SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

THE PEOPLE OF THE STATE OF NEW YORK,	§	
-against-	§	Indictment No. 05393-2013
ZACHARY WARREN, Defendant.	§	
THE PEOPLE OF THE STATE OF NEW YORK,	§	
-against-	§	Indictment No. 00773-2014
STEVEN DAVIS, et al., Defendants.	§	

MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANT ZACHARY WARREN FOR A SEVERANCE

This memorandum is respectfully submitted in support of defendant Zachary Warren's motion to sever the charges against him from those against his co-defendants. As the People have recently informed the Court, the trial of Mr. Warren's co-defendants is slated to take four to six months. If Mr. Warren were tried separately, his trial would take no more than two weeks. Moreover, it would be free of a mountain of irrelevant and prejudicial evidence concerning events that occurred at the Dewey & LeBoeuf law firm after he left it in July 2009. In short, a separate trial for Mr. Warren would not only be shorter, it would be far fairer.[1]

[1] If the Court grants Mr. Warren's severance motion, it has broad discretion to decide the order of the separate trials. See New York Pretrial Criminal Procedure §5.22 ("the order of [severed] trials is left to the sound discretion of the court"). We would be prepared to try Mr. Warren's case in October 2014.

I. Procedural Posture of these Cases

On December 17, 2013, the Grand Jury returned a six count indictment naming Zachary Warren as the sole defendant. That indictment, No. 05393-2013, was filed under seal, and was not made public until after the Grand Jury had returned its second indictment in this matter on February 27, 2014.[2] Each count of the first indictment charges Mr. Warren with the crime of falsifying business records in the first degree, in violation of Penal Law § 175.10. In its Voluntary Disclosure Form, the People revealed that Count 2 of the first indictment had been included by mistake, and that the remaining counts all relate to accounting entries that were made in the financial records of Dewey & LeBoeuf at year-end 2008.

On February 27, 2014, the Grand Jury returned its second indictment in this matter, naming Steven Davis, the former Chairman of Dewey & LeBoeuf; Stephen DiCarmine, the Executive Director of the firm; and Joel Sanders, the firm's Chief Financial Officer, as defendants in a total of 106 counts. This second indictment also names Mr. Warren as a defendant, but in only two of the 106 counts. Those two counts charge Mr. Warren and the other defendants with participating in a scheme to defraud in the first degree, in violation of Penal Law § 190.65(1)(b) (Count 1), and participating in a conspiracy in the fifth degree, in violation of Penal Law § 105.05(1) (Count 106). The other three defendants are charged in each of those counts, as well as 15 counts of grand larceny in the first degree, apparently based on alleged thefts from the institutional investors in the Dewey & LeBoeuf private placement of debt securities or from the banks that provided its credit facilities (Counts 2 to 16); 55 counts of

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[2] The People apparently sought the return of the first indictment to prevent the running of the statute of limitations with respect to the charges set out therein. Mr. Warren was not made aware of the filing of the first indictment until he was informed of his need to surrender in connection with the return of the second indictment. His initial appearance took place on March 6, 2014.

falsifying business records in the first degree based on the alleged falsification of accounting records at Dewey & LeBoeuf for the years ending between 2008 and 2011 (Counts 17 to 71); and one count of securities fraud under the Martin Act, General Business Law § 352(c)(5), for misrepresentations made in connection with the private placement offering (Count 105). In addition to those charges, Mr. Davis and Mr. Sanders are charged with three counts of falsifying the business records of Ernst & Young LLP, the outside auditor for the law firm, in connection with its audit of the law firm's financial statements for the years ending in 2008, 2009 and 2010 (Counts 72 to 74), and Mr. Sanders is charged with 30 additional counts of falsifying the business records of either the law firm or the banks and institutional investors that provided financing to the firm (Counts 75 to 104).

From the Voluntary Disclosure Form, it appears that the charges included in Counts 17 to 19, 22, and 23 of the second indictment relate to the same accounting entries as those referenced in the five counts of the separate Warren indictment. Mr. Warren is not charged in either indictment with respect to any accounting offenses relating to any period after year-end 2008. Nor is he charged with any thefts from banks or investors, nor with any violation of the Martin Act. Indeed, even with respect to the alleged scheme to defraud and the conspiracy charge, Mr. Warren is not alleged to have committed any offense related to the law firm's financial statements created and made available to its lenders after the year-end 2008 statements. The 2014 indictment acknowledges that Mr. Warren left the firm in 2009 and the Statement of Facts, filed by the District Attorney's office when the 2014 indictment was returned, alleges only that Mr. Warren "helped plan the fraudulent [accounting] entries and took part in covering them up while he was at the firm." People's Statement of Facts at 2 (emphasis added).

On April 21, 2014, the People provided the Court with its initial estimate of the length of the trial in this case – that the prosecution's case alone would take from four to six months to complete. Based on the preliminary discovery obtained thus far, it seems clear that the massive case envisioned by the People is one in which perhaps only a few dozen of the 1.1 million documents produced to the defense in electronic form (with the promise of hundreds of thousands of additional third-party documents to follow) are material to the charges against Mr. Warren. The massive trial envisioned by the People is one in which literally scores of witnesses will testify who never met Mr. Warren, never corresponded with him, and may not even remember his brief tenure at the firm. The People's case promises to drag on for months, while counsel for Mr. Warren await the opportunity to cross-examine the handful of witnesses who actually worked with, and remember, him. It is primarily for this reason that counsel for Mr. Warren informed the Court at the first opportunity that this is an appropriate case for a severance.

II. Relevant Facts About Mr. Warren[3]

Zachary Warren is a 2006 graduate of Stanford University with a bachelor's degree in International Relations. He never took an accounting course in college. During college, Mr. Warren became interested in pursuing a legal career, but before applying to law schools, he sought a job with a major law firm. In early 2007, he obtained an interview with LeBoeuf, Lamb, Greene & MacRae LLP, seeking a position as a paralegal. The firm instead offered him an entry-level position as a client relations coordinator – one of a small group of young people whose jobs involved interacting with the firm's partners about clients who were

[3] This statement is drawn largely from the statements given by Mr. Warren to representatives of the District Attorney's office in voluntary interviews on April 1, 2013, and November 15, 2013.

behind in the payment of their legal bills, and sometimes dealing with the clients to facilitate past-due payments.

Mr. Warren started as a client relations coordinator in March 2007, several months before the LeBoeuf firm's merger with Dewey Ballantine LLP. In the summer of 2008, when the manager of his department announced her intention to leave, Mr. Warren was asked to assume her position as Client Relations Manager. Mr. Warren accepted the position, with a raise in salary from $40,000 per year (plus overtime) to $100,000 per year (without overtime). Mr. Warren was also promised a bonus ranging between $50,000 and $75,000 depending on the firm's ability to achieve certain financial targets for 2008.

2008 was an enormously difficult year for law firms generally, and for large New York based firms in particular. It was Mr. Warren's principal job during the financial crisis to coordinate with the firm's partners and their largest clients to determine when, whether, and how much those clients would be paying of their outstanding legal bills. Mr. Warren also supervised five or six other client relations coordinators who performed similar tasks involving partners of the firm and their clients around the world. As year-end 2008 approached, Mr. Warren reported on a frequent basis to Mr. Sanders the likely revenues that the firm could expect to receive from its base of receivables.

In the spring of 2009, Mr. Warren received the full measure of his promised bonus from Dewey & LeBoeuf. He announced that he would be leaving the firm in July to matriculate at Georgetown University Law Center. He enrolled at Georgetown in September 2009 and had a very successful law school career. He graduated in May 2012, finishing in the top 5% of his class, and was an Executive Articles Editor for the *Georgetown Law Journal*. Following his graduation, Mr. Warren served as a law clerk to the Honorable J. Frederick Motz,

of the United States District Court for the District of Maryland, from August 2012 through September 2013. In September 2013, he began a second judicial clerkship with the Honorable Julia Smith Gibbons, of the United States Court of Appeals for the Sixth Circuit, in Memphis, Tennessee. Suffice it to say that at the start of his law practice, he never expected to be standing trial for criminal charges resulting from his two-year stint, right out of college, at Dewey & LeBoeuf.

III. Argument

There is "a significant body of well-settled case law establishing, for this State, minimum fair trial standards in cases involving multiple defendants." People v. Payne, 35 N.Y.2d 22, 26-27 (1974). CPL § 200.40(1) serves as one crucial protection of such defendants against "injustice or impairment of substantial rights." Id. at 26. The statute provides that, upon a showing of "good cause," a court may order "that any defendant be tried separately from the other or from one or more or all of the others." CPL § 200.40(1). "[G]ood cause" is defined to "include, but not be limited to, a finding that a defendant . . . will be unduly prejudiced by a joint trial." Id. "Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires." Id.

For the following reasons, Mr. Warren would be unduly prejudiced and his substantial rights impaired if the People were to proceed against him at a joint trial with the co-defendants, Steven Davis, Stephen DiCarmine, and Joel Sanders.

A. At A Joint Trial, Mr. Warren Would Be Unduly Prejudiced By The Presentation Of Confusing And Inflammatory Evidence Relevant Only To Alleged Offenses That Occurred After He Left The Law Firm.

If forced to stand trial jointly with Messrs. Davis, DiCarmine and Sanders, Mr. Warren would be unduly prejudiced. The jury likely would become confused and unable to differentiate between the evidence against Mr. Warren and the evidence properly admissible only

against the co-defendants, and the jury would hear evidence of statements by the co-defendants (and other potentially inflammatory evidence) that would be inadmissible in a separate trial of Mr. Warren. In these circumstances, there is an unacceptable risk that a jury would resort to "guilt by association." The Court can readily avoid that risk, and protect Mr. Warren's "substantial rights," Payne, 35 N.Y.2d at 26, by ordering that the People proceed against him in a separate trial.

1. Mr. Warren Would Be Prejudiced By A Jury's Inevitable Confusion In the Face Of Mountains of Evidence Unrelated to the Charges Against Him.

The People anticipate a massive joint trial in which the prosecution's case alone will take four to six months. The overwhelming bulk of the evidence will relate to scores of alleged criminal acts that the People acknowledge had absolutely nothing to do with Mr. Warren, and which occurred well after he had left Dewey & LeBoeuf and matriculated at Georgetown Law. "In a trial of this length, we cannot assume that the jury [would] properly segregate[] the evidence on its own" between the evidence that may relate to Mr. Warren and the evidence related solely to the allegations against the co-defendants. People v. Papa, 47 A.D.2d 902, 902 (2d Dept. 1975). The substantial risk of jury confusion alone entitles Mr. Warren to a separate trial.

The co-defendants are alleged to have committed at least five categories of frauds that have nothing to do with Mr. Warren. These include (i) the alleged frauds in connection with 2009 year-end cash flow and distribution covenants unknown to Mr. Warren; (ii) misstatements allegedly made in early 2010 in connection with the private placement; (iii) 2010 year-end actions allegedly designed to satisfy a new distribution covenant; (iv) accounting adjustments allegedly made to satisfy asset coverage ratio financial covenants for the first and third quarters of 2011; and (v) further adjustments at year-end 2011 allegedly to "boost" the amount of funds

available for distribution to the law firm's partners at year-end 2011. The People already have conceded that Mr. Warren's alleged involvement in the charged "scheme" ended when he left the law firm in July 2009, before any of these alleged frauds occurred. See Statement, at 2. During all of this alleged criminal activity – for which the People are likely to offer hundreds of exhibits and the testimony of dozens of witnesses – Mr. Warren was miles away from New York, pursuing his studies at Georgetown Law.

The scope of the criminal activity charged against Mr. Warren is far narrower, in terms of the number and nature of the alleged substantive offenses, the purposes of the scheme to defraud, and the overt acts alleged to have been performed as part of the alleged conspiracy. The actions alleged against Mr. Warren ended just eight months into what the People allege was a scheme and conspiracy that lasted more than forty months. At the end of months and months of evidence, the vast majority of which would have had absolutely nothing to do with Mr. Warren, few jurors could reasonably be expected to fairly assess the limited allegations against him. See Papa, 47 A.D.2d at 902. Unjust confusion is bound to result.

There is a substantial likelihood that a jury's reaction to this inevitable confusion would be to resort to "guilt by association" rather than the careful consideration of the relevant admissible evidence. In a joint trial, particularly a joint conspiracy trial, "[t]here generally will be evidence of wrongdoing by somebody [and] [i]t is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring). The substantial risk of prejudice to Mr. Warren of a joint trial that the prosecution estimates will take four to six months for its case alone far outweighs the inconvenience to the People of a separate trial of perhaps a week or two. Substantial justice requires a severance.

2. Mr. Warren Would Be Prejudiced By The Admission of Statements of the Co-Defendants That Would Be Inadmissible Against Him.

The jury in a joint trial would not only be confused by the mountains of evidence concerning Dewey & LeBoeuf's financial condition over the course of forty months, most of which had nothing to do with Mr. Warren. It also would hear evidence of highly prejudicial statements of the co-defendants themselves, at least some of which are quoted in the course of the 106-count joint indictment. Few, if any, of those alleged statements by the co-defendants would be admissible in a separate trial against Mr. Warren. The inevitable prejudice that would result merits a severance. See Papa, 47 A.D.2d at 902 (vacating conviction and ordering new trial where "mounds upon mounds of evidence in this lengthy trial came in solely with relation to the entrapment defense [raised by Papa's co-defendants], some of which was highly prejudicial to Papa").

Nowhere is "injustice or impairment of substantial rights" more compelling than where evidence that would be admissible against one defendant would be inadmissible against a second defendant, and, if admitted, would unduly prejudice the second defendant (even if the jury were instructed to "disregard[]" the evidence as to the second defendant). Payne, 35 N.Y.2d at 26, 29. In such circumstances, "[s]imple fairness requires that [the prejudiced defendant] be tried separately in an atmosphere free" of the evidence that would be inadmissible in a separate trial and that "would necessarily infect a joint trial." Id. at 29.[4]

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[4] One circumstance in which the use of a defendant's statements requires a severance is where the People offer a defendant's confession, that defendant does not testify, and the confession "implicate[s]" another defendant. See People v. Singleton, 111 A.D.3d 769 (2d Dept. 2013) (citing Bruton v. United States, 391 U.S. 123, 135-37 (1968)). A potential Bruton violation, however, "is just one way in which a denial of a motion for a separate trial may result in 'injustice or impairment of substantial rights.'" Payne, 35 N.Y.2d at 26. Minimum fair trial standards may require a severance "[q]uite apart from the Federal right" embodied in Bruton. Id.

First, were the People to attempt to use *any* statements or writings of Messrs. Davis, DiCarmine or Sanders against Mr. Warren, the People would have to establish the admissibility of such co-defendant statements as evidence against Mr. Warren. Presumably, the People would principally rely on the co-conspirator exception to the hearsay rule. But that would require the People to make out a "prima facie case of conspiracy" based on independent evidence linking Mr. Warren to the conspiracy. See People v. Salko, 47 N.Y.2d 230, 238 (1979) ("Of course, the determination whether a prima facie case of conspiracy has been established must be made without recourse to the declarations sought to be introduced"). Counsel submits that such a showing will never be made in this case.

Second, even if the People could somehow establish the admissibility against Mr. Warren of some statements or writings of the co-defendants during some period of time, the People would be unable to use the statements or writings of Messrs. Davis, DiCarmine, and Sanders that post-date Mr. Warren's 2009 departure from Dewey & LeBoeuf. Such statements, including emails, might be admissible as admissions against the other defendants, but the People already have conceded that Mr. Warren's alleged involvement in the charged "scheme" ended when he left the law firm several years before its fiscal collapse. See Statement, at 2. Thus, there is no doubt that the jury in a joint trial would hear "mounds of evidence" admissible against only one or more of the other defendants that the jury would not hear in a separate trial of Mr. Warren.

The presentation of such evidence to a jury in a joint trial would be highly prejudicial to Mr. Warren. Even the relatively few e-mails cited in the joint indictment contain numerous prejudicial statements that would be inadmissible with respect to Mr. Warren. For example:

- Mr. Sanders allegedly wrote an email to Frank Canellas (the former Dewey & LeBoeuf Director of Finance, who has pled guilty) on June 27, 2009, expressing a desire to "find another clueless auditor for next year." Joint Indictment, Count 106, ¶ 23.

- Mr. Sanders allegedly wrote an email to recipients including Messrs. Davis, DiCarmine and Canellas on November 10, 2009, describing "$25M" of "fake income." Id. ¶ 26.

- Mr. Sanders allegedly wrote an email on December 9, 2009, stating that Mr. Canellas had "hear[d] and see[n] too much." Id. ¶ 29.

- Mr. Sanders allegedly wrote an email on January 5, 2010, stating that he had been "pushing [Mr. Canellas] to go way out on a limb right behind me if you know what I mean." Id. ¶ 37.

- Mr. Canellas allegedly wrote an email on February 10, 2012, describing accounting adjustments that he perceived to "present audit risk." Id. ¶ 51.

- Mr. Sanders allegedly wrote an email in 2011 stating, "We need to hide this [issue regarding receivables without] actually writing it off." Statement, at 4.

These statements are just a tiny sampling of the email traffic, accounting records, and other documentary evidence that is included in the "mounds of evidence" produced by the People in discovery in this case thus far. The evidence to be presented by the People at trial will no doubt include hundreds or even thousands of documents, as well as the expected testimony of dozens of witnesses, that may be admissible in a trial that includes Messrs. Davis, DiCarmine, and Sanders but that would be inadmissible in a separate trial of Mr. Warren. Although as a technical matter the Court could instruct the jury each time to consider such evidence only in determining the culpability of one or more of the co-defendants, any limiting instruction would be futile to avoid prejudice to Mr. Warren, as no reasonable jury could be expected to disregard such evidence in adjudging the charges against him.

As the Third Department aptly observed over a half century ago, in a case where testimony admissible only against one defendant (Stendor) "beclouded" the evidence admissible against the other (Rossi), even though the court gave careful limiting instructions:

> [T]he instances were so many and varied that after an intensive study of the record we are unable to separate and limit clearly in our own minds the testimony inadmissible against Rossi from that which was properly admissible against him without a line by line reference to the record. We think it obvious that the jury could not possibly have limited their consideration of his case only to the evidence properly admitted against him. It was inevitable that they would view the record as a whole, and this under the circumstances was highly prejudicial to Rossi.

People v. Rossi, 270 A.D. 624, 629 (3d Dept. 1946).

For these additional reasons, Mr. Warren has shown good cause for severance under CPL § 200.40(1).

3. Mr. Warren Would Be Prejudiced By Inflammatory Evidence and Arguments About the Events Leading Up To The Collapse of Dewey & LeBoeuf.

Finally, Mr. Warren will be prejudiced not only by the jury's inevitable confusion and by the admission of co-defendant statements and similar evidence in a joint trial. He also would be unduly prejudiced by highly inflammatory evidence about events in 2009 and 2010 and 2011, followed by the collapse of the firm in 2012, that would be off-limits in a separate trial of Mr. Warren. For this additional reason, a severance is warranted.

The People have signaled an apparent theme that the alleged fraudulent acts in 2009, 2010 and 2011 were part of a grand scheme that resulted in the collapse of Dewey & LeBoeuf, with the corresponding impact on the firm's partners, employees and creditors. Regardless of whether the evidence against any of the defendants will support that theory, the fact remains that the People intend to argue that in March 2012 – nearly three years after Mr. Warren had left the firm – "the Schemers" were no longer able to "fool the Firm's lenders," and

that, as a result, "[t]he Firm declared bankruptcy; thousands lost their jobs; and the Firm's creditors were left owed hundreds of millions of dollars." 2014 Indictment, Count 1.

The firm's collapse, the bankruptcy, and those job losses would make no appearance at a separate trial of Mr. Warren. The People do not allege that Mr. Warren could have anticipated those events, which occurred years after Mr. Warren had left the law firm, let alone that he caused them. Indeed, Mr. Warren had nearly graduated from law school by the time Dewey & LeBoeuf declared bankruptcy. Nor would the jury in a separate trial hear the allegations of myriad fraudulent acts committed by others in 2009, 2010, and 2011. Yet in a joint trial that is precisely the evidence the People would make every effort to put front and center before the jury. The resulting prejudice to Mr. Warren would be substantial, and demonstrates additional good cause for a severance.

B. A Joint Trial Would Unfairly Extend The Impact of this Unwarranted Prosecution on Mr. Warren's Life for Months, If Not Years.

For the reasons discussed above, a joint trial in this case would create a substantial risk that a jury would resort to pure "guilt by association" in adjudging the People's charges against Mr. Warren, rather than carefully considering the relevant admissible evidence. But the prejudice to Mr. Warren if forced to stand trial jointly with the co-defendants would not only be to deprive him of a fair trial. A joint trial also would deprive Mr. Warren of anything remotely resembling a speedy trial that would allow him to demonstrate his innocence and resume his promising legal career.

Make no mistake: Mr. Warren is innocent of the charges against him. Whatever the merit of the allegations of fraudulent acts by others, Mr. Warren was not part of any scheme or conspiracy, and he did not have any role in the alleged fraudulent falsification of Dewey & LeBoeuf's business records. He is a recent law school graduate, with a promising future, at a

crucial point in his legal career. The People could readily present their purported evidence against Mr. Warren in a two week trial. And yet the People want Mr. Warren to wait for months as the People and co-defendants prepare for a trial of a half-year or more, and then to sit through that trial, putting his career on hold, while the People assemble and present mountains of complex evidence largely in an attempt to prove that three other people violated the law. By contrast, a severance and speedy trial of Mr. Warren would allow him to demonstrate his innocence promptly, and get on with his life.

CPL § 200.40(1) entrusts this Court with discretion to order separate trials upon a showing of undue prejudice. Mr. Warren should have a chance to demonstrate his innocence – in an expeditious trial that is fair, separate, and of a reasonable length commensurate with the few charges that have been lodged against him.

IV. Conclusion

For all the foregoing reasons, Zachary Warren has shown good cause for a severance. The Court should exercise the discretion granted by CPL § 200.40(1) and order that he be tried separately from co-defendants Davis, DiCarmine and Sanders.

Dated: New York, New York
May 12, 2014

Respectfully submitted,

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