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

THE PEOPLE OF THE STATE OF NEW YORK -against- STEPHEN DICARMINE, JOEL SANDERS, Defendants.	Ind. No. 773/2014

PEOPLE'S MOTIONS *IN LIMINE*

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Table of Contents

Page

The People should be permitted to introduce certain evidence that was precluded, in whole or in part, during the first trial. 1

2007 Management Representations Letter 1

Defendants' Transcripts and Related Records 4

The defendants should be precluded from inquiring or arguing whether any witness or defendant knew or thought their conduct was criminal. 10

Counts One and One-hundred-and-six of the indictment should be amended. 15

Count One – Scheme to Defraud in the First Degree 16

Count One-hundred-and-six – Conspiracy in the Fifth Degree 18

The People should be permitted to introduce certain evidence that was precluded, in whole or in part, during the first trial.

The People will seek to have several exhibits admitted that were precluded, in whole or in part, during the first trial. "Evidence is relevant if it tends to prove the existence or non-existence of a material fact, i.e., a fact directly at issue in the case." *People v. Jin Chen Lin*, 26 N.Y.3d 701, 727 (2016) (internal quotation marks omitted). "The well-established rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule." *Id.* (internal quotation marks omitted). "A court may, in its discretion, exclude relevant evidence if its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury." *People v. Primo*, 96 N.Y.2d 351, 355 (2001). In each instance, the evidence we will seek to admit is relevant and highly probative and its admission would not be misleading and would likewise not cause undue prejudice, confusion, or delay.

2007 Management Representations Letter

During the first trial, the People offered the Dewey & LeBoeuf management representations letter dated July 31, 2008, which relates to the audit of the Firm's 2007 financial statements. *See* People's Exh. 52-005 (attached, in unredacted form, as Exhibit 1). Initially, the exhibit was admitted in full, *see* Tr. at 1023:2 – 6,[1] and a portion of the exhibit was read to the jury. *See* Tr. at 1048:18 – 1049:18. Subsequently, Mr. Campriello moved to strike the exhibit, and eventually that motion was granted, on the grounds of

[1] All Tr. references are to the trial transcript.

relevance and confusion of the jury. *See* Tr. at 1890:17 – 1891:9. At that time, the People argued that the letter went to the issue of knowledge. *See* Tr. at 1888:25 – 1889:8. Ultimately, the exhibit was admitted, but with defendant DiCarmine's signature redacted. *See* Tr. 5162:2 – 5163:20.

This exhibit should be admitted without redaction, because it provides evidence of defendant DiCarmine's knowledge of Dewey's accounting practices prior to the start of the charged conspiracy. For example, the letter states that "[t]he Firm's practice is to review outstanding client disbursement receivables in detail and write-off any amounts deemed uncollectible." Exh. 1, at 3. Just a few months after defendants Sanders and DiCarmine signed this document, when Dewey needed higher net income to meet its cash flow covenant, over $4 million in disbursement receivable write-offs were reversed and put back on the Firm's books.

There is evidence that defendant DiCarmine was made aware that changes were made to the Firm's accounting records to show compliance with the covenant. For example, on December 31, 2008, defendant Sanders wrote to defendant DiCarmine, "I think we made the covenants and I'm shooting for 60%. Don't even ask – you don't want to know." *See* People's Exh. 21-073 (attached as Exhibit 2). This was two days after defendant Sanders wrote to defendant DiCarmine, "We came up with a big one. Reclass the disbursements." *See* People's Exh. 21-053 (attached as Exhibit 3). Defendant DiCarmine was further informed that one of the changes made to the Firm's accounting records was reversing disbursement write-offs. For example, on January 8, 2009, defendant Sanders forwarded defendant DiCarmine a financial update

showing that the Firm would meet its required net income for covenant purposes by, among other things, backing out $4,000,000 of disbursement write-offs, or "Back-Out of Disbursement W/O," as it is listed on the update. *See* People's Exhs. 21-085 and 21-085A (attached as Exhibit 4).

Defendant DiCarmine was also informed that the $4,000,000 of disbursement write-offs that were put back on the Firm's books for year-end 2008 would have to be written off again in 2009. In a PowerPoint presentation intended for the Executive Committee, defendant Sanders had certain slides prepared just for defendant DiCarmine to review, and these slides were removed from the presentation made to the Executive Committee. One of these "Steve's copy" slides showed adjustments that were made to reduce 2008 expenses. *See* People's Exhs. 21-118 and 21-118A, at slide 6 (attached as Exhibit 5). The list was divided into two groups: those adjustments that were permanent and would not impact the 2009 budget, and those that were temporary and had to be corrected in 2009. Among the adjustments that impacted the 2009 budget were the $4,000,000 in disbursement write-offs that were reversed and put back on the books.

The fact that these reversed disbursement write-offs were budgeted to be re-written off in 2009 demonstrates that they were not collectible at the time they were put back on the Firm's books in order to increase 2008 net income. (After all, if they were collectible, there would have been no reason to budget to write them off again in 2009.) The management representations letter provides a crucial link in the evidence chain establishing that defendant DiCarmine knew that this adjustment violated the

Firm's practice and was done to deceive the Firm's auditors and users of the Firm's financial statements. What defendant DiCarmine knew is highly relevant.

Indeed, during his summation, Mr. Campriello focused heavily on lack of knowledge. For example, he argued that defendant DiCarmine could not have known from the words used on the "Steve's copy" slide that the adjustments were wrongful. *See* Tr. at 8684:3 – 7 ("If Alter who was creating the slides, or at least involved in the creation of the slides and who had been in finance for years didn't think there was anything wrong, false from just the words on the slides, how was Steve supposed to know?"). Of course, the answer is that defendant DiCarmine, accountant or not, knew what the Firm's practice was, because he had signed the management representations letter. Mr. Campriello also argued that the People could not "prove that Steve had any knowledge." Tr. at 8686:11. The fact that in July 2008 defendant DiCarmine signed the 2007 management representations letter is highly relevant in proving that knowledge, and its admission will not confuse the jury, but will instead assist them in understanding exactly what defendant DiCarmine knew. It should be admitted without redaction.

Defendants' Transcripts and Related Records

At the first trial, the People offered defendant Sanders' Baruch College transcript and related documents. *See* People's Exh. 81-001 (attached as Exhibit 6). Mr. Frisch objected and the Court sustained the objection, preventing the People from presenting irrefutable proof that defendant Sanders earned a master's degree in

business administration prior to becoming the CFO of Dewey & LeBoeuf, completing graduate-level accounting courses in the process. *See* Tr. at 7402:18 – 7409:2.

Mr. Frisch argued that these records were inadmissible because they are "from the mid 1990s," there is "no information" regarding whether "the issues… relevant in this case" were covered in defendant Sanders' classes, and because "[t]here is no information about the grading protocol." *See* Tr. at 7404:25 –7405:15.

The People will seek to introduce People's 81-001 into evidence in the retrial, as well as defendant DiCarmine's academic transcripts from his Master of Laws program in Taxation at New York University (NYU) (attached as Exhibit 7).

As the Court may recall, defendant Sanders was a student in Baruch College's Executive MBA program from the fall of 1995 through the spring of 1997, taking 18 graduate-level courses before being awarded an MBA. Defendant Sanders graduated with a 3.966 GPA, receiving an "A" in "Financial Statement Analysis," "Accounting for Management Decision," and "Financial & Management Accounting."

Defendant DiCarmine enrolled in NYU's Master of Laws program in Taxation for the 1983-84 academic year, taking more than ten courses in, or related to, federal income tax. As the Court knows, Dewey & LeBoeuf maintained its accounting records and prepared its financial statements on the federal income tax basis of accounting.

Evidence of the defendants' knowledge and understanding of accounting and federal income tax are obviously relevant in this case. So much so that in the defendants' own opening remarks, counsel for both defendants felt compelled to acknowledge and explain away the defendants' educational background to the jury.

In Mr. Campriello's opening statement, he told the jury:

> Now, you will learn a little more about Steve after law school. Steve, about 30 years ago thought of being a tax lawyer, so he enrolled in a Masters of Tax program at NYU Law School. His grades you will learn were dismal, and so he did not become a tax lawyer. He was not a very good incipient tax lawyer.
>
> ...
>
> The evidence is going to show you that Steve was not a bookkeeper. Steve was not an accountant. Steve was not a CPA. And some of this stuff is complicated. Steve was not an auditor. *Steve was not an MBA.*

See Tr. at 196:2 – 7; 202: 2 – 5 (emphasis added).

And even though Mr. Frisch tried to keep out *any* evidence that defendant Sanders had an MBA, he too acknowledged the relevance and admissibility of defendant Sanders' MBA by addressing it in his opening statement. *See* Tr. at 238:19 – 21 ("[Defendant Sanders] got his MBA at night from Baruch College here in Manhattan and his law degree at night from St. Johns in Queens.").[2]

Mr. Frisch's opening then proceeded much like that of Mr. Campriello, stating that defendant Sanders "was not an accountant," Tr. at 240:8, delegated all accounting responsibilities to Frank Canellas and Thomas Mullikin, *see* Tr. at 242:24 – 243:3, and could not possibly have known the accounting adjustments at issue were wrong. *See* Tr. at 243:25 – 244:2. Similarly, when the People's first cooperator, Thomas Mullikin, testified, Mr. Frisch cross-examined Mr. Mullikin about defendant Sanders' lack of an accounting background. *See* Tr. at 1978:23 – 25.

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[2] In the end, the only evidence in the first trial of defendant Sanders' MBA was the testimony of Mr. Alter, who, over the objection of Mr. Frisch, testified that it was his "understanding" that defendant Sanders has an MBA. *See* Tr. at 4148:24 – 4149:7. Certainly not the irrefutable proof that the business records from Baruch College would provide.

Throughout the case, the relevance of educational background was repeatedly underscored as the defendants made a point of cross-examining the People's witnesses on their own training and education. For example:

1. John Salmon was cross-examined on never having taken any "accounting courses." Mr. Salmon's cross-examination also focused on whether either of the defendants or Steven Davis is an accountant or had any accounting training or education. *See* Tr. at 948:8 – 20; 993:5 – 994:4.

2. David Rodriguez was cross-examined about his formal accounting training and education, and was specifically asked about the number and type of accounting courses he took at the Borough of Manhattan Community College (BMCC). Mr. Rodriguez was pressed about learning in his classes at BMCC that accounting involves judgment, is more than math, and that "accountants reclassify things sometimes." *See* Tr. at 2251:15 – 2253:1.

3. Ilya Alter was cross-examined about his undergraduate degrees in finance and international business and his master's degree in business administration. Mr. Alter was specifically questioned about the number of accounting classes that he completed in college, and placing out of the accounting requirement in his MBA program. *See* Tr. at 4102:14 – 4103:25; 4012:17 – 4013:2. Mr. Alter was then asked a number of questions based on his "education and experience," including being asked – by Mr. Frisch – when an expense can be capitalized or amortized, *see* Tr. at 4020:4 – 25, and when an expense is recorded under the cash or modified cash basis of accounting. *See* Tr. at 4084:16 – 4085:19. Notably, Mr. Frisch, who objected to the People introducing evidence that defendant Sanders has an MBA or took accounting courses, asked the similarly-situated Mr. Alter questions such as the following:

   > Even though you are neither an accountant or a CPA, you know from your education and professional experience that one of the things that accountants do is make year-end adjustments, is that so?

   Tr. 4066:23 – 4067:1.

4. Frank Canellas was cross-examined about the typical year-end process for accountants, based on Mr. Canellas's "education and experience." *See* Tr. at 4731:6 – 12. Similar to the questions posed to other cooperators such as Mr. Alter and Mr. Rodriguez, Mr. Canellas was asked questions "based on [his] accounting degree and experience." *See* Tr. at 4888:5 – 8.

As discussed, a core of the defense has always been that the defendants lacked the knowledge and understanding of the relevant accounting issues necessary to formulate the requisite "intent to defraud." In point of fact, Mr. Campriello argued both in cross examination and in summation that the words in certain emails and other exhibits documenting the fraud were benign without the necessary education and experience to understand them. For example, he argued, if Frank Canellas didn't know what certain terms and phrases "meant until he graduated college and started working as an accountant," "how can you find beyond a reasonable doubt that Steve knew, not only what they meant, but that they meant something wrong, false, criminal was going on." Tr. at 8684:8 – 17; *see also* Tr. at 5001:18 – 5002:4; 8683:25 – 8684:7; 8703:23 – 8708:15. The defendants could not more demonstrably put their own educational background at issue.

The probative value of the defendants' pertinent educational background simply cannot be *substantially outweighed* by a danger of unfair prejudice or misleading the jury. Rather, giving the jury minimal information on the defendants' education, training, and experience – what Mr. Frisch advocated for in the first trial – is misleading the jury.

Lastly, it should be noted that the defendants' transcripts and related records are admissible under the business records exception to the hearsay rule – they are clearly records of an "act, transaction, occurrence or event," C.P.L.R. § 4518(a), made in the regular course of business of the academic institution.[3]

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[3] While certainly not controlling, a family court in Brooklyn found that grades stand on a different footing than the remainder of the transcript and related records. *See Devon S. v. Aundrea B. – S.*, 32 Misc. 3d 341, 346 (Kings County Family Court 2011) (holding that while transcripts and other school records come in under the business records exception, grades are "the subjective judgments of the teacher" and require a live witness).

The argument that the records are too old, too imprecise, and allow the People to "put[] in a piece of paper... without giving [defense counsel] something to cross-examine," Tr. at 7404:25 – 7406:9, is an argument on the weight of the evidence that should be made to a jury. *See Clarke v. New York City Transit Authority*, 174 A.D.2d 268, 273 (1st Dept. 1992) (holding that the availability of a live witness to testify to the acts or events reflected in a business record does not affect the admissibility of the business record). If Mr. Frisch believes that defendant Sanders' "A" grades in graduate-level accounting courses need an explanation, he is free to call a witness to explain. It is noteworthy that neither defense counsel, nor the People, nor the Court thought it was necessary for the cooperators to detail exactly what was covered in each of the accounting courses they took in college and graduate school.

The defendants have also tried to minimize the significance of their own education and experience by calling the relevant accounting concepts "arcane," Tr. at 7405:6, or "esoteric," Tr. at 1303:1 – 2, and implying these concepts are the subject of especially "complicated" courses dedicated to law firm accounting. Tr. at 2252:1 – 8. Mr. Frisch even claimed the he would be "shocked" if any of the relevant concepts were covered at Baruch. *See* Tr. at 7405:3 – 8. These assertions are simply false and are contradicted by the testimony of numerous witnesses. *See, e.g.*, Tr. at 4161:18 – 13; 4165: 3 – 8; 5108:17 – 5109:4; 5757:15 – 23. The reality is that the accounting concepts involved in this case are basic and are not law firm-specific.

Common sense dictates that defendant DiCarmine having completed more than ten courses in federal income tax law and defendant Sanders having aced graduate-level

accounting classes on his way to earning an MBA is highly probative evidence of their ability to understand certain basic terms or principles relevant in this case.

The defendants should be precluded from inquiring or arguing whether any witness or defendant knew or thought their conduct was criminal.

The rule that "ignorance of the law will not excuse," *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910), is deeply rooted in both U.S. and New York law, and can be found in the opening pages of the New York State Penal Law. The Penal Law, at § 15.20(2), states, in pertinent part, that "[a] person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense."

The Court of Appeals, in its opinion in *People v. Marrero*, holding that a defendant's misunderstanding of the law is no defense, quoted Justice Oliver Wendell Holmes, Jr.:

> It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

69 N.Y.2d 382, 386 (1987).

Stated another way, "in order to properly return a verdict of guilty on a criminal charge there is no need for the jury to find that the defendant knew that what he was doing was a violation of law" *People v. Speach*, 49 A.D.2d 210, 214 (4th Dept. 1975); *see also People v. Dandridge*, 45 A.D.3d 330, 332 (1st Dept. 2007), *app. denied*, 9 N.Y.3d 1032 (2008).

Despite the rule, echoed by the Court of Appeals, the Penal Law, and the United States Supreme Court, defendants DiCarmine and Sanders, as well as Steven Davis, were repeatedly permitted – over the People's objections – to ask witnesses and cooperators about whether they knew certain conduct was in fact criminal, and even argue to the jury that this was something the jury must consider in order to convict. Now, outside the fast moving trial setting, a cold analysis of the law makes it clear that this line of argument is contrary to the law, and should not be allowed at a retrial of these two defendants.

This line of inappropriate questioning started early, with former partner John Salmon. Mr. Salmon was asked if the language in a particular email "register[ed]" with him "as an illegal, criminal request." The People objected, the Court overruled the objection, and the witness responded: "I can't speak to what's criminal." Defense counsel pushed the witness to answer the question anyway. The People again objected and were again overruled, and the witness was compelled to explain what he thought might be a "criminal request," or whether he believed there was anything "illegal" about asking a client to backdate a check to the prior year. *See* Tr. at 977:13 – 978:14.

First thing the following morning, the People renewed their objection, moving to strike the above testimony. The Court denied the People's motion but indicated it would provide a curative instruction at the appropriate time. *See* Tr. at 1039:23 – 1046:23. No such instruction was ever provided to the jury, despite repeated requests by the People during the charge conference and during summations.

The defendants seized on the opportunity to ask misleading and inappropriate questions regarding ignorance of the law, returning to the well over and over again, including, significantly, during summations.

Examples of such improper questioning include the following:

1. During the cross-examination of Ilya Alter, Mr. Alter was questioned on whether he "thought [he was] committing a crime." When Mr. Alter replied: "I didn't know whether or not my conduct was criminal," he was cross-examined on not knowing what is criminal "despite the fact that [he] had been working in finance for all of those years." The People objected to both questions, even explaining to the Court that the witness "is not a lawyer" and defense counsel was asking the witness to give a legal opinion. The Court overruled the People's objections. *See* Tr. at 4137:1 – 15.

2. During the cross-examination of Frank Canellas, Mr. Canellas was confronted about not realizing "at the time" that his conduct was criminal, and even failing to consider that he was committing grand larceny in the first degree. The defense even suggested on cross-examination that unless Mr. Canellas agreed that the accounting adjustments were not just "wrong," but that he "knew at that time they were criminal," he would have been indicted for grand larceny in the first degree. Again, the People's repeated objections were overruled. *See* Tr. at 5248:24 – 5252:8.

3. During the cross-examination of Dianne Cascino, Ms. Cascino was questioned on whether she believed she was "committing a crime," and even if, "at the time," she "intend[ed] to defraud anyone." Tr. at 7284:8 – 13. As we are all aware, "intent to defraud" is a legal term with a specific definition under the law. It was defined for the jury numerous times in the initial reading of the final charge, and then again in response to juror notes. Indeed, it is worth noting that the Court determined that the jury would benefit from hearing a definition for "intent to defraud," even though no definition is included in the CJI. There is certainly no reason to believe that Dianne Cascino has any greater experience with legal definitions than any of the jurors. Mr. Frisch is quite fond of pointing to his question to Ms. Cascino about her intent to defraud, but he ignores every time what she said on re-direct, testimony that proves she had no idea what he was talking about:

   Q On cross-examination by Mr. Frisch, you said that you didn't intend to defraud anyone, do you recall that?

   A Yes.

Q Did you know that the adjustments you were making were wrong at the time you made them?
A Yes, wrong, but not criminal.
Q Okay. So when you said you didn't intend to defraud anyone, did you mean that you weren't intending to commit a crime?
A Correct.
Q All right, but did you know -- did you lie to partners and to other employees in the process?
A Yes, sir.
Q In many of the emails that we looked at in your direct examination?
A Yes, sir.
Q And did you lie to the auditors?
A Yes, sir.
Q And did you want those people to believe you when you lied to them?
A Yes, sir.
Q And did you know that all of that was wrong at the time that you did it?
A Yes, sir.

Tr. at 7395:22 – 7396:20.

Likewise, the closing remarks were rife with inappropriate and misleading argument. For example, in defendant DiCarmine's summation, Mr. Campriello argued that "several of [the People's] cooperating witnesses… [t]old you that they did not know at the time they were making those adjustments that the adjustments were criminal… [I]t seems to me fair [to consider] when you are trying to assess whether or not Steve DiCarmine, the non CPA, non accountant, non auditor knew that what these folks were doing was allegedly criminal, that several… [d]id not know that what they were doing was criminal." The People objected. *See* Tr. at 8704:16 – 8705:8.

The Court ruled at a sidebar held shortly after the above argument that the People's request for a charge on Penal Law § 15.20(2) would be granted. *See* Tr. at

8707:11 – 19. However, since the Court never sustained any of the People's objections on this issue, Mr. Campriello's summation resumed right where it left off.

Mr. Campriello addressed many of the cooperators – Ilya Alter, Thomas Mullikin, Dianne Cascino, Frank Canellas – and argued to the jury, if all these people, with all of their combined education, training, and experience, did not think what they were doing was criminal, there is no way Mr. DiCarmine could have had the requisite intent. *See* Tr. at 8708:16 – 8712:6; *see also* Tr. at 8713:1 – 14; 8776:5 – 7. Mr. Campriello even went as far as to suggest that knowing certain accounting treatments are "wrong" but not "criminal," could be the difference between "permissible," "very aggressive accounting" and committing a crime. *See* Tr. at 8705:9 – 8706:6.

The People refrained from continuing to object after the sidebar, because the Court had just informed the parties that a curative instruction would be included in the final charge. *See* Tr. at 8706:7 – 8708:15. Despite that ruling, the Court later changed course, citing procedural concerns. Instead, it was left to the People to spend time during its summation trying to clean up any confusion for the jury. *See* Tr. at 8796:4 – 14.

Whether any witness or defendant knew or even considered that lying to lenders, investors and others – under the circumstances presented in this case – is a crime in New York is irrelevant. The defendants should be precluded from asking any questions or making any arguments regarding whether a witness or defendant knew his or her conduct was criminal or otherwise intended to commit a crime. The People's request is clearly supported by the law. Mistake or ignorance of the law is not an

applicable defense in this case, and the People should not be put in the position of having to correct and explain the law to the jury in summation.

Counts One and One-hundred-and-six of the indictment should be amended.

In aid of streamlining the presentation of certain evidence at trial, the People move to amend the indictment, pursuant to section 200.70(1) of the Criminal Procedure Law, by deleting extraneous language from the scheme to defraud count, and also by reducing overt acts from the conspiracy count. An amendment of an indictment is permitted under section 200.70(1) of the Criminal Procedure Law, which provides in pertinent part, that:

> At any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits.

"An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime . . . . The incorporation by specific reference to the statute operates without more to constitute allegations of all the elements of the crime." *People v. D'Angelo*, 98 N.Y.2d 733, 734-35 (2002) (internal citations and alterations omitted). "[W]hen an indictment alleges facts that are extraneous . . . or beyond what is necessary to support the charges, . . . the People need not prove more than those factual allegations necessary to support a conviction." *People v. Grega,* 72 N.Y.2d 489, 497 (1988); *see also*, *People v. Charles*, 61 N.Y.2d 321, 327 (1984);

People v. Rooney, 57 N.Y.2d 822, 823 (1982). For example, it is well settled that, when a crime can be committed through any one of several acts, including all the acts in the indictment and using "the conjunctive 'and' rather than the disjunctive 'or' . . . charge[s] more than the People [are] required to prove under the statute and [does] not bind the prosecution to prove all [the] acts." *Charles*, 61 N.Y.2d at 327.

While the People need not prove every extraneous fact contained in a count, that does not always stop defense counsel from arguing to the jury that the People need to do so. *See, e.g.*, *People v. Brown*, 196 A.D.2d 428, 431 (1st Dept. 1993) (noting defense counsel's attempt to use extraneous facts in an indictment to his advantage during summation by arguing the People must prove every fact in the indictment).

Count One – Scheme to Defraud in the First Degree

During the upcoming trial, the People plan to present evidence on just a subset of conduct the defendants and others engaged in as part of the scheme to defraud. In aid of this streamlined presentation, the People move to amend Count One of the indictment by deleting the text that follows the first two paragraphs. As amended, Count One would read:

> THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuses defendants STEVEN DAVIS, STEPHEN DICARMINE, JOEL SANDERS, and ZACHARY WARREN of the crime of SCHEME TO DEFRAUD IN THE FIRST DEGREE, in violation of Penal Law §190.65(1)(b), committed as follows:

> The defendants, STEVEN DAVIS, STEPHEN DICARMINE, JOEL SANDERS, and ZACHARY WARREN, in the County of New York and elsewhere, from on or about November 3, 2008, to on or about March 7, 2012, both dates being approximate and inclusive, engaged in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person and to obtain property from more than one person by false and fraudulent pretenses, representations and promises, and so obtained property with a value in excess of one thousand dollars from one and more such persons.

The language of Count One that follows these paragraphs served to give notice to the defendants of types of conduct that constituted the charged offense. During the upcoming trial, the People plan to limit the length of the trial by not presenting evidence of certain conduct described in Count One. Count One was never read to the jury in the first trial, and indeed, the defense moved in their Omnibus Motion to strike language from Count One of the indictment. *See Memorandum in Support of Omnibus Motion*, at 28. Nonetheless, the People want to prevent the possibility that defense counsel might read portions of Count One to the jury in the second trial and argue (albeit incorrectly) that the People are required to prove every factual allegation contained therein. To prevent this possibility, the People move to amend Count One to delete all language that appears beyond the second paragraph.

Doing so would neither "change the theory or theories of the prosecution as reflected in the evidence before the grand jury," nor would it "otherwise tend to

prejudice the defendant[s] on the merits." C.P.L. § 200.70(1). This case has already been tried once. The theory of the prosecution is well-established, and the defendants have ample notice of the conduct at issue. Amending Count One as requested would simply allow the People to streamline the presentation of evidence at trial without risking the defense trying to use such streamlining to their advantage.

Count One-hundred-and-six – Conspiracy in the Fifth Degree

The People also move to amend Count 106 of the indictment by deleting certain overt acts, renumbering the remaining overt acts, identifying individuals who were initially not referred to by name, and changing the reference to defendants Davis and Warren, neither of whom will be tried in September.[4] Again, doing so will neither change the theory of prosecution nor prejudice the defendants on the merits. It will simply reduce the number of overt acts the Court has to read to the jury and consequently the number of overt acts the jury has to consider. A list of overt acts reflecting the requested amendments is attached at Exhibit 8.

[4] The People seek only to amend the overt acts as they relate to the trial of defendants Sanders and DiCarmine. Also, to be clear, the People reserve the right to present evidence of conduct reflected in overt acts that have been deleted.

WHEREFORE, the People urge the Court to grant the People's motions and to provide the People with such other and further relief as the Court may deem just and proper.

Dated: May 6, 2016
New York, New York

Respectfully submitted,

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