Docket No. H14H-CR09-0635038-S
Docket No. H14H-CR09-0628569-S

State of Connecticut	:	**Superior Court**
	:	
V.	:	**Judicial District of Hartford**
	:	
Eddie Perez	:	**November 2, 2009**

Defendant's Memorandum In Opposition To
State's Motion To Consolidate

The Defendant, **Eddie Perez**, hereby submits this Memorandum of Law in Opposition to the State's Motion to Consolidate dated September 10, 2009.

I. Introduction

After successfully derailing Mr. Perez's opportunity for a fair and speedy trial by arresting him on new charges one week before jury selection in his first case, the State is now attempting to prejudice him even further by lumping all of its allegations into one trial that no single jury could possibly be expected to fairly assess. In its one-page motion to this Court, the State has asserted without any analysis that joinder of these completely unrelated matters would serve the interests of judicial economy without substantially prejudicing the Defendant. The State's conclusory justifications are both wrong and noteworthy insofar as none address the key factor in this case; namely, that if there were separate trials the evidence from either case would be completely inadmissible.

Consolidation of these cases implicates a host of Mr. Perez's constitutional rights under the fifth, sixth and fourteenth amendments to the federal constitution and article 1, sections 8, 9 and 20 of the state constitution, including his rights to due process, a

fair trial, confrontation, equal protection, the effective assistance of counsel, and the ability to exercise his right to testify. For these reasons and the others that follow in this memorandum, the Defendant will suffer substantial prejudice if the charges are joined for trial, and this Court should deny the State's motion.

II. Background

As this Court is aware, jury selection was scheduled to begin in docket number CR09-0628569 on September 9, 2009, with trial scheduled to commence on or about November of 2009. However, after being arrested just seven days before jury selection on entirely new charges, the Defendant moved to dismiss both cases on September 2, 2009, on the basis that the State had engaged in intentional misconduct by attempting to prejudice the jury pool just prior to the commencement of trial. After that motion was denied by the Court, the Defendant moved for and was granted a continuance based on the prejudice that would result from the pretrial publicity regarding allegations that were not part of the existing charges scheduled for trial.

On September 10, 2009, despite the fact that a continuance was granted in part because the jury would be prejudiced by news reports of the unrelated charges, the State filed a motion to consolidate. The Defendant was granted an extension of time to November 4, 2009, so that he would be able to review the discovery on the new charges before responding to the State's motion, and a hearing date was scheduled for the same day.

SANTOS & SEELEY, P.C. • *ATTORNEYS AT LAW* • 51 RUSS STREET • HARTFORD, CT 06106-1566 • (860) 249-6548 • FAX (860) 724-5533 • JURIS NO. 07230

III. Argument

While Connecticut represents the minority of jurisdictions with a presumption in favor of joinder, our Courts have clearly and consistently reaffirmed that when prejudice would result and jury instructions are an insufficient cure, a trial court must sever unrelated charges. Because such substantial prejudice would occur in the present case, the State's motion should be denied.

A. Standard

General Statutes § 54-57 provides that "[w]henever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise." Practice Book § 41-19 similarly provides that "[t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together." While Connecticut has upheld a presumption in favor of joinder, it is well settled that "[t]he court's discretion ... is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial." State v. Davis, 286 Conn. 17, 29 (2008) (citations omitted).

In reviewing cases where defendants have challenged a trial court's discretion to join cases for trial, our Supreme Court has typically assessed the potential for prejudice under the factors articulated in State v. Boscarino, 204 Conn. 714, 722 (1987). "These factors include: (1) whether the charges involve discrete, easily distinguishable factual

scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial...." Id. at 722-24. "If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." Id. As recognized by Justice Katz in her concurring opinion in Davis, though, "Boscarino did not purport to identify an exhaustive list of factors relevant to determining whether joinder is proper in any given case; rather, it simply applied those considerations that previously had been identified in our case law." State v. Davis, 286 Conn. at 50 n. 8 (Katz, concurring) (citing State v. Boscarino, 204 Conn. at 722-23).

B. Judicial Economy Will Not Be Served By Joinder Of The Present Charges

The State has first submitted in conclusory fashion that "joinder would foster judicial economy and administration" in this case. Even without assessing the prejudice that the Defendant would suffer from a consolidated trial, reasoned analysis of this preliminary consideration reveals that there is little, if any, economic benefit to consolidating the Defendant's trials under the circumstances of this case. Thus, when considered with the substantial prejudice that the Defendant would suffer as a result of these so-called efficiencies, severance is supported even further.

1. The pending charges against Mr. Giles negates any efficiencies created by joinder

First, it is noteworthy that the State has *not* moved to consolidate the Defendant's cases with that of Abraham Giles, who has been charged as a co-

conspirator in connection with the State's second set of charges against the Defendant. See State v. Abraham Giles, Docket No. HHD-CR09-0635036-T.[1] Thus, even if the Defendant's larceny case was consolidated with the unrelated bribery charges, this Court would potentially be holding a separate trial where the State would be calling the same witnesses into court and introducing the same evidence at a trial which would take even more time and judicial resources than if Mr. Perez's charges had not been consolidated at all. If the State were truly interested in judicial economy, it would move to consolidate the Defendant's case with that of Mr. Giles, not with unrelated charges that are not going be rehashed at another trial in the future. Consolidation in this alternate manner would not only foster greater judicial economy, but would also better protect the Defendant's constitutional rights to confrontation, since Mr. Giles would be present at the same trial.

2. The inefficiencies created from holding one large trial outweigh any perceived efficiencies

Furthermore, because these unrelated crimes involve different times, locations, witnesses and evidence, there are few, if any efficiency advantages to the consolidation of two complex trials into one enormously complex trial. Indeed, the inefficiencies created by trying both cases together is apparent in all three stages of these proceedings:

[1] Even if the State had moved to consolidate Mr. Giles' matter with both of the Defendant's pending cases, it is unlikely that this Court could grant such a motion since he would be prejudiced from the unrelated bribery case in which he has not been implicated in any way.

- *Pretrial Preparation*

As this Court is aware, the Defendant moved for an extension of time to respond to this motion precisely so that he could review the discovery and include more detailed information about the relative complexity of preparing the second set of charges in its submission to this Court. See Motion For Extension Of Time In Which To Respond To State's Motion To Consolidate dated October 1, 2009.[2] Ironically, the Defendant was nearly unsuccessful in presenting this factor precisely *because* the discovery from the second case was too voluminous for the State to provide in the time provided. See Letter from Supervisory Assistant State's Attorney Alexy to Attorney Santos dated October 23, 2009, attached here as Exhibit A.

As indicated in the letter sent by Attorney Alexy to undersigned counsel, as of one week ago the State was unable to even provide the discovery to undersigned counsel, despite its diligent efforts. Attorney Alexy indicates that "[t]he relevant material has to be culled from over 800 reports (plus attached documents) and the transcripts of over 100 witnesses questioned not only during the 18 months of the grand jury, but before and after as well." See Exhibit A. Indeed, the State has just begun the process of providing those aspects of the discovery that are available electronically; just last

---

[2] While the State previously indicated in its Notice of Compliance With Discovery Request dated October 20, 2009 that evidence copied by the State remained at the Office of the Chief State's Attorney, undersigned counsel have confirmed that there were in fact no additional boxes to pick up from the Office of the Chief State's Attorney, but rather a number of discs containing audio recordings, many of which were already provided to the Defendant. In any case, the fact that the Defendant requires additional time to adequately prepare for the second case should not suggest that he is not ready to go forward on the first set of charges.

Thursday defense counsel received the first disc of discovery that is available electronically. See Letter from Supervisory Assistant State's Attorney Alexy to Attorney Santos dated October 29, 2009, attached here as Exhibit B. Undersigned counsel have now begun their review over 1 gigabyte of electronic discovery, including 36 grand jury transcripts, numerous arrest and search warrants, hundreds of pages of phone records and nearly 19 hours of audio recordings. Separate and apart from that information that was provided last Thursday, much of the State's material is not even available for electronic production and is currently only being offered for inspection and copying at the Office of the Chief State's Attorney in Rocky Hill. See Exhibit B.

Considering the amount of discovery that must be reviewed in connection with the new case, a consolidated trial would likely have to be delayed yet again in order for counsel to be given the fair opportunity to effectively represent the Defendant. Where trial has already been scheduled *twice* in connection with the first case, it fosters neither judicial economy nor the Defendant's rights to a fair and speedy trial on his first charges to delay it yet again as a result of discretionary consolidation.

This point is more important when considered with the prejudice that the Defendant will suffer if he is forced to try the second case without delay. The new charges are more complex, involve more witnesses and present complicated questions of law. See infra, at 15-16. As indicated in his motion to amend the scheduling order that was denied by the Court, defense counsel had previously cleared his trial calendar to prepare and try the charges in the first information last month. Now that the first trial

has instead been delayed he has been ordered to commence jury trials in November and December of 2009, and January 2010. Two of those cases involve charges of manslaughter, and the third case involves a charge of sexual assault and risk of injury. To now require defense counsel to proceed on the new charges in March when all his time prior to trial has already been scheduled on other trials, will deny the Defendant effective assistance of counsel.

- *Jury Selection*

Judicial economy is also not served when it will prolong the processes of both jury selection and service under the circumstances of this case. In the present case, where the Defendant is a highly visible figure being tried in a judicial district where there has been intense media attention, it will be difficult enough to pick a jury for one case that will be unusually lengthy. Adding another set of more complex charges to the same case will dramatically extend the length of the trial, which will in turn decrease the number of venirepersons able to serve on the such a long jury.

Consolidation will transform a relatively straightforward bribery prosecution into a nine-week marathon. Indeed, in undersigned counsel's experience, the only citizens typically able to serve on a trial of such length are either retirees, state workers or employees of large corporations. The Defendant has not sought a change of venue so that he could be judged in part by the minority community that he serves. Thus, joinder in and of itself will substantially prejudice the Defendant because it will be directly attributable to his receiving a fair cross section of the community to sit on the jury.

- *Length of the Trial*

Finally, it cannot be said that the interests of judicial economy will be served when consolidation of these informations would create one trial that could potentially take months to try together. Each of the two informations that the State is attempting to consolidate involve multiple sets of allegations with overlapping timeframes, which will result in numerous breaks in trial activity to determine what part of the State's evidence is applying to which case, and numerous sets of jury instructions throughout the trial to properly alert the jury. See infra, at 15-16. This result will not only negate any of the efficiencies derived from holding one trial, but will also substantially prejudice the Defendant.

C. The Defendant Will Suffer Substantial Prejudice Because The Evidence From One Case Is Not Cross-Admissible In The Other

As indicated above, it is extremely significant that in support of its motion to consolidate, the State has not argued that any of the evidence in these cases is "cross-admissible." That is, if Mr. Perez's two informations were to be tried separately, no jury hearing one would hear evidence as to the others. This is true because Connecticut follows the universal rule that evidence of other "bad acts" is inadmissible so as to avoid the prohibited conclusion that because the defendant committed some bad acts, he has the propensity to commit others. See Connecticut Code of Evidence § 4-5(a).[3]

---

[3] Conn. Code of Evid. § 4-5 provides: "(a) Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person. (b) Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the

It is well settled that a jury may hear "other act" evidence only if a two part test is satisfied. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions enumerated under subsection (b) of § 4-5. See footnote 3. In the present case, the State has not even suggested that any of the evidence from one of the Defendant's unrelated cases would be admissible in the other, let alone identified a recognized exception that would justify such admission.[4] Even if the State attempted to identify such an exception, though, such evidence would still need to be excluded from the separate trials under C.C.E. § 4-3 since the probative value of the evidence must outweigh its prejudicial effect." State v. Aaron L., 272 Conn. 798, 820 (2005).[5]

---

crime, or to corroborate crucial prosecution testimony." Our Supreme Court has held that "[a]s a general rule, evidence of guilt of other crimes is inadmissible... The rationale of this rule is to guard against its use merely to show an evil disposition of an accused, and especially the predisposition to commit the crime with which he is now charged." State v. Stenner, 281 Conn. 742, 752 (2007).

[4] For the purposes of the present memorandum, the Defendant will not play the legal version of "Go Fish" by arguing against all of the possible exceptions to the rule prohibiting evidence of other crimes, wrongs or bad acts pursuant to Connecticut Code of Evidence § 4-5. It is the State's burden to demonstrate that the evidence would be admissible under any of the recognized exceptions enumerated under C.C.E. § 4-5(b). Should the State belatedly argue that the evidence would be admissible under one of the exceptions in support of its motion, due process demands that the Court defer judgment on the Motion to Consolidate, order the State to specify the evidence that it submits is cross admissible and to provide the Defendant a reasonable opportunity to respond to the State's proffer.

[5] Our Supreme Court "has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be excluded as unduly prejudicial: (1) where it may unnecessarily arouse the jury's emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it." State v. Horrocks, 57 Conn. App. 32, 40, cert. denied, 253 Conn. 908 (2000) (internal quotation marks omitted).

SANTOS & SEELEY, P.C. • *ATTORNEYS AT LAW* • 51 RUSS STREET • HARTFORD, CT 06106-1566 • (860) 249-6548 • FAX (860) 724-5533 • JURIS NO. 07230

or scheme exception, and in light of its ruling specifically instructed the trial court to reevaluate whether the cases should be joined on retrial. Id. at 368.

In State v. Davis, 286 Conn. at 26 n. 6, the Court declined to adopt the defendant's claim that the court should presume prejudice from joinder where the evidence would not be cross-admissible in separate trials. In her concurring opinion, Justice Katz (joined by Justice Palmer) recognized that Connecticut is in the minority of jurisdictions that do not recognize either (a) the minimal judicial economy that is derived from joining two unrelated cases, or (b) the inherent prejudice that inures to the defendant when inadmissible "other acts" evidence is presented to the jury. After reviewing the significant number of cases from other jurisdictions that do recognize these risks,[6] Justice Katz remarked:

> As the Fourth Circuit Court of Appeals noted: "[A]lthough it is true that the ... [r]ules of [c]riminal [p]rocedure [were] designed to promote economy and efficiency and to avoid a multiplicity of trials ... we are of the strong opinion that the consideration of one's constitutional right to a fair trial cannot be reduced to a cost/benefit analysis. Thus, while we are concerned with judicial economy and efficiency, our overriding concern in an instance such as this is that [the] jury consider only relevant and competent evidence bearing on the issue of guilt or innocence for each individually charged crime separately and distinctly from the other." (Citation omitted; internal quotation marks omitted.) United States v. Isom, 138 Fed. Appx. 574, 581 (4th Cir.2005), cert. denied, 546 U.S. 1124 (2006) ... . Accordingly, I would instruct the trial courts that the presumption in favor of joinder is limited to cases wherein there is cross admissibility of substantive evidence. When the evidence would not be cross admissible, trial courts should presume prejudice and grant joinder only when the risk of prejudice appears to be "substantially reduced."

---

[6] See e.g., Drew v. United States, 331 F.2d 85, 89-90 (D.C.Cir.1964); United States v. Halper, 590 F.2d 422, 431(2d Cir.1978); United States v. Foutz, 540 F.2d 733, 738 n. 4 (4th Cir.1976); United States v. Isom, 138 Fed. Appx. 574, 581 (4th Cir.2005), cert. denied, 546 U.S. 1124 (2006). See also McKnight v. Maryland, 375 A.2d 551, 554 (Md. 1977) (in joining unrelated offenses "the saving of time and money allegedly effected by a joint trial is questionable").

Id. at 44 (Katz, concurring) (citations omitted).

For the purposes of appellate review, the Defendant maintains that the majority decision in Davis should be overruled and the Court should adopt Justice Katz's concurring opinion presuming prejudice under these circumstances. Even if that portion of Davis is not overruled, though, it remains clear from our own caselaw that the issue of cross-admissibility remains one of the most key considerations in assessing the potential for substantial prejudice to the defendant. See supra, at 12. In the present case, where the State has not even argued that the evidence is cross-admissible, the substantial prejudice that the Defendant would suffer, including the prejudice from the jury's consideration of inadmissible "other act" evidence, substantially outweighs the efficiencies, if any, from a joined trial.

D. The Complexity Of The Second Set Of Charges, If Joined With The Defendant's First Case, Will Prejudice Him In The Same Manner As A Joined Case With Brutal Or Shocking Characteristics

As indicated above, the factors enumerated under State v. Boscarino are not exhaustive, and have developed largely from the factual circumstances of the cases before it. See supra, at 4; State v. Davis, 286 Conn. at 50 n. 8 (Katz, concurring). Thus, under the circumstances of prior cases where the elements of the offense were inherently violent by nature, the comparatively "brutal or shocking nature" of those allegations would predictably be a relevant factor for the Court's consideration. See, e.g., State v. Davis 286 Conn. at 50; State v. Ellis, 270 Conn. at 378.

In the present case, the nature of the charges against the defendant are never inherently violent. Therefore, this Court should not be led to believe that just because the cases do not include brutal or shocking aspects, that such circumstances somehow support joinder. In the present case, the crux of the substantial prejudice that the Defendant will suffer arises from the combination of a jury assessing numerous complex scenarios that it would not otherwise assess in separate trials.

Careful examination of the complexity contained in both arrest warrant affidavits confirms that in the same way "brutal or shocking" allegations can prevent jurors from fully and fairly assessing all of the evidence, so too can the complexity of many unrelated scenarios with overlapping timeframes irreversibly prejudice them.

In the first case, the Defendant has been charged in a 25-page affidavit with bribe receiving and fabricating physical evidence. The State's allegations, while relatively straightforward in the first case, still contain multiple allegations surrounding the timing and values of multiple payments from different sources, see Arrest Warrant Affidavit at 2-5; 7-15, as well as three separate allegations related to the inner workings of city government as they allegedly relate to Mr. Perez's interactions with Mr. Costa during the time periods between 2005 and 2007. See Arrest Warrant Affidavit at 6; 16-25.

In the second case, the Defendant is charged with criminal attempt and conspiracy to commit larceny in the first degree. In contrast to the first case, the State's 24-page affidavit in support of the second contains a far greater variety of factual

allegations which span over different time periods and alleging a number of different scenarios that are completely unrelated from the first case, yet overlap in time and location in ways that would needlessly confuse a jury that would otherwise be able to clearly follow the first case. Indeed, preliminary review of the arrest warrant without the benefit of reviewing the underlying discovery reveals that the most recent charges allege no less than *seven* different scenarios over a variety of dates and times overlapping the same time periods addressed in the first case. See Arrest Warrant Affidavit dated 8/28/09 at 4-9 (allegations regarding 1214 Main Street spanning overlapping time periods over various months in 2006); Arrest Warrant Affidavit dated 8/28/09 at 9-16 (allegations regarding 1143 Main Street from dates in 2006, 2007 and 2008); Arrest Warrant Affidavit dated 8/28/09 at 16 (allegations regarding the so-called "Triangle Lot" on the corner of Main Street and Trumbull Street during various dates in 2007); Arrest Warrant Affidavit dated 8/28/09 at 17 (allegations regarding Giles' warehouse in 2006 and 2007); Arrest Warrant Affidavit dated 8/28/09 at 17-18 (allegations regarding an eviction fee increase in 2005); Arrest Warrant Affidavit dated 8/28/09 at 18-19 (allegations relating to a dumpster at 726 Windsor Street from 2007); Arrest Warrant Affidavit dated 8/28/09 at19-20 (allegations relating to a new moving services contract from 2005, spanning into 2007).

Under these circumstances, jury instructions would simply not cure the substantial prejudice that will result from so many unrelated scenarios spanning the same general time periods being thrown at the same jury. In the same way that brutal

or shocking conduct in violent cases can blur the lines between joined cases, the complexity of the dual white-collar prosecutions can blur the lines for an already confused jury.

III. Conclusion

In September, when jury selection was scheduled in the bribery case, the trial testimony was estimated to be three to four weeks. If the Court grants the State's motion to consolidate, undersigned counsel predicts that the length of the trial will far exceed this original estimate, substantially prejudicing the Defendant and depriving him of both his state and federal constitutional rights outlined above. As such, this Court should deny the State's motion to consolidate the cases.

RESPECTFULLY SUBMITTED,
EDDIE PEREZ

BY _____

HUBERT J. SANTOS
BENJAMIN B. ADAMS
SANTOS & SEELEY, P.C.
51 Russ Street
Hartford, CT 06106
(tel) 860-249-6548
(fax) 860-724-5533

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been sent by fax and regular mail, first class and postage prepaid, this 2nd day of November, 2009 to the following counsel of record:

Kevin T. Kane, Esq.
Christopher Alexy, Esq.
Michael Gailor, Esq.
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067

HUBERT J. SANTOS

EXHIBIT A

State of Connecticut
DIVISION OF CRIMINAL JUSTICE

OFFICE OF
THE CHIEF STATE'S ATTORNEY

KEVIN T. KANE
CHIEF STATE'S ATTORNEY

300 CORPORATE PLACE
ROCKY HILL, CONNECTICUT 06067
TELEPHONE (860) 258-5800

October 23, 2009

Hubert J. Santos, Esq.
Santos & Seeley, P.C.
51 Russ Street
Hartford, CT 06106

Re: Eddie Perez (CR09-0635038)

Dear Attorney Santos:

I am writing to let you know that we are diligently working on providing the discovery relevant to your client. The relevant material has to be culled from over 800 reports (plus attached documents) and the transcripts of over 100 witnesses questioned not only during the 18 months of the grand jury, but before and after as well. To avoid inundating you with material all at one time, we will provide your items as they are separated and gathered.

In the meantime, we have approximately one dozen banker's boxes containing various subpoenaed documents, which you are free to examine and copy at any time.

Very truly yours,

Christopher A. Alexy
Supervisory Assistant State's Attorney
Public Integrity Bureau

CAA/at

EXHIBIT B

State of Connecticut
DIVISION OF CRIMINAL JUSTICE

OFFICE OF
THE CHIEF STATE'S ATTORNEY

KEVIN T. KANE
CHIEF STATE'S ATTORNEY

300 CORPORATE PLACE
ROCKY HILL, CONNECTICUT 06067
TELEPHONE (860) 258-5800

October 29, 2009

HAND DELIVERED

Hubert J. Santos, Esq.
Santos & Seeley P.C.
51 Russ Street
Hartford, CT 06106

Re: State v. Eddie Perez (CR09-0635038-S)

Dear Attorney Santos:

Enclosed is a disc containing the discovery material for the above captioned case. The attachments referenced in the reports, because they are not in electronic format, are available for your inspection and copying at your convenience. The same is true of the boxes of subpoenaed documents referenced in my letter dated October 23, 2009.

Very truly yours,

Christopher A. Alexy
Supervisory Assistant State's Attorney
Public Integrity Bureau

CAA/at

Enclosure