SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 42

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THE PEOPLE OF THE STATE OF NEW YORK, : **DECISION AND ORDER**

INDICTMENT NO. 774/19

-against- :

PAUL J. MANAFORT, JR., :

Defendant. :

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MAXWELL WILEY, J.:

The defendant has been charged by a New York County Grand Jury, in an indictment filed March 7, 2019, with the crimes of Residential Mortgage Fraud in the First Degree (Penal Law §187.25), Attempted Residential Mortgage Fraud in the First Degree (Penal Law §§110/187.25), Conspiracy in the Fourth Degree [Penal Law §105.10(1)], Falsifying Business Records in the First Degree (Penal Law §175.10), and Scheme to Defraud in the First Degree [Penal Law §190.65(1)(b)]. The charges stem, in general, from allegations that, between December 2015 and January 2017, defendant obtained or attempted to obtain mortgages from three different financial institutions on four residential properties he owned by submitting false information and documentation to the institutions. It is alleged that defendant defrauded the institutions of over $20 million dollars. It is also alleged that in 2016 defendant fraudulently obtained a $1 million line of credit from Banc of California by falsifying documents.

Defendant filed an omnibus motion on September 4, 2019. In that motion defendant seeks, among other forms of relief, dismissal of the indictment based on the claim that the prosecution of this indictment is barred by defendant's previous prosecution on similar charges in federal court. For the reasons stated below, defendant's motion to dismiss the indictment on this ground is granted.

Procedural and Factual History

Defendant was indicted in the United States District Court for the Eastern District of Virginia, Criminal No. 1:18-cr-00083 ("Federal Indictment") on February 22, 2018. Defendant was charged with, as is relevant to this case, four counts each of Bank Fraud Conspiracy (18 USC §§ 1344 and 3551 *et seq*) and Bank Fraud (18 USC §§1344, 2 and 3551 *et seq*). A jury trial on the Federal Indictment commenced on July 31, 2018. On August 21, 2018 defendant was found guilty on counts 25 and 27, Bank Fraud, as well as other counts not relevant to this case. The jury was unable to reach a unanimous verdict, again as is relevant here, on seven counts. Those were counts 24, 26, 28, 29 and 31, all charging Bank Fraud Conspiracy, and counts 30 and 32 charging Bank Fraud (collectively "Hung Counts").

Thereafter, on September 14, 2018, pursuant to a plea and cooperation agreement in another federal indictment originating out of the United States District Court for the District of Columbia, specifically, *United States v. Manafort, Jr.*, Criminal No. 1:17-201-1 ("Second Federal Indictment"), defendant pleaded guilty to the Second Federal Indictment. Pursuant to that agreement, defendant agreed not to file any post-trial motions challenging the verdict in the Federal Indictment and admitted to the conduct underlying the allegations in the Hung Counts.

In return, the prosecution agreed to move to dismiss the Hung Counts either at the time of sentencing or the successful completion of his cooperation.

On September 20, 2018, defendant informed the Federal Indictment trial court in Virginia that he would not file any post-trial motions challenging the verdict. As per the agreement, on September 26, 2018, the prosecution moved to dismiss the Hung Counts. Those counts were dismissed by the trial court on October 19, 2018 and defendant was sentenced on March 7, 2019 to a term of forty-seven months imprisonment as a result of his conviction on the Federal Indictment.

A New York County Grand Jury handed up the instant sixteen-count indictment on March 7, 2019. The People concede that the charges in the relevant counts in the Federal Indictment, including those in the Hung Counts, were based on the same acts and transactions that form the basis of all the charges in this New York State indictment.

As noted above, Defendant filed his omnibus motion on September 4, 2019, seeking dismissal on double jeopardy grounds and various other forms of relief. The People filed a response on October 9, 2019 to which defendant replied on October 29, 2019. The People submitted a further response on November 8, 2019. Briefly, defendant claims that, under New York's double jeopardy law, insofar as defendant has been previously prosecuted on these charges in U.S. District Court, the People are barred from prosecuting him on this indictment in New York State Supreme Court. The People respond that this indictment contains a number of charges for which defendant was not "previously prosecuted," as that term is defined in New York law, and that the remainder of the charges fit squarely into one of New York's statutory exceptions to the double jeopardy prohibition.

Legal Analysis

It should be noted at the outset that this is not a case in which defendant's constitutional rights are at issue. The double jeopardy clauses of the constitutions of the United States and the State of New York generally allow for successive federal and state prosecutions for the same criminal conduct under the doctrine of "dual sovereignty." *See, Matter of Polito v. Walsh*, 8 NY3d 683 (2007). As the parties here recognize, in New York the prohibition against double jeopardy is governed by statute, Article 40 of the Criminal Procedure Law. Specifically, CPL 40.20(1) states the basic rule that "a person may not be twice prosecuted for the same offense." Subsection two of that statute then extends this prohibition to separate prosecutions "for the same act or criminal transaction," subject to nine specific exceptions to the rule. CPL 40.20(2)(a) through (i). The next section of the double jeopardy statute, CPL 40.30, then defines the term "previous prosecution" as a charge that has either resulted in a conviction by a guilty plea or upon which a trial has commenced. This statute, too, subjects this definition to certain specified exceptions.

Here, the parties agree that the charges in this indictment and the relevant charges in the earlier Federal Indictment arose from the "same act or criminal transaction." Defendant contends, however, that all the charges in this indictment were already the subject of a previous prosecution, the trial of the Federal Indictment, and that none of the enumerated exceptions in CPL 40.20(2) apply here. In response, the People argue: first, that a number of the charges in this case were not the subject of a previous prosecution in the Federal Indictment, and that those charges must therefore survive any attack on double jeopardy grounds; and, second, that those

charges that could be considered previously prosecuted are subject to one of the statutory exceptions to New York's double jeopardy prohibition.

Previous prosecution

The first determination to be made is whether defendant's Federal Indictment can be deemed a previous prosecution under CPL 40.30. The People concede that defendant's convictions for Bank Fraud under counts 25 and 27 in the Federal Indictment constitute prior prosecutions. The question then turns to whether the Hung Counts also constitute previous prosecutions.

Relying on the exception specified in CPL 40.30(4), the People argue that the Hung Counts were not previously prosecuted and therefore, the instant prosecution is not barred by double jeopardy.[1] While the People agree that defendant was "prosecuted" as that term is defined in CPL §40.30(1)(b), they argue that the court must then look to CPL 40.30(4) and determine whether defendant falls into this exception which, if so, would deem defendant not previously prosecuted on the Hung Counts. The People concede that the other exceptions listed in CPL 40.30 are not applicable here. Defendant argues that none of the exceptions, including CPL 40.30(4), apply, and as such defendant must be deemed to have been previously prosecuted on

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Although the double jeopardy exception found in CPL 40.30(3) allows for retrials as a result of a hung jury, the People concede that provision is not applicable here. The subdivision authorizes a retrial on the same accusatory instrument only. Here defendant is faced with an entirely new accusatory instrument thus making CPL 40.30(3) inapplicable.

the Hung Counts and, consequently, the instant prosecution is barred as to the parallel counts in this indictment.

CPL 40.30(4) reads:

> Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

The People contend that based upon a plain language reading of the text, the exception under CPL 40.30(4) applies to the factual setting of the instant indictment. Specifically, the People claim that because the Federal Indictment was dismissed by the judge presiding over the Federal Indictment "without prejudice," that dismissal acted as an authorization for the People to obtain a new accusatory instrument. And, that in obtaining the instant indictment, the People were acting "pursuant to" the federal judge's dismissal order.

Defendant counters that the statute, by the very nature of its terms, cannot apply to this case—or, for that matter, to any previous prosecution occurring outside New York state. Defendant points to the few cases that have applied this subdivision as well as the Practice Commentaries in support of his position. All the cited cases concern initial indictments where jeopardy attached under CPL 40.30(1) and which were then dismissed prior to a verdict being reached because of a defect in the accusatory instrument followed by a specific authorization to seek a new indictment or which were the subject of an appellate directive for a new prosecution. Defendant argues that under CPL 40.30(4), because the prosecution in the cited cases was

specifically permitted by the courts' order to seek a new accusatory instrument, double jeopardy did not bar prosecution on the new indictment brought pursuant to the order. Further, defendant contends that the subsequent prosecution necessarily must occur in the same court where the initial prosecution originated since it must be brought *pursuant to* that court's order. Much like the authorization permitting a retrial in the case of a hung jury in CPL 40.30(3) which permits a new trial on the same accusatory instrument, defendant claims that subsequent prosecutions in this setting are confined to the courts where the defective accusatory instrument originated and where an order authorizing a new accusatory instrument was issued.

Having considered the arguments raised by both parties, as well as the legal support cited, the Court agrees with the defense and finds that the Hung Counts were "previously prosecuted" under CPL 40.30(1)(b) and that the exception under CPL 40.30(4) does not apply. Despite having been enacted in 1970, there is a paucity of case law interpreting the exception set forth in CPL 40.30(4). Indeed, the People cite to no case in which CPL 40.30(4) was applied to a factual scenario remotely similar to the one at hand. The Practice Commentaries and the few cases that have applied this exception, however, support the interpretation set forth by the defense.

The question is whether by dismissing the Federal Indictment the U.S. District Court judge in Virginia authorized the People to obtain a new accusatory instrument and whether the present indictment was "obtained pursuant to" such an order. In light of the case law, a plain reading of the statutory language and the circumstances of the dismissal in Federal Court, the answer to both questions is no, and accordingly, the People cannot avail themselves of exception under CPL 40.30(4).

The Court starts where it must, with the dismissal of the Federal Indictment. In a Notice filed on September 26, 2018, in the Eastern District of Virginia, the government informed the court, U.S. District Judge T.S. Ellis, III, that pursuant to a plea agreement in the Second Federal Indictment, the government would be moving to dismiss the Hung Counts at the time of sentencing. Judge Ellis addressed the status of the Hung Counts on October 19, 2018. At that proceeding, Judge Ellis stated, "[w]e'll dismiss the deadlocked counts today without prejudice. Whether or not they can ever been [sic] reinstituted, I don't have to address. I don't know. There may be some doubt about that. But that's your problem, not the Court's." He later said, "I will dismiss the deadlocked counts without prejudice."

Several months later, at defendant's sentencing on March 7, 2019 on the Federal Indictment, Judge Ellis stated, with relation to the Hung Counts, "I dismissed those without prejudice...In the end, Mr. Manafort has admitted to the conduct constituting those other counts. So they are part of the related conduct that is considered by the Court in sentencing in this case. He admitted to those facts in the District of Columbia's Statement of Facts...He's before the Court for those counts on which he's been found guilty and the related conduct. And the counts that were hung, the facts of those are also to be part of the sentencing consideration." In the Judgment entered on March 7, 2019, the Hung Counts were "dismissed with prejudice." Regardless of this apparent discrepancy between Judge Ellis's words and the court document, the federal record is clear that Judge Ellis was not authorizing any governmental entity, either state or federal, to obtain a new accusatory instrument.

Indeed, it is clear from the Government's motion to dismiss the Hung Counts, the plea agreement in the Second Federal Indictment and the comments by Judge Ellis on October 19,

2018 and March 7, 2019, that no new accusatory instrument was contemplated, or much less, ordered. Further, Judge Ellis apparently used defendant's admissions of guilt to the Hung Counts—during proceedings in the Second Federal Indictment—in arriving at the sentence he, the judge, imposed on the convicted counts in the Federal Indictment. To argue, as the People do here, that the statement "without prejudice" is in fact an authorization to obtain a new accusatory instrument strains reason. In fact, Judge Ellis expressed doubt that the Hung Counts could ever be resurrected—and added that that was not "his problem." Such language can hardly be interpreted as authorizing a new prosecution. Based upon the federal record, the Court concludes that Judge Ellis did not authorize a new accusatory instrument as that term is contemplated under CPL 40.30(4). As such, the People here cannot be found to have been acting pursuant to such an "authorization" in obtaining this indictment.

The case law in New York supports a finding that a court's "authorization" to obtain a new accusatory instrument must be a specific, and explicit, directive. Further, the courts have found such authorizations to be valid under CPL 40.30(4) only where the dismissals stem from defects in the accusatory instrument or where there is a directive by an appellate court after a ruling favorable to the defendant. Neither situation is the case here. In *Matter of DeLee v. Brunetti,* 158 AD3d 1171 (4th Dept 2018), *lv denied* 31 NY3d 911, the court considered whether a defendant can be tried on a second indictment which stemmed from a prior conviction that was reversed as repugnant or whether a trial on the second indictment is barred by double jeopardy. In that case, defendant had been convicted by a jury of Manslaughter in the First Degree as a Hate Crime but acquitted of Manslaughter in the First Degree. Defendant appealed and in *People v. DeLee*, 24 NY3d 603 (2014), the Court of Appeals found that the verdicts were

repugnant and reversed defendant's conviction for Manslaughter in the First Degree as a Hate Crime. The court went on to find that the appropriate remedy was to permit a retrial on the repugnant charge, Manslaughter in the First Degree as a Hate Crime, but not on the Manslaughter in the First Degree charge for which defendant was acquitted. The court authorized the People to resubmit the count of Manslaughter in the First Degree as a Hate Crime to a new grand jury. The case was re-presented, and the grand jury returned a second indictment charging defendant with Manslaughter in the First Degree as a Hate Crime. The defendant then sought a dismissal on the ground of double jeopardy. In *Matter of DeLee v. Brunetti*, *supra*, the court found,"[i]nasmuch as the Court of Appeals has *specifically authorized* the People to obtain a new accusatory instrument charging the same offense under CPL 40.30(4)," a trial on the second indictment was not barred by double jeopardy. (Emphasis added).

In *People v. Fleegle*, 20 AD3d 684 (3d Dept 2005), *lv denied* 5 NY3d 828, *cert denied* 547 US 1152, defendant was initially tried and convicted of multiple counts of sex crimes. On appeal, several counts were reversed and upon remittal, the court granted defendant's motion to dismiss the indictment because it contained duplicitous counts. The court granted the People leave to represent the counts to a new grand jury. The People re-presented the case and defendant was indicted. Defendant proceeded to trial and was convicted. Defendant argued on appeal that his conviction was obtained in violation of double jeopardy. The court held that, because the dismissal of the indictment "expressly included leave to re-present the case to a grand jury," a trial on the counts that survived appeal and were re-presented was not barred by double jeopardy under CPL 40.30(4). *See also, People v. Lane*, 93 AD2d 92 (1st Dept 1983), *lv denied* 59 NY2d 974 (Sandler, J concurring)(CPL 40.30(4) interpreted as requiring that dismissal

of the original accusatory instrument be based upon a legal defect followed by permission to file new instrument); *Matter of DeCanzio v. Kennedy*, 67 AD2d 111 (4th Dept 1979), *lv denied* 47 NY2d 709(new indictment not barred by double jeopardy under CPL 40.30(4) where dismissal based upon invalid indictment coupled with court authorization for representation); *People v. Key*, 87 Misc2d 262, 267 (App Term 2d Dept 1976), *affd* 45 NY2d 111 (1978)(Gagliardi, J concurring)(retrial authorized under CPL 40.30(4) as defective accusatory instrument never placed defendant in jeopardy). A common thread running through the cases interpreting the exception under CPL 40.30(4) is that the defendant sought the dismissal of a defective accusatory instrument or vacatur of a defective conviction even though jeopardy had already attached under CPL 40.30(1). To allow a defendant to escape prosecution when he prompted the dismissal would permit him to use double jeopardy as a sword and not as a protective shield as intended. Additionally, common to all the cases is a specific directive from the court authorizing the People to seek a new accusatory instrument.

Further guidance on interpreting CPL 40.30(4) can be found in the Practice Commentaries. The original Practice Commentaries by Richard Denzer read as follows:

> The application of subdivision 4 may be illustrated by a case in which, following the commencement of a trial, the court dismisses the indictment on the basis of some defect therein but authorizes the people to resubmit the charge to a grand jury for the purpose of obtaining a new indictment for the same offense or for an offense based upon the same facts.

Richard Denzer, Practice Commentaries, McKinney's Cons Laws of NY Book 11A, CPL 40.30 (1971 ed).

The subsequent Practice Commentaries by William C. Donnino similarly comment that:

> An example of a dismissal warranting a retrial on a new accusatory instrument would be a dismissal for a defect in the accusatory instrument...or an appellate court's dismissal of an indictment upon finding an error in the defendant's conviction only for a lesser included offense of the one charged when that lesser offense was not in the accusatory instrument charging the higher offense.

William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, 2019 Electronic Version, CPL 40.30. In line with the case law, the commentators state that a retrial is permitted when the dismissal is based upon a defective accusatory instrument or upon an appropriate appellate directive. Again, in both situations, a defendant would not have actually been placed in jeopardy and hence, the filing of a new accusatory instrument pursuant to such authorization would not violate the bar against double jeopardy.

Here, the dismissal of the Hung Counts in the Federal Indictment was not the type of dismissal contemplated by CPL 40.30(4) in that they were not dismissed because of a legal defect in the indictment or because of any appellate directive. Instead, the dismissal was premised upon the government's motion stemming from a plea agreement in the Second Federal Indictment after a hung jury on the Federal Indictment. There was no defect in the accusatory instrument. Further, based on the federal record, it cannot be said that Judge Ellis "authorized" the People to obtain a new accusatory instrument when the counts were "dismissed without prejudice." Judge Ellis did not only not specifically authorize that a new accusatory instrument be pursued, he, in fact, expressed doubt that the counts could ever be reinstituted. To interpret this as authorization to seek a new accusatory instrument as the People suggest is to disregard the clear meaning of his words. The instant situation simply does not fit within the parameters of CPL 40.30(4). As such, the Hung Counts are deemed to have been previously prosecuted under CPL 40.30(1)(b), and the exception set forth in CPL 40.30(4) does not apply to this indictment.

Double jeopardy exception

Having found that the defendant has been previously prosecuted under CPL 40.30(1)(b), the next question is whether the instant prosecution is prohibited by CPL 40.20(1), or whether it is permitted under one of the nine exceptions listed in CPL 40.20(2). As noted previously, the People concede that the offenses charged in the present indictment are based upon the same acts and criminal transactions as those underlying the Federal Indictment. The People argue that the instant prosecution is not barred by double jeopardy as the exception set forth in CPL 40.20(2)(b) applies to the circumstances of this case. The People concede that the other exceptions listed in CPL 40.20(2) do not apply.

CPL 40.20(2)(b) provides:

> A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless: (b) Each of the offenses as defined contains an element which is not an element of the other, *and* the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil.

(Emphasis added.) In order for this exception to apply, the statute requires both a finding that the state and federal offenses contain a different element and that each statute is aimed at curing "very different kinds of harm or evil." Here, the first question is easily answered in the affirmative. As the People set forth, and as defendant does not seriously dispute, each of the New York crimes contain at least one element that is not contained in the federal crimes. A comparison of the elements of Residential Mortgage Fraud in the First Degree (Penal Law §187.25), and Bank Fraud (18 USC §1344) and Conspiracy to Commit Bank Fraud (18 USC

§1349) establishes that the charge of Residential Mortgage Fraud in the First Degree requires that defendant submit a written statement containing materially false information in support of a mortgage loan. No such written statement is required in the federal statutes. Additionally, the New York statute requires that defendant obtain proceeds or funds as a result of his actions, specifically over one million dollars, whereas the federal statute does not require that defendant actually receive any proceeds from the crime. The federal conspiracy charge differs from this state charge in that the federal charge requires an agreement between defendant and one or more people whereas no such agreement is required for Residential Mortgage Fraud in the First Degree. Similarly, the elements for an Attempted Residential Mortgage Fraud in the First Degree contain differing elements. Under the state law, defendant would have to engage in conduct that tends to effect Residential Mortgage Fraud in the First Degree and defendant would have to act with the specific intent to commit that particular crime not simply an intent to defraud as required in the federal crime. Again, the federal conspiracy charge differs in that it requires an agreement which the attempt charge does not.

Moving next to the state charge of Scheme to Defraud in the First Degree, here too the elements differ from the federal charges. Specifically, the state charge requires that defendant intend to defraud more than one person and that he obtained property as a result of the scheme from at least one person. Under the federal statutes there is no requirement that the fraudulent scheme be targeted at multiple individuals or that defendant actually obtain property as a result. And, again, in comparison to the federal conspiracy charge, there is no requirement in the state statute that defendant have formed an agreement with another person.

Likewise, the state charge of Falsifying Business Records in the First Degree requires that defendant actually falsified business records and that he did so with the intent to defraud that

includes an intent to commit, aid or conceal the commission another crime. Neither of these elements is present in the federal statutes. And, again, the federal conspiracy charge requires an agreement which the state charge does not. Finally, the New York charge of Conspiracy in the Fourth Degree differs from the federal statutes in that it requires an agreement to commit a class B felony—specifically Residential Mortgage Fraud in the First Degree, and that at least one party to the agreement committed an overt act in furtherance of the conspiracy. Neither of these elements is contained in the federal charges.

Accordingly, the first requirement of CPL 40.20(2)(b) is satisfied. There are different elements in all of the state charges when compared to the elements of the federal charges. While this aspect of the double jeopardy exception is not seriously contested by the defendant, the second requirement of CPL 40.20(2)(b) is, and it presents the more significant question.

It has been recognized that "New York does indeed have relatively broad statutory protection against double jeopardy....To the extent our protections go beyond those afforded by the State or Federal Constitution...they are to be found in CPL 40.20(2)." *Matter of Polito v. Walsh, supra, at* 690 (2007); *see also People v. Latham*, 83 NY2d 233, 237 (1994). In order to avail themselves of the exception set forth in CPL 40.20(2)(b), not only must the People establish that each offense contains a different element which here they have, they must also show that "the statutory provisions defining such offenses are designed to prevent *very different kinds of harm or evil.*" CPL 40.20(2)(b)(emphasis added). Discussing this exception, the court in *Matter of Kaplan v. Ritter*, 71 NY2d 222, 229 (1987), stated that the exception, "which is potentially quite broad, has been legislatively narrowed by the requirements...that each crime have at least one element not shared by the other and that the 'harm or evil' to be addressed by

the separate prosecutions be analyzed by reference to the 'statutory provisions defining such offenses' rather than to the particular criminal acts charged." Again, illustrating the expansive protections against double jeopardy provided under the statute, the court went on to state that the "demanding" requirements of the exception, "[look] not to the evil toward which the particular prior prosecution was directed, but rather to the broader evil to which the penal statute in question was addressed." *Id*, at 230.

In *Kaplan*, petitioner was prosecuted for federal RICO crimes and for state securities fraud and larceny crimes. There, the People opted not to justify the prosecution under the exception set forth in CPL 40.20(2)(b), which the court also deemed an untenable position stating:

> It is clear that the Federal RICO statutes... were 'designed to prevent' the enhanced evil and societal harm that occurs when criminal activities, of many types, are conducted in organized form. Such criminal activities as securities fraud and theft conducted through legitimate and illegitimate organizations were plainly contemplated. In fact 'harm to investors' was one of the targeted evils specifically mentioned when the legislation was enacted. Thus, even though the elements of the previously prosecuted Federal RICO crimes may be different from those of the State securities fraud and larceny crimes that the District Attorney now wishes to pursue, it can hardly be said that the underlying penal statutes were aimed at 'very different kinds of harms or evil' within the meaning of CPL 40.20(2)(b). (citations omitted)

Id, at 233 n 4. By including the words "very different kinds of harms or evils," it is clear that the statutory exception, in line with providing broader protection against double jeopardy, contemplates a significant and meaningful difference in the types of harms addressed before the exception will apply.

Where the harms or evils contemplated by the differing statutes are generally similar, the courts will find that the exception under CPL 40.20(2)(b) does not apply. *See*, *People v. Claud*,

76 NY2d 951 (1990)(town code provision regarding careful operation of boats and Navigational Law proscribing assault by operation of a vessel were both concerned with ensuring boat safety - specifically protecting life and avoiding injury on the water); *Matter of Schmidt v. Roberts*, 74 NY2d 513, 522 (1989)(federal interstate transportation of stolen property and state larceny charge both designed to "punish thieves and to protect property owners from thefts"); *Matter of Wiley v. Altman*, 52 NY2d 410,414 (1981)(Maryland conspiracy to commit murder and New York murder charge both directed "at a like goal; punishment for the unlawful taking of a particular human life"); *Matter of Abraham v. Justices of the Supreme Ct of Bronx County*, 37 NY2d560 (1975)(state narcotics possession laws and federal narcotics conspiracy laws aimed at preventing the same harm - narcotics trafficking); *People v. Helmsley*, 170 AD2d 209 (1st Dept 1991)(state and federal tax fraud statutes found to prevent the same harms or evils); *People v. Fernandez*, 43 AD2d 83 (2d Dept 1973)(assault and resisting arrest statutes found to guard against the same evil as disorderly conduct statute, namely preventing violence and public disturbance); *People v. Lennon*, 80 AD2d 672 (3d Dept 1981)(harms caused in larceny crimes which are directed at thief and possession of stolen property crimes which are directed at fencing stolen goods are not "very different"); *People v. Wood*, 260 AD2d 102 (4th Dept 1999), *affd* 95 NY2d 509(2000)(contempt violations of Family Court and Criminal Court orders of protection both designed to prevent harm to protected party and preserve court's authority); *Matter of Northrup v. Relin*, 197 AD2d 228 (4th Dept 1994), *lv denied* 84 NY2d 803 (1994)(court martial and state prosecution for sexual crimes against children both address the same evil - "carnal abuse of young children"); *People v. Alba*, 43 Misc3d 878 (Sup Ct Bronx Co 2014)(both federal

wire fraud statute and state scheme to defraud statute "designed to protect the unwary from schemes to deprive them of their property by fraud").

Where the harms or evils targeted by the statutes are very different, then the exception under CPL 40.20(2)(b) is available to the People. *See*, *People v. Bryant*, 92 NY2d 216, 229 (1998)(federal crime of, *inter alia,* bank robbery directed at protecting financial institutions is aimed at different evil from state charges of attempted murder of a police officer and possession of defaced firearms which are directed at preventing the killing of police officers and proliferation of defaced firearms); *People v. DeOca*, 282 AD2d 401 (1st Dept 2001), *lv denied* 97 NY2d 731(2002)(state narcotics related charges including conspiracy aimed at very different harms than federal crimes of conspiracy to commit money laundering and money laundering); *Matter of Robinson v. Snyder* 259 AD2d 280 (1st Dept 1999), *lv denied* 93 NY2d 810 (1999)(different evils between possession of narcotics and conspiracy charge as conspiracy aimed at preventing concerted criminal activity); *Matter of Mason v. Rothwax*, 152 AD2d 272, 282 (1st Dept 1989), *lv denied* 75 NY2d 705(1990)(different harms found and prosecution permitted where state charges related to promotion and marketing of fraudulent real estate limited partnership tax shelter investments and federal charges involved conspiracy to defraud the IRS, RICO violations, and conspiracy to defraud the Federal Home Loan Bank Board by creating and selling investments in oil and gas limited partnership tax shelters); *People v. Biear*, 119 AD3d 599 (2d Dept 2014), *lv denied* 24 NY3d 959(2014)(different harms found between federal mail fraud aimed at preventing use of post office to conduct fraudulent schemes and state crime of false reporting an incident aimed at preventing waste of police resources); *Matter of Martinucci v. Becker*, 50 AD3d 1293, 1295 (3d Dept 2008), *lv denied* 10 NY2d 709 (2008)

(federal charge of production of child pornography aimed not only at preventing sexual conduct against minor but detrimental impact images will have upon community where state charges directed only on the sexual assault on the child); *People v. Maidana*, 285 AD2d 669, 671 (3d Dept 2001)(state conspiracy charge aims to prevent harm grounded in concerted criminal activity and differs from possession of narcotics charge despite fact that possession constituted overt act of conspiracy); *People v. Hilts*, 224 AD2d 824 (3d Dept 1996), *lv denied* 88 NY2d 937 (1996)(possession of marijuana violation conviction did not bar prosecution of possession of cocaine as different harms addressed by both statutes); *Matter of Parmeter v. Feinberg*, 105 AD2d 886 (3d Dept 1984)(growing marijuana without a license aimed at preventing propagation of marijuana in the state while possession of marijuana in the first degree is directed at controlling availability, use and distribution of marijuana - different harms allowed prosecution to proceed). In determining whether two statutes are aimed at preventing very different kinds of harms or evils under CPL 40.20(2)(b), the court can look to all the normal legal sources for guidance, including legislative history, case law and secondary sources. *See*, *People v. Byrant*, *supra*.

The Court will turn first to the federal charges of Bank Fraud and the New York charges of Residential Mortgage Fraud in the First Degree. While there is no instructive case law on the Residential Mortgage Fraud charge as the statute is relatively new, the legislative history and practice commentaries offer guidance. The crime of Residential Mortgage Fraud was included as part of Governor's Program Bill S.8143-A which called for comprehensive legislation to address the abusive subprime mortgage lending practices and mortgage foreclosures that led to

the 2008 state and national financial crisis. In the Introducer's Memorandum in Support of S8143A the purpose of the bill was five-fold and set forth as follows:

> This bill seeks to address the mortgage foreclosure crisis in the state by: (1) providing additional protections and foreclosure prevention opportunities for homeowners at risk of losing their homes; (2) strengthening the Banking Law to prevent similar crisis from occurring in the future; (3) establishing standards for lenders and mortgage brokers to prevent borrowers from being placed into unaffordable home loans; (4) registering and regulating mortgage loan servicers to enhance loan servicing standards in the state; and (5) defining the crime of residential mortgage fraud and establishing strict criminal penalties to deter those who may engage in such activity.

The Introduction goes on in the Statement of Support to state:

> New York State faces a mortgage crisis of immense magnitude. Many families have lost their homes and entire neighborhoods have been devastated. In 2007, there were more than 52,000 foreclosure filings in the state - an increase of 10% from 2006 and 55% from 2005. These statistics, especially in light of inaction by the federal government, make clear the need for state action on this issue. This bill attempts to address the mortgage foreclosure crisis in two ways. First, this bill provides assistance to homeowners currently at risk of losing their homes by providing additional protections and foreclosure prevention opportunities for such homeowners. Second, this bill establishes further protections in the law to mitigate the possibility of similar crises in the future.

The Introduction then sets forth the first objective of the bill which is titled "I. Elements of legislation targeted to help homeowners currently at risk of foreclosure," and goes on to list the four provisions aimed at accomplishing this first objective. The Introduction then goes on to state the second objective of the bill which is entitled, "II. Elements of the bill targeted to prevent similar future crises," and then lists the four provisions aimed at accomplishing this second objective. The new crime of mortgage fraud is set forth as the fourth provision under the second objective. Clearly, the purpose of the new residential mortgage fraud crime was to address the 2008 financial crisis and to assist in preventing similar financial crises in the future.

See, William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law Article 187.

Similarly, the federal bank fraud statute, which was amended in 2009, is also geared at preventing the type of financial fraud that led to the financial crisis of 2008. The amendment, as relevant here, was in the definition of "financial institution." Previously, the bank fraud statute was limited to fraud against financial institutions which were federally chartered or insured. In 2009, the definition was expanded to include mortgage lending businesses which were defined as any "organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce." 18 USC §27; 18 USC §20. As set forth in the legislative history, the impetus for the amendment was the rampant fraud in the mortgage lending industry that triggered the "most serious economic crisis since the Great Depression." 2009 USCCAN 430 (Leg Hist) PL 111-21, p. 2; 2009 WL 787872. The Senate report goes on to state that, "[to] make sure this kind of collapse cannot happen again, we must reinvigorate our anti-fraud measures and give law enforcement agencies the tools and resources they need to root out fraud so that it can never again place our financial system at risk." *Id.*

With regard to the specific amendment at issue here, the report states:

> This legislation also makes a number of important improvements to fraud and money laundering statutes to strengthen prosecutors' ability to combat this growing wave of fraud. Specifically, the bill amends the definition of 'financial institution' in the criminal code (18 U.S.C. S20) in order to extend Federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the Federal Government. These companies were responsible for nearly half the residential mortgage market before the economic collapse, yet they remain largely unregulated and outside the scope of traditional Federal fraud statutes. This change would apply the Federal fraud laws to private mortgage businesses, just as they apply to federally insured and regulated banks.

Id, at 3. This Court concludes that a principal purpose of the amendment to the federal bank fraud law was to help avert another financial crisis caused, *inter alia*, by fraud in the mortgage lending industry and to provide law enforcement with the capacity to prevent against this type of fraud. The Court cannot agree with the People's narrow interpretation of the legislative history. While the bank fraud law indeed protects federal financial institutions against fraud and was enlarged to include mortgage lenders, the overarching reason to protect these financial entities against fraud was to promote stability in the overall economy. It was not solely to protect the financial institutions, but to provide a mechanism to protect them for the benefit of stability in the overall economy. Accordingly, the harm or evil the federal bank fraud and the state residential mortgage fraud and attempted residential mortgage fraud statutes were aimed at combating are the same. They are certainly not of a *very* different kind. Conspiracy to commit bank fraud is similarly aimed at combating the same evil as the underlying substantive crime of bank fraud. *Matter of Abraham v. Justices of Supreme Ct Bronx County, supra.* As such, the exception under CPL 40.20(2)(b), is not available to the People and the present prosecution of Residential Mortgage Fraud in the First Degree (counts one, two and three) and Attempted Residential Mortgage Fraud in the First Degree (count four) is barred under CPL 40.20(1).

Turning now to the remaining charges of the indictment, Conspiracy in the Fourth Degree, Falsifying Business Records in the First Degree and Scheme to Defraud in the First Degree, the Court finds that they fare no better under CPL 40.20(2)(b) than the residential mortgage fraud charges. The People have failed to establish that the harm or evil each statute is designed to prevent is very different in kind from the federal statutes for which defendant was previously prosecuted.

Starting with the conspiracy charges, both the state and federal conspiracy statutes seek to protect against concerted criminal activity, namely illicit agreements. Indeed, the objective of the conspiracy need not be realized under either the federal or state statute in order for a defendant to be convicted of conspiracy. *See*, O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions* §31.04 (6th ed, electronic update August 2019); William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law Article 105. Further, looking at the objectives of the conspiracies in both the federal and state prosecutions here, the targeted harm is the same--preventing financial fraud. *See, Matter of Wiley v. Altman*, *supra* (prosecution for conspiracy to murder in Maryland barred murder prosecution in New York as harm each statute sought to prevent—harm to human life—the same); *People v. DeOca*, *supra* (state conspiracy charge associated with state narcotics charges was not barred under CPL 40.20(2)(b) because of federal conspiracy to commit money laundering harms were different). Accordingly, the People have failed to establish that charges of Conspiracy in the Fourth Degree (counts five, six and seven) are subject to the exception in CPL 40.20(2)(b) and as such, the prosecution for these charges is barred under CPL 40.20(1).

The People have also failed to establish that the exception under CPL 40.20(2)(b) applies to the charges of Falsifying Business Records in the First Degree. The gravamen of this crime is

the intent to defraud. In order to be convicted of this crime, a defendant must falsify business records with the "intent to defraud that includes an intent to commit another crime or to aid or conceal the commission thereof." Penal Law §175.10. The basic harm the statute aims to combat is fraud, including fraud perpetrated on business or commercial enterprises. This is the same broad category of harm that the bank fraud statute seeks to combat, and consequently, both statutes are not directed against *very* different evils or harm. *See, People v. Helmsley, supra.* Further, the crime of falsifying business records provides a method by which to perpetrate the fraud and can be thought of as an ancillary crime to the bank fraud. Specifically, in this case, the bank fraud was carried out, in part, by defendant falsifying the business records of the various banks he was defrauding. Accordingly, prosecution of counts eight through fifteen is barred under CPL 40.20(1). Finally, the Court considers the charge of Scheme to Defraud in the First Degree, count sixteen. Here too, the People have failed to establish that the exception under CPL 40.20(2)(b) applies. The People argue that because the statute was designed as a consumer protection law, it is not aimed at addressing the same harm the band fraud statute addresses, namely protection of financial institutions. The scheme to defraud statute is not as limited in purpose as the People suggest. The practice commentaries to Penal Law §190.65 state:

> In 1976, the crime of scheme to defraud, in two degrees [Penal Law §§ 190.60, 190.65], was added to the Penal Law. L.1976, c. 384. The crime was designed to overcome some of the shortcomings of the larceny statutes as applied to various forms of fraud, *including* consumer fraud. *See* Givens, Additional Practice Commentary to Penal Law §190.60, McKinney's Penal Law (Pocket Part 1988).
> Unfortunately, schemes to defraud are limited only by the imaginations of those who would prey on others. These sections are designed to be sufficiently definite in the meaning of their terms, and yet sufficiently flexible in application to encompass the myriad schemes to defraud, in order to punish, if not deter, those who commit them.

(Emphasis added) William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law §190.65. Indeed, the statute has not been so narrowly

construed and has been applied to disparate fraudulent schemes. *See*, *People v. Alba*, *supra*, at 885(federal wire fraud statute and state scheme to defraud both "designed to protect the unwary from schemes to deprive to deprive them of their property by fraud" and thus, CPL 40.20(2)(b) does not apply as the harms are the same); *People v. Reynolds*, 174 Misc2d 812, 824-826 (Sup Ct NY Co 1997), *affd* 284 AD2d 102(2001), *affd* 98 NY2d105(2002). Here, both the state scheme to defraud statute and the federal bank fraud statute are designed to combat fraud - the same broad type of evil. As stated above, the Court disagrees with the People's conclusion that the bank fraud statute was aimed simply at protecting financial institutions. The Court has concluded the federal bank fraud statute was directed at combating financial fraud in lending institutions in an effort to prevent overall economic damage to our society. The purpose behind the scheme to defraud statute is also to prevent fraud. Accordingly, the People have failed to establish that the exception under CPL 40.20(2)(b) applies and therefore, prosecution of count sixteen is barred under CPL 40.20(1).

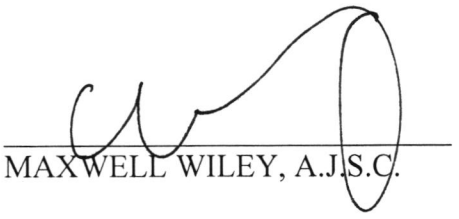
In concluding that the prosecution of the indictment before this Court is barred by New York's double jeopardy law, the Court has been guided by the well-reasoned arguments presented by both parties. Each party has narrowed the issues to what this court considers to be the core analysis: whether the crimes for which defendant was previously prosecuted were subject to one statutory exception to New York's rather broad double jeopardy prohibition. As far as the Court can determine, New York courts have not yet been required to answer the question of whether this exception can apply to the two sets of federal and state fraud statutes charged in the successive prosecutions here. Despite the reasoned arguments advanced by the People, the Court concludes that, given the rather unique set of facts pertaining to defendant's

previous prosecution in federal court, and given New York's law on this subject, defendant's motion to dismiss the indictment as barred by state double jeopardy law must be granted.

Given this ruling, the Court does not reach the remaining remedies requested by defendant in his omnibus motion.

For all the reasons set forth above, the instant prosecution is barred under CPL 40.20(1). Accordingly, defendant's motion to dismiss the indictment on double jeopardy grounds is granted.

DATED: New York, New York
December 18, 2019



MAXWELL WILEY, A.J.S.C.