To be argued by
VALERIE FIGUEREDO
(15 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

Ind. No. 774/2019

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

- against -

PAUL J. MANAFORT, JR.,

Defendant-Respondent.

On Appeal from the Supreme Court of the State of New York, New York County

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

The People of the State of New York appeal from a December 18, 2019 decision and order of the Supreme Court, New York County (Maxwell Wiley, J.). By that order, Justice Wiley granted defendant's motion to dismiss a New York County indictment filed against defendant, on the ground that the People's prosecution was barred by New York's statutory double jeopardy prohibition.

QUESTION PRESENTED

In federal court, defendant was prosecuted for the federal offenses of Bank Fraud, 18 U.S.C. § 1344, and Conspiracy to Commit Bank Fraud, 18 U.S.C. § 1349. The People subsequently commenced this action against defendant for First-Degree Scheme to Defraud, Penal Law § 190.65, First-Degree Falsifying Business Records, Penal Law § 175.10, First-Degree Residential Mortgage Fraud, Penal Law § 187.25,

Attempted First-Degree Residential Mortgage Fraud, Penal Law §§ 110/187.25, and Fourth-Degree Conspiracy, Penal Law § 105.10. In New York, CPL § 40.20(2)(b) exempts from the statutory double jeopardy bar a subsequent prosecution where the offenses contain different elements and were designed to prevent very different harms than the offenses in the prior prosecution.

Is the People's prosecution of defendant permitted under CPL § 40.20(2)(b), where the state offenses protect different classes of victims than the federal offenses and serve different objectives than the federal crimes—thereby demonstrating that the state offenses were designed to prevent very different kinds of harm than the federal offenses? The court below concluded that it was not.

INTRODUCTION

New York's statutory double jeopardy prohibition, CPL § 40.20(2), bars successive prosecutions based upon the same act or criminal transaction unless a statutory exception applies to the subsequent prosecution. CPL § 40.20(2)(b) is one such exception. Under that provision, successive prosecutions are permitted where the offenses in the second prosecution contain different elements and were designed to prevent very different kinds of harm than the offenses in the first prosecution.

This prosecution stems from defendant's scheme in New York County, between December 2015 and January 2017, to fraudulently obtain over $19 million in residential-mortgage loans and a $1 million line of credit. In March 2017, the New York County District Attorney's Office commenced a grand-jury investigation into

defendant's criminal activities. That investigation was halted due to the commencement of a federal investigation into some of the same conduct. In February 2018, a federal indictment was filed, commencing a federal prosecution against defendant in the District Court for the Eastern District of Virginia. Among other crimes, the federal indictment charged defendant with four counts of Bank Fraud, 18 U.S.C. § 1344, and five counts of Conspiracy to Commit Bank Fraud, 18 U.S.C. § 1349, for engaging in a fraudulent scheme involving residential mortgages and a line of credit. A jury convicted defendant of two counts of Bank Fraud and other charges in the federal proceeding. The jury was unable to reach a unanimous verdict as to two counts of Bank Fraud and five counts of Bank Fraud Conspiracy, as well as several other counts, and all of those counts were ultimately dismissed.

In March 2019, New York County Indictment Number 774/2019 was filed, charging defendant with three counts of Residential Mortgage Fraud in the First Degree (Penal Law § 187.25), one count of Attempted Residential Mortgage Fraud in the First Degree (Penal Law §§ 110/187.25), three counts of Conspiracy in the Fourth Degree (Penal Law § 105.10(1)), eight counts of Falsifying Business Records in the First Degree (Penal Law § 175.10), and one count of Scheme to Defraud in the First Degree (Penal Law § 190.65(1)(b))—all stemming from defendant's scheme to fraudulently obtain residential-mortgage loans and a line of credit. On September 4, 2019, defendant moved to dismiss the state indictment pursuant to CPL §§ 210.20 and 40.20, arguing, among other things, that the prosecution was barred under New

York's statutory double jeopardy bar. Defendant argued that the nine counts of federal Bank Fraud and Bank Fraud Conspiracy, relating to applications for residential mortgages and a line of credit, were based on the same criminal transactions as the state offenses. Moreover, defendant contended that none of the exceptions to the State's double jeopardy statute applied to the state prosecution. The People opposed the motion, contending that the exception in CPL § 40.20(2)(b) applied, because each of the state offenses contained at least one distinct element and were designed to prevent very different kinds of harm than the federal crimes of Bank Fraud and Bank Fraud Conspiracy.

On December 17, 2019, the Supreme Court, New York County (Maxwell Wiley, J.) granted defendant's motion and dismissed the indictment. In a written decision and order, Justice Wiley concluded that the exception in CPL § 40.20(2)(b) did not apply. Justice Wiley determined that the five crimes charged in the state prosecution met the different-elements prong of CPL § 40.20(2)(b), but not the different-harms prong.

This Court should reverse the dismissal order of the Supreme Court and reinstate the indictment. A review of the statutes defining the state and federal offenses, together with the relevant legislative history and the pertinent caselaw, demonstrates that the state offenses were enacted to safeguard distinct classes of victims, from those protected by the federal offenses. The state offenses were also enacted by the State Legislature to serve objectives unlike those Congress intended to

further with the enactment of the federal offenses. Those key differences demonstrate that the federal and state offenses were designed to prevent very different harms, as required under CPL § 40.20(2)(b). In concluding otherwise, the Supreme Court misapplied Court of Appeals and Appellate Division precedents, which make clear that the Legislature authorized successive prosecutions where such key differences exist. Accordingly, the state crimes charged in the New York prosecution fall squarely under the exception in CPL § 40.20(2)(b), and thus are not barred by the State's double jeopardy statute.

BACKGROUND

The Charged Conduct[1]

Between December 2015 and January 2017, defendant, as part of a scheme to obtain residential-mortgage loans based on fraudulent representations, prepared and submitted residential mortgage applications to various banks, in connection with four parcels of residential real estate (Appendix ("A.") 31-40). Defendant also applied for a $1 million line of credit and made fraudulent representations in connection with that application (Id.). Those various fraudulent loan applications formed the basis of a federal prosecution commenced in the United States District Court for the Eastern District of Virginia in February 2018, and of the subsequent New York indictment, filed in March 2019, that underlies this appeal (A.31-40, 211-247).

[1] The following description of the charged conduct is based on the federal and New York indictments of defendant, included in the Appendix in this appeal.

More specifically, in December 2015, defendant applied to Citizens Bank for a $3.4 million residential-mortgage loan on an apartment on Howard Street in Manhattan. As part of his application, defendant submitted to Citizens Bank a number of documents containing misrepresentations, including misrepresentations about his income, how the property would be used, and the existence of an outstanding mortgage loan in his name on a different property. In March 2016, Citizens Bank approved the loan application, and defendant obtained the mortgage (see A.232-234).

In February 2016, defendant applied for a $1 million line of credit from Banc of California. During the application process, defendant made false statements, including misrepresentations about the amount of the outstanding mortgage loan on the Howard Street apartment in Manhattan and submitted a false profit and loss statement for one of his companies that overstated the company's income. The bank approved the application, and defendant received the line of credit (see A.234-235).

In March 2016, defendant applied for a $5.5 million residential-mortgage loan from Citizens Bank for a brownstone on Union Street in Brooklyn. In connection with his mortgage application, defendant made various false misrepresentations, including submitting a false profit and loss statement for one of his companies that vastly overstated the company's income. Citizens Bank ultimately declined defendant's mortgage application (see A.235).

Subsequently, in July 2016, defendant applied for a $5 million residential-mortgage loan from The Federal Savings Bank on a house on Nottingham Avenue in Los Angeles, California. In connection with his application, defendant submitted false profit and loss statements for one of his companies that overstated the company's income. Although the bank approved the loan application in October 2016, defendant did not accept the money (see A.65-66, 122).

In October 2016, defendant returned to The Federal Savings Bank and applied for a $9.5 million residential-mortgage loan on a house on Jobs Lane in Water Mill, New York. In applying for the mortgage, defendant relied on the same false representations he had previously made in connection with the Los Angeles property. In November 2016, the bank approved defendant's loan application, and defendant obtained the mortgage (see A.235-236).

In November 2016, defendant again applied for a residential-mortgage loan on the Union Street brownstone in Brooklyn. This time, defendant applied for a loan in the amount of $6.5 million from The Federal Savings Bank. In the course of doing so, defendant relied on the same false information he had previously submitted to that bank in connection with his prior loan applications. The bank approved defendant's loan application, and defendant received the funds in January 2017 (see A.235-236).

The Federal Prosecution

On February 22, 2018, the Special Counsel's Office of the United States Department of Justice ("Special Counsel") filed a superseding indictment in a federal

prosecution against defendant in the United States District Court for the Eastern District of Virginia (the "Federal Indictment") (A.211-247). The indictment charged defendant with five counts of Subscribing to False United States Individual Income Tax Returns, 26 U.S.C. § 7206(1), 18 U.S.C. §§ 2 and 3551 et seq. (Counts 1s-5s); four counts of Failure to File Reports of Foreign Bank and Financial Accounts, 31 U.S.C. §§ 5314 and 5322(a), 18 U.S.C. §§ 2 and 3551 et seq. (Counts 11s-14s); five counts of Bank Fraud Conspiracy, 18 U.S.C. §§ 1349 and 3551 et seq. (Counts 24s, 26s, 28s-29s, 31s); and four counts of Bank Fraud, 18 U.S.C. §§ 2, 1344, and 3551 et seq. (Counts 25s, 27s, 30s, 32s) (A.237-239, 241-245). As is relevant here, counts 24s-32s of the Federal Indictment alleged a scheme by defendant and his co-conspirator, Richard Gates III, to fraudulently obtain mortgage loans and a line of credit from financial institutions by filing applications containing misstatements or omissions concerning defendant's businesses, his finances, and certain properties owned by him (A.241-245).[2] More specifically, the Bank Fraud and Conspiracy to Commit Bank Fraud charges in counts 24s-32s pertained to defendant's mortgage-loan applications for the Manhattan apartment and the houses in Brooklyn, Water Mill, and Los Angeles, and for his $1 million line-of-credit application (Id.).

[2] Defendant and his co-conspirator, Gates, were charged jointly in the counts of Bank Fraud and Bank Fraud Conspiracy pertinent to this appeal (A.241-245). The indictment also charged Gates alone in counts 6s-10s and 15s-23s (A.238-241).

On July 31, 2018, defendant's jury trial on the Federal Indictment commenced before the Honorable T.S. Ellis III in the Eastern District of Virginia (the "Federal Proceeding") (see A. 66, 125). That trial concluded on August 21, 2018, when the jury convicted defendant of eight of the 18 counts in the indictment, including two counts of Bank Fraud (counts 25s, 27s) relating to defendant's mortgage application on the Manhattan apartment and his application for the $1 million line of credit (A.241-243, 264, 268).[3] With respect to the remaining 10 counts in the indictment—including five counts of Bank Fraud Conspiracy and two counts of Bank Fraud—the jury was unable to reach a unanimous verdict (the "Hung Counts") (see A.66, 125, 264, 269). As is pertinent here, the jury deadlocked on the Bank Fraud charges in counts 30s and 32s (relating to the Water Mill and Brooklyn properties, respectively), and the Bank Fraud Conspiracy charges in counts 24s, 26s, 28s-29s, and 31s (relating to the properties in Manhattan, Brooklyn, and Water Mill, and the line of credit) (see A.66, 125, 269).[4] Judge Ellis declared a mistrial based on manifest necessity as to the Hung Counts (see A.66, 125, 269).

On October 19, 2018, the parties appeared in court before Judge Ellis to "address dismissal of the [Hung] counts" (A.249). Prior to that date, pursuant to a

[3] The jury also convicted defendant of counts 1s-5s and 12s of the Federal Indictment (see A.66, 125, 268, 270).

[4] The jury also deadlocked on counts 11s and 13s-14s (all relating to the Failure to File Reports of Foreign Banks and Financial Accounts) (see A.66, 125, 269).

plea agreement between defendant and the Special Counsel in another federal criminal case, defendant had admitted the facts underlying the Hung Counts (see A.250, 264).[5] On March 7, 2019, Judge Ellis sentenced defendant to a prison term of 47 months, followed by three years of post-release supervision and restitution (A.266-267, 270).[6] Although Judge Ellis stated at the sentencing proceeding, and at a prior proceeding, that the Hung Counts would be dismissed without prejudice, the judgment filed by the court indicated that the Hung Counts were "dismissed with prejudice" (A.269).[7]

[5] In October 2017, the Special Counsel had filed an indictment against defendant in the United States District Court for the District of Columbia (see A.67, 125). As part of defendant's guilty plea in that proceeding, defendant also entered into a cooperation agreement with the Special Counsel, pursuant to which he admitted to facts underlying the Hung Counts in the Federal Proceeding in Virginia (see A.67, 126, 250, 264). On March 13, 2019, defendant was sentenced in the D.C. proceeding to a prison term of 73 months—30 months of which were to run concurrently with the sentence to be imposed in the Federal Proceeding in Virginia (see A.126).

[6] At the sentencing proceeding, the court observed that defendant had "admitted to the conduct constituting [the Hung Counts]," and noted that it would be "part of the related conduct" that the court would "consider[ ] . . . in sentencing" defendant (A.264).

[7] In the October 19, 2018 proceeding, Judge Ellis had twice stated that he would "dismiss the [Hung] counts . . . without prejudice" (A.254, 258). Again, in the sentencing proceeding in March 2019, Judge Ellis stated that the Hung Counts were "dismissed . . . *without* prejudice" (A.264 (emphasis added)). Nevertheless, the judgment filed the same day as the sentencing proceeding indicated that the Hung Counts were dismissed with prejudice (A.269). Relying on the court's statements that the Hung Counts were dismissed without prejudice, the People below asserted that the federal prosecution was not a "previous prosecution" under CPL § 40.20(3) (A.133-139). The People do not renew that claim in this appeal.

The State Prosecution

In March 2017, the New York County District Attorney's Office commenced a grand-jury investigation into defendant's mortgage-loan applications (see A.118). That investigation was halted in May 2017, when it became publicly known that the Special Counsel was also investigating defendant for some of the same criminal activity. After defendant's trial in the Federal Proceeding, the District Attorney's Office resumed its investigation (see A.118-119).

In March 2019, a 16-count indictment against defendant was filed in New York County (A.31-41). The grand jury indicted defendant for three counts of Residential Mortgage Fraud in the First Degree, Penal Law § 187.25 (Counts 1-3); one count of attempted Residential Mortgage Fraud in the First Degree, Penal Law §§ 110/187.25 (Count 4); three counts of Conspiracy in the Fourth Degree, Penal Law § 105.10(1) (conspire to commit class-B or class-C felony) (Counts 5-7); eight counts of Falsifying Business Records in the First Degree, Penal Law § 175.10 (Counts 8-15); and one count of Scheme to Defraud in the First Degree, Penal Law § 190.65(1)(b) (property with value greater than $1000) (Count 16).

On September 4, 2019, as part of his *omnibus* motion, defendant moved to dismiss the indictment pursuant to CPL §§ 40.20 and 210.20, arguing, among other things, that the state proceeding was barred by New York's double jeopardy statute because of the prior federal prosecution (A.68-78, 82-105). Defendant claimed that the state offenses arose from the same criminal transactions as the nine counts of

Bank Fraud and Bank Fraud Conspiracy charged in the federal prosecution, and that the state crimes charged in the indictment did not fall within any exception to the statutory double jeopardy bar, including CPL § 40.20(2)(b) (A.95-104). CPL § 40.20(2)(b) allows successive prosecutions for two offenses based on the same criminal transaction where "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." In his motion, defendant did not meaningfully contest that the state charges satisfied the different-elements prong of subsection (2)(b) (see A.96). Instead, defendant principally relied on the different-harms prong of the exception and argued that this prong was not met because the federal offenses of Bank Fraud and Bank Fraud Conspiracy were not designed to prevent "very different kinds of harm or evil" than the state offenses were designed to prevent (A.95-98).

The People opposed the motion (A.129-169). The People did not dispute that the charges in the state indictment were based on the same criminal transactions as the Bank Fraud and Bank Fraud Conspiracy charges in the Federal Indictment (A.131). However, the People argued that the state prosecution was permitted pursuant to the exception in CPL § 40.20(2)(b) (A.140-141). As to the first prong of that exception, the People argued that each of the state offenses contained at least one element which was not an element of the federal offenses and vice versa (A.141-142).

And as to the second prong, the People contended that the state and federal offenses were intended to prevent very different harms or evils (A.154-169).

The Supreme Court's Order

In a written decision and order dated December 18, 2019, Justice Wiley granted defendant's motion to dismiss the indictment in its entirety, concluding that the state prosecution was a successive prosecution under CPL § 40.20 and the exception in CPL § 40.20(2)(b) did not apply (A.6, 30). Justice Wiley recognized that the first prong of CPL § 40.20(2)(b) was satisfied because—as even defendant did not "seriously dispute"—each of the state charges contained at least one element that was not present in the federal crimes (A.17-19). As to the exception's second prong, however, Justice Wiley concluded that the state and federal offenses were not designed to prevent "very different kinds of harms" and, instead, were all "designed to combat fraud" (A.24-29).

Turning first to the federal offenses, Justice Wiley acknowledged that Bank Fraud was intended to protect "financial entities" from "financial fraud," and was expanded in 2009 to also protect "mortgage lending businesses" from fraud (A.25-26). Yet, Justice Wiley dismissed that view of the statute's purpose as too narrow and instead opined that the "overarching reason" for protecting those financial institutions against fraud was to "promote stability in the overall economy" (A.26). And as to Bank Fraud Conspiracy, Justice Wiley stated that the statute was "aimed at combating the same evil as the underlying substantive crime of bank fraud" (Id.).

Justice Wiley went on to note that all of the state offenses—like the federal offenses—were enacted "to prevent fraud" (A.29). Justice Wiley observed that New York's Residential Mortgage Fraud statute was part of legislation to "address the abusive subprime mortgage lending practices and mortgage foreclosures that led to the 2008 and national financial crises" (A.23-24). Given that impetus for the legislation, Justice Wiley concluded that the "purpose" of the Residential Mortgage Fraud statute "was to address the 2008 financial crisis and to assist in preventing similar financial crises in the future" (A.24). Comparing that purpose to the purpose of the federal Bank Fraud statute, Justice Wiley determined that the Residential Mortgage Fraud statute and the Bank Fraud statute were aimed at combatting the same harms (A.26).

As to New York's crime of Falsifying Business Records, Justice Wiley noted that, to commit this crime, a defendant must have the "intent to defraud that includes" an intent to commit, aid, or conceal "another crime" (A.28). Justice Wiley continued, stating that the "basic harm the statute aims to combat is fraud, including fraud perpetrated on business or commercial enterprises" (Id.). Justice Wiley was further persuaded that because "the crime of falsifying business records provides a method by which to perpetrate the fraud," it "can be thought of as an ancillary crime to the bank fraud" (Id.). As Justice Wiley explained, "in this case, the bank fraud was carried out, in part, by defendant falsifying the business records of the various banks he was defrauding" (Id.). Consequently, Justice Wiley concluded that the crime of

Falsifying Business Records was directed at "the same broad category of harm" as the crime of Bank Fraud (Id.).

Regarding the crime of Scheme to Defraud, Justice Wiley acknowledged that the state crime was a consumer-protection law, whereas the federal Bank Fraud statute was aimed at protecting financial institutions (A.28). Justice Wiley concluded, however, that for purposes of CPL § 40.20(2)(b), that characterization of the harm was too "limited" (Id.). As support for that conclusion, Justice Wiley stated that New York's Scheme to Defraud statute "has been applied to disparate fraudulent schemes" and that the statute was "designed to combat fraud"—the "same broad type of evil" at which the crime of Bank Fraud was directed (A.28-29). Justice Wiley determined that the "federal bank fraud statute was directed at combating financial fraud in lending institutions" in order "to prevent overall economic damage to our society" and "[t]he purpose behind the scheme to defraud statute [was] also to prevent fraud" (A.29).

Finally, as to the State Conspiracy statute, Justice Wiley observed that "both the state and federal conspiracy statutes seek to protect against concerted criminal activity, namely illicit agreements" (A.27). Justice Wiley then "look[ed] at the objectives of" the particular conspiracies in the federal and state prosecutions and viewed "the targeted harm" as being the same—namely, "preventing financial fraud" (Id.). As such, Justice Wiley concluded that the State Conspiracy statute and the offense of Bank Fraud Conspiracy were aimed at similar harms (Id.).

ARGUMENT

NEW YORK'S DOUBLE JEOPARDY STATUTE DOES NOT BAR THE PEOPLE'S PROSECUTION OF DEFENDANT, BECAUSE THE STATE CRIMES HAVE DIFFERENT ELEMENTS AND PREVENT VERY DIFFERENT HARMS THAN THE FEDERAL OFFENSES WERE DESIGNED TO ADDRESS.

The prosecution of defendant in New York is not barred by the State's statutory double jeopardy prohibition, despite the previous federal prosecution. The New York prosecution falls squarely under CPL § 40.20(2)(b), which permits a successive prosecution arising from the same criminal transaction where the successive prosecution satisfies two requirements.

Both requirements are satisfied here. First, the offenses in the successive prosecution must each contain one element not present in the offenses in the previous prosecution and vice versa. Second, the offenses in the previous and successive prosecutions must be designed to prevent very different kinds of harm. Justice Wiley agreed as to the different-elements requirement. The crux of this appeal concerns Justice Wiley's determination that the different-harms requirement was not met. That determination was wrong. As is evident from the statutory provisions defining the state and federal crimes, the legislative history of those statutes, and the relevant case law, the state offenses and federal offenses were designed to prevent very different kinds of harm.

A. The Relevant Law

CPL § 40.20 provides that "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction." CPL § 40.20; see also People v. Bryant, 92 N.Y.2d 216, 226 (1998). The Legislature, however, placed limits on that broad bar by creating nine exceptions under which "sequential prosecutions for offenses arising from the same criminal transaction" are permitted. Bryant, 92 N.Y.2d at 227. One of those exceptions—found in subsection (2)(b) of CPL § 40.20—is at issue in this appeal.

Under that exception, a person may be successively prosecuted for two offenses based on the same "criminal transaction" where two conditions are satisfied. First, each offense "as defined contains an element which is not an element of the other," and second, "the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil." CPL § 40.20(2)(b). The first condition of CPL § 40.20(2)(b) requires a comparison of the statutory definitions of the pertinent offenses to determine whether the offenses in the previous prosecution contain an element which is not an element of the offenses in the successive prosecution, and vice versa. Bryant, 92 N.Y.2d at 227.

Regarding the second condition, the Court of Appeals has explained that "the harm or evil" that an offense was designed to prevent for purposes of CPL § 40.20(2)(b) must "be analyzed by reference to the statutory provisions defining such offenses rather than to the particular criminal acts charged." Matter of Kaplan v.

Ritter, 71 N.Y.2d 222, 229-30 (1987) (internal quotation marks omitted). Put another way, CPL § 40.20(2)(b) "looks 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." Matter of Kaplan, 71 N.Y.2d at 229-30 (explaining that the relevant evil or harm under CPL § 40.20(2)(b) is the one the "penal legislation was *designed* to prevent") (emphasis added); see also Matter of Martinucci v. Becker, 50 A.D.3d 1293, 1295 (3d Dep't 2008) (explaining that the different-harms prong of CPL § 40.20(2)(b) requires an examination of the "statute[s] as worded" to determine whether the statutes "seek[ ] to address a different kind of harm"). Courts look to the legislative history of a statute, in addition to the language of the statute and case law, to determine the harm the statute was designed to address. Matter of Sharpton v. Turner, 170 A.D.2d 43, 48 (3d Dep't 1991) (looking at "[c]ase law" and "legislative annotations" to determine harm sought to be prevented by statute); People v. Hilts, 224 A.D.2d 824, 825 (3d Dep't 1996) (examining legislative history in assessing whether CPL § 40.20(2)(b) exception applied). Accordingly, the actual injuries caused by the particular criminal acts charged in a prosecution do not bear on whether the prosecution is permitted under CPL § 40.20(2)(b).

Whether two statutes were designed to prevent very different kinds of harm turns on various factors. Court look to whether the statutes differ in purpose or objective. See Bryant, 92 N.Y.2d at 229 ("purposes" of federal offenses of bank robbery and assault with a dangerous weapon differed from the purposes of state

offenses of homicide and possession of defaced firearm); Matter of McNerlin v. Argento, 173 A.D.3d 1646, 1648-49 (4th Dep't 2019) (concluding that "DWI" statute and statute penalizing leaving the scene of an accident served different purposes and thus prevented different harms); Hilts, 224 A.D.2d at 825 (assessing different legislative "objective[s]" of marihuana-possession statute and controlled-substance statute to determine that statutes prevented different harms).

Another factor courts consider is whether two statutes target "very different kinds of unlawful activity." See Matter of Parmeter v. Feinberg, 105 A.D.2d 886, 887-88 (3d Dep't 1984) (two statutes that regulated marihuana prevented very different kinds of harm because one was "directed to controlling availability and use of the substance" and the other was "intended to prevent the propagation of the plant within [the] State").

Courts have also determined that statutes seeking to protect "different classes of victims" prevent different harms. See Matter of Kaplan, 71 N.Y.2d at 229 (explaining that the "evil or harm" a statute was designed to prevent can "correspond[ ]" to a "general category of 'victims'"); Bryant, 92 N.Y.2d at 229 (determining that state and federal offenses were designed to prevent different harms, in part, because state homicide offense was "focuse[d] exclusively on the prevention of the killing of police officers" and the federal bank robbery offense was enacted for "the protection of financial institutions"); Matter of Sharpton, 170 A.D.2d at 48 (concluding that Scheme to Defraud statute was a "consumer protection measure"

and thus prevented very different harm from Offering a False Instrument for Filing statute, which protected the State from fraud).

A review of the cases applying such factors demonstrates that harms may be "very different" within the meaning of CPL § 40.20(2)(b), even if they relate to the same overarching societal ill. For example, in Hilts, the Third Department determined that a statute prohibiting possession of cocaine and a statute prohibiting possession of marihuana prevented very different kinds of harm, 224 A.D.2d at 824-25, despite both statutes addressing the possession of illicit drugs. In Matter of Parmeter, the court determined that two statutes—one "directed to controlling availability and use of" marihuana and another "intended to prevent the propagation of the plant within [the] State"—were designed to prevent very different kinds of harm, despite both statutes regulating marihuana. 105 A.D.2d at 887-88.

And in Matter of Sharpton, the Third Department determined that the crimes of Scheme to Defraud and Falsifying Business Records, for which the defendant had previously been prosecuted, were each designed to prevent a harm that was "entirely different" than the harm addressed by the crime of Offering a False Instrument for Filing, Penal Law § 175.35, for which the defendant was subsequently prosecuted. 170 A.D.2d at 48. As the court reasoned, the Scheme to Defraud statute was "a consumer protection measure;" the Offering a False Instrument for Filing statute "was enacted to prevent persons from defrauding the State;" and the Falsifying Business Records statute was intended to "prevent a business entity from being defrauded by means of

false entries in its books or records."[8] Id. The court thus determined that the different-harms requirement was met because the statutes were principally designed to protect different classes of victims. Id. And, the court reached that conclusion despite the Legislature having enacted all three statutes for the same overriding goal of thwarting fraud. In that regard, all three crimes are classified in the Penal Law under Title K, as "Offenses Involving Fraud," and the two false records offenses are grouped in Article 175, as "Offenses Involving False Written Statements."

Finally, this Court has applied CPL § 40.20(2)(b) to permit successive prosecutions where one prosecution contained a charge under a state conspiracy statute and the other prosecution charged the substantive offense that was the object of the conspiracy. See Matter of Robinson v. Snyder, 259 A.D.2d 280, 281-82 (1st Dep't 1999) (holding that prosecution under First and Second-Degree Conspiracy statutes was not barred by prior prosecution for substantive drug offenses which were object of conspiracy); see also People v. O'Neill, 285 A.D.2d 669, 671 (3d Dep't 2001) (allowing prosecution for Fourth-Degree Conspiracy despite prior prosecution for possession of cocaine, which was an overt act of the conspiracy). That is because "[t]he evil sought to be prevented by the [State] conspiracy statute is the deterrence of

[8] The court explained that, although the crimes of Scheme to Defraud and Falsifying Business Records could be committed in a manner that victimized the State, those statutes were nevertheless designed to protect different classes of victims and thus met the requirement of CPL § 40.20(2)(b). See Matter of Sharpton, 170 A.D.2d at 48.

concerted activity in furtherance of a criminal purpose," which is distinct from the evil sought to be prevented by statutes directed at specific substantive offenses. Matter of Robinson, 259 A.D.2d at 281-82; see also O'Neill, 285 A.D.2d at 671 (concluding that the "State conspiracy laws . . . have a more general aim at deterring concerted activity in furtherance of a criminal purpose").

The People's prosecution of defendant falls squarely under CPL § 40.20(2)(b). First, as even defendant did not "seriously contest[ ]" below (A.17, 19), each of the state offenses contains at least one element that is not an element of the federal offenses of Bank Fraud or Bank Fraud Conspiracy. And second, all of the state offenses were designed to prevent very different kinds of harm from the federal offenses.

B. The federal offenses were enacted to protect a specific class of victim, financial institutions, from a specific type of harm, financial loss.

The counts in the federal prosecution, which are relevant here, all charged Bank Fraud and Conspiracy to Commit Bank Fraud. Both of those federal crimes were designed to protect financial institutions from financial loss caused by fraudulent schemes.

Bank Fraud, 18 U.S.C. § 1344

A person commits the crime of Bank Fraud when he "knowingly executes, or attempts to execute, a scheme or artifice: (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned

by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. "Financial institution" is defined in 18 U.S.C. § 20(10) to include banks, credit unions and other entities doing business of a financial nature. In 2009, Congress added "mortgage lending business" to the definition of "financial institution." Pub. L. No. 111-21, § 2(a), 123 Stat. 1617 (codified as amended at 18 U.S.C. § 20 (2009)). A "mortgage lending business" is "an 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." See 18 U.S.C. § 27.

The Bank Fraud statute reflects a specific legislative intent to protect financial institutions from financial harm caused by any kind of fraudulent activity. By its plain terms, the statute requires that the target of the fraud be a "financial institution." See 18 U.S.C. § 1344 (barring a scheme "to defraud a financial institution" or to obtain money or property "under the custody or control of a financial institution"). And, the statute extends comprehensive protection against fraud to that special class of victims.

Consistent with the statute's text, the legislative history further demonstrates that the Bank Fraud statute was enacted to prevent financial harm to banks and other types of financial institutions. Prior to the enactment of 18 U.S.C. § 1344 in 1984, federal prosecutions for fraudulent acts committed against financial institutions often charged federal crimes that were based on particular bad acts and were "not

specifically designed to reach" fraud perpetrated against those institutions, such as 18 U.S.C. § 1014, which criminalized false statements, and 18 U.S.C. § 1341, the Mail Fraud statute. See S. Rep. No. 98-225, at 377-78 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3517-18; see also Steven M. Biskupic, Fine Tuning the Bank Fraud Statute: A Prosecutor's Perspective, 82 Marq. L. Rev. 381, 382 (1999) (explaining that federal statutes prior to the Bank Fraud statute were not designed to address "complex frauds aimed at financial institutions").

Two decisions of the United States Supreme Court, in 1974 and 1982, effectively circumscribed the ability to use such statutes to prosecute bank fraud. See S. Rep. No. 98-225, at 377-78. Williams v. United States, 458 U.S. 279, 281-83 (1982), concerned a prosecution of a defendant under 18 U.S.C. § 1014 for a check-kiting scheme involving the deposit of several checks that were not supported by sufficient funds. The Supreme Court held that a "bad check" was not a "statement" within the meaning of 18 U.S.C. § 1014, id. at 280, 284, eliminating the ability to use that statute to prosecute check-kiting schemes, "the most pervasive form[ ]" of bank fraud at the time, S. Rep. No. 98-225, at 378. In United States v. Maze, 414 U.S. 395, 396-97 (1974), the Court held that the Mail Fraud statute required that the use of the mail be "closely related" to the fraudulent scheme to bring the scheme within the scope of the statute, id. at 399, 404, thereby limiting the usefulness of that statute to prosecute fraudulent schemes involving financial institutions, S. Rep. No. 98-225, at 377-78.

Williams and Maze revealed a "serious gap[ ]" in existing federal statutes concerning "crimes committed against federally insured and controlled institutions," creating a "plain need" for a bank fraud statute that would "assure effective prosecution of the range of fraudulent crimes commonly committed" against banks and other financial institutions. S. Rep. No. 98-225, at 377-79. In 1984, Congress bridged the gap with the enactment of the Bank Fraud statute, 18 U.S.C. § 1344. See Pub. L. No. 98-473, § 1108(a), 98 Stat. 1837 (codified as amended at 18 U.S.C. § 1344 (1990)). The statute "protect[s] the financial integrity of [banking] institutions" by broadly authorizing the prosecution of those who use fraudulent schemes to victimize those institutions. United States v. Leahy, 445 F.3d 634, 646 (3d Cir. 2006) (alteration in original and internal quotation marks omitted); see also United States v. Brandon, 17 F.3d 409, 426 (1st Cir. 1994) (examining legislative history to conclude that Bank Fraud statute was intended to "criminalize bank frauds that harm federally insured banks"). In that respect, the statute reflects a "strong federal interest in protecting the financial integrity of [banking] institutions." S. Rep. No. 98-225, at 377-79.

Also relevant here, in the wake of the 2008 financial crises, Congress, in 2009, amended the Bank Fraud statute to broaden the definition of a "financial institution" to include a "mortgage lending business." See Pub. L. No. 111-21, § 2(a), 123 Stat. 1617 (codified as amended at 18 U.S.C. § 20 (2009)). That amendment to the federal Bank Fraud statute, like the original statute itself, was believed by Congress to be

necessary to further protect financial institutions from the financial harm caused by fraudulent activity.

"[F]raudulent mortgages" had adversely affected "the health of the banking system and the overall economy." S. Rep. No. 111-10, at 6 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 434. In particular, the financial crisis had caused "banks and financial institutions in the United States . . . to suffer[ ] more than $500 million in losses associated with the subprime mortgage industry," resulting in the collapse "of [the] Nation's largest and most venerable financial institutions." S. Rep. No. 111-10, at 2-3. Private-mortgage-lending businesses, which were "responsible for nearly half the residential mortgage market before the economic collapse," were "largely unregulated and outside the scope of traditional Federal fraud statutes." Id. at 3. The lack of anti-fraud measures applicable to private-mortgage-lending businesses had allowed "unscrupulous mortgage brokers and Wall Street financiers" to commit financial fraud, forcing "[t]axpayers" to "bear the burden of [the] financial downturn." Id. at 2-3.

"Given the impact of these businesses on federally-insured and federally-regulated institutions," Congress determined that expanding the definition of "financial institutions," to include mortgage-lending businesses, was necessary to protect the banking system and overall economy. Id. at 6-7. Thus, the 2009 amendment was intended by Congress "to cover new conduct by new actors" that it determined "directly affect[ed] the banking system." United States v. Bouchard, 828

F.3d 116, 126 (2d Cir. 2016). Consistent with Congress's purpose when it enacted the Bank Fraud statute, the 2009 amendment was also intended to protect banks and other financial institutions from monetary harm.

Conspiracy to Commit Bank Fraud, 18 U.S.C. § 1349

In 2002, as part of the White-Collar Crime Penalty Enhancement Act, Congress enacted 18 U.S.C. § 1349, which provides that a "person who attempts or conspires to commit" certain crimes—including, among others, Bank Fraud, Mail Fraud, and Wire Fraud—"shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of" the conspiracy. See Pub. L. No. 107-204, § 902(a), 116 Stat. 745, (codified at 18 U.S.C. § 1349 (2002)). As is relevant here, the Bank Fraud Conspiracy statute makes it a federal crime to conspire to commit the crime of Bank Fraud, see United States v. Vinson, 852 F.3d 333, 351 (4th Cir. 2017), and guarantees the "same penalties" for conspiracy to commit bank fraud as for the substantive offense of federal Bank Fraud, 18 U.S.C. § 1349.

The crime of Bank Fraud Conspiracy has two elements: (1) two or more persons agreed to commit bank fraud; and (2) with knowledge of the agreement's criminal objective, the defendant "willfully joined the conspiracy with the intent to further its unlawful purpose." Vinson, 852 F.3d at 351. The Bank Fraud Conspiracy offense therefore requires an agreement and intent to commit the federal crime of Bank Fraud. Id.

Congress enacted 18 U.S.C. § 1349 to fix a sentencing disparity between offenders convicted of certain substantive fraud offenses and those convicted under the then-existing federal conspiracy statute, 18 U.S.C. § 371, for agreements to commit those fraud offenses, such as Bank Fraud. Under 18 U.S.C. § 371, the maximum term of imprisonment for a conspiracy conviction was five years, regardless of the nature of the substantive offense. As such, offenders charged with conspiracy "were afforded a potential windfall in terms of their sentence, vis-à-vis their co-defendants who were convicted of the actual offenses," which carried greater penalties. 149 Cong. Rec. S5325, at 5327 (daily ed. Apr. 11, 2003) (statement of Sen. Joseph R. Biden, Jr.).

The new statute eliminated that disparity, providing that a person convicted of the crime of Conspiracy to Commit Bank Fraud faced the same penalties as a person convicted of the substantive crime of Bank Fraud. By stiffening the penalties for the crime of Bank Fraud Conspiracy, Congress further evidenced an intent to protect financial institutions from fraudulent schemes.

C. The state offenses and federal offenses have different elements and were designed to protect against very different harms.

All of the state offenses meet the different-elements prong of CPL § 40.20(2)(b), because they each contain at least one element that is not present in the federal offenses, as Justice Wiley recognized, and defendant did not seriously dispute (A.17-19). Moreover, all of the state offenses also satisfy the different-harms

prong. As already shown, the federal offenses were enacted to protect a specific class of victims—financial institutions—from a very specific type of harm—financial loss. Moreover, the federal crime of Bank Fraud was deliberately designed to avoid a focus on distinct fraudulent acts and, instead, created a comprehensive bar to deceptive conduct aimed at financial institutions. The state offenses differ markedly from the federal offenses in focus and in the harms they seek to prevent.

First-Degree Scheme to Defraud, Penal Law § 190.65

The New York crime of Scheme to Defraud in the First Degree under Penal Law § 190.65(1)(b) is committed when a person "engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property with a value in excess of [$1,000] from one or more such persons."

The offense of First-Degree Scheme to Defraud satisfies the different-elements prong of CPL § 40.20(2)(b). That state statute requires that defendant have intended to defraud multiple persons, and that the defendant actually obtained property by means of the fraudulent scheme. See Penal Law § 190.65. The federal crimes of Bank Fraud and Bank Fraud Conspiracy do not require that defendant have targeted multiple victims, and the defendant does not have to succeed in obtaining the financial institution's property to be guilty of the crimes.

Conversely, the federal offenses also contain at least one element that is not shared by the state crime of Scheme to Defraud. The state crime does not require that the target of the crime be a financial institution—an element of both the federal crimes of Bank Fraud Conspiracy and Bank Fraud. And, the state crime does not require an agreement, which is an element of federal Bank Fraud Conspiracy.

The Scheme to Defraud statute also satisfies the different-harms prong of CPL § 40.20(2)(b). And that is so despite the state and federal offenses all constituting fraud-related crimes. As reflected in the statute's legislative history, the State Legislature enacted first-degree Scheme to Defraud, Penal Law § 190.65, in 1976 to "protect consumers" from "a growing number of frauds" that "involve[d] the fleecing of many victims" of small amounts of money, through pyramid, chain-letter, and other schemes. Mem. of Assemblyman Stanley Fink, 1976 N.Y.S. Legislative Annual, at 35; Ltr. of R. Hayes to J. Gribetz (June 11, 1976), reprinted in Bill Jacket for Ch. 384; People v. Mikuszewski, 73 N.Y.2d 407, 412-13 (1989). A memorandum prepared by the bill's sponsor indicates that the Legislature was specifically concerned that unwary customers were falling prey to "get rich quick schemes," where "goods and services [were] promised and paid for but without the expected performance." Fink Mem., supra, at 35-36.[9] The creation of the Scheme to Defraud offense "was thought

[9] For example, one such scheme involved consumers purchasing burglar alarms based on the false representation that the alarms would be connected to a local police station. Fink Mem., supra, at 35.

to be needed because under the then existing offense choices these types of consumer scams often escaped successful prosecution." See Mikuszewski, 73 N.Y.2d at 412-13 (noting that successful prosecution of consumer scams was often not possible under the "larceny-by-false-promise statute"); see also Fink Mem., supra, at 36.

It is thus apparent that the Scheme to Defraud statute was enacted specifically to address the harm posed by consumer scams whereby individual consumers were cheated out of small amounts of money through fraudulent representations. That legislative objective is wholly distinct from the objective of the federal offenses, which were intended to address fraudulent schemes that could cause financial losses to financial institutions.

It follows that the Scheme to Defraud statute was designed to serve different objectives and to protect a very different class of victims than the federal crimes. In Matter of Sharpton, the Third Department concluded that Scheme to Defraud was a "consumer protection measure" and thus designed to prevent a very different kind of harm than a statute that was "enacted to prevent persons from defrauding the State." 170 A.D.2d at 48; cf. Matter of Schmidt v. Roberts, 74 N.Y.2d 513, 522 (1989) (concluding that CPL § 40.20(2)(b) did not apply where a state larceny prosecution followed a federal prosecution for interstate stolen property, because "both [crimes were] designed to punish thieves and to protect property owners from thefts").

The very different objectives of the federal and state crimes, and their focus on very different classes of victims, amply demonstrate that the federal and state statutes

were designed to prevent very different kinds of harm within the meaning of CPL § 40.20(2)(b). In concluding otherwise, Justice Wiley erred in several respects.

First, Justice Wiley erred when, in determining the harm the statute was designed to prevent, he relied on the fact that the state Scheme to Defraud statute had been "applied to disparate fraudulent schemes," including schemes perpetrated against banks and other financial institutions (A.28-29). It is the statutory text and the Legislature's purpose in enacting the statute that determine the harm a statute was intended to prevent, and not the facts to which the statute has been applied in any particular case. See Matter of Kaplan, 71 N.Y.2d at 229; Matter of Martinucci, 50 A.D.3d at 1295; see also supra pp. 17-18. That is apparent from the Court of Appeals' admonition in Matter of Kaplan, that the "statutory provisions defining [the] offenses rather than . . . the particular criminal acts charged" determines the "harm or evil" addressed by a statute. 71 N.Y.2d at 229 (internal quotation marks omitted). As the Court expressly stated in that case, "the *broader* evil to which the penal statute in question was addressed" is determined by reference to the "evil or harm that the relevant penal legislation was *designed* to prevent." Id. at 229-30 (emphasis added).

In Matter of Kaplan, the People argued that a subsequent state prosecution fell within the scope of a different exception to the double jeopardy prohibition, CPL § 40.20(2)(e). 71 N.Y.2d at 227-28. However, in the course of discussing that exception, the Court of Appeals addressed the exception in CPL § 40.20(2)(b). In doing so, the Court made evident that a determination regarding the harm or evil a

statute addresses turns on the class of victims the statute was intended to safeguard, and not the particular victim in any given case. Id. at 229-30. The exception in CPL § 40.20(2)(b) is thus satisfied even when the victim in a particular case does not fall within the class of victims the statute was enacted to protect.

Second, Justice Wiley erred in concluding that the federal and state statutes were designed to prevent the same harm because "both the state scheme to defraud statute and the federal bank fraud statute [were] designed to combat fraud—the same broad type of evil" (A.29). Justice Wiley stated that "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," and the "purpose behind the scheme to defraud statute [was] also to prevent fraud" (A.29). But, as the statute's legislative history and text establish, the Legislature did not enact the Scheme to Defraud statute merely to combat fraud "generally," Justice Wiley's contrary conclusion notwithstanding (A.28-29). Rather, as discussed, the Legislature's principal purpose was to protect individual consumers from "being bilked of small amounts of money by way of fraudulent scams or schemes." Matter of Sharpton, 170 A.D.2d at 48. The offenses of federal Bank Fraud and Bank Fraud Conspiracy were enacted for an entirely different purpose—the protection of financial institutions.

Justice Wiley overlooked the very different focus of the federal and state statutes by taking an exceedingly broad view of the harms the statutes addressed. To be sure, under an expansive view of the harms, the federal crimes of Bank Fraud and

Bank Fraud Conspiracy, and the state crime of Scheme to Defraud, all seek to prevent the same common overarching evil, "fraud." But successive prosecutions are not barred merely because the particular harms addressed by two statutes both concern a societal evil as expansive as fraud. People v. Hilts illustrates that point. In Hilts, the court considered whether a prosecution under Penal Law § 221.05, which prohibited the possession of marihuana, barred a prosecution under Penal Law § 220.09, which prohibited the criminal possession of cocaine. 224 A.D.2d at 824. Although both statutes regulate the possession of illicit drugs—and thus broadly fall under the umbrella of drug crimes—the court determined that the two statutes nonetheless addressed very different harms within the meaning of CPL § 40.20(2)(b). As the court succinctly explained: "a prosecution for cocaine possession . . . satisfies an objective different from a prosecution for marihuana possession." 224 A.D.2d at 824-25; Matter of Parmeter, 105 A.D.2d at 888 (reasoning that statute barring growing marihuana without a license was designed to prevent very different harm from statute criminalizing the possession of marihuana); Bryant, 92 N.Y.2d at 225, 229 (concluding that state offense of possession of defaced weapon prevented very different harm from federal offense penalizing possession of a firearm during a bank robbery despite both offenses concerning the possession of a dangerous weapon); People v. Austin, 14 Misc.3d 295 (Sup. Ct. N.Y. Cty. 2006) (defendant's guilty-plea conviction to federal weapon-possession offense did not bar state prosecution of defendant for weapon-

possession crimes because federal and state offenses sought to prevent substantially different harms), aff'd without opinion, 63 A.D.3d 490 (1st Dep't 2009).

Likewise, two crimes involving fraudulent conduct can still be directed at very different harms within the meaning of CPL § 40.20(2)(b), as the Second and Third Departments have held. For example, in People v. Biear, 119 A.D.3d 599, 599 (2d Dep't 2014), the Second Department considered whether the federal Mail Fraud statute, 18 U.S.C. § 1341, and the state crime of Falsely Reporting an Incident, Penal Law § 240.50, addressed very different harms. Both of those crimes addressed fraudulent conduct in some respect. Nevertheless, the Second Department concluded that the state crime was designed to prevent a very different harm from the federal crime because the federal and state fraud statutes were enacted to serve distinct purposes. Id. at 599. As the court reasoned, the federal Mail Fraud statute was intended "to prevent the post office from being used to carry out fraudulent schemes," whereas the state crime of Falsely Reporting an Incident was enacted to prevent "the waste of the time and resources of law enforcement." Id.

Additionally, in Matter of Sharpton, the Third Department reached a similar conclusion as it pertained to various statutes concerning fraudulent conduct. The court concluded that the crimes of Scheme to Defraud and Falsifying Business Records (charged in the first prosecution) were each designed to prevent a very different harm than the crime of Offering a False Instrument for Filing, Penal Law § 175.35, (charged in the second prosecution). 170 A.D.2d at 48. Even though all

three statutes targeted conduct that would "defraud" the victim, the court nonetheless determined that the crime of Offering a False Instrument for Filing was designed to prevent a very different harm than the harms that the crimes of Scheme to Defraud and Falsifying Business Records addressed, because the crimes protected different classes of victims. Id. (Scheme to Defraud was "a consumer protection measure;" Offering a False Instrument for Filing protected the State; and Falsifying Business Records safeguarded the integrity of the written records of public and private entities).

The flaw in Justice Wiley's seeming conclusion that all fraud crimes address the same harm is also vividly apparent from a review of the myriad offenses in the Penal Law that involve fraud. The Legislature has classified 103 offenses under Title K of the Penal Law as "offenses involving fraud." Yet, those crimes clearly do not all address the same harm within the meaning of CPL § 40.20(2)(b), as the Third Department ostensibly recognized in Matter of Sharpton, 170 A.D.2d at 48.[10] Of course, if a broad enough view is taken the harms addressed by two crimes could virtually always be described as being the same. In that regard, the "general

[10] The following two examples illustrate the diverse nature of the crimes classified as "fraud" crimes in the Penal Law. For instance, a person violates Penal Law § 170.45, Criminal Simulation, when "with intent to defraud, he makes or alters any object in such manner that it appears to have antiquity, rarity, source or authorship which it does not in fact possess." And, Penal Law § 195.20, Defrauding the Government, penalizes a "public servant or party officer" who engages in a scheme to "defraud the state or to obtain property, services or other resources from the state . . . by false or fraudulent pretenses, representations or promises."

purpose[ ]" of the Penal Law is to "proscribe conduct which unjustifiably and inexcusably causes or threatens *substantial harm to individual or public interests*." Penal Law § 1.05(1) (emphasis added). Plainly, the Legislature did not intend to bar successive prosecutions where the statutes at issue address demonstrably different, specific harms even though, when viewed through the widest possible lens, the statutes also address conduct that is generally fraudulent.

For all of these reasons, Justice Wiley erred in concluding that the state crime of Scheme to Defraud was enacted to prevent the same kinds of harm as the federal offenses.

First-Degree Falsifying Business Records, Penal Law § 175.10

New York's crime of Falsifying Business Records in the First Degree, Penal Law § 175.10, requires that a person, "with intent to defraud" and to "commit another crime or to aid or conceal the commission thereof:"

> (1) makes or causes a false entry in the business records of an enterprise; (2) alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; (3) omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or (4) prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Penal Law §§ 175.05, 175.10. "Enterprise" is defined as "any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity." Penal

Law § 175.00(1). A "business record" is "any writing or article . . . kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity." Penal Law § 175.00(2).

The crime of First-Degree Falsifying Business Records satisfies the different-elements prong of CPL § 40.20(2)(b). First, the state statute requires that the defendant falsified a business record. Penal Law § 175.05. Second, the statute requires that the defendant was aware of the falsity of the entry. Lastly, the statute requires that the defendant had an intent to defraud that included an "intent to commit another crime or to aid or conceal the commission thereof." Penal Law § 175.10. None of those elements is present in the federal offenses. Moreover, the federal offenses contain at least one element that is not common to the Falsifying Business Records statute. The federal offenses of Bank Fraud and Bank Fraud Conspiracy require that the target of the criminal venture be a financial institution. The crime of federal Bank Fraud Conspiracy also requires an agreement. Neither of those elements is required by the state crime.

New York's Falsifying Business Records statute also satisfies the different-harms prong of CPL § 40.20(2)(b). The state crime of Falsifying Business Records and the federal offenses serve different objectives, regulate different types of unlawful activity, and protect different classes of victims. As the text of the statute makes plain, the primary objective of the state crime is to protect the integrity of written records. And the state crime furthers that objective by prohibiting certain discrete acts that

jeopardize the accuracy of written records, such as the making of a false entry or the omission of a true entry in a written record. See Matter of Sharpton, 170 A.D.2d at 48 (explaining that statute was intended to prevent fraud "by means of false entries in [entity's] books or records"). The state crime does not necessitate that the enterprise suffer (or be at risk of) any injury or loss from the falsification or omission of information contained in the written business record, further underscoring that the integrity of the written records is the paramount objective of the statute. See, e.g., People v. Feerick, 241 A.D.2d 126, 148 (1st Dep't 1998) (defendant convicted under Penal Law § 175.10 for making false statements in Police Department records); People v. Taveras, 46 A.D.3d 399, 399-400 (1st Dep't 2007) (defendant convicted of Penal Law § 175.10 where the crime defendant tried to conceal was a sexual assault).

By contrast, the federal offenses are concerned only with preventing financial harm to financial institutions. In that regard, the federal offenses require that a financial institution suffer a financial loss or be placed at risk of such a loss. See, e.g., United States v. Brandon, 298 F.3d 307, 312 (4th Cir. 2002) (explaining that Bank Fraud requires evidence that the financial institution was "exposed to an actual or potential risk of loss"). And, the federal offenses broadly prohibit fraudulent schemes of any kind involving a financial institution, without regard to whether a written statement was involved. See 18 U.S.C. § 1344.

Additionally, whereas the federal crimes are directed at protecting financial institutions, the state crime benefits a far broader class of victims—namely, any

person or entity that relies on the written records of businesses and government enterprises. The text of the Falsifying Business Records statute makes clear that the statute guards the integrity of business records of "any entity of one or more persons," whether the entity is a public or private corporation, a government agency, or a not-for-profit entity. See Penal Law § 175.00(1). Moreover, the state statute prohibits false entries in business records, even if those entries are intended to deceive a third party outside of the enterprise, and not the enterprise itself. See People v. Bloomfield, 6 N.Y.3d 165, 170-71 (2006) (explaining that the Legislature "intended to protect outsiders, as well as insiders, from fraudulent falsification of an enterprise's records" in enacting Penal Law § 175.10).

The statute's legislative history further demonstrates that the crime of Falsifying Business Records was enacted to ensure the integrity of written records of businesses and government entities, for the benefit of persons who might rely on such records. In 1965, the Legislature replaced four provisions in the old Penal Code with Penal Law § 175.10. See L. 1965, Ch. 1030. The new statute "embrace[d] and somewhat expand[ed]" on Penal Code § 889, and three other related provisions, all of which were primarily concerned with the making of a false entry or the omission of a true entry in the records of businesses or government offices by any person, including directors, officers, and government employees. See Richard G. Denzer & Peter McQuillan, Practice Commentary, Penal Law § 175.10, Vol. 39 at 566-67 (explaining

that Falsifying Business Records replaced Penal Code §§ 665 (2, 3, 4), 887(2), 889, 1865(2, 3)).

Justice Wiley nevertheless ruled that the "basic harm that Falsifying Business Records aims to combat is fraud," the "same broad category of harm" that the federal Bank Fraud statute "seeks to combat" (A.28). In so ruling, Justice Wiley disregarded that the state crime benefits different victims than the federal offenses; that it furthers a different objective than the federal offenses; and that the scope of the criminal activity targeted by the state statute is decidedly different—factors demonstrating that the different-harms prong of CPL § 40.20(2)(b) is satisfied. Indeed, as already discussed, CPL § 40.20(2)(b) permits successive prosecutions where the crimes charged in two prosecutions were designed to remedy very different harms, notwithstanding that the crimes in both prosecutions, generally speaking, relate to fraudulent conduct. See supra pp. 33-37.

Justice Wiley's explanation for determining that the state crime prevented the same harm as the federal offenses was that "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" (A.28). But contrary to Justice Wiley's conclusion (A.28), even a crime that could be deemed "ancillary" to another crime, can still be designed to prevent a very different harm within the meaning of CPL § 40.20(2)(b). In People v. Bryant, for instance, the Court of Appeals concluded that a state prosecution for the unlawful possession of a defaced firearm was permitted under

CPL § 40.20(2)(b) even though defendant was previously prosecuted for the two federal offenses of "bank robbery" and "assaulting and placing in jeopardy the lives of persons by the use of [a] dangerous weapon[ ]." 92 N.Y.2d at 225, 229-30. Although commission of the crime of unlawful possession of a defaced weapon could be a means by which to commit federal bank robbery, the Court of Appeals nevertheless concluded that the federal offenses were designed to prevent very different harms than the state weapon-possession offense. Id. Thus, even if the crime of Falsifying Business Records constitutes a means by which one could commit the crime of federal Bank Fraud, the state and federal offenses were still designed to prevent very different kinds of harm within the meaning of CPL § 40.20(2)(b).

First-Degree Residential Mortgage Fraud, Penal Law § 187.25

The New York crime of Residential Mortgage Fraud occurs when a person:

> knowingly and with intent to defraud, presents, causes to be presented, or prepares with knowledge or belief that it will be used in soliciting an applicant for, applying for, underwriting or closing a residential mortgage loan, or filing with a county clerk of any county in the state arising out of and related to the closing of a residential mortgage loan, any written statement which: (a) contains materially false information concerning any fact material thereto; or (b) conceals, for the purpose of misleading, information concerning any fact material thereto.

Penal Law § 187.00(4).

The crime rises to the first-degree level when the proceeds of the mortgage loan exceed one million dollars. See Penal Law § 187.25. Penal Law § 187.01 defines a

class of person exempted from liability for the offense of Residential Mortgage Fraud: "[n]o individual who applies for a residential mortgage loan and intends to occupy such residential property which such mortgage secures" is liable for committing the crime of Residential Mortgage Fraud, unless that individual "acts as an accessory" to another individual who commits the crime of Residential Mortgage Fraud.

As with the other state offenses, New York's Residential Mortgage Fraud statute satisfies the different-elements prong of CPL § 40.20(2)(b). The crime of Residential Mortgage Fraud contains at least four elements not required of the federal crimes of Bank Fraud or Bank Fraud Conspiracy. First, the state crime requires a "written statement." Penal Law § 187.00(4). Second, the state crime requires that the defendant knew that the written statement would be used for soliciting, applying for, underwriting, or closing a residential mortgage, or in connection with filing documents with the county clerk related to a residential mortgage. Id. Third, the state crime requires that the defendant knew the written statement contained "false information" or concealed a "material" fact. Id. Finally, Residential Mortgage Fraud requires that the defendant received proceeds totaling more than $1 million dollars. Penal Law § 187.25.

By contrast, the Bank Fraud and Bank Fraud Conspiracy statutes do not require that a written statement have been used to perpetrate the crime. See 18 U.S.C. §§ 1344, 1349. And because the federal crimes do not require the use of a written statement, the federal offenses also do not have any requirements concerning a

defendant's knowledge and intent as it pertains to a written statement. Additionally, the federal crimes of Bank Fraud and Bank Fraud Conspiracy do not require that a defendant have attempted or succeeded in obtaining at least $1 million dollars as a result of the fraud. See Loughrin v. United States, 573 U.S. 351, 364 (2014) (noting that because Bank Fraud punishes "fraudulent 'scheme[s],'" and not "completed frauds," defendant need not succeed in obtaining property from the financial institution).

Finally, each of the federal offenses contain at least one element that is not present in the crime of Residential Mortgage Fraud. The state crime does not mandate that the target of the crime be a financial institution, as is required under the federal Bank Fraud offense. The state crime also does not need an agreement, as is required under the federal Bank Fraud Conspiracy offense.

The state offense of Residential Mortgage Fraud also satisfies the different-harms prong of CPL § 40.20(2)(b).[11] The federal offenses were exclusively concerned with protecting financial institutions from financial loss caused by any kind of fraudulent activity. And, when Congress extended the reach of the Bank Fraud statute

[11] Defendant was also charged with Attempted First-Degree Residential Mortgage Fraud. That crime meets the different-elements and different-harms prongs of CPL § 40.20(2)(b) for the same reasons the completed crime meets it. See Bryant, 92 N.Y.2d at 229 (The "harm or evil" addressed by an attempt under Penal Law § 110.00 is equivalent to that of the "substantive" offense that the defendant is "charged with attempting to commit.").

in 2009 in response to the 2008 financial crisis, it did so by adding a new type of commercial entity, mortgage-lending businesses, to the protected class of "financial institutions." New York took a distinctly different tack in response to that crisis. It enacted the Residential Mortgage Fraud statute to protect homeowners from predatory lending practices in connection with residential mortgages.

More specifically, New York's crime of Residential Mortgage Fraud, Penal Law Article 187, was enacted in 2008, as part of legislation to address the "mortgage foreclosure crisis" then facing the state. See L. 2008, Ch. 472; Senate Mem. in Supp., reprinted in Bill Jacket for Ch. 472, at 7, 9 (2008). At the time, foreclosure filings and mortgage defaults, particularly in connection with subprime mortgages, had increased significantly in the state. See Ltr. from Sen. H. Farley to K. Rosenstein (July 31, 2008), reprinted in Bill Jacket for Ch. 472, at 5 (2008). "Many families [had] lost their homes and entire neighborhoods [had] been devastated." Senate Mem., supra, at 9. The New York Legislature enacted the Residential Mortgage Fraud statute in response to that crisis, to protect homeowners by targeting the fraud in the residential mortgage market that "contributed to many mortgage foreclosures," and to prevent a similar crisis in the future. See Farley Ltr., supra, at 6; Senate Mem., supra, at 9, 11; N.Y. State Assembly, Comm. on Codes, 2008 Ann. Rep., at 5 (explaining that "comprehensive legislation" was enacted "to address the fraud which contributed in great part to the 'sub-prime' lending crisis").

As reflected in the New York Senate debate on the bill—which included the Residential Mortgage Fraud statute—the crisis was "affecting tens of thousands of families" and the bill dealt "with predatory lenders, scammers, [and] a whole host of abuses that have impacted the lives of so many people in this state." L. 2008, Ch. 472 (Senate Debate on Bill S8143 (June 23, 2008)) at 4431-32. In that respect, the statute provides "essential consumer protections to prevent lenders and brokers from taking advantage of borrowers eager to realize the American dream of homeownership." Ltr. from M. Bloomberg to Hon. David Paterson (July 31, 2008), reprinted in Bill Jacket for Ch. 472, at 43 (2008); see also 6/23/08 Senate Debate, supra, at 4455 (noting that the legislation was intended to address predatory lending that allowed homeowners to "have been duped, [and] taken advantage of with teaser rates").

The text of the statute further demonstrates that the Legislature created the crime of Residential Mortgage Fraud to protect existing and would-be homeowners, not financial institutions. First, the Legislature exempted from liability for the crime of Residential Mortgage Fraud individuals who apply for a residential mortgage loan on property they "intend[ ] to occupy," unless the homeowner "acts as an accessory" to another person who commits the crime of residential mortgage fraud. Penal Law § 187.01. That exemption shows that the Legislature's intent was to protect individual

homeowners from deceptive practices by intermediaries, such as mortgage brokers.[12] See Governor's Program Bill Mem., reprinted in Bill Jacket for Ch. 507, at 8 (2009). Second, Residential Mortgage Fraud criminalizes fraud only in connection with "residential mortgage loans" obtained on "residential real property." Penal Law §§ 187.00(2), (3). If protecting financial institutions had been the animating principle behind the state statute, the Legislature would have had no reason to exclude from the statute's reach mortgages taken on commercial properties.[13]

[12] During the New York Senate debate on the bill, two state senators described the predatory lending practices that prompted the need for legislation. As one state senator explained, mortgage brokers had exploited their relationships with appraisers, who then overvalued property "so the mortgage broker [could] sell a bigger loan and make a maximum . . . profit for themselves." 6/23/08 Senate Debate, supra, at 4459. Another state senator described a practice by mortgage brokers where homeowners were sold "adjustable rate mortgage[s]" and were wrongly told that if the interest rate increased, they would "be able to refinance based on the new-found equity in [their] home." Id. at 4444. To be sure, during the Congressional debate on the 2009 amendment to the federal Bank Fraud statute, some members of Congress similarly expressed concerns about protecting "American taxpayers" from fraud perpetrated by "unscrupulous mortgage brokers and corrupt financiers." See 155 Cong. Rec. No. 59, at S4532, S4536 (daily ed. Apr. 22, 2009); 155 Cong. Rec. No. 69, at H5265-H5266 (daily ed. May 6, 2009); see also S. Rep. No. 111-10, at 2 (noting that "many thousands" of Americans were "losing their homes to foreclosure"). But, nevertheless Congress did not exempt individual homeowners from the scope of the federal crime of Bank Fraud. Congress believed that "some Mr. and Mrs. Main Street Americans [had] played a role" in the fraudulent practices by making "false statements or exaggera[ting] their income or engag[ing] in other types of fraud in an effort to secure a mortgage that they could not afford," and Congress responded with "an even-handed approach" in order to "stamp out fraud" whether it occur[red] on Main Street or Wall Street." See 155 Cong. Rec. No. 69, at H5267 (daily ed. May 6, 2009).

[13] That the State Legislature was concerned with protecting homeowners (and not financial institutions) from predatory lending practices when enacting the

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Thus, as the legislative history and text of the statute demonstrate, the crime of Residential Mortgage Fraud was enacted to protect homeowners, a class of victims very unlike the class of victims the federal offenses were enacted to protect, namely, financial institutions. That distinction establishes that the state crime was designed to prevent a very different harm than the federal offenses. See, e.g., Bryant, 92 N.Y.2d at 229 (concluding that state and federal offenses were designed to prevent very different harms because the federal offenses protected "financial institutions in which the government has an interest" and the state offenses focused on preventing "the killing of police officers"); Matter of Sharpton, 170 A.D.2d at 48 (finding that offenses prevented different harms where one was intended to protect business entities and another was intended to protect the State).

Justice Wiley concluded that the state offense of Residential Mortgage Fraud and the federal offenses, as amended in 2009, were designed to prevent the same harm because they were enacted in response to the same financial crisis and intended to prevent a similar crisis in the future (A.24-26). But it does not follow that, because

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Residential Mortgage Fraud statute is further evident from a comment made during the State Senate debate on the bill. In that debate, a senator notes that the "banks in many cases aren't the holders of the mortgage[s]" that were now the subject of foreclosure. See 6/23/08 Senate Debate, supra, at 4449. And, indeed, in his motion papers before Justice Wiley, even defendant acknowledged that the crime of Residential Mortgage Fraud covers "actions that would not necessarily, standing alone, threaten to harm a financial institution" (A.100).

two statutes were enacted in response to the same precipitating event, the statutes were intended to prevent the same kinds of harm within the meaning of CPL § 40.20(2)(b). Where, as here, federal and state offenses were enacted to protect different classes of victims, the different-harms prong of CPL § 40.20(2)(b) is met. See Bryant, 92 N.Y.2d at 229. Thus, the state crime of Residential Mortgage Fraud satisfies both prongs of CPL § 40.20(2)(b).

Fourth-Degree Conspiracy, Penal Law § 105.10

The state crime of Fourth-Degree Conspiracy under Penal Law § 105.10(1) satisfies the different-elements prong of CPL § 40.20(2)(b). That crime contains distinct elements not present in the federal offenses. As is relevant here, Conspiracy in the Fourth Degree requires an agreement to commit any class-B or class-C felony under state law, and at least one conspirator must have performed an overt act in furtherance of the conspiracy. See Penal Law §§ 105.10(1), 105.20; see also People v. Ramos, 19 N.Y.3d 417, 420 (2012) (holding that an overt act is an element of state-law conspiracy). The crime of federal Bank Fraud, by contrast, does not require an agreement. The crime of federal Bank Fraud Conspiracy requires an agreement, but it must be an agreement to commit federal Bank Fraud. See 18 U.S.C. § 1349; Vinson, 852 F.3d at 351. And, the federal offense of Bank Fraud Conspiracy does not require the commission of an overt act in furtherance of the conspiracy. See United States v. Roy, 783 F.3d 418, 419 (2d Cir. 2015). Finally, the federal offenses each require that the target of the crime be a financial institution—an element not required of the state

conspiracy offense. The State's conspiracy statute thus satisfies the first prong of CPL § 40.20(2)(b).

New York's Fourth-Degree Conspiracy statute also satisfies the different-harms prong of CPL § 40.20(2)(b). As this Court has held, "[t]he evil sought to be prevented by the [State] conspiracy statute is the deterrence of concerted activity in furtherance of a criminal purpose," and not the deterrence of the substantive crime that is the object of the conspiracy. See Matter of Robinson, 259 A.D.2d at 281-82; see also O'Neill, 285 A.D.2d at 671 (concluding that the "State conspiracy laws . . . have a more general aim at deterring concerted activity in furtherance of a criminal purpose"). That is because the state crime of conspiracy, "is an offense separate from the crime that is the object of the conspiracy." People v. McGee, 49 N.Y.2d 48, 57 (1979); accord People v. Flanagan, 28 N.Y.3d 644, 662-63 (2017).

Indeed, the crime of Fourth-Degree Conspiracy, under Penal Law § 105.10, is not tied to the commission of a specific kind of substantive offense. Rather, that crime criminalizes concerted illegal activity aimed at the commission of any class-B or class-C felony. Penal Law § 105.10(1). Thus, the Fourth-Degree Conspiracy statute applies to concerted activity aimed at wide-ranging criminal conduct. For instance, First-Degree Criminal Possession of a Weapon, Penal Law § 265.04, First-Degree Assault, Penal Law § 120.10, and Sex Trafficking, Penal Law § 230.34, are all examples

of class-B felonies.[14] And, Aggravated Criminally Negligent Homicide, Penal Law § 125.11, and First-Degree Strangulation, Penal Law § 121.13, are examples of class-C felonies.

The harm that the offense of Fourth-Degree Conspiracy seeks to prevent—concerted criminal activity—is different than the harm that the federal offenses of Bank Fraud Conspiracy and Bank Fraud were designed to prevent. In contrast to the State conspiracy offense, Bank Fraud Conspiracy requires an agreement to commit a specific crime, federal Bank Fraud. See 18 USC § 1349; Vinson, 852 F.3d at 351. New York appellate courts have held that a federal conspiracy statute that requires an agreement to commit a specific type of substantive offense is designed to prevent the same harm as the substantive offense was designed to prevent. See, e.g., Matter of Abraham v. Justices of N.Y. Supreme Court, 37 N.Y.2d 560, 567 (1975) (concluding that federal drug-conspiracy laws were designed to prevent the same harm as substantive drug-possession laws).

As such, the federal offense of Bank Fraud Conspiracy is directed at preventing the same harm as the offense of federal Bank Fraud—namely, the risk of financial loss to banks caused by fraud. Necessarily then, the offenses of federal Bank Fraud Conspiracy and State Conspiracy—despite both being conspiracy statutes—were

[14] Of the crimes charged in the New York indictment, the offense of Residential Mortgage Fraud was the only class-B felony. The indictment did not charge any class-C felonies.

designed to prevent very different harms for purposes of CPL § 40.20(2)(b). This Court has found that a federal conspiracy prosecution does not bar a state conspiracy prosecution in similar circumstances. In People v. De Oca, 282 A.D.2d 401, 402 (1st Dep't 2001), this Court held that a federal prosecution for conspiracy to commit money laundering did not bar a state prosecution for second-degree conspiracy. See Penal Law § 105.15 (second-degree conspiracy prohibits an agreement to commit a class-A felony). Like the federal offense of Bank Fraud Conspiracy, the federal conspiracy statute at issue in De Oca was limited to a particular category of substantive offense—money laundering.

Similarly, the federal offense of Bank Fraud and the state crime of Fourth-Degree Conspiracy were designed to prevent very different harms, even if the object of the conspiracy was commission of the criminal acts underlying the federal offense. This and other Courts have found that CPL § 40.20(2)(b) permitted successive prosecutions where one prosecution charged a New York conspiracy crime and the other prosecution charged the substantive offense that was the object of that conspiracy. See Matter of Robinson, 259 A.D.2d at 281-82 (holding that a prosecution under State's First and Second-Degree Conspiracy statutes was not barred by prior prosecution for substantive drug offenses which were object of the conspiracy); De Oca, 282 A.D.2d at 402 (holding that prosecution for substantive crime of money laundering did not bar prosecution under state Second-Degree Conspiracy statute); see also O'Neill, 285 A.D.2d at 671 (allowing state prosecution under Fifth-Degree

Conspiracy statute despite prior prosecution under state drug laws where object of conspiracy was criminal possession of cocaine).

Thus, the federal prosecution for the offenses of Bank Fraud and Bank Fraud Conspiracy did not bar the state prosecution for the crime of Fourth-Degree Conspiracy. The federal crimes were designed to prevent fraudulent schemes that cause pecuniary loss to financial institutions, whereas New York's Fourth-Degree Conspiracy statute was designed to prevent concerted criminal activity, without regard to the substantive nature of the object crime.

Although Justice Wiley correctly recognized that the state conspiracy statute was intended to "protect against concerted criminal activity, namely illicit agreements," he nevertheless disregarded that legislative intent and "look[ed]" to the actual "objectives" of the particular conspiratorial conduct charged in the state prosecution when determining whether the conspiracy charge met the different-harms prong of CPL § 40.20(2)(b) (A.27). On that basis, Justice Wiley found that "the federal and state prosecutions here" targeted the same harm—"preventing financial fraud" (A.27). That analysis was wrong. As already discussed, the harm a statute was designed to prevent is measured by "the statutory provisions defining such offenses rather than . . . the particular criminal acts charged."[15] Matter of Kaplan, 71 N.Y.2d at

[15] Justice Wiley cited Matter of Wiley v. Altman, 52 N.Y.2d 410 (1981), to support his reliance on the conduct in the particular prosecutions here, when determining whether the state prosecution met the different-harms prong of (Continued…)

229. In short, the harm the State conspiracy statute was designed to prevent was "concerted [criminal] activity," Matter of Robinson, 259 A.D.2d at 281-82, and that harm was markedly different from the financial harm to financial institutions that the federal offenses of Bank Fraud Conspiracy and Bank Fraud were enacted to address.

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CPL § 40.20(2)(b). However, Matter of Wiley predates Matter of Kaplan, where the Court of Appeals made clear that an assessment of the harm a statute was designed to prevent does not turn on the specific conduct charged in a particular prosecution, but, rather, on the statutory text. Matter of Kaplan, 71 N.Y.2d at 229-30.

CONCLUSION

The order appealed from should be reversed and the indictment reinstated.

Respectfully submitted,

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April 2020

PRINTING SPECIFICATIONS STATEMENT

The word count for this brief is 13759, excluding the Table of Contents and Table of Authorities. The word processing system used to prepare this brief and to calculate the word count was Microsoft Word 2016. The brief is printed in Garamond, a serifed, proportionally spaced typeface. The type size is 14 points in the text and headings, and 13 points in the footnotes.