To be Argued by:
TODD BLANCHE
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

Appellate Case No.: 2020-01097

– against –

PAUL J. MANAFORT, JR.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

CADWALADER, WICKERSHAM & TAFT LLP
Attorneys for Defendant-Respondent
200 Liberty Street
New York, New York 10281
(212) 504-6000
todd.blanche@cwt.com
jared.stanisci@cwt.com
matthew.karlan@cwt.com

Of Counsel:
TODD BLANCHE
JARED STANISCI
MATTHEW M. KARLAN

New York County Clerk's Index No. 774/19

TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES:

PAGE(S)

PAGE(S)

STATUTES & OTHER AUTHORITIES:

PAGE(S)

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Supreme Court err in concluding that the People's successive fraud prosecution against defendant was not permitted under the "different evils" exception to New York's statutory double jeopardy law—an exception available only when the statutory provisions are designed to prevent "very different kinds of harm or evil," CPL § 40.20(2)(b)—where the successive prosecution was based on the same alleged fraud causing the same alleged harm to the same alleged victims for which defendant was previously charged, tried, and sentenced?

PRELIMINARY STATEMENT

In a thorough, 26-page written decision and order, the Supreme Court, New York County (Maxwell Wiley, J.) concluded that the prior federal prosecution of defendant Paul J. Manafort, Jr., which contributed to the seven-and-a-half year federal prison sentence which he is currently serving, precluded the People's successive prosecution against him based on the same alleged fraud causing the same alleged harm to the same alleged victims. *See* CPL § 40.20. That decision was correct. The People identify no error in Justice Wiley's ruling, and this Court should affirm on substantially the same grounds.

Since 1970, the New York Legislature has "decreed" that this state's courts will extend double jeopardy protection beyond the minimum standard

embodied in the state and federal constitutions, *Schmidt ex rel. McNell v. Roberts*, 74 N.Y.2d 513, 517 (1989), providing in Section 40.20 of the CPL that "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless" one of nine enumerated statutory exceptions applies. CPL § 40.20(2). Under the CPL's "extraordinarily broad proscriptions against multiple prosecutions," *People v. Berkowitz*, 50 N.Y.2d 333, 345 (1980), "absent the statutory exceptions, no matter the number of statutory offenses technically violated, or the number of jurisdictions involved, an accused is not to suffer repeated prosecution for the same general conduct." *People v. Abbamonte*, 43 N.Y.2d 74, 81-82 (1977); *see Wiley v. Altman*, 52 N.Y.2d 410, 413 (1981) (CPL § 40.20 "legislatively nullifies the 'dual sovereign' doctrine in this State."). As Justice Wiley properly held, the New York indictment against Mr. Manafort—charges brought by the New York County District Attorney based on the same alleged fraud causing the same alleged harm to the same alleged victims for which Mr. Manafort was previously charged, tried, and sentenced—violates this black-letter New York law. As such, the indictment was properly dismissed.

The People acknowledge that Mr. Manafort, a former government relations consultant and one-time campaign manager for President Donald J. Trump, has previously been charged, tried, and sentenced in a federal prosecution before the United States District Court for the Eastern District of Virginia, resulting in a years-

long term of imprisonment for federal Bank Fraud offenses allegedly committed in connection with applications for residential mortgage loans from 2015 to 2017. Unsatisfied with the result of the month-long federal trial on the thirty-two count federal indictment, the People have brought the present indictment charging Mr. Manafort with an additional sixteen counts of state-law offenses—including Residential Mortgage Fraud, Falsifying Business Records, and Scheme to Defraud—based on the same alleged acts and transactions underlying the prior federal proceeding.

The People concede here, as they did below, that the federal and state prosecutions are based on the same alleged conduct. (People's Br. 12.) Moreover, the People have now abandoned their argument that the prior federal case did not constitute a prior prosecution under New York's double jeopardy statute, notwithstanding that the federal trial court declared a mistrial on certain counts. (*Id.* at 10 n.7.) The People's only remaining argument at issue on this appeal is that a successive prosecution is permitted under one of the nine statutory double jeopardy exceptions—specifically, the exception that applies where the statutory provisions defining the charges have different elements and were designed to prevent "very different kinds of harm or evil." CPL § 40.20(2)(b). As the Supreme Court correctly determined, that argument fails under well-established law.

The People's principal contention is that the Supreme Court failed to heed the teachings of *Kaplan v. Ritter*, 71 N.Y.2d 222 (1987), a decision which, as the Supreme Court properly determined, does nothing to aid the People's case. In *Kaplan*, the Court of Appeals rejected an interpretation of the "different victims" exception in CPL § 40.20(2)(e)—not at issue here—that would permit "the circumvention of the more demanding requirements of CPL 40.20(2)(b)"—the "different evils" exception invoked by the People in this case—concluding that the different-evils exception had been "legislatively narrowed" by the requirement of looking to the "broader evil" addressed by the offenses. *Id.* at 228-30. Thus, *Kaplan* sought to raise the bar for invocation of the "different evils" exception, not lower it, even making clear that the "different evils" argument previously raised and "understandably" abandoned by the People in that case—which, like this case, involved fraud charges in both proceedings—was meritless. *Id.* at 229-30 & n.4. As Justice Wiley properly held, the same conclusion applies here.

Nonetheless, relying on *Kaplan*, the People argue that while all of the state and federal charges allege the same fraud on the same victims, the "different evils" exception applies because the potential "class" of victims identified in the federal bank fraud statute—financial institutions—is purportedly wholly separate from the potential "class" of victims protected by each of the state offenses. *Kaplan* does nothing to support this novel theory. But even if the People's class-based

approach could apply in some circumstances, it has no application here, where the New York charges allege the exact same fraud, causing the exact same harm, to the exact same victims as were at issue in the prior federal proceeding. Indeed, the People's logic collapses on itself when they are forced to concede that the only alleged victims of the fraud here—the banks to which Mr. Manafort applied for loans—are not even members of the purported classes of victims—such as "consumers" and "homeowners"—that the People argue are the sole intended beneficiaries of the statutes creating the state offenses. That cannot be right. Rather, by the People's own admission in bringing this case, and as the Supreme Court properly determined, each of the state and federal charges is sufficiently broad to encompass the same alleged harm at issue in both proceedings.

The Supreme Court correctly concluded that the "broader evil," *Kaplan*, 71 N.Y.2d at 230, addressed by the New York fraud charges against Mr. Manafort was not "very different" in "kind" from that addressed by the prior federal fraud charges against him based on the same facts. *See People v. Helmsley*, 170 A.D.2d 209, 212 (1st Dep't 1991) (rejecting "different evils" exception where state and federal indictments charged fraud offenses based on the same scheme). The Supreme Court's decision should be affirmed.

STATEMENT OF FACTS

Paul J. Manafort, Jr. is an American government relations consultant. He is a second-generation immigrant and the first person in his family to go to college. For nearly his entire career, Mr. Manafort worked for elected officials of both parties and operated businesses engaged in political consulting and public affairs work in the United States and around the globe. He graduated from Georgetown University in 1971 with a bachelor's degree in business administration and earned his law degree from Georgetown in 1974. He began his career in politics in 1975, working in President Gerald R. Ford's White House personnel office. In 1980, he co-founded the firm Black, Manafort, Stone & Kelly. In March 2016, Mr. Manafort was hired by then-presidential candidate Donald J. Trump's campaign to serve as an advisor and campaign chairman for the 2016 presidential election. In August 2016, Mr. Manafort resigned from the Trump campaign.

A. Prior Federal Indictment In The Eastern District Of Virginia

On February 22, 2018, the Department of Justice Special Counsel's Office (the "Federal Government") filed a Superseding Indictment (the "Federal Indictment") in a criminal case before the United States District Court for the Eastern District of Virginia, captioned *United States v. Paul J. Manafort, Jr.*, No. 1:18-CR-83 (the "Federal Proceeding") (A.211). As is relevant here, the Federal Indictment charged Mr. Manafort with five counts of Bank Fraud Conspiracy under 18 U.S.C.

§§ 1349 and 3551 *et seq*. (Counts 24s, 26s, 28s-29s, and 31s) and four counts of Bank Fraud under 18 U.S.C. §§ 2, 1344, and 3551 *et seq*. (Counts 25s, 27s, 30s, and 32s) (the "Federal Charges").[1] The case was assigned to the Honorable T. S. Ellis, III.

The Federal Charges alleged a scheme by Mr. Manafort and co-conspirators to fraudulently obtain mortgage loans from financial institutions by misstatements or omissions concerning certain properties Mr. Manafort owned, his businesses, and his finances. In particular, the bank fraud and conspiracy charges pertained to Mr. Manafort's efforts to secure (i) loans from Citizens Bank, N.A. for 29 Howard Street and 377 Union Street in New York, New York; (ii) a business loan from Banc of California, N.A.; and (iii) loans from The Federal Savings Bank for 174 Jobs Lane in Water Mill, New York, 2401 Nottingham Avenue in Los Angeles, California, and the previously noted Union Street property.

B. Prior Federal Trial And Sentencing

A jury trial commenced in the Federal Proceeding on July 31, 2018. On August 21, 2018, a jury found Mr. Manafort guilty on eight counts of the Federal

---

[1] The Federal Indictment also charged Mr. Manafort with an additional five counts of Subscribing to False United States Individual Income Tax Returns (Counts 1s-5s) and four counts of Failure to File Reports of Foreign Bank and Financial Accounts (Counts 11s-14s). Counts 6s-10s and 15s-23s of the Federal Indictment were brought only against co-defendant Richard W. Gates III.

Indictment, including two counts of Bank Fraud (Counts 25s and 27s). With respect to the remaining ten counts, including, as relevant here, five counts of Bank Fraud Conspiracy (Counts 24s, 26s, 28s-29s, and 31s) and two counts of Bank Fraud (Counts 30s and 32s), the jury failed to reach a unanimous verdict and Judge Ellis declared a mistrial (the "Hung Counts"). On September 26, 2018, the Federal Government notified the Court that it would move to dismiss the Hung Counts. On March 7, 2019, the day of Mr. Manafort's sentencing, Judge Ellis entered judgment and dismissed the Hung Counts with prejudice (A.268-69).

Judge Ellis sentenced Mr. Manafort to a total of 47 months' imprisonment (with nine months' credit for time served), including 47 months on each of the convicted Bank Fraud counts (Counts 25s and 27s), to run concurrently (A.270). Mr. Manafort was also sentenced to three years' supervised release and ordered to pay $25,548,287.60, primarily as restitution (A.271-73).

In sentencing Mr. Manafort, Judge Ellis took into account as "related conduct" the alleged actions underlying the Hung Counts, which conduct Mr. Manafort admitted in connection with a plea agreement resolving a separate criminal case brought against him by the Federal Government in the United States District Court for the District of Columbia, captioned *United States v. Paul Manafort, Jr.*, No. 17-CR-201 (D.D.C. 2017) (the "DC Proceeding") (A.264-65).

In total, between the sentences imposed in the Federal Proceeding and the DC Proceeding, Mr. Manafort is currently serving a sentence of approximately seven-and-a-half years' imprisonment. In addition, Mr. Manafort has forfeited, among other property, the Union Street, Howard Street, and Jobs Lane properties at issue in the Federal Proceeding, as well as a life insurance policy and the funds in several bank accounts.[2]

C. New York Indictment

On March 13, 2019, shortly after Mr. Manafort was sentenced in the DC Proceeding, the Manhattan District Attorney's Office announced a sixteen-count indictment against him (the "New York Indictment"), which had been filed in the Supreme Court, New York County on March 7, 2019, the day of Mr. Manafort's sentencing in the Federal Proceeding (A.31). The New York Indictment consists of three counts of Residential Mortgage Fraud in the First Degree (Counts 1-3), one count of Attempt to Commit Residential Mortgage Fraud in the First Degree

---

[2] In the DC Proceeding, the Federal Government charged Mr. Manafort with Conspiracy Against the United States, Conspiracy to Launder Money, Unregistered Agent of a Foreign Principal, False and Misleading FARA Statements, False Statements, Obstruction of Justice, and Conspiracy to Obstruct Justice. On March 13, 2019, following Mr. Manafort's entry into a plea agreement, the Honorable Amy Berman Jackson sentenced Mr. Manafort to 60 months' imprisonment for Conspiracy Against the United States, to run concurrently with 30 months of the sentence previously imposed in the Federal Proceeding, and 13 months for Conspiracy to Obstruct Justice, to run consecutively to the 60-month sentence and the sentence imposed in the Federal Proceeding.

(Count 4), three counts of Conspiracy in the Fourth Degree (Counts 5-7), eight counts of Falsifying Business Records in the First Degree (Counts 8-15), and one count of Scheme to Defraud in the First Degree (Count 16) (the "New York Charges"). The People concede that the New York Charges are based on the same alleged conduct underlying the Federal Charges (A.8, 13, 124-25).

D. Supreme Court's Decision And Order

On September 4, 2019, Mr. Manafort filed an omnibus motion seeking, *inter alia*, dismissal of the New York Indictment on statutory double jeopardy grounds pursuant to CPL §§ 210.20 and 40.20 based on the prior Federal Proceeding (A.42). Following two full rounds of briefing (A.42-210), Justice Wiley issued his decision and order granting the motion to dismiss on statutory double jeopardy grounds (A.5).

At the outset, Justice Wiley noted the parties' "agree[ment] that the charges in this indictment and the relevant charges in the earlier Federal Indictment arose from the 'same act or criminal transaction'" (A.8). Thus, the only issues requiring the Supreme Court's resolution were (i) whether the Hung Counts constituted a previous prosecution for purposes of the double jeopardy statute (*see* CPL § 40.30), and (ii) whether the "different evils" exception to statutory double jeopardy applied (*see* CPL § 40.20(2)(b)).

On the first issue, the Supreme Court determined that the Federal Proceeding constituted a prior prosecution under the double jeopardy statute, including with respect to the Hung Counts, noting that "the People cite to no case in which CPL 40.30(4)"—the exception urged by the People with respect to the Hung Counts—"was applied to a factual scenario remotely similar to the one at hand," and that the People's contrary argument "strains reason" and "disregard[s] the clear meaning" of the Federal Proceeding (A.11, 13, 16). As noted above, the People do not appeal that ruling. (People's Br. 10 n.7.)

The Supreme Court then turned to the "different evils" exception under CPL § 40.20(2)(b). As Justice Wiley noted, "[i]n order for this exception to apply, the statute requires both [i] a finding that the state and federal offenses contain a different element and [ii] that each statute is aimed at curing 'very different kinds of harm or evil'" (A.17). The Supreme Court concluded that the first element of the exception was satisfied (A.17-19). As to the second element, however, Justice Wiley concluded that none of the New York Charges was designed to prevent a harm or evil that was very different in kind from those addressed by the Federal Charges. Surveying the statutory text and controlling case law (A.17-23), the Supreme Court observed that the double jeopardy statute requires a "significant and meaningful difference in the types of harms addressed before the exception will apply" (A.20). As set out in greater detail below, Justice Wiley then addressed each of the New

York Charges in turn, concluding that none satisfied the "different evils" exception (A.23-30).

Beginning with Residential Mortgage Fraud in the First Degree, the Supreme Court noted that while there was a lack of instructive case law interpreting the offense, based on its legislative history, "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." (A.24-25 (citing Introducer's Memorandum in Support of Governor's Program Bill S8143-A; William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law § 187).) "Similarly," Justice Wiley concluded, "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" (A.25).

Rejecting the People's narrow reading of the federal bank fraud statute as limited to protecting financial institutions, the court noted that "a principal purpose of the amendment to the federal bank fraud law," which expanded the scope of the statute to embrace fraud on any mortgage lending institution, regardless of whether federally chartered or insured, "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." (A.25-26 (citing 2009 U.S.C.C.A.N. 430 (Leg Hist) PL 111-21, p 2-3; 2009 WL 787872).) Thus,

"[w]hile 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" (A.26).

The Supreme Court then addressed the state conspiracy charges. As Justice Wiley noted, "both the state and federal conspiracy statutes seek to protect against concerted criminal activity, namely illicit agreements." (A.27 (citing 2 Kevin F. O'Malley, *et al.*, *Federal Jury Practice & Instructions Criminal* § 31.04 (6th ed. 2020); William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law § 105).) Thus, the People failed to establish that the statutes addressed very different kinds of harm. Moreover, citing the Court of Appeals' treatment of a conspiracy count in *Wiley v. Altman*, Justice Wiley noted that this conclusion was supported by the fact that "the targeted harm" of both conspiracy prosecutions was "the same—preventing financial fraud" (A.27). *See Altman*, 52 N.Y.2d at 414-15 (holding different-evils exception inapplicable where the "Maryland [conspiracy] prosecution" and "present prosecution for murder" were both "directed at a like goal: punishment for the unlawful taking of a particular human life").

Next, the Supreme Court addressed Falsifying Business Records in the First Degree. Reviewing the elements of the offense, the Supreme Court concluded

that "[t]he gravamen of this crime is the intent to defraud" (A.27-28). *See* Penal Law § 175.10 (offense requires "intent to defraud [that] includes an intent to commit another crime or to aid or conceal the commission thereof"). Thus, relying on this Court's decision in *Helmsley*, Justice Wiley concluded that because "[t]he basic harm the statute aims to combat is fraud, including fraud perpetrated on business or commercial enterprises," and because "[t]his is the same broad category of harm that the bank fraud statute seeks to combat," "consequently, both statutes are not directed against *very* different evils or harm" (A.28 (emphasis in original)). *See Helmsley*, 170 A.D.2d at 212 (rejecting "different evils" exception where state and federal indictments charged fraud offenses based on the same scheme).[3]

Finally, as to Scheme to Defraud in the First Degree, the Supreme Court concluded that "both the state scheme to defraud statute and the federal bank fraud statute are designed to combat fraud – the same broad type of evil" (A.29). The Supreme Court rejected the People's argument that the scheme to defraud statute was purely intended as a "consumer protection law" and thus was "not aimed at addressing the same harm the [bank] fraud statute addresses, namely protection of

---

[3] While the foregoing was sufficient to reject application of the different-evils exception, the Supreme Court also observed 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). 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" (A.28).

financial institutions," concluding that "[t]he scheme to defraud statute is not as limited in purpose as the People suggest" (A.28). To the contrary, the Practice Commentary to Penal Law § 190.65 states that the offense was "designed to overcome some of the shortcomings of the larceny statutes as applied to various forms of fraud, *including* consumer fraud." (A.28 (quoting William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law § 190.65) (emphasis in original).) Indeed, the commentaries recognize that "schemes to defraud are limited only by the imaginations of those who would prey on others," and thus the provisions "are designed to be . . . sufficiently flexible in application to encompass the myriad schemes to defraud." (*Id.*)[4]

ARGUMENT

Section 40.20 of the CPL provides that "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal

---

[4] The Supreme Court's conclusion concerning Scheme to Defraud was reinforced by the fact that "the statute has not been so narrowly construed and has been applied to disparate fraudulent schemes" (A.28-29). *See, e.g.*, *People v. Alba*, 43 Misc. 3d 878, 882, 885 (Sup. Ct. Bronx Cnty. 2014) (the "'scheme constituting a systematic ongoing course of conduct' required for scheme to defraud is essentially the 'scheme or artifice' required" under the federal fraud statutes, all of which are "designed to protect the unwary from schemes to deprive them of their property by fraud").

transaction" unless one of nine enumerated statutory exceptions applies. CPL § 40.20(2).

As courts have recognized, New York's double jeopardy statute provides "additional and broader statutory double jeopardy protections" compared to the constitutional standard in at least two respects. *Booth v. Clary*, 83 N.Y.2d 675, 678 (1994). First, the statute "legislatively nullifies the 'dual sovereign' doctrine in this State," with the result that a prior federal prosecution will bar a subsequent New York prosecution unless one of the statutory exceptions applies. *Altman*, 52 N.Y.2d at 413; *see Booth*, 83 N.Y.2d at 678-79.

Second, "[t]he Legislature, apparently dissatisfied with the Federal formulation, adopted in the Criminal Procedure Law (CPL 40.20, subd 2) what is generally known as the 'same transaction' test which, in its purest form, prohibits a second prosecution to be based on the *same transaction* as a former one." *Abraham v. Justices of N.Y. Sup. Ct. of Bronx Cnty.*, 37 N.Y.2d 560, 565 (1975) (citation omitted) (emphasis in original). Thus, "[u]nder CPL 40.20, not only is the 'dual sovereignties' doctrine ignored, but double jeopardy protection is extended, generally, to offenses arising out of a common event." *Abbamonte*, 43 N.Y.2d at 81.

The statutory double jeopardy bar is subject to nine enumerated exceptions, each of which "was drafted to address a particular situation in which the statutory prohibition was deemed overly broad." *Kaplan*, 71 N.Y.2d at 229. As

such, each exception is strictly construed in accordance with its terms. *See id.* at 229-30 (rejecting interpretation of the "different victim" exception in CPL § 40.20(2)(e) that would permit "the circumvention of the more demanding requirements of CPL 40.20(2)(b)," the "different evils" exception); *Schmidt*, 74 N.Y.2d at 520 (holding that "subdivision [g] by its language is limited to prior prosecutions in another 'state,'" and thus does not apply where the "prior prosecution occurred in Federal court").

Here, the People's only argument is that the different-evils exception found in CPL § 40.20(2)(b) applies. As the Supreme Court correctly determined, it does not.

I.

THE EXCEPTION UNDER CPL § 40.20(2)(b) ONLY APPLIES WHERE THE "BROADER EVILS" TO WHICH THE OFFENSES ARE DIRECTED ARE "VERY DIFFERENT" IN "KIND"

As the Court of Appeals and this Court have repeatedly emphasized, the only exception urged by the People—CPL § 40.20(2)(b)—"requires that the offenses be 'designed to prevent *very different kinds of harm or evil*'." *Abraham*, 37 N.Y.2d at 567 (emphasis in original); *see also Helmsley*, 170 A.D.2d at 212 ("There is nothing different *in kind* between the harms or evils sought to be prevented in the Federal and State statutes; much less can it be said that the harms

or evils sought to be prevented are *very* different in kind." (emphasis in original)). Throughout their brief, the People elide this clear statutory language, repeatedly omitting—including in their Question Presented—the statutory requirement that the harms not only be "very" different, but also very different "in kind." (*See, e.g.*, People's Br. 2, 5, 28, 41, 48.) Elsewhere, the People ignore the statutory text altogether, undertaking to fashion their own preferred test—positing, for example, that the exception applies if the offenses "serve different objectives," *id.* at 2, "safeguard distinct classes of victims," *id.* at 4, or contain purportedly "key differences," *id.* at 5. None of these reformulations correctly states the law.

Section 40.20(2)(b) applies only where the statutory provisions defining the charges are designed to prevent "very different kinds of harm or evil." CPL § 40.20(2)(b). Thus, as the Court of Appeals has held, the different-evils exception does not apply where, as here, the "broader evil[s]" addressed, *Kaplan*, 71 N.Y.2d at 230, are similar, even if various distinctions could be found in the statutes' respective texts or legislative histories. *See Abraham*, 37 N.Y.2d at 567 ("Federal drug conspiracy laws and the State's drug possession laws are aimed at the same evil—narcotics trafficking."); *Altman*, 52 N.Y.2d at 414-15 ("Maryland [conspiracy] prosecution" and "present prosecution for murder" are both "directed at a like goal: punishment for the unlawful taking of a particular human life."); *Kaplan*, 71 N.Y.2d at 230 n.4 ("Federal RICO crimes" are not very different in kind

from "State securities fraud and larceny."); *Schmidt*, 74 N.Y.2d at 522-23 ("Federal crime of interstate transportation of stolen property and the State crime of larceny are both designed to punish thieves and to protect property owners from thefts."); *People v. Claud*, 76 N.Y.2d 951, 953 (1990) ("Notwithstanding that the Navigation Law refers to the prevention of serious physical injury and the Town Code commands the operation of a boat in a careful and prudent manner, both provisions are designed to assure the safe operation of boats so as to protect human life and avoid injury.").

In pursuit of a contrary result, the People primarily rely on the Court of Appeals' decision in *Kaplan*, 71 N.Y.2d 222. But as the Supreme Court rightly concluded (A.19-20), *Kaplan* supports defendant's position, not the People's, confirming that the different-evils exception has no application to offenses addressing the same fundamental harm, including specifically two jurisdictions' respective anti-fraud statutes. Nor is there anything in *Kaplan* to support the People's theory that the different-evils exception applies where, as here, two statutes protect overlapping classes of victims.

In *Kaplan*, the defendants, who were previously tried and convicted in federal court of various racketeering, conspiracy, and fraud counts arising out of efforts to obtain a lucrative government contract by bribery and fraud, sought to prevent the District Attorney from prosecuting them for larceny and securities fraud

based on the same scheme. 71 N.Y.2d at 224-25. The Court of Appeals held that the prior federal prosecution barred the New York case, and that the "different victims" exception urged by the People did not apply. *Id.* at 230-31. In doing so, the Court considered the People's argument that the "classes of victims" addressed by the two prosecutions were distinct because the federal charges addressed harm to "citizens and taxpayers of New York City," whereas the state prosecution addressed harm to the "investing public." *Id.* at 228-30. The Court rejected the People's approach, concluding that it impermissibly sought "circumvention of the more demanding requirements of CPL 40.20(2)(b) [the different-evils exception]," which had been "legislatively narrowed" by the requirement of considering "the broader evil to which the penal statute in question was addressed." *Id.* at 230.

That *Kaplan* sought to raise the bar for invocation of the "different evils" exception, not lower it, is confirmed by the Court of Appeals' observation that the different-evils argument previously raised and "understandably" abandoned by the People in that case—which, like this case, involved fraud charges in both proceedings—was meritless. *Id.* at 229-30 & n.4. Despite the putatively unique goals of the federal RICO statute, which was "'designed to prevent' the enhanced evil and societal harm that occurs when criminal activities, of many types, are conducted in organized form," the different-evils exception did not apply, because "[s]uch criminal activities as" were charged in the state prosecution—"securities

fraud and theft conducted through legitimate and illegitimate organizations"—"were plainly contemplated" under the RICO statute. *Id.* at 230 n.4. Thus, the Court concluded, "the remaining counts [for] securities fraud and grand larceny, cannot be prosecuted in light of the prior Federal prosecution for RICO violations and fraud." *Id.* at 230-31.

In view of the foregoing, the People's reading of *Kaplan* is untenable. Nothing in *Kaplan* can be read, as the People suggest, to erect a *per se* rule that statutes protecting different "classes" of victims necessarily satisfy the different-evils exception, particularly where the classes of victims encompassed by the respective statutes overlap—here, encompassing the same fraud, causing the same harm, to the same banks. Indeed, if the People's argument here had merit, it would have applied in *Kaplan*, where the successive proceedings addressed harm to two purportedly separate classes of victims: taxpayers and the investing public. To the extent relevant to this case at all, the import of *Kaplan* is that the bar for invoking the different-evils exception is high—and made higher still by the requirement that the two offenses must address "broader" evils (not the most narrowly or specifically articulated evil, as the People would have it) that are very different in kind.

This Court's post-*Kaplan* decision in *Helmsley*, 170 A.D.2d 209, confirms that the People's reading is wrong. In *Helmsley*, this Court again addressed a state prosecution following a prior federal case, each involving fraud. Both

prosecutions alleged a fraudulent scheme to "renovate and decorate the Helmsleys' homes . . . by falsely claiming those personal expenses as business expenses," *id.* at 210, thus "defrauding Federal and State tax authorities and other parties necessarily affected." *Id.* at 211. Accordingly, both the state and federal indictments included various fraud charges, including, in the federal indictment, "17 counts of mail fraud in which the fraudulent documents allegedly mailed were the same documents or classes of documents as those forming the basis for the State indictment." *Id.* at 209. Similar to the argument advanced in this case by the District Attorney, the People in *Helmsley* argued that "the indictments charge different 'evils' (*e.g.*, cheating the Federal versus the State government of tax revenue)." *Id.* at 212. The First Department rejected that argument, notwithstanding the Court of Appeals' decision in *Kaplan*, which it also cited and relied upon:

> The exception set forth in CPL 40.20 (2) (b) is also inapplicable, because despite the People's argument that the indictments charge different "evils" (*e.g.*, cheating the Federal versus the State government of tax revenue), the statute requires that the statutory provisions defining the offenses must be "designed to prevent *very different kinds* of harm or evil" . . . . There is nothing different *in kind* between the harms or evils sought to be prevented in the Federal and State statutes; much less can it be said that the harms or evils sought to be prevented are *very* different in kind.

Helmsley, 170 A.D.2d at 212 (emphasis in original).

As the Supreme Court properly held, the same conclusion applies here.

II.

NONE OF THE NEW YORK CHARGES ADDRESSES A "BROADER EVIL" THAT IS "VERY DIFFERENT" IN "KIND" FROM THE FEDERAL CHARGES

Applying the foregoing principles here, the different-evils exception found in CPL § 40.20(2)(b) does not apply to any of the New York Charges, none of which addresses a "broader evil" that is "very different" in "kind" from the evils addressed by the federal fraud charges in the Federal Proceeding.

A. Substantive Federal Charges

Addressing the federal Bank Fraud charges at issue in the Federal Proceeding, the Supreme Court noted the following: "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" (A.26). In particular, "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" (A.25).

The People concede, as they must, that the bank fraud statute concerns fraud on any mortgage lender, and that the Congressional intent behind the 2009

amendments to the bank fraud statute included the desire to address "fraudulent mortgages" that had adversely affected the "health of the banking system and the overall economy." (People's Br. 26 (quoting S. Rep. No. 111-10, at 6 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 434).) Yet, in applying the different-evils test to the New York Charges, and to Residential Mortgage Fraud in particular, the People revert to an overly restrictive view of the bank fraud statute, purporting to limit its scope to the harm suffered directly by financial institutions, and ignoring the conceded legislative purpose of protecting the "overall economy." *Id.* As the Supreme Court correctly determined, the People's view of the bank fraud statute is unduly narrow.

As originally enacted, "[t]he offense of bank fraud . . . [was] designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured." Comprehensive Crime Control Act of 1983, S. Rep. No. 98-225, at 377 (1983), 1984 U.S.C.C.A.N. 3182, 3517 (legislation "would assure a basis for federal prosecution of those who victimize these banks through fraudulent schemes"). The legislative purpose was expanded in the wake of the 2008 financial crisis to include frauds on mortgage lenders, regardless of whether federally chartered or insured. *See United States v. Bouchard*, 828 F.3d 116, 124 (2d Cir. 2016) ("Prior to 2009, the term 'financial institution' was defined to include insured depository institutions of the

FDIC, but not mortgage lenders . . . . The crisis prompted Congress in 2009 to amend . . . § 20 (which defines financial institutions for purposes of § 1344) . . . to cover mortgage lending institutions specifically.") (citing Fraud Enforcement and Recovery Act ("FERA") of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009)).

Thus, as the Supreme Court concluded, any suggestion that the bank fraud statute, as amended in response to the 2008 financial crisis to "improve enforcement of mortgage fraud," does not concern itself with the foreclosure crisis or the residential housing market is demonstrably false. S. Rep. No. 111-10, at 1, 2009 U.S.C.C.A.N. 430, 430. As the Senate Report explains, the legislation was intended to "increase accountability for the corporate and mortgage frauds," *id.*, leading to the crisis, including by expanding the definition of "financial institution" to include "mortgage lending businesses that are not directly regulated or insured by the Federal Government," but which were "responsible for nearly half the residential mortgage market before the economic collapse." S. Rep. No. 111-10, at 3, 2009 U.S.C.C.A.N. at 432. As Justice Wiley noted, 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'" (A.25 (citation omitted)). The legislative history explains:

> Our Nation is in the midst of its most serious economic crisis since the Great Depression. With each passing week, tens of thousands more Americans lose their jobs to

> layoffs, and many thousands more are losing their homes to foreclosure.
>
> . . . . As banks and private mortgage companies relaxed their standards for loans, approving ever riskier mortgages with less and less due diligence, they created an environment that invited fraud. Private mortgage brokers and lending businesses came to dominate the home housing market, and these companies were not subject to the kind of banking oversight and internal regulations that had traditionally helped to prevent fraud. . . .
>
> In the last six years, suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased nearly tenfold to more than 62,000 in 2008. In the last three years, the number of criminal mortgage fraud investigations opened by the Federal Bureau of Investigation (FBI) has more than doubled, and the FBI anticipates a new wave of cases that could double that number yet again in coming years.

S. Rep. No. 111-10, at 2, 2009 U.S.C.C.A.N. at 431. (*See also* A.25 (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.'") (citation omitted).)

As set out below, the "broader evil" addressed by the bank fraud statute is not very different in kind from the broader evil addressed by each of the substantive New York Charges of Residential Mortgage Fraud, Scheme to Defraud, and Falsifying Business Records.

B. Substantive New York Charges

1. Residential Mortgage Fraud (and Attempt to Commit the Same)

Justice Wiley concluded that the different-evils exception did not apply to the Residential Mortgage Fraud counts, which, like the federal counts for Bank Fraud, are aimed, at least in part, at "preventing the type of financial fraud that led to the financial crisis of 2008" (A.25). On appeal, the People's primary contention is that "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"—a purported distinction which, according to the People, "establishes" that the different-evils exception applies here. (People's Br. 48.) This argument fails on several fronts.[5]

First, as the Supreme Court held, the People's underlying premise—that the federal offenses were "exclusively" concerned with protecting financial institutions from financial loss—is wrong. (People's Br. 44.) As discussed, *supra*, II.A, while the elements of Bank Fraud limit the offense to frauds on financial institutions, the "harm or evil" to which the statute is addressed is fairly broad, extending to protection of not just the banking system, but, as the People concede,

---

[5] The parties agree that the harm or evil addressed by Attempted First Degree Residential Mortgage Fraud is the same as the substantive offense that was allegedly attempted. (People's Br. 44 n.11.) *See People v. Bryant*, 92 N.Y.2d 216, 229 (1998).

to the "overall economy." (People's Br. 26.) *See Kaplan*, 71 N.Y.2d at 230 n.4 ("[E]ven though the elements of the previously prosecuted . . . crimes may differ from those . . . 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 harm or evil.'") (citation omitted). And, as noted above, the legislative history makes clear that Congress intended the 2009 amendments to the bank fraud statute to address harm to homeowners in particular. *See* S. Rep. No. 111-10, at 2, 2009 U.S.C.C.A.N. at 431 (discussing the need to address "mortgage fraud" and the fact that "tens of thousands more Americans lose their jobs to layoffs, and many thousands more are losing their homes to foreclosure").[6]

Second, while the People go to considerable lengths in an effort to show that Residential Mortgage Fraud was not intended to apply where the victim was a financial institution—in other words, was not intended to apply here—those efforts are as futile as they are self-contradictory. As is well illustrated by this case, the scope of Residential Mortgage Fraud is sufficiently broad (at least in the People's

---

[6] The People concede, albeit in a footnote, that the purposes of the federal statute are more varied and nuanced. For example, the People acknowledge that "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.'" (People's Br. 47 n.12.) (*See also id.* at 26 (discussing legislative concern with "[t]axpayers" being forced to "bear the burden of [the] financial downturn").)

view) to encompass a prosecution for an alleged scheme to defraud one or more federally insured or chartered banks in connection with residential mortgage loans. The statute provides that Residential Mortgage Fraud is committed by any "person" (meaning "any individual or entity") who:

> 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(1), (4). Nothing in the statute limits its application to frauds on homeowners, nor does the statute exclude fraud on banks or any other class of victim.

The limited reported cases of Residential Mortgage Fraud prosecutions confirm this broad reading. *See, e.g.*, *In re Ibraham*, 104 A.D.3d 184, 185 (2d Dep't 2013) (disbarring attorney convicted of Residential Mortgage Fraud in which he "misrepresent[ed] purchaser contributions in real estate transactions . . . to obtain loan proceeds from multiple lenders" with the "intention . . . to defraud the mortgage lenders"); *In re Hecht*, 135 A.D.3d 28, 29 (2d Dep't 2015) (disbarring attorney

convicted of Residential Mortgage Fraud "to obtain mortgage loan proceeds from financial institutions using materially false paperwork").

Likewise, the legislative history demonstrates a broad concern for preventing mortgage fraud against any victim, and certainly nothing in the legislative history suggests that the sole and exclusive intended beneficiaries of Residential Mortgage Fraud were homeowners. As Justice Wiley noted (A.24), the Introducer's Memorandum for the bill creating Residential Mortgage Fraud identified five primary purposes for the broad legislative package, only one of which—the fifth—related to the new offense of Residential Mortgage Fraud:

> PURPOSE: 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 crises 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.

N.Y. B. Jacket, 2008 S.B. 8143, Ch. 472 at 7. Further, while certain aspects of the legislation fell under the heading of "legislation targeted to help homeowners currently at risk of foreclosure," others—including Residential Mortgage Fraud—fell under the bill's second objective: "Elements of the bill targeted to prevent similar

future crises." (A.24 (quoting N.Y. B. Jacket, 2008 S.B. 8143, Ch. 472 at 11).) Thus, as Justice Wiley concluded, at least one "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" (A.24).

Indeed, while the overall bill creating Residential Mortgage Fraud includes provisions that are specific to the protection of homeowners, the legislative history concerning the anti-fraud provisions in particular evinces a concern primarily with enhancing prosecutors' toolkit for combatting fraud that would also be addressable under existing criminal statutes. The relevant discussion of the purposes animating Residential Mortgage Fraud states as follows:

> There currently is no separate Penal Law provision expressly prohibiting residential mortgage fraud, and thus prosecutors must bring such cases under different theories, such as scheme to defraud and larceny. This bill therefore seeks to simplify such prosecutions by explicitly defining and criminalizing the act of residential mortgage fraud.

N.Y. B. Jacket, 2008 S.B. 8143, Ch. 472 at 12. In other words, "[t]he Legislature recognized that the conduct encompassed by the new crimes could be prosecuted under other pre-existing provisions of the Penal Law, but wanted 'to simplify such prosecutions by explicitly defining and criminalizing the act of residential mortgage fraud.'" William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law § 187.

The People's arguments fail to overcome this clear text and legislative history. For example, the People note that the Legislature included a defense generally available to individuals who apply for a residential mortgage loan on a property that they intend to occupy, unless acting as an accessory. (People's Br. 46 (citing Penal Law § 187.01).) Of course, the defense is not absolute, and in any case, if the intent were truly to exclude any prosecution in which a financial institution were the victim, it would have been easy enough to say so, and this case would be foreclosed. Similarly, the People argue that if the Legislature had intended to protect financial institutions, it would have expanded the scope of the statute to encompass commercial, as well as residential, real estate. (People's Br. 47.) But the fact that the Legislature was responding to a crisis in the residential real estate market specifically does nothing to show that it intended to exclude financial institutions from the law's protections. To the contrary, the statutory text and legislative history both show that frauds on financial intuitions fall within the statute's purview—indeed, that is precisely what the People allege here.[7]

---

[7] The People also attack the strawman that simply "because 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)." (People's Br. 48-49.) But neither Mr. Manafort nor the Supreme Court ever suggested as much. Rather, in response to the same financial crisis, both New York and the federal government enacted criminal offenses that are similar insofar as they target similar harms caused by fraud in the mortgage market, including fraud on mortgage lenders.

Whatever the possible scope of Residential Mortgage Fraud, the People have charged Mr. Manafort with defrauding financial institutions in connection with mortgage loans, not with causing any other harm to any other type of victim or constituency. There has been no allegation, nor could there be, that Mr. Manafort's conduct constituted a fraud upon a single homeowner, nor any plausible suggestion that the New York Charges were brought to "protect homeowners from predatory lending practices in connection with residential mortgages," as the People urge is the offense's exclusive purpose. (People's Br. 45.) Thus, by the People's own admission in bringing this case, whatever the differences between Residential Mortgage Fraud and Bank Fraud, the two statutes are sufficiently overlapping in purpose and scope to embrace prosecutions against Mr. Manafort for the same alleged fraud, causing the same alleged harm, to the same alleged victims. The People cannot have it both ways.

2. Scheme to Defraud

Justice Wiley correctly held that "both the state scheme to defraud statute and the federal bank fraud statute are designed to combat fraud – the same broad type of evil" (A.29). In doing so, the Supreme Court properly rejected the People's argument that because Scheme to Defraud "was designed as a consumer protection law, it is not aimed at addressing the same harm the [bank] fraud statute addresses, namely protection of financial institutions," concluding that "[t]he

scheme to defraud statute is not as limited in purpose as the People suggest" (A.28). The People fail to identify any error in this conclusion.

The People acknowledge, as they must, that "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.'" (People's Br. 33-34.) The People argue, however, that Scheme to Defraud is solely a consumer fraud measure, with apparently no application to a scheme to defraud financial institutions, as is alleged here. Putting aside once again the incongruity in the People's argument, Justice Wiley correctly concluded that it was not supported by the statute's legislative history, or any other authority. As Justice Wiley noted, the practice commentaries to Penal Law § 190.65, and the legislative history cited herein, refute the People's narrow reading of the statute:

> 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.

(A.28 (citing William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law §190.65) (emphasis in original).)[8]

The Supreme Court's conclusion is confirmed by the fact that both Scheme to Defraud and Bank Fraud are patterned on the same federal statutes—the federal mail and wire fraud offenses. "Congress modeled the bank fraud statute upon the mail and wire fraud statutes, indicating that it wanted the bank fraud statute to be just as broad as the mail and wire fraud statutes." *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992) ("[T]he bank fraud statute should be read expansively and, where it dovetails with the mail and wire fraud statutes, we look to precedents arising under those statutes to inform our interpretation of such amorphous phrases as 'scheme to defraud.'"). Similarly, Scheme to Defraud was patterned on the federal Mail Fraud statute. *See People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 616 (1995) (because "the Legislature . . . modeled the [scheme to defraud] offenses upon the Federal mail fraud statute," "we may look to Federal precedents applying similar statutory language"); *People v. Taylor*, 304

---

[8] Justice Wiley also noted that the statute "has been applied to disparate fraudulent schemes" (A.28-29). Seizing upon this language, the People argue that Justice Wiley erred when he acknowledged that the statute had been applied to "schemes perpetrated against banks and other financial institutions." (People's Br. 32.) But as the People concede, "case law" is relevant to determining the harm or evil to which a statute is directed. (People's Br. 18; *see also* A.153.)

A.D.2d 434, 435 (1st Dep't 2003) ("The scheme to defraud statute . . . was derived from and patterned after the federal mail fraud statute.").

Notably, every court to consider the question in the context of the analogous federal mail and wire fraud statutes (on which Bank Fraud is patterned) has ruled that Scheme to Defraud does not address a very different kind of harm or evil. *See Helmsley*, 170 A.D.2d at 209, 212 (rejecting "different evils" exception where state indictment charged, *inter alia*, Scheme to Defraud and the federal indictment charged, *inter alia*, Mail Fraud); *Alba*, 43 Misc. 3d at 882, 885 (the "'scheme constituting a systematic ongoing course of conduct' required for scheme to defraud is essentially the 'scheme or artifice' required" under the federal fraud statutes, all of which are "designed to protect the unwary from schemes to deprive them of their property by fraud"); *People v. Naqvi*, 1995 WL 550472, at *5 (Sup. Ct. N.Y. Cnty. Aug. 9, 1995) (federal Mail and Wire fraud are "not designed to target very different kinds of harm or evil" compared to Scheme to Defraud). The same applies equally here with respect to Bank Fraud.

In response, the People erect a strawman, distorting Justice Wiley's ruling in an effort to create a "seeming conclusion" that "all" fraud crimes address the same harm. (People's Br. 36.) Of course, Justice Wiley made no such determination, nor is that overbroad question before this Court. It is enough to hold, as the Supreme Court did, that where, as here, two different fraud offenses do not

address very different types of harm or evil, the exception does not apply. *See Kaplan*, 71 N.Y.2d at 230-31 & n.4 (noting that different-evils exception would not have applied with respect to "the remaining counts [for] securities fraud and grand larceny," which "cannot be prosecuted in light of the prior Federal prosecution for RICO violations and fraud"); *Helmsley*, 170 A.D.2d at 212 (rejecting "different evils" exception where state and federal indictments charged fraud offenses).

The Second and Third Department decisions cited by the People are readily distinguishable, and in any case, are not binding. The People rely on *People v. Biear*, where the Second Department applied the different-evils exception, holding that "the purpose of 18 USC § 1341 [Mail Fraud] is to prevent the post office from being used to carry out fraudulent schemes," whereas "the purpose of Penal Law § 240.50(3)(a) [falsely reporting an incident to a law enforcement officer] is to prevent the waste of the time and resources of law enforcement." 119 A.D.3d 599, 599 (2d Dep't 2014). The People attempt to characterize making a false report as "address[ing] fraudulent conduct in some respect" (People's Br. 35), but unlike the substantive offenses charged in the New York Indictment here, all of which are found in Title K of the Penal Law ("Offenses Involving Fraud"), Penal Law § 240.50, Falsely Reporting an Incident in the Third Degree, is located in Title N

("Offenses Against Public Order, Public Sensibilities and the Right to Privacy").[9] Thus, even under the broad categorizations of the Penal Code (which the People contend are too broad to reliably indicate whether the different-evils exception applies, People's Br. 36), *Biear* did not, as the People suggest, involve successive fraud prosecutions.

The People also cite *Sharpton v. Turner*, where the Third Department considered whether a prior prosecution for Scheme to Defraud and Falsifying Business Records precluded a subsequent prosecution for various tax offenses, including Offering a False Instrument for Filing, Filing a False or Fraudulent Return, and Failure to File a Return or Report. 170 A.D.2d 43, 44-45 (3d Dep't 1991). The first prosecution focused on allegations that "petitioner fraudulently sought contributions from individual donors to the National Youth Movement which he converted to his personal use," while the second prosecution focused on allegations of false tax filings related to that scheme. *Id.* at 45. Whatever the merits of the Third Department's decision applying the different-evils exception to these facts, the case is distinguishable, because in *Sharpton*—unlike here—the two prosecutions targeted harm to different classes of victims: in the first case, the harm to donors "bilked" by

---

[9] While not alone dispositive, it is notable that all of the relevant Federal Charges are likewise found in Chapter 63 of the federal criminal code ("Mail Fraud and Other Fraud Offenses"). *Cf. Aldridge v. Kelly*, 157 A.D.2d 716, 718 (2d Dep't 1990) (considering placement of offenses in Penal Law in connection with evils analysis).

the defendant's scheme, and in the second case, the harm to the State through his non-payment of taxes. *See id.* at 49 (reasoning that different-evils exception applied because Scheme to Defraud was not "enacted to prevent tax evasion"). Thus, while in *Sharpton* it was "arguably possible to bring the State within the reach of the crimes charged" in the first indictment, *id.* at 48, the successive prosecutions focused on harms to different groups. Here, by contrast, there is only one alleged set of victims (the banks), and only one type of alleged harm (defrauding those banks in connection with loan applications), which is exactly the same in both prosecutions.

3. Falsifying Business Records

Addressing Falsifying Business Records, Justice Wiley correctly concluded that "[t]he gravamen of this crime is the intent to defraud" (A.27-28). Specifically, "[t]he basic harm the statute aims to combat is fraud, including fraud perpetrated on business or commercial enterprises," and this "is the same broad category of harm that the bank fraud statute seeks to combat" (A.28). "[C]onsequently, both statutes are not directed against *very* different evils or harm" (A.28 (emphasis in original)). *See Helmsley*, 170 A.D.2d at 209, 212 (rejecting "different evils" exception where state indictment charged, *inter alia*, Falsifying Business Records and the federal indictment charged, *inter alia*, Mail Fraud).

The People do not dispute that both the New York Charges and the Federal Charges address fraud, nor could they. Instead, attempting to distinguish

the state and federal offenses, the People point to various differences in their elements—noting, for example, that Bank Fraud requires an attempt to defraud a bank (while Falsifying Business Records does not), and that Falsifying Business Records requires a writing (while Bank Fraud does not). (People's Br. 39.) But the fact that the elements of the offenses are not identical is not sufficient to establish the different-evils exception—indeed, it is only one prong of the analysis, and one not disputed by Mr. Manafort. *See Kaplan*, 71 N.Y.2d at 230. As to the second prong, the broader evil addressed by the state and federal offenses—fraud—is not very different in kind, and thus the exception does not apply.

The People's contrary interpretation—that the "the primary objective of the state crime is to protect the integrity of written records" for their own sake (People's Br. 38-39)—makes a farce of the statutory provisions. As the People's own authorities make clear (People's Br. 39-40), the purpose of protecting written records is to avoid fraud, the harm or evil inherent in the falsification of business records. *See Sharpton*, 170 A.D.2d at 49 (evil addressed by Falsifying Business Records is "the defrauding of a business entity by falsification of its records"); *People v. Bloomfield*, 6 N.Y.3d 165, 170-71 (2006) (Falsifying Business Records is "intended to protect . . . from fraudulent falsification of an enterprise's records"); *People v. Taveras*, 46 A.D.3d 399, 400 (1st Dep't 2007) (Falsifying Business Records in the First Degree requires "that a defendant's 'intent to defraud includes

an intent to commit another crime or to aid or conceal the commission thereof'" (citation omitted)).

Moreover, as the People concede, the state and federal offenses again address overlapping—not separate—classes of victims, as demonstrated by this very case. The People argue that the New York Charges address a "far broader class of victims" than the Federal Charges—"namely, any person or entity that relies on the written records of businesses and government enterprises" (People's Br. 39-40)—not that the classes of victims are wholly separate, "never the twain shall meet." Thus, the People's argument again reveals its own fatal flaws: the classes of victims are overlapping, even if one is broader.

Finally, the People argue that Justice Wiley erred in noting that falsifying business records was a "method" of committing the alleged bank fraud here, and thus could be "thought of as an ancillary crime to the bank fraud." (People's Br. 41 (quoting A.28).) The People do not dispute, nor could they, the accuracy of Justice Wiley's observation that the alleged bank fraud here was "carried out, in part, by defendant falsifying the business records of the various banks he was defrauding" (A.28). Nonetheless, the People cite *Bryant*, 92 N.Y.2d 216, for the proposition (nowhere stated therein) that "even a crime that could be deemed 'ancillary' to another crime, can still be designed to prevent a very different harm." (People's Br. 41.)

The People's reliance on *Bryant* is misplaced. There, the different-evils exception applied to defendants charged in a New York indictment with knowing possession of defaced firearms (Penal Law § 265.02(3)) following a prior federal prosecution for bank robbery. *Bryant*, 92 N.Y.2d at 225. There, unlike here, the "different evils" exception applied because the state charge "was intended to curtail the availability of defaced firearms which prevent the identification and detection of crime, and the trafficking of such firearms in the marketplace." *Id.* at 229. In other words, the state charge addressed a harm separate from the robbery itself. Here, in contrast, the New York Charges address the same evil posed by the same alleged frauds on the same banks. Thus, here, unlike in *Bryant*, the "prevention of this evil" is "addressed by" and "embraced within, the Federal provisions at issue." *Id.* at 230.[10]

C. Federal And State Conspiracy Charges

Justice Wiley correctly concluded that "both the state and federal conspiracy statutes seek to protect against concerted criminal activity, namely illicit

---

[10] The People offer inapposite hypotheticals, such as false statements in Police Department records or efforts to conceal sexual assault. (People's Br. 39.) But the fact that falsifying business records can, in some cases, address non-financial harms does not demonstrate that the broader evil addressed—fraud—is not common to the state and federal charges. Indeed, the People do not suggest that if a defendant were to conceal sexual misconduct from a bank as part of a loan application, the bank fraud statute would not apply.

agreements," and thus, the different-evils exception did not apply (A.27). *See Helmsley*, 170 A.D.2d at 212 (different-evils exception inapplicable where both indictments charged conspiracy to defraud).

The People do not challenge the Supreme Court's conclusion that Conspiracy in the Fourth Degree is designed to prevent the harm caused by illicit agreements. However, citing *Abraham*—where the Court of Appeals rejected the argument that a conspiracy charge targeted a very different kind of harm—the People argue that Justice Wiley erred because "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." (People's Br. 51.) For a number of reasons, the People's argument is no more availing here than it was in *Abraham*. *See Abraham*, 37 N.Y.2d at 567 (holding that "Federal drug conspiracy laws and the State's drug possession laws are aimed at the same evil—narcotics trafficking," and rejecting argument that an exception applied because "conspiracy 'presents a greater potential threat to the public than individual delicts'" (citation omitted)).

As a threshold matter, the People's argument misconstrues the nature of the federal Bank Fraud Conspiracy charge. As Justice Wiley found, the harm or evil addressed by the conspiracy counts in the New York Indictment is the same as that addressed by the conspiracy counts in the Federal Indictment, as, under both,

the essence of conspiracy is an illicit agreement. As Justice Wiley explained, "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." (A.27 (citing 2 Kevin F. O'Malley, *et al.*, *Federal Jury Practice & Instructions* § 31.04 (6th ed. 2020); William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Version, Penal Law § 105).) Indeed, despite emphasizing that the state crime of conspiracy "'is an offense separate from the crime that is the object of the conspiracy'" (People's Br. 50 (quoting *People v. McGee*, 49 N.Y.2d 48, 57 (1979)), the People do not dispute that under the jury instructions used in the Federal Proceeding with respect to Bank Fraud Conspiracy, the very same was true: "[P]articipating in a conspiracy to commit a crime is an entirely separate and distinct charge from the actual violation of the substantive charge which may be the object of the conspiracy," and "[a]ll that [the jury] must find [to convict] is that there was an agreement to commit that offense and that a defendant voluntarily joined the conspiracy" (Defendant-Respondent's Appendix 7; *see also* A.104).[11]

---

[11] The relevant jury instructions used in the Federal Proceeding were annexed as Exhibit E to the affirmation supporting defendant's omnibus motion, but were not included by the People in the Appendix. The relevant instructions are quoted in defendant's motion, which is included in the Appendix, at A.104, and the entirety of Exhibit E is included in Respondent's Appendix.

The People attempt to equate conspiracy under 18 U.S.C. § 1349, as was charged in the Federal Proceeding, with the substantive charge of Bank Fraud under 18 U.S.C. § 1344. (People's Br. 51.) But Section 1349 applies to "any offense under" chapter 63—"Mail Fraud and Other Fraud Offenses"—meaning that it is not synonymous with Bank Fraud specifically, as the People would have it. 18 U.S.C. § 1349. Instead, Section 1349 applies to a wide swath of fraud offenses, including wire, mail, health care, and securities fraud. Thus, while the state conspiracy offense may apply to potentially "wide-ranging criminal conduct" (People's Br. 50), including any class-B or class-C felony, the distinction between the state and federal conspiracy offenses is one of degree, not kind. Both the state and federal conspiracy statutes at issue apply to certain classes of statutorily defined offenses—including, in both cases, fraud on banks. Neither is synonymous with conspiracy to commit a single substantive offense. Thus, the People fail to establish that the state and federal conspiracy statutes are designed to prevent very different kinds of harm.

Even if the nature of the federal conspiracy charges were as the People claim, however, the People's argument is foreclosed by *Altman*, 52 N.Y.2d 410, where the Court of Appeals rejected the very position advanced by the People here. In *Altman*, "the question posed [was] whether the petitioner may be prosecuted for murder in New York after he was tried for conspiracy to commit that murder in Maryland." *Id.* at 412. The dissent argued that while the New York murder statute

"clearly seeks to prevent the intentional murder of another person," the evil addressed by the Maryland conspiracy statute was different because—like the People argue here with respect to the New York conspiracy statute—"[t]he gist of the Maryland offense is the unlawful combination resulting from the agreement," and thus "the Maryland law of conspiracy serves as a general prohibition against illegal agreements of all kinds without regard to the particular object sought to be achieved." *Id.* at 418-19. The Court rejected this view, concluding that "both the Maryland prosecution, based though it was on that State's conspiracy statute, and the present prosecution for murder [under] this State's laws were directed at a like goal: punishment for the unlawful taking of a particular human life," and "in light of the fact that the 'governmental interests' are the same in both prosecutions, the statutory [different-evils] exception is inapplicable." *Id.* at 414-15.

While in *Altman* the "general" conspiracy count was in the prior prosecution, not the successive New York prosecution, the point is the same: the Court of Appeals specifically rejected the notion that a general conspiracy offense addresses a harm or evil that is very different in kind from offenses targeting more particular subject matter or conduct at issue in the conspiracy—be it murder (as in *Altman*), narcotics (as in *Abraham*), or fraud (as in *Helmsley*, and of course, here).

Thus, as the Supreme Court recognized (A.27), *Altman*, consistent with a long line of authority, squarely forecloses the People's position.[12]

People v. De Oca, 282 A.D.2d 401 (1st Dep't 2001), cited by the People, is not to the contrary. *De Oca* upheld the defendant's convictions for criminal sale and possession of a controlled substance, as well as conspiracy, despite his prior federal prosecution for "conspiracy to commit money laundering and the substantive crime of money laundering." *Id.* at 401-02. If anything, *De Oca*, which includes no reasoning specific to the conspiracy counts, stands for the unexceptional proposition that a prior federal money-laundering-conspiracy prosecution does not preclude a state narcotics-conspiracy prosecution. That unsurprising result provides no guidance on the question posed here: Does a federal conspiracy-to-defraud prosecution preclude a subsequent conspiracy-to-defraud prosecution on the same alleged victims and facts? The answer to that question here is yes.[13]

---

[12] The People argue that Justice Wiley was wrong to rely on *Altman*, decided in 1981, because it came before *Kaplan*, decided in 1987. (People's Br. 53 n.15.) But *Kaplan* did not address the proper application of the different-evils exception to conspiracy offenses, and certainly it did not overrule *Altman* or otherwise change the double jeopardy effect of a conspiracy prosecution *sub silentio*. To the extent the chronology of Court of Appeals decisions is of any moment here, it is notable that *Abraham*, the decision on which the People principally rely with respect to the conspiracy counts, was issued in 1975, before *Altman*. In any case, all three decisions support Justice Wiley's ruling.

[13] While candidly acknowledging in their briefing below that the four-paragraph opinion in *De Oca* "did not explain its reasoning," the People nonetheless proposed a leap of faith in their favor, arguing that the "clear inference" is that the Court would

Ultimately, because Mr. Manafort was charged in each prosecution with both substantive fraud offenses and conspiracy-to-defraud, the People's successive prosecution is foreclosed whether the federal conspiracy offense is viewed as addressing the same harm as the substantive bank fraud offense (in which case the evil is the same as for the substantive state-law fraud offenses) or is viewed as addressing the illicit agreement itself (in which case the evil is the same as for the state-law conspiracy charges).[14]

---

have agreed with the People's position here (A.168 (Opp. at 51)). This is pure speculation, which Justice Wiley rightly rejected. A review of the appellate briefs in *De Oca* confirms that the People there did not advance, and thus this Court did not adopt, the proposition advanced by the People here.

[14] The People also cite two cases where a conspiracy prosecution was permitted following prosecution for possession of contraband. (People's Br. 52 (citing *People v. O'Neill*, 285 A.D.2d 669 (3d Dep't 2001); *Robinson v. Snyder*, 259 A.D.2d 280, 280 (1st Dep't 1999)).) Even assuming these cases could be squared with the controlling precedent already cited, they are not on point, as Mr. Manafort was charged with conspiracy offenses in both proceedings, not possession in one and conspiracy in the other.

CONCLUSION

The order of the Supreme Court dismissing the indictment should be affirmed.

Dated: August 3, 2020
New York, New York

Respectfully Submitted,

CADWALADER, WICKERSHAM &
TAFT LLP

By: _____
Todd Blanche
Jared Stanisci
Matthew Karlan

200 Liberty Street
New York, NY 10281
Tel.: (212) 504-6000
Fax: (212) 504-6666
Todd.Blanche@cwt.com
Jared.Stanisci@cwt.com
Matthew.Karlan@cwt.com

Counsel for Defendant-Respondent
Paul J. Manafort, Jr.

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14-point font
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 11,678.

Dated: August 3, 2020

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On August 3, 2020

deponent served the within: **Brief for Defendant-Respondent**

upon:

Cyrus R. Vance, Jr.
District Attorney, New York County
Attorney for Appellant
One Hogan Place
New York, New York 10013
(212) 335-9000
danyappeals@dany.nyc.gov

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York, also by electronic service via e-mail.

Sworn to before me on August 3, 2020

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

Job# 296957