

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

THE PEOPLE OF THE STATE OF NEW YORK

v.

LUIGI MANGIONE,

Defendant.

NOTICE OF MOTION

Ind. No. 75657/2024

PLEASE TAKE NOTICE that, upon the annexed affirmation of KAREN FRIEDMAN AGNIFILO, Esq., sworn and affirmed to on August 14, 2026, upon the indictment and all previous proceedings, defendant LUIGI MANGIONE moves this Court for the following Orders:

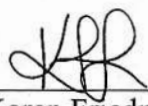
1. Dismissing the remaining second-degree murder count (Count Three) and the firearms counts (Counts Four through Ten) pursuant to CPL § 40.20 given Mr. Mangione's August 14, 2026, guilty plea in federal court to intentionally causing Brian Thompson's death through stalking; and
2. Dismissing these same counts because the particular dual prosecutions here violated Mr. Mangione's Fifth Amendment Due Process rights.

Dated: August 14, 2026
New York, NY

Respectfully submitted,

AGNIFILO INTRATER LLP

By:



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Marc Agnifilo
Jacob Kaplan
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New York, NY 10005

Counsel for Luigi Mangione

cc: District Attorney's Office

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

THE PEOPLE OF THE STATE OF NEW YORK

v.

Ind. No. 75657/2024

LUIGI MANGIONE,

Defendant.

X

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

Karen Friedman Agnifilo
Marc Agnifilo
Jacob Kaplan
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v.

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Defendant.

**AFFIRMATION IN
SUPPORT OF MOTION**
Ind. No. 75657/2024

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

KAREN FRIEDMAN AGNIFILO, an attorney at law duly admitted to practice in the courts of New York State, affirms the following to be true under the penalty of perjury:

1. I am an attorney and Of Counsel at Agnifilo Intrater LLP, a law firm located in New York City, and I represent Luigi Mangione. I make this affirmation in support of a motion dated August 14, 2026, seeking Orders (1) dismissing the remaining second-degree murder count (Count Three) and weapons possession counts (Counts Four through Ten) pursuant to CPL § 40.20 given Mr. Mangione's August 14, 2026, guilty plea in federal court to intentionally causing Brian Thompson's death through stalking; and (2) dismissing these same counts under the Fifth Amendment's Due Process clause because the dual prosecutions arising out of the same event has violated Mr. Mangione's right to due process of law.

I. OVERVIEW

2. Mr. Mangione, through his counsel, moves to dismiss Counts Three through Ten of this indictment on two related grounds. First, in light of his guilty plea in federal court from earlier today, the murder and weapons counts are statutorily barred by CPL § 40.20. The only surviving count (Count Eleven) relates to a criminal transaction separate from the killing of Brian Thompson, namely Mr. Mangione's possession of an allegedly fraudulent identification card

which took place on a different date and location than the conduct in the remaining counts. Second, because the federal and state governments coordinated these prosecutions so that the state went first, even though the state case involved an affirmative factual defense that the federal case did not, the dual prosecutions here violated Mr. Mangione's Fifth Amendment rights.

3. From the day of his arrest on December 9, 2024, Luigi Mangione has been a pawn in parallel prosecutions pursued by the New York County District Attorney's Office and the United States Department of Justice. Both have sensationalized this case and misapplied statutes in an effort to overcharge him. At times, the two offices have battled one another to be the first office to prosecute these cases. Indeed, in recent correspondence to this Court, the District Attorney's Office claimed to have "primary jurisdiction" of his matter.¹ The District Attorney's Office pushed the Court unrelentingly to agree with its position that the state should prosecute Mr. Mangione first. The proffered reason was that state law enforcement did most of the work (a view that is not endorsed by their federal counterparts) and that there was an agreement between the two governments to this effect. As for the federal government, the federal court said on several occasions that absent the District Attorney's Office or another party asking the court for a particular remedy, the federal court would proceed as though the federal case was the only case.

¹In recent letters, the District Attorney's Office asserts that the state has "primary jurisdiction" over Mr. Mangione and that this somehow entitles it to proceed to trial before the federal prosecution. The defense disputes that characterization and in any event it is irrelevant to the analysis here. The doctrine of primary jurisdiction is more accurately described as **primary custodial jurisdiction**—a judicially created doctrine of comity between sovereigns governing **custody**, not trial priority. See *Ponzi v. Fessenden*, 258 U.S. 254 (1922). *Ponzi* addressed only whether a federal prisoner could be temporarily transferred to state authorities with the Attorney General's consent. The Court held that the issue was one of comity between sovereigns, not constitutional entitlement. Nothing in *Ponzi* holds that the sovereign obtaining initial custody has the right to try a defendant first or that the doctrine governs trial scheduling. Subsequent cases applying the doctrine likewise concern custody-related matters such as writs, transportation, sentence credit, and place of confinement—not which sovereign's prosecution should proceed first as a constitutional or statutory issue. It does *not* somehow create a right for the state has a right to try Mr. Mangione first.

4. But before the District Attorney's Office and the Department of Justice vied for prosecutorial supremacy, they acted in concert and coordination with each other to ensure that both offices would prosecute Mr. Mangione for a single criminal episode, allowing them to each punish him separately for the same event. The coordinated effort between the two systems to prosecute Mr. Mangione was part of a plan put in place by the two prosecutors' offices at the outset of the two cases. In a word, the District Attorney's Office and the Justice Department cut a deal.² This deal did not include Mr. Mangione, or his lawyers, or a judge from either the state or federal court. Rather, it was a deal made by and between what are supposed to be two independent executive sovereigns in different systems of government.

5. By virtue of this coordinated deal and plan, the two sovereigns acted as one—agreeing that the District Attorney's Office would prosecute Mr. Mangione first and the Justice Department would prosecute him second. This coordinated deal between them had a specific purpose: The scheme was designed solely to ensure dual successive prosecutions, in order to attempt to avoid double jeopardy protections. But this coordinated plan between the two governments with its one specific purpose is a purpose prohibited by the Fifth Amendment: The two sovereigns, acting as one, attempted to ensure that Mr. Mangione would be prosecuted twice for the same criminal acts.

6. Mr. Mangione has now pled guilty to the crime he committed: possessing a single gun that he fired at a single person, Brian Thompson, on a single morning, December 4, 2024, in

²Previous U.S. Attorney Edward Y. Kim issued a press release in which he “thanked the Manhattan District Attorney's Office, which has brought a separate prosecution against Mangione, which is currently expected to proceed to trial before the federal case.” Press Release, *S.D.N.Y., U.S. Dep't of Justice, Luigi Mangione Charged with Stalking and Murder of UnitedHealthcare CEO Brian Thompson and Use of a Firearm to Commit Murder* (Dec. 19, 2024), <https://www.justice.gov/usao-sdny/pr/luigi-mangione-charged-stalking-and-murder-unitedhealthcare-ceo-brian-thompson-and-use>.

a single place, Manhattan. The District Attorney's Office and Justice Department coordinated their prosecutions specifically to avoid the New York State statute preventing successive prosecutions and Mr. Mangione's Fifth Amendment rights. By explicitly coordinating and planning the order of prosecutions against Mr. Mangione so as to maximize his punishment and increase each government's chances to convict him, the facts here do not allow the District Attorney's Office to continue to prosecute Mr. Mangione under the Fifth Amendment.

7. In addition to the murder and weapons charges being prevented by the Fifth Amendment, these charges are also statutorily barred under New York's double jeopardy law, CPL § 40.20.

II. FACTUAL RECORD

A. Mr. Mangione is Arrested in Pennsylvania

8. Luigi Mangione was arrested by officers of the Altoona Police Department in Altoona, Pennsylvania, on December 9, 2024, and charged with multiple violations of Pennsylvania law including unlawful possession of a handgun – a single handgun. The Commonwealth of Pennsylvania arrested, charged and incarcerated Mr. Mangione before either the New York County District Attorney's Office or the United States Department of Justice had taken any legal action against him.

9. Among the law enforcement officers present at the McDonald's restaurant where Mr. Mangione was arrested was an FBI Task Force officer who was a Pennsylvania State Police Detective assigned to the FBI Task Force. No members of the NYPD were present at the scene when Mr. Mangione was arrested by Pennsylvania authorities on Pennsylvania offenses.

10. While still at the McDonald's restaurant, and before Mr. Mangione was transported to the Altoona police station, officers of the Altoona Police Department and the FBI Task Force Officer were in regular communication with both the FBI and the NYPD. For example, at

approximately 9:52 a.m., the Task Force Officer photographed Mr. Mangione and transmitted the photograph to an FBI Special Agent so that the FBI could conduct facial recognition analysis. Over the ensuing hour, federal authorities continued to receive photographs and other investigative materials, including images of a firearm, a magazine, an identification card, articles of Mr. Mangione's clothing and other evidence recovered during the arrest.

B. The State and Federal Authorities Charge Mr. Mangione with the Same Murder and Same Firearm

11. While the FBI was conducting its investigation of Mr. Mangione, the NYPD dispatched Detective David Leonardi and other investigators to Altoona. As Detective Leonardi testified during the state suppression hearing, "I told Lieutenant Hanelly that it's possible that he is my person of interest, that I'm en route and I would like no one to speak to him and all of the property held." (Suppression Hearing Tr. at 1407.) Consistent with that directive, the NYPD arranged to both interview Mr. Mangione and to take custody of the physical evidence recovered by the Altoona Police Department by securing a seizure warrant. Ultimately, the NYPD took possession of the physical evidence, while the FBI retained photographs and other investigative materials documenting the evidence. Using the information and evidence gathered during the joint investigation, federal authorities prepared a criminal complaint charging Mr. Mangione with causing Brian Thompson's death. The federal authorities charged him with two counts of stalking with the intent to kill, and murder through the use of a firearm, for the shooting death of Mr. Thompson and, using, carrying and possessing a firearm during and in relation to the stalking offenses in the first two counts. The federal indictment charged these same four counts with the only difference being the statutory and non-statutory aggravating factors supporting capital punishment for the murder counts.

12. At approximately the same time, the District Attorney's Office secured an

indictment charging Mr. Mangione with first- and second-degree murder and related charges.

C. Mr. Mangione Appears First in Federal Court and Is Placed in Federal Custody

13. Mr. Mangione waived extradition from Pennsylvania to New York. On December 19, 2024, he was transported to New York City, where he was brought directly before the United States District Court for the Southern District of New York for an initial appearance on a federal criminal complaint charging the four federal offenses. This was Mr. Mangione's first appearance in either the federal or the New York prosecutions; as noted, he had already been charged by Pennsylvania authorities and presented to a judge in Pennsylvania on Pennsylvania charges. At his initial appearance in federal court, the federal court ordered Mr. Mangione detained, and he was remanded to federal custody at the Metropolitan Detention Center ("MDC"). Four days later, on December 23, 2024, Mr. Mangione made his first appearance in the New York case, after being produced from federal custody pursuant to a writ to appear before the Supreme Court of the State of New York. He was arraigned on the instant indictment and, following the proceeding, was returned to federal custody at the MDC. He has remained in federal custody at the MDC during the pendency of all three cases.

14. It is noteworthy that, while Mr. Mangione has been brought numerous times to New York State court proceedings, he has not been permitted to attend Pennsylvania court proceedings despite his desire to do so.

D. The Federal and New York State Charging Documents

15. Mr. Mangione has been indicted in New York state and federal courts as well as being charged in Pennsylvania. The New York state indictment charged Mr. Mangione with first-degree murder (Count One), second-degree murder as a crime of terrorism (Count Two), second-degree murder (Count Three), various weapons charges (Counts Four–Ten) and second-degree

possession of a forged instrument (Count Eleven).³

16. The federal indictment charged Mr. Mangione with causing death through stalking (Counts One and Two), the murder of Brian Thompson through use of a firearm (Count Three) and using, carrying and possessing a firearm (Count Four).⁴

E. The New York and Federal Cases Charging the Same Murder and Possession of the Same Firearm Proceeded at the Same Time

17. The New York state and federal prosecutions thereafter proceeded simultaneously. Because the shooting death of Mr. Thompson with a firearm during the crime of stalking was death-eligible as a capital offense, the defense prepared a written and verbal presentation to the Biden Administration's Capital Crimes Committee in hopes of convincing the federal government to not seek the death penalty.

18. In the New York state case, because the same shooting charged as a death-eligible murder in the federal case was charged as an act of terrorism by the District Attorney's Office, the defense litigated numerous motions resulting in the dismissal of the terrorism and first-degree murder charges. Throughout this period, the United States District Court repeatedly made clear that it intended to manage the federal case without regard to the pendency of the state case, noting that it had received no application from any party—or from the New York County District Attorney's Office—requesting that the federal proceedings be altered or delayed in deference to the state prosecution. In particular, at no time did the District Attorney advise the federal court that it believed it had primary jurisdiction over this matter or any other special position that entitled it

³The terrorism-related counts (Counts One and Two) were dismissed by this Court on September 16, 2025, and one count relating to a firearm magazine has also been dismissed as a result of an unlawful search of Mr. Mangione's backpack upon arrest in Pennsylvania.

⁴The firearm-related counts (Counts Three and Four) were dismissed by Judge Garnett on January 30, 2026.

to prosecute Mr. Mangione first. In fact, as the federal court explicitly stated, the District Attorney's Office did not contact the federal court at all, for any reason.

19. As defense counsel has repeatedly argued before this Court, the existence of simultaneous state and federal prosecutions, and particularly that the two governments planned and agreed that the state trial would go first, substantially prejudiced Mr. Mangione's ability to investigate and, if appropriate, present what may be a meritorious mitigation affirmative defense only available under New York law.

20. On April 17, 2025, the federal Court advised the parties that it intended to set a firm trial date in 2026 in the federal case. Unlike the New York case, the federal prosecution did not present the unique issues associated with a potential statutory affirmative defense. Consequently, assuming the federal capital allegations and related death-penalty issues were resolved, the federal case was expected to be trial-ready well before the state prosecution.

21. In December 2025, the parties conducted pretrial suppression hearings in the state case. On December 18, 2025 (the last day of the hearings), this Court adjourned the case to May 18, 2026, for decision. The prosecution asked the Court if it intended to set a trial date at the May 18th appearance, and the Court indicated that it would. In December 2025, however, no trial date had been set in either case.

22. On January 9, 2026, the federal Court discussed alternative trial schedules, observing that the then pending motion to dismiss the death penalty count could "significantly impact the trial timeline." (1/9/26 Tr. 4-5.) The Court considered separate schedules depending upon whether the case remained a capital case. The federal prosecutors and the defense proposed that, if the case became non-capital, jury selection would begin in early September 2026, with trial commencing in October 2026 (*Id.* at 89.) If the case remained capital, the parties proposed that

trial begin in January 2027. (*Id.* at 89–90.) The federal Court agreed with that framework. Consistent with that discussion, on January 23, 2026, the federal Court adopted the parties’ proposed schedule, setting jury selection for September 8, 2026, and trial for October 13, 2026, if the case proceeded as a non-capital prosecution, or January 11, 2027, if it remained a capital case. (1/23/26 Tr. at 3.)

F. The District Attorney’s Office and This Court Accelerate the State Trial Solely to Prevent the Federal Case from Proceeding First

23. On January 28, 2026, shortly after the federal Court announced its anticipated trial schedule, the District Attorney’s Office filed a letter requesting that this Court set a July 1, 2026, trial date—arguing that the state prosecution’s “right to a speedy resolution of this case would be severely compromised should the federal trial proceed first.” (1/28/26 Letter at 3.) The intended effect of that request was to ensure that the state prosecution would reach trial before the federal case so that the District Attorney’s Office could circumvent the statutory protections provided by New York’s double jeopardy law. This purpose was stated multiple times by the prosecution both on the record and at bench conferences. The defense made an extensive record as to why it could not be ready for trial at that time and requested additional time to continue its investigation.

24. Two days later, on January 30, 2026, the federal Court dismissed the death-eligible murder count of the federal indictment as well as the firearm count, and directed the federal government to advise the court by February 27, 2026, whether it intended to appeal the ruling. (1/30/26 Tr. at 4–5.) The federal Court further stated that it would “like things to continue to proceed on the assumption that we’re going to have a trial beginning on September 8.” (*Id.* at 4.) Consistent with that directive, on February 3, 2026, the federal Court issued a comprehensive Scheduling Order establishing deadlines for jury selection, pre-trial materials, motions, submissions and other proceedings in Mr. Mangione’s federal case. With the capital count

dismissed, and no affirmative defense available federally, the federal prosecution was positioned to be trial-ready well before the state case.

25. On February 5, 2026, defense counsel filed a written response opposing the District Attorney's Office's request for a July 1, 2026, trial date. In its opposition, the defense relied upon the federal Court's scheduling order, the extraordinary pretrial publicity surrounding the case, and the substantial additional time required to prepare the affirmative defense in the state case. There was absolutely no reason why this request could not have been granted: The case had not been pending for an unusually long period of time as compared to other state murder cases; the defense represented in detail why it needed additional time to investigate the affirmative defense due to no fault of the defense; the defense stated it would waive speedy trial; and there were no court calendar considerations that contributed to this timing.

26. Instead, the following day, February 6, 2026, this Court, *sua sponte*, advanced the trial to a date three weeks closer than the date requested by the People—setting trial for June 8, 2026—stating that “the Federal Government has reneged on their agreement to allow the state that did most of the work in this case to go first,” and therefore, “I’m going to set an earlier date than the Federal Government of June 8th for trial.” (2/6/26 Tr. at 2.) Rather than focusing on the constitutional consequences of requiring Mr. Mangione to defend the state prosecution with an affirmative defense before the federal case which has no affirmative defense, the Court based its scheduling decision on its understanding that the federal government had broken an agreement between the two sovereigns. According to this Court, the agreement was that the District Attorney's Office could proceed first *specifically* so it would not be subject to the Criminal Procedure Laws of New York, which would ban this case as a second prosecution.

27. The Court further stated that, if the federal government appealed the federal Court's

dismissal ruling, the state trial would instead commence on September 8, 2026. (*Id.* at 2-3.) Defense counsel immediately objected, explaining that the defense would be preparing for trial in the federal case beginning in April and, as a result, could not be ready to proceed with a June 8, 2026, trial in this matter. (*Id.* at 5.) As the defense repeatedly explained, because of the unique issues presented by an affirmative defense only available in the state case, the parallel prosecutions were necessarily progressing on different timelines.

28. The District Attorney's Office responded by arguing that the defense was attempting to "jeopardy [the state] out of the case" under "the New York statutory double jeopardy" statute. (*Id.* at 6.) The District Attorney's Office expressly acknowledged that, if the federal prosecution were to proceed first, the New York case "would be jeopardied out." (*Id.*) Reiterating their double jeopardy concerns, the prosecution further noted that this "is a delay that they're seeking to lock the courtroom to deprive us of our right to try this case." (*Id.* at 7.)

29. This record demonstrates that the prosecution's insistence on trying the state case first was driven not by trial readiness or case considerations, but by a desire solely to avoid the potential application of New York's statutory bar – grounded in Due Process – against successive prosecutions. Notwithstanding the defense's repeated representations that it could not be prepared to proceed for reasons wholly independent of the successive prosecution issue, the Court nevertheless directed defense counsel to "be ready on June 8th." (*Id.* at 8.)

30. On February 27, 2026, the federal government advised Judge Garnett that the Department of Justice would not seek interlocutory review of the dismissal of the death penalty count. As a result, the federal trial remained on track for a non-capital trial beginning September 8, 2026, while the state prosecution was scheduled to proceed on June 8, 2026.

31. The defense was now on the horns of a dilemma, because advancing an affirmative

defense in the state case would jeopardize Mr. Mangione's chances in the federal case (which does not have the affirmative defense). The defense therefore had no choice but to seek an adjournment of the federal trial on March 18, 2026, so that counsel could attempt to meet this artificially compressed state court timetable. The federal Court granted that request on April 1, 2026. The effect of the defense's application was to postpone the federal prosecution solely because the District Attorney's Office insisted that the state trial proceed first, causing an insurmountable constitutional dilemma depriving Mr. Mangione of an affirmative defense created by the New York State Legislature.

32. Thereafter, this Court adjourned the state trial to September 8, 2026, acknowledging on the record that the trial "was never supposed to start in June." (6/3/26 Tr. at 11.) That acknowledgment is consistent with the defense's position that the June 2026 trial date was not driven by any legitimate case-management need but was instead selected for the purpose of ensuring that the state prosecution reached trial before the federal case. Although the June date was ultimately abandoned, the constitutional violations remained unchanged. By setting the state trial for September 8, 2026, a date intentionally devised to cause Mr. Mangione to be prosecuted twice for the same criminal incident, the Court continued to prioritize the sequencing of the prosecutions over Mr. Mangione's ability to exercise his constitutional rights and to obtain the benefit of New York's double jeopardy law.

33. At the June 3, 2026, appearance, defense counsel made the following record: "the People have been desperate for this case to go first because they know that if the federal case, which is in a different posture goes first, that the murder charges there will double jeopardy out the murder charges here." (6/3/26 Tr. 11.) The District Attorney's Office did not dispute that characterization. Indeed, the prosecution argued that the defense was deliberately attempting to

“jeopardy out the [state] case,” and deprive the prosecution of their day in court. (*Id.* at 15, 17-19.) This record reflected that the District Attorney’s Office and the Court understood precisely what was at stake: the sequencing of the federal and state trials would determine whether New York’s double jeopardy statute would apply. Nevertheless, the negative constitutional consequences of forcing Mr. Mangione to try the state case first remained unaddressed.

34. The District Attorney’s Office again raised its double jeopardy concerns in a July 2, 2026, letter where the prosecution stated the following:

The People are aware of public reporting regarding the possibility of a guilty plea in defendant’s federal case. If a proposed federal guilty plea would operate to defeat a just outcome in the state prosecution, the People could advise the federal district court of that consequence, and the court should consider that fact in deciding whether to accept the plea, as well as any opposition by the victim’s family to such a resolution.

(7/2/26 Letter at 2.) While not using the term “double jeopardy,” the prosecution’s letter demonstrated its concern that a federal plea “would operate to defeat a just outcome in the state prosecution” because the state would be statutorily barred from prosecuting that case. The District Attorney’s Office has been well-aware from the commencement of the two cases that a guilty plea in the defendant’s federal case would prevent the state from further prosecution of the second-degree murder count and weapons possession counts in this case.

35. Earlier today, the defendant appeared in United States District Court for the Southern District of New York and entered a guilty plea to the two remaining counts of a federal indictment charging him with stalking Brian Thompson with the intent to kill him on December 4, 2024, in Manhattan. As part of today’s plea allocution, Mr. Mangione admitted that he possessed a loaded firearm that was equipped with a silencer and a magazine that he used to shoot and kill Brian Thompson. Today’s guilty plea in federal court “terminates” the federal proceeding, within the meaning of New York’s double jeopardy law. As a result, this federal proceeding is a “previous

prosecution” such that this New York State proceeding is now a “second prosecution” under the law.

36. There is no dispute that the state and federal prosecutors each charged the identical murder—specifically the murder of Brian Thompson on December 4, 2024, in Manhattan—and that each alleged that the murder was committed with the same firearm—specifically the same one that was in Mr. Mangione’s possession when arrested in Pennsylvania. Accordingly, the District Attorney’s Office is precluded from prosecuting him further on the murder and firearms counts for two reasons. First, because doing so, under these specific facts, violates Mr. Mangione’s Fifth Amendment right to Due Process of Law. Second, because CPL § 40.20 bars them from doing so.

III. THE SECOND-DEGREE MURDER AND WEAPONS POSSESSION COUNTS SHOULD BE DISMISSED DUE TO A VIOLATION OF DUE PROCESS

37. “Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.” *Gamble v. United States*, 587 U.S. 678, 738 (2019) (Gorsuch J., dissenting) (quoting *Bartkus v. Illinois*, 359 U.S. 121, 151 (Black, J., dissenting)). “Throughout history, people have worried about the vast disparity of power between governments and individuals, the capacity of the state to bring charges repeatedly until it wins the result it wants, and what little would be left of human liberty if that power remained unchecked.” *Gamble*, 587 U.S. at 738. “The Old Testament and later church teachings endorsed the bar against double jeopardy”; “the Roman Republic and Empire incorporated a form of double jeopardy protection in their laws”; and “the laws of ancient Athens held that ‘a man could not be tried twice for the same offense.’” *Id.* (quoting Z. Brooke, *The English Church and the Papacy*, 204-205 (1931); Digest of Justinian: Digest 48.2.7.2, translated in 11 S. Scott, *The Civil Law* 17 (1927); R. Bonner, *Lawyers and Litigants in Ancient Athens* 195 (1927)). “The rule against double jeopardy

was firmly entrenched in both the American colonies and England at the time of our revolution.”
Gamble, 587 U.S. at 739.

38. However, federal jurisprudence has reduced centuries of double jeopardy traditions to rubble through the following sleight of hand: “an offense is defined by a law, and each law is defined by a sovereign. So, where there are two sovereigns, there are two laws, and two offenses.” *Id.* This syllogism allows someone to be prosecuted 51 times for the same offense without violating the Fifth Amendment Double Jeopardy clause because each state and the federal government has its own body of laws. Here, however, the constitutional violation committed by virtue of the two governments acting in concert to deprive Mr. Mangione of a legislatively created affirmative defense is not dependent on the Fifth Amendment’s Double Jeopardy clause but rather the Due Process clause. Accordingly, rather than exhuming the once vital doctrine of constitutional double jeopardy, we leave it dead in the earth, where the Supreme Court buried it decades ago, and turn instead to due process to avenge this wrong.

39. The damage and prejudice suffered by Mr. Mangione in connection with the dual New York/federal prosecutions here is not their serial nature but rather that the two sovereigns acted in concert with each other, and that they specifically did so to best ensure that each got their chance to prosecute and convict Mr. Mangione, and that the Criminal Procedure Law of this State would not interfere with this coordinated effort. Moreover, the damage and prejudice here is due to the concerted efforts of the District Attorney’s Office to try the state case, which has an affirmative factual defense, before the federal case, which does not.

40. This presented Mr. Mangione with an intractable constitutional dilemma where he would have to choose between which case to defend. By defending the state case and availing himself of the affirmative defense New York law provided him, he would necessarily implicate

himself in the federal case. This, ostensibly, was the District Attorney's Office's and the federal government's plan all along: make the state go first so Mr. Mangione would have to face prosecutions for the identical conduct in two jurisdictions and further ensure that he could not avail himself of New York's affirmative defense to murder or else virtually assure a federal conviction. While this was an especially difficult and unconstitutional conundrum when the federal case carried the death penalty, it is barely less so now that the federal case is punishable by life in prison.

41. Notably, double jeopardy has not been held to violate Fifth Amendment due process only because the states and federal government are seen as independent sovereigns, and each is believed to have the "right" to prosecute its own laws. *See Bartkus v. Illinois*, 359 U.S. 121 (1959); *see also Heath v. Alabama*, 475 U.S. 82 (1985). However, where, as here, two sovereigns did not operate independently, but instead forged an agreement between them to try a defendant twice for the identical conduct and to do so in a way to prejudice his New York affirmative defense while also avoiding New York's double jeopardy legislation, this case is well outside the realm of typical double jeopardy cases.

42. The constitutional violation created here is not double jeopardy alone but the elimination of due process, specifically the ability of a criminal defendant to fully and fairly pursue an affirmative defense that the legislature of this state explicitly afforded him. The Supreme Court has stated that "due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept . . . What is fair in one set of circumstances may be an act of tyranny in others." *Snyder v. Massachusetts*, 291 U.S. 97 (1934). "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

43. Moreover, the agreement between the two prosecutor's offices to maximize the punitive effectiveness of the two cases at the expense of Mr. Mangione undercuts the separate sovereign rationale of the federal double jeopardy jurisprudence. Simply put, if two sovereigns agree on a plan to prosecute two criminal cases charging the same exact criminal event—in this case a single murder—so as to maximize each of their chances of gaining convictions and achieving the greatest degree of punishment, they are acting as a single sovereign, one prosecuting the same man twice for the same event.

44. The State of New York created an affirmative defense, where the burden of proof is on the defendant. In addition to the burden of proof being on the defendant at trial, the defendant has an additional notice obligation to provide a wide variety of information to the District Attorney's Office before the trial begins. Accordingly, to avail himself of the affirmative defense, the defendant has an affirmative obligation to come forward with facts and information in advance of trial that would substantiate his affirmative factual defense or else run the risk that the Court precludes his affirmative defense. The Court here was very clear that unless Mr. Mangione came forward with particular information relevant to his proffered affirmative defense that the Court would preclude him from advancing it. However, if Mr. Mangione abided by the Court's order, he would be making factual admissions in both the State and federal cases.

45. Where, as here, the laws of a state impose affirmative defenses on criminal defendants, and further require them to provide meaningful factual information concerning that defense pretrial, courts must be especially vigilant to avoid violating certain basic constitutional rights—including the right to remain silent, the right to have the prosecution bear the full burden of proof, and the right to advance a trial defense. Even without a second, federal prosecution tipping the balance as to each of these rights, the Supreme Court has repeatedly indicated that

while affirmative defenses are not per se unconstitutional, they do present acute constitutional risks. *See Patterson v. New York*, 432 U.S. 197 (1977).

46. The facts here amount to a clear violation of due process. First, the two governments planned the order of prosecution specifically so the state case went to trial first. The consequence of that planned arrangement between the sovereigns is that the New York case would not be statutorily barred by the federal case and that Mr. Mangione would necessarily be put in a Hobson's choice where to advance the affirmative defense to reduce murder to manslaughter, he would necessarily have to admit to facts that would be used by the federal prosecutors to convict him. Second, this Court demanded that in order to avail himself of the affirmative defense, Mr. Mangione was compelled to provide well in advance of trial the specific basis of his defense and how he intended to prove it. The Court further stated that unless Mr. Mangione's factual proffer was sufficiently detailed, the defense would be precluded, and he would have to try the state case without that defense.

47. We are unaware of a single other case with this combination of circumstances in the history of prosecutions in this country. Of course, it does sometimes happen that the state and federal governments try the same person for similar offenses. But we have not found a single case where the defendant is forced to abandon his rights by advancing an affirmative defense that would require him to admit conduct to one sovereign that would be used by another sovereign to convict him. Even more remarkable—and similarly without any precedent—is this dynamic being deliberately orchestrated as the product of a plan between the state and federal governments at the outset of both cases.

IV. NEW YORK'S DOUBLE JEOPARDY LAW REQUIRES DISMISSAL OF THE STATE MURDER AND WEAPONS POSSESSION CHARGES

48. In addition to violating due process, continuing the state prosecution after Mr. Mangione's federal plea also violates New York's double jeopardy law that provides a type and degree of double jeopardy protection not historically provided by the U.S. Constitution. The greater protection provided by CPL § 40.20 against dual sovereign prosecutions has been long recognized by the New York Court of Appeals. *See, e.g., Polito v. Walsh*, 8 N.Y.3d 683, 690 (2007) ("New York does indeed have relatively broad statutory protection against double jeopardy, and our statutory law does reject, in large part, the dual sovereignty doctrine."); *People v. Rivera*, 60 N.Y.2d 110, 114 (1983) ("This statutory prohibition against separately prosecuting a person for the same offense was enacted primarily to supersede the 'dual sovereignties' doctrine which permitted successive State and Federal prosecutions based on the same transaction or conduct and it extended protection for second prosecutions beyond that required by the constitutional double jeopardy clause."); *People v. Abbamonte*, 43 N.Y.2d 74, 81 (1977) ("Under 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."); *Abraham v. Justs. of New York Supreme Ct. of Bronx Cnty.*, 37 N.Y.2d 560, 565 (1975) ("Invoking the so-called 'dual sovereignties' doctrine, the United States Supreme Court has held that a subsequent State prosecution based on the same facts and conduct underlying a prior Federal prosecution is *not* violative of the double jeopardy proscription. . . . The 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." (citation omitted)).

49. Under New York's double jeopardy law, a "person may not be separately prosecuted for two offenses based upon the same act or criminal transaction." CPL § 40.20(2). To understand the scope of this provision, there are four terms that must be further examined: "prosecuted," "offense," "act" and "criminal transaction." The term "prosecuted" in the statute is defined as follows:

a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

- (a) Terminates in a conviction upon a plea of guilty;
- (b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

CPL § 40.30(1); *see also* 9/16/25 Decision at 11 (noting that New York's statutory double jeopardy law "is triggered . . . when a prior prosecution ends in a conviction by guilty plea, or once a jury has been sworn."). As relevant here, the federal government charged Mr. Mangione by a criminal complaint and an indictment, each of which were filed in federal court. The federal prosecution was terminated as of this morning upon a plea of guilty to the two remaining counts of the indictment in full satisfaction of all federal charges.

50. The definition of "prosecuted" under CPL § 40.20(2) includes the term "conviction," which also must be defined. New York law has defined the term "conviction" as "the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument." CPL § 1.20(13). Given this definition, the phrase "[t]erminates in a conviction upon a plea of guilty" used in CPL § 40.30(1) specifically includes a guilty plea even when the defendant has not yet been sentenced.⁵

⁵Instead of "conviction," the CPL uses the term "judgment" in a situation where a defendant is convicted and sentenced. CPL § 1.20(15).

51. Under Penal Law § 10.00(1), the term “offense” means “any conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any other order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.” Offense is defined also in CPL 40.10(1), in part, as follows: “an ‘offense’ is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violated two or more such statutory provisions each such violation constitutes a separate and distinct offense.

52. The term “act” is defined as a “bodily movement.” Penal Law § 15.00(1).

53. The term “criminal transaction” means “conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.” CPL § 40.10(2).

54. Based on these definitions, CPL § 40.20(2)—with exceptions that will be addressed below—prevents separate prosecutions, by any sovereign, where the offenses are based on the same act or the same criminal transaction. Significantly, the statute does not limit the preclusion to offenses that have the same elements or means of commission. Nor does the statute require that all acts committed as part of one offense be committed as part of the other or that the criminal transactions be precisely identical. The two offenses need only be based on the same act or transaction. For example, there could be other aspects of conduct, like an act impacting interstate commerce in a federal offense that would not exist in the state, that do not defeat the two crimes being based on the same act or criminal transaction. If that were the case, a federal prosecution

would never lead to the preclusion of a New York prosecution under CPL § 40.20. Rather, the same acts or criminal transactions need only be the basis for the two offenses at issue.

55. Applying the CPL to the facts here compels dismissal of Counts Three through Ten in this case. All the acts Mr. Mangione has now admitted to doing on the morning of December 4, 2024 were part of the same criminal transaction. Specifically, he possessed the gun, the magazine, and the silencer to shoot Mr. Thompson. The actions comprising each of these offenses occurred virtually at the same time and in the same location all with the same purpose. For instance, there is no view of the facts that Mr. Mangione stalked Mr. Thompson aside from the actions on the morning of December 4, 2024. The full range of conduct that comprises the stalking offense is coterminous with the conduct committed as part of the murder offense. As a result, under subdivision (a) above of the definition of criminal transaction, each of the two or more acts comprising this conduct was “so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident.” Each of those acts likewise constitute the federal offense of stalking with the purpose of killing Brian Thompson. That Mr. Mangione traveled from out of state in order to be at the crime scene at the time of the shooting does nothing to eliminate the stalking of Mr. Thompson from the acts constituting his murder. They are all part of the same criminal incident or criminal transaction, as defined by CPL § 40.20.

56. Here, Mr. Mangione is charged separately by the state and federal governments for the same act of shooting and killing Brian Thompson. CPL § 40.20(2), however, provides that a “person may not be separately prosecuted for two offenses based upon the same act or criminal transaction.” On August 14, 2026, Mr. Mangione pleaded guilty in federal court to causing Brian Thompson’s death through stalking. Under CPL §§ 40.20’s and 40.30’s statutory framework, Mr. Mangione’s federal plea is a prosecution that terminated in a “conviction upon a plea of guilty,”

and would therefore bar the state from separately prosecuting Mr. Mangione for murder because both prosecutions are based on the same exact act. Accordingly, Count Three of the indictment charging second-degree murder must be dismissed.

57. In addition to Mr. Mangione's federal stalking plea, there is a second legal basis for barring the second-degree murder count under CPL § 40.20. Specifically, Mr. Mangione was originally charged federally with four counts: Stalking (Counts One and Two), Murder Through Use of a Firearm (Count Three) and another firearms offense for using, carrying and possessing a firearm (Count Four). On January 30, 2026, Judge Garnett dismissed Counts Three and Four of the federal indictment. Nevertheless, under CPL § 40.30(1), these dismissed counts can still be an independent basis for double jeopardy. This is because CPL § 40.30(1)(a) states that, under New York's double jeopardy law, a person "is prosecuted" for an offense . . . when he is charged therewith by an accusatory instrument filed in a court of this state or any other jurisdiction within the United States, and when the action . . . [t]erminates in a conviction upon a plea of guilty."

58. This language in CPL § 40.30(1)(a) is unequivocal that the defendant need only be charged with an offense and that the action in which the offense was charged be resolved with a plea. Notably, there is no requirement that the defendant plead guilty to every specific offense. Consequently, under this statutory language, just because a charge was dismissed before trial does not prevent New York's double jeopardy law from applying as long as the defendant was charged with that offense and the action was terminated by a guilty plea.

59. Accordingly, Mr. Mangione is deemed to have been "prosecuted" for Murder Through the Use of a Firearm and the federal firearms offense (Counts Three and Four of the federal indictment) because (1) he was charged with those offenses in an accusatory instrument

filed in federal court; and (2) the “action” (i.e., the federal prosecution) in which those offenses were charged was terminated in a conviction based on a guilty plea.

60. While this additional basis for double jeopardy obviously bars the state from prosecuting its second-degree murder charge—because the state murder charge and the federal Murder Through Use of a Firearm are based on the same act or criminal transaction under CPL § 40.20(2), i.e., the murder of Brian Thompson—it also bars the state from prosecuting its firearms charges as well. This is because the state firearms charges⁶ are all based on Mr. Mangione’s possession and use of a firearm on December 4, 2024, to shoot and kill Brian Thompson, which is the same exact firearm and basis for the federal charges of Murder Through Use of a Firearm and the use, carrying and possession of a firearm. Because the state and federal firearms charges are based on the same act or criminal transaction, the resolution of the federal firearms charges bars the subsequent prosecution of the state firearms charges.

V. THE EXCEPTIONS TO NEW YORK’S DOUBLE JEOPARDY LAW DO NOT APPLY

A. CPL § 40.20(2)(b)

61. CPL § 40.20(2) lists nine exceptions to New York’s general bar on successive prosecutions based on the same act or transaction. Although none of them exist in this case, counsel will address the exception listed in CPL § 40.20(2)(b) because that is the exception that the District Attorney’s Office has tried to rely in previous cases. That exception provides as follows:

A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless: (b) Each of the offenses as defined contains an

⁶The same firearm was charged in multiple counts in the New York indictment due to the different facets of the firearm, including that it had a suppressor, an extended magazine, that it was allegedly defined as an assault weapon and fit the definition of “ghost gun.” Regardless of how many different ways the state charged the gun, it is the same gun charged by the federal prosecutors and was involved in the same criminal transaction as the federal offenses.

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.

CPL § 40.20(2)(b).

62. For this exception to apply, both factors must be present, since the statute is written in the conjunctive. As to the first factor—that each offense contains an element that is not the element of the other—counsel acknowledges that the state and federal charges have different elements. It has been well established that this factor alone is not sufficient to trigger this exception as it must satisfy both factors. *People v. Manafort*, Decision and Order at 13–15 (Judge Maxwell Wiley) (N.Y. Sup. Ct. Dec. 18, 2019) (attached as Ex. A).

63. The second factor, however, is the problem for the District Attorney’s Office. It cannot establish that “the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil.” As the Court of Appeals has noted, although the “different harm or evil” exception could have been “potentially quite broad,” it “has been legislatively narrowed” by the requirement that the “‘harm or evil’ to be addressed by the separate prosecutions be analyzed by reference to the ‘statutory provisions defining such offenses’ rather than to the particular criminal acts charged.” *Kaplan v. Ritter*, 71 N.Y.2d 222, 229 (1987). Accordingly, the “demanding requirements” to establish the exception under 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.” *Id.* at 230.

64. Given the broad protections of New York’s double jeopardy law and the “demanding requirements” of the CPL § 40.20(2)(b) exception, “it is clear that the statutory exception, in line with providing broader protection against double jeopardy, contemplates a significant and meaningful difference in the types of harms addressed before the exception will apply.” *People v. Manafort*, Decision and Order at 16. Put differently, “[w]here the harms or evils

contemplated by the differing statutes are generally similar, the courts will find that the exception under CPL 40.20(2)(b) does not apply.” *Id.*

65. In examining the harms or evil addressed by the different statutory schemes, the Court should be mindful that the legislature requires that the schemes address “very” different kinds of harm or evil. Mere differences or slight differences are insufficient to trigger the exception. The kinds of harm or evil addressed by the statute must be very different from each other. Otherwise, the exception does not apply.

66. For example, in *Wiley v. Altman*, 52 N.Y.2d 410 (1981), the defendant was prosecuted in New York for murder and in Maryland for conspiracy to commit the same murder. After being acquitted in the Maryland case, the defendant moved to dismiss the New York murder indictment based on New York’s double jeopardy law. On appeal, the Court of Appeals first noted that CPL § 40.20 “legislatively nullified” the dual sovereigns doctrine in New York, and that the prosecution did not dispute that the New York and Maryland prosecutions stemmed from the same criminal transaction as defined by CPL § 40.10(2). *Id.* at 413–14.

67. The Court then analyzed the prosecution’s claim that the “different kind of harm or evil” exception under CPL § 40.20(2)(b) applied. The Court rejected the prosecution’s argument. The Court noted that, although the defendant was charged with conspiracy (not murder) in Maryland, the conspiracy charge “permit[ted] the same punishment as that proscribed for the object crime to which a conspiracy is directed, in this case life imprisonment.” *Id.* at 414. The Court then noted:

Clearly, then, both the Maryland prosecution, based though it was on that State’s conspiracy statute, and the present prosecution for murder this State’s laws were directed at a like goal; punishment for the unlawful taking of a particular human life.

Id. Because the “governmental interests” were the same in both prosecutions, the Court found the CPL § 40.20(2)(b) exception inapplicable. *Id.* at 414–15.

68. The same analysis applies in this case and the result should be the same. As noted in *Wiley v. Altman*, the goal of New York’s murder statute is “punishment for the unlawful taking of a particular human life.” *Id.* at 414. Under the second basis for double jeopardy argued above—that the state murder charge is barred because of the federal Murder Through Use of a Firearm charge—both statutes involve murder and both share the same exact goal.

69. The same is true for the first basis for double jeopardy argued above—the federal stalking charge (18 U.S.C. § 2261A) that Mr. Mangione was charged with and that he pleaded guilty to on August 14, 2026. That statute prohibits a defendant from traveling interstate (as charged on Count One of the federal indictment) or using a facility of interstate commerce (as charged in Count Two of the federal indictment) to engage in conduct that places a victim in reasonable fear of death or serious bodily injury and where death resulted. It is precisely why Mr. Mangione is potentially facing up to life in prison for this offense, because it involves intentional conduct of taking someone’s life.

70. In addition, the penalty provision of the stalking statute (18 U.S.C. § 2261(b)(1)), specifically provides that, if the victim dies as the result of the defendant’s violation of the stalking statute, the defendant shall be imprisoned “for life or any terms of years.” Accordingly, when all aspects of the federal stalking statute are read together (*i.e.*, the elements portion of 18 U.S.C. § 2261A and the penalty portion of 18 U.S.C. § 2261(b)), it also punishes a defendant for the unlawful taking of a particular human life—the exact same goal as New York’s murder statute.

71. When considering the nature of the stalking offense, it must be noted that the sentencing scheme for the charged stalking offense is precisely the same as for the Murder Through

Use of a Firearm offense that was dismissed by Judge Garnett with a single difference: the murder charge is punishable under the murder statute by the death penalty and the stalking offense is punishable by a maximum of life in prison. The Sentencing Guidelines calculation for the two offenses, however, is precisely the same. This shows that the gravamen of the stalking with intent to kill offense and the murder offense is the same: the loss of human life, requiring the highest degree of punishment available under the law.

72. On the topic of Sentencing Guidelines, we can further represent to this Court that the federal government will take the position at sentencing that Mr. Mangione's Sentencing Guidelines should be calculated based on the base sentencing level for first-degree murder, which is a level 43, the highest level recognized by the Guidelines. Because Mr. Mangione has entered a guilty plea, rather than proceeding to trial, the base level of 43 will be reduced by two levels. The resulting adjusted level is 41. Additionally, because the entry of this guilty plea was sufficiently in advance of the federal trial that the government was saved prosecution resources, Judge Garnett will likely reduce the level by an additional one point. With this calculation—which is likely (but not definitely) to be argued by the government—the final adjusted offense level would be a level 40. Because Mr. Mangione has no criminal history, he will have no criminal history points, which would put him in a criminal history category of I. At a level 40 with a criminal history category of I, the suggested Guidelines range is between 292 and 365 months in prison. In terms of years, this range is between 24 years and four months and 30 years and five months. The point of course is that Mr. Mangione stands to be sentenced as though his crime was first-degree murder, according to the government. Any suggestion, therefore, that the federal offenses to which he has pleaded guilty do not firmly focus and account for the intentional loss of human life is belied by the Guidelines likely applicable to these crimes.

73. Moreover, the federal Court’s ruling that stalking is not a crime of violence is irrelevant in determining whether New York’s murder statute and the federal stalking statute were designed to prevent very different kinds of harm or evil. Specifically, on January 30, 2026, Judge Garnett dismissed Counts Three and Four of the federal indictment against Mr. Mangione charging Murder through Use of a Firearm under 18 USC § 924(j) and using, carrying and possessing a firearm under 18 USC § 924(c). In her ruling, Judge Garnett found that these counts—one of which potentially carried the death penalty—required that the stalking charges in Counts One and Two were “crimes of violence” as defined under federal law.

74. At the outset of her analysis, Judge Garnett noted the “apparent absurdity of the inquiry” whether stalking was a crime of violence given that Mr. Mangione was charged with

selecting a stranger to be killed based on his employment; carefully planning the killing, including identifying where and when the selected victim would be most vulnerable; traveling across multiple states to carry out that killing; and then gunning the victim down on a public street in midtown Manhattan, using a handgun equipped with a silencer.

United States v. Mangione, 818 F. Supp. 3d 509, 515–16 (S.D.N.Y. 2026). As Judge Garnett noted, “No one could seriously question that this is violent criminal conduct.” *Id.* at 516.

75. Nevertheless, Judge Garnett noted that, “regardless of its own views, a district court is duty-bound to follow binding Supreme Court precedent.” *Id.* After careful consideration of this precedent, Judge Garnett determined that the crime of Stalking under 18 U.S.C. § 2261A (as charged on Counts One and Two of the federal indictment) were not crimes of violence as defined under federal law because it was possible to commit these crimes without the knowing or intentional use, attempted use, or threatened use of violent force against the person or property of another.

76. Notably, the determination that the federal stalking statute was not a crime of violence was limited to the context of whether Counts Three and Four of the federal indictment met the required statutory elements. Judge Garnett was not defining the purpose of the federal stalking statute or what harm it was meant to prevent. In other words, even though a specific federal crime is not “a crime of violence”—a term of art defined by federal law—that federal crime can still be meant to prevent violent conduct. In fact, several other violent crimes have also been found not to be crimes of violence under federal law. *See, e.g., United States v. Lung'aho*, 72 F.4th 845, 847, 851 (8th Cir. 2023) (arson is not a “crime of violence”); *United States v. Walker*, 934 F.3d 375, 379 (4th Cir. 2019) (kidnapping is not a “crime of violence”). Even first-degree murder itself—the most violent of crimes—was recently found not to be a “crime of violence” under federal law. *See United States v. Ahemeid*, 819 F. Supp. 3d 143, 158 (E.D.N.Y. 2026) (“first-degree murder under 18 U.S.C. § 1111(a) is not a categorical crime of violence.”).

77. Accordingly, because the state murder statute and the federal stalking statute were designed to prevent the same kind of harm or evil—the unlawful taking of a human life—the District Attorney’s Office cannot establish that the CPL § 40.20(2)(b) exception to New York’s double jeopardy law applies. Accordingly, the remaining second-degree murder count (Count Three) must be dismissed.

78. The state firearms counts must likewise be dismissed under the second basis for double jeopardy argued above. Here, Mr. Mangione possessed a single firearm, the one recovered from his backpack in Altoona, Pennsylvania. That firearm has now been charged in all three jurisdictions. It was charged as an unlawful firearms offense in Pennsylvania. It was charged in multiple counts in the New York indictment. It was charged in the federal indictment in two counts: Murder Through Use of a Firearm and the use, carrying and possession of a firearm. As argued

above, although those federal counts were dismissed pretrial, they are still a basis for double jeopardy. Because those federal statutes were intended to prohibit and punish the illegal use of a firearm—the same exact harm addressed by the state firearms counts—the District Attorney’s Office cannot establish that the CPL § 40.20(2)(b) exception to New York’s double jeopardy law applies.

B. CPL § 40.20(2)(f)

79. Another exception to New York’s double jeopardy law is listed as follows in CPL § 40.20(2)(f):

One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state.

80. This exception has no application here. Under the first basis for double jeopardy (Mr. Mangione’s federal stalking plea), the stalking charge was never terminated by “a court order expressly founded upon insufficiency of evidence to establish some element of such offense,” as contemplated by this exception.

81. The same is true under the second basis for double jeopardy (the dismissed federal murder and firearm counts). Although the federal Court dismissed those counts pretrial, the dismissal was because both those charges only applied if Mr. Mangione committed them while committing a crime of violence as that term is defined under federal law. The only alleged crime of violence in the federal indictment were the stalking charges (Counts One and Two). After ruling that the federal stalking charges were not crimes of violence, Judge Garnett dismissed the federal murder and firearm offenses as a matter of law because the government failed to meet the necessary elements of those crimes. Accordingly, the termination of these charges was based solely on required legal elements and had nothing to do with the sufficiency of the evidence. In fact, Judge

Garnett's decision did not analyze any of the evidence against Mr. Mangione. Because the § 40.20(2)(f) exception applies only if the dismissal was based on the insufficiency of the evidence, that exception does not apply here.

VI. CONCLUSION

82. For all the reasons stated above, this Court must dismiss the remaining second-degree murder count (Count Three) and the weapons possession counts (Counts Four through Ten) pursuant to CPL § 40.20 given Mr. Mangione's August 14, 2026, guilty plea in federal court to causing Brian Thompson's death through stalking. In addition, the Court must dismiss these counts as the particular dual prosecutions here violated the defendant's rights under the Fifth Amendment.

Dated: August 14, 2026
New York, NY

Respectfully submitted,



Karen Friedman Agnifilo
Marc Agnifilo
Jacob Kaplan

Counsel for Luigi Mangione

cc: District Attorney's Office (via email)

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

----- X
THE PEOPLE OF THE STATE OF NEW YORK, : **DECISION AND ORDER**
INDICTMENT NO. 774/19
-against- :
PAUL J. MANAFORT, JR., :
Defendant. :
----- X

MAXWELL WILEY, J.:

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

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

Procedural and Factual History

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

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

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

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

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

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

Legal Analysis

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

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

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

Previous prosecution

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

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

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

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

CPL 40.30(4) reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Double jeopardy exception

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

CPL 40.20(2)(b) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This legislation also makes a number of important improvements to fraud and money laundering statutes to strengthen prosecutors' ability to combat this growing wave of fraud. Specifically, the bill amends the definition of 'financial institution' in the criminal code (18 U.S.C. §20) in order to extend Federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the Federal Government. These companies were responsible for nearly half the residential mortgage market before the economic collapse, yet they remain largely unregulated and outside the scope of traditional Federal fraud statutes. This change would apply the Federal fraud laws to private mortgage businesses, just as they apply to federally insured and regulated banks.

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

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

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

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

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

In 1976, the crime of scheme to defraud, in two degrees [Penal Law §§ 190.60, 190.65], was added to the Penal Law. L.1976, c. 384. The crime was designed to overcome some of the shortcomings of the larceny statutes as applied to various forms of fraud, *including* consumer fraud. *See* Givens, Additional Practice Commentary to Penal Law §190.60, McKinney's Penal Law (Pocket Part 1988).

Unfortunately, schemes to defraud are limited only by the imaginations of those who would prey on others. These sections are designed to be sufficiently definite in the meaning of their terms, and yet sufficiently flexible in application to encompass the myriad schemes to defraud, in order to punish, if not deter, those who commit them.

(Emphasis added) William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY,

2019 Electronic Version, Penal Law §190.65. Indeed, the statute has not been so narrowly

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

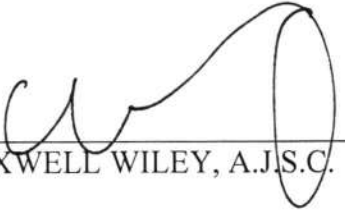
In concluding that the prosecution of the indictment before this Court is barred by New York’s double jeopardy law, the Court has been guided by the well-reasoned arguments presented by both parties. Each party has narrowed the issues to what this court considers to be the core analysis: whether the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

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

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

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

DATED: New York, New York
December 18, 2019


MAXWELL WILEY, A.J.S.C.