

life or limb[.]” U.S. Const. amend. V. The purpose of the Fifth Amendment is to protect a person from a second prosecution for the same offense after acquittal, from a second prosecution for the same offense after conviction, and from multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410, 415 (1980).

Title 18 U.S.C. § 1344 (Count Seven) provides in relevant part:

Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution;
or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of a false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. § 1014 (Count Eight) reads in relevant part:

Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, loan, or insurance agreement or application for insurance or a guarantee, or any change or extension of

any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

The government may not prosecute a defendant for charges which are multiplicitous. See Vitale, 447 U.S. at 419-21. The Supreme Court, in Blockburger v. United States, 284 U.S. 299 (1932), set forth the test to make this determination. The Court, without reference to the double jeopardy clause, stated:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

Id. at 304.

Count Seven charges Shulick, a lawyer, under § 1344 with a scheme to defraud PNC Bank from around November 2009 until around July 2010. The indictment alleges that Shulick falsely represented to the bank that his employee and client Chaka Fattah, Jr. was making very little money to repay the \$17,000 balance on his PNC loan when in reality he was receiving a salary of \$75,000 per year in 2009. It also alleges that Shulick concealed from the bank an agreement he had made with Fattah to pay him a much higher salary in 2010 and that he

falsely submitted a form to the bank stating that Fattah's monthly income was only \$2,500. According to the indictment, the purpose of the purported scheme was to obtain a favorable settlement of Fattah's debt obligation.

Count Eight charges Shulick under § 1014 with making a false statement to PNC Bank for the purpose of influencing in any way the action of the bank in dealing with the loan it had made to Fattah. Specifically, Shulick purportedly submitted a form on behalf of Fattah that falsely stated Fattah's income was only \$2,500 per month.

The court agrees with Shulick that the two counts arise out of his interactions with PNC Bank in connection with Fattah's loan. This same factual predicate, however, is not dispositive in determining multiplicity. Dixon, 509 U.S. at 703-12; United States v. Hodge, 211 F.3d 74, 78 (3d Cir. 2000); United States v. Hoffman, 148 F. App'x 122, 128 (3d Cir. 2005). The critical question is not whether the counts involve the same facts but whether each of the offenses charged has one or more elements that are not included in the other offense. If this difference exists, there is no multiplicity, and the government may prosecute both counts. On the other hand, multiplicity is present and one of the counts must be dismissed where the proof of one count is always necessary to prove the other count. See Vitale, 447 U.S. at 419-21.

Section 1344 (Count Seven) requires proof that Shulick knowingly executed or attempted to execute "a scheme or artifice to defraud PNC Bank or to obtain money or credits by false or fraudulent pretenses, representations, or promises." To convict, the fraud or falsehoods must be material. Neder v. United States, 527 U.S. 1, 20-25 (1999). The scheme or artifice and the materiality elements of § 1344 are not elements of § 1014 (Count Eight). See United States v. Wells, 519 U.S. 482 (1997). Thus § 1344 requires proof of elements not found in § 1014.

Section 1014 likewise contains elements absent from § 1344. Contrary to defendant's argument, § 1014 (Count Eight) is not a lesser included offense vis-à-vis § 1344. Section 1014 requires proof that the defendant made a false statement with the intent to influence the action of PNC Bank in any way to make or change a loan or advance. The false statement requirement of § 1014 is not an element of § 1344. See United States v. Nash, 115 F.3d 1431, 1438 (9th Cir. 1997). For example, under § 1344, the scheme or artifice can involve bogus checks, which the Supreme Court has determined are not false statements under § 1014. Wells, 519 U.S. at 498. Moreover, under § 1014, the false statement must be in connection with a loan or advance. See Nash, 115 F.3d at 1438. The scheme or artifice in § 1344 does not mandate any such connection. As the

Court of Appeals for the Second Circuit has explained in contrasting § 1344 with § 1014, "[t]here is a fundamental difference between a scheme to defraud and a false statement made to influence the action of a federally insured institution." United States v. Chacko, 169 F.3d 140, 146 (2d Cir. 1999).

It is late in the day for the defendant to argue multiplicity under the circumstances presented here. The First, Second, Fifth, Seventh, Eighth, and Ninth Circuits have all reached the same conclusion that both § 1344 and § 1014 contain elements not found in the other so that the Blockburger test for separate offenses has been met. United States v. Fraza, 106 F.3d 1050, 1054 (1st Cir. 1997); Chacko, 169 F.3d at 148; United States v. Dupre, 117 F.3d 810, 818 (5th Cir. 1997); United States v. Abu-Shawish, 175 F. App'x 41, 43-44 (7th Cir. 2006); United States v. Honarvar, 477 F.3d 999, 1002 (8th Cir. 2007); and Nash, 115 F.3d at 1437-38. The defendant has cited and we have located no appellate case to the contrary, except for one from the Second Circuit which is no longer good law in that jurisdiction.¹

1. Defendant has cited United States v. Seda, 978 F.2d 779 (2d Cir. 1992), which deviated from the Blockburger test. However, the Court of Appeals for the Second Circuit later held in Chacko that its analysis in Seda is no longer valid as a result of the Supreme Court's decision in Dixon, 509 U.S. at 696. See Chacko, 169 F.3d at 147.

Shulick, nonetheless, heavily relies on United States v. Rigas, 605 F.3d 194 (3d Cir. 2010), in urging the court to apply a totality of the circumstances test instead of the Blockburger test. That case is inapposite. There defendants had been indicted and convicted in the Southern District of New York of conspiracy under 18 U.S.C. § 371. Thereafter, they were indicted in the Middle District of Pennsylvania under the same statute. Although the underlying facts were different in the two prosecutions, the defendants argued that the later indictment violated their rights against double jeopardy since, in their view, they were being indicated for the same offense. The government maintained that defendants were being indicted for distinctive offenses even though the same statute was involved. The Court of Appeals held that § 371 creates a single offense that may be violated in different ways. Rigas, 605 F.3d at 199. It explained that the Blockburger test does not apply when the issue is whether there are multiple violations of a single statute. Instead the Court required the application of the totality of the circumstances test to determine in that case whether a single conspiracy had been split improperly into multiple conspiracies. Id. at 213.

Unlike Rigas, neither of the two counts in issue here charges conspiracy. In addition, the instant counts involve violations of not one statute but of two separate statutes,

§ 1344 and § 1014. The Blockburger test is applicable and for the reasons stated above allows both counts to proceed.

The defendant also cites Whalen v. United States, 445 U.S. 684 (1980). There the defendant had been convicted in the Superior Court of the District of Columbia of felony-murder, specifically a killing during the commission of a rape. The trial court sentenced the defendant to consecutive terms of imprisonment for the murder and for the rape. The question before the Supreme Court was whether the punishment for both crimes was permissible under the relevant criminal statutes and if so whether the two punishments violated the double jeopardy clause. The Court focused on the relevant sentencing statute in the District of Columbia and held that Congress had embodied within the statute the Blockburger test. D.C. Code, § 23-112 (1970). Under that test consecutive sentences in that action were not authorized. Only one punishment was proper as the defendant could not have been convicted of the felony-murder without committing the rape. Whalen, 445 U.S. at 693-94.

Again, the indictment against Shulick is different. While rape was a lesser included offense of felony-murder in Whalen, § 1014 is not a lesser included offense of § 1344.

Section 1344 (Count Seven) and § 1014 (Count Eight) both require proof of a fact not required in the other. Therefore, the counts are not multiplicitous. See Blockburger,

284 U.S. at 304. Counts Seven and Eight are properly charged, and the motion of defendant to dismiss one or the other of these counts will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DAVID T. SHULICK	:	NO. 16-428

ORDER

AND NOW, this 23rd day of May, 2017, for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that the motion of defendant to dismiss Count Seven or Count Eight of the indictment (Doc. # 15) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.