IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

04-CR-022-S

KENT G. BERHEIDE,

Defendant.

REPORT

The grand jury has charged defendant Kent G. Berheide and his wife, co-defendant Lisa Berheide, in a nine count indictment with engaging in bankruptcy fraud. Before the court is Kent Berheide's multiplicity challenge to Counts 3, 5 and 6. Berheide claims that the government unfairly has divided one continuous course of conduct into three criminal charges, and asks this court either to dismiss two of the challenge counts or force the government to consolidate them into one count. For the reasons stated below I am recommending that the court deny Berheide's motion.

The indictment (dkt. 3) speaks for itself. By way of overview, Count 1 (which Berheide does not challenge) charges that Berheide and his wife engaged in a scheme to defraud the bankruptcy court, the trustee and creditors from May 19, 1999 to December 21, 2000. In Count 3, the grand jury incorporates the allegations of Count 1, then separately

charges that on August 31, 1999, the Berheides, for the purpose of executing the fraud scheme, knowingly filed a statement of affairs and schedules in support of their bankruptcy petition, in violation of 18 U.S.C. § 157.

In Count 5, the grand jury incorporates the allegations of Count 1 and charges that on August 27, 1999, the Berheides knowingly and fraudulently made false declarations and statements under penalty of perjury by declaring that their statement of affairs, property and asset schedules were true and correct when in fact Berheide knew that he had failed to disclose five material facts, in violation of 18 U.S.C. § 152(3). The allegedly material omissions were the failure to disclose: (1) Ownership of a 1999 Jayco trailer, (2) Expected tax refunds for 1998, (3) Funds deposited toward a land purchase in Ohio, (4) The contract to purchase land in Ohio; and (5) Lisa Berheide's one-third interest in real estate in Ohio.

In Count 6, the grand jury incorporated the allegations of Count 1 and charged that on September 21, 1999, the Berheides violated 18 U.S.C. § 152(2) when they knowingly and fraudulently made a false oath and account at a meeting of creditors in bankruptcy proceedings by swearing under oath that: (1) Their petitions, statements of affairs and schedules were correct and complete, (2) The Berheides had not received anything from the estate of Lisa Berheide's recently-deceased mother, and (3) Lisa Berheide had not received anything else of value as a result of her mother's death; when in fact the Berheides knew that their filed documents were not complete and correct, and that Lisa had received money from the sale of real property from her mother's estate, as well as insurance proceeds.

Berheide objects to this as multiplicitous, claiming that Count 3 charges that he *filed* a fraudulent statement of financial affairs, that Count 5 then charges him with having *signed* under penalty of perjury that same financial statement, and that Count 6 charges him with *swearing* under oath at a creditors' meeting that this same statement was true and correct. In opposition to this trisection of his acts, Berheide invokes the "unitary harm rule" fashioned by the Court of Appeals for the Eighth Circuit in *United States v. Graham*, 60 F. 3d 463, 467 (8th Cir. 1995), which posits that repetition of a false statement that does not constitute an additional impairment of governmental functions should not be charged separately in an indictment.

In *Graham*, the debtor allegedly made "practically identical" fraudulent statements at three different creditor meetings, and was charged with a separate count for each meeting. The court of appeals acknowledged that the fraudulent statement was made to three different individuals (the trustee and two different attorneys representing different creditors), and that each of these individuals was acting in the same role with the same objective: to ascertain all assets that should have been included in the bankruptcy estate. According to the Eighth Circuit, defendant's repetition of the same fraudulent statement at the second and third creditors' meetings added nothing further to harm the bankruptcy action: the harm was done from the outset. *See also United States v. McIntosh*, 124 F. 3d 1330, 1337 (10th Cir. 1997) (It is multiplicitous to charge a defendant both with concealing an asset in violation of § 152(7) and with making a false statement pursuant to § 152(3) for

filing one false operating report); *United States v. Montilla-Ambrosiana*, 610 F. 2d 65, 68 (1st Cir. 1979) (it is improper to charge a defendant in one count with concealing bank deposits and in another count with failing to disclose them).

The government responds that Berheide's entire argument is misdirected because the Court of Appeals for the Seventh Circuit never has adopted or recognized the "unitary harm rule." The government is correct insofar as the Seventh Circuit has never used that title, but it has engaged in a similar analysis, at least when the claimed multiplicity involves separate charges under one statute. In that circumstance, courts in this circuit are to determine whether an indictment contains multiplicitous counts by parsing the applicable criminal statue to determine the allowable "unit" of prosecution, namely the minimum amount of activity for which criminal liability attaches. *United States v. Allender*, 62 F.3d 909, 912 (7th Cir. 1995). In *Allender*, the issue was whether the government had charged too many § 1344 charges by breaking the defendant's bank fraud scheme into pieces that were too small. The court found that each of defendant's four renewals of his initial fraudulent loan constituted a discrete execution of his scheme, even though three of the renewals did not generate additional loan funds. Each renewal, while related to the others, was chronologically and substantively independent because there was no evidence that the defendant at the outset planned or contemplated these renewals as a group, and because each loan renewal put the bank at risk for the funds loaned at least for another term of days. *Id.* at 913.

To the same effect, in *United States v. Conley*, 291 F.3d 464, 470 (7th Cir. 2002), the court held that it was proper to indict and convict defendant on two counts of unlawfully possessing the same firearm on two different dates when the government proved an actual break in custody between defendant's first possession in July 1999 and his second possession in January 2000. *Id.* at 470. The operative question was "whether each count requires proof of a fact which the other does not. If one element is required to prove the offense in one count which is not required to prove the offense in the second count, there is no multiplicity." *Id.* Because the government proved "two distinct courses of conduct," it established the elements of two separate crimes. *Id.* at 470-71.

But the multiplicity analysis is different when the government has charged violations of several different statutes against a set of related acts. As the Seventh Circuit observed in *United States v. Hatchett* 245 F.3d 625 (7th Cir. 2001), the Supreme Court announced in *United States v. Dixon*, 509 U.S. 688 (1993) that it was ending its brief flirtation with the "underlying conduct" test of *Grady v. Corbin*, 495 U.S. 508 (1990) and re-embracing the steadfast "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932).

So in this case, the government is basically correct: the analytical starting point is to compare and contrast the elements of Counts 3, 5 and 6 to determine if each requires an element that the others do not. *See Hatchett*, 245 F.3d at 631. A possible second step would be to review the facts underlying the charges to see if the three challenged charges actually stand alone, or whether any of them factually depends upon another to the degree that it

must be deemed the same offense. *Id.* at 637. But this is an extraordinarily narrow codicil to the *Blockburger* test that courts only need to consider when one charge actually requires as an element that the government prove the defendant committed another *crime* (as opposed to requiring proof the same *conduct*). *Id.* at 642.

In the instant case, Count 3 charges a violation of § 157(2), which requires the government to prove that: 1) Berheide devised a scheme to defraud; 2) That he did so knowingly and with intent to defraud, and 3) That for the purpose of executing this scheme he filed document in a proceeding under Title 11.

Count 5 charges a violation of 152(3), which requires the government to prove that: 1) A proceeding in bankruptcy under Title 11 existed; 2) Berheide made a statement under penalty of perjury in relation to the bankruptcy proceeding; 3) This statement related to some material matter; 4) This statement was false; and 5) The defendant made this statement knowingly and fraudulently.

Count 6 charges a violation of §152(2),which requires the government to prove that: 1) A proceeding in bankruptcy under Title 11 existed; 2) Berheide made an oath in relation to the bankruptcy proceeding; 3) The oath related to some material matter; 4) The oath was false; and 5) The defendant made such oath knowingly and fraudulently. The only difference in the elements between Counts 5 and 6 is the substitution of "oath" for "statement under penalty of perjury."

Count 3 requires proof that Berheide devised a scheme to defraud, an element lacking from both Counts 5 and 6. This is true even though the government incorporated the fraud scheme from Count 1 into Counts 3, 5 and 6: incorporation by reference provides helpful context, but it does not add a new element to charges brought under § 152. Neither is the requirement in Count 5 and Count 6 that Berheide offered his falsehoods with intent to defraud synonymous with Count 1's requirement that Berheide actually devising a scheme to defraud. The former is an intangible state of mind, the latter is the more tangible execution of a plan.

Count 5 and Count 6 each requires as a fourth element proof that Berheide filed a *false* statement or made a *false* oath in a Title 11 proceeding. The filing required for Count 3's § 157 charge does not have to be false, it merely has to be filed for the purpose of executing the scheme. The fact that in this case the filing happened to be the same false document underlying Count 5 would matter if *Grady*'s "underlying conduct" test still were valid, but it's not. Neither does Count 3's use of an allegedly false document trigger the "other crime" codicil identified in *Hatchett*, *supra*.[1] Therefore, Count 3 is not multiplicitous of Counts 5 or 6 and it should not be dismissed or merged.

[1] This would be a closer call if the government had charged in Count 3 a violation of § 157 (3), which criminalizes making a false or fraudulent representation for the purpose of executing a scheme to defraud (which it could have done on these facts). But the government seems to have chosen its statutes carefully with an eye toward maximizing Berheide's exposure. While this may not amount to improper multiplicity, I share Berheide's bemusement as to why the government chose to slice the loaf so thinly.

Are Counts 5 and 6 multiplicitous of each other? No. Although they charge different statutes, their elements are virtually identical (the Seventh Circuit Pattern Instructions merge them), but there is one material distinction between them based on the nature of the falsehood alleged in each charge and each statute. Count 5 charges the submission of a false *statement* on August 27, while Count 6 charges swearing a false *oath* at a creditor's meeting on September 21.

Which gets to the heart of Berheide's exasperated question: how many times may the government charge him for repeating the same lies? Per *Allender*, the answer would seem to be: as many times as he proactively renewed them during his bankruptcy proceeding. Although the subject matter covered by the false statement and the false oath was the same, and although the alleged material omissions from each overlapped significantly, they are discrete substantive acts spaced three weeks apart and aimed at overlapping but not necessarily congruent audiences. As in *Allender*, *supra*, the subsequent oral sworn reaffirmation of the allegedly false initial written statement constituted a new act that the government may charge separately.

In sum, the challenged charges are not multiplicitous and this court should not dismiss any of them.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Kent Berheide's motion to dismiss or to merge Counts 3, 5 and 6.

Entered this 9th day of June, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge