No. 20-4164 (Lead)
No. 21-654 (Consolidated)

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Respondent,

v.

RAHEEM JEFFERSON BRENNERMAN,

Applicant,

MOTION FOR STAY OF ENFOCEMENT OF JUDGEMENT OF CONVICTION AND SENTENCE

Raheem J. Brennerman
FCI ALLENWOOD LOW
P. O. Box 1000
White Deer, Pa. 17887-1000
Pro Se Defendant-Appellant

Table of Contents

Table of Authorities

Cases

Statutes

Rules

I. APPLICATION FOR STAY OF ENFORCEMENT OF JUDGEMENT

Applicant Raheem Jefferson Brennerman ("Brennerman") respectfully submits this motion for stay of enforcement of Judgment ("Judgment of Conviction") entered in the United States District Court for the Southern District of New York in the criminal case, No. 17 Cr. 337 (RJS) and the Judgment ("Summary Order affirming Judgment of Conviction") entered in the United States Court of Appeals for the Second Circuit at Appeal EFC Nos. 18-3546(L); 19-497(Con) on June 9, 2020. *United States v. Brennerman*, No. 17 Cr. 337 (RJS); *United States v. Brennerman*, No. 18-3546, 818 F. App`x 25 (2d Cir. June 9, 2020) (19-497 (Con)).

II. JURISDICTION

Applicant Raheem Jefferson Brennerman appeals from the final order entered in the United States District Court for the Southern District of New York at No. 17 Cr. 337 (RJS), doc. nos. 249, 251 and 257 denying motion for relief from judicial misconduct and bias at 17 Cr. 337 (RJS), EFC Nos. 248, 250, 254, 256.

Brennerman filed a timely notice of appeal from the original November 20, 2020, final order, on November 27, 2020. A supplemental notice of appeal from the final order was filed on March 17, 2021, giving rise to EFC No. 21-645, which is Consolidated with this appeal. The district court had jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3238.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. JUDGMENT(S) WHICH MOTION FOR STAY IS BEING SOUGHT

On November 19, 2018, the United States District Court for the Southern District of New York (Judge Richard J. Sullivan) entered Judgment of Conviction and imposed Sentence and restitution (copy Judgment of Conviction appended as Appendix to this application) and on June 9, 2020, the United States Court of Appeals for the Second Circuit entered Judgment affirming the Judgment of Conviction ("Summary Order affirming Judgment of Conviction") (copy Summary Order affirming Judgment of Conviction appended as Appendix to this application).

IV. PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

V. RELIEF SOUGHT

This motion is submitted pursuant to Fed. R. Crim. P. 38 and Fed. R. App. P. 8 to stay the enforcement of Judgment ("Judgment of Conviction") entered in the United States District Court for the Southern District of New York, arising from the criminal case in *United States v. Brennerman*, No. 17 Cr. 337 (RJS) and the judgment of affirmation ("Summary Order affirming Judgment of Conviction") at appeal EFC No. 18-3546(L); 19-497(Con) in the United States Court of Appeals for the Second Circuit.

This application to stay enforcement of judgment presents an opportunity for this Court to rectify the fundamental miscarriage of justice given the extraordinary circumstance where trial Court deliberately abridged and abrogated the fundamental rights of criminal defendant conferred by the U.S. Constitution, thus violating his Fifth, Sixth, Thirteenth and Fourteenth Amendment rights of the United States Constitution. The issue for consideration here is not whether applicant is entitled to reprieve from the deliberate civil and Constitutional rights deprivation but rather whether the continued infringement on his Constitutional rights and civil liberties affects the very fabric of United States democracy.

Rule 38 of the Federal Rules of Criminal Procedure authorizes a court to enter a stay pending appeal of relief from judicial misconduct and bias in a criminal proceeding. A stay pending appeal "is not a matter of right," and "[t]he party requesting a stay bears the burden of showing that the

circumstances justify an exercise of that discretion. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The traditional factors that govern whether to grant a stay of court order pending appeal are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. at 434; *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Cooper v. Town of East Hampton,* 83 F.3d 31, 36 (2d Cir. 1996).

Applicant submits that the judge (Judge Richard J. Sullivan) who presided over the criminal case in the lower Court surreptitiously supplanted evidence of a non-FDIC insured institution, Morgan Stanley Smith Barney, LLC with a FDIC-insured institution, Morgan Stanley Private Bank to falsely satisfy the essential element necessary to convict applicant for bank fraud in violation of 18 U.S.C. § 1344(1) and bank fraud conspiracy in violation of 18 U.S.C. § 1349. Applicant presents demonstrable evidence that when he highlighted this issue to the Court (Sullivan, J.) in twelve separate filings, the Court continually ignored him. Applicant will further highlight that the Court denied and deprived him access to pertinent evidence (ICBC underwriting file) which he requested approximately twelve times including during trial immediately upon learning from Government witness, Julian Madgett during his testimony that the evidence (ICBC underwriting file)

exists with the bank`s file in London, United Kingdom. Applicant requested for the evidence so as to confront witness [Julian Madgett] against him and so that he may present a complete defense in reliance on applicable law and his Constitutional rights particularly given that the Court permitted Government witness, Julian Madgett to testify as to the contents of the evidence - ICBC underwriting file. The Court (Sullivan, J.) denied all of applicant`s requests for the evidence thus depriving him of the ability to exercise his Constitutional rights.

Applicant contends that such actions and deeds by the Court (Sullivan, J.) veered from the permissible norm to an impermissible realm, warranting a stay of enforcement of the judgment of conviction and sentence. The questions which this Court should consider are quite simple – (a.) are federal judges permitted to misrepresent or distort evidence in an endeavor to deprive criminal defendants their right to liberty; and (b.) whether federal judges can capriciously and intentionally abridge Constitutional rights conferred to criminal defendants.

The four factors which motion for stay must satisfy:

1. Whether the stay applicant has made a strong showing that he is likely to succeed on the merits - To answer this question, we must consult our jurisprudence in deciding whether the lower Court is bound by an obligation to protect the Constitutional rights of criminal defendant or whether the lower Court can capriciously and arbitrarily abrogate and abridge the rights conferred to every Persons within the United States territories. Our jurisprudence informs that where lower Court deliberately deprives a criminal defendant of his Constitutional rights through its own misconduct by surreptitiously supplanting evidence to falsely satisfy the essential element to convict applicant for

a federal crime, this Court should exercise its inherent supervisory role and appellate discretion to rectify such injustice.

This case presents a matter of significant public interest in highlighting the extraordinary circumstances where the Court, that has an obligation to protect the Constitutional rights of a criminal defendant, veers from the permissible to the impermissible with the Court deliberately violating the Constitutional rights of applicant. The attack on applicant Raheem Jefferson Brennerman is an attack on the rule of law, civil rights and liberties affecting everyone as well as the very fabric of United States democracy. The United States Court of Appeals has a Constitutional obligation to review de novo, meaning for clear error.

2. Whether the applicant will be irreparably injured absent a stay – Brennerman is currently incarcerated because the Court surreptitiously supplanted evidence to falsely satisfy the essential element to convict applicant for a federal crime. The Court also intentionally denied applicant requests for evidence (ICBC underwriting file) which would have proven his innocence, while allowing Government witness, Julian Madgett to testify that the evidence exists and to the contents of the file.

A Person who has been substantively prejudiced through the loss of their fundamental rights conferred by the Constitution suffers irreparable injury. Applicant has been subjected to Constitutional right deprivation through the loss of liberty due to the deliberate endeavor of the prosecution and Court to falsely satisfy the essential element to convict him. The Fifth Amendment of the United States Constitution states, "No person shall be deprived....of life, liberty or property without the due process of law." The due process right is

enshrined in the bedrock of our democracy, however in this case, the prosecution and Court deliberately deprived applicant of his Constitutional rights in an unusual endeavor to deprive him of liberty.

Exacerbating the prejudice highlighted above, the global pandemic caused by Covid-19 presents an even heightened and amplified severity to such prejudice as applicant will remain incarcerated, absent a stay of the judgment, at a time when the coronavirus is resurging and claiming more lives every day in the community and inside prison walls. To-date over thirty million (30,000,000) cases of Covid-19 have been reported in the United States alone with in-excess of five hundred thousand deaths in the United states. Applicant remains at a heightened risk from Coivd-19 should he contract the virus again given his medical vulnerabilities including diabetes, hypertension, BMI (Body-Mass-Index) of 37; all medical vulnerabilities promulgated by the Center for Disease Control and Prevention (C.D.C.). Applicant already suffered Constitutional right deprivation where in December 2020, he tested positive for Covid-19 along with 114-out of 116 inmates at his housing unit testing positive for Covid-19. He was later diagnosed with Covid-19 pneumonia which caused severe breathing difficulty, pain and suffering exposing him to serious illness and possibility of death. Exacerbating the prejudice already suffered, he is now at risk of serious injury or death should he contract Covid-19 again due to his

continued incarceration in an environment where social distancing and recommended hygiene practices are impossible.

Although applicant was vaccinated in January and February of 2021, such vaccination do not attenuate the significant Constitutional rights deprivation or the prejudice which applicant has already suffered or will continue to suffer. Moreover, there has been to conclusive study to demonstrate that applicant is fully (100%) protected from the new strains of Covid-19. A stay is warranted to avert further miscarriage of justice.

3. Whether issuance of the stay will substantively injure the other parties interested in the due proceeding - No, it will not. The prosecution (United States Attorney Office for the Southern District of New York) and Court (Sullivan, J.) are not entitled to the continued deprivation of rights imposed upon applicant where they deliberately violated his rights to the Due Process Clause and the U.S. Constitution. The prosecution, which serves as advocate for the People of the United States and the Courts which has an obligation as an independent arbiter to protect the Constitutional rights of criminal defendants, veers to the impermissible by deliberately depriving a criminal defendant his Constitutional rights. A stay is warranted in the interest of justice to limit the suffering and injustice imposed on applicant.

4. Where the public interest lies - The danger of this wrongful prosecution, the continued incarceration, the judicial misconduct and bias and the Constitutionally impermissible Court rulings, is amply demonstrated by the consequences of erosion of public trust in the United States justice system and other institutions. As the Fourth Circuit recently promulgated, "what gives people confidence in our justice system is not that we merely get things right, rather it is that we live in a system that upholds the rule of law even when it is inconvenient to do so". The Court through its misconduct and bias veered from the rule of law in this case. Interest of comity - in addition to fairness and substantial justice as embodied in the Due Process Clause and the U.S. Constitution - warrant a stay of enforcement of the judgment.

VI. ISSUES PRESENTED

BACKGROUND

The history of this matter began in 2014 when ICBC (London) PLC sued The Blacksands Pacific Group, Inc ("Blacksands") in New York Supreme Court primarily alleging, inter alia that Blacksands had failed to repay approximately $4.4 million dollars extended to Blacksands pursuant to a Bridge Loan Agreement. Significantly, applicant Raheem J. Brennerman, the CEO of Blacksands, was not named as a defendant in that action. (Notice of Removal; Cv. Cover Sheet, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 15 Cv. 70 (LAK), EFC No. 1-2).

Blacksands removed the case to the Southern District of New York and the matter was assigned to Hon. Lewis A. Kaplan, under the caption *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.* (Notice of Removal, No. 15 Cv. 70 (LAK), EFC No. 1).

Based on the loan documents, Judge Kaplan granted ICBC London`s motion for summary judgment against Blacksands. (Mem. Op., No. 15 Cv. 70 (LAK), EFC No. 38).

ICBC London then served Blacksands with extremely broad post-judgment discovery requests. Blacksands counsel, Latham & Watkins LLP ("Latham") interposed objections to those demands and filed a brief in support of those objections. (*See* Def. Interrog., No. 15 Cv. 70 (LAK), EFC No. 84 Ex. 2); (Mem.; Def.'s Decl., No. 15 Cv. 70 (LAK), EFC Nos. 85, 86). The

Court conducting no analysis regarding the permissible scope of post-judgment discovery of the actual breadth of plaintiff`s demands, instead in conclusionary fashion declared that the objections were "baseless" and that Blacksands "shall comply fully." (*See* Order, No. 15 Cv. 70 (LAK), EFC No. 87).

Subsequently, ICBC London moved for contempt and coercive sanctions against Blacksands. (Order to Show Cause; Pl.'s Decl.; Mem., No. 15 Cv. 70 (LAK), EFC Nos. 101, 102-103). On October 24, 2016, Judge Kaplan granted ICBC London`s motion holding Blacksands in contempt and imposing coercive sanctions. (Order, No. 15 Cv. 70 (LAK), EFC No. 108). Over the course of the next two weeks, on November 4 and November 10, 2016, Mr. Brennerman on behalf of Blacksands provided detailed discovery responses to ICBC London, including approximately 400 pages of documents, in an effort to comply with ICBC London`s discovery requests. (*See* Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC. No. 123, ¶¶ 9, 11-12). Mr. Brennerman also made continued efforts without support from other shareholders and partners to settle the matter with ICBC London, including meeting with ICBC London executives in London and providing them with even more information about Blacksands and its pending transaction, which were pertinent to Blacksands settlement efforts. (*See* Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC No. 123, ¶¶ 45, 9, 11-12).

On December 7, 2016, ICBC London moved for civil contempt against Mr. Brennerman personally, even though he was not a named defendant in the

matter and was not personally named in any discovery orders. (Order; Mem.; Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC Nos. 121-23). A contempt hearing was scheduled for December 13, 2016, less than a week later. (Corrected Order, No. 15 Cv. 70 (LAK), EFC No. 125).

Mr. Brennerman, however, did not have counsel. In fact, Latham repeatedly and consistently communicated to the Court, and to Mr. Brennerman that they did not represent Mr. Brennerman personally. (*See* e.g. Letter, No. 15 Cv. 70 (LAK), EFC No. 124). Although Mr. Brennerman was out of the country at the time he learned of the pending contempt hearing against him, he immediately sought to retain counsel to represent him in the contempt proceeding and wrote the Court requesting a reasonable adjournment because he was currently outside the United States and needed more time to retain counsel. (Email; Letter, No. 15 Cv. 70 (LAK), EFC Nos. 127-28) (Judge Kaplan was previously a partner at Paul Weiss LLP which represented Mr. Brennerman at the time thus the law firm could not appear before Judge Kaplan hence why Mr. Brennerman had to retain another law firm to represent him for the contempt proceedings). Judge Kaplan denied Mr. Brennerman`s request on December 12, 2016 (Order, No. 15 Cv. 70 (LAK), EFC No. 134), and found Mr. Brennerman personally in contempt on December 13, 2016. (Orders, No. 15 Cv. 70 (LAK), EFC Nos. 139-40). While Mr. Brennerman had provided a substantial document production in November, after Blacksands was found in contempt, the Court made no

mention of it and appeared not to have reviewed or considered that production in its determination that Mr. Brennerman was himself in contempt. (Orders, 15 Cv. 70 (LAK), EFC. Nos. 139-40).

On December 13, 2016 when Judge Kaplan held Mr. Brennerman personally in contempt, he [Judge Kaplan] ignored the law from the Second Circuit U.S. Court of Appeals in *OSRecovery,* where the Appeals Court stated directly to Judge Kaplan in relevant parts: ("[T]he District Court abused its discretion by issuing a contempt order to a non-party for failing to respond to discovery request propounded to him as a party without providing sufficient legal authority or explanation for treating him as a party solely for the purpose of discovery)) and held Mr. Brennerman in contempt (even though there were no court order[s] directed at him personally. No subpoena or motion-to-compel were directed at him). *OSRecovery, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006).

Judge Kaplan also ignored the federal rule to conduct extra-judicial research into Mr. Brennerman by Googling him. (*See* Bail Hr.'g Tr., *United States v. Brennerman*, No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 1 at 28). Then following the erroneous contempt propounded against Mr. Brennerman, Judge Kaplan referred him to the Manhattan federal prosecutors (United States Attorney Office for the Southern District of New York "USAO, SDNY") and persuaded the prosecutors to arrest Mr. Brennerman and prosecute him criminally. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2).

THE CRIMINAL REFERRAL, THE PETITION AND EX PARTE CONFERENCE BETWEEN JUDGE KAPLAN AND THE GOVERNMENT

In late 2016 or early 2017, Judge Kaplan referred Blacksands and Mr. Brennerman personally to the United States Attorney`s Office for criminal prosecution.

Thereafter, on March 3, 2017, the government filed a Petition seeking to initiate criminal contempt proceedings against Blacksands and Mr. Brennerman personally, including an Order to Show Cause for them to appear in Court to answer the charges. On March 7, 2017, Judge Kaplan summoned AUSAs Robert Benjamin Sobelman and Nicolas Tyler Landsman-Roos to his robing room to advise that an arrest warrant should be issued for Mr. Brennerman. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2). The prosecution, consistent with Fed. R. Crim. P. 42, had prepared an Order to Show Cause that would have directed Blacksands and Mr. Brennerman to appear before the Court on a date in the future. The Court made clear, however that it did not agree with the government`s approach and advised the prosecutors that the Court should issue an arrest warrant instead as to Mr. Brennerman, stating his assumption that "the United States can`t find him." The prosecutors repeatedly expressed their view that execution of an arrest warrant was not necessary under the circumstances. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2). The prosecutors advised, first, that Mr. Brennerman had actually called them on Friday, March 3, 2017, the same day that the Petition was filed to talk to them about that Petition. *Id.* The

prosecutors informed Mr. Brennerman that he could not speak with him, and Mr. Brennerman then provided his phone number so that "there may be a way for the government to be in touch with him via that telephone number." The prosecutors then proposed that the Order to Show Cause previously prepared and filed by the government, could be entered to require Mr. Brennerman to attend the conference and "should he not appear, [] a summons or arrest warrant be issued to secure his appearance." *Id.*

The Court continued to press the issue of an arrest warrant, asking '[w]hy shouldn`t I, given the history in this case issue a warrant?" (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2 At 5). The Prosecutors responded with a number of reasons, stating:

> Mr. Brennerman did try to contact the government on Friday, and we don`t know that he has absconded or seeks to abscond. He`s already knowledgeable about the petition. His email address is included on the ECF notification that went out when the petition was publicly filed. He appears to have the resources to have fled had he intended to, and the government thinks it`s prudent to provide him an opportunity to appear at the conference voluntarily.

Id. The prosecution went on to say that, even if the Court issued an arrest warrant, "the government would likely provide Mr. Brennerman an opportunity to surrender rather than dispatching law enforcement to apprehend him without providing that opportunity." *Id.*

The Court pressed on, stating "I`m inclined to issue an arrest warrant" and pushed back against the prospect that Mr. Brennerman should be allowed to surrender: "Now, if the government is going to give him an

opportunity to surrender; there`s a substantial question as to whether I`m wasting my time because I think the odds are not unreasonable that he will abscond". *Id.* at 6.

Eventually the prosecutors deferred to the Court and confirmed that if an arrest warrant was issued, they would discuss in their office how best to proceed. *Id.* at 7. Thus, as of March 7, 2017, when the government entered the robing room, there was no pending investigation of fraud as to Mr. Brennerman with the prosecutors in the Southern District of New York, and the government was prepared to proceed with a contempt proceeding by Order to Show Cause and had no concern that Mr. Brennerman would seek to abscond.

Thus pursuant to the arrest warrant prepared and signed by Judge Kaplan, Mr. Brennerman was arrested on April 19, 2017 at his home in Las Vegas. As of the date of the arrest warrant and because the Court had declined to sign the order to show cause presented by the government, there was no actual contempt charge pending against Mr. Brennerman. The Court omitted Mr. Brennerman from the signed Order to Show Cause but then failed to otherwise rule or grant the government`s Petition as it related to Mr. Brennerman. There was, therefore, no proper basis for the arrest warrant. The Court`s decision to alter the warrant to reference the Petition was inadequate to support the warrant. (The arrest warrant included an option for a Probation Violation Petition; those instruments, unlike a Petition

in a contempt proceeding, actually do charge an offense). (*See* Arrest Warrant, No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 3).

Mr. Brennerman`s arrest on April 19, 2017 (when government seized his electronic devices and documents (which was adduced as evidence (e-mails between Mr. Brennerman (on behalf of Blacksands) and Madgett (ICBC London) at trial of the contempt and fraud case (where the government actually never obtained or reviewed any pertinent ICBC transaction files from ICBC (London) plc) was in violation of both Mr. Brennerman`s Fourth and Fifth Amendment rights.

THE INDICTMENT AND ORDER TO SHOW CAUSE

On May 31, 2017, weeks after Mr. Brennerman was released on bail in the criminal contempt of court case, he was re-arrested by the U.S. Attorney`s Office pursuant to an indictment alleging fraud in connection with the transaction that was at issue in the underlying civil action, No. 15 Cv. 70 (LAK) between ICBC (London) PLC and The Blacksands Pacific Group, Inc (even though the civil action had been ongoing for two and half years at that point) Mr. Brennerman was charged with Conspiracy to commit bank and wire fraud, bank fraud and wire fraud. *Id*. The case was assigned to Hon. Richard J. Sullivan, under the caption, *United States v. Brennerman*, No. 17 Cr. 337 (RJS).

In August 2017, because Judge Kaplan had failed to sign the Order to Show Cause as it related to Mr. Brennerman in the criminal contempt of

court case at No. 17 Cr. 155 (LAK) (even though Mr. Brennerman had been arrested at the behest of Judge Kaplan) he had revoked the bail granted to Mr. Brennerman even without any violations of the bail conditions. The government realizing their error filed a new two count Order to Show Cause Petition formally charging Mr. Brennerman in the criminal contempt of court case. (*See* Order to Show Cause, *Brennerman* No. 17 Cr. 155, EFC No. 52).

THE DISTRICT COURT`S DECISION

In August 2017, prior to trial for the criminal contempt of court case, Mr. Brennerman sought to obtain the complete ICBC records (including the underwriting file and negotiations between agents of Blacksands and ICBC London) to demonstrate his innocence and to present a complete defense. However Mr. Brennerman`s request to the Manhattan federal prosecutors was denied. The [Manhattan federal prosecutors] refused to obtain or review the complete ICBC records including the underwriting files, arguing that they were not obligated to collect any additional evidence from ICBC London beyond what the bank had selectively provided to them. Judge Kaplan also denied Mr. Brennerman`s request seeking to compel the complete ICBC record. (*See* Mem. & Order, No. 17 Cr. 155 (LAK), EFC No. 76).

In November 2017, prior to trial for the fraud case, Mr. Brennerman made request to Judge Sullivan in his motion-in-limine requesting that the Court exclude the testimony of any witness from ICBC London because he had been unable to obtain the complete ICBC records including the underwriting files,

which he required to engage in cross-examination of the witness and that the government will be able to elicit testimony from such witness while he would be deprived of the ability to engage in any meaningful cross-examination of the witness as to substance and credibility on the issues. Mr. Brennerman argued that his Constitutional rights including his right to a fair trial will be deprived. Mr. Brennerman also argued that he would be deprived of his ability to present a complete defense, thus depriving his Sixth Amendment right. However Judge Sullivan denied his request. (*See* Mem. in Opp'n; Mot. in Lim.; Mem. In Supp., No. 17 Cr. 337 (RJS), EFC Nos. 54, 58, 59).

THE TRIAL AND POST-TRIAL PROCEEDINGS
CRIMINAL CONTEMPT OF COURT CASE AT NO. 17 CR. 155 (LAK)

During trial, District Court (Judge Kaplan) rejected defendant argument regarding presentment of the civil contempt order to the jury, ruling that the government could present evidence that both the company and Mr. Brennerman had been found in contempt of Court (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 3-7). A juror named Gordon later told the media - Law 360 that the civil contempt orders swayed the jury to find Mr. Brennerman guilty of criminal contempt (*See* Law 360 Article, No. 17 Cr. 337 (RJS), EFC No. 236, Ex. 3 at 17).

Mr. Brennerman was deprived of the very evidence he required to defend himself. Although such evidence (agents of ICBC London requesting settlement discussion) plainly was relevant to the issue of Mr. Brennerman`s willfulness in failing to comply with the Court`s discovery orders, the District

Court refused repeatedly to allow counsel to elicit such evidence on the issue and so the record was devoid of the precise evidence that would have demonstrated the defendant`s lack of intent (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 269-277; 236-249).

The District Court went a step further and proposed an instruction to the jury that settlement discussions in a civil case did not excuse a defendant`s failure to comply with the court's discovery order absent an order suspending or modifying the requirement to comply (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 509-510). Defense counsel objected arguing that even if that were technically true, if the parties specifically engaged in settlement discussion with the understanding that discovery would not be pursued, such evidence was certainly relevant to defendant`s intent in not complying with the Court`s order and should have been considered by the jury. The District Court (Judge Kaplan) overruled counsel`s objection and instructed the jury as indicated. (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 538-544).

The trial commenced on September 6, 2017 and concluded on September 12, 2017 with the jury returning a guilty verdict on both counts of criminal contempt.

THE TRIAL AND POST-TRIAL PROCEEDINGS
FRAUD CASE AT NO. 17 CR. 337 (RJS)

During trial, following testimony by government sole witness from ICBC London, Julian Madgett that evidence (ICBC underwriting files) existed with the bank`s file which document the basis for approving the bridge finance

including representations relied upon by the bank in approving the bridge finance and that the prosecution never requested or obtained the ICBC underwriting files, thus never provided it to the defense. (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Mr. Brennerman again filed motion to compel for the evidence arguing that he required it to present a complete defense (that the bank did not rely on any representation or alleged misrepresentation in approving the bridge finance) and to confront witness against him. (*See* Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71). Judge Sullivan denied Mr. Brennerman`s request while acknowledging that government`s witness, Julian Madgett had testified that the evidence (ICBC underwriting files) were with the bank`s file in London, U.K. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 617).

Government presented evidence - Government Exhibits GX1-57A; GX1-73; GX529 to demonstrate that Mr. Brennerman opened a wealth management account at Morgan Stanley. (*See* Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167). The evidence presented clearly demonstrated that the wealth management account was opened at Morgan Stanley Smith Barney, LLC. Government witness, Kevin Bonebrake testified that he worked for the Institutional Securities division of Morgan Stanley which is a wholly-owned subsidiary of Morgan Stanley & Company LLC (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 384-385); That "this was very preliminary stage of our conversation" (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 409); That "Morgan Stanley would not

typically provide the money"; "It would seek financing from outside investors," and "my recollection was that what the company wanted was unclear. We didn`t get very far in our discussion." (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 387-388).

Government presented four FDIC certificates - Government Exhibit - GX530 (FDIC certificate for Morgan Stanley Private Bank); GX531 (FDIC certificate for Citibank); GX532 (FDIC Certificate for Morgan Stanley National Bank NA); GX533 (FDIC certificate for JP Morgan Chase)

Another Government witness, Barry Gonzalez, FDIC commissioner testified "that the FDIC certificate of one subsidiary does not cover another subsidiary or the parent company because each will require its own separate FDIC certificate (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1060-1061). Testified that FDIC certificate only cover depository accounts and would not cover the Institutional Securities division/subsidiary of Morgan Stanley (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1057); That there was no confirmation that Morgan Stanley Smith Barney, LLC was FDIC insured. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1059). His testimony demonstrated that neither ICBC (London) PLC, Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division/subsidiary are FDIC insured. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1059-1061).

The trial commenced on November 26, 2017 and concluded on December 6, 2017 with the jury returning a guilty verdict on all counts.

After trial, Mr. Brennerman again moved to compel for the ICBC underwriting files to prepare his post-trial motions however Judge Sullivan denied his requests. (*See* Orders, No. 17 Cr. 337 (RJS), EFC Nos. 153, 161, 187, 200, 235, 236, 240, 241). Judge Sullivan also ignored evidence which Mr. Brennerman presented to the Court to demonstrate that there was a statutory error with his conviction for bank fraud as it relates to his interaction with non-FDIC subsidiaries of Morgan Stanley however Judge Sullivan ignored him and ultimately denied his post-trial motions. (*See* Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167).

THE COURT OF APPEAL DECISION
FRAUD CASE APPEAL AT, NOS. 18 3546(L); 19 497(CON)

The United States Court of Appeals for the Second Circuit affirmed Mr. Brennerman`s conviction and sentence in a Summary Order on June 9, 2020.

The Court misapprehended the record with respect to the FDIC-insured status of Morgan Stanley and overlooked Mr. Brennerman`s argument about the non FDIC insured personal wealth division (Morgan Stanley Smith Barney, LLC) and the non-FDIC-insured Institutional Securities division, generalizing that:

> [T]he record did establish that he defrauded Morgan Stanley, an FDIC-insured institution, as part of his broader scheme by, among other things, inducing it to issue him a credit card based on false representation about his citizenship, assets, and the nature and worth of his company.

(Slip Op., *United States v. Brennerman*, No. 18 3546, EFC No. 183 at 3).

With respect to Mr. Brennerman`s Constructive amendment argument, the Circuit Court similarly misunderstood the crucial distinction between the subsidiary divisions of Morgan Stanley, relying on the Government`s arguments at summation and finding that no constructive amendment had occurred because:

> It is clear from the indictment that the scheme against ICBC was merely one target of Brennerman`s alleged fraud.....At trial, the government offered evidence that Morgan Stanley was one of those "other financial institutions." (*See* App`x at 608-09) (testimony of Morgan Stanley`s Kevin Bonebrake about a January 2013 telephone call with Brennerman discussing financing to develop asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offence other than that the one charged by the grand jury." *United States v. Vebeliunas*, 76 F.3d at 1290.

(Slip Op., No. 18 3546, EFC No. 183 at 4).

With respect to the ICBC file, the Circuit Court disagreed with Mr. Brennerman on the first two points and did not issue a written opinion on the third, writing that:

> The government`s discovery and disclosure obligations extend only to information and documents in the government`s possession. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (explaining that the *Brady* obligation applies only to evidence "that is known to the prosecutor"). The government insists that every document it received from ICBC was turned over to Brennerman and that it is not aware of the personal notes referenced by Brennerman. Therefore, the government has not violated its disclosure obligations. Nor was the government under any obligation under the Jencks Act to collect materials about Madgett that were not in the government`s possession. *See United States v. Bermudez*, 526 F.2d 89, 100 n.9 (2d Cir. 1975).

> Even if the documents exist and are material and favorable, Brennerman never sought a subpoena pursuant to Federal Rule of Criminal Procedure 17.....The only indication that such documents are extant comes from Brennerman`s bare assertions.

(Slip Op., No. 18 3546, EFC No. 183 at 4-5).

The panel denied a motion for rehearing by order dated July 31, 2020.

THE COURT OF APPEAL DECISION
CRIMINAL CONTEMPT OF COURT APPEAL AT,
NOS. 18 1033(L); 18 1618(CON)

The Second Circuit found that the district court did not err in its failure to compel ICBC`s production of its entire file because Brennerman did not comply with the rules governing subpoenas under Rule 17(d) of the Federal Rules of Criminal Procedure when he served ICBC`s New York-based attorney, not the ICBC`s London branch. *United States v. Brennerman*, No. 18 1033(L), WL 3053867 at *1 (2d Cir. June 9, 2020). The Court further concluded that, "the prosecution was under no obligation to make efforts to obtain information beyond what it previously collected and turned over to Brennerman." *Id.*

As to the evidence concerning settlement discussions, the Second Circuit found that the district court had allowed Brennerman "to introduce evidence concerning settlement discussions on the condition that he establish his knowledge of the substance of the exhibits and their relationship to the relevant time period..." and that "through cross-examination, Brennerman was able to introduce evidence about the parties' settlement discussions. *Id.*

at *2. The Second Circuit found that "the district court did not abuse its discretion in admitting some but not all of this evidence, and Brennerman had failed to point to any specific evidence that would have helped his case had it been submitted." *Id*.

In regard to the admission of the civil contempt order against Brennerman, the Second Circuit found that "the district court correctly determined, the civil contempt orders were relevant to Brennerman`s willfulness. To minimize any potential prejudicial effect, the district court redacted portions of the orders and instructed the jury on the limited purposes for which it could consider the civil contempt orders in the context of a trial about criminal contempt." *Id*.

The panel denied a motion for rehearing by order dated September 9, 2020. (*See* Order, No. 18 1033, EFC No 318).

ERROR(S) WITH THE COURT OF APPEALS' DECISION
FRAUD CASE APPEAL AT, NOS. 18 3546(L); 19 497(CON)
ARISING FROM CRIMINAL CASE AT DISTRICT COURT
AT, NO. 17 CR. 337 (RJS)

I. THE SECOND CIRCUIT ERRED WHEN IT MISAPPREHENDED KEY FACTS ABOUT WHICH MORGAN STANLEY SUBSIDIARY WAS FDIC INSURED AND MISUNDERSTOOD WHY A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT OCCURRED.

A. THE FEDERAL BANK FRAUD STATUTE REQUIRES INTENT TO DEFRAUD AN FDIC-INSURED INSTITUTION AND APPLICANT`S CONSTITUTIONAL RIGHT WAS VIOLATED WHERE HIS CONVICTION FOR BANK FRAUD AND BANK FRAUD CONSPIRACY IS ILLEGAL AND IN VIOLATION OF THE BANK FRAUD STATUTE AND LAW.

Title 18 United States Code § 1344 makes it a crime to "knowingly execut[e], or attemp[t] to execute, a scheme or artifice - (1) to defraud a financial institution; . . ." "The well established elements of the crime of bank fraud are that the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property, and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss." *United States v. Barrett*, 178 F.3d 643, 647-48 (2d Cir. 1999); *See* also 18 U.S.C. § 20 (defining "financial institution"). "[A] defendant cannot be convicted of violating § 1344(1) merely because he intends to defraud an entity...that is not in fact covered by the statute." *United States v. Bouchard*, 828 F.3d 116, 125 (2d Cir. 2016).

Applicant was convicted of bank fraud and bank fraud conspiracy based on an account he opened at Morgan Stanley Smith Barnet, LLC. (*See* Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167) (highlighting Government Exhibit - GX1-57A; GX1-73; GX529 - Morgan Stanley Smith Barney, LLC account opening form, correspondence and account statement). The government failed to confirm through government witness, Barry Gonzalez, the FDIC commissioner that Morgan Stanley Smith Barney, LLC was/is FDIC insured. The Court also stated that Brennerman had a single telephone call with Kevin Bonebrake (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 387-388; 409) who worked at Morgan Stanley Institutional Securities division (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 384-385) which is not FDIC insured.

Although Applicant`s wealth management account at Morgan Stanley Smith Barney, LLC was not a depository account, the funds were held by Morgan Stanley Smith Barney, LLC in a depository account at Morgan Stanley Bank National Association. Any statements made by Applicant to Scott Stout, who worked at Morgan Stanley Smith Barney, LLC would have been insufficient to establish that Applicant took any step toward defrauding an FDIC-insured institution.

When Applicant presented evidence to Judge Sullivan at No. 17 Cr. 337 (RJS), EFC. No. 167, demonstrating that his account was held at Morgan Stanley Smith Barney, LLC which is not FDIC insured and not at Morgan Stanley Private Bank, the judge ignored him. The judge also ignored the testimony by Barry Gonzalez, FDIC commissioner which confirmed that neither Morgan Stanley Smith Barney, LLC (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1059) or Morgan Stanley Institutional Securities division (*See* Trial Tr., 17-cr-337 (RJS), at 1057) are FDIC insured. Further that the FDIC certificate or one subsidiary/division does not cover other subsidiary/division within Morgan Stanley because each subsidiary/division will require its own FDIC certificate. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1060-1061). Thus highlighting that the FDIC certificates presented by the government at trial for Morgan Stanley Private Bank (*See* Government Exhibit - GX530) and Morgan Stanley National Bank NA (*See* Government Exhibit - GX532) does not cover either Morgan Stanley Smith Barney, LLC or Morgan Stanley

Institutional Securities division which Applicant interacted with and thus Applicant could not be convicted for bank fraud and bank fraud conspiracy for interacting with institutions which are not FDIC insured. Notwithstanding these evidence and confirmation, Judge Sullivan allowed Applicant to be wrongly convicted.

On appeal, the Second Circuit ignored Applicant`s argument while stating that Applicant defrauded Morgan Stanley, an FDIC insured institution by receiving perks (even though Applicant was not charged for receiving perks) and for making a single telephone call to Kevin Bonebrake to discuss about financing without acknowledging the testimony from Barry Gonzalez which did not confirm that either Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division are FDIC Insured to satisfy the essential element necessary to convict for bank fraud. That Morgan Stanley has different subsidiaries and divisions, further than each subsidiary/division will require its own FDIC certificate as the FDIC certificate of one subsidiary/division does not cover the other subsidiary/division.

B. CONSTRUCTIVE AMENDMENT OF AN INDICTMENT OCCURS WHEN THE CHARGING TERMS ARE ALTERED AND APPLICANT`S CONSTITUTIONAL RIGHT WAS VIOLATED

Constructive amendment of an indictment "occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them." *United States v. LaSpina*, 299 F.3d 165, 181 (2d Cir. 2002) (citations omitted). "To prevail on a

constructive amendment claim, a defendant must demonstrate that the proof at trial....so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury`s indictment." *LaSpina*, 299 F.3d at 181 (citations omitted).

Applicant was indicted with "having made false representation to financial institutions in the course of seeking loans and other forms of financing for purported business ventures" however during summation the prosecution and again during appearance on November 19, 2018 (sentencing hearing) the Court, each argued the theory of the bank fraud and bank fraud conspiracy that the defendant became entitled to "perks" including fancy credit card and preferential interest rate however the defendant was not charged with obtaining perks. Moreover the fancy credit card was not issued by any Morgan Stanley subsidiary or division and was closed with zero balance. The account which the defendant opened at Morgan Stanley Smith Barney, LLC was only opened for three weeks and not long enough for him to earn any perks. Most important, both Morgan Stanley Smith Barney, LLC where Applicant opened his account and Morgan Stanley Institutional Securities division where Kevin Bonebrake (whom he had a single telephone call about financing) worked at are not FDIC insured, an essential element necessary to convict for bank fraud and bank fraud conspiracy.

On appeal, when the Applicant highlighted the constructive amendment issue, the Second Circuit refused to review the record on which Applicant was convicted (theory of bank fraud) and statement made by trial court during appearance on November 19, 2018 (sentencing hearing) as to the theory of the bank fraud which was argued by the government and trial judge as receiving perks and as to his single telephone call to Kevin Bonebrake about financing. The Court also stated that there was no constructive amendment because the Applicant spoke to Kevin Bonebrake who worked for the Institutional Securities division of Morgan Stanley without acknowledging the trial records which clearly demonstrated that the Institutional Securities division of Morgan Stanley is not covered by any FDIC certificate thus cannot satisfy the essential element to convict for bank fraud and bank fraud conspiracy.

C. THE CIRCUIT COURT`S DECISION OVERLOOKED THE FACT THAT BRENNERMAN HAD MADE ATTEMPTS TO OBTAIN AND TO COMPEL THE PRODUCTION OF THE COMPLETE ICBC FILE AND ERRONEOUSLY ASSUMED THAT THE ONLY INDICATION OF THE DOCUMENT`S EXISTENCE CAME FROM BRENNERMAN`S BARE ASSERTIONS.

Both during the related case in front of Judge Kaplan (*United States v. Brennerman*, No. 17 Cr.155 (LAK)) and in the instant case from which this application arose (*United States v. Brennerman*, No. 17 Cr. 337 (RJS)) in front of Judge Sullivan, Applicant moved for discovery of the full ICBC file related to the bridge loan to Blacksands. Applicant avers as confirmed by government witness that the file would contain ICBC employee Julian

Madgett`s notes related to the credit paper, underwriting documents and credit decision to approve the loan and would support Applicant`s theory of defense. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Both Judge Kaplan and Judge Sullivan denied Applicant`s request for a subpoena to obtain these documents; Judge Sullivan additionally declined to compel the Government to produce them at trial even after government witness, Julian Madgett testified to its existence in open Court. *See*., e.g., (Mem. & Order, No. 17 Cr. 155 (LAK), EFC No. 76); (Def.'s Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71); (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554); (Trial Tr., No. 17 Cr. 337 (RJS), at 617).

For these reasons, the Second Circuit was mistaken that the record contained no evidence that Applicant had attempted to obtain the complete ICBC files and the Court`s assumption that the only indication that such documents (ICBC file) are extant came from Applicant`s bare assertion was erroneous.

II. THE SECOND CIRCUIT ERRED BECAUSE THE PANEL`S DECISION CONFLICTS WITH SETTLED LAW ON THE SIXTH AMENDMENT RIGHTS OF A CRIMINAL DEFENDANT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM AND TO PRESENT A COMPLETE DEFENSE.

The Due Process Clause requires the Government to make a timely disclosure of any exculpatory or impeaching evidence that is material and in its possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). The Government is further obligated under *Kyles,* to "learn of any favorable evidence known to the others acting on the

government`s behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

In some circumstances, discovery may be obtained from abroad. *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir. 2019) ("[A] district court is not categorically barred from allowing discovery....of evidence located abroad....") (internal reference omitted). "[I]t is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir. 2015).

Applicant was deprived of the ability to present a complete defense in violation of his Sixth Amendment right as promulgated by the United States Supreme Court in *Crane v. Ky.*, where Applicant requested for evidence (ICBC underwriting files) at No. 17 Cr. 337 (RJS), EFC No. 71, following testimony by government sole witness from ICBC London, Julian Madgett (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554) that evidence (the ICBC underwriting files) existed with the bank`s file which document the basis for approving the bridge finance including representations relied upon by the bank in approving the bridge finance. *Crane v. Ky.*, 476 U.S. 683 (1986).

The prosecution never requested or obtained the ICBC underwriting files, thus never provided it to the defense. When Brennerman requested for the files so that he may use it in presenting a complete defense (that the bank did

not rely on any representation or alleged misrepresentation in approving the bridge finance) and confront witness against him, trial judge (Judge Richard J. Sullivan) denied his request while acknowledging that the prosecution witness, Julian Madgett had testified that the evidence (ICBC underwriting files) existed with the bank`s file in London, U.K. (*See* Trial Tr., No. 17 Cr. 337 (RJS). at 617). The Judge`s denial was in contrast with the Second Circuit ruling in *In re del Valle Ruiz*, which stated that District Courts were not categorically barred from permitting evidence located abroad. *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019).

Moreover trial judge permitted government sole witness from ICBC London, Julian Madgett to testify as to the content of the ICBC Underwriting files (to satisfy the essential element of "MATERIALITY") while Applicant was deprived of the ability to engage in any meaningful cross-examination of the witness depriving him a fair trial.

Under *Kyles* Government had an obligation to learn of any favorable evidence known to the others acting on the Government behalf in the case, thus when Government witness, Julian Madgett testified in open Court that evidence (ICBC underwriting file) existed in the bank`s file which document the basis for approving the bridge finance including representation relied upon by the bank in approving the bridge finance which Government never requested or obtained. (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Government had an obligation to collect the evidence after learning of its

existence particularly where Applicant made request to the Court (for among others) that the Court compel Government to collect the evidence (ICBC underwriting file). (Def.'s Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71). However Government`s failure to collect or learn of the evidence violated its *Brady* obligations.

It follows that if Government never obtained or reviewed the pertinent evidence (ICBC underwriting file) it [Government] failed to conduct any independent investigation on the transaction at issue prior to indicting and prosecuting Applicant thus deliberately violating Applicant`s right to the Due Process clause. The Court (Judge Richard J. Sullivan) exacerbated the Constitutional violation when it refused to compel Government to satisfy its *Brady* obligation, particularly following the testimony by Government witness, Julian Madgett that pertinent evidence (ICBC underwriting file) existed which Government never obtained or reviewed. Thus, the Court and Government deliberately violated Applicant`s right to the Due Process clause.

On appeal, the Second Circuit that recently made decision in *Scrimo,* which stated that "It is a federal law that a criminal defendant has a Constitutional right to present a complete defense" ignored Applicant`s argument that he was deprived of his Constitutional right to present a complete defense. (Summ. Order, No. 18 3546(L), EFC No. 186); *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019). The Second Circuit also made an erroneous statement that "the only indication that the evidence is extant comes from

Brennerman`s bare assertion" Such statement was/is inaccurate and in contrast with the trial records which clearly highlight government witness, Julian Madgett, confirming that the evidence are extant and with the bank`s file in London, U.K. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554); (Summ. Order, No. 18 3546(L), EFC No. 186 at 5).

ERROR(S) WITH THE COURT OF APPEALS' DECISION

CRIMINAL CONTEMPT OF COURT APPEAL AT, NOS. 18 1033(L); 18 1616(CON) ARISING FROM CRIMINAL CASE AT DISTRICT COURT AT, NO. 17 CR. 155 (LAK)

I. THE SECOND CIRCUIT ERRED IN APPROVING THE DISTRICT COURT`S (1) ADMISSION OF THE CIVIL CONTEMPT ORDER AGAINST APPLICANT; (2) FAILURE TO COMPEL PRODUCTION OF CERTAIN EXCULPATORY MATERIALS; AND (3) PRECLUSION OF THE ADMISSION OF EVIDENCE PERTAINING TO SETTLEMENT NEGOTIATIONS, BECAUSE THE ISSUE RAISED ARE QUESTIONS OF EXCEPTIONAL IMPORTANCE. THIS CASE RAISE ISSUE OF IMPORTANT SYSTEMIC CONSEQUENCES FOR THE DEVELOPMENT OF THE LAW AND ADMINISTRATION OF JUSTICE.

A. ADMISSION OF THE CIVIL CONTEMPT ORDER VIOLATED APPLICANT`S CONSTITUTIONAL RIGHTS WHERE THE COURT FAILED TO AFFORD HIM THE EQUAL PROTECTION GUARANTEE AND THE PROSECUTION VIOLATED HIS RIGHT TO DUE PROCESS OF LAW.

In *OSRecovery*, the Second Circuit U.S. Court of Appeals vacated civil contempt adjudicated by Judge Lewis A. Kaplan ("Judge Kaplan") against a party who was not part of the civil case. *OSRecovery, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006). In vacating the contempt order the Court of Appeals stated directly to Judge Kaplan that the Court abused its discretion by holding a non-party in civil contempt propounded against him solely for the purpose of discovery without providing any legal authority or clear explanation for doing so. In 2016, Judge Kaplan ignored the law and

held Applicant, a non-party who was not involved in the underlying case, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, in contempt without providing any legal authority or clear explanation. (*See* Order; Mem. & Order, No. 15 Cv. 70 EFC. Nos. 139-40). This time, Judge Kaplan went a step further and referred Applicant to Manhattan prosecutors to be prosecuted criminally. The prosecution undertook no diligence or investigation prior to initiating criminal contempt charges against Applicant.

During trial of the criminal contempt of court case, Judge Kaplan permitted the prosecution to present to the jury the civil contempt order erroneously adjudged against Applicant which was in tension with the law. (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 3-7). Such presentment significantly prejudiced Applicant, because the judge allowed the presentment of an erroneously adjudged civil contempt order as evidence to the jury (that concluded that Applicant must be guilty of criminal contempt), without allowing Applicant to present the background to the adjudication of the civil contempt order. (*See* Law 360 Article, No. 17 Cr. 337 (RJS), EFC No. 236, Ex. 3 at 17).

The question of whether the civil contempt order was properly admitted against Applicant goes beyond a simple analysis of Rules 403 and 404(b) of the Federal Rules of Evidence. Applicant was a non-party in the civil lawsuit at the time of the order. Because the order was erroneously adjudged against

him, its erroneous admission had more serious legal implication above and beyond an abuse of discretion analysis.

The Second Circuit had previously held that "because the power of a district court to impose contempt liability is carefully limited, our review of a contempt order for abuse of discretion is more rigorous than would be the case in other situations in which abuse-of-discretion review is conducted." *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998). "Moreover, we think it is fundamentally unfair to hold [a non-party] in contempt as if he were a party without legal support for treating him, a non-party, as a party but only for the purpose of discovery." *OSRecovery, Inc.*, 462 F.3d at 90. In *OSRecovery*, the Second Circuit court had found that the district court abused its discretion by holding a person "in contempt as a party without sufficient explanation or citation to legal authority supporting the basis upon which the court relied in treating [him] as a party—for discovery purposes only—despite the fact that [he] was not actually a party." *Id.* at 93.

Here Judge Lewis A. Kaplan (the same district judge whose contempt order the Second Circuit court found inappropriate in *OSRecovery*) held Applicant in civil contempt as a non-party and failed to provide any legal authority or present any particular theory for treating him as a party solely for the purpose of discovery. (*See* Order; Mem. & Order, No. 15 Cv. 70 (LAK), EFC. Nos. 139-40). No court orders, subpoenas, or motion to compel were ever

directed at Applicant personally nor was he present during the civil case`s various proceedings.

The erroneous admission of the civil contempt order was more than an evidentiary error. It violated the Second Circuit court`s instructions concerning contempt order against non-parties. On appeal, the Second Circuit affirmed district court`s rulings creating disparity with the Second Circuit`s treatment and review of such order`s and deprived Applicant of his Constitutional right to an equal protection guarantee.

B. Failure to compel production of certain exculpatory materials violated Applicant`s Sixth Amendment right, where he was deprived of the evidence he required to present a complete defense

Applicant`s central argument concerning the ICBC production requests is that there existed exculpatory evidence materials that were not provided to him and could not otherwise be compelled due to Rule 17 limitations regarding foreign entities. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). The Second Circuit did not address Applicant`s argument that, if the government claimed that it had produced all documents in its possession but the omission of the entire file was glaringly obvious, then it follows that the government was aware that relevant information existed and was therefore, withholding material that it could (and should) have obtained, in violation of *Brady*. *See Brady v. Maryland*, 373 U.S. 83 (1963).

Because Applicant was effectively barred from obtaining relevant evidence, such as the entirety of his communications with ICBC

representatives, due to subpoena constraints, he was denied the opportunity to put forth a complete defense.

Because no meaningful inquiry was conducted, either at the district court or before the Second Circuit, concerning the discrepancies between the government`s representations that the production was complete and the obviously incomplete materials produced, the issue of whether *Brady* obligations were flouted by the government remains open. *See Brady v. Maryland*, 373 U.S. 83 (1963). The sanctity of *Brady* obligations cannot be interpreted as anything less than a question of exceptional importance warranting further reconsideration on this point. *See Id.*

C. PRECLUSION OF THE ADMISSION OF EVIDENCE PERTAINING TO SETTLEMENT NEGOTIATIONS (DUE TO FAILURE TO PERMIT FULL SETTLEMENT NEGOTIATION EVIDENCE) VIOLATED APPLICANT`S CONSTITUTIONAL RIGHT WHERE HE WAS DEPRIVED OF EVIDENCE HE REQUIRED TO PRESENT A COMPLETE DEFENSE

Without the entire ICBC file, Applicant was precluded from presenting evidence regarding settlement negotiations between Blacksands and ICBC. Applicant avers that evidence of these negotiations would have convinced the jury that he had not willfully disobeyed any court orders.

Although Applicant was permitted certain lines of questioning concerning settlement negotiations, the admitted evidence was woefully inadequate to set forth his complete defense. Applicant was attempting to elicit evidence of settlement discussions with agents of ICBC that, he argued, would have demonstrated that he was not willfully disobeying the district court`s

discovery orders but was instead prioritizing settlement with ICBC over Blacksands' discovery obligations. This evidence was not permitted, could not be elicited through cross-examination of witnesses, and was not part of the jury instruction. (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 236-277). Although such evidence was plainly relevant to the issue of Applicant`s willfulness in failing to comply with the court`s discovery orders, the record was devoid of the precise evidence that would have demonstrated the Applicant`s lack and intent. The district court exacerbated the harm by instructing the jury that settlement discussions in a civil case did not excuse a defendant`s failure to comply with the court`s discovery order absent an order suspending or modifying the requirements to comply. (*See* Trial Tr., No. 17 Cr. at 509-510; 538-544).

The limitation on evidence of settlement negotiations was not merely an evidentiary issues, but rather, a constitutional one which violated Applicant`s right to present a defense. The violation was compounded by the fact that the district court essentially eviscerated the element of intent in determining whether Applicant was guilty of criminal contempt. The Second Circuit`s decision failed to address the manner in which the district court`s evidentiary rulings precluded Applicant`s right to present a complete defense.

VII. REASONS FOR GRANTING STAY OF ENFORCEMENT OF JUDGEMENT OF CONVICTION AND SENTENCE

ARGUMENT

I. BRENNERMAN SUFFERED AND CONTINUES TO SUFFER SIGNIFICANT PREJUDICE AND CONSTITUTIONAL RIGHT VIOLATION BASED ON JUDICIAL MISCONDUCT AND BIAS BY THE COURT (SULLIVAN, J.)

A. SIGNIFICANT JUDICIAL MISCONDUCT AND BIAS WITH THE COURT MISREPRESENTING AND DISTORTING EVIDENCE TO FALSELY SATISFY THE ESSENTIAL ELEMENT NECESSARY TO CONVICT APPLICANT FOR BAND FRAUD AND BANK FRAUD CONSPIRACY.

During trial in the criminal case at 17 Cr. 337 (RJS) before Hon. Richard J, Sullivan (Sullivan, J.) in November and December 2017, Government presented evidence - Government Exhibit GX1-57; GX1-57A; GX1-73; GX529 to highlight Brennerman`s interaction with Morgan Stanley. All evidence presented by Government demonstrated that Brennerman interacted with Government witness, Scott Stout who worked at Morgan Stanley Smith Barney, LLC where Brennerman opened his wealth management brokerage account. *See* GX1-73 Notice to Recipient: confirming that the email was sent by an employee of Morgan Stanley Smith Barneys, LLC; *see* also 17 CR. 337 (RJS), EFC No. 167; *see* also 17 CR. 337 (RJS), EFC No. 254, exhibit C.

After trial, in June 2018, Brennerman submitted evidence in support of his motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 ("Rule 29 motion") highlighting that he interacted with non-FDIC insured institution and that Government failed to prove that Morgan Stanley Smith Barney, LLC is FDIC insured. *See* Trial Tr., No. 17 Cr. 337 (RJS), at 1059 (testimony

of Government witness, Barry Gonzalez); *see* also 17 CR. 337 (RJS), EFC No. 254, exhibit G; *see* also 17 CR. 337 (RJS), at doc. no. 167; and 17 CR. 337 (RJS), EFC No. 254, exhibit C (supplemental evidence).

In November 2018, Judge Sullivan denied the Rule 29 motion for judgment of acquittal and sentenced Brennerman. Notwithstanding the demonstrable evidence submitted Judge Sullivan denied Brennerman`s Rule 29 motion by surreptitiously supplanting a non-FDIC insured institution, Morgan Stanley Smith Barney, LLC with a FDIC insured institution, Morgan Stanley Private Bank, in an endeavor to falsely satisfy the essential element necessary to convict Brennerman for bank fraud in violation of 18 U.S.C. § 1344(1) and conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349. 17 CR. 337 (RJS), EFC No. 167. This is the significant issue.

Judge Sullivan improperly stated on the record that the fraud was a scheme or artifice to defraud the private banking arm of Morgan Stanley, an FDIC insured institution even though Government presented no evidence to support such ruling. *See* Sentencing Tr., No. 17 CR. 337 (RJS), EFC No. 206, at 19; *see* also 17 CR. 337 (RJS), EFC No. 254, exhibit D. Under certain circumstances a judge`s behavior can be "per se misconduct." *United States v. Marquez-Perez*, 835 F.3d 153, 158 (1st Cir. 2016). This happens when judges "exceed their authority" by "testify[ing] as witnesses, or add[ing] to or distort[ing] the evidence." *Id*. Here the Court (Sullivan, J.) distorted the

evidence in order to convict Brennerman of bank fraud and bank fraud conspiracy.

To the extent that the Court affirms its prior ruling that Brennerman opened his wealth management account at the private banking arm of Morgan Stanley or that Scott Stout whom Brennerman interacted with worked there, then Brennerman sought evidence to support such ruling given that the criminal case records at 17 CR. 337 (RJS) lacks indicia of any evidence to support such ruling. However the Court did not provide any evidence, opinion or memorandum of law other than a single word "Denied".

B. JUDICIAL MISCONDUCT AND BIAS WITH THE COURT INTENTIONALLY DENYING BRENNERMAN'S REQUEST FOR PERTINENT EVIDENCE WHICH BRENNERMAN REQUIRED TO PROVE HIS INNOCENCE

Brennerman requested for evidence of Morgan Stanley presented by the prosecution at trial particularly given the divergence between the evidence presented on record at trial and the Court`s ruling on November 19, 2018 during sentencing and denial of Brennerman`s motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 with respect to Morgan Stanley. *See* 17 CR. 337 (RJS), EFC No. 167.

Moreover, the evidence will irrefutably and conclusively demonstrate that Brennerman opened a wealth management brokerage account in January 2013 at Morgan Stanley Smith Barney, LLC in Beverly Hills, California. That he did not receive any perks because the account was opened for a few weeks and was closed in February 2013. The charge card which was issued by

another non-Morgan Stanley institution was closed with zero balance. Further that, Brennerman had a single preliminary telephone call about oil asset financing with Kevin Bonebrake who worked at the institutional securities division of Morgan Stanley, a subsidiary of Morgan Stanley & Company, LLC, which is also not FDIC-insured.

Additionally, testimony of FDIC commissioner, Barry Gonzalez at trial confirmed that the prosecution did not prove that either Morgan Stanley Smith Barney, LLC (where Brennerman opened his wealth management brokerage account) and the Institutional Securities division of Morgan Stanley (where Kevin Bonebrake worked) are FDIC insured. *See* Trial Tr., No. 17 Cr. 337 (RJS), 1057-1061. Testimony of Government witness, Barry Gonzalez, FDIC commissioner also confirmed that Morgan Stanley & Company, LLC, the parent company for all Morgan Stanley businesses and subsidiaries is not FDIC insured. *Id*. Not FDIC-insured. Not Bank fraud.

Brennerman highlighted to the Court that the evidence will prove that he has been wrongfully convicted and sentenced, however the Court ignored him and denied his request for relief. *See* 17 CR. 337 (RJS), EFC No. 256.

Such intentional deprivation of evidence was also demonstrated where the Court permitted Government witness, Julian Madgett to testify at trial that evidence (ICBC underwriting file) exist with the bank`s file in London, U.K., which documents the basis for the bank approving the bridge finance thus

highlights the representations relied upon by the bank. *See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554.

Brennerman, upon learning of the evidence (ICBC underwriting file) and its importance to his defense immediately requested that the Court either compel the Government to obtain it because it was *Brady* material given that Government were present when their witness testified about its existence in open Court.

Government had already obtained over 6,000 pages of discovery (excluding the critical and pertinent evidence (ICBC underwriting file which Brennerman required for his defense) through ICBC`s lawyers, Linklaters LLP with global offices including in London and New York. When Brennerman requested for the evidence, Government refused to obtain it even after Julian Madgett testified to its existence and the Court refused to compel the Government.

Brennerman, in the alternative, requested that the Court compel ICBC (London) plc to provide the evidence to him so that he may use it to confront (impeach) witness against him and to present a complete defense, however the Court (Sullivan, J.) denied his request while permitting Government witness, Julian Madgett to testify as to the contents of the evidence knowing that Brennerman would be unable to challenge (impeach) the uncorroborated testimony of Julian Madgett. *See* 17 Cr. 337 (RJS), EFC No. 71. No file. No trial.

In essence, Brennerman was charged with wire fraud in violation of 18 U.S.C. § 1343 and Conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 based on the transaction between ICBC (London) plc, a British subsidiary of a Chinese bank headquartered in Beijing, China and The Blacksands Pacific Group, Inc., a Delaware-U.S. oil and gas development and production company headquartered in Los Angeles, California.

However during trial, the Court (Sullivan, J.) intentionally and deliberately denied Brennerman access to the most critical evidence – the ICBC underwriting file, which documents the basis for the bank approving the bridge loan thus highlights representations that were MATERIAL to the bank in its approval of the bridge loan. Notwithstanding permitting Government witness, Julian Madgett to testify as to the existence of the evidence in open Court in the presence of the Court and Government. *See* Trial Tr., No. 17 CR. 337 (RJS), at 551-554.

Even after learning of the evidence and its importance to the defense argument, Government continued to refuse to obtain or produce the evidence to the defense highlighting a *Brady* violation. Even though they [Government] could have easily obtained the evidence via e-mail within seconds given that they had already obtained over 6,000 pages of discovery from ICBC (London) plc through their New York based lawyers, Linklaters LLP. Government witness, Julian Madgett testified that ICBC (London) plc had handed over the files to Linklaters LLP. The Court (Sullivan, J.) denied

Brennerman`s request for this critical evidence – ICBC underwriting file stating that the evidence was in London, U.K. notwithstanding that over 6,000 pages of discovery were already produced by ICBC from London, U.K. *See* 17 CR. 337 (RJS), EFC No. 71.

More importantly the Court (Sullivan, J.) permitted Government sole witness, Julian Madgett to testify as to the contents of the evidence knowing that Brennerman would be unable to challenge the uncorroborated testimony presented before the jury at trial, given that Brennerman had been deprived of the evidence which he required to impeach the testimony. This was a fundamental miscarriage of justice where the presiding judge intentionally and significantly abridged the Constitutional rights of a criminal defendant.

Even after trial, the Court continued to deliberately and intentionally deny and deprive Brennerman access to the evidence (ICBC underwriting file) which he [Brennerman] requires to prove his innocence of the crime of wire fraud in violation of 18 U.S.C. § 1343 and wire fraud conspiracy in violation of 18 U.S.C. § 1349. *See* 17 Cr. 337 (RJS), EFC Nos. 153, 161, 187, 200, 236, 240, 241, 248, 250, 254, 256.

Additionally, during trial for the fraud case at No. 17 Cr. 337 (RJS), the prosecution were in possession of Brennerman`s birth certificate, an exculpatory evidence, which could have exonerated him [Brennerman] of indicted offense. At trial, the Government made contrasting argument to the jury and deliberately refused to present the evidence (Brennerman`s birth

certificate) to the jury for consideration/deliberation notwithstanding their allegation that Brennerman made false statement about his place of birth. The evidence corroborated Brennerman`s statement regarding his place of birth and was exculpatory however the prosecution deliberately omitted its presentment to the jury for consideration.

After trial, Brennerman sought to obtain the evidence from the Government in an endeavor to seek relief through the Court. When the Government ignored his request, he made application directly to the Court to compel for the evidence however the Court denied his request without offering any explanation. Brennerman again submitted further requests to the Court to compel the Government for the evidence (Brennerman`s birth certificate). To-date, the Court has ignored him. *See* 17 Cr. 337 (RJS), EFC Nos. 236, 240, 241, 248, 250.

II. THE JUDICIAL MISCONDUCT AND BIAS WERE SO EGREGIOUS AND SIGNIFICANT AS TO CALL INTO QUESTION THE INTEGRITY AND FAIRNESS OF THE ENTIRE CRIMINAL PROCEEDINGS

Brennerman contends that he was denied his Constitutional rights to a fair trial. Further that, his Constitutional rights were intentionally abridged due to the significant judicial misconduct, partiality and bias by the presiding judge (Sullivan, J.) as highlighted above. The enforcement of judgment of conviction and sentence should be stayed in the interest of justice.

Defendants in the American judicial system have the right to a fair trial, and part of this right is fulfilled by a judicial officer who impartially presides

over the trial. *See* e.g., *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). However "most questions concerning a judge`s qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Id*. at 904. A judge will, however, violate a defendant`s due process right if he is biased against the defendant or has an interest in the outcome of the case. *Id*. at 905. A likelihood or appearance of bias can disqualify a judge as well. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974). "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." *Edwards v. Balisok*, 520 U.S. 641, 647 (1997) (citations omitted).

A presiding judge misrepresenting and distorting evidence so as to falsely satisfy the essential element necessary to convict a criminal defendant cannot be said to be impartial because he has clearly exhibited an interest in the outcome of the case. Moreover misrepresenting or distorting the evidence so as to convict a criminal defendant is a per se misconduct.

Under certain circumstances, a judge`s behavior can be "per se misconduct." *United States v. Marquez-Perez*, 835 F.3d 153, 158 (1st Cir. 2016). This happens when judges "exceed their authority" by "testify[ing] as witnesses, or add[ing] to or distort[ing] the evidence." *Id*. It can also happen when judges "opin[e] to the jury on the credibility of witnesses, the character of the defendant, or the ultimate issue." *Id.*

Because the judge (Sullivan, J.) who presided over the entire criminal proceeding demonstrated partiality by intentionally distorting evidence of non-FDIC insured institution, Morgan Stanley Smith Barney, LLC with a FDIC-insured institution, Morgan Stanley Private Bank, so as to falsely satisfy the essential element necessary to convict Brennerman, Brennerman is entitled to have his conviction set-aside.

In *Liteky v. United States*, the Supreme Court held that a trial judge exhibits "such a high degree of favoritism or antagonism as to make fair judgment impossible" when the trial judge veers from the permissible norm. 510 U.S. 540, 555 (1994). Brennerman contends that misrepresenting evidence to falsely satisfy the essential element necessary to convict him and intentionally depriving him access to evidence – ICBC underwriting file which he required to confront (impeach) witnesses against him and to present a complete defense demonstrates a degree of favoritism to the Government and antagonism to him [Brennerman] as to make fair judgment impossible.

Due process guarantees a fair trial, not a perfect one. *United States v. Ayala-Vazquez*, 751 F.3d 1, 23-24 (1st Cir. 2014). To prevail on a judicial misconduct claim, a party must show that (1) the judge acted improperly, (2) thereby causing him prejudice. *United States v. Lanza Vazquez*, 799 F.3d 134, 143 (1st Cir. 2015).

Here, it cannot be said that the presiding judge`s conduct of misrepresenting and distorting evidence so as to falsely satisfy the essential

element necessary to convict a criminal defendant constitutes proper conduct, thus the judge acted improperly. The judge (Sullivan, J.) did so, in an endeavor to falsely deprive the criminal defendant, Brennerman, his Constitutional right to liberty thereby causing him significant prejudice.

Trial judges cross the line of neutrality, if they "misemploy [their] powers." *Id*. by assuming "the role of an advocate or 'otherwise us[ing] [their] judicial powers to advantage or disadvantage a party unfairly." *Ayala-Vazquez*, 751 F.3d at 24 (quoting *Logue*, 103 F.3d at 1045). Remaining impartial in a justice system built on jury trials is essential to guaranteeing the due process rights of criminal defendant, for the jury may be swayed by a judge`s "lightest word or intimation." *Starr v. United States*, 153 U.S. 614, 626 (1894).

Here, trial judge (Sullivan, J.) permitted Government witness to testify as to the existence of evidence - ICBC underwriting file in open Court in the presence of the Court and jury. The Court denied Brennerman`s request to obtain the evidence (ICBC underwriting file) which Brennerman required to confront (impeach) witness against him and to present a complete defense. The trial judge (Sullivan, J.) did so, while permitting Government witness to testify as to the contents of the evidence (ICBC underwriting file) to satisfy the essential element of MATERIALITY in highlighting which representations were material to the bank in its approval of the bridge loan, knowing that Brennerman would be unable to challenge (impeach) the

uncorroborated testimony before the jury. The trial judge (Sullivan, J.) employed his judicial powers to disadvantage Brennerman unfairly thus depriving him of his Constitutional right to a fair trial.

III. THE COURT (SULLIVAN, J.) ABUSED ITS DISCRETION WHEN IT FAILED TO PROMULGATE THE BASIS FOR DENYING RELIEF TO A CRIMINAL DEFENDANT, BRENNERMAN, WHO SOUGHT RELIEF FROM THE COURT'S OWN MISCONDUCT AND BIAS.

The United States Court of Appeals for the Second Circuit reviews a district court`s denial of relief from judgment for abuse of discretion. *Devlin v. Transp. Commc'ns Int`l Union*, 175 F.3d 121, 132 (2d Cir. 1999).

Here the Court (Sullivan, J.) provided no opinion or memorandum of law from which a meaningful appellate review could be undertaken. The Court provided no rational basis for the denial of relief. *See* 17 Cr. 337 (RJS), EFC No. 257. Hence, because the Court provided no basis in law or fact for its denial of relief to a criminal defendant, it [the Court] abused its discretion by not explaining the basis for its denial of relief from asserted and demonstrable judicial misconduct and bias.

IV. PROSECUTORIAL MISCONDUCT ARISING FROM CONDUCT IN THE CRIMINAL CASES AT DISTRICT COURT. *UNITED STATES V. THE BLACKSANDS PACIFIC GROUP, INC., ET AL*, NO. 17 CR. 155 (LAK) AND *UNITED STATES V. BRENNERMAN*, NO. 17 CR. 337 (RJS)

I. PROSECUTORIAL MISCONDUCT ARISING FROM A) GOVERNMENT`S FAILURE TO PRESENT EVIDENCE IN THEIR POSSESSION (DURING TRIAL) TO THE JURY FOR CONSIDERATION; B) VIOLATION OF DUE PROCESS GUARANTEE; C) *BRADY* VIOLATION.

A. GOVERNMENT`S FAILURE TO PRESENT EVIDENCE IN THEIR POSSESSION (DURING TRIAL) TO THE JURY FOR CONSIDERATION IN RESPECT OF COUNT 4 OF THE INDICTMENT

During trial for the fraud case at No. 17 Cr. 337 (RJS), the prosecution were in possession of Applicant`s birth certificate, an exculpatory evidence, which could have exonerated Applicant of indicted offense. At trial, the prosecution made contrasting argument to the Court and jury and deliberately refused to present the evidence (Applicant`s birth certificate) to the Jury for consideration/deliberation notwithstanding their allegation that Applicant made false statement about his place of birth. The evidence corroborated Applicant`s statement regarding his place of birth and was exculpatory however the prosecution deliberately omitted its presentment to the jury for consideration/deliberation.

After trial, Applicant sought to obtain the evidence from the prosecution in an endeavor to seek relief through District Court. When the prosecution ignored his request, he made application to District Court to compel for the evidence however District Court denied his request. Applicant appealed the denial order to the United States Court of Appeals for the Second Circuit at appeal No. 20 1414, however the Circuit Court denied and dismissed his appeal as moot even though Applicant continued to maintain liberty interest pursuant to 18 U.S.C. § 3143(b) pending collateral review pursuant to 28 U.S.C. § 2255.

B. VIOLATION OF DUE PROCESS GUARANTEE ARISING FROM THE GOVERNMENT`S DELIBERATE VIOLATION OF APPLICANT`S CONSTITUTIONAL RIGHTS

The entire prosecution was commenced with the deliberate endeavor to violate the Due Process Clause with the prosecution ignoring the law in *OSRecovery, Inc.,* to commence criminal prosecution against a non-party who was not involved in the underlying civil case in *ICBC (London) PLC. OSRecovery,* 462 F.3d at 90; *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 15 Cv. 70 (LAK). No subpoena or motion-to-compel were ever directed at him personally. To exacerbate the prejudice, during trial the prosecution then presented the erroneously adjudged civil contempt order propounded against a non-party to the jury resulting in a fundamental miscarriage of justice. (*See* Law 360 Article, No. 17 Cr. 337 (RJS), EFC No. 236, Ex. 3 at 17) (one of the jurors informing the media that the civil contempt order presented at trial swayed their decision to find Applicant guilty).

The prosecution went a step further and failed to investigate whether Morgan Stanley Smith Barney, LLC where Applicant previously maintained an account was federally insured and whether Morgan Stanley Institutional Securities division where Kevin Bonebrake, whom Applicant had a single telephone call in 2013 to discuss financing for an oil asset, worked, was federally insured. (*See* Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167). Had the prosecution undertaken the necessary investigation they would have realized that both subsidiaries/division within Morgan Stanley & Co, LLC are not federally insured thus the prosecution lacked jurisdiction to prosecute.

The prosecutors commenced this prosecution at District Court, No. 17 Cr. 337 (RJS) in respect of the underlying transaction between ICBC (London) PLC and The Blacksands Pacific Group, Inc., without obtaining or reviewing the pertinent underwriting transaction files which document the basis for approving the transaction to highlight materiality or the lack thereof of any representation or alleged misrepresentation. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554).

C. *BRADY* VIOLATION ARISING FROM THE GOVERNMENT`S DELIBERATE VIOLATION OF APPLICANT`S CONSTITUTIONAL RIGHTS

The core issue here occurred when Government witness, Julian Madgett testified that evidence (ICBC underwriting file) exists with the bank`s file in London, U.K. (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). First, the testimony/record confirmed that the Circuit Court panel either erroneously ignored or intentionally omitted the record. Second, it demonstrated that District Court (Judge Richard J. Sullivan) erred when Applicant requested for the evidence (ICBC underwriting file) so that he may present a complete defense in reliance on Supreme Court ruling in *Crane v. Kentucky* adopted by the Second Circuit in *Scrimo v. Lee*, and confront the witnesses against him, however the Court (Judge Sullivan) denied his request. (Def.'s Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71); *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019).

More important and in reliance on the holdings in *Kyles* regarding *Brady* violation. Government witness, Julian Madgett testified at trial he did so on behalf of the Government in open Court, hence when Mr. Madgett testified

that evidence exists (documenting the basis for the approval of the transaction at issue) which the Government never requested or obtained, the Government became aware of such evidence and thus was obligated to collect and learn of it. (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Their failure to collect or learn of the evidence was a *Brady* violation and violated Applicant`s right to the Due Process Clause because Government deprived him of his Constitutional right to liberty without considering all available evidence or undertaking an independent investigation on the transaction at issue prior to commencing this prosecution. Courts have required the Government to disclose evidence material to the defense where the Government "actually or constructively" possesses it. E.g., *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993) ("The prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it." (internal quotation marks omitted)); cf. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that, to satisfy *Brady* and *Giglio*, prosecutors have "a duty to learn of any favorable evidence known to the others acting on the Government`s behalf in the case"). In particular, in *Patemina-Vergara*, the Second Circuit held that the Government had an obligation to make good faith effort to obtain Jencks Act statements possessed by a third party that had cooperated extensively and had close relationship with the Government. *United States v. Patemina-Vergara*, 749 F.2d 993 (2d Cir. 1984); *see* also *United States v. Kilroy*, 488 F. Supp. 2d 350, 362 (E.D. Wis. 1981) ("Since Standard Oil is cooperating with

the Government in the preparation of the case and is making available to the Government for retention in the Government`s files any record which Standard Oil has and which the Government wants, however, is not unreasonable to treat the records as being within the Government`s control at least to the extent of requiring the Government to request the records on the defendant`s behalf and to include them in its files for the defendant`s review if Standard Oil agrees to make them available to the Government." (emphasis added)). See also *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008).[1]

During this unfortunate prosecution, Applicant lost his mother who was sick at the time of his arrest however due to the fact that Applicant was unable to donate his kidney to her (as he was a match) and care for her (even though Applicant pleaded with District Court (Judge Richard J. Sullivan) to allow him access to the evidence (ICBC (London) plc underwriting file) so that he may clear his name and return to care for his mother. (*See* Letter, No. 17 Cr. 337 (RJS), EFC No. 188). She passed away in 2019 while waiting for him to clear his name and return to care for her, demonstrating one of the most egregious prejudice suffered through this deliberate violation of Applicant`s Constitutional rights, civil rights and liberties.

[1] Courts have granted motions to dismiss an indictment where the Government fails to satisfy its discovery and disclosure obligation, either on the basis of a Due Process violation or under the Court`s inherent supervisory powers, including when the Government belatedly disclosed Jencks Act materials. E.g., *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008).

Given the extraordinary circumstances highlighted above. A Stay of enforcement of Judgment(s) is warranted as a matter of public interest to promote the rule of law and emphasize conformity and uniformity with the law and Constitution and to avoid continued attack on the civil rights and liberties of criminal defendants.

VIII. LEGAL AUTHORITY GOVERNING PRO SE APPLICANT

Raheem Jefferson Brennerman, is a pro se Applicant, therefore his pleadings are generally liberally construed and held to a less stringent standard than pleadings drafted by an attorney. *See Hughes v. Rowe*, 449 U.S. 6, 9 (1980) (per curiam); *Estelle v. Gamble*, 429 U.S. 97 (1976).

CONCLUSION

The application for Stay of enforcement of Judgment of Conviction and Sentence should be granted.

Dated: White Deer, Pennsylvania,
May 3, 2021

Respectfully submitted
/s/ Raheem J. Brennerman

RAHEEM JEFFERSON BRENNERMAN
Reg. No. 54001-048
FCI Allenwood Low
White Deer, Pa. 17887-1000

APPENDIX