IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Respondent, v. RAHEEM BRENNERMAN, Petitioner/Movant,	Case No.: 17-cr-337 (RJS)

OMNIBUS MOTION INCLUDING MOTION FOR COLLATERAL ATTACK RELIEF PURSUANT TO 28 UNITED STATES CODE SECTION 2255 AND OTHER RELIEFS

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I. RELIEF SOUGHT

Petitioner/Movant Pro Se Raheem Jefferson Brennerman ("Brennerman") respectfully submits this Omnibus Motions (the "Omnibus Motion") and will move this Court before Honorable Richard J. Sullivan, United States Circuit Judge, at 40 Foley Square, New York, New York 10007 for an order: (a.) Granting Brennerman`s collateral attack motion pursuant to 28 United States Code § 2255 (the "Collateral Attack Motion") to set-aside the judgment of conviction and vacate the sentence; (b.) Granting Brennerman`s motion for bail pending the determination of the collateral attack motion pursuant to 18 United States Code § 3143(b); (c.) Granting Brennerman`s motion to stay enforcement of the judgment of conviction and sentence pending determination of the collateral attack motion pursuant to Rule 38 of the Federal Rule of Criminal Procedure; (d.) Granting Brennerman`s motion to disqualify and/or seek recusal of the Court (Sullivan, J.) to consider and determine the omnibus motion pursuant to 28 United States Code § 455(a), or any other relief which this Court may deem just, necessary or appropriate including evidentiary hearing.

II. JURISDICTION

The Court of Appeals judgment affirming Petitioner`s conviction and sentence was entered on June 9, 2020. Brennerman`s motion for rehearing en banc was denied on July 31, 2020. *U.S. v. Brennerman,* No. 18-3546, EFC No. 190; 195. Brennerman filed Petition for writ of certiorari to the Supreme Court of the United States. *Brennerman v. U.S.*, S. Ct. No. 20-6638 (EFC Dec 09, 2020). The Supreme Court of the United States denied to grant certiorari on January 25, 2021. A one-year limitation for Brennerman to bring collateral attack motion challenging his judgment of conviction and sentence expires on January 24, 2022. This omnibus motion was presented prior to the one-year time limitation.

III. ISSUES PRESENTED

BACKGROUND

The history of this matter began in 2014 when ICBC (London) PLC ("ICBC London") 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, after ICBC London had reneged on the original $1.35 Billion dollars financing agreed with Blacksands. Significantly, Petitioner Raheem J. Brennerman, the CEO of Blacksands, was not named as a defendant in that action. *ICBC (London) PLC v. The Blacksands Pacific Group*, Inc., Notice of Removal; Cv. Cover Sheet, No. 15 Cv. 70 (LAK), EFC Nos. 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. *ICBC*, 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. *ICBC*, 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." *ICBC*, Order, No. 15 Cv. 70 (LAK), EFC No. 87).

Subsequently, ICBC London moved for contempt and coercive sanctions against Blacksands. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *Brennerman*, Bail Hr.'g Tr., 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. *United States v. Brennerman*, 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. *Brennerman*, 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. *Brennerman,* 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?" *Brennerman*, 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). *Brennerman*, 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). 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. *Brennerman*, Order to Show Cause, 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. *Brennerman*, 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. *Brennerman*, 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
FRAUD CASE AT NO. 17 CR. 337 (RJS)

During trial, following testimony by government's 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (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. *Brennerman*, Def.'s 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 96 at 4 (617).

Government presented evidence - Government Exhibits GX1-57A; GX1-73; GX529 to demonstrate that Mr. Brennerman opened a wealth management account at Morgan Stanley. *Brennerman*, 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 (*Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 34-35 (384-85)); That "this was very preliminary stage of our conversation" (Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 59 (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." *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 37-38 (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. *Brennerman,* Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 132-33 (1060-61). Gonzalez also testified that FDIC certificates only cover depository accounts and would not cover the Institutional Securities division/subsidiary of Morgan Stanley and that there was no confirmation that Morgan Stanley Smith Barney, LLC was FDIC insured. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 129 (1057) (testifying that FDIC certificates only cover depository accounts and do not cover divisions/subsidiaries); Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 131 (1059) (testifying no conformation that Morgan Stanley Smith Barney, LLC was FDIC insured). His testimony

demonstrated that neither ICBC (London) PLC, Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division/subsidiary are FDIC insured. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 131-33 (1059-61).

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. *Brennerman*, 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. *Brennerman*, 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.

Brennerman, Slip Op., 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.

Brennerman, 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.

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

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

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)

A. 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.

I. THE FEDERAL BANK FRAUD STATUTE REQUIRES INTENT TO DEFRAUD AN FDIC-INSURED INSTITUTION AND PETITIONER`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); 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).

Petitioner was convicted of bank fraud and bank fraud conspiracy based on an account he opened at Morgan Stanley Smith Barney, LLC. *Brennerman*, 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, who worked at Morgan Stanley Institutional Securities division, which is not FDIC insured. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 34-35, 37-38, 59 (384-85, 387-88, 409).

Although Petitioner`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 Petitioner to Scott Stout, who worked at Morgan Stanley Smith Barney, LLC would have been insufficient to establish that Petitioner took any step toward defrauding an FDIC-insured institution.

When Petitioner presented evidence to Judge Sullivan, 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. *Brennerman*, Def.'s Mot., No. 17 Cr. 337 (RJS), EFC No. 167. The judge also ignored the testimony by Barry Gonzalez, FDIC commissioner which confirmed that neither Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division are FDIC insured. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 131 (1059) (Testifying that Morgan Stanley Smith Barney, LLC is not FDIC insured). Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 129 (1057) (Testifying that Morgan Stanley Institutional Securities division is not FDIC insured). Further that the FDIC certificate of one subsidiary/division does not cover other subsidiary/division within Morgan Stanley because each subsidiary/division will require its own FDIC certificate. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 132-33 (1060-61). Thus highlighting that the FDIC certificates presented by the government at trial for Morgan Stanley Private Bank (Government Exhibit - GX530) and Morgan Stanley National Bank NA (Government Exhibit - GX532) does not cover

either Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division which Petitioner interacted with and thus Petitioner 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 Petitioner to be wrongly convicted.

On appeal, the Second Circuit ignored Petitioner`s argument while stating that Petitioner defrauded Morgan Stanley, an FDIC insured institution by receiving perks (even though Petitioner 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.

II. CONSTRUCTIVE AMENDMENT OF AN INDICTMENT OCCURS WHEN THE CHARGING TERMS ARE ALTERED AND PETITIONER`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).

Petitioner 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 Petitioner 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 Petitioner highlighted the constructive amendment issue, the Second Circuit refused to review the record on which Petitioner 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 Petitioner 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.

III. THE CIRCUIT COURT`S DECISION OVERLOOKED THE FACT THAT BRENNERMAN HAD MADE ATTEMPTS TO BBTAIN 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, Petitioner moved for discovery of the full ICBC file related to the bridge loan to Blacksands. Petitioner 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 Petitioner`s theory of defense. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554). Both Judge Kaplan and Judge Sullivan denied Petitioner`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. *Brennerman*, Mem. & Order, No. 17 Cr. 155 (LAK), EFC No. 76; Def.'s Mot., No. 17 Cr. 337 (RJS), EFC No. 71; Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554); Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 96 at 4 (617).

For these reasons, the Second Circuit was mistaken that the record contained no evidence that Petitioner 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 Petitioner`s bare assertion was erroneous.

B. 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. *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).

Petitioner 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 Petitioner requested for evidence (ICBC underwriting files), following testimony by government sole witness from ICBC London, Julian Madgett, 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. *Brennerman*, Def.'s Mot., No. 17 Cr. 337 (RJS). EFC No. 71 (requesting evidence – ICBC underwriting files); Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554); *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. *Brennerman,* Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 96 at 4 (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 Petitioner 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554); *Kyles v. Whitley*, 514 U.S. 419 (1995). Government had an obligation to collect the evidence after learning of its existence particularly where Petitioner made request to the Court (for among others) that the Court compel Government to collect the evidence (ICBC underwriting file).

Brennerman, Def.'s 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 Petitioner thus deliberately violating Petitioner`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 Petitioner`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 Petitioner`s argument that he was deprived of his Constitutional right to present a complete defense. *Brennerman*, 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554); *Brennerman*, Summ. Order, No. 18 3546(L), EFC No. 186 at 5.

IV. REASON FOR GRANTING COLLATERAL ATTACK MOTION

STANDARD OF REVIEW

A federal prisoner may challenge his detention under 28 U.S.C. §§ 2241 and 2255. 28 U.S.C. § 2255: *Adams v. United States*, 372 F.3d 132, 134 (2d Cir. 2004); *Chambers v. United States*, 106 F.3d 472, 474 (2d Cir. 1997). Section 2255 is proper mechanism for a prisoner to attack the imposition of a sentence. *Adams*, 372 F.3d at 134; *McQueen v. Shult*, No. 9:08-cv-903 (GLS/GHL), 2008 U.S. Dist. LEXIS 87668 at *2 (N.D.N.Y. Oct 28, 2008). A motion pursuant to U.S.C. § 2255 must be brought in the sentencing court. *Boumediene v. Bush*, 553 U.S. 723, 774-75 (2008) ("Section 2255 directed claims challenging a federal sentence on the ground that it was imposed in violation of the Constitution or law of the United States "not to the court that had territorial jurisdiction over the place of the petitioner`s confinement but to the sentencing court, a court already familiar with the fact of the case."); *Williams v. Winn*, 2005 U.S. Dist. LEXIS 12966 at *1 (D. Mass Jun 30, 2005).

ARGUMENT

A. GROUND ONE: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO A FAIR TRIAL AND PROCEEDINGS.

I. SIGNIFICANT JUDICIAL MISCONDUCT AND BIAS WITH THE COURT MISREPRESENTING AND DISTORTING EVIDENCE TO FALSELY SATISFY THE ESSENTIAL ELEMENT NECESSARY TO CONVICT PETITIONER FOR BANK 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 to highlight Brennerman`s interaction with Morgan Stanley. *Brennerman*, 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). 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. *Brennerman*, Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167 (highlighting Government Exhibit GX1-73 - confirming that the email was sent by an employee of Morgan Stanley Smith Barneys, LLC); Def.'s Mot., No. 17 Cr. 337 (RJS), EFC No. 254, Ex. 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 131 (1059) (testimony of Government witness, Barry Gonzalez); Def.'s Mot. No. 17 Cr. 337 (RJS), EFC No. 254, Ex. G; Ex. C (supplemental evidence).

In November 2018, Judge Sullivan verbally 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. *Brennerman*, 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. *Brennerman*, Sentencing Tr., No. 17

Cr. 337 (RJS), EFC No. 206, at 19; Def.'s Mot. No. 17 Cr. 337 (RJS), EFC No. 254, Ex. 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".

II. 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. *Brennerman*, Def.'s Letter, No. 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 129-33 (1057-61). 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. *Brennerman*, Def.'s Mot., No. 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (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. *Brennerman,* Def.'s Mot., No. 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (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. *Brennerman*, Def.'s Mot., No. 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] required 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. *Brennerman*, No. 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. *Brennerman*, Def.'s Mot., No. 17 Cr. 337 (RJS), EFC Nos. 236, 240, 241, 248, 250.

III. 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*, 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. *Liteky v. U.S.*, 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 v. Dore*, 103 F.3d 1040 (1st Cir. 1997)). 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.

B. GROUND TWO: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO CONSTITUTIONAL DUE PROCESS

APPLICABLE LAW

Prosecutorial misconduct can cause constitutional error in two ways. *Underwood v. Royal*, 894 F.3d 1154, 1167 (10th Cir. 2018). First, it can prejudice a specific constitutional right amounting to a denial of the right. *Id.* Second, "absent infringement of a specific constitutional right, a prosecutor`s misconduct may in some instances render a . . . trial 'so fundamentally unfair as to deny [a defendant] due process." *Id*. (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974); *see United States v. Anaya*, 727 F.3d 1043, 1052-53 (10th Cir. 2013) ("Prosecutorial misconduct violates a defendant`s due process if it infects the trial with unfairness and denies the defendant`s right to a fair trial." (quotations and alterations omitted).

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

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

II. VIOLATION OF DUE PROCESS GUARANTEE ARISING FROM THE GOVERNMENT`S DELIBERATE VIOLATION OF PETITIONER`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*, 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. *Brennerman*, Def.'s Mot., No. 17 Cr. 337 (RJS), EFC

No. 236, Ex. 3 at 17 (Law 360 Article - one of the jurors informing the media that the civil contempt order presented at trial swayed their decision to find Petitioner guilty).

The prosecution went a step further and failed to investigate whether Morgan Stanley Smith Barney, LLC where Petitioner previously maintained an account was federally insured and whether Morgan Stanley Institutional Securities division where Kevin Bonebrake, whom Petitioner had a single telephone call in 2013 to discuss financing for an oil asset, worked, was federally insured. *Brennerman,* Def.'s Mot., 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. *Brennerman,* Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554).

III. *BRADY* VIOLATION ARISING FROM THE GOVERNMENT`S DELIBERATE VIOLATION OF PETITIONER`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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (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

Petitioner requested for the evidence (ICBC underwriting file) so that he may present a complete defense in reliance on Supreme Court ruling in *Crane v. Ky*. adopted by the Second Circuit in *Scrimo v. Lee*, and confront the witnesses against him, however the Court (Judge Sullivan) denied his request. *Brennerman*, Def.'s 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554); *see Kyles v. Whitley*, 514 U.S. 419 (1995). Their failure to collect or learn of the evidence was a *Brady* violation and violated Petitioner`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. 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]

Both the Court (Judge Richard J. Sullivan) and the prosecution (United States Attorney Office for the Southern District of New York) intentionally deprived Petitioner Raheem J. Brennerman access to the evidence (ICBC London underwriting file) for among other reasons, because the file will reveal that there was no fraud or violation of the wire fraud statute. The file will reveal the disclaimer stipulated by Blacksands and Petitioner to ICBC London, which states in part: "The foregoing information is confidential and the contents thereof may not be reproduced or distributed. The statements contained herein are based upon information that we believe to be reliable, but we cannot guarantee and make no representation that they are complete and accurate." Thus highlighting that ICBC London did not rely on any representation or alleged misrepresentation by Blacksands and Petitioner Raheem J. Brennerman.

[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).

C. GROUND THREE: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO AN EFFECTIVE ASSISTANCE OF COUNSEL

APPLICABLE LAW

Kimmelman reads, in pertinent parts, as follows:

> The right to counsel is a fundamental right of criminal defendants; it assures the fairness and their legitimacy of our adversary process. E.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The essence of an ineffective assistance claim is that counsel`s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. *See*, e.g., *Strickland v. Washington*, 466 U.S. at 686; *United States v. Cronic*, 466 U.S. 648, 655-657 (1984). In order to prevail, the defendant must show both that counsel`s representation fell below an objective standard of reasonableness, *Strickland*, 466 U.S. at 688, and that there exists a reasonable probability that, but for counsel`s unprofessional errors, the result of the proceeding would have been different. *Id*. at 694; 477 U.S. at 372.
>
> The right of an accused to counsel is beyond a fundamental right. *See*, e.g. *Gideon*, 372 U.S. at 344, 83 S. Ct. at 796 ("The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in other countries, but it is in ours."). Without counsel, the right to a fair trial would be of little consequences...for it is through counsel that the accused secures his other rights . . . 477 U.S. at 377, 106 S. Ct. at 2584.

Kimmelman v. Morrison, 466 U.S. 365 (1986).

Strickland recognized that an attorney`s duty to provide reasonably effective assistance includes "the duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691; *see also* ABA Standards for Criminal Justice: Prosecution Function and the Defense Function, 4-4. 1(a) (3rd Edition 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case..."). *See also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (finding ABA standard useful guide to determining what is reasonable" (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

The right to effective assistance of counsel includes the right to have the lawyer adequately investigate the facts and prepare the case for plea or for trial. *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932) (presuming prejudice where there was "no attempt made to investigate" noting that "consultation, thorough-going investigation and preparation are vitally important" in providing effective representation); *United States v. Baynes*, 622 F.2d 66 (3d Cir. 1980) (failure to investigate voice exemplars); *United States v. Gray*, 878 F.2d 702 (3d Cir. 1989); *Couch v. Booker*, 632 F.3d 241, 246 (6th Cir. 2011); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984); *House v. Balkom*, 725 F.2d 608 (11th Cir. 1984); *Langone v. Smith*, 682 F.2d 282 (2d Cir. 1982).

Other Circuits agree that the failure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." *United States v. Gray*, 878 F. 2d 702, 711 (3d Cir. 2011). A lawyer has a duty to "investigate what information . . . potential eye-witnesses possess[], even if he later decides not to put them to the stand." *Id*. at 712; *Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir. 1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); *Brit v. Montgomery*, 709 F.2d 690, 701 (7th Cir. 1983) cert. denied, 469 U.S. 874 (1984) ("Essential to effective representation...is the independent duty to investigate and prepare."); *Mosley v. Atchison*, 689 F. 3d 838 (7th Cir. 2012).

Defense counsel has a duty to investigate the facts, learn the law, and evaluate the application to the facts of the case. *Everett v. Beard*, 290 F.3d 500, 509 (3d Cir. 2002); *United States v. Bui*, 769 F.3d 831, 835 (3d Cir. 2014); *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973); *Hill v.*

Lockhart, 894 F.2d 1009 (8th Cir. 1990); *Cooks v. United States*, 461 F. 2d 530 (5th Cir. 1972); *Government of Virgin Islands v. Vanderpool*, 767 F.3d 157, 169 (3d Cir. 2014) ["[a]n attorney`s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*"]; *Hinton v. Alabama*, 134 S. Ct. 1081, 1089, 188 L. Ed 2d I (2014); *Medina v. DiGuglielmo*, 461 F.3d 417, 428 (3d Cir. 2006).

I. TRIAL COUNSEL DEPRIVED PETITIONER AN EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEIR FAILURE SIGNIFICANTLY PREJUDICED PETITIONER WHERE HE WAS CONVICTED AND INCARCERATED FOR ALLEGED CONDUCT WHICH DID NOT VIOLATE THE LAW AND FEDERAL STATUTE

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 to highlight Brennerman`s interaction with Morgan Stanley. *Brennerman*, Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167 (highlighting Government Exhibit - GX1-57A; GX1-73; GX529). 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. *Brennerman*, Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167 (highlighting Government Exhibit GX1-73 - confirming that the email was sent by an employee of Morgan Stanley Smith Barneys, LLC); Def.'s Mot., No. 17 Cr. 337 (RJS), EFC No. 254, Ex. C.

The evidence also demonstrated 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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 34-35, 37-38, 59 (384-85, 387-88, 409).

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. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 98 at 129-33 (1057-61). 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.

Notwithstanding these overwhelming and demonstrable evidence, during trial, trial counsel Thompson Hine LLP through Attorneys Maranda Fritz and Brian D. Waller failed to highlight to the Court, prosecutors and jury that Morgan Stanley Smith Barney, LLC where Scott Stout worked, and Petitioner opened his wealth management account was not federally insured (No FDIC). Nor did they [trial counsel] highlight to the Court, prosecutors, and jury that the Institutional Securities division of Morgan Stanley where Kevin Bonebrake, with whom Petitioner had a brief discussion about oil asset financing, worked was not federally insured (No FDIC). Trial counsel`s failure to highlight that these subsidiaries of Morgan Stanley that Petitioner interacted with were not federally insured (No FDIC) significantly prejudiced Petitioner, thus their professional error and deficiency caused Petitioner to be convicted and incarcerated for alleged conducts which did not violate the law and federal statute.

II. TRIAL COUNSEL DEPRIVED PETITIONER AN EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEIR FAILURE SIGNIFICANTLY PREJUDICED PETITIONER WHERE THEY FAILED TO OBTAIN AND PRESENT EVIDENCE (ICBC UNDERWRITING FILE) WHICH PETITIONER REQUIRED TO ENGAGE IN MEANINGFUL CROSS-EXAMINATION (IMPEACHMENT) OF WITNESSES AGAINST HIM AND TO PRESENT A COMPLETE DEFENSE

Prior to trial and during trial, trial counsel failed to highlight, argue and make request to the Court (Sullivan, J.) for the Court to order and compel for the complete evidence from ICBC (London) plc including the pertinent underwriting file pursuant to Rule 17 of the Federal Rule of Criminal Procedure or "Letter Rogatory" pursuant to 28 U.S.C. § 1781. Even following Government witness, Julian Madgett testifying in open Court about the missing evidence - the underwriting file, and that it documents the basis for the bank, ICBC (London) plc approving the bridge finance at issue in this case and thus will highlight if the bank relied on any representations or alleged misrepresentations from Petitioner, trial counsel failed to request for the evidence pursuant to Rule 17 for obtaining evidence located overseas. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 94 at 201-204 (551-554).

Again, during trial, following the Court`s (Sullivan, J.) denial of Petitioner`s request for the evidence with the Court stating that "If it was a Rule 17 request then that would be a different matter," trial counsel still failed to make such request for the pertinent evidence pursuant to Rule 17 even though it was obvious that Petitioner required the evidence to meaningfully cross-examine Government witness and to present his complete defense. *Brennerman*, Def.'s Mot., No. 17 Cr. 337 (RJS), EFC No. 71 (requesting evidence); Trial Tr., No. 17 Cr. 337 (RJS), EFC No. 96 at 4 (617) (stating, "If it was a Rule 17 request then that would be a different matter").

Trial counsel`s errors and deficient performance in failing to make a Rule 17 request to obtain and present the pertinent evidence - ICBC underwriting file, deprived Petitioner of the

very evidence he required to confront (impeach) witness against him and to present his complete defense at trial, thus causing significant prejudice to him and violating his Constitutional rights.

The Court of Appeals in its affirmation summary order stated in pertinent part: "Even if the documents exist and are material and favorable, Brennerman never sought a subpoena pursuant to Federal Rule of Criminal Procedure 17." *Brennerman*, Slip OP., No. 18-3546, EFC No. 183 at 4-5. Although the Court of Appeals erred when the Court failed to review the record to realize the testimony of Government witness, Julian Magett where he testified to the existence of the evidence and its significance to Petitioner, because it documents the basis for the bank approving the bridge finance. Their [Court of Appeals] promulgation highlights the significant prejudice suffered by Petitioner due to counsel`s ineffectiveness and failure to make a Rule 17 request to obtain and present pertinent evidence which Petitioner required to confront (impeach) the Government witness and to present his complete defense.

Counsel`s performance(s) were so egregious that it was tantamount to a denial of Petitioner`s Constitutional right to an effective assistance of counsel. In this case, it is unequivocal that but for the deficient performance by trial counsel, the outcome of the case would have been vastly different.

III. TRIAL COUNSEL DEPRIVED PETITIONER AN EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEIR FAILURE SIGNIFICANTLY PREJUDICED PETITIONER WHERE THEY FAILED TO PRESENT EXCULPATORY EVIDENCE IN THEIR POSSESSION DURING TRIAL FOR JURY CONSIDERATION AND DELIBERATION

Trial counsel failed to highlight and present Petitioner`s birth certificate, which was in their possession and in the possession of the prosecutors, to the Court and jury during trial. Such evidence was required to impeach and challenge the erroneous arguments and assertions by the prosecutors. Their failure to present the evidence (birth certificate) significantly prejudiced

Petitioner and deprived him of the very exculpatory evidence he required to demonstrate his innocence of the charged offense.

V. REASON FOR GRANTING MOTION FOR BAIL PENDING DETERMINATION OF COLLATERAL ATTACK MOTION

APPLICABLE LAW

The Court has the "inherent power to release on bail a habeas petitioner who challenges his detention after a criminal conviction," but "[t]he standard....is a difficult one to meet": "The petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective." *Mapp v. Reno*, 241 F.3d 221, 223, 226 (2d Cir. 2001).

"The standard for release on bail under 28 U.S.C. § 2255 is even higher than under 18 U.S.C. § 3143(b)," requiring "a demonstrated likelihood that the petition will prevail, based upon claims of a substantial nature upon which the petitioner has a high probability of success....so that victory for petitioner can be predicted with confidence." *United States v. Yarmoluk*, 1997 U.S. Dist. LEXIS 16140 at *1 (S.D.N.Y. Oct. 17 1997) (internal quotation marks omitted); *Beras v. United States*, 2012 U.S. Dist. LEXIS 82297 at *1 (S.D.N.Y. June 12, 2012) ("Judges in this district have ruled that this high hurdle requires that the petitioner show a demonstrated likelihood the petition will prevail such that the petitioner has a 'high probability of success.").

DISCUSSION

Petitioner contends that he was deprived of his Constitutional right to a fair trial and that he suffered and continues to suffer gross miscarriage of justice where the presiding judge misrepresented and distorted evidence to falsely satisfy the law to convict and imprison him. The presiding judge also intentionally deprived Petitioner of the very evidence - ICBC underwriting

file, which he required to prove his innocence. Bail pending the determination of the collateral attack motion is warranted in the interest of justice.

During this unfortunate prosecution, Petitioner lost his mother who was sick at the time of his arrest. Due to the fact that Petitioner was deprived of the ability to donate his kidney to her (as he was a match) and care for her (even though Petitioner pleaded with the Court (Sullivan, J.) 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. *Brennerman*, Letter No. 17 Cr. 337 (RJS), at EFC. No. 188. She passed away in 2019 while waiting for Petitioner to clear his name and return to care for her, demonstrating one of the most egregious prejudice suffered through this deliberate violation of Petitioner`s Constitutional and human rights, civil rights and liberties.

Petitioner also contracted Covid-19 in December 2020, alongside with 114 out-of 116 inmates at his housing unit at Allenwood Low. He was later diagnosed with Covid-19 pneumonia which lead to significant breathing difficulties and suffering while Allenwood Low, where he is currently incarcerated provided no medication or therapeutics, further exacerbating the Constitutional rights violations already suffered.

As of September 3, 2021, Allenwood Low where Petitioner is currently incarcerated has been categorized as "Level 3 (Red) Intense Modification" by the Federal Bureau of Prisons as regards Covid-19 threat level, this is the BOP`s highest categorization. Petitioner is very concerned about his health and welfare, as he suffers from diabetes and hypertension both medical vulnerabilities promulgated by the C.D.C. that puts him at a heightened risk of serious illness or death, given that the Covid-19 delta variant is now resurging in the community and inside prison walls.

VI. REASONS FOR GRANTING STAY OF ENFORCEMENT OF JUDGMENT OF CONVICTION AND SENTENCE PENDING DETERMINATION OF COLLATERAL ATTACK MOTION

DISCUSSION

This motion is submitted pursuant to Fed. R. Crim. P. 38 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 Petitioner 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/collateral attack from judicial misconduct and bias in a criminal proceeding. A stay pending appeal/collateral attack "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/collateral attack are "(1) whether the stay Petitioner has made a

strong showing that he is likely to succeed on the merits; (2) whether the Petitioner 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); *Cooper v. Town of East Hampton*, 83 F.3d 31, 36 (2d Cir. 1996).

Petitioner 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 Petitioner for bank fraud in violation of 18 U.S.C. § 1344(1) and bank fraud conspiracy in violation of 18 U.S.C. § 1349. Petitioner presents demonstrable evidence that when he highlighted this issue to the Court (Sullivan, J.) in twelve separate filings, the Court continually ignored him. Petitioner 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. Petitioner 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 Petitioner`s requests for the evidence thus depriving him of the ability to exercise his Constitutional rights.

Petitioner 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 Petitioner 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 Petitioner 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 Petitioner. The attack on Petitioner 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 Petitioner 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 Petitioner for a federal crime. The Court also intentionally denied Petitioner 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. Petitioner 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 Petitioner 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 Petitioner 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. Petitioner 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.). Petitioner 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 Petitioner was vaccinated in January and February of 2021, such vaccination do not attenuate the significant Constitutional rights deprivation or the prejudice which Petitioner has already suffered or will continue to suffer. Moreover, there has been no conclusive study to demonstrate that Petitioner 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 Petitioner 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 Petitioner.

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.

VII. REASON FOR GRANTING RECUSAL /DISQUALIFICATION OF THE COURT (SULLIVAN, J.).

DISCUSSION

There are few characteristics of a judiciary more cherished and indispensable to justice than impartiality. By enacting 28 U.S.C. § 455(a) Congress has mandated that justice must not only be impartial but also that is must reasonably be perceived to be impartial. To that end, the

Supreme Court held in *Liljeberg*, that judges must apply an objective, "reasonable person" standard in deciding whether disqualification is mandated by § 455(a), rather than making a subjective assessment of whether the facts and circumstances warrant disqualification. *Liljeberg v. Health Servs. Corp*., 486 U.S. 847 (1988), If a judge`s impartiality "reasonably might be questioned" in a case, the judge must disqualify himself or herself "even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible." *Id*. at 860 (quoting *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)); *Chase Manhattan Bank v. Affiliated FM Ins. Co*., 343 F.3d 120, 127 (2d Cir. 2003). Indeed, in that case, the Court held that the judge should have recused himself even though he was unaware of the circumstances that gave rise to the conflict, because a reasonable person could conclude that the judge should have been aware. *Liljeberg*, 486 U.S. at 861. Only in this manner can the congressional purpose underlying § 455(a) be achieved, namely, "to promote public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 859-60.

Judge Sullivan is disqualified from continuing to preside over this matter because a reasonable person who is aware of the Court`s action with respect to misrepresenting and distorting evidence to falsely satisfy the essential element and law to convict and imprison Petitioner would conclude that Judge Sullivan`s impartiality in this case "reasonably might be questioned." 28 U.S.C. § 455(a).

VIII. LEGAL AUTHORITY GOVERNING PRO SE PETITIONER

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

IX. CLOSING STATEMENT

Given the extraordinary circumstances highlighted above, grant of the relief requested in its entirety 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 Petitioner.

CONCLUSION

The Omnibus motion for an order of this Court granting: (a.) Collateral attack motion to set-aside the judgment of conviction and vacate the sentence; (b.) Bail pending determination of the collateral attack motion; (c.) Stay of enforcement of the judgment of conviction and sentence pending determination of the collateral attack motion; (d.) Recusal and/or disqualification of the Court (Sullivan, J.) from considering and determination of the Omnibus motion, should be granted in its entirety. In addition to any other relief which this Court may deem just, necessary and appropriate, including granting an evidentiary hearing.

Dated: White Deer, Pennsylvania
October 3, 2021

Respectfully submitted

/s/ Raheem J. Brennerman
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EXHIBIT