X

Raheem J. Brennerman
Reg. No. 54001-048
Federal Correctional Institution
Allenwood Low
P. O. Box 1000
White Deer, Pa. 17887-1000

Hon. Lewis A. Kaplan
UNITED STATES DISTRICT COURT
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

February 11, 2022

Regarding: Brennerman v. United States, Civil No. 22 Cv. 996 (LAK)
United States v. Brennerman, Criminal No. 17 Cr. 155 (LAK)
ADDENDUM TO COLLATERAL ATTACK MOTION

Dear Judge Kaplan:

Petitioner Raheem J. Brennerman ("Brennerman") respectfully submits this addendum (the "Addendum") as amendment to pertinent argument within the Omnibus Motion including Collateral Attack Motion at United States v. Brennerman, 17 Cr. 155 (LAK), EFC No. 211 and at Brennerman v. United States, 22 Cv. 996 (LAK), EFC No. 1.

Given the significance and egregious nature of the Prosecutorial misconduct and the clear unprofessional errors of Petitioner's trial counsel cited within the collateral attack motion, it is necessary to clarify any ambiguity and succinctly present the pertinent arguments. Petitioner hereby respectfully submits the argument(s) below as amendment to supplant the current argument(s) at Ground(s) Two and Four of the collateral attack motion.

B. Ground Two: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO AN EFFECTIVE ASSISTANCE OF COUNSEL

APPLICABLE LAW

Kimmelman v. Morrison, 466 U.S. 365, 106 S. Ct. 2574, 91 L Ed 2d 305 (1986) reads, in pertinent parts, as follows:

The right to counsel is a fundamental right to criminal defendants, it assumes the fairness and best legitimacy of our adversarial process. E.g., Gideon vs. Wainwright, 372 U.S. 335, 344 83 S. Ct. 792 9 L. ED 799 (1963). The essence of an effective 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, 104 S. Ct at 2064; United States v. Cronic, 466 U.S. 648, 655-657, 104 S. Ct. 2039, 2044-2046, 80 L. Ed. 2d 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, 104 S. Ct. at 2064, 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 694 104 S. Ct. at 2068, 477 U.S. at 372, 106 S. Ct. at 2574.

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 to one charged with a crime to counsel may not be deemed fundamental and essential to fair trial 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.

Strickland recognized that an attorney's duty to provide reasonable 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, 104 S. Ct. at 2052; 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, 548 U.S. 374, 387, 125 S. Ct. 2456, 162 L ED 2d 360 (2005) (finding ABA standard useful guide to determining what is reasonable" quoting Wiggin, 539 U.S. at 524, 123 S. Ct. 2527)

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, 53 S. Ct. 55, 77 L. Ed 158 (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 (3rd Cir. 1980) (failure to investigate voice exemplars), United States v. Gray, 878 F.2d 702 (3rd 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 808 (11th Cir. 1984), Longone 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." See United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). A lawyer has a duty to "investigate what information...potential eye-witnesses possesses[], even if he later decides not to put them to the stand." Id at 712. See also 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. 674 (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 fact, learn the law, and evaluate the application to the facts of the case. Everett v. Beard, 290 F.3d 500, 509 (3rd Cir. 2002), United States v. Bui, 769 F.3d 831, 835 (3rd 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 (3rd 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 (2014), Medina v. DiGuglielmo, 461 F.3d 417, 428 (3rd Cir. 2008)

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

The Second Circuit found that the district court did not err in its failure to compel ICBC's production of its entire file because Brennerman did not comply with the rules governing subpoenas under Rule 17(d) of the Federal Rules of Criminal Procedure where he served ICBC's New York-based attorney, not the ICBC's London branch. United States v. Brennerman, No. 18-1033(L), WL 3053867 at *1 (2d Cir. June 9, 2020). Highlighting trial counsel's unprofessional errors and deficient performance which significantly prejudiced Petitioner by failing to obtain and present the very evidence which existed at time of trial and which Petitioner required to prepare for trial, confront (impeach) witnesses against him and to present his complete defense at trial.

Prior to trial, Petitioner's trial counsel, Thompson Hine LLP through Attorneys Maranda Fritz and Brian Waller Esq. filed an order to show cause to compel for the pertinent evidence (complete ICBC transaction files as more succinctly highlighted within the Motion and Affidavit in furtherance and support of the Omnibus Motion including Collateral Attack Motion at 17 Cr. 155 (LAK), EFC No. 212 and 22 Cv. 996 (LAK), EFC No. 2) which Petitioner required to prepare for trial, confront (impeach) witnesses against him and present a complete defense during trial. In response, district court issued a ruling stating in relevant parts: "In this case, defendants (Brennerman and Blacksands) did not seek, and this Court did not issue, an order authorizing the issuance of this subpoena. Nor would the Court authorize its issuance nunc pro tunc because it is undisputed that ICBC is "a foreign bank located approximately 3,500 miles from the courthouse." DI 69. It is not "a national of the United States who is in a foreign country." Accordingly Section 1783(a) does not authorize issuance of a subpoena to it. See Aristocrat Leisure, 262 F.R.D. at 305; United States v. Johnpoll, 739 F.2d 702, 709 (2d Cir. 1984)); accord WRIGHT, supra, Section

2462. For the foregoing reasons, defendants motion to compel ICBC [DI 59] to respond to the subpoena dated August 22, 2017 is denied in all respects."

Notwithstanding the ruling by district court, trial counsel still failed to compel for the evidence (complete pertinent ICBC transaction files) pursuant to the appropriate federal rule for obtaining evidence located overseas including "Letter Rogatory" pursuant to 28 United States Code Section 1781 or appropriate Federal Rule of Criminal Procedure governing evidence located overseas thus significantly prejudicing Petitioner. The resulting prejudice, because of trial counsel's unprofessional error, Petitioner was deprived of the very evidence which he required to prepare for trial and confront (impeach) witnesses against him and present his complete defense during trial.

The complete pertinent ICBC transaction files would have demonstrated (as succinctly highlighted at 17 Cr. 155 (LAK), EFC No. 212 and 22 Cv. 996 (LAK), EFC No. 2) that agents of ICBC (London) plc repeatedly advised agents of The Blacksands Pacific Group, Inc., including Petitioner that they [ICBC (London) plc] were not interested in discovery but in settlement on which Blacksands and Brennerman focused their attention, thereby negotiating and presenting a draft settlement agreement (See Draft Settlement Agreement, United States v. Brennerman et. ano., 17 Cr. 155 (LAK), EFC No. 12 Ex. 10).

Thus, Petitioner and Blacksands did not willfully disobey any Court order(s) because by prioritizing the negotiation of the settlement agreement rather than providing more discovery, they (Blacksands and Brennerman) assumed that they were complying with the Court order, particularly the second court order which stipulated for the parties to settle or provide discovery, especially given the discussion with agents of ICBC (London) plc during the meeting at Exotix Partners London office where they advised that settlement was preferred to discovery.

Petitioner was however deprived of the very evidence (complete pertinent ICBC transaction files which includes records of discussions and minutes of meetings between agents of ICBC and Blacksands) during trial to confront (impeach) witnesses against him and to present his complete defense, thereby violating his Constitutional rights including his right to an effective assistance of counsel.

The existence and importance of the evidence was highlighted within Petitioner's Motion and Affidavit in furtherance and support of the Omnibus Motion including Collateral Attack Motion submitted at United States v. Brennerman, 17 Cr. 155 (LAK), EFC No. 212 and at Brennerman v. United States, 22 Cv. 996 (LAK), EFC No. 2. More importantly, the existence and importance of the evidence was highlighted through testimony of Government sole witness from ICBC (London) plc, Mr. Julian Madgett, who testified that the evidence contained the basis for the bank approving the bridge loan finance. Thus, the evidence would highlight why agents of ICBC (London) plc preferred settlement rather than discovery. See United States v. Brennerman, 17 Cr. 337 (RJS), trial tr. 551-554.

This conclusively demonstrates that Petitioner was significantly prejudiced where he was deprived of the very important evidence which existed at the time of trial and he required for his complete defense, however was not obtained or presented by his trial counsel. Accordingly, Petitioner satisfies both necessary elements for a claim of ineffective assistance of counsel at set forth in Strickland v. Washington, 466 U.S. 688, 80 L. Ed 2d 674, 104 S. Ct. 2052 (1984). Specifically, Petitioner has shown that counsel's performance "fell below an objective standard of reasonableness" under "prevailing professional norms," and that there is a "reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different."

D. Ground Four: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE CONSTITUTIONAL RIGHTS GUARANTEE

APPLICABLE LAW

Prosecutorial misconduct can cause constitutional error in two ways. Underwood v. Royal, 894 F.3d 1154, 1167 (11th 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. PROSECUTORIAL MISCONDUCT ARISING FROM THE GOVERNMENT'S DELIBERATE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

The entire prosecution was commenced with the deliberate endeavor to violate Petitioner's Constitutional rights with the prosecution conspiring with Attorney Paul S. Hessler who represented ICBC (London) plc while working at Linklaters LLP and subsequently while working independently, to deprive Petitioner of the very exculpatory evidence which he [Petitioner] required to prove his innocence and present his complete defense.

As evident from the testimony of Government sole witness from ICBC (London) plc, Mr. Julian Madgett, during trial in the interrelated criminal case where Mr. Madgett testified that the bank, ICBC (London) plc had provided documents related to the bridge loan transaction between the bank, ICBC (London) plc, The Blacksands Pacific Group, Inc., and Blacksands Pacific Alpha Blue, LLC to their New York based counsel, Linklaters LLP and that Linklaters LLP were expected to turn over all those documents to the prosecution ("U.S. Attorney Office")

Through Mr. Madgett's testimony it became apparent that Mr. Hessler had withheld the pertinent documents and did not provide those documents to the prosecution in an endeavor to deprive Petitioner of those documents for his complete defense particularly the underwriting file

which documents the basis for the bank approving the bridge loan transaction at issue and all notes relating to the settlement discussion which Petitioner required to present his complete defense. (See Testimony of Government witness from ICBC (London) plc, Julian Madgett at United States v. Brennerman, 17 Cr. 337 (RJS), trial tr. 551-554; 552 at 15-25; see also United States v. Brennerman, 17 Cr. 337 (RJS), EFC No. 272 Ex 1.)

Prior to trial, Petitioner through his counsel, Thompson Hine LLP had repeatedly requested for the missing evidence for his defense, however the prosecution repeatedly refused to even ask Linklaters LLP or Attorney Paul S. Hessler for any additional evidence and denied Petitioner's request. The testimony highlighted and demonstrated that the prosecution commenced this prosecution without obtaining or reviewing the complete evidence and pertinent documents related to the conduct which was being prosecuted. More importantly, the prosecution refused to obtain the evidence even after learning of its importance to this prosecution and that those documents were missing from the production received from Linklaters LLP. The prosecution's refusal to obtain the documents was done with the deliberate endeavor to deprive Petitioner of those evidence for his defense.

The importance of the missing evidence to Petitioner's defense is succinctly highlighted within the Affidavit and Motion in furtherance and support of the Omnibus Motion including Collateral Attack Motion at United States v. Brennerman et ano., 17 Cr. 155 (LAK), EFC No. 212 and at Brennerman v. United States, 22 Cv. 996 (LAK), EFC No. 2.

Government's deliberate refusal and failure to obtain and learn of the complete evidence including the exculpatory evidence prior to commencing this prosecution deprived Petitioner of his Constitutional right. Furthermore, Government's failure to learn of and obtain evidence which includes exculpatory evidence meant they [Government] were unable to provide those evidence as discovery (pursuant to Fed. R. Crim. P. 16) to Petitioner for his defense, depriving Petitioner of the very evidence which he required to present his complete defense and to confront witnesses against him thereby infecting the trial with unfairness and denying Petitioner his right to a fair trial and proceeding.

Dated: February 11, 2022
White Deer, Pa. 17887-1000

Respectfully submitted,

/s/ Raheem J. Brennerman
RAHEEM JEFFERSON BRENNERMAN
Federal Correctional Institution
Allenwood Low
P. O. Box 1000
White Deer, Pa. 17887-1000

Pro Se Petitioner