

In re Raheem Jefferson Brennerman

## **I. QUESTION PRESENTED**

- 1) Whether the abuse of process and discretion standard imposed by the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, is Constitutionally permissible - where trial Court (United States District Court for the Southern District of New York) which had an obligation to protect the Constitutional rights of a criminal defendant deliberately deprived him of his Constitutional rights and the United States Court of Appeals for the Second Circuit refused to correct the deliberate violation of trial Court.
- 2) Whether trial Court (United States District Court for the Southern District of New York) abused its obligations to protect the Constitutional rights of a criminal defendant during and after trial - where trial Court deliberately caused the deprivation of a criminal defendant's Constitutional rights in an endeavor to unjustly deprive him of liberty.

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#### **IV. PETITION FOR AN EXTRAORDINARY WRIT**

Petitioner petitions this Court for an Extraordinary Writ pursuant to 28 U.S.C. Section 1651(a) to vacate or reverse the judgment of conviction and sentence entered at the United States District Court for the Southern District of New York at criminal case, United States v. Brennerman, case no. 1:17 CR. 337 (RJS), at ECF No. 203 ("Judgment of Conviction and Sentence"); 223 ("Amended Judgment of Conviction and Sentence"); the Summary Order and Judgment entered at the United States Court of Appeals for the Second Circuit at Appeal, United States v. Brennerman, No. 18-3546(L), ECF No. 186, United States v. Brennerman, No. 18-3546, 818 F. App'x 25 (2d Cir. June 9, 2020) ("Summary Order and Judgment"); and dismiss the indictment at the United States District Court for the Southern District of New York at criminal case, United States v. Brennerman, no. 1:17 CR. 337 (RJS), at ECF No. 1, because it violates the Due Process Clause, Fourth and Fifth Amendment Constitutional rights and the Sixth Amendment Constitutional rights to a fair trial and proceedings.

#### **V. OPINION BELOW**

#### **VI. JURISDICTION**

This Petition is necessary to rectify the fundamental miscarriage of justice where the United States Court of Appeals for the Second Circuit has blatantly refused to correct the intentional deprivation of Constitutional rights and other errors by the United States District Court for the Southern District of New York - where Petitioner highlighted the fundamental miscarriage of justice to the Second Circuit's panel Court in the direct appeal - Petition for Rehearing En banc at

Appeal No. 18-3546(L), Doc. No. 190 (denied at Doc. No. 195), in the motion to recall mandate at Appeal No. 18-3546(L), Doc. Nos. 222, 224, 226 (Papers returned at Doc. Nos. 223, 225, 227); and in the Appeal of the denial of collateral attack petition at Appeal No. 23-6180. The United States Court of Appeals for the Second Circuit had ample opportunity to rectify the fundamental miscarriage of justice in this case however refused to do so. Significantly, the miscarriage of justice concerns highlighted in this case arises from the conduct or rather misconduct of the United States District Court for the Southern District of New York (Sullivan, J.). Thus, this petition for an Extraordinary Writ is in aid of this Court's appellate jurisdiction because exceptional circumstances warrant the exercise of this Court's discretionary powers and adequate relief has not been obtained and cannot be obtained in any other form or from any other court, warranting the grant of relief by this Court. Supp. Ct. R. 13(1); 13(3); 13(5); 29(2); 30(1). Petitioner invokes this Court's jurisdiction under 28 U.S.C.S. 1254(1)



## **VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **18 U.S.C.S. 1349. ATTEMPT AND CONSPIRACY:**

Any person who attempts or conspires to commit any offense under this chapter [18 USCS 1341 et seq.] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the subject of the attempt or conspiracy.

### **18 U.S.C.S. 1344(1). BANK FRAUD:**

Whoever knowingly executes, or attempts to execute; a scheme or artifice-- (1) to defraud a financial institution; or shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

### **18 U.S.C.S. 1343 - FRAUD BY WIRE, RADIO, OR TELEVISION:**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

### **AMENDMENT IV OF THE U.S. CONSTITUTION**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### **AMENDMENT V OF THE U.S. CONSTITUTION**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be

subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### **AMENDMENT VI OF THE U.S. CONSTITUTION**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

#### **AMENDMENT XIV OF THE U.S. CONSTITUTION**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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 by imposing the equal protection of law doctrine. See *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316-17 (3d Cir. 2001) (en banc) (Although the Fifth Amendment contains no Equal Protection Clause...[t]he [Supreme] Court has construed the Fifth Amendment to contain an Equal Protection Guarantee [;]... Fifth Amendment Equal Protection claims are examined under the same principle that apply to such claims under the Fourteenth Amendment) (internal citations omitted).

The Fifth Amendment of the United States Constitution guarantees a criminal defendant the right to Due Process of the law. U.S. CONST. AMEND. V. (No defendant shall be deprived of life, liberty or property, without Due Process of law"), inherent in the guarantee of Due Process is that the trial procedure itself shall be fair and unbiased. See *Smith v. Phillips*, 455 U.S. 209, 219 (1983) (The 'touchstone of Due Process analysis...is the fairness of the trial...") *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Steven, J. concurring) (citing, *Friendly, Is innocence irrelevant?*) *Collateral attack on criminal judgment*, 38 U.CHI. L. Rev. 142, 151-154 (1970))("[T]here are context in which irrespective of guilt or innocence, Constitutional errors violate fundamental fairness...fundamental fairness is more than accuracy at trial. Justice is more than guilt or innocence.")

The Court had previously promulgated that a criminal defendant has a Sixth Amendment right to present a complete defense. See *Crane v. Ky.*, 476 U.S. 683 (1986) (holding that "It is a federal law that a criminal defendant has a Constitutional right to present a complete defense"). The United States Court of Appeals for the Second Circuit recently adopted such holding in *Scrimo* while creating disparity with Petitioner. *Scrimo v. Lee*, 935 F. 3d 103 (2d Cir. 2019).

Review and grant of this petition is warranted as a matter of public interest to emphasize conformity and uniformity with the law and Constitution among lower Courts in ensuring adherence with their Constitutional obligations and to avoid attack on the civil rights and liberties of criminal defendants because of their race, sex or religion.

### **VIII. STATEMENT OF CASE**

This petition for an Extraordinary Writ presents a matter of significant public interest in highlighting the unusual instance where the Courts, that have an obligation to protect the Constitutional rights of a criminal defendant, veers from the permissible to the impermissible with the Courts deliberately violating the Constitutional rights of Petitioner. The attack on Petitioner Raheem J. 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 for the Second Circuit has a Constitutional obligation to review de novo meaning for clear error. See *United States v. Bershchansky*, 755 F.3d 102, 108 (2d Cir. 2015) (internal citations and question marks omitted.) The Circuit Court exacerbated the Constitutional deprivation already suffered by Petitioner by imposing a constitutionally impermissible abuse of process and discretion standard with its review.

This petition presents an opportunity for this Court to rectify the fundamental miscarriage of justice given the extraordinary circumstance where trial Court (Sullivan, J.) deliberately abridged and abrogated the fundamental rights of a criminal defendant conferred by the U.S. Constitution, thus violating his Fourth, Fifth, Sixth 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.

Petitioner submits that the trial judge (Judge Richard J. Sullivan) who presided over the criminal case in the lower Court surreptitiously supplanted evidence of 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 (violation of federal statute - 18 U.S.C. Section 1344(1)) and bank fraud conspiracy (violation of federal statute - 18 U.S.C. Section 1349.) Petitioner presents demonstrable evidence that when he highlighted this issue to the Court in more than 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 more than twelve times including during trial immediately upon learning from Government witness, Mr. Julian R. Madgett, during his testimony that the evidence [ICBC underwriting file] exists with the bank's New York based counsel, Linklaters LLP. Petitioner requested for the evidence so as to confront witness (Mr. Madgett) against him and to present his complete defense in reliance on applicable law and his Constitutional rights, particularly given that the Court permitted Government witness, Mr. Madgett, to testify as to the contents of the evidence - ICBC underwriting file, knowing that Petitioner had already been deprived access to the evidence and would be unable to meaningfully cross-examine him (Mr. Madgett) as to substance and credibility on the issue. The Court 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 the grant of an Extraordinary Writ. 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 crucial thing is the impact of the thing done wrong on the minds of other men not on one's own, in the total setting. *United States v. Hasting*, 461 U.S. 499, 516, 103 S. Ct. 1974, 1984, 76 L. Ed 2d 96 (1983) (Stevens, J. Concurring).

This petition for an Extraordinary Writ boils down to an extraordinary assertion that the Constitutional violations(s) here are simply too blatant and consequential to ignore. Petitioner seeks review and grant of this petition for clarification on the obligations of the Courts - United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York, particularly where a criminal defendant's right has been so abridged and abrogated because of his race resulting in a fundamental miscarriage of justice.

### 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 confirmation 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 attempt[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 OBTAIN AND 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.

**ERROR(S) WITH THE DISTRICT COURT'S DECISION TO THE COLLATERAL**  
**ATTACK PETITION AND OTHER RELIEFS**

On June 24, 2018, Petitioner submitted at case no. 1:17 CR. 337 (RJS), ECF No. 167, copies of Government exhibits - GX1-57; GX1-57A; GX529; GX1-73, which were adduced at trial to demonstrate that he interacted with Scott Stout and Morgan Stanley Smith Barney, LLC where he (Petitioner) opened his wealth management brokerage account. Petitioner's aforesaid submissions were to bolster his argument in judgment of acquittal motion pursuant to Rule 29 of the Federal Rule of Criminal Procedure (Fed. R. Crim. P. 29) arguing that all evidence adduced by the Government at trial demonstrated and highlighted that his interaction was with Morgan Stanley Smith Barney, LLC and that Government witness, Barry Gonzalez, the FDIC commissioner testified that Morgan Stanley Smith Barney, LLC was not FDIC insured, hence there was no federal jurisdiction to even indict (charge) him, much less prosecute and convict him for bank fraud and conspiracy to commit bank fraud. The basis for the motion pursuant to Rule 29 of the Federal Rule of Criminal Procedure was for the Court to acquit him of the bank fraud charge even where the jury had capriciously convicted him because jurors are unfamiliar with the legal standard and the law.

On November 19, 2018, during sentencing at case no. 1:17 CR. 337 (RJS), ECF No. 206 (Sentencing Tr. 19:12-21) Judge Sullivan stated:

".....the bank fraud was a scheme or artifice to defraud the private banking arm of Morgan Stanley to enable Mr. Brennerman to get access to the perks which are tangible. They're worth money, free checking, among them. I don't get that. And some other perks. But also to get more intangible perks which would be access to other arms of the Morgan Stanley family of entities.

I'm only really focused on the first category here. It seems to me the first category here, there's been no evidence that I've seen that suggests that was worth more than \$6,500 or so."

On November 19, 2018, Judge Sullivan made such promulgations after denying the motion for judgment of acquittal field pursuant to Rule 29 of the Federal Rule of Criminal Procedure (Fed. R. Crim. P. 29), where argument was that evidence adduced at trial demonstrated that Petitioner interacted with Morgan Stanley Smith Barney, LLC where he maintained a wealth management account. And that trial testimony demonstrated that Morgan Stanley Smith Barney, LLC is not FDIC insured, hence there was no violation of the federal bank fraud statute or jurisdiction to convict him. See case no. 1: 17 CR. 337 (RJS), ECF No. 167. However, Judge Sullivan denied the motion arguing that Petitioner defrauded the private banking arm of Morgan Stanley which is FDIC insured. See case no. 1:17 CR. 337 (RJS), ECF No. 206:19, Judge Sullivan then proceeded to sentence Petitioner.

On November 16, 2021, Petitioner signed and submitted a 442 page omnibus motion including collateral attack petition at case no. 1:17 CR. 337 (RJS), ECF No. 269; Supplemental papers and exhibits in support of the omnibus motion were submitted at case no. 1:17 CR. 337 (RJS), ECF No. 270, 272, 274, 288. Among others, the crux of the argument presented was that Petitioner never or rather did not interact with the private banking arm of Morgan Stanley which

is FDIC insured because all evidence adduced by Government at trial demonstrated that Petitioner interacted with Morgan Stanley Smith Barney, LLC which is not FDIC insured. Further that, to convict Petitioner of bank fraud and its related conspiracy, the institution which he interacted with must be FDIC insured.

On January 2, 2023 (in-excess of 4 years after November 19, 2018) in adjudicating Petitioner's omnibus motion including collateral attack petition to vacate the judgment and set-aside the sentence pursuant to 28 U.S.C. Section 2255, at case no. 1:17 CR. 337 (RJS), ECF Nos. 269, 270, 272, 274, 288, Judge Sullivan promulgated at case no. 1:17 CR. 337 (RJS), ECF No. 289: pgs. 6-7 that:

".....As an initial matter, the record reveals that Brennerman's counsel vigorously pursued the FDIC issue before the jury. For instance, counsel elicited testimony from a government witness that Morgan Stanley Smith Barney, LLC was not insured by the FDIC (Tr. at 1059:9-11). He further elicited testimony that affiliate entities within a corporate family...like Morgan Stanley Smith Barney, LLC and Morgan Stanley & Company, LLC - must obtain 'separate certificate(s) of insurance to be FDIC insured' (Tr. at 1060:24-1061:5)

In summation, Brennerman's counsel again argued that "the law absolutely required that the bank...targeted in a fraud...be insured by the FDIC (Tr. at 1538:9-10) and that Brennerman was not looking to take money" from "wealth management arm of Morgan Stanley...the only arm of Morgan Stanley [at issue] that was FDIC insured" (Tr. at 1539:9-14). In short, Brennerman's allegation that his counsel failed to press the FDIC argument before the jury is plainly contradicted by the record."

Judge Sullivan's Jan 3, 2023 promulgation at case no. 1:17 CR. 337 (RJS), at ECF Nos. 289: pgs. 6-7, was in significant contradiction to his prior promulgation on November 19, 2018 at case no. 1:17 CR. 337 (RJS), ECF No. 206:19 when he (Judge Sullivan) sentenced Petitioner. Specifically the statement: "...For instance, counsel elicited testimony from a government witness that Morgan Stanley Smith Barney, LLC was not insured by the FDIC (Tr. at 1059:9-11)..." demonstrates that the Court (Judge Sullivan) lacked jurisdiction to convict and sentence Petitioner for conspiracy to commit bank fraud in violation of 18 U.S.C. Section 1344. Second, that Petitioner did not violate the federal bank fraud statute. Third, that Judge Sullivan intentionally misrepresented the evidence on November 19, 2018 at case no. 1:17 CR. 337 (RJS), ECF No. 206:19, by surreptitiously supplanting Morgan Stanley Smith Barney, LLC ("MSSB") which is not FDIC insured (and all evidence adduced at trial demonstrated Petitioner interacted with) with the private banking arm of Morgan Stanley ("MSPB") which is FDIC insured, so as to falsely satisfy the law and federal statute, and finally, that the adjudication of Petitioner's direct appeal by the United States Court of Appeals for the Second Circuit was erroneous where the Second Circuit panel Court intentionally generalized Morgan Stanley as a single entity without considering the trial records which Judge Sullivan now succinctly outlines in his Jan 2023 promulgation.

Judge Sullivan further cites other erroneous promulgation by the Second Circuit panel Court with respect to the ICBC document including the transaction underwriting file where they falsely stated: "[t]he only indication that such documents are extant comes from Brennerman's bare assertion." Brennerman II 818 F. App'x at 30. This was even after Petitioner submitted the trial records with his collateral attack petition which demonstrated that government witness, Mr. Julian R. Madgett, testified on record that the ICBC document including the underwriting file which documents the basis for ICBC approving the finance [at issue] are extant and were provided to



ICBC's New York based lawyers, Linklaters LLP (see case no. 1:17 CR. 337 (RJS), Trial Tr. 551-554.) Petitioner also submitted on record (at ECF No. 274) that ICBC's New York based counsel, Linklaters LLP wrote to him on March 17, 2022 to confirm that they are in possession of the ICBC document, however that as a law firm, they require either an order from the Court or consent from their client to provide the ICBC document to Petitioner. Even Judge Sullivan conceded on record at trial that government witness, Mr. Julian Madgett, testified that the ICBC documents are extant and with the bank's file in London, U.K. (see case no. 1:17 CR. 337 (RJS), Trial Tr. 617)

Given the above and pursuant to Judge Sullivan's own promulgation on record, the Court (Judge Sullivan) exhibited partiality and interest in the outcome of the case, first, by convicting and sentencing Petitioner for bank fraud and bank fraud conspiracy where the Court lacked jurisdiction. Second, by convicting Petitioner for bank fraud and bank fraud conspiracy where no conduct violated the federal bank fraud statute. Third, by the Court (Judge Sullivan) intentionally misrepresenting the evidence during sentencing on November 19, 2018, by surreptitiously supplanting a non-FDIC insured institution, MSSB, with MSPB, a FDIC insured institution, so as to falsely satisfy the law and the federal bank fraud statute to convict and imprison Petitioner.

Supreme Court precedent makes clear that a criminal defendant tried by a partial judge is entitled to have his conviction set-aside no matter how strong the evidence against him. See *Edward v. Balisok*, 520 U.S. 641, 647, 117 S. Ct. 1684, 13 L. Ed. 2d 906 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Hence, the entire case and conviction should be set-aside. Court's denial order and applicants responses are submitted at case no. 1:17 CR. 337 (RJS), ECF Nos. 269, 290, 291, 298.

## **IX. REASONS FOR GRANTING EXTRAORDINARY WRIT**

### **ARGUMENTS**

This petition for an Extraordinary Writ presents an opportunity for this Court to rectify the fundamental miscarriage of justice given the extraordinary circumstance with (a.) the abuse of process and discretion standard imposed by United States District Court for the Southern District of New York and United States Court of Appeals for the Second Circuit - where the District and Circuit Court refused to correct deliberate violation(s) and error(s) of trial Court which substantively abridged and abrogated the rights of Petitioner, a criminal defendant, protected by the United States Constitution; and (b.) where trial Court deliberately deprived the criminal defendant, Petitioner, of his Constitutional rights thus violating his Fourth, Fifth and Sixth Amendment rights of the United States Constitution.

The grant of this petition will also clarify the obligations of lower Courts as a matter of public interest to emphasize conformity and uniformity with the law and Constitution among lower Courts in ensuring adherence with their Constitutional obligations and avoid attack on the civil rights and liberty of criminal defendant because of their race, sex or religion.

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

A. SIGNIFICANT JUDICIAL MISCONDUCT AND BIAS WITH THE COURT MISREPRESENTING AND DISTORTING EVIDENCE TO FALSELY SATISFY THE ESSENTIAL ELEMENT NECESSARY TO CONVICT 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.

B. JUDICIAL MISCONDUCT AND BIAS WITH THE COURT  
INTENTIONALLY DENYING PETITIONER'S REQUEST FOR PERTINENT  
EVIDENCE WHICH HE 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.

C. PETITIONER WAS DELIBERATELY DEPRIVED OF THE PERTINENT EVIDENCE [ICBC UNDERWRITING FILE] WHICH HE REQUIRED TO SUPPORT HIS DEFENSE AND ALSO CONFRONT WITNESSES AGAINST HIM, IN VIOLATION OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHTS.

Following referral of Petitioner for criminal prosecution by Judge Lewis A. Kaplan, the prosecution commenced their investigation by making requests of ICBC's New York based counsel, Linklaters LLP through Attorney Paul Stephen Hessler, for the pertinent ICBC documents. Mr. Hessler provided the prosecution with communications between Blacksands Pacific and ICBC on the one part and Petitioner and ICBC on the other part. However, glaringly obvious from the document production were the missing ICBC documents - there was no



transaction underwriting file, no ICBC internal documents or minutes and no settlement discussion notes, meeting minutes or emails.

The prosecution then proceeded to obtain search warrant, upon Judge Kaplan insisting on them (prosecutors) enforcing his arrest warrant, to obtain Petitioner's electronic devices so they (prosecutors) may prove that those communications provided by Attorney Hessler are from Petitioner.

Prior to trial, Petitioner notified the prosecution of the missing ICBC documents which he required for his defense. The prosecution refused to obtain or review those missing ICBC files and the Courts - Judge Kaplan and Sullivan denied Petitioner's request to compel for the missing ICBC files.

During trial of the fraud case, the prosecutor's sole witness from ICBC, Mr. Julian R. Madgett testified in open Court before the Court, prosecutors and jury that the missing ICBC files including the underwriting file were provided by ICBC to their counsel, Linklaters LLP and that their counsel had communicated with the U.S. Attorney office. He also testified that the missing ICBC underwriting file documents the basis for the bank, ICBC, approving the bridge finance [at issue] thus would highlight which representations or alleged misrepresentations were MATERIAL to the bank in approving the bridge finance. See Trial Tr. No. 1:17 CR. 337 (RJS), ECF Nos. 94 at 201-204 (Trial Tr. 551-554)

During trial following Mr. Madgett's testimony, Petitioner again requested that Judge Sullivan compel the prosecution to obtain the missing ICBC files and present it to him for his complete defense or in the alternative for ICBC to provide the missing ICBC file to him for his complete defense. See case no. 1:17 CR. 337 (RJS), ECF No. 71, however, Judge Sullivan denied

Petitioner's request while permitting Mr. Madgett to testify as to the contents of the missing ICBC underwriting file, knowing that Petitioner was already deprived of the evidence [ICBC underwriting file] and would be unable to meaningfully cross-examine Mr. Madgett as to substance and credibility on the issue. Mr. Madgett made misleading statements to the jury, however, Petitioner was deprived of the ability to rebut his statements. That violated Petitioner's right to a fair trial by depriving him of the right to present his complete defense and to confront witnesses against him. See Trial Tr. No. 1:17 CR. 337 (RJS), ECF No. 96 (Trial Tr. 617-623)

During Petitioner's direct appeal, the United States Court of Appeals for the Second Circuit incorrectly stated that "[t]he only indication that the document (ICBC document) is extant comes from Brennerman's bare assertion," in contrast with the trial records.

D. PETITIONER WAS CONVICTED BASED ON A THEORY WHICH BEARS NO RESEMBLANCE TO THE THEORY PROPOUNDED IN THE CHARGING DOCUMENT (PREJUDICIAL VARIANCE), IN VIOLATION OF HIS FIFTH AMENDMENT CONSTITUTIONAL RIGHTS AND THE COURT (JUDGE RICHARD J. SULLIVAN) MADE FACTUALLY AND LEGALLY FLAWED RULING TO WRONGLY CONVICT AND IMPRISON HIM.

The gravamen of the Petitioner indictment was that he obtained a loan from ICBC through fraud. The only other allegation of financial fraud was a generic claim that he "made similar misrepresentation" to other, unnamed financial institutions in order to obtain financing for Blacksands Pacific.

However, faced with the reality that its allegation about the ICBC loan would not support a bank fraud conviction since ICBC was not FDIC-insured, as required by the relevant statute, the

prosecution pivoted at trial and argued that Petitioner's guilt was established by his dealings with Morgan Stanley, where he opened an account which came with "special perks, things like fancy credit card and lower rates" (United States v. Brennerman, 17 CR. 337, prosecutor's summation, trial transcript at 1430).

When, as here, the prosecution, through its argument, broadens the basis of conviction beyond those charged in the indictment, a prejudicial variance occurs. This fatal variance violated Petitioner's Fifth Amendment right to be indicted by a grand jury. It also violated his right to be informed of what he is accused of doing so that he could prepare his defense.

Moreover, even had the indictment included the Morgan Stanley "banking perks" theory, that evidence could not legitimately establish Petitioner's guilt of bank fraud because the entity that gave him those "perks" was not FDIC-insured either. Nonetheless, the judge allowed the case to go to the jury on that theory, confusing that entity (Morgan Stanley's Wealth Management subsidiary, a non-FDIC-insured entity) with its FDIC-insured affiliate.

After trial, Petitioner highlighted the confusion to Judge Sullivan in his motion for judgment of acquittal and motion for new trial (see Rule 29/33 motion of the Federal Rule of Criminal Procedure at case no. 1:17 CR. 337 (RJS), ECF No. 167), in response, Judge Sullivan then misrepresented the evidence, by supplanting the non-FDIC insured institution, Morgan Stanley Smith Barney, LLC, where Petitioner opened his wealth management account based on all evidence adduced at trial with a FDIC-insured affiliate, Morgan Stanley Private Bank, even though there was no evidence presented by either the prosecution or Judge Sullivan to support such ruling.

The factually and legally flawed ruling by Judge Sullivan falsely satisfied the law and statute, which requires that the institution be FDIC insured. Judge Sullivan made such flawed ruling purposely to wrongly convict and imprison Petitioner. (see Sentencing Tr. at case no. 1:17 CR. 337 (RJS), ECF No. 206 at 19).

Judge Sullivan was advised numerous times of his factually and legally flawed ruling to wrongly convict and imprison Petitioner, however, he has chosen to ignore him. (See motions at case no. 1:17 CR. 337 (RJS), ECF Nos. 269, 290, 298, 303)

"A criminal defendant tried by a partial judge is entitled to have his conviction set-aside, no matter how strong the evidence against him." *Edward v. Balisok*, 520 U.S. 641, 647 (1997) (citations omitted)

E. 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. 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.

## **X. CONCLUSION**

The danger of the United States District Court for the Southern District of New York and United States Court of Appeals for the Second Circuit's rule is amply demonstrated by the consequences of erosion of public trust in the United States justice system and other institutions. As the Fourth Circuit 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 lower Courts - United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York 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 United States Constitution - warrants vacatur or reversal of the United States Court of Appeals for the Second Circuit's decision and the United States District Court for the Southern District of New York's judgment of conviction and sentence, in addition to dismissal of the indictment in this case.

## **XI. APPENDIX**

Omnibus motion including Collateral Attack Petition  
at United States District Court at criminal case no. 17

CR. 337 (RJS), ECF no. 269.....APPENDIX A

Evidence in furtherance and support of Omnibus  
motion including Collateral Attack Petition at United  
States District Court at criminal case no. 17 CR. 337

(RJS), ECF no. 272 .....APPENDIX B

Supplemental motion in furtherance and support of  
Omnibus motion including Collateral Attack Petition  
at United States District Court at criminal case no.17

CR. 337 (RJS), ECF no. 274.....APPENDIX C

Order of United States District Court denying  
Omnibus motion including Collateral Attack Petition  
at United States District Court at criminal case no.17

CR. 337 (RJS), ECF no. 289.....APPENDIX D



Motion for Reconsideration of Order denying  
Omnibus motion including Collateral Attack Petition  
at United States District Court at criminal case no. 17  
CR. 337 (RJS), ECF no. 290..... APPENDIX E

Order of United States District Court denying motion  
for reconsideration at United States District Court at  
criminal case no. 17 CR. 337 (RJS), ECF no. 291.....APPENDIX F

Motion and Notification of violation of  
Law/Defendant's human, civil and Constitutional  
rights in seeking appropriate relief at United States  
District Court at criminal case no. 17 CR. 337 (RJS),  
ECF no. 298 .....APPENDIX G