# 18-3546(L)

## Consolidated with 19-497

**IN THE**

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

*Appellee,*

v.

RAHEEM BRENNERMAN,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION FOR REHEARING *EN BANC* AND FOR RECONSIDERATION OF DEFENDANT-APPELLANT**

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## PRELIMINARY STATEMENT

Appellant Raheem J. Brennerman respectfully submits this petition for reconsideration pursuant to Fed.R.App.P. 40(a)(2) and for rehearing *en banc* pursuant to Fed.R.App.P. 35(b). The decision of the panel on which rehearing *en banc* and reconsideration is requested, *United States v. Brennerman*, 18-3546-cr (2d Cir. Jun. 9, 2020) (Summary Order), is attached hereto as Exhibit A.

The panel should reconsider its decision because the panel misapprehended key facts in Petitioner's argument concerning the FDIC-insured status of Morgan Stanley's subsidiary entities. The indictment charged that Brennerman had "made false representations to financial institutions in the course of seeking loans and other forms of financing for purported business ventures." A39[1] (Indictment at ¶4). But the conduct that this Court found sufficient to satisfy the FDIC-insured element of the offense—Brennerman's having obtained "perks" from Morgan Stanley's personal wealth division in the form of lower interest rates and access to credit cards—was not business-related. Moreover, Brennerman's personal wealth management account was opened at Morgan Stanley Smith Barney, LLC, which is a brokerage business and is not FDIC-insured, as it does not directly accept deposits. A1305.[2] Similarly, the investment division of Morgan Stanley, which is a wholly owned subsidiary of the parent company and is the entity at which Brennerman's fraudulent representations were directed, is not FDIC insured.

Therefore, there was no conduct directed at an FDIC-insured institution that was sufficient to satisfy every element of the statute of conviction and the Court should reconsider its

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[1] Citations beginning with "A" refer to the pagination of the Appendix submitted concurrently with Appellant's Opening Brief on September 6, 2019.

[2] Brennerman additionally refers the Court to the Government's trial exhibits GX1-57A, GX1-73, and GX529, the third page of which indicates that Morgan Stanley Smith Barney, LLC held client funds in a number of FDIC-insured affiliates.

decision. For the same reason, because Brennerman was convicted of fraud related to his personal account, not to his investment scheme, the Court should reconsider and should conclude that a constructive amendment of the indictment occurred.

In addition, the Court should reconsider its decision concerning the complete ICBC file, the Government's obligation to procure it, and Brennerman's constitutional right to present a complete defense insofar as the decision was premised on the assumption that Brennerman had taken no steps to obtain the file and that his bare assertion provided the only indication of the file's existence. The file's existence was confirmed by the testimony of Julian Madgett. A866; A800-803. Brennerman attempted to serve subpoenas and asked the district court to compel production both before and during the trial.

The Court should rehear this case *en banc* because the panel's decision denying Brennerman's appeal is contrary to law insofar as the panel neglected this Court's holding in *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019) (district courts are not categorically barred from allowing discovery of evidence located abroad) and the Supreme Court's instruction that a criminal defendant has a constitutional right to present a complete defense. *See Scrimo v. Lee*, 935 F.3d 103 (2d Cir.2019) (citing *Crane v. Kentucky*, 476 U.S. 683 (1986)).

## STATEMENT OF FACTS

Brennerman incorporates by reference the statement of facts and legal argument in his opening brief on appeal (Dkt. #127) and his reply brief (Dkt. #158) and limits the discussion herein to those facts necessary to the determination of this petition.

This case arose out of a search of Brennerman's Las Vegas, Nevada residence on April 18, 2017, following the issuance of an arrest warrant by Judge Lewis A. Kaplan for Brennerman after the initiation of a petition pursuant to Fed.R.Crim.P. 42 to hold Brennerman in criminal

contempt of court. The search led to a four-count indictment in this case, which alleged *inter alia* that Brennerman's company, The Blacksands Pacific Group, Inc., and its subsidiaries were shell companies and that Brennerman had sought financing from international banking institutions including the Industrial Commercial Bank of China in London ("ICBC") and the investment division of Morgan Stanley for no legitimate purpose. *See*, *generally*, Opening Brief ("Op.Br.") at 3-4 and citations therein.

The case was tried to a jury in November and December 2017. On December 6, 2017, Brennerman was convicted on all counts. *See generally United States v. Brennerman*, 17-CR-337 (RJS), Indictment (A38-49); A1925.

## I. FDIC Insurance: Insufficiency of the Evidence and Constructive Amendment of the Indictment.

Count One of the Indictment describes the scheme in which Brennerman engaged in order to obtain the $20,000,000 bridge loan from ICBC ("Bank-1"). A38-43 (Ind. ¶¶1-9). Count Two, which incorporates the speaking allegations in Count One, charges that Brennerman "made false representations to financial institutions in the course of obtaining or attempting to obtain loans for purported business ventures." A45 (Ind. ¶14).

At trial, the Government failed to prove that Brennerman's conduct with respect to ICBC satisfied every element of the charge. With respect to Morgan Stanley, the Government proved only that Brennerman made false representations in the course of opening a depository account—*not* that his false representations had led to any serious negotiations for a business loan from Morgan Stanley's investment bank.

ICBC London is a subsidiary and a branch of a Chinese bank. It is not FDIC insured. A800; A1308-09. Brennerman avers that his wealth management relationship with Scott Stout

and wealth management account was with Morgan Stanley Smith Barney, LLC[3], a Morgan Stanley subsidiary whose FDIC insurance status commissioner Barry Gonzalez had not confirmed in anticipation of trial. *See* A1308; A1305.

Morgan Stanley Smith Barney, LLC did not hold Brennerman`s funds directly, as it is not a depository subsidiary; instead, Brennerman's personal funds were held with another subsidiary within Morgan Stanley, Morgan Stanley Bank National Association, which is FDIC insured. A1300-01. Brennerman avers that the credit card, which was not issued by any Morgan Stanley subsidiary, was never used and was closed with zero balance. A1300-01. Brennerman had no personal relationship with individuals at Morgan Stanley Bank National Association, nor did he make any statements to any individual or have any interaction with that entity that could have been construed as fraudulent.

The Morgan Stanley institutional securities division, with which Brennerman sought to negotiate further financing in his discussions with Kevin Bonebrake, was also not FDIC-insured. A1298-1310. Only depository accounts are FDIC-insured. A1306. The insurance of one subsidiary institution would not apply to its parent corporation. A1308-10.

Yet, when, at the conclusion of the Government's case, the defense moved to dismiss under Rule 29 (A1743), the Government argued, and the district court agreed, that Brennerman's conduct directed at Morgan Stanley fell within the ambit of the Indictment's statutory allegations and satisfied the statutory elements of bank fraud through execution of:

> a scheme to defraud Morgan Stanley by targeting Scott Stout, giving him 200,000, promises $10 million, and then lying about the supposed 45 million he had in assets and what his business was about, and through this fraud on Morgan Stanley and Scott Stout, Mr. Brennerman got access to special perks other people couldn't get, like lower rates, and fancy credit cards, and also the opportunity and

[3] Brennerman additionally respectfully directs the Court to the Government's trial exhibits GX1-57A, GX529, and GX1-73; and to *United States v. Brennerman*, 17-Cr-337 (RJS) at Dkt. #167.

> access to people like -- opportunity to meet and access to do business with people like Kevin Bonebrake.

A1742-43. *See also* A1709-10; A1712.

In his *pro se* Rule 29 and 33 motions, Brennerman asked the district court to vacate his conviction because the FDIC-insured element had not been satisfied as alleged in the Indictment. A1932; A1941-43. The district court declined, reasoning again that the "perks" obtained from Morgan Stanley had been sufficient to bring his conduct within the ambit of 18 U.S.C. § 1344(1). A2020-21. Similarly, the district court relied on these same "perks" to calculate the applicable loss for sentencing purposes. A2035-36.

On appeal, Brennerman argued, as is relevant here, that because he had taken no substantial step with regard to the bank fraud conspiracy or substantive bank fraud toward an FDIC-insured institution, the evidence on those counts was insufficient to convict. Further, because the indictment alleged that he had sought to defraud banks including ICBC to obtain money for his business fraud, the Government's reliance on his personal conduct related to the personal wealth management division of Morgan Stanley (Morgan Stanley Smith Barney, LLC), another non-FDIC-insured entity, had constructively amended the indictment leading to Brennerman's conviction for an offense with which he had not been charged. Op.Br. Argument Point III.

This Court upheld 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 Brennerman's argument about the non FDIC-insured personal wealth division (Morgan Stanley Smith Barney, LLC) and the non-FDIC-insured investment 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 representations about his citizenship, assets, and the nature and worth of his company.

*United States v. Brennerman*, 18-3645, Slip Op. (Jun. 9, 2020) at 3.

With respect to Brennerman's constructive amendment argument, the 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 oil asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *Vebeliunas*, 76 F.3d at 1290.

*Id.* Slip Op. at 4.

## II. Failure to Obtain the ICBC File and Consequent Violation of Brennerman's Sixth Amendment Rights.

During the trial preparation, the defense became aware that certain files from ICBC including the complete file of Julian Madgett, who had prepared the paperwork for the $20,000,000 bridge loan and submitted it to ICBC's credit committee, were missing. A763; A802. Included in the credit committee documentation would have been a credit application document summarizing the case for making the loan. A802. These documents were not provided to the Government or made available to Brennerman for use at trial. A800-801.

In his motions *in limine*, Brennerman moved to preclude testimony of any individual affiliated with ICBC concerning the financing of the Cat Canyon asset on the ground that, because ICBC, through the Government, had not produced the complete file of discoverable

materials concerning the negotiations, permitting any ICBC representative to testify concerning the negotiations would deny Brennerman his Sixth Amendment right to confront the witnesses against him. Dkt. #59; A242-44. The district court denied the motion. Dkt. # 69 at 25.

Both during the related case in front of Judge Kaplan (*United States v. Brennerman*, 17-CR-155 (LAK)) and in the case at bar, Brennerman moved for discovery of the full ICBC file related to the bridge loan to Blacksands. Brennerman averred that the file would contain Madgett's notes related to the credit paper and credit decision to approve the loan and would support Brennerman's theory of defense. Both Judge Kaplan and Judge Sullivan denied Brennerman's requests for a subpoena to obtain these documents; Judge Sullivan additionally declined to compel the Government to produce them at trial. *See*, *e.g.*, 17-CR-755 at Dkt.#76; 17-CR-337 at Dkt.#71 (letter motion); A866; A800-803; A867-68; A868-69.

On appeal, Brennerman argued three points with respect to the ICBC file: First, that because the Government had been aware of the file's existence, the Government's failure to procure the file violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny; second, that because Brennerman had been forced to cross-examine Madgett without the benefit of the full file, his Sixth Amendment right to cross-examine the witness against him had been violated; and third, that his Sixth Amendment right to present a complete defense had been violated because he was denied the opportunity to present documents to the jury that would have supported his defense.

The Court disagreed with 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 obligation. 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.

*United States v. Brennerman*, 18-3645, Slip Op. at 4-5.

Brennerman now brings this petition for reconsideration as to the Court's conclusions concerning his convictions on counts one and two and the adequacy of the evidence of FDIC insurance presented in the Government's case-in-chief and as to the Court's statement that he never sought a Rule 17 subpoena for the complete ICBC file and further that the only indication that such documents (ICBC file) are extant comes from Brennerman`s bare assertion and for rehearing *en banc* as to the Court's denial of his Sixth Amendment and Confrontation Clause argument and the exclusion from consideration of his complete defense argument.

## REASONS FOR GRANTING RECONSIDERATION AND REHEARING *EN BANC*

### I. This Court Should Reconsider Its Denial of Brennerman's Appeal Because The Court's Decision Misapprehended Key Facts.

Fed.R.App.P. 40(a)(2) permits motions for reconsideration where the deciding court has overlooked points of law or fact.

### A. The Court's Decision Misapprehended Key Facts About Which Morgan Stanley Subsidiary Was FDIC Insured and Misunderstood Why A Constructive Amendment of the Indictment Occurred.

#### 1. Applicable Law

##### a. Federal Bank Fraud Requires Intent to Defraud an FDIC-Insured Institution.

Title 18 United States Code section 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); *see also* 18 U.S.C. §20 (defining "financial institution"). "[A] defendant cannot be convicted of violating §1344(1) merely because he intends to defraud an entity . . . that is not in fact covered by the statute." *United States v. Bouchard*, 828 F.3d 116, 125 (2d Cir.2016).

##### b. Constructive Amendment of An Indictment Occurs When the Charging Terms Are Altered.

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).

**2. Discussion**

The theory on which the Government and, in turn, the district court and this Court relied to uphold Brennerman's conviction was that he had obtained certain benefits or "perks" from Morgan Stanley's personal wealth management division through misrepresentations. *See*, *e.g.*, A1709-10; A1742-43; Slip Op. at 3. But this theory fails on two independent, yet related, grounds.

First, Brennerman's personal wealth management account at Morgan Stanley Smith Barney, LLC, was not a depository account; the funds were held in a depository account at Morgan Stanley Bank National Association. *See generally* A1298-1310. Any statements made by Brennerman to Scott Stout, who worked at Morgan Stanley Smith Barney, LLC (A959, A962) would have been insufficient to establish that Brennerman took any step toward defrauding an FDIC-insured institution. Further, the Morgan Stanley investment division, with which Brennerman sought to negotiate financing in his discussions with Kevin Bonebrake, was not FDIC-insured. A1298-1310. Therefore, there was no evidence at trial that Brennerman had taken any substantial step toward defrauding any FDIC-insured entity. *See* A1880-81 (jury charge); A1881-82 (same).

Second, because the indictment charged Brennerman with having "made false representations to financial institutions in the course of seeking loans and other forms of financing for purported business ventures" (A39 (Indictment at ¶4)), but Brennerman was convicted based on conduct directed at Morgan Stanley Smith Barney, LLC—the personal wealth management division, about which there was no evidence of FDIC insurance, a constructive amendment of the indictment occurred.

There is no question that Morgan Stanley Bank National Association, which held

Brennerman's personal funds, is FDIC-insured. But neither Scott Stout nor Kevin Bonebrake—the individuals with whom Brennerman interacted for the initiation of a personal wealth management account and concerning possible financing of Blacksands' ventures, respectively, worked at Morgan Stanley Bank National Association. Nor, because that institution was merely the repository for Brennerman's personal wealth, could he have taken any actions sufficient to satisfy the language of the indictment directed at it insofar as the financing of his Blacksands ventures were concerned. *See* A45 (Ind. at ¶14).

Therefore, there evidence failed to satisfy every element of the statute of conviction. The Court should reconsider its decision on this point. And because Brennerman was convicted of fraud related to his personal account, not to his investment/fundraising scheme as charged, the Court should reconsider and should conclude that a constructive amendment of the indictment occurred.

### B. The Court's Decision Overlooked the Fact that Brennerman Had Made Attempts to Obtain and to Compel the Production of the Complete ICBC File and Erroneously Assumed that the Only Indication of the Documents' Existence Came From Brennerman's Bare Assertions.

Both during the related case in front of Judge Kaplan (*United States v. Brennerman*, 17-CR-155 (LAK)) and in the case at bar, Brennerman moved for discovery of the full ICBC file related to the bridge loan to Blacksands. Brennerman posited that the file would contain ICBC employee Julian Madgett's notes related to the credit paper and credit decision to approve the loan and would support Brennerman's theory of defense. Both Judge Kaplan and Judge Sullivan denied Brennerman's requests for a subpoena to obtain these documents; Judge Sullivan additionally declined to compel the Government to produce them at trial. *See*, *e.g.*, 17-CR-755 at Dkt.#76; 17-CR-337 at Dkt.#71; A866; A867-68; A868-69.

For these reasons, the Court was mistaken that the record contained no evidence that Brennerman had attempted to obtain the complete ICBC file and the Court's assumption that the only indication that such documents (ICBC file) are extant came from Brennerman`s bare assertion was erroneous. The Court should reconsider its decision on this point.

## II. The Court Should Grant Rehearing *En Banc* 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.

Under Fed.R.App.P. 35(b)(1)(A), a petition for rehearing *en banc* is proper when the Circuit Court panel decision "conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions."

### A. Applicable Law

The Due Process Clause requires the Government to make a timely disclosure of any exculpatory or impeaching evidence that is material and in its possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). The Government is further obligated under *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

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).

**B. Discussion**

Brennerman argued to the jury that he had negotiated in good faith with ICBC, that he had provided accurate information about Blacksands and its holdings, and that he had intended to repay the bridge loan. *See*, *e.g.*, A1773-74. But he was precluded from putting all of the evidence necessary to establish his good faith defense before the jury because he did not possess, and the Government did not obtain and disclose, the entire file from ICBC that would, Brennerman posits, have contained the compete credit application and information submitted by Brennerman and evaluated by Madgett in connection with Madgett's preparation of the credit application for the bridge loan. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."); *Scrimo*, 935 F.3d at 113-14; *United States v. Mulder*, 147 F.3d 703, 707 (8th Cir.1998). Because the information and reasoning behind ICBC's decision to grant Brennerman the bridge loan was of paramount importance, the additional evidence in the file might have been sufficient to create a reasonable doubt in the mind of the jury. *See Scrimo*, 935 F.3d at 120 (citations omitted).

Further, because the district court permitted Madgett to testify as to the contents of those documents that ICBC had (selectively, Brennerman argues) provided to the Government and to be cross-examined on those documents, which were removed from the context of the complete ICBC credit application file, Madgett's testimony misled the jury and unfairly prejudiced Brennerman. *See* A242-44.

It was constitutional error to permit Madgett to testify, given that he could not be fully cross-examined. Brennerman was deprived of his Sixth Amendment confrontation right and of

his right to present a complete defense. This deprivation had a substantial and injurious effect and influence in determining the jury`s verdict.

The panel's decision to the contrary conflicts with this Court's decisions in *Scrimo* and *In re del Valle Ruiz*, and the Court should rehear the case *en banc* accordingly.

## CONCLUSION

Wherefore, Brennerman's petition should be granted and this Court should reconsider its decision and rehear his case *en banc*.

Dated: New York, NY
June 23, 2020

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# EXHIBIT A

18-3546(L)
United States v. Raheem Brennerman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 9th day of June, two thousand twenty.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
WILLIAM J. NARDINI,
*Circuit Judges*.

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UNITED STATES OF AMERICA,

*Appellee*,

v. 18-3546, 19-497

RAHEEM BRENNERMAN,
AKA JEFERSON R. BRENNERMAN,
AKA AYODEJI SOETAN,

*Defendant-Appellant*.

Appearing for Appellant: John C. Meringolo, Meringolo & Associates, P.C., Brooklyn, N.Y.

Appearing for Appellee: Danielle R. Sassoon, Assistant United States Attorney (Nicholas Roos, Robert B. Sobelman, Matthew Podolsky, Assistant United States Attorneys, *on the brief*), *for* Geoffrey S. Berman, United

States Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Sullivan, *J.*).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment be and it hereby is **AFFIRMED**.

Defendant-Appellant Raheem Brennerman appeals from the February 12, 2019, amended judgment of conviction entered in the United States District Court for the Southern District of New York (Sullivan, *J.*), sentencing him principally to 144 months' imprisonment, 3 years' supervised release, forfeiture in the amount of $4,400,000, and restitution in the amount of $5,264,176.19. Following a jury trial, Brennerman was convicted of one count of conspiracy to commit bank and wire fraud, in violation of 18 U.S.C. § 1349; one count of bank fraud, in violation of 18 U.S.C. §§ 1344 and 2; one count of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; and one count of visa fraud, in violation of 18 U.S.C. § 1546(a). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On appeal, Brennerman argues: (1) there was insufficient evidence to convict him on the conspiracy count, the substantive bank fraud count, and the substantive wire fraud count; (2) the government made an impermissible constructive amendment to the indictment; (3) the search warrant for Brennerman's Las Vegas apartment was unlawful; (4) the admission of the testimony of Julian Madgett violated Brennerman's constitutional rights; (5) the district court erred by applying a two-offense level enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1; and (6) the district court incorrectly determined the restitution amount.

## I. Sufficiency of the Evidence

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004), as the standard of review is "exceedingly deferential," *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). Ultimately, "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court." *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

Brennerman argues there was insufficient evidence to convict him of a conspiracy. He argues the jury could not have adduced the existence of an agreement because the record does not contain a single response from Peter Aderinwale, the purported co-conspirator with whom Brennerman corresponded over email. His argument is both factually and legally flawed. First, the record did contain two responsive emails from Aderinwale concerning draft emails to be sent to ICBC as part of the scheme. Second, a response from an alleged co-conspirator following conspiratorial communication is not legally necessary to establish the existence of a conspiracy. We agree with the government that a reasonable jury could infer the requisite intent from emails in which Brennerman solicited Aderinwale's input on aspects of the fraud scheme and from Brennerman's transfer of substantial scheme proceeds to Aderinwale. These facts would have supported the inference that Aderinwale was a co-conspirator, even in the absence of any email

response from Aderinwale. The jury would have been entitled to infer that Aderinwale's responses had been conveyed over the phone or in person. "This is so because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992) (internal quotation marks and citation omitted). Thus, viewing the evidence in the light most favorable to the government, we find there was sufficient evidence from which the jury could have reasonably inferred the existence of a conspiracy.

Brennerman also argues that there was insufficient evidence that he intended to defraud an institution insured by the Federal Deposit Insurance Corporation ("FDIC") as required for bank fraud, because most of the evidence offered at trial showed that he targeted the Industrial and Commercial Bank of China's London branch ("ICBC"), which is not FDIC-insured. Contrary to Brennerman's assertions, however, the 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 representations about his citizenship, assets, and the nature and worth of his company. Indeed, the government argued just this theory on summation, asserting that Brennerman was guilty of bank fraud because "he engaged in a scheme to defraud Morgan Stanley" through lies told to a Morgan Stanley employee, which were "all part of an attempt to defraud an FDIC-insured institution." App'x at 1709-10. Defense counsel in summation also emphasized that Morgan Stanley was the sole FDIC-insured institution involved. And the district court instructed the jury on the proper elements of bank fraud, including the FDIC-insured institution element. Brennerman's challenge, therefore, is foreclosed by "the law's general assumption that juries follow the instructions they are given," which applied here would indicate that the jury properly accounted for the evidence related to Morgan Stanley when convicting Brennerman of the bank fraud count. *United States v. Agrawal*, 726 F.3d 235, 258 (2d Cir. 2013).

As to the wire fraud count, Brennerman argues there was insufficient evidence to establish a domestic violation of the statute. "[W]ire fraud involves sufficient domestic conduct when (1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme to defraud." *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019). We conclude that the evidence here was sufficient. The record at trial established that Brennerman used domestic wires to carry out the fraudulent scheme. Indeed, he concedes that he used telephone lines and email in the United States to make fraudulent representations in furtherance of the scheme. In addition, the account to which ICBC wired the loan money was a Citibank account within the United States, and Brennerman subsequently moved that money to domestic accounts. This is precisely the kind of use of domestic wires that we have held sufficient under the wire fraud statute. *See, e.g.*, *United States v. Kim*, 246 F.3d 186, 190 (2d Cir. 2001).

## II. Constructive Amendment

An impermissible constructive amendment occurs only when the government's proof and the trial court's jury instructions "modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense

other than the one charged by the grand jury." *United States v. Vebeliunas*, 76 F.3d 1283, 1290 (2d Cir. 1996) (internal quotation marks and citation omitted).

Brennerman contends that the government constructively amended counts one and two of the indictment by proving a fraud against Morgan Stanley at trial—while the indictment, especially the speaking part, focuses on the fraud against ICBC. We disagree. It is clear from the indictment that the scheme against ICBC was merely one target of Brennerman's alleged fraud. The indictment alleged that Brennerman's scheme in fact targeted "several financial institutions around the world, including in the United States." App'x at 39. It also specifically alleged that Brennerman defrauded an FDIC-insured financial institution. The indictment did not limit the proof only to Brennerman's scheme against ICBC. While the indictment discusses ICBC activity at length, it makes clear that those allegations are illustrations, asserting that "[b]eginning in or about January 2013, [Brennerman] made similar [false] representations to other financial institutions in an effort to induce those institutions to provide financing to Blacksands Pacific and Blacksands Alpha." App'x at 42. 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 oil asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *Vebeliunas*, 76 F.3d at 1290.

## III. Search Warrant

Brennerman challenges the lawfulness of the search warrant of his Las Vegas apartment. Even assuming, for the sake of argument only, that the search warrant was unlawful, we conclude that the good faith exception to the Fourth Amendment's exclusionary rule would apply. We therefore need not address the propriety of the search warrant. The district court found that the law enforcement agents who executed the warrant reasonably relied on its terms in good faith, and Brennerman has not challenged this finding. Where, as here, evidence is obtained by police officers executing the search "in objectively reasonable reliance" on a warrant, the good faith exception to the exclusionary rule applies. *United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008) (internal quotation marks and citation omitted).

## IV. Testimony of Julian Madgett

Brennerman argues that Julian Madgett's testimony at trial violated due process and his Sixth Amendment rights to confrontation and compulsory process because he was unable to obtain certain exculpatory personal notes from Madgett, and the government would not turn the notes over or otherwise retrieve them from ICBC.

The government has an obligation under the Due Process Clause to make a timely disclosure of any exculpatory or impeaching evidence that is material and in its possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *see also Giglio v. United States*, 405 U.S. 150 (1972). Additionally, the Jencks Act provides that, "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

Brennerman's argument claiming constitutional violations as a result of Madgett's testimony is without merit. 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 obligation. 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, never made a timely request for a deposition under Federal Rule of Criminal Procedure 15, and never asked the district court to issue letters rogatory pursuant to 28 U.S.C. § 1781 to obtain documentary evidence or secure testimony from the United Kingdom where ICBC maintains its records. The only indication that such documents are extant comes from Brennerman's bare assertions.

## V. Sentence

At sentencing, the court applied a two-offense level enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, a finding that relied on, as an alternative basis, Brennerman's false representations in his bail applications to the court. Brennerman argues that those misrepresentations cannot support an obstruction of justice enhancement because the misstatements "were at most minimally connected to the offense conduct in this case and did not obstruct the prosecution in any meaningful way." Appellant's Br. at 54. However, this argument has already been rejected by our Court in *United States v. Mafanya*, 24 F.3d 412, 415 (2d Cir. 1994) ("Appellant's false statement to a judicial officer (the magistrate judge) was an attempt to obstruct justice. Therefore, the district court properly Applied the [Section 3C1.1] enhancement . . . ."). Accordingly, the district court did not err in applying the enhancement.

## VI. Restitution

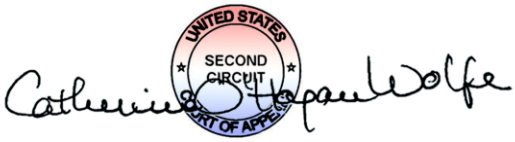
The Mandatory Victims Restitution Act of 1996 ("MVRA") provides that "[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A). "[A]t sentencing, the government bears the preponderance burden of proving actual loss supporting a restitution order." *United States v. Rutigliano*, 887 F.3d 98, 109 (2d Cir. 2018). "[W]e review a district court's order of restitution under the MVRA for abuse of discretion." *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012).

Brennerman argues that the district court improperly imposed restitution in the full amount of the $5 million ICBC loan even though Brennerman had already made a payment of $446,466.13. But the testimony at trial established that ICBC released approximately $4.4 million to Brennerman and the rest was used to finance loan servicing fees. The $446,466.13

paid to ICBC by Brennerman was an interest-only payment that did not reduce the $5 million principal owed. Therefore, ICBC's loss of $5 million as a result of the fraud was supported, and Brennerman points to nothing that undermines the district court's finding.

We have considered the remainder of Brennerman's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



**United States Court of Appeals for the Second Circuit**
**Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**ROBERT A. KATZMANN**
**CHIEF JUDGE**

**CATHERINE O'HAGAN WOLFE**
**CLERK OF COURT**

Date: June 09, 2020
Docket #: 18-3546cr
Short Title: United States of America v. Brennerman

DC Docket #: 1:17-cr-337-1
DC Court: SDNY (NEW YORK CITY)
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DC Judge: Sullivan

## BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

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## VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____ ) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____ ) _____

**(VERIFICATION HERE)**

_____
Signature