UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-3546(L); 19-497(CON)

Caption [use short title]

Motion for: Motion for Reconsideration of Motion-to-Recall Madate

Set forth below precise, complete statement of relief sought:
Defendant/Appellant respectfully submits this motion for reconsideration of his motion-to-recall Mandate to allow panel Court consider the appended evidence

UNITED STATES OF AMERICA

v.

RAHEEM J. BRENNERMAN

MOVING PARTY: Raheem J. Brennerman **OPPOSING PARTY:** United States of America

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Raheem J. Brennerman, Pro Se **OPPOSING ATTORNEY:** Robert B. Sobelman, Esq.

[name of attorney, with firm, address, phone number and e-mail]

LSCI-Allenwood
PO Box 1000
White Deer, PA 17887-1000

US Attorney Office
One St. Andrew's Plaza
New York, NY 10007

Court- Judge/ Agency appealed from: US Circuit Judge Richard J. Sullivan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Raheem Brennerman **Date:** Feb. 8, 2021 Service by: ☐ CM/ECF ☑ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

UNITED STATES OF AMERICA

v.

RAHEEM J. BRENNERMAN

CERTIFICATE OF SERVICE*

Docket Number: 18-3546(L); 19-497(CON)

I, RAHEEM J. BRENNERMAN (print name), hereby certify under penalty of perjury that on February 8, 2021 (date), I served a copy of Motion for Reconsideration (list all documents)

by (select all applicable)**

___ Personal Delivery

X United States Mail

___ Federal Express or other Overnight Courier

___ Commercial Carrier

___ E-Mail (on consent)

on the following parties:

Name	Address	City	State	Zip Code
Robert Sobelman, Esq	USAO, One St. Andrew's Plaza	New York	NY	10007
Nicolas Landsman-Roos, Esq	USAO, One St. Andrew's Plaza	New York	NY	10007

*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

February 8, 2021
Today's Date

/s/ Raheem J. Brennerman
Signature

Certificate of Service Form (Last Revised 12/2015)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

-vs- Docket Nos. 18-3546(L); 19-497(CON)

RAHEEM J. BRENNERMAN,

Defendant-Appellant,

MOTION FOR RECONSIDERATION OF
MOTION-TO-RECALL MANDATE

RAHEEM JEFFERSON BRENNERMAN, hereby affirms under penalty of perjury:

1. I, Raheem Jefferson Brennerman ("Brennerman") am the Defendant-Appellant in this instant action.

2. I am a Pro Se Defendant-Appellant in this matter. As such, I am familiar with the facts and circumstances of this action.

3. I am a Petitioner at the Supreme Court of the United States, Petition at docket no. 20-6638, which arose from this instant appeal.

4. On January 5, 2021, Brennerman submitted motion-to-recall mandate for this instant appeal, 18-3546(L), doc. no. 211. On January 19, 2021, and submitted supplemental papers in support of his motion-to-recall mandate at this instant appeal, 18-3546(L), doc. no. 217.

5. On January 28, 2021, this Court denied Brennerman`s motion seeking for panel Court to recall mandate.

6. REDACTED

7. On February 2, 2021, Brennerman submitted motion with evidence to District Court at criminal case no. 1:17-CR-337-RJS from which this instant appeal arose (District Court has refused to docket the evidence on record). The motion included evidence which highlighted misrepresentation of material facts and evidence by District Court, where the Court improperly supplanted facts and evidence of interaction with non-FDIC insured institution, Morgan Stanley

Smith Barney, LLC "MSSB" (presented by Government at trial through Exhibits - GX1-57; GX1-57A; GX529; GX1-73 (see 1:17-CR-337-RJS, doc. no. 167) to demonstrate Brennerman`s interaction with Morgan Stanley) with a FDIC-insured institution, Morgan Stanley Private Bank "MSPB" (even though Government adduced no evidence of Brennerman interacting with that institution) in a surreptitious endeavor to falsely satisfy the essential element necessary to convict Brennerman for bank fraud in violation of 18 U.S.C.S. 1344 and Conspiracy to commit bank fraud in violation of 18 U.S.C.S. 1349.

8. Given the significance and materiality of this supplemental information where Brennerman was surreptitiously convicted for his interaction with Morgan Stanley Smith Barney, LLC "MSSB", a non-FDIC insured institution (see transcript of hearing on November 19, 2018 at 1:17-CR-337-RJS, doc. no. 206, Tr. 19 at 9-18) where District Court described the theory of the bank fraud and improperly supplanted MSSB with a FDIC insured institution, private bank of Morgan Stanley. This Court which reviews de novo should correct the clear error.

9. This Court should correct the clear error because the single telephone call which panel Court highlighted as satisfying the essential element to convict Brennerman, in its Summary Order dated June 9, 2020 was made to Kevin Bonebrake, who worked at another non-FDIC insured subsidiary of Morgan Stanley & Co, LLC (see 1:17-CR-337-RJS, doc. 384-385; 387-388; 409) highlighting testimony of Kevin Bonebrake that he worked at the Institutional Securities subsidiary of Morgan Stanley & Co and that Morgan Stanley & Co operates through various subsidiaries. Also see 1:17-CR-337-RJS, doc. no. 1057-1061 for testimony of Barry Gonzalez, FDIC commissioner testifying that Government failed to present FDIC certificate for the Institutional Securities subsidiary of Morgan Stanley & Co, because it is not FDIC-insured. Further that, the FDIC certificate of one subsidiary does not cover another subsidiary or the parent company as each will require its own FDIC certificate.

10. Pursuant to FRAP and the Court`s Local Rules, Defendant-Appellant Raheem Jefferson Brennerman respectfully submits this motion with appended evidence to allow panel Court to reconsider its decision on Brennerman`s motion-to-recall mandate at 18-3546(L), doc. no. 211, 217.

WHEREFORE, the Court should grant this motion in its entirety.

Dated: February 8, 2021
White Deer, Pa. 17887-1000

Respectfully submitted

/s/ Raheem J. Brennerman
RAHEEM JEFFERSON BRENNERMAN
Defendant - Appellant
FCI Allenwood Low
P. O. Box 1000
White Deer, Pa. 17887-1000

EXHIBIT

x

Raheem J. Brennerman
Reg. No. 54001-048
LSCI-Allenwood
P. O. Box 1000
White Deer, Pa. 17887-1000

Hon. Richard J. Sullivan
United States Circuit Judge
UNITED STATES DISTRICT COURT
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

with copy to:

Clerk of Court
UNITED STATES DISTRICT COURT
Southern District of New York
Daniel Patrick Moyniham U.S. Courthouse
500 Pearl Street
New York, New York 10007

February 2, 2021

BY E-MAIL & CERTIFIED FIRST CLASS MAI
Email: Temporary_Pro_Se_filing@nysd.uscourts.gov

Regarding: United States v. Brennerman
District Court Case No. 17 CR. 337 (RJS)
MOTION FOR COMPASSIONATE RELEASE EVIDENCE

Dear Judge Sullivan:

Defendant Pro Se Raheem Jefferson Brennerman ("Brennerman") respectfully submits this motion with appended evidence together (the "Motion") in reliance on his Constitutional rights, applicable law and federal rule and will move this Court before Honorable Richard J. Sullivan, United States Circuit Judge, at Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, New York 10007 for an order directing the prosecutors, United States Attorney Office for the Southern District of New York to obtain and present to the Court and Brennerman (a.) evidence of Brennerman`s interaction with Morgan Stanley in light of the surreptitious endeavor by the Court to falsely satisfy the FDIC essential element necessary to convict Brennerman for bank fraud and bank fraud conspiracy by improperly supplanting a non-FDIC insured institution, Morgan Stanley Smith Barney, LLC "MSSB" (which Government presented as Government

Exhibit - GX1-57; GX1-57A; GX529; GX1-73 during trial as evidence of Brennerman`s interaction with Morgan Stanley (see 17 CR. 337 (RJS), doc. no. 167)) with a FDIC insured institution, Morgan Stanley Private Bank "MSPB" (even though Government presented no evidence of Brennerman`s interaction with MSPB (see appended evidence at "Exhibit C" underlined for clarity)), in an endeavor to wrongly convict and imprison Brennerman; (b.) the pertinent evidence mainly the ICBC (London) plc underwriting file relating to the transaction between ICBC (London) plc and The Blacksands Pacific Group, Inc., in light of the arguments presented within the appended evidence (correspondence dated January 22, 2021 and evidence). Brennerman requires the evidence highlighted above to present a comprehensive Compassionate release pursuant to 18 U.S.C. Section 3582(c)(1)(A) as directed by the Court in its order (at 17 CR. 337 (RJS), doc. no. 253)

On January 22, 2021, Brennerman submitted via electronic mailing at Temporary_Pro_Se_filing@nysd.uscourts.gov to the Clerk of Court for the U.S. District Court for the Southern District of New York, correspondence with respect to his Covid-19 infection and other issues for the record in an endeavor to compel the Court to order evidence which he requires for his pleadings. On February 2, 2021, the Court (Sullivan, J.) (at 17 CR. 337 (RJS), doc. no. 253) through an order refused to docket the correspondence and relied on an erroneous assumption that the appended correspondence and evidence dated January 22, 2021 was an endeavor by Brennerman to supplement his appellate record. Brennerman emphatically asserts that such assumption is erroneous because this instant motion from which Brennerman seeks affirmative relief differs significantly from previous relief sought. This instant motion and relief sought is made in reliance on the Due Process, Brady and Constitutional rights. Moreover, federal rule and applicable law mandates that the Clerk of Court shall docket all submissions to the Court irrespective of its nature.

Given the significance of the issues cited within the appended evidence (correspondence and evidence dated January 22, 2021) and in light of the urgency that Covid-19 presents to Brennerman. Brennerman respectfully submits this motion and appended evidence seeking affirmative relief as stated above from this Court.

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

Brennerman respectfully submits the above and appended evidence and prays that this Court grants his request in its entirety.

Dated: February 2, 2021
White Deer, Pa. 17887-1000

Respectfully Submitted

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

Defendant Pro Se

Cc: REDACTED
Cc: REDACTED
Cc: www.freeraheem.com
Cc: www.freerjbrennerman.com
Cc: U.S. Attorney Office (S.D.N.Y.)

Enclosure:
Correspondence with evidence for record dated January 22, 2021

EXHIBIT A

Raheem J. Brennerman
Reg. No. 54001-048
LSCI-Allenwood
P. O. Box 1000
White Deer, Pa. 17887-1000

Hon. Richard J. Sullivan
United States Circuit Judge
UNITED STATES DISTRICT COURT
Southern District of New York
40 Foley Square
New York, New York 10007

January 22, 2021

BY E-MAIL & CERTIFIED FIRST CLASS MAIL
Email: Temporary_Pro_Se_filing@nysd.uscourts.gov

Regarding: United States v. Brennerman
District Court Case No. 17 CR. 337 (RJS)
CORRESPONDENCE WITH EVIDENCE FOR THE RECORD

Dear Judge Sullivan:

Defendant Pro Se Raheem Jefferson Brennerman ("Brennerman") respectfully submits the appended record and evidence pursuant to all applicable law and federal rule in an endeavor to document his Covid-19 infection and other issues for the record.

I. COVID-19 INFECTION:

On December 17, 2020, Brennerman who is currently incarcerated at FCI Allenwood Low ("Allenwood") arising from the above criminal cases tested positive for Covid-19 and a few days later was diagnosed with Covid-19 pneumonia causing severe breathing difficulty among other Covid-19 symptoms. Brennerman suffers from diabetes and hypertension, medical conditions promulgated by the Center for Disease Control and Prevention ("CDC") that places him at a heightened risk of serious illness or death should he contract Covid-19 (A copy of the medical record is appended as "Exhibit A")

Brennerman is currently incarcerated at FCI Allenwood Low pursuant to an order of Judge Richard J. Sullivan arising from the criminal case at 17 CR. 337 (RJS). Notwithstanding, proclamation by the prosecutors that the BOP had formulated preventive measures and action plan with respect to protecting incarcerated persons from contracting Covid-19. On December 17, 2020 approximately 114 inmates out of 116 inmates residing at the same unit at FCI Allenwood Low with Brennerman tested positive for Covid-19. Thereafter, Brennerman was denied adequate care or medication and endured significant pain and suffering arising from Covid-19 with symptoms including high body temperature, severe difficulty with breathing and pneumonia, body aches, violent coughs among others.

Although Brennerman strenuously presented evidence of Constitutional violation with his conviction where he was deprived evidence which he required to present complete defense and highlighted erroneous proclamation by the Court in respect of which Morgan Stanley subsidiary he interacted with, the Court has refused to correct its errors. Brennerman has also continued to request and persuade the Court to allow him access to evidence which he requires to present a comprehensive Compassionate release motion pursuant to 18 U.S.C.S. 3582(c)(1)(A) and argue as to the 3553 factor (which the Court will consider in the adjudication of the motion) however the Court has continued to ignore him, thus Brennerman remains unjustly incarcerated and the institution where he is currently incarcerated failed to provide any medication or therapeutic treatment to Brennerman while enduring significant suffering arising from Covid-19 infection which exacerbates the Constitutional violation already suffered and highlights the deliberate indifference while the Court (Sullivan, J.) continues to wrongly convict and imprison Brennerman.

Brennerman now faces the serious possibility of a second wave of Covid-19 infection while he remains incarcerated with a much weakened immune system while the Court (Sullivan, J.) continues to deny and deprive him access to pertinent evidence for his release.

II. REQUEST FOR EVIDENCE TO PRESENT COMPREHENSIVE COMPASSIONATE RELEASE MOTION PURSUANT TO 18 U.S.C.S. 3582(c)(1)(A):

Prior to contracting Covid-19, Brennerman strenuously requested and pleaded with the Court (Sullivan, J.) see 17 CR. 337 (RJS), doc. nos. 248, 250 to provide him with the pertinent evidence (ICBC underwriting file) which he required to present a comprehensive Compassionate release pursuant to 18 U.S.C.S. 3582(c)(1)(A) and argue as to the 3553 factors. The Court (Sullivan, J.) at 17 CR. 337 (RJS), doc. no. 249, 251 instead pivoted to the erroneous disposition by the Second Circuit U.S. Court of Appeals ("Second Circuit") which inaccurately stated that "the only indication that the document are extant comes from Brennerman`s bare assertion".

III. MOTION-TO-RECALL MANDATE AT THE SECOND CIRCUIT:

Brennerman has presented overwhelming evidence from the case proceedings including trial transcripts and other evidence to both the Chief Judge of the Second Circuit (Hon. Debra Ann Livingston) and Second Circuit (panel Court) in an endeavor to allow the Court to recall the mandate and correct its erroneous disposition. see Appeal Docket No. 18-3546(L), doc. nos. 211, 212, 217 and Appeals Docket No. 18-1033(L), doc. nos. 334, 335.

IV. PETITION FOR WRIT OF CERTIORARI AT THE SUPREME COURT OF U.S.:

Brennerman has also succinctly presented issues with extensive evidence to the Supreme Court of the United States ("Supreme Court") in an endeavor to document and present pertinent record (irrespective of whether certiorari is granted) at docket no. 20-6638 (arising from appeal docket nos. 18-3546(L); 19-497(Con) at the Second Circuit and 17 CR. 337 (RJS) at the U.S. District Court (S.D.N.Y.)) and at docket no. 20-6895 (arising from appeal docket nos. 18-

1033(L); 18-1618(Con) at the Second Circuit and 17 CR. 155 (LAK) at the U.S. District Court (S.D.N.Y.))

V. ISSUES WITH BANK FRAUD AND BANK FRAUD CONSPIRACY (18 U.S.C.S. 1344):

Brennerman, in an endeavor to strenuously present pertinent evidence is again appending with this correspondence, evidence at 17 CR. 337 (RJS), doc. no. 167 which irrefutably demonstrate that Brennerman opened his account at Morgan Stanley Smith Barney, LLC ("MSSB") and interacted with Scott Stout who worked at MSSB (A copy of evidence at 17 CR. 337 (RJS), doc. no. 167 is appended as "Exhibit B"). This evidence from trial records directly contradict the erroneous proclamation by the Court that Brennerman interacted with the "private bank of Morgan Stanley" which was proffered by the Court (Sullivan, J.) during the hearing on November 19, 2018 when the Court denied Brennerman`s motion for judgment of acquittal submitted pursuant to Fed. R. Crim. P. 29. (A copy of excerpt from the hearing transcript is appended as "Exhibit C" and underlined for clarity). The erroneous proclamation was made in a surreptitious endeavor to falsely satisfy the FDIC essential element necessary to convict Brennerman for bank fraud (18 U.S.C.S. 1344(1)) and bank fraud conspiracy (18 U.S.C.S. 1349) by improperly supplanting a non-FDIC institution (MSSB) for a FDIC insured institution (Morgan Stanley Private Bank) where there was no evidence presented at trial to demonstrate that Brennerman interacted with Morgan Stanley Private Bank. Brennerman presented evidence at 17 CR. 337 (RJS), doc. no. 167 (appended as "Exhibit B") which conclusively demonstrated that he interacted with a non-FDIC insured institution. Even the erroneous disposition by the Second Circuit points to Brennerman`s single telephone call with Kevin Bonbrake who worked for another non-FDIC subsidiary of Morgan Stanley. (A copy of trial transcripts at 17 CR. 337 (RJS), trial. tr. 384-385; 409; 387-388; 1057; 1059; 1060-1061 appended as "Exhibit F") Notwithstanding these overwhelming evidence, Brennerman remains incarcerated for bank fraud and bank fraud conspiracy solely because of the erroneous proclamation by the Court (Sullivan, J.)

VI. ISSUES WITH WIRE FRAUD AND WIRE FRAUD CONSPIRACY (18 U.S.C.S. 1343):

Already demonstrated through extensive submissions at appeal docket no. 18-3546(L), doc. nos. 211, 212, 217, trial transcripts from 17 CR. 337 (RJS) contradict the Court (Sullivan, J.) and Second Circuit panel Court, that the pertinent evidence (ICBC underwriting file, which documents the basis for approving the bridge finance and thus confirms "Materiality" of any representation or alleged misrepresentation) is not extant beyond Brennerman`s assertion. Indeed, Government sole witness from ICBC (London) plc, Julian Madgett confirmed that the evidence (ICBC underwriting file) is/was extant and with the bank`s file in London, United Kingdom (A copy of the trial transcript with Government witness, Julian Madgett, 17 CR. 337 (RJS), Trial Tr. 551-554 is appended as "Exhibit D") and the Court (Sullivan, J.) confirmed that the witness (Julian Madgett) had confirmed that the evidence (ICBC underwriting file) is/was extant with the bank`s file in London, United Kingdom (A copy of the trial transcript, 17 CR. 337 (RJS), Trial Tr. 617 is appended as "Exhibit E").

The Court continues to deny request for the evidence (ICBC underwriting file) stating that the Court cannot permit indiscriminate introduction of evidence which was not presented at trial,

even though during trial the Court denied Brennerman`s request for the evidence (A copy of the letter motion submitted by Brennerman to request for the evidence (ICBC underwriting file) submitted at 17 CR. 337 (RJS), doc. no. 71 is appended at "Exhibit G") upon learning of its existence following testimony by Government sole witness from ICBC (London) plc, Julian Madgett that evidence (ICBC underwriting file) exists with the bank`s file which document the basis for ICBC (London) plc approving the bridge finance and thus confirms "Materiality" of any representation or alleged misrepresentation. Further that, the Government never obtained or reviewed the evidence (ICBC underwriting file). The Court (Sullivan, J.) denied Brennerman`s request for the evidence (ICBC underwriting file) which he required to present a complete defense and confront witness against him while permitting Government witness, Julian Madgett to testify as to the contents of the evidence (ICBC underwriting file) to satisfy "Materiality (an essential element of charged crime)" of any representation or alleged misrepresentation contained within the evidence (ICBC underwriting file) which was considered in the approval of the bridge finance.

VII. OTHER ISSUES:

Additionally, Brennerman has strenuously requested for a copy of his birth certificate which is/was in the Government`s possession at time of trial and which Government never presented to the jury for consideration in their deliberation. Brennerman requested for this evidence (birth certificate) to present comprehensive argument in a Compassionate release motion pursuant to 18 U.S.C.S. 3582(c)(1)(A) and argue as to the 3553 factor, however the Court (Sullivan, J.) continues to ignore his request. see 17 CR. 337 (RJS), doc. nos. 236, 240, 241, 248, 250.

VIII. CONCLUSION:

In light of the above and the overwhelming evidence, Brennerman respectfully submits the appended evidence in compliance with applicable law and federal rule on record.

Dated: January 22, 2021
White Deer, Pa. 17887-1000

Respectfully submitted

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

Defendant Pro Se.

Cc: REDACTED
Cc: REDACTED
Cc: www.freeraheem.com
Cc: www.freerjbrennerman.com
Cc: U.S. Attorney Office (S.D.N.Y.)

EXHIBIT B

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: BRENNERMAN, RAHEEM J
Date of Birth: [redacted]
Encounter Date: 12/22/2020 09:59
Sex: M Race: BLACK
Provider: Moclock, Michael MD
Reg #: 54001-048
Facility: ALF
Unit: G03

Physician - Evaluation encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 Provider: Moclock, Michael MD

Chief Complaint: INFECTIOUS DISEASE
Subjective: Patient Covid positive. He c/o worsening cough. No sputum production. No fever.
Pain: No

OBJECTIVE:

Exam:

Cardiovascular

Auscultation

Yes: Regular Rate and Rhythm (RRR), Normal S1 and S2

No: M/R/G

Infectious Disease

COVID 19

Yes: Vital Signs w/O2 sat recorded in flowsheet, Alert and oriented, Lung sounds clear bilaterally, Adequate respiratory effort

No: Using accessory muscles

Exam Comments

Lungs clear in all fields. No egophony. No tachypnea.

ASSESSMENT:

Confirmed case COVID-19, U07.1 - Current

PLAN:

Disposition:

Placed in Quarantine

Other:

1. Covid positive with worsening cough. Await CXR report. Exam unremarkable. Con't supportive care.

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
12/22/2020	Counseling	Plan of Care	Moclock, Michael	Verbalizes Understanding

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Moclock, Michael MD on 12/22/2020 10:04

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	BRENNERMAN, RAHEEM J			Reg #:	54001-048
Date of Birth:	[redacted]	Sex:	M Race: BLACK	Facility:	ALF
Note Date:	12/22/2020 10:37	Provider:	Stoltz, John PA-C	Unit:	G03

Admin Note - General Administrative Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 Provider: Stoltz, John PA-C

X-ray completed today showed subtle mixed interstitial and alveolar opacities in both lungs. Correspond with COVID pneumonia. Will have pt. monitored more frequently the daily.

ASSESSMENTS:

Viral pneumonia, unspecified, J129 - Current

New Non-Medication Orders:

Order	Frequency	Duration	Details	Ordered By
Vitals	Daily	5 days	Please completed vitals each evening along with completing the COVID screening. Please notify MLP if SPO2 is less the 92% or if pt. develops concerning signs or symptoms. Thanks. Screening will also be completed each morning.	Stoltz, John PA-C

Order Date: 12/22/2020

Copay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Completed by Stoltz, John PA-C on 12/22/2020 10:44

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	BRENNERMAN, RAHEEM J			Reg #:	54001-048
Date of Birth:	[redacted]	Sex:	M Race: BLACK	Facility:	ALF
Note Date:	12/22/2020 10:50	Provider:	Brown, Desiree RN	Unit:	G03

Admin Note - General Administrative Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE **1** Provider: Brown, Desiree RN

Incentive spirometer given to inmate per MLP15. Inmate instructed/educated on how to use and frequency. Inmate verbalized understanding.

Supplies Issued:

Supply	Quantity	Date Issued
Incentive Spirometer	1	12/22/2020

Copay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Completed by Brown, Desiree RN on 12/22/2020 10:52

EXHIBIT C

TRULINCS 54001048 - BRENNERMAN, RAHEEM J - Unit: BRO-I-B

FROM: 54001048
TO:
SUBJECT: Re: LEGAL CORRESPONDENCE -06.20.18
DATE: 06/20/2018 02:25:49 PM

x

Raheem J. Brennerman (54001-048)
Metropolitan Detention Center
P O Box 329002
Brooklyn, New York 11232

Honorable Judge Richard J. Sullivan
United States District Judge
United States District Court
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

June 20, 2018

Re: United States v. Raheem J. Brennerman
Case No: 1:17-cr-337 (RJS)

Dear Judge Sullivan

Defendant Pro Se, Raheem Brennerman ("Brennerman") submits additional evidence to bolster his arguments, which are succinctly highlighted in correspondences dated June 10, 2018 (see 17-cr-337 (RJS), dkt. no. 164), the June 11, 2018 and June 17, 2018 correspondences.

Brennerman submits, Government Exhibit 1-57, e-mail correspondence between Mr. Scott Stout and Brennerman, which highlights the e-mail signature of Scott Stout and the Beverly Hills, California address of Morgan Stanley Smith Barney LLC (not Morgan Stanley Private Bank); Government Exhibit 1-57A, the account opening form, which highlights "Morgan Stanley Smith Barney (not Morgan Stanley Private Bank)" at the top right corner of the form; Government Exhibit 1-73, e-mail between Scott Stout and Brennerman, which highlights Brennerman`s alleged fraud - the perks which he became entitled to, however more important, page two of the e-mail correspondence highlights within the "Important Notice to Recipient" in relevant parts that "The sender of this e-mail is an employee of Morgan Stanley Smith Barney LLC ("Morgan Stanley"); Government Exhibit 529, the Morgan Stanley account statement, which highlights Morgan Stanley Smith Barney LLC (not Morgan Stanley Private Bank) at the bottom left corner of the bank statement cover page. Additionally Brennerman submits the profile of Mr. Scott Stout which highlights that Mr. Scott Stout worked at Morgan Stanley Wealth Management between May 2011 and November 2014, as well the announcement on September 25, 2012 by Morgan Stanley Smith Barney LLC stating in relevant parts that "Morgan Stanley Smith Barney is now Morgan Stanley Wealth Management.

These evidence are important to highlight that Brennerman interacted with Morgan Stanley Smith Barney LLC which is indisputably not FDIC insured and thus the essential element necessary to convict for bank fraud in violation of 18 United States Code Section 1344(1) and its related conspiracy - conspiracy to commit bank fraud in violation of 18 United States Code Section 1349 cannot be satisfied and Brennerman`s relief for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure should be granted, and that Government failed to conduct the necessary diligence or investigation prior to indicting and prosecuting Brennerman.

Brennerman highlights the following as to the wire fraud charge and its related conspiracy. Brennerman was charged in two criminal cases - criminal contempt of court in case no. 17-cr-155 (LAK), before Hon. Judge Lewis A. Kaplan and the related fraud case in case no. 17-cr-337 (RJS), before Hon. Richard J. Sullivan, both stemming from the underlying civil case, case no. 15 cv 70 (LAK) captioned - ICBC (London) PLC v. The Blacksands Pacific Group, Inc before Hon. Judge Lewis A. Kaplan. Because the trial in the case before Judge Kaplan was scheduled ahead of that before this court, Brennerman sought to obtain the relevant ICBC London lending and underwriting file which is probative as to materiality an essential element of the charged crime of wire fraud and its related conspiracy. Because Brennerman`s request to both the government and directly to ICBC (London) PLC had been denied, Brennerman sought to compel for the relevant files through U.S District Court (S.D.N.Y), since the criminal cases stemming from the ICBC (London) PLC transaction were being prosecuted at the U.S District Court (S.D.N.Y), however Brennerman`s request to U.S District Court (S.D.N.Y) was denied (see 17-cr-155 (LAK), dkt. no. 76). Deprived of the relevant files necessary to cross-examine any government witness as to substance or credibility, Brennerman moved in his motion-in-limine and reply to Government`s motion-in-limine, prior to trial of the related fraud charge, for U.S District Court (S.D.N.Y) to exclude the testimony of any witness from ICBC (London), because such testimony will be highly

TRULINCS 54001048 - BRENNERMAN, RAHEEM J - Unit: BRO-I-B

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prejudicial and unfair to Brennerman as government will simply be allowed to present any witness, who will be able to say anything without corroboration and without Brennerman having the opportunity to cross-examine him as to substance or credibility, as Brennerman would not have been able to review the relevant lending and underwriting files. Moreover, he will be unable to assert his good faith defense, thus violating Brennerman`s constitutional rights to a fair trial.

Even after trial, Brennerman has presented evidence to highlight that Mr. Robert Clarke (not Mr. Julian Madgett) was responsible for the relevant transaction at ICBC (London) PLC as evidenced through his affidavit in the underlying civil case at 15 cv 70 (LAK). (See copy of Robert Clarke affidavit at, (17-cr-337 (RJS), dkt. no. 164, exhibit 2). Additionally Brennerman submitted evidence - Government Exhibit 1-19 and 1-22 which highlights that Blacksands had already incurred and disbursed $6.45 million in satisfying the finance conditions of ICBC (London) PLC and that the bridge finance was agreed to replace part of those funds which Blacksands already disbursed, further that Brennerman informed both Mr. Bo Jiang and Mr. Julian Madgett at ICBC (London) PLC and ICBC (London) PLC agreed to the use of the bridge finance. (See 17-cr-337 (RJS), dkt. no. 164, exhibit 2). Among others, Brennerman submitted newly discovered evidence (see 17-cr-337 (RJS), dkt. no. 164, exhibit 3) - the 2017 ICBC (London) PLC financial and company disclosure which was made publicly available on June 6, 2018, after trial. The disclosure highlights that there was no fraud. Because ICBC (London) PLC, the alleged victim of the wire fraud and related conspiracy has made no disclosure, representation or announcement that the transaction involving Blacksands Pacific was fraudulent or that it became a victim of fraud due to the transaction with Blacksands. Notwithstanding, that ICBC (London) PLC, a financial institution and publicly traded company in United Kingdom (England and Wales) is mandated by regulations to disclose publicly, if it became a victim of fraud or became involved with fraudulent transaction. This is particularly significant, where Government never reviewed, adduced or presented the relevant ICBC London lending and underwriting files, and because Brennerman was deprived from engaging in any meaningful cross-examination of the sole witness presented by Government from ICBC (London) PLC as to credibility and substance. In addition to the fact that, the sole witness - Mr. Julian Madgett, is not a member of the credit committee responsible for approving the transaction at ICBC (London) PLC.

Thus, Brennerman submits, arguing that since Government ostensibly argued (although erroneously) that Scott Stout worked at Morgan Stanley Private Bank (instead of Morgan Stanley Smith Barney) in their opposition to his Rule 29 and 33 motion. (See 17-cr-337 (RJS), dkt. no. 149), now highlighted as an erroneous proffer by Government given the overwhelming evidence which were all available to Government. Government`s credibility is questionable; further that, because Brennerman was deprived of the relevant ICBC London lending and underwriting file prior to trial and even Government concedes that it had not reviewed the files; additionally, because Robert Clarke and not Julian Madgett is/was responsible for the relevant transaction at ICBC (London) PLC as highlighted through his affidavit; additionally, because Brennerman suffered for ineffective assistance of counsel due to the conflict of interest issue, with his trial counsel; additionally, because Brennerman submitted and highlighted newly discovered evidence - the 2017 financial and company disclosure, by ICBC (London) PLC, which was filed and made public on June 6, 2018. Brennerman respectfully requests and pleads for the Court to resolve the factual dispute as to the relevant ICBC London transaction with Blacksands Pacific, as it pertains to this case, by reviewing the relevant ICBC London lending and underwriting files, especially in light of the newly discovered evidence which demonstrates that, ICBC (London) PLC, the alleged victim has not disclosed or represented that the transaction with Blacksands was fraudulent or that it became a victim of fraud through the transaction with Blacksands, which it would have had to disclose by regulation if any fraud occurred.

The above presents significant issues, because Brennerman suffered prejudicial spillover on other counts of the charged crime, due to Government`s erroneous argument and presentment to the court and jury at trial. In addition, Brennerman suffered prejudice due to the conflict of interest issue with his trial counsel. Evidence submitted to date, supports, Brennerman`s pleading for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Brennerman submits the above and the appended evidence in addition to his submissions at (dkt. no. 164), his June 11, 2018 and June 17, 2018 correspondences, and awaits the Court`s decision

Dated: June 20, 2018
New York City, New York

RESPECTFULLY SUBMITTED

/s/ Raheem J. Brennerman
Defendant Pro Se

From: BRENNERMAN, R. J @The Executive Office
To: Stout, Scott
Cc: BRENNERMAN R. J@Executive Office
Subject: Re: Morgan Stanley (Wealth Management)
Date: Tuesday, January 8, 2013 9:09:49 AM
Attachments: Morgan Stanley (Client Profile).pdf
Importance: High

Dear Scott,

As discussed, attached is the completed forms, as advised the account will be in the corporate name however you wanted me to also complete a form with personal information. As discussed, I will require Debit Card and AMEX card with the account.

Please let know what are the next steps.

Best Regards

From: Stout, Scott
Sent: Monday, December 10, 2012 1:10 PM
To: mailto:rbrennerman@blacksandspacific.com
Subject: RE: 2013 Preparation

Hi RJ,

Just a reminder to get those forms to me so I can get everything in order prior to our lunch on Friday.

Thanks,
Scott

Scott Stout
F.A. - Wealth Management
MorganStanley
Direct: 310 205 4912
9665 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

http://www.morganstanley.com/fa/scott.stout
scott.stout@morganstanley.com

GOVERNMENT
EXHIBIT
1-57
17 Cr. 337 (RJS)

9665 Wilshire Boulevard
Suite 600 Beverly Hills CA 90212

MorganStanley SmithBarney

Kindly provide all personal information.
For additional owners, please complete a 2nd profile.

Full Name Kamron Jefferson Brumgrman

Address 245 Park Avenue, 37fl

City New York State New York Zip Code 10167

Home Phone _____ Business _____

Cell 917 699 6930 Fax 310 861 1057

SS# or Tax ID [redacted] US Citizen (Y) N

Marital Status Single #of Dependents N/A Date of Birth 04/21/78

E-mail Address kbrumgrman@blacksandpci.com

Telephone access Prompts **Mother's Maiden Name** _____

City of Birth _____ **or 1st School Attended** Dwight

Employer Blacksands Pacific Energy Corporation

Nature of Business Oil & Gas Occupation Oil & Gas Executive

Est. Annual Compensation $ 720,000 (Base Salary) Employed Since 2010

Primary Source of Income-Check all that apply

Annual Salary X Investments X Retirement Assets ____ Amount $ _____

Est. Total Annual Income (all sources) _____

Est. Liquid Net Worth $ 45m Est. Total Net Worth $ _____

Tax Bracket (percentile) _____

Investment Objectives: (*Please rank 1 through 4, in order of priority*)

Growth 1X Current Income 3 Tax Deferral 4 Liquidity X 2

Investing Since (*year*) Stocks 99 Bonds 99 Commodities 01 Options 02

Risk Tolerance (check one) Aggressive ___ Moderate X Conservative ___

Speculation Yes ____ No ____

Primary Financial Need: (circle one)

(Wealth Accumulation) Estate Planning | Major Purchase Retirement | Healthcare Charity | Education Income

Outside Investments: **Firms Used:** _____

Equities $ _____ **Fixed Income $** _____ **Cash$** _____ **Alt Investments** _____

Time Horizon _____ **Liquidity Needs** _____

Are you or anyone in your household a major share holder in a publicly traded company? Y (N)
Are you an executive of a publicly traded company? Y (N)
Do you or anyone in your immediate family work for a brokerage house? Y (N)
Is anyone in your immediate family employed by CitiGroup? Y (N)

1/5/13

Please sign and date above

In order to open your account we are required to obtain this information. Thank you for assisting us.

THIS INFORMATION WILL REMAIN CONFIDENTIAL 02/2012

GOVERNMENT EXHIBIT 1-57A 17 Cr. 337 (RJS)

9665 Wilshire Boulevard
Suite 600 Beverly Hills, CA 90212

MorganStanley SmithBarney

Kindly provide all personal information.
For additional owners, please complete a 2nd profile.

Full Name JEFFERSON III HOLDINGS LLC

Address 3960 HOWARD HUGHES PARKWAY, SUITE 500

City LAS VEGAS State NEVADA Zip Code 89169

Home Phone _____ Business _____

Cell 917 699 6430 Fax _____

SS# or Tax ID [redacted] US Citizen (Y) N

Marital Status N/A #of Dependents _____ Date of Birth _____

E-mail Address _____

Telephone access Prompts **Mother's Maiden Name** _____

City of Birth _____ or **1st School Attended** DWIGHT

Employer _____

Nature of Business INVESTMENTS Occupation _____

Est. Annual Compensation $_____ Employed Since _____

Primary Source of Income-Check all that apply

Annual Salary____ Investments ___ Retirement Assets____ Amount $_____

Est. Total Annual Income (all sources)_____

Est. Liquid Net Worth $_____ Est. Total Net Worth $_____

Tax Bracket (percentile)_____

Investment Objectives: (*Please rank 1 through 4, in order of priority*)

Growth 1 Current Income 2 Tax Deferral 3 Liquidity 4

Investing Since *(year)* Stocks 99 Bonds 99 Commodities 01 Options 02

Risk Tolerance (check one) Aggressive ___ Moderate X Conservative ___

Speculation Yes_____ No_____

Primary Financial Need: (circle one)

Wealth Accumulation (Estate Planning)	Major Purchase Retirement	Healthcare Charity	Education Income

Outside Investments: **Firms Used:** _____

Equities $_____ **Fixed Income $**_____ **Cash$**_____ **Alt Investments**_____

Time Horizon _____ **Liquidity Needs** _____

Are you or anyone in your household a major share holder in a publicly traded company? Y N
Are you an executive of a publicly traded company? Y N
Do you or anyone in your immediate family work for a brokerage house? Y N
Is anyone in your immediate family employed by CitiGroup? Y N

1/5/13

Please sign and date above

In order to open your account we are required to obtain this information. Thank you for assisting us.

THIS INFORMATION WILL REMAIN CONFIDENTIAL 02/2012

From: BRENNERMAN, R. J @The Executive Office
To: Stout, Scott
Cc: Gevarter, Mona
Subject: Re: Platinum AMEX
Date: Wednesday, January 9, 2013 7:24:39 PM
Importance: High

Dear Mona,

Are you able to call me on my cellphone 917 699 6430 regarding the email below

Best Regards

From: Stout, Scott
Sent: Wednesday, January 09, 2013 4:45 PM
To: mailto:rbrennerman@blacksandspacific.com
Cc: Gevarter, Mona
Subject: Platinum AMEX

RJ,

Please give Mona a call to set up your Platinum AMEX card. 310 205 4751.

As a Morgan Stanley perk, if you spend $100k annually we deposit $500 into your account to cover your annual fee ($450).

Other MS/Platinum Perks Include:

- First Class Lounge Access
- $200 annually in airline fee credits (checking bags, etc)
- No foreign transaction fees
- Premium upgrades for car rentals
- Concierge
- 20% Travel Bonus

Scott Stout
F.A. - Wealth Management
MorganStanley
Direct: 310 205 4912
9665 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

http://www.morganstanley.com/fa/scott.stout
scott.stout@morganstanley.com

Important Notice to Recipients:

GOVERNMENT EXHIBIT 1-73 17 Cr. 337 (RJS)

Please do not use e-mail to request, authorize or effect the purchase or sale of any security or commodity. Unfortunately, we cannot execute such instructions provided in e-mail. Thank you.

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Morgan Stanley

CLIENT STATEMENT For the Period January 1-31, 2013

#BWNJGWM

RAHEEM JEFFERSON BRENNERMAN
245 PARK AVENUE
39 FLOOR
NEW YORK NY 10167-4000

TOTAL VALUE LAST PERIOD (as of 12/31/12)	[redacted]
NET CREDITS/DEBITS	200,000.00
CHANGE IN VALUE	0.88
TOTAL VALUE OF YOUR ACCOUNT (as of 1/31/13)	$200,000.88

(Total Values include accrued interest)

Your Branch

9665 WILSHIRE BLVD STE 600
BEVERLY HILLS, CA 90212
Telephone: 310-285-2600
Alt. Phone: 800-458-9838
Fax: 310-285-2696

Your Financial Advisor

Scott Stout

Client Interaction Center

800-869-3326
24 Hours a Day, 7 Days a Week

Access your accounts online

www.morganstanley.com/online

GOVERNMENT EXHIBIT 529 17 Cr. 337 (RJS)

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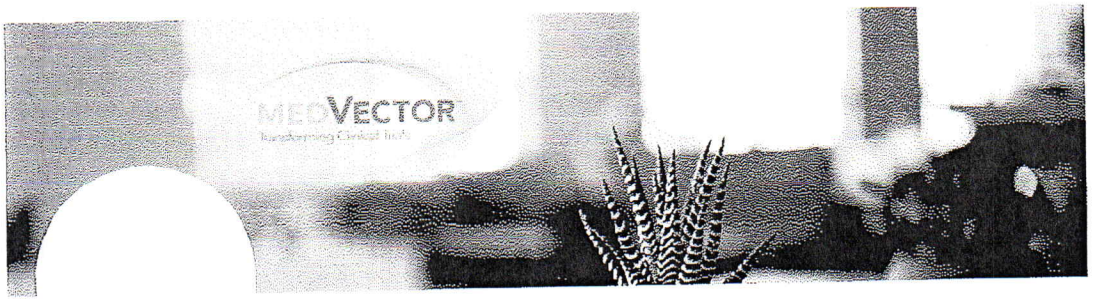

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Shop Stickers
MOO

Scott Stout • 3rd

CEO, Co-Founder at MedVector Clinical Trials

El Segundo, California

InMail

MedVector Clinical Trials

University of Arizona

See contact info

500+ connections

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CEO & Co-Founder
MedVector Clinical Trials
Jun 2017 – Present • 1 yr 1 mo
El Segundo, CA

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Once suitable candidates have been identified, MedVector connects our research clients to trial participants utilizing a state of the art, HIPAA compliant, telemedicine network, allowing them to virtually move patients to clinical trial site-locations from anywhere in the world.

Our process allows clinical trial sites (locations) to capture marketshare, creates economies-of-scale by removing redundancies in the current marketplace, creates revenue for hospitals not conducting clinical trials, gives remote populations access to cutting edge medicine, and significantly expedites the process of bringing life saving, advanced medicine to market.

To learn more visit: www.MedVectorTrials.com

Financial Advisor
Wells Fargo Private Bank
Oct 2014 – Apr 2018 • 3 yrs 7 mos
Los Angeles, California

Built a Wealth Management team within the Private Bank, incorporting Wealth Managers, Portfolio Managers, Private Bankers and Financial Advisors.

Financial Advisor
Morgan Stanley Wealth Management
May 2011 – Nov 2014 • 3 yrs 7 mos

Messaging

D & S Investments
Jan 2008 – May 2011 • 3 yrs 5 mos

Advised a Family Office regarding options strategy.

Education

University of Arizona
Bachelor of Science (BS), Marketing
1997 – 2002
Activities and Societies: Delta Chi

Interests

University of Arizona
214,411 followers

MedVector Clinical Trials
4 followers

University of Arizona Alumni
34,140 members

Barrington Legal, Inc.
40 followers

Delta Chi Fraternity
5,471 members

Fortis Partners
1,045 followers

See all

Morgan Stanley Smith Barney is Now Morgan Stanley Wealth Management

Sep 25, 2012

Morgan Stanley's U.S. Wealth Management Business Has a New Name Following Largest-Ever Integration in the Wealth Management Industry

New York —

Morgan Stanley (NYSE: MS) today announced that its U.S. wealth management business, Morgan Stanley Smith Barney, has been renamed Morgan Stanley Wealth Management (MSWM).

Morgan Stanley Wealth Management is an industry leader, managing $1.7 trillion in client assets through a network of 17,000 representatives in 740 locations. Morgan Stanley on September 11 announced an agreement with Citigroup to increase its majority ownership of MSWM such that Morgan Stanley will assume full control by June of 2015, subject to regulatory approval. The business was formed in 2009 as a joint venture between Morgan Stanley and Citi's Smith Barney.

"Today, as we move under one name, we are culminating a three-year effort to integrate two outstanding franchises," said James Gorman, Chairman and Chief Executive Officer of Morgan Stanley. "The Smith Barney name stood for investment excellence for three-quarters of a century, and Morgan Stanley Wealth Management will provide the first-class service that has distinguished Morgan Stanley as a firm for more than 75 years. Going forward, we remain focused on being the world's premier wealth management group."

Said Greg Fleming, President of Morgan Stanley Wealth Management, "Today, we are one integrated business, with one overarching mission: to earn the trust of our clients every day

https://www.morganstanley.com/press-releases/morgan-stanley-smith-barney-is-now-morgan-stanley-wealth-management_7a78aa1d-036a-4fbf-9df7-1e73387a

through superior advice and execution. Our name has changed to reflect our integration, but our mission remains the same: We are committed to helping our clients reach their financial goals."

The broker-dealer designation for Morgan Stanley Wealth Management will remain "Morgan Stanley Smith Barney LLC."

Morgan Stanley Wealth Management, a global leader in wealth management, provides access to a wide range of products and services to individuals, businesses and institutions, including brokerage and investment advisory services, financial and wealth planning, credit and lending, cash management, annuities and insurance, retirement and trust services.

Morgan Stanley (NYSE: MS) is a leading global financial services firm providing a wide range of investment banking, securities, investment management and wealth management services. The Firm's employees serve clients worldwide including corporations, governments, institutions and individuals from more than 1,200 offices in 43 countries. For further information about Morgan Stanley, please visit www.morganstanley.com.

Media Relations Contact:

Jeanmarie McFadden, 212.761.2433

Jim Wiggins, 914.225.6161

EXHIBIT D

there's a grid or a table. You probably can't see it, but it's a chart, and there's a column here on the far left. That's the offense level column. It starts at number one and goes down to level 43. The judge goes down that column until the judge gets to the number that the judge found to be the offense level.

The judge then goes across these other columns from left to right, each of which reflects a criminal history category, and the judge keeps going until the judge gets to the criminal history category that the judge found to be appropriate. Where the judge's finger finally stops then after that exercise, well, that's the range that in the view of the commission that prepares this book would be appropriate.

I don't have to follow this book. This book is not mandatory. It's advisory. But I do have to consider it, and I have to make my findings under it. So we are going to spend a few minutes now talking about how this book applies in this case. It can be a little complicated. It can be sort of a little like accounting, but it's not too hard to follow, and I think the issues here are relatively straightforward and understandable. So we'll pick them up. All right?

According to the presentence report prepared by the probation department, beginning on page 6 -- there are four counts of conviction here, so according to probation, Counts One, Two and Three are grouped together pursuant to a different section of the guidelines that says where you have crimes that

are distinct crimes but they all involve the same conduct, in most cases you group them all together and you do an analysis all together. You don't count them separately and add them up. You do them together. So the conspiracy to commit bank and wire fraud, the bank fraud and the wire fraud are all treated together, and they're all covered by the same guidelines provision, which is Section 2B1.1. That's the general fraud provision under the guidelines.

Now, I do think, frankly, that it's worth pointing out that the bank fraud calculation here I think would be quite different than the wire fraud, and I guess I want to hear from the parties on that. But the bank fraud here 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 some 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.

Mr. Roos, do you disagree?

MR. ROOS: I think that's right, your Honor.

THE COURT: You agree, OK.

IBJQBREs

And I assume, Mr. Tulman, you agree with that.

MR. TULMAN: I have no problem with that, Judge.

THE COURT: So, that being the case then, the base offense level is 7, because the maximum sentence of bank fraud is 30 years, but there's no enhancement for loss because the loss amount in dollar terms for the bank fraud count did not exceed $6,500.

Is the government arguing there are any other enhancements for the bank fraud count? I didn't see any, but maybe I'm wrong.

MR. ROOS: Well, your Honor, the PSR sets forth sophisticated means.

THE COURT: Sophisticated means for the bank fraud?

MR. ROOS: It's identified as sophisticated means include, like, for instance, his papering of a fake company, his setting up shell entities. The government's proof at trial was -- while I think your Honor is right that from the FDIC institution, the potential loss to that institution was low, he still used those various sophisticated means, basically, the papering of a company that didn't exist in order to get access to those benefits and expose the bank's potential loss. So I think that enhancement would apply.

THE COURT: Mr. Tulman, thoughts on that?

MR. TULMAN: I don't know that there's anything particularly sophisticated about the conduct.

IBJQBREs

THE COURT: Well, it does require you to create a company. It might require you to incorporate a company. It requires you to develop financials for that company and brochures and things like that. There was a lot of evidence about those things. I guess that's more sophisticated than a typical situation where somebody just uses a false name when they go into a bank or adds a zero to their income in a form. I think it's more sophisticated than that. I think ultimately it's not going to matter, the impact of that doesn't add much of anything here, but I think that that argument is -- I'm persuaded there has been proof of sophisticated means that by a preponderance would warrant a two-level increase. So the bank fraud would be at level 9, before we get to obstruction. And I think that's going to be a lot lower than the wire fraud. The wire fraud is what drives this here. So the wire fraud is also going to be a base offense level of 7, correct?

MR. ROOS: That's correct, your Honor.

THE COURT: And then there the loss amount is disputed. The probation department concludes that the loss amount was $20 million because that is what the defendant -- that was the nominal amount of the loan that he fraudulently secured. He didn't get it all, but I guess the argument is that he didn't have to have gotten it all to be on the hook for the full $20 million. It's the loss and the intended loss, at least with the conspiracy count, but probably even for the

substantive count, the intended loss would be relevant. So why don't we talk about that.

The restitution amount will be lower. Obviously, it's not going to be 20 million for restitution. The restitution is not the driver of loss for intended loss. So the government's view is this nominal amount alone of $20 million, that's the fraud?

MR. ROOS: Your Honor, I think this is a relatively conservative estimate by probation. There was plenty of proof at trial that the defendant went to both the ICBC and the non-FDIC insured branch of Morgan Stanley and sought out considerably more --

THE COURT: He was trying to get $600 million. I guess at one point that was what there was discussion about, but you're not seeking that as the loss amount, right?

MR. ROOS: That's right, your Honor, although I think there was evidence at trial that he intended that amount. Julian Madgett testified that this bridge loan of $20 million wasn't contemplated as the exclusive deal. Rather, it was sort of the entree to a much larger deal that the bank was totally serious about. So, I think there actually would be a basis for the Court to conclude that there was a $300 million intended loss.

The government isn't pursuing that though, and that's not what probation did. I think this is very reasonable. He

IBJQBREs

had a contract, something reduced to writing for $20 million. Sure, the drawdown happened before the fraud was exposed was approximately $5 million, but there is not only a clear evidence in the trial record of intention to take $20 million from the bank, but actually multiple steps taken by the defendant, up to the point of entering into a contract, having money transferred into an escrow account.

So, there is more -- as your Honor pointed out, the test is not exclusively what actually was lost by the bank. That's may be it for restitution, but in terms of intended loss, there is more than sufficient evidence in the record to conclude that $20 million is the appropriate amount.

THE COURT: Mr. Tulman, do you want to be heard on that?

MR. TULMAN: Yes, your Honor.

The issue, as the government rightly points out, is of intended loss, and what Mr. Brennerman has pointed out to the Court is simply the fact that of the $20 million, as a matter of English law, the $15 million was not controlled by Mr. Brennerman, he would never have been able to gain access to it. It was held in a pledged account to ICBC. So he could not and did not intend ever to receive any of those $15 million.

THE COURT: Why are you saying he never intended to get that money?

MR. TULMAN: That's right. What he maintains is that

EXHIBIT E

(Jury present)

THE COURT: Okay. Have a seat. We will now begin the cross-examination of Mr. Madgett by Mr. Waller.

CROSS EXAMINATION

BY MR. WALLER:

Q. Good afternoon, Mr. Madgett.

A. Good afternoon.

Q. When did you say you started working for ICBC?

A. 2009.

Q. And you work for ICBC in London, correct?

A. Correct.

Q. And it is a subsidiary of a Chinese bank?

A. It is a subsidiary and a branch of a Chinese bank.

Q. ICBC London is not FDIC insured; is that correct?

A. You are referring to the U.S. arrangement?

Q. That's correct.

A. No, it would not be because it's an operation in the U.K.

Q. When your credit committee makes a decision, a credit decision whether or not to give a loan or not to give a loan, what sort of documentation does it produce? Does it produce a memo that explains its reasons or analysis for giving a loan?

A. The credit committee will have a series of minutes which reflects a discussion of the case in credit committee and records the decision of the credit committee.

Q. Did you ever produce the documents from that credit

committee, the ones you just described, to the government?

MR. ROOS: Objection.

THE COURT: You can answer.

A. To my knowledge, no. But I need to state perhaps it's appropriate to say this: After the loan was defaulted, the internal process of the bank means that the direct relationship managers who were responsible for that dialogue step away and the defaulted loan is then passed to a different department. So, I'm not fully aware of all aspects of what has happened to the management of the loan after around April 2014.

Q. And when I say produced to the government, I meant to the prosecutors here in this case. You understood that?

A. I understood that and to my knowledge, no, that has not been the case.

Q. But ICBC did produce a lot of documents to the government, correct?

A. All I can state is that the documents were provided to our legal advisors and then our legal advisors have interacted with the U.S. Attorney's office.

Q. Would it be fair to say that some documents that are in the underwriting file for ICBC were produced to the document and others were not?

A. Some documents will have been passed across. I do not know whether or not all or some. I'm not in -- I don't have that knowledge.

Q. Is there an underwriting file for a loan application such as the one we are dealing with in this case?
A. There would be a credit application document which is where the case for making the loan has been summarized, and that is the credit application document which then goes to credit committee for approval or decline.
Q. Do you know if that -- well who would have prepared that document?
A. I would have been one of the main authors of that document.
Q. Do you know if that document was produced to the government?
A. I do not and I wouldn't see great relevance in it, but I do not know if it has gone to the government.
Q. Well, relevance is not really your determination, correct?
A. Correct, correct. Yes.
Q. So you don't know if it was produced to the government and it certainly wasn't produced to the defense, correct, by ICBC?
THE COURT: Well, do you know?
THE WITNESS: I don't know, but I'm assuming from your question that it wasn't.
THE COURT: Well, don't assume.
THE WITNESS: Okay, sorry. My apologies.
THE COURT: The jury knows not to assume anything from a question. So, you just answer as to what you know.
THE WITNESS: All right.

BY MR. WALLER:

Q. Was there an answer?

A. Could you repeat the question, please?

Q. Yes.

Do you know if that document that we were talking about was ever produced?

THE COURT: He answered. He said I don't know.

THE WITNESS: I don't know.

THE COURT: And then he started assuming things and that's when I jumped in.

BY MR. WALLER:

Q. So the answer is you don't know?

A. I don't know.

Q. Now, you first met Mr. Brennerman in 2011, correct?

A. Yes.

Q. Did you meet him in person for a meeting?

A. Yes.

Q. Jumeirah Carlton Tower Hotel, does that sound right?

A. On one occasion I met him in a hotel, yes.

Q. At that point when you met him I think you testified that there were no firm deals that he was bringing to you at that point? There were no deals that he was bringing to you, he was just making an introduction?

A. When the initial interaction between us started, yes.

Q. And, do you recall when the first deal was that he brought

EXHIBIT F

MS. FRITZ: Your Honor, your Honor, no. We have it here, but --

THE COURT: You haven't served it yet?

MS. FRITZ: We wanted to hear what your Honor said.

THE COURT: In any event, the witness has indicated he doesn't possess the documents, so the documents are not with him. He doesn't have them. According to his testimony, they're in London with the bank's files that he turned over once the deal went south. He certainly said he didn't review them in preparation for his testimony. He doesn't possess them now.

So, to the extent the bank is subpoenaed with a Rule 17 subpoena, then that would be a different issue, but I don't think serving Mr. -- who is the lawyer, Mr.?

MR. HESSLER: Hessler, your Honor.

THE COURT: Yes, Mr. Hessler. I'm sorry.

I don't think serving Mr. Hessler is adequate service for purposes of the bank.

MS. FRITZ: Let me explain why we did it that way, because initially last night, we had an ICBC subpoena drafted, and the reason that we did it this way is, again, I don't necessarily agree with your Honor's definition of possession. I do think that Julian Madgett, I think quite plainly, has access to these documents. People very rarely walk around with the documents that you're asking for from them, but they do

EXHIBIT G

Q. Is that the same title you had or position you had while you were at Morgan Stanley?
A. My title -- my specific job title at Morgan Stanley varied as I was promoted from vice president, to director, to managing director, and I worked within what they called the institutional securities division. My current title is managing director at Lazard within what they call the financial advisory division, but I'm doing substantially the same job, except I'm more solely focused on mergers and acquisitions now and not so much on financings, if that makes sense.
Q. Staying with Morgan Stanley, you mentioned that Morgan Stanley has two business lines?
A. Broadly, if you look at their financials, that's how they characterize it, yes.
Q. And can you just explain, to the extent you understand, what you mean by "business lines"?
A. Certainly. So, Morgan Stanley has a private wealth management business, which is one of the aforementioned two business lines. That business is composed of individuals who somewhat confusingly are also called financial advisors, who work with high net worth individuals to help them manage their money.
And then the other business line that I was referring to, which I was a part of, is called the institutional securities division. And within that division is housed what

is the traditional investment banking activities, which is capital markets, underwriting, so think about initial public offerings, helping companies with that. Mergers and acquisitions, when two companies merge, and then aside from that, there's sales and trading, which is basically making markets in various securities around the world, and also asset management.

Q. You said business lines, but they're really separate entities; is that correct?

A. They're all a part of the Morgan Stanley & Company LLC, which is listed on the New York Stock Exchange, but we report up through different superiors.

Q. You say "part of." Are they the same company? Are they a separate entity?

A. They're wholly-owned subsidiaries of Morgan Stanley & Company LLC.

Q. And you called it, I believe, wealth management. Is it also referred to as the private bank?

A. I don't believe I have the expertise to answer that.

Q. I understand.

A. I could speculate, but...

Q. So you're not really familiar with anything that's handled on the wealth management side, other than sometimes you have clients referred?

A. I've never worked on the wealth management side, so I don't

BY MS. SASSOON:

Q. Just to clarify, turning back to Exhibit 1-61, page 6, is it clear to you one way or the other from looking at this e-mail whether this is an asset-based lending proposal?

A. It's not clear to me, it would be speculation.

Q. Looking at page 7, going back to the part in blue with the asterisk, can you read that, please?

A. 50 percent working interest owned by Black Sands Pacific Alpha Blue, LLC.

MS. SASSOON: No further questions.

THE COURT: Okay. Any recross?

MR. STEINWASCHER: Very briefly, your Honor.

RECROSS EXAMINATION

BY MR. STEINWASCHER:

Q. Can we go back to that same exhibit, same page?

Very briefly, Mr. Bonebrake. Did this proposal provide you -- I say proposal, overview summary proposal, did it provide you with really any information on which Morgan Stanley could make a decision about financing?

A. To get to the point of actually, quote, making a decision on financing, there would have been a lot more work and information needed than this. Again, this was very preliminary stage of our conversation.

MR. STEINWASCHER: Thank you.

THE COURT: Okay. You can step down. Thanks very

BY MR. STEINWASCHER:

Q. Did you have specific recollection as to your conversations -- specific details of your conversations with Mr. Brennerman prior to looking at the documents when meeting with the government?

A. I had recollections of conversations with Mr. Brennerman that were enhanced by looking at the documents. I did recall the conversations before seeing the documents, but the documents were very helpful.

Q. So, it's safe to say that for some specific details, your memory was refreshed by the documents and not something that you just remembered independently prior?

A. That's a broad statement. I'm not sure I could agree or disagree with that, but...

Q. That's fine. That's fine.

On the topic of financing, you said that for these types of deals, the ones that you have handled primarily, and specifically the one involving Mr. Brennerman, Morgan Stanley would not provide the money that it would seek financing from outside investors; is that correct?

A. They would not typically provide the money. There are some cases where Morgan Stanley -- let me rephrase that. I can only speak for my particular division. So, Morgan Stanley is a $700 billion company operating across the globe with over 50,000 employees. So my particular division would typically

not be providing the financing directly, but we might backstop an offering where we commit that if we can't find third-party investors to purchase these securities, then we would provide the money. But that was not the majority of the cases.

Q. And in the particular case of the proposal from Mr. Brennerman, I believe you said that it was something that you understood he was looking for Morgan Stanley to find financing from investors for?

A. My recollection was that it was unclear. We didn't get very far in our discussions. And then, after reviewing the emails, I think it's still unclear.

Q. You mentioned several times, I believe, a distinction between dealing with public companies and private companies?

A. Yes.

Q. At one point I believe you said your knowledge of the number of private companies that are involved in this type of business that you do, the oil and gas business, you're a little less certain of the specific number because the information is not publicly available; is that correct?

A. Correct.

Q. So, for a private company like Blacksands Pacific, it wouldn't be unusual that you hadn't heard of them, given that they're a private company, and you're not familiar with every single private company out there?

A. It would be unusual that a company -- that I had not heard

don't.
Q. If it had no depository accounts, would there be any reason for it to need FDIC insurance?
A. I'm not certain.
Q. Does FDIC insurance cover anything else other than depository accounts?
A. No.
Q. So if there is a company that has many different sub-entities, some of those that hold depository accounts and some of those that don't, a financial institution I should say, it's safe to say the FDIC would only offer insurance to those portions of the company that handle depository accounts?
A. You kind of lost me. Can you repeat that?
Q. If there is a financial institution that has one division that covers investments and another division that covers depository accounts, would the FDIC insure the division that covers investment banking?
A. If it does not have a certificate of deposit insurance it would not.
Q. If it had no depository accounts, there was no reason for that institution to seek a certificate of insurance?
A. I can't opine on what someone would want to do, in terms of seeking insurance or not seeking insurance.
Q. Well, there would be nothing for the FDIC to insure in that instance, is that correct?

Q. OK. I am not sure it's reflected on this page, but maybe on the first page of this exhibit.

You see at the bottom here, on the bottom left, there is an italicized text that reads "Morgan Stanley Smith Barney LLC"?

A. It's hard for me to see.

Q. Do you see that text now?

A. Yes.

Q. Are you aware if Morgan Stanley Smith Barney LLC is insured by the FDIC?

A. I'm not aware of that.

Q. Did you conduct any search to confirm that?

A. No.

Q. The rest of this text, it has "member SIPC." Do you see that?

A. Yes.

Q. Are you familiar with that acronym SIPC?

A. I'm not familiar with that acronym.

Q. Does that, as far as you know, pertain to the FDIC in any way?

A. No.

Q. Does the FDIC insure banks outside of the United States?

A. No.

Q. So if there is a bank located in London, in the United Kingdom, that would not be covered by the FDIC?

A. Not without a certificate of deposit insurance.
Q. I just want to clear this up. Your answer to my previous question was the FDIC does not insure banks outside of the United States.
A. A foreign bank?
Q. Correct.
A. No.
Q. So if there is a foreign bank located in London, even if it held depository accounts, the FDIC could not insure it, is that correct?
A. That is correct.
Q. I apologize for this. I want to go back to one point.

Those two Morgan Stanley banks that we looked at, those two entities that had certificates of insurance with the FDIC, if an entity is a subsidiary of a parent in a financial institution, does the fact that the subsidiary is FDIC insured also mean that the parent is FDIC insured?
A. Can you repeat that? I'm not sure I understand.
Q. Does FDIC insurance for a financial institution, which is a subsidiary of another financial institution, so the FDIC has issued a certificate to that subsidiary, does that certificate somehow also cover the parent corporation?
A. No.
Q. So the parent entity would need a separate certificate of insurance?

A. Yes.

Q. The same thing for an affiliate within a company or affiliates between companies, each entity would require a separate certificate of insurance in order to be FDIC insured?

A. That is correct.

MR. STEINWASCHER: We are just about approaching lunch and I am done with this witness.

THE COURT: Any redirect?

MR. SOBELMAN: No, your Honor.

THE COURT: Why don't we break then. We will pick up at 2.

Don't discuss the case and bring your books with you into the jury room, but don't take them outside of the jury room. Have a good lunch.

All rise for the jury, please.

(Jury exits courtroom)

THE COURT: You can step down. Thank you very much, Mr. Gonzalez.

Have a seat. Let's talk about what we have left and an ETA.

MR. ROOS: We have six witnesses remaining, two of them are on the longer side and the other ones are about the length that some of these shorter witnesses have been today. And we also have three stipulations to read into the record at some point. We can do it right after lunch.

EXHIBIT H

THOMPSON HINE
ATLANTA CLEVELAND DAYTON WASHINGTON, D.C.
CINCINNATI COLUMBUS NEW YORK

November 29, 2017

Via ECF and Email

Hon. Richard J. Sullivan
Thurgood Marshall
United States Courthouse, Room 905
40 Foley Square
New York, NY 10007

Re: *United States v. Raheem J. Brennerman*; No. 17 Cr. 337 (RJS)

Dear Judge Sullivan,

We write to address the issue raised today with respect to the production of certain documents. Specifically, we learned today that that the notes of the Government's witness, Julian Madgett, pertaining to matters to which he testified, were not obtained by the Government, or provided to the defense. For the reasons detailed below, it is our position that the materials should have been produced pursuant to Fed. Rule Crim. P. 16 and the Jencks Act, 18 U.S.C. § 3500; in addition, the defendant is serving a subpoena on counsel for this witness, Paul Hessler, for their production and the production of other documents.

The Government has asserted that Mr. Madgett's notes – made by the alleged victim and pertaining to the precise subject matter at issue in this trial – are not in its actual "possession," and therefore it has no obligation to produce them. But possession is not so narrowly defined. Courts have required the Government to disclose evidence material to the defense where the Government "actually or constructively" possesses it. *E.g.*, *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993) ("The prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it." (internal quotation marks omitted)); *cf. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that, to satisfy *Brady* and *Giglio*, prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"). In particular, in *United States v. Paternina-Vergara*, the Second Circuit held that the Government had an obligation to make good faith efforts to obtain Jencks Act statements possessed by a third party that had cooperated extensively, and had a close relationship with, the Government. 749 F.2d 993 (2d Cir. 1984). And in *United States v. Stein*, the court directed the Government to produce documents in the actual possession of a third party, KPMG, because KPMG had voluntarily agreed to do so in an deferred prosecution agreement. 488 F. Supp. 2d 350, 361 (S.D.N.Y. 2007) (noting that the term "control" has been "broadly construed"); *see also United States v. Kilroy*, 488 F. Supp. 2d 350, 362 (E.D. Wis. 1981) ("Since Standard Oil is cooperating with the Government in the preparation of the case and is making available to the Government for retention in the Government's files any records which Standard Oil has and

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THOMPSON HINE

which the Government wants, however, it is not unreasonable to treat the records as being within the Government's control *at least to the extent of requiring the Government to request the records on the defendant's behalf and to include them in its files for the defendant's review if Standard Oil agrees to make them available to the Government*." (emphasis added)).[1]

Here, there can be no question that Mr. Madgett and his employer, ICBC (London) plc ("ICBC"), are in a cooperative relationship with the Government. ICBC is the complainant and alleged victim in this case. Moreover, counsel for ICBC confirmed in the recent criminal contempt trial before Judge Kaplan that ICBC had voluntarily produced more than 5000 pages of documents at the mere request of the Government. And Mr. Madgett is voluntarily appearing as a Government witness. Given this close relationship, and one demonstrating extensive cooperation between Mr. Madgett, ICBC, and the Government, the Government had (and has) an obligation to obtain and produce to Mr. Brennerman materials required by Rule 16 and the Jencks Act. Yet, Mr. Madgett testified today that the Government never asked him for any notes.

Mr. Brennerman therefore moves this Court to direct the Government to request, at a minimum, Mr. Madgett's notes that pertain to the subject matter of this case and his testimony. This is especially necessary given the critical importance of such materials to this case and Mr. Brennerman's defense, as *no* documents have been produced to date that pertain to the critical issue of ICBC's decision-making process with respect to the loan it provided to Mr. Brennerman – i.e., the transaction at the very core of the Government's case.

Additionally, since Mr. Brennerman has been unable to obtain any such materials, and in light of Mr. Madgett's testimony, we are issuing a subpoena directly to ICBC, through its counsel Mr. Hessler, for these records and others.

We are prepared to address these issues at any time convenient to the Court.

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

THOMPSON HINE

Respectfully,

s/ Maranda E. Fritz

Maranda E. Fritz

Enclosures

AO 89 (Rev. 08/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case

UNITED STATES DISTRICT COURT

for the

Southern District of New York

United States of America
v.
Raheem J. Brennerman
Defendant

Case No. 1:17-cr-0377-RJS

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: Julian Madgett

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance:	Southern District of New York 500 Pearl Street New York, New York	Courtroom No.: 15C
		Date and Time: 12/06/2017 9:30 am

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*:

Please see attached rider.

(SEAL)

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Raheem J. Brennerman, who requests this subpoena, are:

Maranda E. Fritz, Esq.
Brian D. Waller, Esq.
Brian K. Steinwascher, Esq.
Thompson Hine LLP
335 Madison Avenue, 12th Floor
New York, New York 10017-4611
(212) 908-3966
Maranda.Fritz@ThompsonHine.com, Brian.Waller@ThompsonHine.com & Brian.Steinwascher@ThompsonHine.com

AO 89 (Rev. 08/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case (Page 2)

Case No. 1:17-cr-0377-RJS

PROOF OF SERVICE

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

RIDER

(Subpoena to Julian Madgett)

Definitions and Instructions:

1. Please produce any documents responsive to this Subpoena by 12/6/2017 at 9:30 am.

2. Please produce requested records in electronic form (native format where necessary to view the material in its full scope) in a manner that is OCR-searchable, and with all available electronic metadata.

3. The term "documents" includes writings, emails, text messages, drawings, graphs, charts, calendar entries, photographs, audio or visual recordings, images, and other data or data compilations, and includes materials in both paper and electronic form.

4. The term "ICBC" refers to the Plaintiff in the civil litigation in the Southern District of New York captioned *ICBC (London) plc v. The Blacksands Pacific Group, Inc.*, 15 Cv. 70 (LAK) and includes its agents, representatives and counsel.

5. The term "Blacksands Pacific" includes The Blacksands Pacific Group Inc. and the Blacksands Pacific Alpha Blue, LLC or any Blacksands Pacific entity and any of its subsidiaries and affiliates, and any officer, employee, volunteer, representative, or agent of those entities.

6. The Subpoena calls for the production of documents from the period January 1, 2013 to March 3, 2017.

7. Any documents withheld on grounds of privilege must be identified on a privilege log with descriptions sufficient to identify their dates, authors, recipients, and general subject matter.

Materials to be Produced:

1. All notes relating to meetings and communications with representatives of Blacksands Pacific.

2. All documents relating to or reflecting the decision by the credit committee at ICBC to issue a bridge loan to Blacksands Pacific including but not limited to the "credit paper" and memorialization of the committee's decision.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-3546(L); 19-497(CON)

Caption [use short title]

Motion for: Supplemental Papers to Motion for Reconsideration of Motion to recall mandate

UNITED STATES OF AMERICA

Set forth below precise, complete statement of relief sought:

Defendant/Appellant respectfully submits supplemental papers to Motion for Reconsideration of Motion to Recall Mandate

V.

RAHEEM BRENNERMAN

MOVING PARTY: Raheem Brennerman **OPPOSING PARTY:** United States of America

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Raheem J. Brennerman, Pro Se **OPPOSING ATTORNEY:** Robert Sobelman, Esq

[name of attorney, with firm, address, phone number and e-mail]

LSCI-Allenwood
PO Box 1000
White Deer, PA 17887-1000

US Attorney Office
One St. Andrew's Plaza
New York, NY 10007

Court- Judge/ Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/Raheem Brennerman **Date:** February 21, 2021 Service by: ☐ CM/ECF ☑ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

UNITED STATES OF AMERICA

v.

RAHEEM J. BRENNERMAN

CERTIFICATE OF SERVICE*

Docket Number: 18-3546(L); 19-497(CON)

I, RAHEEM J. BRENNERMAN (print name), hereby certify under penalty of perjury that on February 0/ , 2021 (date), I served a copy of Supplemental papers to Motion for Reconsideration (list all documents)

by (select all applicable)**

___ Personal Delivery

X United States Mail

___ Federal Express or other Overnight Courier

___ Commercial Carrier

___ E-Mail (on consent)

on the following parties:

Name	Address	City	State	Zip Code
Robert Sobelman, Esq	USAO, One St. Andrew's Plaza	New York	NY	10007
Nicolas Landsman-Roos, Esq	USAO, One St. Andrew's Plaza	New York	NY	10007

*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

February 0/ , 2021
Today's Date

/s/ Raheem J. Brennerman
Signature

Certificate of Service Form (Last Revised 12/2015)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff,

-vs- Docket Nos. 18-3546(L); 19-497(CON)

RAHEEM J. BRENNERMAN,

Defendant-Appellant,

_____

SUPPLEMENTAL PAPERS TO MOTION FOR RECONSIDERATION
OF MOTION-TO-RECALL MANDATE

_____

RAHEEM JEFFERSON BRENNERMAN, hereby affirms under penalty of perjury:

1. I, Raheem Jefferson Brennerman ("Brennerman") am the Defendant-Appellant in this instant appeal.

2. I am a Pro Se Defendant-Appellant in this matter. As such, I am familiar with the facts and circumstances of this action.

3. This instant appeal arose from the conviction and sentence in the criminal case, 17 Cr. 337 (RJS)

4. Pursuant to FRAP and the Court`s Local Rules, Brennerman respectfully submits this supplemental information and exhibit in support of his motion for reconsideration of motion-to-recall mandate.

BACKGROUND:

5. Between November 26, 2017 and December 6, 2017, the trial in the underlying criminal case, 17 Cr. 337 (RJS) was prosecuted by the United States Attorney Office, SDNY with prosecutors, Assistant United States Attorney Emil J. Bove III, Danielle Renee Sassoon, Nicolas Tyler Landsman-Roos and Robert Benjamin Sobleman.

6. This Court, United States Court of Appeals for the Second Circuit ("Second Circuit") affirmed the conviction and sentence through Summary Order issued on June 9, 2020.

7. On January 5, 2021, Brennerman submitted motion to recall mandate to allow the appeal panel Court to correct certain errors with its decision (See Appeal docket No. 18-3546(L), doc. nos. 211, 217). Among other issues, Brennerman highlighted that he had been deprived of the evidence (ICBC (London) plc underwriting file) which he required to present a complete defense and confront witness against him in reliance on his Sixth Amendment rights and applicable law. Brennerman highlighted that Government sole witness from ICBC (London) plc, Julian Madgett testified (See Trial Tr. 17 Cr. 337 (RJS), at 551-554) that evidence (ICBC (London) plc underwriting file) exists with the bank`s file which documents the basis that the bank considered in approving the bridge finance loan at issue in this prosecution and thus contains any material representations or alleged misrepresentations. Further that, Government never obtained or reviewed the evidence.

8. On January 28, 2021, this Court denied Brennerman`s motion-to-recall mandate.

9. On February 8, 2021, Brennerman submitted motion for reconsideration of his motion-to-recall mandate and appended significant and material evidence with his submission, at 18-3546(L), doc. no. 222

PROSECUTORIAL MISCONDUCT AND URGE BY DISTRICT COURT TO INVESTIGATE SDNY PROSECUTORS INCLUDING AUSA. EMIL J. BOVE III:

10. On February 19, 2021, following actions and order by Honorable Alison J. Nathan of the United States District Court for the Southern District of New York in "United States v. Ali Sadr Hashemi Nejad, 18 Cr. 224 (AJN)", the media disseminated under the headline "District Court urges the DOJ to investigate misconduct by SDNY prosecutors" highlighting misconduct by SDNY prosecutors including SDNY prosecutor AUSA Emil J. Bove III in which the prosecutors "repeatedly violated their disclosure obligations and, at best, toed the line with respect to their duty of candor. [They] made countless belated disclosures. And when the Court pressed for more information about one of these failures, the Government made a misrepresentation to the Court." AUSA Emil J. Bove III and other SDNY prosecutors deliberately and surreptitiously deprived a criminal defendant evidence which he required for his defense.

The Defendant was initially convicted at trial however his conviction was dismissed when it became apparent that the SDNY prosecutors (including AUSA Emil J. Bove III) had intentionally violated their disclosure obligations. (See appended as "Exhibit 1")

RELEVANT CONDUCT BY SDNY PROSECUTORS IN CRIMINAL CASE, 17 Cr. 337 (RJS) VIOLATION OF *BRADY* OBLIGATION AND CONSTITUTIONAL RIGHTS:

11. 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*, 415 U.S. 150 (1972). The Government is further obligated under Kyles, to "learn of any favorable evidence known to the others acting in 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)"

Brennerman 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. Kentucky*, 476 U.S. 683 (1986), where Brennerman requested for evidence (ICBC underwriting files) at No. 17 Cr. 337 (RJS), ECF No. 71, following testimony by government sole witness from ICBC London, Julian Madgett (see Trial Tr. 17 Cr. 337 (RJS), at 551-554) that evidence (the ICBC underwriting files) existed with the bank`s file which document the basis for approving the bridge finance including representations relied upon by the bank in approving the bridge finance. *Crane v. Kentucky*, 476 U.S. 683 (1986).

The government never requested or obtained the ICBC underwriting file 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 government witness, Julian Madgett had testified that the evidence (ICBC underwriting file) existed with the bank`s file in London, U.K. (See Trial Tr. No. 17 Cr. 337 (RJS), at 617). The Judge`s denial was in contrast with the Second Circuit ruling in In re del Valle Ruiz which stated that District Court 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 sole witness from ICBC London, Julian Madgett to testify as to the content of the ICBC Underwriting file (to satisfy the essential element of "MATERIALITY") while Brennerman was deprived of the ability to engage in any meaningful cross-examination of the witness depriving him a fair trial.

Under Kyles Government had an obligation to learn of any favorable evidence known to the others acting on the Government behalf in the case, thus when Government witness, Julian Madgett testified in open Court that evidence (ICBC underwriting file) existed in the bank`s file which document the basis for approving the bridge finance including representation relied upon by the bank in approving the bridge finance which Government never requested or

obtained (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Government had an obligation to collect the evidence after learning of its existence particularly where Brennerman made request to the Court (for among others) that the Court compel Government to collect the evidence (ICBC underwriting file). (Def`s Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71). However Government`s failure to collect or learn of the evidence violated its *Brady* obligations.

It follows that if Government never obtained or reviewed the pertinent evidence (ICBC underwriting file) it [Government] failed to conduct any independent investigation on the transaction at issue prior to indicting and prosecuting Brennerman this deliberately violating Brennerman`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* obligations, 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 Brennerman`s right to the Due Process clause.

Courts have required the Government to disclose evidence material to the defense where the Government "actually or constructively" possesses it. E.g., United States v. Joseph, 996 F.2d 36, 39 (3d Cir. 1993) ("The prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it." (Internal quotation marks omitted); cf. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that to satisfy *Brady* and *Giglio* prosecutors have "a duty to learn of any favorable evidence known to the others acting on the Government`s behalf in the case"). In particular in *Patemina-Vergara*, the Second Circuit held that the Government had an obligation to make good faith effort to obtain Jencks Act statements possessed by a third party that had cooperated extensively and had close working relationship with the Government, *United States v. Patemina-Vergara*, 749 F.2d 993 (2d Cir. 1984); see also *United States v. Kilroy*, 488 F. Supp 2d 350, 362 (E.D. Wis. 1981) ("since Standard Oil is cooperating with the Government for retention in the Government`s files any record which Standard Oil has and which the Government wants, however, is not unreasonable to treat the records as being within the Government`s control at least to the extent of requiring the Government to request the records on the defendant`s behalf and to include them in its files for the defendant`s review if Standard Oil agrees to make them available to the Government." (emphasis added)). See also *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) (Courts have granted motion to dismiss an indictment where the Government fails to satisfy its discovery and disclosure obligation, either on the basis of a Due Process violation or under the Court`s inherent supervisory powers, including when the Government belatedly disclosed Jencks Act materials.

12. In light of the violation of disclosure obligations highlighted by District Court (Hon. Alison J. Nathan) warranting District Court to urge the DOJ to investigate such misconduct by SDNY prosecutors, including AUSA Emil J. Bove III, and given the similarities with Brennerman`s prosecution where the same SDNY prosecutor (AUSA Emil J. Bove III) and others deliberately deprived Brennerman evidence (resulting in *Brady* violation) which he required for

his defense as highlighted above. Defendant - Appellant Raheem Jefferson Brennerman, respectfully requests that this Court grant his request in its entirety.

CONCLUSION:

WHEREFORE, this Court should grant this motion in its entirety.

Dated: February 21, 2021
White Deer, Pa. 17887-1000

Respectfully submitted

/s/ Raheem J. Brennerman
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Pro Se Defendant-Appellant

EXHIBIT 1

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 9/16/20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Ali Sadr Hashemi Nejad,

Defendant.

18-cr-224 (AJN)

OPINION & ORDER

ALISON J. NATHAN, District Judge:

Federal prosecutors have constitutional and statutory duties to disclose many types of evidence to defendants. This principle of disclosure is central to our criminal-justice system. "A prosecutor that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant . . . That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963). And federal prosecutors, like all parties that appear before the Court, have ethical duties of candor. *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962) ("The prosecution has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth."). In the near decade the Undersigned has sat on the bench in the Southern District of New York, the vast majority of Assistant United States Attorneys before the Court have embraced their disclosure obligations, worked diligently to meet them, and forthrightly admitted when they did not.

But not all. In this case, federal prosecutors have by their own admission repeatedly violated their disclosure obligations and, at best, toed the line with respect to their duty of candor. Over the course of years in this prosecution—before, during, and after trial—the

Government has made countless belated disclosures of arguably (and, in one instance, admittedly) exculpatory evidence. For some pieces of evidence, the Government provides plausible explanations for its late disclosure. For others, it provides no explanation at all. And when the Court pressed for more information about one of these failures, the Government made a misrepresentation to the Court. This serious dereliction requires a serious response.

The story begins in 2018, with the Government's indictment of Mr. Sadr. After a two-week trial in March 2020, a jury found him guilty on five counts. But in part because of its disclosure failures, the Government later agreed that the Court should grant Mr. Sadr's motion for a new trial, vacate his guilty verdict, and dismiss the indictment against him with prejudice. The Court did just that, thus ending this criminal proceeding with respect to Mr. Sadr—but it is not the end of the matter. As this Court stated to the Government lawyers at trial and in several later orders, the serious and pervasive issues related to disclosure failures and misleading statements to the Court by at least one or more of the Government lawyers must be addressed separate and apart from the resolution of this case against Mr. Sadr. *See* Trial Tr. at 998:8–9; Dkt. Nos. 350, 357.

Consistent with that view, after dismissing the indictment, the Court pressed the Government for more information about its disclosure failures and misstatements. Unfortunately, the response from the United States Attorney's Office (USAO) for the Southern District of New York has been inadequate. To be clear, the Court does commend the USAO for admitting error and ultimately seeking to do justice in this case. But the dismissal of charges is not a basis for sweeping the Government's repeated failures under the rug. Nor does the dismissal of the indictment obviate the need for inquiry into whether the Government intentionally and in bad faith withheld exculpatory evidence or intentionally misled the Court.

The Court hoped that the Government's response would create a record sufficient to resolve these issues. Instead, the Government revealed an array of additional errors, including disclosure failures and new admissions of misconduct related to the Government's handling of search-warrant returns.

The Government also revealed new, highly problematic internal communications between the AUSAs who prosecuted this case. In particular, in the middle of trial, Government lawyers allegedly realized for the first time that they had not turned over a particular document to the defense. Instead of immediately disclosing that file, Government lawyers spent almost twenty hours strategizing how best to turn it over. One prosecutor suggested to another that they "bury" the evidence along with other, already-disclosed documents, and the second prosecutor agreed. And after looping in more prosecutors, the Government did just that, obfuscating its disclosure. The Government now admits that this document had exculpatory value for Mr. Sadr. Disappointingly, the leadership of the USAO has failed to unequivocally condemn these prosecutors' improper actions and communications, and the Court has not been ensured that an investigation by the Department of Justice's Office of Professional Responsibility will take place. A further response is therefore required from the Court.

Such a response includes making a clear record of the Government's failures in this case in an effort to prevent these issues from reoccurring. The Court thus begins by recounting the factual and procedural background of this prosecution. The Court then details the Government's many search-warrant and disclosure-related failures and urges structural solutions. This factual recitation is based on information provided by the Government. The Court then narrows its focus to a single piece of evidence disclosed mid-trial, and concludes that the Government both violated its disclosure obligations and subsequently made a misrepresentation to the Court about

its conduct. The Court finally orders additional fact-finding and briefing to determine whether any of the Government lawyers in this case either intentionally withheld exculpatory evidence or intentionally misled the Court about one of the late disclosures.

Government lawyers wield enormous prosecutorial power. They must exercise it in a way that is fully consistent with their constitutional and ethical obligations. And it is the obligation of the courts to ensure that they do and hold them accountable if they do not.

I. DISCLOSURE AND SUPPRESSION FAILURES RESULT IN DISMISSAL OF THE INDICTMENT

In March 2018, the Government charged Mr. Sadr with conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, bank fraud, bank-fraud conspiracy, money laundering, and money-laundering conspiracy. Dkt. No. 2. Over one year later, this case was transferred to the Undersigned. This Court presided over extensive pretrial litigation—including suppression litigation—after which Mr. Sadr's case proceeded to trial. *See* Dkt. Nos. 164, 197. The Court held a two-week trial in early March 2020, during which the jury continued to serve diligently despite the onset of the COVID-19 pandemic in New York City. On March 16, 2020, the jury convicted Mr. Sadr on five counts, finding him guilty on all but the money-laundering-conspiracy charge. *See* Dkt. No. 310. The Government asked that Mr. Sadr immediately be taken into federal custody, but the Court denied this request. *See* Trial Tr. at 2129:1–10.

After the trial, Mr. Sadr moved for acquittal as a matter of law or, in the alternative, for a new trial. Dkt. No. 335. Although the Court was assured in March that the disclosure issues in this case were being raised at the "level of the U.S. Attorney," Trial Tr. at 996:6–10, it was apparently not until the end of May 2020 that the USAO's Criminal Discovery Coordinator and Professional Responsibility Officer "began" looking into disclosure issues in this case. Dkt. No.

352 at 1. As a result of this inquiry—and while Mr. Sadr's motion remained pending—the Government determined that it would not be in the "interests of justice" to further prosecute this case. Dkt. Nos. 348, 348-1. It thus took the extraordinary step of asking the Court to enter an order of *nolle prosequi* as to the indictments filed against both Mr. Sadr and his co-defendant Bahram Karimi. *Id.*

While Mr. Sadr agreed that the indictment against him should be dismissed with prejudice, he disagreed with the Government's proposed procedural mechanism for dismissal. *See* Dkt. Nos. 349. The Government eventually acceded to Mr. Sadr's request that the verdict be vacated and a new trial be granted under Federal Rule of Criminal Procedure 33(a), and that the indictment subsequently be dismissed with prejudice under Rule 48(a). *See* Dkt. Nos. 360, 361. On July 17, 2020, the Court therefore granted Mr. Sadr's motion for a new trial, vacated the verdict against him, and dismissed the indictment with prejudice. *See* Dkt. No. 362. The Court's July 17 Order referenced the Government's explicit acknowledgement of the "disclosure-related issues that arose during the March 2020 trial as well as in pre- and post-trial motion practice, including with respect to pretrial suppression litigation." *See id.* (quoting Dkt. No. 348).

As noted, the Court commends the USAO's admission of error and effort to do justice in this case by agreeing to dismiss the indictment. Better late than never. Still, that dismissal cannot be a basis for failing to grapple fully with the Government's many errors in this prosecution.

II. THE EXISTING RECORD EXPOSES SIGNIFICANT ERRORS

Before granting Mr. Sadr's motion for a new trial and vacating his conviction, the Court ordered the Government to respond to a series of questions addressing disclosure-related issues and any associated misrepresentations or misstatements made to the Court. *See* Dkt. No. 350. The Government's responses not only detailed issues already familiar to the Court, but they also

raised—for the first time, over two years after this case was charged and over two months after a jury found Mr. Sadr guilty on five counts—a slew of search-warrant-related issues implicating the Fourth Amendment. Several of these issues, both new and old, suggest patterns that may extend beyond this case and require systemic solutions.

A. Suppression Issues

The Court begins briefly with suppression issues raised by the Government for the first time in its July 2, 2020 letter. *See* Dkt. No. 354. To understand these issues, some background is helpful: The Manhattan District Attorney's Office (DANY) investigated this matter for state-law crimes before referring the case to the USAO. During its state-law investigation, DANY executed search warrants of various email accounts, including Mr. Sadr's personal email accounts. *See, e.g.*, Dkt. No. 96-1. The affidavit in support of one warrant cited "reasonable cause to believe that evidence of the crimes of Money Laundering [under New York State Law,] as well as attempt and conspiracy to commit said crimes, may be found" in these email accounts. *Id.* at 3–4. And the warrant authorized "members of the New York County District Attorney's Office" to seize and search these documents. *Id.* at 38–39. Some of those emails were later turned over to the USAO, and the Government viewed their content as "particularly incriminating and pertinent." Dkt. No. 147-3. Mr. Sadr however argued in his pretrial motions that much of this evidence should be suppressed. The Court only partially granted his request, rejected most of Mr. Sadr's arguments, and allowed the Government to rely upon thousands of pages of seized documents. *See United States v. Sadr*, 436 F. Supp. 3d 707, 736–38 (S.D.N.Y. 2020).

During this extensive pretrial suppression litigation, Government lawyers consistently argued that DANY searched those state email search-warrant returns for material pertinent to violations of state law alleged in those warrants. Dkt. No. 354 at 16. In September 2019, the

Government specifically represented to Mr. Sadr "that the email search warrant returns had been reviewed by DANY personnel and that after the DANY review had ended . . . , 'hot docs' were provided to the U.S. Attorney's Office." *See id.*; *see also* Dkt. No. 147-3. But over six years after the first of these state email search warrants was issued, the Government now informs the Court—and Mr. Sadr—that in fact federal investigators were mining the state search-warrant returns for federal crimes without authorization of a warrant. Dkt. No. 354 at 6, 16. The Government confesses that "early on in the DANY investigation, the FBI had had DANY personnel search email data in general support of at least one witness interview, and that the FBI *was investigating federal crimes rather than the state-law offenses at issue in the warrants, contrary to arguments [the Government] made during suppression litigation.*" Dkt. No. 354 at 6 (emphasis added). The Government further acknowledges "that the FBI was seeking to use material gathered in response to the state email search warrants in aid of FBI interviews, and to further investigation of federal charges." *Id.* at 7. This conduct was likely unconstitutional because review of search-warrant returns must be done in conformity with the warrants themselves. *See generally United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988) ("A search must be confined to the terms and limitations of the warrant authorizing it."). Moreover, the Government now admits that a central premise of its pretrial arguments opposing Mr. Sadr's suppression motion was directly contrary to what actually occurred during the investigation of this case.

The Court cannot state with certainty the outcome of the pretrial suppression litigation had these additional search-warrant-related issues come to light earlier. But it is certainly possible, as Mr. Sadr argues, that had the Government "disclosed the true facts [regarding the execution of the state email search warrants] to [him], the email evidence would have been

suppressed, and the trial would have been avoided altogether." Dkt. No. 355 at 5. Indeed, one of the Government's arguments in seeking dismissal of the indictment against Mr. Sadr's co-defendant Bahram Karimi, who was not tried (and thus not prejudiced by the late disclosure issues discussed extensively below), is that the discovery of the FBI's involvement in DANY's investigation creates a "substantial risk that essential email evidence would be suppressed." Dkt. No. 354 at 7. What is clear, however, from the Government's belated revelations is that the USAO for SDNY specifically, and the Department of Justice more broadly, must implement policy and training procedures that instill in FBI agents the permissible limits of searching electronic warrant returns in a way that conforms to constitutional requirements. Moreover, AUSAs must be trained to conduct proper due diligence about the conduct of investigating agents *before* making misleading representations to the Court about that conduct. *See, e.g.*, Dkt. No. 155 at 3–4 (describing searches of state email search-warrant returns from April 2014 to April 2017, but nowhere mentioning FBI investigation of federal crimes during this period). And if any of the Government lawyers made (or allowed others to make) knowing misrepresentations to the Court in opposing the motion to suppress, as Mr. Sadr argues likely occurred, Dkt. No. 355, their conduct would constitute an egregious ethical violation.

In light of the dismissal of the indictments here, there will be no further litigation of these issues before the Court. Accordingly, it is the view of the Court that the suppression issues belatedly revealed by the Government in its July 2 letter, Dkt. No. 354, ought to be the subject of a referral to the Department of Justice's Office of Professional Responsibility for a full investigation.

B. Disclosure Issues

The Court next turns to the numerous disclosure-related issues that arose prior to, during, and after Mr. Sadr's trial. Disclosure-related issues first arose shortly after this case was

transferred to the Undersigned and have—disturbingly—continued unabated since. The Court and Mr. Sadr were made aware of the first of these issues in a conference held on September 9, 2019. At that conference, the Government revealed to Mr. Sadr for the first time information it had learned back in May 2019—namely, that "there were custodians searched and documents seized . . . that were not produced in [the] initial Rule 16 discovery." Dkt. No. 137 at 35:5–7. At that point in time, Mr. Sadr believed—based on representations made by the Government—that Rule 16 discovery had been closed for over a year. *See id.* at 40:11–19. The Government did not uncover these discovery-related issues until new prosecutors came into the case in the spring and summer of 2019 and, "in the process of attempting to understand the case," asked questions of former prosecutors regarding the production of documents to the defense. *See id.* at 35:14–22. As a result of the Government's failure to timely comply with its discovery obligations, it agreed not to rely on any of the untimely produced documents at trial. *See* Dkt. No. 155 at 11; Dkt. No. 173 at 38:24–39:4.

The next disclosure-related issue arose during trial, shortly before the Government rested. Though the Court discusses issues surrounding Government Exhibit (GX) 411 in greater detail below, *see* Section III, it mentions the Government's failure to timely disclose this exhibit here to situate it within the larger pattern of the Government's failure to satisfy its disclosure obligations under the Constitution and the Federal Rules of Criminal Procedure. GX 411 is a letter sent by Commerzbank to the Office of Foreign Assets Control (OFAC) flagging the first payment charged in this case. *See* Dkt. No. 274-1. The failure to timely disclose this exhibit precipitated a cascade of failures to timely disclose related materials—including materials from DANY's and the USAO's earlier investigations of Commerzbank and communications with OFAC—some of which were not disclosed until after the trial in this case had concluded. *See*

Dkt. No. 354 at 3, 8–9.

The belated disclosures did not stop there. The Government disclosed several additional possibly exculpatory documents *after* the trial in this case ended. Perhaps the most egregious of these relate to two interviews of Mr. Sadr's co-defendant, Mr. Karimi. First, a recording was made by Canadian authorities of a January 22, 2020 interview with Mr. Karimi. *See* Dkt. No. 307-1 at 2. On February 3, 2020, after Mr. Karimi's public indictment, counsel for Mr. Sadr requested Mr. Karimi's witness statements. *See id.* at 3. On February 11, 2020, the FBI New York office received a recording of the January 22, 2020 interview of Mr. Karimi. *See id.* at 4. By the next week, the FBI special agents were aware that the FBI was in possession of the recording—but they did not inform the prosecutors of this fact. *See id.* Due to communication breakdowns between the prosecutors and the FBI, the prosecutors informed Mr. Sadr on two separate occasions—first on February 23, 2020, and again on March 10, 2020—that the FBI had requested but not yet received the recording from Canadian authorities. *See id.* at 5. After trial ended, an AUSA followed up with the FBI and learned that the recording *had been in the FBI's possession since before the trial had started*. *See id.* at 5–6. The Government finally produced the recording to Mr. Sadr on March 31, 2020, over two weeks after Mr. Sadr's trial had ended. *See id.* at 6.

Second, a classified FD-1057 report was created from an interview with Mr. Karimi on September 14, 2016. *See* Dkt. No. 354 at 5. Yet despite multiple communications with the FBI, beginning in 2017, regarding discoverable information, the prosecutors on this case did not learn of the FD-1057 Karimi report until an AUSA conducted an "on-site personal review of the FBI case file" in *mid-May 2020*, two months after trial. *Id.* As a result, this report was not declassified and disclosed to Mr. Sadr until May 19, 2020. *Id.* The Government attributes the

failure to timely disclose this report, as well as the recording discussed above, to breakdowns in communication between prosecutors and the FBI. Troublingly, the Government makes little effort to explain in detail *why* or *how* these communication breakdowns came to pass, or *why* the prosecutors—well aware of their constitutional and statutory obligations—were not more diligent in communicating with the FBI.

The final category of disclosures made after trial consists of three FBI interview reports (FD-302s) of interviews with Victor Aular, the former CFO and Director of a Venezuelan state-owned oil company, that took place in early 2016. *See* Dkt. No. 354 at 3–4. The parties dispute whether these interviews constitute *Brady* material that the Government was required to disclose. *Compare* Dkt. No. 354 at 3–4 *with* Dkt. No. 355 at 4. But the Government concedes that "even if not required to be disclosed, the Aular 302s *should have been* disclosed ahead of trial as a matter of good practice so that potential defense theories about Sadr's state of mind . . . and the admissibility of Aular's statements, could have been developed and addressed in an orderly fashion in limine." Dkt. No. 354 at 4 (emphasis added). Setting aside whether these interview reports constitute *Brady* material, the Government's handling of them reveals failures in its treatment of potentially exculpatory material. Specifically, at the end of January 2020, the prosecutors discussed whether they were required to disclose the Aular 302s under *Brady*. One prosecutor suggested that it "could be worth running [the question] by a chief," but the AUSAs inexplicably "*did not further pursue the question*" and did not ultimately disclose the interview reports to Mr. Sadr pre-trial. *See id.* (emphasis added). Especially in light of the trial blinders that prevented it from timely disclosing conceded *Brady* material to Mr. Sadr, *see* Section III, the Government's failure to further pursue the question of whether the Aular 302s were required to be disclosed under *Brady* is shocking. And even if the Government had considered the *Brady*

question and concluded that the Aular 302s did not constitute *Brady* material, the Court agrees that the 302s should nonetheless have been disclosed in advance of trial as a matter of good practice. *See Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (noting that a prosecutor's ethical "obligation to disclose evidence favorable to the defense" may be broader than constitutional or statutory duties) (citing ABA Model Rule of Professional Conduct 3.8(d)). Better training and an expansive approach to the Government's discovery obligations would help ensure that, in the future, "trial blinders" do not cause AUSAs to wrongfully withhold potentially exculpatory evidence.

The Court turns finally to the Government's complete failure to produce certain classified material at any point—either before, during, or after trial. During its post-trial review, the Government discovered additional classified material subject to Rule 16 disclosure that was never declassified and disclosed to Mr. Sadr. *See* Dkt. No. 354 at 5. It does not explain why this material was discovered only after trial, and it maintains that, following its application for an order of *nolle prosequi*, the components of the United States Government involved in the handling of classified information would have been unlikely to authorize use of the information. *See id.* As a result, this classified material has never been disclosed to Mr. Sadr.

C. These Issues Call for Systemic Solutions

Having set forth several of the suppression and disclosure-related issues that plagued the prosecution in this case, the Court notes some common themes that have emerged. The issues discussed above appear to have been precipitated by one or a number of the following factors:

1. The sheer number of prosecutors who worked on this case (fourteen total—seven line prosecutors, one Special Assistant United States Attorney (SAUSA), and six supervisors, *see* Dkt. No. 354 at 1–2);
2. The frequency with which different prosecutors subbed into and out of the case, *see id.*;

3. The number of AUSAs on the trial team (this case was tried by four Government lawyers);
4. A failure to coordinate and effectively communicate with the Manhattan District Attorney's Office;
5. Failures to communicate between the AUSAs and the Special Assistant United States Attorney appointed from DANY;
6. Breakdowns in communication between the FBI and line prosecutors, including regarding the FBI's investigation of this case;
7. Insufficient training of FBI agents and AUSAs on appropriate limits to searches of electronic search-warrant returns;
8. Insufficient training for all participating AUSAs and the SAUSA on disclosure obligations;
9. Insufficient policies in place that ensure timely and complete compliance with disclosure obligations; *and*
10. Insufficient supervision of disclosure obligations by the USAO's Unit Chiefs.

It is possible that the issues articulated above, as well as the precipitating factors the Court identifies, are not unique to this case. Indeed, in the last criminal case tried before the Undersigned, the Government also seriously breached its *Brady* obligations. *See United States v. Robert Pizarro*, No. 17-cr-151 (AJN). Following that revelation, the Court was repeatedly assured by the leadership of the USAO that the matter was being taken seriously, would be systemically addressed through training, and would not reoccur. No. 17-cr-151 (AJN), Dkt. No. 135 at 8:11–10:10, 58:2–15. The record before the Court in this case belies those assurances.

It is impossible for the Undersigned alone to address and resolve these issues. Here too, it is thus the Court's view that these errors should be investigated by DOJ's Office of Professional Responsibility. Moreover, the manifold problems that have arisen throughout this prosecution—and that may well have gone undetected in countless others—cry out for a *coordinated*, *systemic* response from the highest levels of leadership within the United States Attorney's Office for the Southern District of New York. The Court implores the Acting United

States Attorney to take seriously the numerous deficiencies set out in detail above and to take action to ensure future prosecutions brought under the aegis of her office do not suffer from the same. In that regard, the Court will prescribe her first order of business: the Acting United States Attorney shall ensure that all current AUSAs and Special AUSAs read this Opinion.

III. THE GOVERNMENT'S FAILURE TO DISCLOSE EXHIBIT 411

The Court next turns to a narrower set of concerns related to Government Exhibit 411. The Court concludes that the Government failed to satisfy its disclosure obligations with respect to this exhibit and then made a misrepresentation to the Court about its conduct. Unfortunately, following the Government's July 2 letter, there remain several significant open questions regarding the Government's conduct that this Court is obligated to resolve. As explained below, further fact-finding by the Court is necessary.

A. The Government Admits GX 411 is Exculpatory

Before diving into the Government's failure to timely disclose GX 411, it is helpful to catalogue the contents of this document and explain why the Government now concedes that it has exculpatory value for Mr. Sadr.

The document that came to be known as Government Exhibit 411 is a 2011 letter from the New York branch of Commerzbank, a German financial institution, to the Treasury Department's Office of Foreign Assets Control. *See* Dkt. No. 274-1 (GX 411). In this letter, Commerzbank's New York branch informs OFAC of an approximately $30 million payment from a Venezuelan entity to Stratus International Contracting Company. As noted, this payment is the first payment charged in this case. The letter further provides information about Stratus and notes that the "purpose of the payment is for the construction of a 7000 apartment unit project" in Venezuela. *Id.* The letter goes on to say that "Although Stratus is not listed as an SDN [Specially Designated National], and the payment does not indicate any direct involvement

of Iran or with Iran, due to conflicting information between [Stratus's] website and the response forwarded by the [Venezuelan bank], [Commerzbank] believes it appropriate to share this information with OFAC since Stratus may be an Iranian Company." *Id.* The letter concludes by noting that Commerzbank had added Stratus "into [its] sanctions filter to monitor any future payments," that Commerzbank had not processed any other transactions involving Stratus, and that this information was being provided to OFAC in hopes of complying with Commerzbank's sanctions-related reporting requirements. *Id.*

The Government maintains that for years it viewed the letter as wholly inculpatory. Specifically, the Government argues that GX 411 was "helpful [to its case-in-chief] because it showed that the information the defendant was trying to hide from the bank was material to the bank, which wouldn't have processed the transaction if it knew it was connected to Iran, and that the bank put the name of the company on its sanctions filter." Dkt. No. 354 at 11; *see also* Trial Tr. at 986:7–16 (The Court: "In the course of this discussion was there any notion as to [GX 411's] potential use to the defense case, having yourselves sat through a week of trial, heard rulings on objections, heard the defendant's opening, in any of that discussion, right at the moment you're talking about, is there the thought: Whether we want to use this or not, it needs to be turned over?" The Government: "Candidly, your Honor, no, there was not that discussion. The discussion was solely about how inculpatory the government viewed the document.").

Mr. Sadr, however, contends that the letter is exculpatory for a slew of reasons. *See* Dkt. No. 274 at 1–2; Dkt. No. 336 at 70–77. To take just a few of Mr. Sadr's explanations of the letter's clear exculpatory value, he argues that GX 411 shows that the affiliation between the recipient of the payment—Stratus International Contracting, a Turkish company—and Stratus Group, an Iranian conglomerate, was immaterial to OFAC. *See* Dkt. No. 274 at 1–2. Indeed, he

points out that this affiliation was ultimately not enough for OFAC to stop U.S. dollar payments to Stratus International Contracting. *Id.* at 2. This point undermines several counts of the indictment, including at least the *Klein* conspiracy alleged in Count One and the bank fraud "right to control" charges alleged in Counts Three and Four. Each of these counts is predicated on the prospect of OFAC enforcement—and associated penalties levied on the intermediary banks—had OFAC known of Stratus International Contracting's Iranian connections. *See United States v. Ballistrea*, 101 F.3d 827, 831 (2d Cir. 1996) (holding that a *Klein* conspiracy requires a "purpose of *impairing, obstructing, or defeating the lawful function*" of OFAC (citation omitted)); *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017) (holding that "misrepresentations or non-disclosure of information cannot support a conviction under the 'right to control' theory [of bank fraud] unless those misrepresentations or non-disclosures can or do result in tangible economic harm" to the banks at issue). But as GX 411 and related disclosures demonstrate, when OFAC was apprised by Commerzbank of this very fact, it took *no* enforcement action.

Mr. Sadr also contends that this letter undermines an argument that was central to the Government's trial theory: that Mr. Sadr structured the charged transactions to conceal connections to Iran. To the contrary, he claims that GX 411 demonstrates that the affiliation between Stratus International Contracting and Stratus Group was readily identifiable—so readily identifiable that it was discovered when the *first* charged payment was processed. *See* Dkt. No. 336 at 74. For these reasons, Mr. Sadr's attorneys stress that if GX 411 had been timely disclosed, their pre-trial investigation, theory of the case, opening and closing statements to the jury, evidentiary submissions, and cross examination of a Government witness all would have materially differed. Dkt. No. 336 at 74–75; Trial Tr. 999:8–18.

The Government has now come around to Mr. Sadr's position and concedes that GX 411 has exculpatory value. *See* Dkt. No. 275 at 2; Dkt. No. 354 at 8; Trial Tr. at 1005:5–6. In the Government's own words, GX 411 is exculpatory because it "advances the defendant's claim that any decision by OFAC not to take enforcement action following this disclosure is probative of the risk of harm from OFAC enforcement that banks face when they process transactions in violation of the sanctions law." Dkt. No. 275 at 2. The Government has thus "concede[d] that it erroneously failed to timely disclose the document at issue, and apologize[d] to the Court and counsel for its error." *Id.* at 1.

B. The Government Has Possessed GX 411 Since 2015

Even accepting the Government's contention that it did not appreciate the letter's exculpatory value does not change the fact that government actors knowingly possessed GX 411 for almost a decade. In January 2011, a slew of federal and state actors—Main Justice, the United States Attorney's Office for the Southern District of New York, OFAC, the Federal Reserve's Board of Governors, and the New York County District Attorney's Office—began investigating Commerzbank for violating U.S. sanctions. Dkt. No. 283 at 2; *see also* Dkt. No. 354 at 8. During these parallel investigations, Commerzbank's New York City branch provided the District Attorney's office various voluntary disclosures, one of which was GX 411. Dkt. No. 283 at 2–3. And about a year into these investigations, an Assistant District Attorney (ADA) was assigned to the District Attorney's investigation. (That ADA would later be appointed a Special Assistant United States Attorney in this case.) In March 2015, Commerzbank resolved these investigations by entering into a universal deferred prosecution agreement. *Id.* at 3; *see also* Dkt. No. 354 at 8.

Two months later, the ADA was assigned to work on the District Attorney's investigation of the "Venezuela housing matter, which ultimately led to this case." Dkt. No. 354 at 9. At

around the same time, the ADA was "boxing up material from the Commerzbank investigation that had [recently] ended." *Id.* In doing so, he "came across some documents (including or consisting of [GX 411]) that he realized related to the [investigation of Mr. Sadr.]" *Id.*; *see also* Dkt. No. 283 at 3. At that time, the ADA "set those documents aside in a hard-copy manila folder." Dkt. No. 354 at 9. These documents then lay dormant for years, somewhere in the ADA's office.

In August 2015, "[the ADA] issued a state grand jury subpoena" to Commerzbank's New York branch in connection with the District Attorney's investigation of Mr. Sadr, and the branch duly responded to that request with many documents. Dkt. No. 354 at 9; Dkt. No. 283 at 3. The parties refer to this as the "Commerzbank Subpoena Production." Dkt. No. 283 at 3. The Government produced this entire Subpoena Production to Mr. Sadr during Rule 16 discovery in this case. *Id.*; *see also* Trial Tr. 988:14–25. But there's a catch: GX 411 was *not* part of the Commerzbank Subpoena Production in this matter, so it was not produced to the defense along with these documents. GX 411 had only been turned over to the Government in the earlier and unrelated investigation of Commerzbank, and the letter remained in that manila folder on the ADA's desk for years. By the time of the Commerzbank Subpoena Production in connection with this case, GX 411's contents were, according to the Government, "lost to [the ADA's] memory." Dkt. No. 354 at 9.

Fast forward four years, to late 2019. By this point, the United States Attorney's Office had indicted Mr. Sadr, and attorneys on both sides were gearing up for trial. Around this time, the ADA, who was now an SAUSA, "rediscovered" the hard copy of GX 411 in his office. The Government has made two different representations about how this rediscovery came to pass. First, in its March 9 letter, the Government stated that on January 10, 2020, "AUSA[-1] sent an

email to [the SAUSA] . . . mention[ing] the April 4, 2011 wire transfer from Fondo Cino to Stratus International Contracting J.S. for $29 million, which is described in GX 411." Dkt. No. 283 at 4. AUSA-1 "stated a document previously provided by a witness—which was produced to the defense during Rule 16 discovery—'should be helpful in tying the wire information we have showing the Fondo Chino transfer to PDVSA.'" *Id.* Her email "triggered for [the SAUSA] a recollection of GX 411." *Id.* "That same day, [the SAUSA] located GX 411 in a hard copy file at his DANY office; [the SAUSA] had segregated [GX 411] from Commerzbank's other voluntary disclosures and stored it in the folder, but does not recall when he did so." *Id.* at 4–5. The SAUSA then emailed the prosecution team, attached GX 411, and said, "In the spirit of closing the loop on the $29M payment through Commerz, attached is the voluntary disclosure Commerze (sic) made to OFAC re: the payment." *Id.* at 5.

But in its July 2 letter, the Government puts forward a different story regarding this rediscovery. This one begins a month earlier: In December 2019, the SAUSA was "making a pre-trial sweep through his office for everything[, and] he rediscovered the separate folder of Commerzbank-Sadr documents." Dkt. No. 354 at 9. The target of the SAUSA's purported pre-trial sweep—"everything"—is vague and unclear. The SAUSA then referenced GX 411 in a December 19 email, three weeks before the January 10 email discussed above. In that December 19 email to the prosecution team, the SAUSA made the following comment, purportedly relating to GX 411: "Now I'm really going off on a tangent, but Commerzbank was an intermediary bank in the first USD payment (to Stratus Turkey) and they actually picked up on 'Stratus' in the payment message, drew the connection to the Iranian entity, and filed a report with OFAC." *Id.* Yet the SAUSA did not attach GX 411 to the December 19 email. He only shared the document with the team three weeks later, in his January 10 email discussed above. In short, the

Government has presented two different versions of events. In one, an email from a colleague "triggered" the SAUSA's memory of GX 411 in January 2020. In the other, the SAUSA was conducting a "pre-trial sweep" of his office, stumbled upon GX 411 in December 2019, and referenced GX 411 in an email that same month.

Whichever is true, here's the nub: On January 10, 2020, every prosecutor active in the case received an email with GX 411. But even on that late date—months after *Brady* and Rule 16 disclosures had been made and two months before trial—no attorney disclosed GX 411 to the defense. The Government proffers that the prosecution team made a "reasonable assumption . . . that all Commerzbank documents had previously been disclosed" through the Commerzbank Subpoena Production. *Id.* at 10. Of course, recall that GX 411 was not part of that Subpoena Production, but instead came from the earlier, non-Sadr-related investigation of Commerzbank. The Court agrees that this is a plausible explanation for why at least some of the prosecutors thought that GX 411 had already been disclosed and thus took no further action in January. From their perspective, nothing in GX 411 distinguished it from the many other documents from Commerzbank that the Government had duly disclosed. Still, it is harder to accept how the SAUSA, who was fully aware of (and indeed had worked on) the separate, non-Sadr related investigation of Commerzbank and who had himself possessed GX 411 as a result of that investigation since 2015, could have assumed throughout that GX 411 had been produced to the defense. And to be clear, he was appointed as an SAUSA in this matter effective June 2017. *Id.* at 2 n.2. As the Government recognizes, "when an attorney from another agency is appointed a SAUSA to assist this Office in a criminal case, it is this Office, and our AUSAs, who are ultimately responsible for disclosures in the case, and knowledge of any matter in the investigation that may be overlooked by a SAUSA is imputed to the Government, whether or not

the AUSAs on a case have actual knowledge of the matter." *Id.* The Government had therefore possessed GX 411 since the day Mr. Sadr was indicted—yet did not disclose the document for *more than two years*, in the midst of trial. Once again, the Government's explanation that it thought the document had been produced to the defense as part of the Commerzbank subpoena production is plausible, but the Court has lingering doubts based on matters discussed below.

C. Government Prosecutors Discuss "Burying" GX 411

Now jump forward another two months, to March 6, 2020. By this point, trial has begun. Around 8 P.M. on that Friday evening, after trial had concluded for the day, AUSA-1 was, according to the Government, "organizing her emails" and stumbled upon the SAUSA's January 10 email attaching what would later be marked as GX 411. Dkt. No. 283 at 5; Dkt. No. 354 at 10. In an email to her colleagues, she wrote, "Given what defense did today, I think [the exhibit that would later be marked as GX 411] could be really valuable to put in. Among other difficulties with doing that is the fact that I don't know that it was ever produced to defense (it's not in the Commerzbank subpoena production). [SAUSA] – do you know where it came from?" Dkt. No. 354 at 10.

But AUSA-1 was unable to get in touch with the SAUSA, so she instead spoke with AUSA-2, another prosecutor on the case. In a chat message, AUSA-1 wrote, "[I] feel like it might be too late to do anything about it, but [I] can't believe we all missed that [C]ommerzbank document," adding "[I] have no idea where that letter came from[;] [I] don't think it has ever been produced to the defense." *Id.* AUSA-2 replied, "[O]h, that letter[;] we can produce it tonight[;] produce it right now and the defense can have 3 days to review[;] that's more than enough time for one document[;] mark and produce it stat—[I] think we should at least try." *Id.* Astonishingly, AUSA-1 responded, "[I]'m wondering if we should wait until tomorrow and bury it in some other documents." *Id.* (emphasis added). In response to AUSA-1's proposal to "bury"

GX 411, AUSA-2 agreed and took the plan further by proposing documents along which GX-411 could be buried when disclosing it to the defense. *Id.* at 11. Specifically, she replied, "that's fine too—some of the [Financial Action Task Force] stuff," referring to another exhibit. *Id.* Later in that chat, AUSA-1 noted that the Government "need[ed] to come up with some explanation for why the defense is just seeing this for the first time . . . ." *Id.* at 11. According to their own internal communications, therefore, on the evening of March 6, the prosecutors in this case again came across GX 411, recognized somehow for the first time that it had never been disclosed to the defense, recognized that its lack of disclosure would likely draw objection, strategized how to "bury" the document, settled on a plan to do so, and discussed waiting an additional day before turning it over to aid in burying the document among others.

Even the next day, disclosure was not immediately forthcoming. Instead, on the morning of Saturday, March 7, the Government admits that several members of the prosecution team discussed GX 411 and debated how and even whether the exhibit should be disclosed. *Id.* at 11. At this time—in the midst of trial—the Government represents that "there was never any notion [among the AUSAs] that GX 411 might be of exculpatory value to the defense." *Id.* On that morning, "AUSAs discussed . . . [w]hether the exhibit was worth offering." *Id.* According to the Government's own theory, if prosecutors believed that the document was wholly inculpatory and decided not to offer it at trial, they likely would have never turned it over to the defense. Indeed, AUSA-1 "did not want to get into a fight with defense counsel over the document," and she "recalls a discussion" amongst the prosecutors that its lack of disclosure may not violate Federal Rule of Criminal Procedure 16. *Id.* There were thus some members of the prosecution team who, even after recognizing that the document had not been disclosed, argued that the Government should not turn it over.

D. The Government Discloses GX 411

At around 4 P.M. on Saturday, March 7, the Government disclosed GX 411. It did so in an email sent from AUSA-1 to the defense team. Dkt. No. 354 at 12–13. The specifics of this transmittal email are critical, so the Court attaches it to this Opinion. *See* Exhibit A. The email began by noting that a potential Government witness remained ill and so he would not testify in the Government's case-in-chief. *Id.* AUSA-1 then wrote "we've attached the following documents" and provided a bulleted list of about fifteen documents, at least two of which were marked for the first time as new Government exhibits. *Id.* All but one of these documents, GX 411, had already been disclosed through discovery; in other words, GX 411 was the *only* document on the list that had not already been provided to the defense. Trial Tr. at 993:5–16 (noting that GX 411 "was the only document" on this list that had not previously been disclosed to the defense); *see also* Dkt. No. 354 at 13 (noting that the other documents were "mostly duplicates of 3500 material or revisions of exhibits"). The *third* bullet, which was virtually identical to the next bullet listing a previously disclosed document, stated as follows: "GX 411 – we intend to offer this Monday. Let us know if you will stipulate to authenticity." Ex. A.

Nothing in this email identified GX 411 as a newly disclosed document, a fact that we now know the Government lawyers were aware of and discussed with each other prior to transmittal. To the contrary, the bulleted list deliberately obscured the fact that GX 411 was different in kind than the other exhibits listed, as it was the only exhibit on that list that had not been previously turned over to the defense. Indeed, as noted, the Government's wording with respect to GX 411 was the same as its wording regarding another exhibit, GX 456, that had already been disclosed. *See id.* (stating as to both exhibits, "we intend to offer this on Monday. Let us know if you will stipulate to authenticity."). Nothing in this email indicated how long the Government had possessed the document. And nothing indicated why the document was

disclosed one week into trial. Indeed, the Government now concedes that "[t]his email does not, as we believe it should have, identify GX 411 as a new document that was not previously disclosed." Dkt. No. 354 at 13 (emphasis in original); *see also* Dkt. No. 283 at 1 (Government admitting that it "fail[ed] to make accurate disclosures regarding the status of [GX 411] on March 7 and March 8, 2020."). All four prosecutors who represented the Government at trial have admitted that the "[t]he transmittal email failed to disclose that GX 411 had not been produced previously" and that "there is *no dispute* that [this] was a failure in judgment on [their] part." Dkt. No. 283 at 5 (emphasis added).

Surprisingly, the Government represents that this "failure in judgment" was no accident—it was the product of reasoned discussion among the prosecution team. In addition to the contemporaneous communications among the AUSAs discussed above, the Government states that the prosecutors discussed how to disclose GX 411 before sending this email. AUSA-1 and AUSA-3, both "confident that the defense would know it was a new document given their knowledge of the case," suggested "that the Government should simply produce it and wait for the defense's questions, and if the Government did not make a big deal about the document, the defense might decide that it was not important enough to object." Dkt. No. 354 at 12. In other words, according to their own after-the-fact account, the Government lawyers knew that GX 411 had not previously been disclosed, but nonetheless thought it best to call no attention to the document and hoped that the defense would stipulate to its authenticity with little fanfare. That did not come to pass.

Even if the story stopped there, things would be bad enough. No responsible Government lawyer should strategize how to "bury" a document that was not, but should have been, previously disclosed to the defense. A responsible Government lawyer should—at a

minimum—forthrightly and truthfully reveal late disclosures to the defense. The leadership of the USAO attempts to justify this conduct by arguing that what the prosecutors did was not, in fact, "burying" a now-admittedly exculpatory document, and instead conveys to its prosecutors and the Court that the conduct of the Government lawyers described above is not condemnable. Dkt. No. 354 at 11 ("[T]he document, which was in fact produced less than 24 hours later, was not buried. . . . [W]e believe it would go too far to condemn [AUSA-1] for a Friday night lapse in thinking regarding a document that was in fact disclosed Saturday afternoon."). This Court disagrees and hereby strongly condemns this conduct.

E. The Government Makes a Misrepresentation to the Court

Unfortunately, that is not the end of the story. The day after this disclosure, Mr. Sadr wrote to the Court, represented that the Government had produced GX 411 for the first time, argued that GX 411 was *Brady* material, and sought a curative instruction. *See* Dkt. No. 274. In simpler terms, Mr. Sadr argued that the Government had breached its constitutional duties in failing to turn over this document, and asked the Court to explain that failure to the jury. The Court quickly ordered the Government to make a "detailed representation" explaining why this document was not disclosed, what led to its March 7 disclosure, and which attorneys were involved in this process. Dkt. Nos. 286, 287. The Government provided a narrative that is now familiar: the prosecution team incorrectly believed that GX 411 had been disclosed to Mr. Sadr with the Commerzbank Subpoena Returns, and only realized it had not on March 6. Dkt. No. 275.

The vagueness of the Government's explanation immediately raised flags for the Court. That same day, the Court issued an order stating that the Government had failed in its letter to "indicate if, upon learning of the late disclosure [of GX 411], the Government informed defense counsel or not." Dkt. No. 290. The Court thus ordered "the Government [to] explain precisely

when and how it realized that the document had been erroneously withheld," and—importantly for present purposes—"when, if at all, . . . the failure to disclose . . . was communicated to the defense." *Id.* This Order is also attached to this Opinion. *See* Exhibit B.

The Government's next letter is central to the lingering ethical questions in this case, and the Court likewise attaches it to this Opinion. *See* Exhibit C. In that letter, the Government recounted how its lawyers had "found" GX 411 on Friday evening and discussed the document the next day. *Id.* at 1. The Government then stated that it "promptly had a paralegal mark it as an exhibit and produced it to the defense along with other exhibits and 3500 materials." *Id.* The Court does not dwell on the Government's representation of promptness, though it does note that the Government disclosed GX 411 about twenty hours after it realized it had never been turned over, consistent with the discussion between the AUSAs about waiting a day in order to "bury" it with other documents. The Government next represented that it "*made clear [in its email] that GX 411 was a newly marked exhibit* and that we intended to offer it, and asked the defense if they would stipulate to authenticity." *Id.* (emphasis added).

To reiterate, the Court asked the Government a direct question: When and how did it inform the defense of the failure to timely *disclose* GX 411? *See* Ex. B. But the Government did not respond to that direct question with a direct answer. Rather, it answered that it had made clear in its March 7 email to defense counsel that GX 411 was newly *marked*. Ex. C. The Court finds that the Government's representation was misleading, as it implied that it had explicitly informed the defense that GX 411 was being disclosed for the first time. Indeed, the Court was misled. Upon receipt of that letter, the Court took great comfort in believing that, despite the disclosure failure, at the very least the Government had clearly indicated that GX 411 had not been previously disclosed. But that was not the truth. To the contrary, the Government placed

GX 411 in the middle of a bulleted list of several other documents, *all of which* had already been disclosed, and at least one other of which was newly marked. *See* Ex. A. The Government did not say that the exhibit was not previously disclosed. The Government did not indicate that GX 411 was different in any way from the other, already-disclosed attachments. Nor did the Government's request for a stipulation of authenticity make clear that this exhibit was newly disclosed—the Government made the same request as to another document on the list that had already been disclosed. *See id.* (GX 456). The Government admits that "[t]he transmittal email failed to disclose that GX 411 had not been produced previously." Dkt. No. 283 at 5.

What arguably occurred here is that at least some of the Government lawyers implemented and executed the strategy the prosecutors had discussed: to "bury" GX 411 by deceptively hiding it among several other documents that had previously been disclosed. Having gotten caught in this effort, the Government then made a misleading representation to the Court, perhaps in an attempt to make its conduct appear better than it was. To make matters worse, as recounted in more detail below, the Court has now learned that certain Government lawyers edited the sentence in question from an accurate recounting of the facts—the letter's first draft rightly stated that the "Government did not specifically identify that GX 411 had not previously been produced in discovery," *see* Dkt. No. 354 at 14—to its final, misleading form.

F. Further Fact-Finding Is Necessary

Several critical questions remain regarding the untimely disclosure of GX 411 and the Government's subsequent misleading representation to the Court. The Court is obligated to determine what has occurred.

First, there are discrepancies presented to the Court about who knew what when regarding the provenance of GX 411. To start, as the Court has discussed, the SAUSA has presented two different stories about how and when he "rediscovered" GX 411. Moreover, the

SAUSA recalls discussing GX 411 "with AUSAs in January 2020," and further represents that "at or about [this] time, he had a telephone conversation with [AUSA-1] about 'how and from where' [GX 411] had been obtained." Dkt. No. 354 at 10 n.6. If this is true, it means that at least two prosecutors knew in January 2020 that GX 411 had not been disclosed as part of the Commerzbank Subpoena Production, yet they took no steps to produce the document to the defense or correct representations to the contrary made to the Court by other Government lawyers. *See, e.g.*, Dkt. No. 277 at 1–2; Trial Tr. at 982:13–17; *id.* at 984:11–19; Dkt. No. 283 at 5. For their part, the AUSAs deny this account and say they did not discuss GX 411 with the SAUSA in January 2020, and learned only in the middle of trial that the exhibit had not been disclosed. Dkt. No. 354 at 10 n.6. At this stage, the Court cannot determine which version is true.

Second, and relatedly, the Court cannot yet firmly conclude based on the existing factual record whether any of the Government lawyers deliberately withheld exculpatory information. The Government maintains that no prosecutor "had any inkling . . . that GX 411 would have exculpatory value for the defense" until defense counsel's emails on March 7. Dkt. No. 354 at 13. The Government further represents that "[h]ad any of the attorneys on the case recognized the exculpatory theory the defense has articulated, that would, we believe, have trigged further analysis, but they did not." *Id.* at 10. And during trial, the Government attributed its misunderstanding to "trial blinders." Trial Tr. at 991:10–992:19.

Certainly, the now-disclosed written, internal communications of the AUSAs—which discuss the usefulness of GX 411 to only the Government's case, and do not speak to its exculpatory value—support the Government's contention that none of the prosecutors recognized the document's now-conceded exculpatory value. The contention that trial blinders

prevented the prosecutors from perceiving the exculpatory value of GX 411 is plausible. But there are other facts in the current record that cast some doubt on this representation of ignorance. To start, by the time the AUSAs were discussing "burying" the document, even if not earlier, the relevance of GX 411 to the defense arguably should have been apparent. Indeed, for reasons already discussed above, GX 411 and subsequent responses to it by OFAC and the intermediary bank tend to demonstrate that Stratus International Contracting's affiliation with Stratus Group was not material to either OFAC or the intermediary banks, a point critical to the Government's ability to establish the elements of several charged counts. *See* Section III.A. Moreover, emails from the SAUSA in late January and early February further call the Government's contention into doubt. The SAUSA at that time notified the trial team that Commerzbank "filed a voluntary disclosure with OFAC regarding the payment [GX 411]," described this disclosure as an "asterisk," and suggested that the team "discuss whether it's worth having the Commerz witness go into that." Dkt. No. 341 at 8. And in a subsequent email, the SAUSA stated "we [the prosecution team] can discuss how we would want to handle" the Commerzbank disclosure. *Id.* Although there are alternative explanations available, these emails at least arguably suggest, as Mr. Sadr argues, that the prosecutors recognized that GX 411 was not wholly helpful to the Government and considered not calling a Commerzbank witness because doing so could lead to disclosure of this document—cutting against the Government's narrative that its prosecutors thought GX 411 was inculpatory. *See* Dkt. No. 355 at 3.

Third, there are discrepancies about which prosecutor(s) were involved in making the misrepresentation in the Government's March 8 letter. These discrepancies prevent the Court from resolving, at this time, whether the misrepresentation was intentional. The Government drafted the letter in question in about one hour. *See* Dkt. No. 354 at 14–15. To her credit, in the

letter's first draft, written by AUSA-1, the sentence in question stated, "The Government did not specifically identify that GX 411 had not previously been produced in discovery." *Id.* at 14. This sentence was directly responsive to the question the Court had asked and was accurate—had it been included in the final letter, this inquiry may have been avoided. But because AUSA-1 "was ill [and] had to leave the Office shortly after" circulating this first draft, *id.* at 14, the drafting of the letter was passed onto other prosecutors, and AUSA-3 took the lead. In the ten minutes before the Court's deadline, AUSA-3 sent AUSA-1's draft to the Co-Chiefs of the Terrorism & International Narcotics Division of the USAO and then spoke with them on the phone. *Id.* at 14–15. At some point in this process, this truthful sentence was edited to make the misrepresentation in question, becoming "The Government made clear that GX 411 was a newly marked exhibit . . . ." *Id.* at 15. AUSA-3 then filed the letter. *Id.* One minute after the Court's deadline, AUSA-3 emailed AUSA-2 saying, "They [the Chiefs] called me with some changes. I made them and filed." *Id.*

When pressed to disclose the prosecutor(s) responsible for this edit, the Government lawyers point fingers. The Unit Chiefs "advise[] that they did not request . . . deletion of the [original language], although they may have missed that deletion . . . if the final draft was read to them over the phone." Dkt. No. 356 at 2 n.1. Significantly, this runs contrary to one of the Unit Chief's explanation at trial on the day after the letter was drafted, when he informed the Court that "[The other Unit Chief] and I reviewed [this] letter in realtime before it was filed—our understanding in submitting [the misrepresentation] to your Honor was that this clearly marked language . . . related to the fact that the document had been marked as a government exhibit with a yellow government sticker. That is what we intended to convey with that." Trial Tr. at 997:14–20. In other words, nearly contemporaneously with the letter's drafting, the Unit Chiefs

represented that they were aware of this language and that it was purposely included in the Government's letter—but in post-trial briefing, the Chiefs claim that they did not request this change and may have missed it entirely. For his part, AUSA-3 "recalls opening [AUSA-1's] draft during the call and making changes that he understood to reflect the input from the unit chiefs." Dkt. No. 354 at 15. AUSA-3 thus "filed a letter that he believed reflected the considered judgment of his supervisors." *Id.* And the other prosecutors' involvement is unclear; AUSA-1 had left the office due to illness by the time of these edits, and the Government says nothing about the SAUSA's and AUSA-2's roles. *Id.* Despite the extensive letter briefing about this issue, therefore, the Court still does not know which prosecutor(s) were responsible for making this misrepresentation. Indeed, the Court notes that these drafting changes were first revealed only with the filing of the Government's July 2 letter, months after trial had ended and months after the Court inquired on the record about this precise misrepresentation. *See* Trial Tr. 989:16–995:16, 996:18–998:18. Fully understanding this drafting process is necessary to determine whether any of the prosecutors intentionally misled the Court.

* * * * *

Even though the Court has now granted Mr. Sadr's motion for a new trial, vacated the verdict against him, and dismissed the indictment with prejudice, the Court retains authority to sanction the prosecutors in this case. *See United States v. Seltzer*, 227 F.3d 36, 41–42 (2d Cir. 2000) (discussing district courts' inherent power to impose sanctions). The Government agrees that the Court retains this supervisory power. Dkt. No. 352 at 2.

It is the fervent hope of the Court that no sanctions are necessary. But it is the firm view of the Court that if Government lawyers acted in bad faith by knowingly withholding exculpatory material from the defense or intentionally made a misleading statement to the Court,

then some sanction or referral to the Grievance Committee of the Southern District of New York would be appropriate. The record before the Court neither conclusively establishes intentionality nor resolves the issue.

Given the lack of clarity surrounding the disclosure of GX 411 and the subsequent misrepresentation to the Court, the Court requires further information. The Court therefore orders each AUSA on the trial team, the two Unit Chiefs, and the SAUSA to submit individual declarations, under penalty of perjury, regarding these issues. These declarations should, at a minimum, respond to the following questions with specificity:

1. When did you first learn of GX 411?
2. When did you first realize that GX 411 had not been disclosed to the defense? Why did you not immediately disclose the document at that time?
3. What specific communications did you have regarding GX 411 or the disclosure of GX 411 with other prosecutors, whether oral, written, or electronic in any form? When did these communications occur? Attach any record you have of any such communication.
4. When did you first recognize GX 411 as having exculpatory value? If you thought the document was wholly inculpatory, provide a good-faith basis for that understanding.
5. With specificity, what role did you play in drafting the Government's March 8, 2020 letter? *See* Ex. C. What role did you play in deleting the accurate sentence responsive to the Court's question that was originally drafted by AUSA-1? *See* Dkt. No. 354 at 14 ("The Government did not specifically identify that GX 411 had not previously been produced in discovery."). What role did you play in drafting the sentence that the Court has concluded was a misrepresentation? *See* Dkt. No. 277 at 1 ("The Government made clear that GX 411 was a newly marked exhibit . . . ."). Why was this sentence changed? Attach any communications related to this change.
6. When the Court asked specific questions at trial on March 9, 2020 regarding the Government's misrepresentation, were you aware that the accurate sentence responsive to the Court's question had been edited or deleted? If so, explain why this was not conveyed to the Court.

The declarations shall further provide any and all other information the prosecutor believes relevant to the unresolved issues identified in this Opinion. Following these declarations, the executive leadership for the USAO may submit letter briefing as to why no further proceeding for additional fact-finding or credibility determinations is necessary. Counsel for Mr. Sadr may file a responsive letter brief, and the Government may file a reply.

After the Court reviews these submissions, it will determine whether a hearing to conduct further fact-finding, including credibility determinations, is necessary.

IV. CONCLUSION

Almost a century ago, the Supreme Court defined the singular role federal prosecutors play in our system of justice:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

The Government in this case has failed to live up to these ideals. The Court has recounted these breaches of trust, proposed some systemic solutions, urged referral to the Office of Professional Responsibility for admitted prosecutorial failures apparent in the existing record, and ordered further fact-finding. The cost of such Government misconduct is high. With each misstep, the public faith in the criminal-justice system further erodes. With each document wrongfully withheld, an innocent person faces the chance of wrongful conviction. And with each unforced Government error, the likelihood grows that a reviewing court will be forced to

reverse a conviction or even dismiss an indictment, resulting in wasted resources, delayed justice, and individuals guilty of crimes potentially going unpunished.

The Court thus issues this Opinion with hopes that in future prosecutions, the United States Attorney for the Southern District of New York will use only "legitimate means to bring about a just" result. *Id.* Nothing less is expected of the revered Office of the United States Attorney for the Southern District of New York. That Office has a well- and hard-earned reputation for outstanding lawyers, fierce independence, and the highest of ethical standards. The daily work of the prosecutors in that Office is critically important to the safety of our community and the rule of law. Those who stand up in court every day on behalf of that Office get the benefit of that reputation—but they also have the responsibility to maintain it.

The Court hereby ORDERS that the Acting United States Attorney ensure that all current AUSAs and SAUSAs read this Opinion. Within one week of the date of this Opinion, the Acting United States Attorney shall file a declaration affirming that this has occurred.

The Court FURTHER ORDERS that each of the trial team AUSAs, supervising Unit Chiefs, and the SAUSA submit the declarations described in Section III no later than October 16, 2020. By October 30, 2020, the executive leadership for the USAO may submit a brief as to why no further proceeding for additional fact-finding or credibility determinations is necessary. Counsel for Mr. Sadr may, if they wish, submit a responsive filing by November 13, 2020, and the Government a reply by November 20, 2020.

SO ORDERED.

Dated: September 16, 2020
New York, New York

ALISON J. NATHAN
United States District Judge

Federal Defenders of New York Blog

Serving the Second Circuit and the Eastern and Southern Districts of New York

Friday, February 19th, 2021

District Court urges the DOJ to investigate misconduct by SDNY prosecutors

On February 17, 2021, the district court issued a new order in the continuing saga of *United States v. Ali Sadr Hashemi Nejad*, 18 Cr. 224 (AJN). A previous opinion detailing the relevant facts was issued on September 16, 2020.

This is a prosecution that began to unravel back in early 2020. In 2018, Mr. Sadr was indicted on charges of conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, bank fraud, and money laundering offenses. The prosecution was handled by AUSAs Andrew J. DeFilippis, Matthew Laroche, David W. Denton, Jr., Emil J. Bove, III, Jane Kim, Michael Krouse, Rebekah Donaleski, Shawn Crowley, and Stephanie Lake.

In March 2020, after a two-week jury trial, Mr. Sadr was found guilty of five counts.

After trial, Mr. Sadr moved for acquittal as a matter of law or, alternatively, a new trial. While that motion was pending, the government determined that further prosecution would not be "in the interests of justice" and took the extraordinary step of asking the district court to vacate the jury verdict and dismiss the charges against Mr. Sadr and his co-defendant.

What happened? In the words of the district court's September order, the prosecutors "by their own admission repeatedly violated their disclosure obligations and, at best, toed the line with respect to their duty of candor. ...[They] made countless belated disclosures .... And when the Court

pressed for more information about one of these failures, the Government made a misrepresentation to the Court."

When the court looked into the matter further, "the Government revealed an array of additional errors, including disclosure failures and new admissions of misconduct related to the Government's handling of search-warrant returns."

Briefly, the district court's post-trial fact-finding revealed the following:

- The case originated with the state district attorney's office and, contrary to prosecutors' representations during suppression litigation, federal investigators "were mining the state search-warrant returns for federal crimes without authorization of a warrant."
- Federal prosecutors neglected to timely disclose certain Rule 16 discovery.
- Federal prosecutors failed to disclose certain exculpatory or possibly exculpatory documents until mid-trial and after trial.
- For one exculpatory document, when prosecutors realized mid-trial that they had not yet disclosed it, but that they wanted to use it, this happened:

AUSA Stephanie Lake sent an email to fellow prosecutors saying "Given what defense did today, I think [the document] could be really valuable to put in. Among other difficulties with doing that is the fact that I don't know that it was ever produced to defense …."

In a written chat, AUSA Jane Kim suggested "we can produce it tonight."

AUSA Lake replied "i'm wondering if we should wait until tomorrow and bury it in some other documents."

To which AUSA Kim responded, "that's fine" and proposed some documents to bury it in.

- When prosecutors did disclose this exculpatory document, AUSA Lake emailed it among a group of previously-disclosed documents. It was not identified as a new document.
- In response to a direct question from the court, prosecutors then misled the court as to whether they had identified this as a new

document when disclosing it. Specifically, following some manner of discussion among AUSAs Krouse, Bove, and Crowley, AUSA Krouse filed a letter with the misleading statement.

In its February order, the district court stated that it did not find intentional wrongdoing based on the record before it, but leaves further investigation to the Office of Professional Responsibility and urges that office to take up the matter.

The court's full opinion is under temporary seal and will be made public after the government has the opportunity to request limited redactions.

Unfortunately, courts have repeatedly confronted these sorts of issues with the SDNY U. S. Attorneys' Office over the past few years. Here is a (by no means exhaustive) round-up of some recent cases:

- *United States v. Anilesh Ahuja and Jeremy Shor*, No. 18 Cr. 328 (KPF), ECF Docket Nos. 385, 424 (S.D.N.Y. Jan. 13, 2021) (noting untrue representations to the court regarding the government's communications with a cooperating witness—which were only revealed by a defense post-trial FOIA request—and ordering sworn statements on the matter by members of the prosecution team, AUSAs Joshua Naftalis, Andrea Griswold, and Max Nicholas).
- *United States v. Joshua Schulte*, No. 17 Cr. 548 (PAC), ECF Docket Nos. 328, 345 at 12 (S.D.N.Y. 2020) (giving jury instruction regarding adverse inference based on government's failure to timely disclose *Brady* and Rule 16 material, in trial handled by AUSAs Denton, Matthew Laroche, and Sidhardha Kamaraju).
- *United States v. Robert Pizarro*, No. 17 Cr. 151 (AJN), ECF Docket No. 135 (S.D.N.Y. May 17, 2018) (postponing trial in matter handled by AUSAs Jason Swergold, Jessica Fender, and Jared Lenow and criticizing prosecutors for delaying production of evidence of a possible alternative perpetrator of the crime until the Friday before the start of trial).
- *United States v. Reichberg*, No. 16 Cr. 468 (GHW), 2018 WL 6599465, at *3-4 (S.D.N.Y. Dec. 14, 2018) (describing earlier trial postponement that was necessary because of prosecutors' delayed disclosure of *Brady* material, in matter handled by AUSAs Kimberly Ravener, Jessica Lonergan, and Martin Bell).
- *United States v. Russell*, No. 16 Cr. 396 (GHW), 2018 WL

2088282, at *1-2 (S.D.N.Y. May 4, 2018) (granting new trial in case handled by AUSAS Swergold and Amanda Houle based on prosecutors' "inadvertent" failure to disclose proffer notes, which would have "provided substantial grist for cross-examination" and impeachment of witness).

Posted by Sarah Baumgartel
Categories: Brady, prosecutorial misconduct

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