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In the Supreme Court of the United States

ORIGINAL

IN RE RAHEEM BRENNERMAN,

Petitioner.

On Petition for an Extraordinary Writ to the United States Court of Appeals for the Second Circuit, *United States v. Raheem Brennerman*, No. 18-1033

PETITION FOR EXTRAORDINARY WRIT OF PROHIBITION AND/OR MANDAMUS

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QUESTION PRESENTED

Whether an Extraordinary Writ should issue where a criminal contempt conviction arises from: (1) an underlying civil contempt order imposed on a non-party absent a subpoena or legal basis, (2) denial of access to material exculpatory evidence necessary for defense and confrontation, and (3) presentation of an invalid contempt order to the jury resulting in a fundamental miscarriage of justice and violations of the Fourth, Fifth, and Sixth Amendments.

LIST OF PARTIES

Petitioner

- Raheem Jefferson Brennerman

Respondent

- United States of America

LIST OF PROCEEDINGS

United States District Court, Southern District of New York

United States of America v. The Blacksands Pacific Group, Inc., et. al.

No. 1:17-cr-00155-LAK

Date of Trial Court Judgment and Sentencing: May 21, 2018

United States Court of Appeals, Second Circuit

No. 18-1033(L)

United States of America, *Appellee*, v. Raheem J. Brennerman, *Appellant*.

Date of Final Opinion: June 9, 2020

Petition for Rehearing en banc denied: September 9, 2020

Supreme Court of the United States

Docket no. 20-6895

United States of America, *Respondent*, v. Raheem J. Brennerman, *Petitioner*.

Date of denial to grant certiorari: February 22, 2021

United States District Court, Southern District of New York

United States of America v. Raheem J. Brennerman, *Movant-Defendant*

No. 1:17-cr-00155-LAK

Date of Trial Court denial of Collateral Attack Petition
pursuant to 28 U.S.C. § 2255: May, 16, 2022

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PETITION FOR AN EXTRAORDINARY WRIT OF PROHIBITION AND/OR MANDAMUS

The Petitioner respectfully petitions for an extraordinary writ of prohibition and/or mandamus to review the civil contempt order and the judgment of conviction and sentence of the United States District Court for the Southern District of New York and the summary order and judgment of the United States Court of Appeals for the Second Circuit and for the relief specified below.

Structural errors are those that affect "the framework within which the trial proceeds." This case presents multiple such defects: (1) exercise of contempt power without jurisdiction, (2) denial of material exculpatory evidence, (3) use of an invalid judicial order to influence the jury. Due Process requires a fair tribunal and a reliable verdict. Taken together, these errors demonstrate a systemic breakdown that renders the conviction unreliable.

Here, the United States District Court for the Southern District of New York lacked jurisdiction and lawful authority to act absent jurisdictional predicate in a civil action and the judgment of conviction and sentence violates the Due Process Clause and Petitioner's Fourth, Fifth and Sixth Amendment Constitutional right.

The foundation of the criminal contempt conviction is a civil contempt order that was legally invalid ab initio. This was not a mere legal error. It was a jurisdictional defect depriving the court of authority to act. The subsequent use of that void order in a criminal proceeding transformed a jurisdictional defect into a mechanism of conviction, violating the basic due process requirement that criminal liability rests on lawful predicate for criminal contempt. The absence of a valid legal duty eliminates the basis for conviction entirely.

OPINIONS BELOW

(a) Order of civil contempt in civil action, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, at the United States District Court, case no. 1:15-cv-00700-LAK (S.D.N.Y.), at ECF Nos. 139-140;

(b) Judgment of Conviction and Sentence in criminal case, *United States v. The Blacksands Pacific Group, Inc., et. al.*, at the United States District Court, case no. 1:17-cr-00155-LAK (S.D.N.Y.), at ECF No. 145;

(c) Summary Order and Judgment in appeal, *United States v. The Blacksands Pacific Group, Inc., et. al.*, at the United States Court of Appeals for the Second Circuit in appeal no. 18-1033(L), at ECF No. 286.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1651, the All Writs Act.

This Court has jurisdiction to issue an Extraordinary Writ to correct a clear and indisputable miscarriage of justice where no adequate alternative remedy exists.

This petition invokes the Court's supervisory authority to ensure uniform adherence to constitutional requirements governing contempt proceedings, discovery obligations, and the rights to criminal defendants. The failure of both the district court and the United States Court of Appeals for the Second Circuit to correct these constitutional violations necessitates intervention by this Court.

After trial, Petitioner highlighted the fundamental miscarriage of justice to the Second Circuit's panel court in the direct appeal—Petition for Rehearing En Banc at Appeal No. 18-1033(L), Doc. No. 314 (Denied at Doc. No. 318); and in the appeal of the denial of collateral attack petition at Appeal No. 22-1282.

Thus this Petition for an Extraordinary Writ of Prohibition and/or Mandamus is in aid of this Court's appellate jurisdiction, because exceptional circumstances warrant the exercise of this Court's discretionary powers and adequate relief has not been and cannot be obtained in any other form or from any other court, warranting the grant of relief by this Court. Sup. Ct. R. 13(1); 13(3); 13(5); 29(2); 30(1). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RULE 20 STATEMENT

Petitioner asks that this Court grant this petition and issue a writ of prohibition and/or mandamus, directing the following relief:

(i) That the civil contempt order of the United States District Court for the Southern District of New York (Kaplan, J.) entered in civil action, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc, et. al.*, civil action no. 1:15-cv-00700-LAK (S.D.N.Y.), at ECF Nos. 139-140, be vacated;

(ii) That the Judgment of Conviction and Sentence of the United States District Court for the Southern District of New York (Kaplan, J.) entered in criminal case, *United States v. The Blacksands Pacific Group, Inc., et. al.*, at case no. 1:17-cr-00155-LAK (S.D.N.Y.), at ECF No. 145, be vacated and the notice pursuant to Federal Rule of Criminal Procedure 42, presented to initiate the criminal proceeding in the criminal case at ECF No. 1, be dismissed;

(iii) That the Summary Order and Judgment of the United States Court of Appeals for the Second Circuit entered in appeal, *United States v. The Blacksands Pacific Group, Inc, et. al.*, No. 18-1033(L), at ECF No. 286, *United States v. The Blacksands Pacific Group, Inc., et. al.*, __Fed. App'x __, No. 18-1033, 2020 WL 3053867 (2d Cir. 2020), be vacated.

Petitioner has exhausted all other avenues of relief. His direct appeal was denied at Appeal No. 18-1033(L), at ECF No. 286, his Petition for Panel Rehearing/ Rehearing En Banc was denied at Appeal No. 18-1033(L), at ECF No. 318, his habeas corpus Collateral Attack Petition pursuant to 28 U.S.C. § 2255 was denied in criminal case no. 1:17-cr-00155-LAK (S.D.N.Y.), at ECF No. 235, and his appeal of denial of habeas corpus Collateral Attack Petition was denied at Appeal No. 22-1282 (associated with appeal no. 23-6435)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 401. Power of Court

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

(3)Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

U.S. Const. amend IV

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

U.S. Const. amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

> have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

U.S. Const. amend XIV

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

Additional Constitutional and Statutory Background

The Fifth Amendment of the United States Constitution states, "No person shall be deprived of life, liberty, or property without due process of law." The due process right is enshrined in the bedrock of our democracy by imposing the equal protection of law doctrine. *See Abdul Akbar v. McKelvie,* 239 F.3d 307, 316-17 (3d Cir. 2001) (en banc) ("Although the Fifth Amendment contains no Equal Protection Clause . . . [t]he [Supreme] Court has construed the Fifth Amendment to contain an Equal Protection Guarantee . . . Fifth Amendment Equal Protection claims are examined under the same principles that apply to such claims under the Fourteenth Amendment") (internal citations omitted).

The Fifth Amendment guarantees a criminal defendant the right to due process of law. U.S. Const. amend. V ("No defendant shall be deprived of life, liberty, or property . . . without due process of law"). Inherent in the guarantee of due process is that the trial procedure itself shall be fair and unbiased. *See Smith v. Phillips,* 455 U.S. 209, 219 (1983) ("The touchstone of due process analysis . . . is the fairness of the trial . . . "); *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring) (citing Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgment," 38 U. Chi. L. REV. 142, 151-154 (1970)) ("[T]here are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness . . . fundamental fairness is more than accuracy at trial. Justice is more than guilt or innocence.").

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

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

STATEMENT OF THE CASE

Petitioner was held in civil contempt in connection with litigation in which he was not a party, and subsequently prosecuted and convicted for criminal contempt arising from that civil contempt order.

In the underlying civil case, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 1:15-cv-0070 (LAK), the district court (Kaplan, J.) compelled production of documents without issuing a subpoena to Petitioner, despite his status as a non-party. *See ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 1:15 CV 0700 (LAK), ECF Nos. 139-140

Petitioner was never served with a subpoena pursuant to Fed R. Civ. P. 45, yet was held in civil contempt for failing to produce documents.

Petitioner attempted to appeal the civil contempt order (Second Circuit Appeal No. 17-00395-cv), but was procedurally barred due to failure to file an "Acknowledgment and Notice of Appearance."

In the subsequent criminal contempt proceeding, Petitioner was denied access to critical ICBC files including the underwriting file and settlement communications despite repeated requests. These materials were central to establishing lack of willfulness and compliance with court directives. *See United States v. The Blacksands Pacific Group, Inc., et., al.*, No. 1:17 CR. 155 (LAK), ECF No. 76.

At trial, the district court permitted the Government to introduce the underlying civil contempt order to the jury (Trial Tr. No. 17 CR. 155 (LAK), Trial Tr. 3-7), while simultaneously preventing Petitioner from presenting the missing ICBC evidence necessary to challenge the order.

The jury returned a conviction for criminal contempt.

A. Background

The history of this matter began in 2014 when ICBC (London) PLC ("ICBC London") sued The Blacksands Pacific Group, Inc. ("Blacksands") in New York Supreme Court primarily alleging, inter alia, that Blacksands had failed to repay approximately $4.4 million dollars extended to Blacksands pursuant to a Bridge Loan Agreement, after ICBC London had reneged on the original $1.35 Billion dollars financing agreed with Blacksands. Significantly, Petitioner Raheem J. Brennerman, the CEO of Blacksands, was not named as a defendant in that action. *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, Notice of Removal; Cv. Cover Sheet, No. 15 Cv. 70 (LAK), ECF Nos. 1-2.

Blacksands removed the case to the Southern District of New York and the matter was assigned to Hon. Lewis A. Kaplan, under the caption *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, Notice of Removal, No. 15 Cv. 70 (LAK), ECF No. 1. Based on the loan documents, Judge Kaplan granted ICBC London's motion for summary judgment against Blacksands. ICBC, Mem. Op., No. 15 Cv. 70 (LAK), ECF No. 1. ICBC London then served Blacksands with extremely broad post-judgment discovery requests. Blacksands counsel, Latham & Watkins LLP ("Latham") interposed objections to those demands and filed a brief in support of those objections. ICBC, Def. Interrog., No. 15 Cv. 70 (LAK), ECF No. 84 Ex. 2; Mem.;

Def.'s Decl., No. 15 Cv. 70 (LAK), ECF Nos. 85, 86. The Court, conducting no analysis regarding the permissible scope of post-judgment discovery or the actual breadth of plaintiff's demands, instead in conclusory fashion declared that the objections were "baseless" and that Blacksands "shall comply fully." ICBC, Order, No. 15 Cv. 70 (LAK), ECF No. 87.

Subsequently, ICBC London moved for contempt and coercive sanctions against Blacksands. ICBC, Order to Show Cause; Pl.'s Decl.; Mem., No. 15 Cv. 70 (LAK), ECF Nos. 101, 102-103. On October 24, 2016, Judge Kaplan granted ICBC London's motion holding Blacksands in contempt and imposing coercive sanctions. ICBC, Order, No. 15 Cv. 70 (LAK), ECF No. 108. Over the course of the next two weeks, on November 4 and November 10, 2016, Mr. Brennerman on behalf of Blacksands provided detailed discovery responses to ICBC London, including approximately 400 pages of documents, in an effort to comply with ICBC London's discovery requests. ICBC, Pl.'s Decl., No. 15 Cv. 70 (LAK), ECF. No. 123, pp. 9, 11-12. Mr. Brennerman also made continued efforts without support from other shareholders and partners to settle the matter with ICBC London, including meeting with ICBC London executives in London and providing them with even more information about Blacksands and its pending transaction, which were pertinent to Blacksands' settlement efforts. ICBC, Pl.'s Decl., No. 15 Cv. 70 (LAK), ECF No. 123, pp. 45, 9, 11-12.

On December 7, 2016, ICBC London moved for civil contempt against Mr. Brennerman personally, even though he was not a named defendant in the matter and was not personally named in any discovery orders. ICBC, Order; Mem.; Pl.'s

Decl., No. 15 Cv. 70 (LAK), ECF Nos. 121- 23. A contempt hearing was scheduled for December 13, 2016, less than a week later. ICBC, Corrected Order, No. 15 Cv. 70 (LAK), ECF No. 125.

Mr. Brennerman, however, did not have counsel. In fact, Latham repeatedly and consistently communicated to the Court, and to Mr. Brennerman, that they did not represent Mr. Brennerman personally. ICBC, Letter, No. 15 Cv. 70 (LAK), ECF No. 124. Although Mr. Brennerman was out of the country at the time he learned of the pending contempt hearing against him, he immediately sought to retain counsel to represent him in the contempt proceeding and wrote the Court requesting a reasonable adjournment because he was currently outside the United States and needed more time to retain counsel. ICBC, Email; Letter, No. 15 Cv. 70 (LAK), ECF Nos. 127-28 (Judge Kaplan was previously a partner at Paul Weiss LLP, which represented Mr. Brennerman at the time, thus the law firm could not appear before Judge Kaplan, hence why Mr. Brennerman had to retain another law firm to represent him for the contempt proceedings). Judge Kaplan denied Mr. Brennerman's request on December 12, 2016 (Order, No. 15 Cv. 70 (LAK), ECF No. 134), and found Mr. Brennerman personally in contempt on December 13, 2016. ICBC, Orders, No. 15 Cv. 70 (LAK), ECF Nos. 139-40. While Mr. Brennerman had provided a substantial document production in November, after Blacksands was found in contempt, the Court made no mention of it and appeared not to have reviewed or considered that production in its determination that Mr. Brennerman was himself in contempt. ICBC, Orders, 15 Cv. 70 (LAK), ECF Nos. 139-40.

On December 13, 2016, when Judge Kaplan held Mr. Brennerman personally in contempt, he [Judge Kaplan] ignored the law from the Second Circuit U.S. Court of Appeals in OSRecovery, where the Appeals Court stated directly to Judge Kaplan in relevant parts: ("[T]he District Court abused its discretion by issuing a contempt order to a non-party for failing to respond to discovery requests propounded to him as a party without providing sufficient legal authority or explanation for treating him as a party solely for the purpose of discovery") and held Mr. Brennerman in contempt (even though there were no court orders directed at him personally. No subpoena or motion-to-compel were directed at him). *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006).

Judge Kaplan also ignored the federal rule to conduct extrajudicial research into Mr. Brennerman by Googling him. Brennerman, Bail Hr.'g Tr., No. 17 Cr. 155 (LAK), ECF No. 12 Ex. 1 at 28. Then, following the erroneous contempt propounded against Mr. Brennerman, Judge Kaplan referred him to the Manhattan federal prosecutors (United States Attorney Office for the Southern District of New York "USAO, SDNY") and persuaded the prosecutors to arrest Mr. Brennerman and prosecute him criminally. *United States v. Brennerman*, Trial Tr., No. 17 Cr. 155 (LAK), ECF No. 12 Ex. 2.

B. The Criminal Referral, the Petition and Ex Parte Conference Between Judge Kaplan and the Government

In late 2016 or early 2017, Judge Kaplan referred Blacksands and Mr. Brennerman personally to the United States Attorney's Office for criminal prosecution. Thereafter, on March 3, 2017, the government filed a Petition seeking to initiate criminal contempt proceedings against Blacksands and Mr. Brennerman personally, including an Order to Show Cause for them to appear in Court to answer the charges. On March 7, 2017, Judge Kaplan summoned AUSAs Robert Benjamin Sobelman and Nicolas Tyler Landsman-Roos to his robing room to advise that an arrest warrant should be issued for Mr. Brennerman. Brennerman, Trial Tr., No. 17 Cr. 155 (LAK), ECF No. 12 Ex. 2.

The prosecution, consistent with Fed. R. Crim. P. 42, had prepared an Order to Show Cause that would have directed Blacksands and Mr. Brennerman to appear before the Court on a date in the future. The Court made clear, however, that it did not agree with the government's approach and advised the prosecutors that the Court should issue an arrest warrant instead as to Mr. Brennerman, stating his assumption that "the United States can't find him." The prosecutors repeatedly expressed their view that execution of an arrest warrant was not necessary under the circumstances. Brennerman, Trial Tr., No. 17 Cr. 155 (LAK), ECF No. 12 Ex. 2. The prosecutors advised, first, that Mr. Brennerman had actually called them on Friday, March 3, 2017, the same day that the Petition was filed to talk to them about that Petition. *Id.* The prosecutors informed Mr. Brennerman that he could not speak with him, and Mr. Brennerman then provided his phone number so that "there may be a way for the government to be in touch with him via that telephone number." The prosecutors then proposed that the Order to Show Cause previously prepared and filed by the government, could be entered to require Mr. Brennerman to attend the conference and "should he not appear, a summons or arrest warrant be issued to secure his appearance." *Id.*

The Court continued to press the issue of an arrest warrant, asking "[w]hy shouldn't I, given the history in this case, issue a warrant?" Brennerman, Trial Tr., No. 17 Cr. 155 (LAK), ECF No. 12 Ex. 2 at 5. The prosecutors responded with a number of reasons, stating: "Mr. Brennerman did try to contact the government on Friday, and we don't know that he has absconded or seeks to abscond. He's already knowledgeable about the petition. His email address is included in the ECF notification that went out when the petition was publicly filed. He appears to have the resources to have fled had he intended to, and the government thinks it's prudent to provide him with an opportunity to appear at the conference voluntarily." *Id.*

The prosecution went on to say that, even if the Court issued an arrest warrant, "the government would likely provide Mr. Brennerman with an opportunity to surrender rather than dispatching law enforcement to apprehend him without providing that opportunity." *Id.*

The Court pressed on, stating "I'm inclined to issue an arrest warrant" and pushed back against the prospect that Mr. Brennerman should be allowed to surrender: "Now, if the government is going to give him an opportunity to surrender; there's a substantial question as to whether I'm wasting my time because I think the odds are not unreasonable that he will abscond." *Id.* at 6.

Eventually, the prosecutors deferred to the Court and confirmed that if an arrest warrant was issued, they would discuss in their office how best to proceed. *Id.* at 7.

Thus, as of March 7, 2017, when the government entered the robing room, there was no pending investigation of fraud as to Mr. Brennerman with the prosecutors in the Southern District of New York, and the government was prepared to proceed with a contempt proceeding by Order to Show Cause and had no concern that Mr. Brennerman would seek to abscond.

Thus, pursuant to the arrest warrant prepared and signed by Judge Kaplan, Mr. Brennerman was arrested on April 19, 2017, at his home in Las Vegas. As of the date of the arrest warrant and because the Court had declined to sign the order to show cause presented by the government, there was no actual contempt charge pending against Mr. Brennerman. The Court omitted Mr. Brennerman from the signed Order to Show Cause but then failed to otherwise rule or grant the government's Petition as it related to Mr. Brennerman. There was, therefore, no proper basis for the arrest warrant. The Court's decision to alter the warrant to reference the Petition was inadequate to support the warrant. (The arrest warrant included an option for a Probation Violation Petition; those instruments, unlike a Petition in a contempt proceeding, actually do charge an offense). Brennerman, Arrest Warrant, No. 17 Cr. 155 (LAK), ECF No. 12 Ex. 3.

Mr. Brennerman's arrest on April 19, 2017 (when the government seized his electronic devices and documents (which were adduced as evidence (e-mails between Mr. Brennerman (on behalf of Blacksands) and Madgett (ICBC London) at trial of the contempt and fraud case (where the government actually never obtained or reviewed any pertinent ICBC transaction files from ICBC (London) PLC) was in violation of both Mr. Brennerman's Fourth and Fifth Amendment rights.

C. The Indictment and Order to Show Cause

On May 31, 2017, weeks after Mr. Brennerman was released on bail in the criminal contempt of court case, he was re-arrested by the U.S. Attorney's Office pursuant to an indictment alleging fraud in connection with the transaction that was at issue in the underlying civil action, No. 15 Cv. 70 (LAK) between ICBC (London) PLC and The Blacksands Pacific Group, Inc. (even though the civil action had been ongoing for two and a half years at that point). Mr. Brennerman was charged with Conspiracy to commit bank and wire fraud, bank fraud and wire fraud. *Id.* The case was assigned to Hon. Richard J. Sullivan, under the caption, *United States v. Brennerman*, No. 17 Cr. 337 (RJS).

In August 2017, because Judge Kaplan had failed to sign the Order to Show Cause as it related to Mr. Brennerman in the criminal contempt of court case at No. 17 Cr. 155 (LAK) (even though Mr. Brennerman had been arrested at the behest of Judge Kaplan), the government realizing their error filed a new two-count Order to Show Cause Petition formally charging Mr. Brennerman in the criminal contempt of court case. Brennerman, Order to Show Cause, No. 17 Cr. 155, ECF No. 52.

D. The District Court's Decision

In August 2017, prior to trial for the criminal contempt of court case, Mr. Brennerman sought to obtain the complete ICBC records (including the underwriting file and negotiations between agents of Blacksands and ICBC London) to demonstrate his innocence and to present a complete defense. However, Mr. Brennerman's request to the Manhattan federal prosecutors was denied. The [Manhattan federal prosecutors] refused to obtain or review the complete ICBC records including the underwriting files, arguing that they were not obligated to collect any additional evidence from ICBC London beyond what the bank had selectively provided to them. Judge Kaplan also denied Mr. Brennerman's request seeking to compel the complete ICBC record. Brennerman, Mem. & Order, No. 17 Cr. 155 (LAK), ECF No. 76.

In November 2017, prior to trial for the fraud case, Mr. Brennerman made a request to Judge Sullivan in his motion-in-limine requesting that the Court exclude the testimony of any witness from ICBC London because he had been unable to obtain the complete ICBC records, including the underwriting files, which he required to engage in cross-examination of the witness and that the government would be able to elicit testimony from such witness while he would be deprived of the ability to engage in any meaningful cross-examination of the witness as to substance and credibility on the issues. Mr. Brennerman argued that his Constitutional rights, including his right to a fair trial, would be deprived. Mr. Brennerman also argued that he would be deprived of his ability to present a complete defense, thus depriving him of his Sixth Amendment right. However, Judge Sullivan denied his request.

Brennerman, Mem. in Opp'n; Mot. in Lim.; Mem. in Supp., No. 17 Cr. 337 (RJS), ECF Nos. 54, 58, 59.

E. The Trial and Post-Trial Proceedings Criminal Contempt of Court Case at No. 17 Cr. 155 (Lak)

During trial, District Court (Judge Kaplan) rejected the defendant's argument regarding the presentment of the civil contempt order to the jury, ruling that the government could present evidence that both the company and Mr. Brennerman had been found in contempt of Court. Brennerman, Trial Tr., No. 17 Cr. 155 (LAK), at 3-7. A juror named Gordon later told the media - Law 360 that the civil contempt orders swayed the jury to find Mr. Brennerman guilty of criminal contempt. Law 360 Article, No. 17 Cr. 337 (RJS), ECF No. 236, Ex. 3 at 17.

Mr. Brennerman was deprived of the very evidence he required to defend himself. Although such evidence (agents of ICBC London requesting settlement discussion) plainly was relevant to the issue of Mr. Brennerman's willfulness in failing to comply with the Court's discovery orders, the District Court refused repeatedly to allow counsel to elicit such evidence on the issue, and so the record was devoid of the precise evidence that would have demonstrated the defendant's lack of intent. Trial Tr., No. 17 Cr. 155 (LAK), at 269-277; 236-249.

The District Court went a step further and proposed an instruction to the jury that settlement discussions in a civil case did not excuse a defendant's failure to comply with the court's discovery order absent an order suspending or modifying the requirement to comply. Trial Tr., No. 17 Cr. 155 (LAK), at 509- 510. Defense counsel objected, arguing that even if that were technically true, if the parties specifically engaged in settlement discussion with the understanding that discovery would not be pursued, such evidence was certainly relevant to the defendant's intent in not complying with the Court's order and should have been considered by the jury. The District Court (Judge Kaplan) overruled counsel's objection and instructed the jury as indicated. Trial Tr., No. 17 Cr. 155 (LAK), at 538-544.

The trial commenced on September 6, 2017, and concluded on September 12, 2017, with the jury returning a guilty verdict on both counts of criminal contempt.

F. The Court of Appeal Decision Criminal Contempt of Court Appeal at, Nos. 18 1033(L); 18 1618(Con)

See United States v. The Blacksands Pacific Group, Inc., et. al., 17 CR. 155 (LAK), ECF No. 211, 11-12 at App. H.

G. Errors with the Court of Appeals' Decision

1. The Second Circuit erred in approving the district court's

> (A) admission of the civil contempt order against petitioner (B) failure to compel production of certain exculpatory materials; and (C) preclusion of the admission of evidence pertaining to settlement negotiations, because the issues raised are of exceptional importance. This case raises issues of important systemic consequences for the development of the law and the administration of justice.

2. The admission of the civil contempt order violated petitioner's constitutional rights where the court failed to afford him the equal protection guarantee and the prosecution violated his right to due process of law. *See U.S. v. The Blacksands Pacific Group, Inc., et. al.*, 17 CR. 155 (LAK), ECF No. 211, 13-15 at App. H.

3. Failure to compel production of certain exculpatory materials violated Petitioner's Sixth Amendment right, where he was deprived of the evidence he required to present a complete defense. *See U.S. v. The Blacksands Pacific Group, Inc., et. al.*, 17 CR. 155 (LAK), ECF No. 211, 16 at App. H.

4. Preclusion of the admission of evidence pertaining to settlement negotiations (due to failure to permit full settlement negotiation evidence) violated Petitioner's constitutional right where he was deprived of evidence he required to present a complete defense. *See U.S. v. The Blacksands Pacific Group, Inc., et. al.*, 17 CR. 155 (LAK), ECF No. 211, 17-18 at App. H.

REASONS TO GRANT THE WRIT OF PROHIBITION AND/OR MANDAMUS

An Extraordinary Writ should issue where a conviction results not from ordinary trial error, but from a proceeding infected by objected legal error and structural due process violations that render the judgment fundamentally unreliable. *See Arizona v. Fulminante*, 499 U.S. 279 (1991).

This case presents such circumstance. The criminal contempt conviction rests on (1) a legally void civil contempt order imposed without jurisdiction over a non-party. (2) the denial of material exculpatory evidence central to the element of willfulness, and (3) the Government's reliance on that invalid order to secure conviction before the jury.

Each error was preserved or functionally uncorrectable, and each independently and certainly cumulatively constitutes a structural defect warranting extraordinary relief.

I. The Underlying Civil Contempt Order was Legally Void and Its Use Violated Structural Due Process

The foundation of the criminal contempt conviction is a civil contempt order that was legally invalid *ab initio*.

As a matter of settled federal law, a non-party may only be compelled to produce documents through a subpoena issued pursuant to Federal Rule of Civil Procedure 45. Wright & Miller, Federal Practice and Procedure S 2456 (9A), *See also Hobley v. Burge*, 433 F.3d 948, 949 (7th Cir. 2006); *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) ("Rule 34(c) explicitly makes the subpoena process of Rule 45 the route to compelling productions of documents from non-parties")

A court's contempt power extends only to violations of lawful binding orders. *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). It is a fundamental principle that a judgment entered without jurisdiction is void. *See Pennoyer v. Neff*, 95 U.S. 714 (1878).

The district court nevertheless imposed civil contempt sanctions, effectively asserting coercive authority over a non-party in the absence of any jurisdictional predicate. This was not a discretionary misapplication of law, it was a categorical legal error depriving the court of authority to act.

Petitioner was a non-party and was never served with a subpoena or any lawful process. Accordingly, no enforceable legal obligation ever arose. District Court's action directly contravenes controlling precedent. In *OSRecovery, Inc. v. One Groupe Int'l*, 462 F.3d 87 (2006), the Second Circuit held that it is "fundamentally unfair" to hold a non-party in contempt absent a valid legal basis for treating that individual as a party.

Here, as in OSRecovery, the court failed to articulate any legal theory justifying its treatment of Petitioner as a party. The contempt order was therefore invalid ab initio. *See ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 1:15 CV. 0700 (LAK), ECF Nos. 139-140

Due process forbids punishment for failing to comply with an order that is not lawfully binding. *See Hicks v. Feiock*, 485 U.S. 624 (1988). Moreover, criminal punishment cannot rest on invalid or unconstitutional authority. *See Ex parte Siebold*, 100 U.S. 371 (1879).

This was not a mere legal error. It was a jurisdictional defect depriving the court of authority to act.

The subsequent use of that void order in a criminal proceeding transformed a jurisdictional defect into a mechanism of conviction, violating the basic due process requirement that criminal liability rest on lawful and valid predicates.

Because the underlying order was void, it could not serve as a lawful predicate for criminal contempt. The absence of a valid legal duty eliminates the basis for conviction entirely.

II. Denial of Access to Material Exculpatory Evidence Deprived Petitioner of a Complete Defense

The proceedings were further tainted by the denial of access to material exculpatory evidence specifically, ICBC's underwriting file and settlement communications. *See* copy of draft settlement agreement at, *United States v. The*

Blacksands Pacific Group, Inc., et. al., No. 17 CR. 155 (LAK), ECF No. 12 Ex. 10, demonstrating existence of settlement negotiations.

These materials were not peripheral. They would have demonstrated ongoing compliance efforts, the existence of settlement negotiations, and the absence of intent to defy any lawful court order.

Petitioner sought access to these materials and objected to their exclusion.

The Government, while obtaining extensive discovery from ICBC failed to produce these critical records, and the court denied Petitioner the ability to compel them. *See United States v. The Blacksands Pacific Group, Inc., et., al.*, No. 17 CR. 155 (LAK), ECF No. 76.

The denial of material evidence favorable to the defense violates due process. *See Brady v. Maryland*, 373 U.S. 83 (1963). This duty extends to evidence material to guilt or punishment. *See United States v. Bagley*, 473 U.S. 667 (1985) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

The excluded materials here went directly to willfulness the central element of criminal contempt. The Constitution guarantees the right to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683 (1986) and *Chambers v. Mississippi*, 410 U.S. 294 (1973)

Here, the Government presented a one-sided evidentiary record while Petitioner was denied access to the materials necessary to challenge intent.

The denial of evidence central to guilt or innocence implicates: (1) The Fifth Amendment right to due process; (2) The Sixth Amendment right to confrontation; and (3) The Sixth Amendment right to present a complete defense.

This asymmetry undermined the adversarial process itself. Where evidence central to the only contested element is withheld, the resulting prejudice is inherent and the reliability of the verdict cannot be presumed.

III. The Presentation of an Invalid Civil Contempt Order to the Jury Created Irremediable Prejudice

The district court permitted the Government to introduce the underlying civil contempt order to the jury as part of its case-in-chief. (Trial Tr. No. 1:17 CR. 155 (LAK), Trial Tr. 3-7). This created an impermissible inference of guilt, undermining the presumption of innocence and relieving the Government of its burden to prove willfulness beyond a reasonable doubt.

Due process required the Government to prove every element of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970).

The introduction of a prior judicial determination risks relieving the Government of that burden and distorting the jury's independent role.

The Supreme Court has condemned evidentiary mechanism that create impermissible inference of guilty. *See Sandstrom v. Montana*, 442 U.S. 510 (1979).

Here, the jury was effectively invited to rely on a prior judicial finding that: (1) lacked lawful jurisdiction, and (2) should never have existed.

This undermined the presumption of innocence and corrupted the framework of adjudication.

Compounding the error, Petitioner was prevented from introducing evidence necessary to challenge the validity and factual basis of that order. *See Taylor v. Illinois*, 484 U.S. 400 (1988).

The use of a void judicial order as substantive evidence of guilt constitutes a structural due process violation.

The prejudice was not theoretical. A juror interview (Law 360 article, 17 CR. 337 (RJS), ECF No. 236, Ex 3. at 17) indicates that the civil contempt order influenced the verdict.

IV. The Cumulative Effect of These Errors Constitutes a Structural Breakdown Warranting Extraordinary Relief

Structural errors are those that affect "the framework within which the trial proceeds." *See Arizona v. Fulminante*, 499 U.S. 279 (1991).

This case presents multiple such defects: (1) Exercise of contempt power without jurisdiction (Pennoyer, Hick), (2) Denial of material exculpatory evidence (Brady, Kyles), (3) Use of an invalid judicial order to influence the jury (Winship, Standstrom).

Due process requires a fair tribunal and a reliable verdict. *See Turney v. Ohio*, 273 U.S. 510 (1927) Taken together, these errors demonstrate a systemic breakdown that renders the conviction unreliable.

V. Extraordinary Relief is Warranted

Extraordinary Writ relief is appropriate where the petitioner's right to relief is "clear and indisputable" and no adequate alternative remedy exists. *See Cheney v. United States District Court*, 542 U.S. 367 (2004).

That standard is satisfied here: (1) The contempt order was void, (2) The defense was denied access to core exculpatory evidence, (3) The jury relied on an invalid judicial determination

These are not correctable trial errors; they are structural defects requiring immediate intervention.

CONCLUSION

This case presents a conviction built on a void order, sustained through denial of critical evidence, and secured by presenting the invalid order to a jury deprived of the full truth.

The Constitution does not permit the exercise of contempt powers absent lawful authority, nor does it tolerate conviction through structurally defective proceedings.

The Petition for an Extraordinary Writ of Prohibition and/or Mandamus pursuant to 28 U.S.C. § 1651(a) (the "All Writs Act"), should be granted, and the civil contempt order adjudged against Petitioner in the civil action, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, case no. 1:15-cv-00155-LAK (S.D.N.Y.), at ECF Nos. 139-140 (the "Civil Contempt Order"), the Judgment of Conviction and Sentence in the criminal case at the United States District Court for the Southern District of New York in criminal case, *United States v. The Blacksands Pacific Group, Inc., et. al.*, case no. 1:17-cr-00155-LAK (S.D.N.Y.), at ECF No. 145 (the "Judgment of Conviction and Sentence"), the Summary Order and Judgment entered in the United

States Court of Appeals for the Second Circuit in appeal, *United States v. The Blacksands Pacific Group, Inc., et. al.*, No. 18-1033(L), at ECF No. 286, *United States v. The Blacksands Pacific Group, Inc., et. al.*, ___ Fed. App'x ___ No. 18-1033, 2020 WL 3053867 (2d Cir. 2020) (the "Summary Order and Judgment"), should be vacated or reversed and the petition presented pursuant to Fed. R. Crim. P. 42 (the "FRCP 42" notice) to initiate the criminal contempt of court case at the United States District Court for the Southern District of New York, in criminal case, *United States v. The Blacksands Pacific Group, Inc., et. al.*, case no. 1:17-cr-00155-LAK (S.D.N.Y.), at ECF No. 1, should be dismissed.

Respectfully submitted,

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