No. __________

In the Supreme Court of the United States

IN RE RAHEEM JEFFERSON 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. 18-3546**

PETITION FOR EXTRAORDINARY WRIT OF PROHIBITION AND/OR MANDAMUS

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July 31, 2026

QUESTION PRESENTED

Whether an Extraordinary Writ should issue where a criminal conviction rests on (1) failure to prove an essential statutory element, later supplied by the court outside the trial record; (2) judicial distortion of evidence to satisfy an essential statutory element; (3) denial of access to material exculpatory evidence; and (4) conviction based on a theory materially different from that charged resulting in structural violations of the Fifth and Sixth Amendments and a fundamental miscarriage of justice.

LIST OF PARTIES

Petitioner

- Raheem Jefferson Brennerman

Respondent

- United States of America

LIST OF PROCEEDINGS

United States District Court for the Southern District of New York

No. 1:17-cr-00337-RJS

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

Date of Trial Court Judgement and Sentencing: November 19, 2018;

February 12, 2019 (Amended Judgment)

United States Court of Appeals for the Second Circuit

No. 18-3546(L)

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

Date of Final Opinion: June 9, 2020

Petition for Rehearing en banc denied: July 31, 2020

Supreme Court of the United States

Docket no. 20-6638

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

Dated of denial to grant certiorari: January 25, 2021

United States District Court, Southern District of New York

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

No. 1:17-cr-00337-RJS

Date of Trial Court denial of Collateral Attack Petition
pursuant to 28 U.S.C. Section 2255: January 3, 2023

United States Court of Appeals, Second Circuit

No. 23-6180, ECF No. 34

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

Date of Appeal Court denial of certificate of appealability
pursuant to 28 U.S.C. Section 2253: January 19, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

APPENDIX TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

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 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) Absence of proof of an essential element, (2) Judicial distortion of evidence to satisfy a statutory element, (3) Denial of material exculpatory evidence, (4) Conviction on an uncharged theory. Taken together, these errors render the verdict unreliable and the proceeding fundamentally unfair. The defects undermine the legal and constitutional validity of the conviction.

Here, the United States District Court for the Southern District of New York lacked subject-matter jurisdiction and the judgment of conviction and sentence violates the Due Process Clause and Petitioner's Fourth, Fifth Amendment Constitutional right and his Sixth Amendment Constitutional right to a fair trial and proceeding.

Pursuant to this Court's holding in *Edward v. Balisok*, 520 U.S. 647 (1997), that "a criminal defendant tried by a partial judge is entitled to have his conviction set-aside no matter how strong the evidence against him," the judgment of conviction and sentence entered in the United States District Court for the Southern District of New York should be set-aside and vacated in its entirety. The summary order and judgment of the United States Court of Appeals for the Second Circuit affirming the conviction and sentence should be vacated. The record demonstrates that the presiding judge (Judge Richard Joseph Sullivan) exhibited partiality by distorting evidence in order to satisfy the required statutory element thereby depriving Petitioner of his Constitutional right to a fair and impartial adjudication.

OPINIONS BELOW

(a) The Judgment of Conviction and Sentence in criminal case, *United States v. Brennerman*, at the United States District Court for the Southern District of New York, criminal case no. 1:17-cr-00337-RJS (S.D.N.Y.), at ECF No. 203;

(b) The Amended Judgment of Conviction and Sentence in criminal case, *United States v. Brennerman*, at the United States District Court for the Southern District of New York, criminal case no. 1:17-cr-00337-RJS (S.D.N.Y.), at ECF No. 223;

(c) Summary Order and Judgment in appeal, *United States v. Brennerman*, at the United States Court of Appeals for the Second Circuit, appeal no. 18-3546(L), at ECF No. 186

JURISDICTION

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

This Court has authority to issue an Extraordinary Writ where (1) no other adequate remedy exists, (2) the petitioner's right to relief is clear and indisputable, and (3) issuance is appropriate under the circumstances. *See Cheney v. United States District Court*, 542 U.S. 367 (2004)

This petition invokes this Court's supervisory authority to correct structural constitutional violations that undermines the integrity of the judicial process and to ensure uniform adherence to due process guarantees. *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) 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. 18-3546(L), Doc. No. 190 (Denied at Doc. No. 195), and in the appeal of the denial of collateral attack petition at Appeal No. 23-6180.

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(5) , 29(2) , 30(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 Judgment of Conviction and Sentence of the United States District Court for the Southern District of New York (Sullivan, J.) entered in criminal case, *United States v. Brennerman*, case no. 1:17-cr-00337-RJS (S.D.N.Y.), at ECF No. 203, be vacated and/or reversed;

(ii) That the Amended Judgement of Conviction and Sentence of the United States District Court for the Southern District of New York (Sullivan, J.) entered in criminal case, *United States v. Brennerman*, case no. 1:17-cr-00337-RJS (S.D.N.Y.), at ECF No. 223, be vacated and/or reversed and the indictment 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. Brennerman*, No. 18-3546(L), at ECF No. 186, *United States v. Brennerman*, No. 18-3546, 818 F. App'x 25 (2d Cir. 2020), be vacated.

Petitioner has exhausted all other avenues of relief. His direct appeal was denied at Appeal No. 18-3546(L), at ECF No. 186, his Petition for Panel Rehearing

/Rehearing En Banc was denied at Appeal No. 18-3546(L), at ECF No. 195, his habeas corpus Collateral Attack petition pursuant to 28 U.S.C. § 2255 was denied at criminal case no. 1:17-cr-00337-RJS (S.D.N.Y.), at ECF No. 289, 291 and his appeal of denial of habeas corpus Collateral Attack petition was denied in Appeal No. 23-6180.

CONSTITUTIONAL PROVISIONS INVOLVED

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

> § 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.

STATEMENT OF THE CASE

A. Conspiracy to Commit Bank Fraud and Bank Fraud:

Petitioner was convicted of count one, conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349, and Count Two, bank fraud in violation of 18 U.S.C. § 1344(1) in the United States District Court for the Southern District of New York.

1. Statement of Relevant Proceedings and Constitutional Defects

On June 24m 2018, Petitioner submitted in case No. 1:17 CR. 337 (RJS), ECF No. 167, copies of Government Exhibits (GX1-57; GX1-57A; GX 529; GX1-73). These materials demonstrated that Petitioner's interactions were exclusively with Morgan Stanley Smith Barney, LLC ("MSSB"), the entity through which he opened and maintained a wealth management brokerage.

At trial, the Government's own witness, FDIC official Barry Gonzalez, testified that MSSB is not an FDIC-insured institution. Trial Tr. 1059:9-11. The record further established that separate corporate affiliates within the Morgan Stanley family must independently obtain FDIC insurance. Trial Tr. 1060:24-1061:5.

Relying on this record, Petitioner moved for judgment of acquittal pursuant to Rule 29 of the Federal Rule of Criminal Procedure, arguing that the Government failed to prove an essential statutory element of bank fraud under 18 U.S.C. § 1344 namely, that the alleged scheme targeting an FDIC-insured financial institution.

The district court denied the motion

2. Post-Trial Substitution of A Different Institution

On November 19, 2018, during sentencing (ECF No. 206 at 19), the district court stated that the offense involved a scheme to defraud the "private banking arm of Morgan Stanley" an entity that is FDIC-insured.

This statement marked a material departure from the trial record.

No evidence was introduced at trial establishing that Petitioner interacted with, targeted, or obtained benefits from Morgan Stanley Private Bank. Instead, the record consistently demonstrated that Petitioner's dealing was with MSSB, a non-FDIC-insured entity.

The court's reliance on a different entity at sentencing effectively supplied a missing statutory element outside the jury record.

A criminal conviction, however, must rest solely on evidence presented to the jury. The substitution of a new factual predicate post-verdict cannot cure a failure of proof at trial.

3. Collateral Proceedings Confirm The Defect

On November 16, 2021, Petitioner filed an omnibus motion, including motion under 28 U.S.C. § 2255 (ECF Nos. 269, 270, 272, 274, 288), again arguing that: (1) At trial evidence established interaction with MSSB, (2) MSSB is not FDIC-insured, (3) The statutory elements of bank fraud were therefore not satisfied.

On January 2, 2023, the district court denied relief (ECF No. 289 at pgs. 6-7), but in doing so expressly acknowledged that: (1) Trial counsel elicited testimony that MSSB was not FDIC insured, (2) The jury was presented with the arguments that the statute required targeting an FDIC-insured institution.

These findings confirm that the trial record lacked proof of the FDIC element. Yet the conviction was not vacated.

Because FDIC insurance is a jurisdictional prerequisite for prosecution under the federal bank fraud statute, the Government and District Court lacked subject-matter jurisdiction over Counts one and two.

Despite Petitioner raising the jurisdictional defect approximately fourteen (14) times, the District Court continued to uphold the conviction and sentence, thereby illegally imprisoning Petitioner. See ECF Nos. 167, 254, 269, 272, 274, 290, 302, 303, 304, 306, 324, 328, 329.

B. Conspiracy to Commit Wire Fraud and Wire Fraud

Concurrently, Petitioner was also convicted of count one, conspiracy to commit wire fraud under 18 U.S.C. § 1349 and Count Three, wire fraud under 18 U.S.C. § 1343, in the United States District Court for the Southern District of New York. Prior to trial, Petitioner sought production of the ICBC underwriting file, which constituted critical exculpatory and impeachment evidence which he required to present his complete defense. See ECF Nos. 54, 58, 59; *see also United States v. Brennerman et. ano.* No. 17 CR. 155 (LAK), ECF No. 76. Both Courts denied access to this evidence.

Petitioner then highlighted to the District Court that it would be patently unfair and a clear violation of his constitutional rights to a fair trial for the Government to be able to elicit testimony from their witness while Petitioner would be deprived of the ability to rebut and challenge those testimonies using the ICBC underwriting file. Petitioner repeatedly warned that allowing the Government to rely on testimony derived from the underwriting file while denying Petitioner access to the same evidence would violate his rights to due process, confrontation and a fair trial.

During trial, Government witness Mr. Madgett testified that the underwriting file existed and documented the basis for ICBC's approval of the bridge financing and that these documents were provided to ICBC's counsel, Linklaters LLP, which communicated with the U.S. Attorney Office. See Trial Tr. No. 94 at 201-204 (551-554.) Petitioner renewed his request for the underwriting file (ECF No. 71), but the District Court again denied the request. *See* Trial Tr. No. 96 at 617-622.

Notwithstanding the denial, the District Court permitted Mr. Madgett to testify regarding the alleged contents of the underwriting file, while Petitioner deprived of access to the file was unable to meaningfully cross-examine or rebut the testimony, using the file. The witness (Mr. Madgett) made misleading statements to the jury, and Petitioner was denied the only evidence capable to demonstrating which representations, if not, were material to ICBC's decision-making.

Compounding this error, the District Court instructed the jury that materiality was a required element of the wire fraud offense. *See* Trial Tr. 1620-1622. Denying Petitioner's access to the underwriting file while instructing the jury on materiality underscores the constitutional infirmity of the proceedings.

Petitioner sought production of the underwriting file approximately twenty-one (21) times, both before, during, and after trial. *See* ECF Nos. 54, 58, 59, 71, 153, 161, 187, 200, 236, 240, 241, 248, 250, 254, 256, 269, 272, 274, 290, 298, 324.

C. Mischaracterization Of Record Evidence On Appeal

The United States Court of Appeals for the Second Circuit had multiple opportunities to correct these constitutional and jurisdictional errors but failed to do so, thereby exacerbating the violations.

The Second Circuit affirmed, including with respect to the ICBC underwriting file, stating that the only evidence of the existence was Petitioner's "bare assertion." Brennerman, 818 F'Appx. at 30.

That conclusion is contradicted by the trial record. Government witness, Julian Madgett testified that the ICBC underwriting file: (1) Existed, (2) Contained the basis for the lending decision, (3) Was maintained with ICBC's file and provided to counsel. Trial Tr. 551-554, 617.

Petitioner further submitted documentary evidence (ECF No, 274) confirming that ICBC's counsel, Linklaters LLP acknowledged possession of the file but required court authorization or client consent to produce it.

Thus, both the trial record and post-trial submissions established that the underwriting file was real, material, and accessible, yet it was not produced to the defense.

The Second Circuit further erroneously generalized Morgan Stanley as a single FDIC-insured entity, stating: "[Brennerman] defrauded Morgan Stanley, a FDIC-insured institution." *United States v. Brennerman*, 818 F. App'x 25, 28 (2d Cir. 2020).

This conclusion is directly contradicted by the District Court's own subsequent findings at ECF No. 289 at pgs. 6-7, which recognized that Morgan Stanley Smith Barney, LLC is not FDIC-insured and that affiliates entities within a corporate family must obtain separate FDIC insurance.

The Second Circuit also erred in concluding that the bank fraud conviction was supported by a single telephone call with Kevin Bonebrake, who was employed by Morgan Stanley Institutional Securities, LLC, another non-FDIC-insured entity. *See* ECF Nos. 94 at 34, 35, 37, 38, 39 (Trial Tr. 384-85; 387-88; 409). Such conduct cannot support a conviction under the federal bank fraud statute.

D. Constitutional Implications

These proceedings reflect three interrelated constitutional defects:

1. Conviction Without Proof of an Essential Element

The Government failed to prove that Petitioner targeted an FDIC-insured financial institution, as required under 18 U.S.C. § 1343. A conviction lacking proof of an essential element violates the due process and cannot stand.

2. Post Hoc Substitution of a Different Factual Predicate

The district court reliance on a different entity at sentencing supplied a missing element outside the trial record. This undermines the jury's role and violates the principle that guilt must be determined based solely on evidence presented at trial.

3. Denial of Access to Material Exculpatory Evidence

The ICBC underwriting file was central to: (1) Materiality, (2) Intent.

The Government relied on testimony about the file and its contents while the defense was denied access to the underlying documents.

This created a one-sided evidentiary presentation and deprived Petitioner of the ability to meaningfully challenge the Government's case.

E. Structural Nature of The Errors

These are not ordinary trial errors. The affect: (1) The existence of a criminal offense (missing element), (2) The integrity of the factfinding process (post-trial substitution), (3) The fairness of the adversarial system (switched evidence)

Where the record demonstrates that a defendant was convicted without proof of a statutory element and without access to evidence necessary to contest that element, the resulting judgment is fundamentally unreliable.

F. Conclusion

The record establishes that Petitioner was convicted of bank and wire fraud despite: (1) The absence of proof that he interacted with an FDIC-insured institution, (2) The court's reliance on a different entity not proven at trial, (3) The denial of access to critical exculpatory evidence.

These defects undermine the legal and constitutional validity of the conviction. The judgment should therefore be vacated.

STATEMENT OF FACTS

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. 38.

ICBC London then served Blacksands with extremely broad post-judgment discovery requests. Blacksands counsel, Latham & Watkins LLP ("Latham") interposed objections to those demands and filed a brief in support of those objections. *ICBC*, Def. Interrog., No. 15 Cv. 70 (LAK), ECF No. 84 Ex. 2; Mem.; Def.'s Decl., No. 15 Cv. 70 (LAK), ECF Nos. 85, 86. The Court conducted no analysis regarding the permissible scope of post-judgment discovery of the actual breadth of plaintiff's demands, instead in conclusionary declaring 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, ¶¶ 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, ¶¶ 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.

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

Judge Kaplan also ignored the federal rule to conduct extra-judicial research into Mr. Brennerman by Googling him. Brennerman, Bail Hr.'g Tr., No. 17 Cr. 155 (LAK), 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.

A. 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 on the ECF notification that went out when the petition was publicly filed. He appears to have the resources to have fled had he intended to, and the government thinks it's prudent to provide him an opportunity to appear at the conference voluntarily." *Id.*

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

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

Eventually the prosecutors deferred to the Court and confirmed that if an arrest warrant was issued, they would discuss in their office how best to proceed. *Id.* at 7. Thus, as of March 7, 2017, when the government entered the robing room, there was no pending investigation of fraud as to Mr. Brennerman with the prosecutors in the Southern District of New York, and the government was prepared to proceed with a contempt proceeding by Order to Show Cause and had no concern that Mr. Brennerman would seek to abscond.

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

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

B. The Indictment and Order to Show Cause

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

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

Show Cause Petition formally charging Mr. Brennerman in the criminal contempt of court case. *Brennerman*, Order to Show Cause, No. 17 Cr. 155, ECF No. 52.

C. 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 request to Judge Sullivan in his motion-in-limine requesting that the Court exclude the testimony of any witness from ICBC London because he had been unable to obtain the complete ICBC records including the underwriting files, which he required to engage in cross-examination of the witness and that the government will be able to elicit testimony from such witness while he would be deprived of the ability to engage in any meaningful cross-examination of the witness as to substance and credibility on the issues. Mr. Brennerman argued that his Constitutional rights including his right to a fair trial will be deprived. Mr. Brennerman also argued that he would be deprived of his ability to present a complete defense, thus depriving his Sixth Amendment right. However, Judge Sullivan denied his request. *Brennerman*, Mem. in Opp'n; Mot. in Lim.; Mem. In Supp., No. 17 Cr. 337 (RJS), ECF Nos. 54, 58, 59.

D. The Trial and Post-Trial Proceedings Fraud Case at No. 17-cr-337(RJS)

During trial, following testimony by government's sole witness from ICBC London, Julian Madgett, that evidence (ICBC underwriting files) existed with the bank's file which document the basis for approving the bridge finance including representations relied upon by the bank in approving the bridge finance and that the prosecution never requested or obtained the ICBC underwriting files, thus never provided it to the defense. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 94 at 201-204 (551-554). Mr. Brennerman again filed motion to compel for the evidence arguing that he required it to present a complete defense (that the bank did not rely on any representation or alleged misrepresentation in approving the bridge finance) and to confront witnesses against him. *Brennerman*, Def.'s Mot., No. 17 Cr. 337 (RJS), ECF No. 71. Judge Sullivan denied Mr. Brennerman's request while acknowledging that government's witness, Julian Madgett had testified that the evidence (ICBC underwriting files) was with the bank's file in London, U.K. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 96 at 4 (617).

Government presented evidence-Government Exhibits GX1-57A; GX1-73; GX529 to demonstrate that Mr. Brennerman opened a wealth management account at Morgan Stanley. *Brennerman*, Def.'s Letter, No. 17 Cr. 337 (RJS), ECF No. 167. The evidence presented clearly demonstrated that the wealth management account was opened at Morgan Stanley Smith Barney, LLC. Government witness, Kevin Bonebrake testified that he worked for the Institutional Securities division of Morgan Stanley which is a wholly-owned subsidiary of Morgan Stanley & Company LLC (*Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 94 at 34-35 (384-85)); That "this was very preliminary stage of our conversation" (Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 94 at 59 (409)); That "Morgan Stanley would not typically provide the money"; "It would seek financing from outside investors," and "my recollection was that what the company wanted was unclear. We didn't get very far in our discussion." *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 94 at 37-38 (387-388).

Government presented four FDIC certificates-Government Exhibit-GX530 (FDIC certificate for Morgan Stanley Private Bank); GX531 (FDIC certificate for Citibank); GX532 (FDIC Certificate for Morgan Stanley National Bank NA); GX533 (FDIC certificate for JP Morgan Chase).

Another Government witness, Barry Gonzalez, FDIC commissioner testified "that the FDIC certificate of one subsidiary does not cover another subsidiary or the parent company because each will require its own separate FDIC certificate. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 98 at 132-33 (1060-61).

Gonzalez also testified that FDIC certificates only cover depository accounts and would not cover the Institutional Securities division/subsidiary of Morgan Stanley and that there was no confirmation that Morgan Stanley Smith Barney, LLC was FDIC insured. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 98 at 129 (1057) (testifying that FDIC certificates only cover depository accounts and do not cover divisions/subsidiaries); Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 98 at 131 (1059) (testifying no confirmation that Morgan Stanley Smith Barney, LLC was FDIC insured). His testimony demonstrated that neither ICBC (London) PLC, Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division/ subsidiary are FDIC insured. *Brennerman*, Trial Tr., No. 17 Cr. 337 (RJS), ECF No. 98 at 131-33 (1059-61).

The trial commenced on November 26, 2017 and concluded on December 6, 2017 with the jury returning a guilty verdict on all counts.

After trial, Mr. Brennerman again moved to compel for the ICBC underwriting files to prepare his post-trial motions however Judge Sullivan denied his requests. *Brennerman*, Orders, No. 17 Cr. 337 (RJS), ECF Nos. 153, 161, 187, 200, 235, 236, 240, 241. Judge Sullivan also ignored evidence which Mr. Brennerman presented to the Court to demonstrate that there was a statutory error with his conviction for bank fraud as it relates to his interaction with non-FDIC subsidiaries of Morgan Stanley however Judge Sullivan ignored him and ultimately denied his post-trial motions. *Brennerman*, Def.'s Letter, No. 17 Cr. 337 (RJS), ECF No. 167.

E. Error(s) with the Court of Appeals' Decision Fraud Case Appeal at Nos. 18-3546(L); 19-497(Con) Arising from Criminal Case at District Court at, No. 17-Cr-337 (RJS)

A. The Second Circuit erred when it misapprehended key facts about which Morgan Stanley subsidiary was FDIC insured and misunderstood why a constructive amendment of the indictment occurred.

1. The federal bank fraud statute requires intent to defraud an FDIC-insured institution and petitioner's constitutional right was violated where his conviction for bank fraud and bank fraud conspiracy is illegal and in violation of the bank fraud statute and law. *See United States v. Brennerman,* 17 cr. 337 (rjs), ECF no. 269, 13-15, at App. E.
2. Constructive amendment of an indictment occurs when the charging terms are altered and petitioner's constitutional right was violated *See United States v. Brennerman,* 17 cr. 337 (rjs), ECF no. 269, 15-16, at App. E..
3. The circuit court's decision overlooked the fact that Brennerman had made attempts to obtain and compel the production of the complete icbc file and erroneously assumed that the only indication of the document's existence came from Brennerman's bare assertions. *See United States v. Brennerman,* 17 cr. 337 (rjs), ECF no. 269, 17, at App. E.
4. The Second Circuit erred because the panel's decision conflicts with settled law on the sixth amendment rights of a criminal defendant to cross-examine the witnesses against him and to present a complete defense. *See United States v. Brennerman,* 17 cr. 337 (rjs), ECF no. 269, 18-20, at App. E.

REASONS FOR GRANTING THE EXTRAORDINARY 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.

This case presents clear, objective legal errors and structural constitutional violations that independently and collectively require relief. This case presents extraordinary circumstances warranting immediate intervention. The record reflects structural constitutional violations, judicial misconduct, and a breakdown of the adversarial process.

I. FAILURE TO PROVE AN ESSENTIAL STATUTORY ELEMENT

A conviction must be supported by proof beyond a reasonable doubt as to every element of the offense. *See In re Winship*, 397 U.S 358 (1970).

Under *Jackson v. Virginia*, 443 U.S. 307 (1979) a conviction cannot stand where no rational tier of fact could find the essential elements proven.

Here, the Government failed to prove that the alleged scheme targeted an FDIC-insured financial institution an essential statutory element under 18 U.S.C. § 1344.

The trial record established only involvement with MSSB (Morgan Stanley Smith Barney, LLC), a non-FDIC-insured entity. *United States v. Brennerman*, No. 1:17 CR. 337 (RJS), ECF Nos. 167, 269, 298; *see also* Trial Tr. at 1059.

That failure is dispositive. A conviction lacking proof of an essential element violates due process and must be vacated. *See Fiore v. White*, 531 U.S. 225 (2001)

The court's subsequent reliance on a different entity at sentencing cannot cure this defect. A conviction must rest on evidence presented to the jury, not post hoc judicial supplementation. *See Dunn v. United States*, 442 U.S. 100 (1979)

This is not a matter of evidentiary weight it is a legal insufficiency.

II. JUDICIAL DISTORTION OF EVIDENCE TO SATISFY A STATUTORY ELEMENT

The conviction rests on a fundamental legal impossibility, the Government failed to prove that Petitioner defrauded a FDIC-insured institution.

At trial, evidence established interaction with MSSB, a non-FDIC-insured entity, ECF No. 167, 269, 298; Trial Tr. at 1059. Nonetheless, the trial court substituted MSSB with Morgan Stanley Private Bank at sentencing to satisfy the statutory requirement. *United States v. Brennerman*, No. 1:17 CR. 337 (RJS), Sentencing Tr. ECF No. 206 at 19.

This was not a permissible inference it was a post hoc judicial reconstruction of the record. The court's later acknowledgment that MSSB was not FDIC-insured (ECF No. 289 at pgs. 6-7) confirms the inconsistency.

Such conduct constituted per se misconduct, where a judge "distort[s] the evidence" to secure conviction. *See United States v. Marquez-Perez*, 835 F.3d 153, 158 (1st Cir. 2018).

A conviction obtained through judicial alteration of an essential element violates due process and requires automatic reversal. *See Arizona v. Fulminante*, 499 U.S. 279

(1991); *see also Edwards v. Balisok*, 520 U.S. 647 (1997) ("a criminal defendant tried by a partial judge is entitled to have his conviction set-aside no matter how strong the evidence against him.")

III. Denial of Access to Material Exculpatory Evidence

The ICBC underwriting file was central to the defense on materiality and intent. Trial testimony confirmed its existence and relevance. Trial Tr. No. 94 at 201-204 (551-554). The file reflected the basis for ICBC's lending decision and directly bore on whether any alleged misrepresentation was material.

Despite extensive documented requests (ECF Nos. 54, 58, 59, 71, 153, 161, 187, 200, 236, 240, 241, 248, 250, 254, 256, 269, 272, 274, 290, 298, 324), Petitioner was denied access.

The denial of access to material exculpatory evidence violates due process. *See Brady v. Maryland*, 373 U.S. 83 (1963). This obligation extends to all evidence material to guilt or innocence. *See United States v. Bagley*, 473 U.S. 667 (1985) and *Kyles v. Whitley*, 514 U.S. 419 (1995)

The ICBC underwriting file went directly to materiality and intent, core components of the Government's case.

At the same time, 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. 284 (1973)

Here, the Government introduced testimony regarding the file and its contents while Petitioner was denied access to the underlying material.

This asymmetry deprived Petitioner of: (1) The right to confront adverse evidence, (2) The right to present a complete defense.

When evidence central to the only contested issues is withheld, the resulting prejudice is inherent.

The prejudice is inherent here, the jury was instructed on materiality (Trial Tr. at 1620-1622) while Petitioner was denied the primary evidence to contest it.

IV. PREJUDICIAL VARIANCE FROM THE INDICTMENT

A defendant has a constitutional right to be tried only on charges returned by a grand jury. *See Stirone v. United States*, 361 U.S. 212 (1960).

A constructive amendment or material variance occurs when the Government broadens the possible bases for conviction beyond those charged. Such error is per se reversible. *Id.*

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

However, faced with the reality that its allegation about the ICBC loan would not support a bank fraud conviction since ICBC was not FDIC-insured, as required by the relevant statute, the prosecution pivoted at trial and argued that Petitioner's guilt was established by his dealings with Morgan Stanley, where he opened an account which came with "special perks, things like fancy credit card and lower rates"

(*United States v. Brennerman*, No. 17 CR. 337 (RJS), prosecutor's summation, trial transcript at 1430).

This shift altered the core factual basis of the prosecution, depriving Petitioner of notice and the ability to prepare a defense, thus violating Petitioner's Fifth Amendment right to be indicted by a grand jury. It also violated his right to be informed of what he is accused of doing so that he could prepare his defense.

Critically, even had the indictment included the Morgan Stanley "banking perks" theory, that evidence could not legitimately establish Petitioner's guilt of bank fraud because the entity that gave him those "perks" was not FDIC-insured either further compounding the defect.

V. CUMULATIVE STRUCTURAL DUE PROCESS VIOLATION

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) Absence of proof of an essential element (*Winship*, *Jackson*); (2) Judicial distortion of evidence to satisfy a statutory element (*Marquez-Perez*); (3) Denial of core exculpatory evidence (*Brady*, *Kyles*); (4) Conviction on an uncharged theory (*Stirone*)

Taken together, these errors render the verdict unreliable and the proceeding fundamentally unfair. *See Tumey v. Ohio*, 273 U.S. 510 (1927).

VI. EXTRAORDINARY RELIEF IS WARRANTED

Extraordinary writ relief is appropriate where the 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) No adequate alternative remedy exists-Relief has been denied at all lower levels; (2) The errors are evident from the record-Clear and indisputable right; (3) Exceptional circumstances-The conviction rests on legal insufficiency and structural constitutional violations.

Absent intervention, Petitioner remains deprived of rights based on a conviction that does not meet constitutional requirements.

CONCLUSION

The Conviction rests on objective legal error and structural violations of due process.

The Government failed to prove an essential element, the defendant was denied access to material exculpatory evidence, the judge distorted evidence to satisfy a statutory element, and the conviction was sustained on a theory not charged in the document. These errors undermined the integrity of the proceedings and the reliability of the verdict.

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 judgment of conviction and sentence at the United States District Court for the Southern District of New York in criminal case, *United States v. Brennerman*, case no. 1:17-cr-00337-RJS (S.D.N.Y.), at ECF No. 203 (the "Judgment of Conviction and Sentence"), at ECF No. 223 (the "Amended Judgment of Conviction and Sentence"), the Summary Order and Judgment entered at the United States Court of Appeals for the Second Circuit in Appeal, *United States v. Brennerman*, No. 18-3546(L), at ECF No. 186, *United States v. Brennerman*, No. 18-3546, 818 F. App'x 25 (2d Cir. June 9, 2020) (the "Summary Order and Judgment"), should be vacated and/or reversed, and the indictment at the United States District Court for the Southern District of New York in criminal case, *United States v. Brennerman*, case no. 1:17-cr-00337-RJS (S.D.N.Y.), at ECF No. 1, should be dismissed.

Pursuant to this Court's holding in *Edward v. Balisok*, 520 U.S. 647 (1997), that "a criminal defendant tried by a partial judge is entitled to have his conviction set-aside no matter how strong the evidence against him," the judgement of conviction and sentence and the amended judgment of conviction and sentence entered in criminal case, *United States v. Brennerman*, case no. 1:17-cr-00337-RJS (S.D.N.Y.), should be set-aside and vacated in its entirety. The record demonstrates that the presiding judge, Judge Richard Joseph Sullivan, exhibited partiality by distorting the evidence in order to satisfy a required statutory element, thereby depriving Petitioner of his Constitutional right to a fair trial and impartial adjudication.

Respectfully submitted,

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