No. 20-6638

ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

RAHEEM JEFFERSON BRENNERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Raheem J. Brennerman
FCI ALLENWOOD LOW
P. O. Box 1000
White Deer, Pa. 17887-1000
Pro Se Petitioner

I. QUESTIONS PRESENTED

1. Whether the abuse of discretion standard imposed by the United States Court of Appeals for the Second Circuit is Constitutionally impermissible - where trial Court which had an obligation to protect the Constitutional rights of a criminal defendant deliberately deprived him of his Constitutional rights and the United States Court of Appeals for the Second Circuit refused to correct the errors of trial Court.

2. Whether trial Court abused its obligation to protect the Constitutional rights of a criminal defendant at trial - where trial Court deliberately caused the deprivation of a criminal defendant`s Constitutional right in an endeavor to unjustly deprive him of liberty.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

II. Table of Contents

III. Table of Authorities

Cases

Statutes

IV. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALSFOR THE SECOND CIRCUIT

Petitioner Raheem Jefferson Brennerman respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Second Circuit entered on June 9, 2020. Mr. Brennerman`s motion for rehearing en banc was denied on July 31, 2020.

V. OPINION BELOW

On June 9, 2020, a panel of the Second Circuit affirmed Petitioner`s conviction. *United States v. Brennerman*, No. 18 3546, 818 F. App'x 1 (2d. Cir. June 9, 2020) (19-497(Con)). Mr. Brennerman`s motion for rehearing en banc was denied by an Order of the Second Circuit dated July 31, 2020. *United States v. Brennerman*, No. 18 3546 Cr., EFC No. 195.

VI. JURISDICTION

The Court of Appeals' judgment affirming Petitioner`s conviction and sentence was entered on June 9, 2020. Mr. Brennerman`s motion for rehearing en banc was denied on July 31, 2020. *See* No. 18 3546, EFC No. 190; 195. Following a 150-day period for filing, including the ordinary 90-day filing period plus the 60-day additional time provided by administrative order relating to the COVID-19 pandemic, this Petition for Certiorari would have expired on December 31, 2020. The petition is being filed postmark on or before that date. 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).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, § 1344(1) provides:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a federally chartered or insured financial institution, or
>
> "(b) As used in this section, the term "federally chartered or insured financial institution" means--
>
> (1) a bank with deposits insured by the Federal Deposit Insurance Corporation;
>
> (2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;
>
> (3) a credit union with accounts insured by the National Credit Union Administration Board;
>
> (4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. § 1422), of the Federal home loan bank system; or
>
> (5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

The Fifth Amendment provides:

> 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 offense to be twice put in jeopardy of life or limbo, 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.

The Sixth Amendment provides:

> 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.

VIII. STATEMENT OF CASE

This case presents a matter of significant public interest in highlighting the unusual instance where the Courts, that have an obligation to protect the Constitutional rights of a criminal defendant, veers from the permissible to the impermissible with the Courts deliberately violating the Constitutional rights of Petitioner. The attack on Petitioner Raheem J. Brennerman is an attack on the rule of law, civil rights and liberties affecting everyone as well as the very fabric of United States' democracy. The United States Court of Appeals for the Second Circuit has a Constitutional obligation to review de novo meaning for clear error. *See United States v. Bershchansky*, 755 F.3d 102, 108 (2d Cir. 2015) (internal citation and quotation marks omitted) The Circuit Court exacerbated the Constitutional deprivation already suffered by Petitioner by imposing a Constitutionally impermissible abuse of discretion standard with its review.

Petitioner seeks review of this case for clarification on the obligations of the Courts - United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York particularly where a criminal defendant`s right has been so abridged and abrogated because of his race resulting in a fundamental miscarriage of justice.

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

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

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

BACKGROUND

The history of this matter began in 2014 when ICBC (London) PLC 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. Significantly, Petitioner Raheem J. Brennerman, the CEO of Blacksands, was not named as a defendant in that action. (Notice of Removal; Cv. Cover Sheet, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 15 Cv. 70 (LAK), EFC No. 1-2).

Blacksands removed the case to the Southern District of New York and the matter was assigned to Hon. Lewis A. Kaplan, under the caption *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.* (Notice of Removal, No. 15 Cv. 70 (LAK), EFC No. 1). Based on the loan documents, Judge Kaplan granted ICBC London's motion for summary judgment against Blacksands. (Mem. Op., No. 15 Cv. 70 (LAK), EFC No. 38).

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

conclusionary fashion declared that the objections were "baseless" and that Blacksands "shall comply fully." (*See* Order, No. 15 Cv. 70 (LAK), EFC No. 87).

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

On December 7, 2016, ICBC London moved for civil contempt against Mr. Brennerman personally, even though he was not a named defendant in the matter and was not personally named in any discovery orders. (Order; Mem.; Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC Nos. 121-23). A contempt hearing

was scheduled for December 13, 2016, less than a week later. (Corrected Order, No. 15 Cv. 70 (LAK), EFC No. 125).

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

production in its determination that Mr. Brennerman was himself in contempt. (Orders, 15 Cv. 70 (LAK), EFC. Nos. 139-40).

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

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

THE CRIMINAL REFERRAL, THE PETITION AND EX PARTE CONFERENCE BETWEEN JUDGE KAPLAN AND THE GOVERNMENT

In late 2016 or early 2017, Judge Kaplan referred Blacksands and Mr. Brennerman personally to the United States Attorney`s Office for criminal prosecution.

Thereafter, on March 3, 2017, the government filed a Petition seeking to initiate criminal contempt proceedings against Blacksands and Mr. Brennerman personally, including an Order to Show Cause for them to appear in Court to answer the charges. On March 7, 2017, Judge Kaplan summoned AUSAs Robert Benjamin Sobelman and Nicolas Tyler Landsman-Roos to his robing room to advise that an arrest warrant should be issued for Mr. Brennerman. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2). The prosecution, consistent with Fed. R. Crim. P. 42, had prepared an Order to Show Cause that would have directed Blacksands and Mr. Brennerman to appear before the Court on a date in the future. The Court made clear, however that it did not agree with the government`s approach and advised the prosecutors that the Court should issue an arrest warrant instead as to Mr. Brennerman, stating his assumption that "the United States can`t find him." The prosecutors repeatedly expressed their view that execution of an arrest warrant was not necessary under the circumstances. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2). The prosecutors advised, first, that Mr. Brennerman had actually called them on Friday, March 3, 2017, the same day that the Petition was filed to talk to them about that Petition. *Id.* The

prosecutors informed Mr. Brennerman that he could not speak with him, and Mr. Brennerman then provided his phone number so that "there may be a way for the government to be in touch with him via that telephone number." The prosecutors then proposed that the Order to Show Cause previously prepared and filed by the government, could be entered to require Mr. Brennerman to attend the conference and "should he not appear, [] a summons or arrest warrant be issued to secure his appearance." *Id.*

The Court continued to press the issue of an arrest warrant, asking '[w]hy shouldn`t I, given the history in this case issue a warrant?" (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2 At 5). The Prosecutors responded with a number of reasons, stating:

> Mr. Brennerman did try to contact the government on Friday, and we don`t know that he has absconded or seeks to abscond. He`s already knowledgeable about the petition. His email address is included on the ECF notification that went out when the petition was publicly filed. He appears to have the resources to have fled had he intended to, and the government thinks it`s prudent to provide him an opportunity to appear at the conference voluntarily.

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

The Court pressed on, stating "I`m inclined to issue an arrest warrant" and pushed back against the prospect that Mr. Brennerman should be allowed to surrender: "Now, if the government is going to give him an

opportunity to surrender; there`s a substantial question as to whether I`m wasting my time because I think the odds are not unreasonable that he will abscond". *Id.* at 6.

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

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

in a contempt proceeding, actually do charge an offense). (*See* Arrest Warrant, No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 3).

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

THE INDICTMENT AND ORDER TO SHOW CAUSE

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

In August 2017, because Judge Kaplan had failed to sign the Order to Show Cause as it related to Mr. Brennerman in the criminal contempt of

court case at No. 17 Cr. 155 (LAK) (even though Mr. Brennerman had been arrested at the behest of Judge Kaplan) he had revoked the bail granted to Mr. Brennerman even without any violations of the bail conditions. 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. (*See* Order to Show Cause, *Brennerman* No. 17 Cr. 155, EFC No. 59).

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. *See* 17-cr-155 (LAK), Dkt. 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. (*See* Mem. in Opp'n; Mot. in Lim.; Mem. In Supp., No. 17 Cr. 337 (RJS), EFC Nos. 54, 58, 59).

THE TRIAL AND POST-TRIAL PROCEEDINGS

During trial, following testimony by government 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. (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Mr. Brennerman again filed motion to compel for the evidence arguing that he required it to present a complete defense (that the bank did not rely on any representation or alleged misrepresentation in approving the bridge finance) and to confront witness against him. (*See* Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71). Judge

Sullivan denied Mr. Brennerman`s request while acknowledging that government`s witness, Julian Madgett had testified that the evidence (ICBC underwriting files) were with the bank`s file in London, U.K. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 617).

Government presented evidence - Government Exhibits GX1-57A; GX1-73; GX529 to demonstrate that Mr. Brennerman opened a wealth management account at Morgan Stanley. (*See* Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167). The evidence presented clearly demonstrated that the wealth management account was opened at Morgan Stanley Smith Barney, LLC. Government witness, Kevin Bonebrake testified that he worked for the Institutional Securities division of Morgan Stanley which is a wholly-owned subsidiary of Morgan Stanley & Company LLC (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 384-385); That "this was very preliminary stage of our conversation" (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 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." (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 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 (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1060-1061). Testified that FDIC certificate only cover depository accounts and would not cover the Institutional Securities division/subsidiary of Morgan Stanley (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1057); That there was no confirmation that Morgan Stanley Smith Barney, LLC was FDIC insured. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1059). His testimony demonstrated that neither ICBC (London) PLC, Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division/subsidiary are FDIC insured. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1059-1061).

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. (*See* Orders, No. 17 Cr. 337 (RJS), EFC Nos. 153, 161, 187, 200, 235, 236, 240, 241). Judge Sullivan also ignored evidence which Mr. Brennerman presented to the Court to demonstrate that there was a statutory error with his conviction for bank fraud as it relates to his interaction with non-FDIC subsidiaries of Morgan Stanley however Judge

Sullivan ignored him and ultimately denied his post-trial motions. (*See* Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167).

THE COURT OF APPEAL DECISION

The United States Court of Appeals for the Second Circuit affirmed Mr. Brennerman`s conviction and sentence in a Summary Order on June 9, 2020.

The Court misapprehended the record with respect to the FDIC-insured status of Morgan Stanley and overlooked Mr. Brennerman`s argument about the non FDIC insured personal wealth division (Morgan Stanley Smith Barney, LLC) and the non-FDIC-insured Institutional Securities division, generalizing that:

> [T]he record did establish that he defrauded Morgan Stanley, an FDIC-insured institution, as part of his broader scheme by, among other things, inducing it to issue him a credit card based on false representation about his citizenship, assets, and the nature and worth of his company.

(Slip Op., *United States v. Brennerman*, No. 18 3546, EFC No. 183 at 3).

With respect to Mr. Brennerman`s Constructive amendment argument, the Circuit Court similarly misunderstood the crucial distinction between the subsidiary divisions of Morgan Stanley, relying on the Government`s arguments at summation and finding that no constructive amendment had occurred because:

> It is clear from the indictment that the scheme against ICBC was merely one target of Brennerman`s alleged fraud.....At trial, the government offered evidence that Morgan Stanley was one of those

> "other financial institutions." *See* App`x at 608-09 (testimony of Morgan Stanley`s Kevin Bonebrake about a January 2013 telephone call with Brennerman discussing financing to develop asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offence other than that the one charged by the grand jury." *United States v. Vebeliunas*, 76 F.3d at 1290.

(Slip Op., No. 18 3546, EFC No. 183 at 4).

With respect to the ICBC file, the Circuit Court disagreed with Mr. Brennerman on the first two points and did not issue a written opinion on the third, writing that:

> The government`s discovery and disclosure obligations extend only to information and documents in the government`s possession. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (explaining that the *Brady* obligation applies only to evidence "that is known to the prosecutor"). The government insists that every document it received from ICBC was turned over to Brennerman and that it is not aware of the personal notes referenced by Brennerman. Therefore, the government has not violated its disclosure obligations. Nor was the government under any obligation under the Jencks Act to collect materials about Madgett that were not in the government`s possession. *See United States v. Bermudez*, 526 F.2d 89, 100 n.9 (2d Cir. 1975).
>
> Even if the documents exist and are material and favorable, Brennerman never sought a subpoena pursuant to Federal Rule of Criminal Procedure 17.....The only indication that such documents are extant comes from Brennerman`s bare assertions.

(Slip Op., No. 18 3546, EFC No. 183 at 4-5).

The panel denied a motion for rehearing by order dated July 31, 2020.

IX. REASON FOR GRANTING CERTIORARI

ARGUMENT

This Petition presents an opportunity for the Court to clarify (a.) whether the abuse of discretion standard imposed by United States Court of Appeals for the Second Circuit is Constitutionally permissible - where the Circuit Court refused to correct errors which substantively abridges and abrogates the rights of criminal defendant which are protected by the United States Constitution and (b) where trial Court deliberately deprived the criminal defendant of his Constitutional rights thus violating his Fifth and Sixth Amendment rights of the U.S. Constitution.

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

I. 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.

A. THE FEDERAL BANK FRAUD STATUTE REQUIRES INTENT TO DEFRAUD AN FDIC-INSURED INSTITUTION AND PETITIONER`S CONSTITUTIONAL RIGHT WAS VIOLATED WHERE HIS CONVICTION FOR BANK FRAUD AND BANK FRAUD CONSPIRACY IS ILLEGAL AND IN VIOLATION OF THE BANK FRAUD STATUTE AND LAW.

Title 18 United States Code § 1344 makes it a crime to "knowingly execut[e], or attemp[t] to execute, a scheme or artifice - (1) to defraud a financial institution; . . ." "The well established elements of the crime of bank fraud are that the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property, and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss." *United States v. Barrett*, 178 F.3d 643, 647-48 (2d Cir. 1999); *See* also 18 U.S.C. § 20 (defining "financial institution"). "[A] defendant cannot be convicted of violating § 1344(1) merely because he intends to defraud an entity...that is not in fact covered by the statute." *United States v. Bouchard*, 828 F.3d 116, 125 (2d Cir. 2016).

Petitioner was convicted of bank fraud and bank fraud conspiracy based on an account he opened at Morgan Stanley Smith Barnet, LLC. (*See* Def.'s Letter, No. 17 Cr. 337 (RJS), EFC No. 167) (highlighting Government Exhibit - GX1-57A; GX1-73; GX529 - Morgan Stanley Smith Barney, LLC account opening form, correspondence and account statement). The government failed to confirm through government witness, Barry Gonzalez, the FDIC commissioner that Morgan Stanley Smith Barney, LLC was/is FDIC insured. The Court also stated that Brennerman had a single telephone call with Kevin Bonebrake (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 387-388; 409) who worked at Morgan Stanley Institutional Securities division (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 384-385) which is not FDIC insured.

Although Petitioner's wealth management account at Morgan Stanley Smith Barney, LLC was not a depository account, the funds were held by Morgan Stanley Smith Barney, LLC in a depository account at Morgan Stanley Bank National Association. Any statements made by Petitioner to Scott Stout, who worked at Morgan Stanley Smith Barney, LLC would have been insufficient to establish that Petitioner took any step toward defrauding an FDIC-insured institution.

When Petitioner presented evidence to Judge Sullivan at No. 17 Cr. 337 (RJS), EFC. No. 167, demonstrating that his account was held at Morgan Stanley Smith Barney, LLC which is not FDIC insured and not at Morgan Stanley Private Bank, the judge ignored him. The judge also ignored the testimony by Barry Gonzalez, FDIC commissioner which confirmed that neither Morgan Stanley Smith Barney, LLC (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1059) or Morgan Stanley Institutional Securities division (*See* Trial Tr., 17-cr-337 (RJS), at 1057) are FDIC insured. Further that the FDIC certificate or one subsidiary/division does not cover other subsidiary/division within Morgan Stanley because each subsidiary/division will require its own FDIC certificate. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 1060-1061). Thus highlighting that the FDIC certificates presented by the government at trial for Morgan Stanley Private Bank (*See* Government Exhibit - GX530) and Morgan Stanley National Bank NA (*See* Government Exhibit - GX532) does not cover either Morgan Stanley Smith Barney, LLC or Morgan Stanley

Institutional Securities division which Petitioner interacted with and thus Petitioner could not be convicted for bank fraud and bank fraud conspiracy for interacting with institutions which are not FDIC insured. Notwithstanding these evidence and confirmation, Judge Sullivan allowed Petitioner to be wrongly convicted.

On appeal, the Second Circuit ignored Petitioner's argument while stating that Petitioner defrauded Morgan Stanley, an FDIC insured institution by receiving perks (even though Petitioner was not charged for receiving perks) and for making a single telephone call to Kevin Bonebrake to discuss about financing without acknowledging the testimony from Barry Gonzalez which did not confirm that either Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division are FDIC Insured to satisfy the essential element necessary to convict for bank fraud. That Morgan Stanley has different subsidiaries and divisions, further than each subsidiary/division will require its own FDIC certificate as the FDIC certificate of one subsidiary/division does not cover the other subsidiary/division.

B. CONSTRUCTIVE AMENDMENT OF AN INDICTMENT OCCURS WHEN THE CHARGING TERMS ARE ALTERED AND PETITIONER'S CONSTITUTIONAL RIGHT WAS VIOLATED

Constructive amendment of an indictment "occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them." *United States v.*

LaSpina, 299 F.3d 165, 181 (2d Cir. 2002) (citations omitted). "To prevail on a constructive amendment claim, a defendant must demonstrate that the proof at trial....so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury`s indictment." *LaSpins*, 299 F.3d at 181 (citations omitted).

Petitioner was indicted with "having made false representation to financial institutions in the course of seeking loans and other forms of financing for purported business ventures" however during summation the prosecution and again during appearance on November 19, 2018 (sentencing hearing) the Court, each argued the theory of the bank fraud and bank fraud conspiracy that the defendant became entitled to "perks" including fancy credit card and preferential interest rate however the defendant was not charged with obtaining perks. Moreover the fancy credit card was not issued by any Morgan Stanley subsidiary or division and was closed with zero balance. The account which the defendant opened at Morgan Stanley Smith Barney, LLC was only opened for three weeks and not long enough for him to earn any perks. Most important, both Morgan Stanley Smith Barney, LLC where Petitioner opened his account and Morgan Stanley Institutional Securities division where Kevin Bonebrake (whom he had a single telephone call about financing) worked at are not FDIC insured, an essential element necessary to convict for bank fraud and bank fraud conspiracy.

On appeal, when the Petitioner highlighted the constructive amendment issue, the Second Circuit refused to review the record on which Petitioner was convicted (theory of bank fraud) and statement made by trial court during appearance on November 19, 2018 (sentencing hearing) as to the theory of the bank fraud which was argued by the government and trial judge as receiving perks and as to his single telephone call to Kevin Bonebrake about financing. The Court also stated that there was no constructive amendment because the Petitioner spoke to Kevin Bonebrake who worked for the Institutional Securities division of Morgan Stanley without acknowledging the trial records which clearly demonstrated that the Institutional Securities division of Morgan Stanley is not covered by any FDIC certificate thus cannot satisfy the essential element to convict for bank fraud and bank fraud conspiracy.

C. THE CIRCUIT COURT'S DECISION OVERLOOKED THE FACT THAT BRENNERMAN HAD MADE ATTEMPTS TO OBTAIN AND TO COMPEL THE PRODUCTION OF THE COMPLETE ICBC FILE AND ERRONEOUSLY ASSUMED THAT THE ONLY INDICATION OF THE DOCUMENT'S EXISTENCE CAME FROM BRENNERMAN'S BARE ASSERTIONS.

Both during the related case in front of Judge Kaplan (*United States v. Brennerman*, No. 17 Cr.155 (LAK)) and in the instant case from which this petition arose (*United States v. Brennerman*, No. 17 Cr. 337 (RJS)) in front of Judge Sullivan, Petitioner moved for discovery of the full ICBC file related to the bridge loan to Blacksands. Petitioner avers as confirmed by government witness that the file would contain ICBC employee Julian Madgett's notes

related to the credit paper, underwriting documents and credit decision to approve the loan and would support Petitioner's theory of defense. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Both Judge Kaplan and Judge Sullivan denied Petitioner's request for a subpoena to obtain these documents; Judge Sullivan additionally declined to compel the Government to produce them at trial even after government witness, Julian Madgett testified to its existence in open Court. *See.*, e.g., (Mem. & Order, No. 17 Cr. 155 (LAK), EFC No. 76); (Def.'s Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71); (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554); (Trial Tr., No. 17 Cr. 337 (RJS), at 617).

For these reasons, the Second Circuit was mistaken that the record contained no evidence that Petitioner had attempted to obtain the complete ICBC files and the Court's assumption that the only indication that such documents (ICBC file) are extant came from Petitioner's bare assertion was erroneous.

II. THE SECOND CIRCUIT ERRED BECAUSE THE PANEL'S DECISION CONFLICTS WITH SETTLED LAW ON THE SIXTH AMENDMENT RIGHTS OF A CRIMINAL DEFENDANT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM AND TO PRESENT A COMPLETE DEFENSE.

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

government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

In some circumstances, discovery may be obtained from abroad. *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir. 2019) ("[A] district court is not categorically barred from allowing discovery....of evidence located abroad....") (internal reference omitted). "[I]t is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir. 2015).

Petitioner was deprived of the ability to present a complete defense in violation of his Sixth Amendment right as promulgated by the United States Supreme Court in *Crane v. Ky.*, where Petitioner requested for evidence (ICBC underwriting files) at No. 17 Cr. 337 (RJS), EFC No. 71, following testimony by government sole witness from ICBC London, Julian Madgett (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554) that evidence (the ICBC underwriting files) existed with the bank's file which document the basis for approving the bridge finance including representations relied upon by the bank in approving the bridge finance. *Crane v. Ky.*, 476 U.S. 683 (1986).

The prosecution never requested or obtained the ICBC underwriting files, thus never provided it to the defense. When Brennerman requested for the files so that he may use it in presenting a complete defense (that the bank

did not rely on any representation or alleged misrepresentation in approving the bridge finance) and confront witness against him, trial judge (Judge Richard J. Sullivan) denied his request while acknowledging that the prosecution witness, Julian Madgett had testified that the evidence (ICBC underwriting files) existed with the bank`s file in London, U.K. (*See* Trial Tr., No. 17 Cr. 337 (RJS). at 617). The Judge`s denial was in contrast with the Second Circuit ruling in *In re del Valle Ruiz*, which stated that District Courts were not categorically barred from permitting evidence located abroad. *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019).

Moreover trial judge permitted government sole witness from ICBC London, Julian Madgett to testify as to the content of the ICBC Underwriting files (to satisfy the essential element of "MATERIALITY") while Petitioner was deprived of the ability to engage in any meaningful cross-examination of the witness depriving him a fair trial.

Under *Kyles* Government had an obligation to learn of any favorable evidence known to the others acting on the Government behalf in the case, thus when Government witness, Julian Madgett testified in open Court that evidence (ICBC underwriting file) existed in the bank`s file which document the basis for approving the bridge finance including representation relied upon by the bank in approving the bridge finance which Government never requested or obtained. (Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). Government had an obligation to collect the evidence after learning of its

existence particularly where Petitioner made request to the Court (for among others) that the Court compel Government to collect the evidence (ICBC underwriting file). (Def.'s Letter Mot., No. 17 Cr. 337 (RJS), EFC No. 71). However Government`s failure to collect or learn of the evidence violated its *Brady* obligations.

It follows that if Government never obtained or reviewed the pertinent evidence (ICBC underwriting file) it [Government] failed to conduct any independent investigation on the transaction at issue prior to indicting and prosecuting Petitioner thus deliberately violating Petitioner`s right to the Due Process clause. The Court (Judge Richard J. Sullivan) exacerbated the Constitutional violation when it refused to compel Government to satisfy its *Brady* obligation, particularly following the testimony by Government witness, Julian Madgett that pertinent evidence (ICBC underwriting file) existed which Government never obtained or reviewed. Thus, the Court and Government deliberately violated Petitioner`s right to the Due Process clause.

Courts have required the Government to disclose evidence material to the defense where the Government "actually or constructively" possesses it. E.g., *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993) ("The prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it." (internal quotation marks omitted)); cf. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that to satisfy *Brady* and *Giglio*

prosecutors have "a duty to learn of any favorable evidence known to the others acting on the Government`s behalf in the case"). In particular in *Patemina-Vergara,* the Second Circuit held that the Government had an obligation to make good faith effort to obtain Jencks Act statements possessed by a third party that had cooperated extensively and had close working relationship with the Government, *United States v. Patemina-Vergara* 749 F.2d 993 (2d Cir. 1984); *see* also *United States v. Kilroy*, 488 F. Supp 2d 350, 362 (E.D. Wis. 1981) ("since Standard Oil is cooperating with the Government in the preparation of the case and is making available to the Government for retention in the Government`s files any record which Standard Oil has and which the Government wants, however, is not unreasonable to treat the records as being within the Government`s control at least to the extent of requiring the Government to request the records on the defendant`s behalf and to include them in its files for the defendant`s review if Standard Oil agrees to make them available to the Government." (emphasis added)). See also *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008).[1]

On appeal, the Second Circuit that recently made decision in *Scrimo,* which stated that "It is a federal law that a criminal defendant has a Constitutional right to present a complete defense" ignored Petitioner`s

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

argument that he was deprived of his Constitutional right to present a complete defense. (Summ. Order, No. 18 3546(L), EFC No. 186); *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019). The Second Circuit also made an erroneous statement that "the only indication that the evidence is extant comes from Brennerman`s bare assertion" Such statement was/is inaccurate and in contrast with the trial records which clearly highlight government witness, Julian Madgett, confirming that the evidence are extant and with the bank`s file in London, U.K. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554); (Summ. Order, No. 18 3546(L), EFC No. 186 at 5).

The danger of the Second Circuit`s rule is amply demonstrated by the consequences of erosion of public trust in the United States justice system and other institutions. As the Fourth Circuit recently promulgated "what gives people confidence in our justice system is not that we merely get things right rather, it is that we live in a system that upholds the rule of law even when it is inconvenient to do so". The lower courts - United States Court of Appeals for the Second Circuit and United States District Court for the Southern District of New York veered from the rule of law in this case. Interests of comity - in addition to fairness and substantial justice as embodied in the Due Process Clause and the U.S. Constitution - warrant reversal of the Second Circuit`s decision.

X. CONCLUSION

The petition for certiorari should be granted.

Dated: White Deer, Pennsylvania
December 1, 2020

Respectfully submitted,
/s/ Raheem J. Brennerman

RAHEEM JEFFERSON BRENNERMAN
Reg. No. 54001-048
FCI Allenwood Low
White Deer, Pa. 17887-1000

Petitioner Pro Se

XI. APPENDIX TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE

No. 20-

RAHEEM JEFFERSON BRENNERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 7,613 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2020

/s/ Raheem J. Brennerman

RAHEEM JEFFERSON BRENNERMAN
Petitioner