Raheem J. Brennerman
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LSCI-Allenwood
SPECIAL MAIL-OPEN ONLY IN
PRESENCE OF COMPLAINANT
P. O. Box 1000
White Deer, PA 17887-1000

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

October 20, 2020

BY FIRST CLASS CERTIFIED MAIL

Re: Judicial Complaint regarding SDNY District Court Judge Lewis A. Kaplan and Second Circuit Judge Richard J. Sullivan

Dear Clerk:

On September 20, 2020 the undersigned submitted Complaint in respect of the above Judges directly to Hon. Robert A. Katzmann. This Complaint supplants prior aforementioned complaint and is submitted given that Hon. Debra Ann Livingston is now the Chief Judge of the United States Court of Appeals for the Second Circuit.

The undersigned, Raheem Jefferson Brennerman, Petitioner and Defendant-Appellant in the appeals at *United States v. The Blacksands Pacific Group, Inc., et al*., 18-1033(L); 18-1618(Con) and at *United States v. Brennerman*, 18-3546(L) and 19-497(Con), file this complaint for judicial misconduct against District Court Judge Lewis A. Kaplan of the Southern District of New York and Circuit Court Judge Richard J. Sullivan of the Second Circuit. I file in furtherance of the complaint filed on behalf of Mr. Steven Donziger to demonstrate a pattern of Judicial Misconduct and Abuse of Power by Judge Lewis A. Kaplan when considered in conjunction with my complaint of Racial Bias and Deliberate Violation of Constitutional rights where Judge Lewis A. Kaplan ignored federal rule and Googled me (see Draft Petition); realizing that I am a black man, Judge Kaplan ignored the law in "*OSRecovery, Inc., v. One Groupe Int`l, Inc.,* 462 F.3d 87, 90 (2d Cir. 2006)" to pursue me for civil contempt and criminal contempt of court notwithstanding that I was a non-party in the underlying civil case between ICBC (London) PLC and The Blacksands Pacific Group, Inc., at 15-cv-70 (LAK). The Judicial Misconduct and Abuse of Power was also demonstrated by Judge Richard J. Sullivan, where Judge Sullivan deliberately ignored exculpatory evidence which I presented to the Court, in an endeavor to deprive me of

liberty. (See 17-cr-337 (RJS), Dkt. No. 167). This was in addition to Judge Sullivan deliberately causing Constitutional deprivation where he allowed me to be wrongly convicted for conduct which did not satisfy the statute while also depriving me of my Sixth Amendment Constitutional right and ignoring my request to present exculpatory evidence in Government`s possession during trial however was not presented to the Jury for consideration (See 17-cr-337 (RJS), Dkt. No. 236 and Appeal docket No. 20-1414). In summary, both Judge Lewis A. Kaplan and Judge Richard J. Sullivan violated their oath and obligation to protect my Constitutional rights. The complained issues are succinctly detailed within our public campaign websites: www.freerjbrennerman.com and www.freeraheem.com; the rehearing en banc petitions at 18-3546(L), Dkt. No. 190 and 18-1033(L), Dkt. No. 314; and the appended Draft Petition for writ of certiorari from the United States Supreme Court.

Complainant files this compliant pursuant to the Judicial Conduct and Disability Act of 1980. 28 U.S.C. § 351-364. The judicial complaint arises out of Judge Kaplan`s and Judge Sullivan`s handling of litigation in the matters of *ICBC (London) PLC v. The Blacksands Pacific Group, Inc*., 15-cv-70 (LAK); United States v. The Blacksands Pacific Group, Inc., 17-cr-155 (LAK); and *United States v. Brennerman*, 17-cr-337 (RJS) over the past three years. Complainant asks for a special investigating committee based on the charges herein.

The Complainant is aware that the Second Circuit has had occasion to rule on the appeals in both of these matters. Currently Complainant is preparing to file Petitions for writ of Certiorari to the United States Supreme Court concurrently with an Emergency Motion highlighting the deliberate endeavor by both Judge Lewis A. Kaplan and Judge Richard J. Sullivan to deprive Complainant of his Constitutional rights and the Constitutionally impermissible abuse of discretion standard imposed by the United States Court of Appeals for the Second Circuit in its de novo review of the appeals.

The Complaint is supported by an Appendix with supporting exhibits which sets forth the facts referenced in the complaint, including the rehearing en banc motions filed to the United States Court of Appeals for the Second Circuit, the Draft Petitions for writ of certiorari to be filed at the United States Supreme Court and our public outreach campaign websites www.freerjbrennerman.com and www.freeraheem.com. In addition to this complaint, Complainant is also actively engaged in public outreach campaign highlighting the various civil and Constitutional rights deprivations as succinctly presented at www.freeraheem.com and www.freerjbrennerman.com to the media (including national and international cable news networks), civil rights groups and others.

The undersigned declare under penalty of perjury that the statements made in this complaint are true and correct to the best of his knowledge.

Dated: October 20, 2020
White Deer, PA 17887-1000

Respectfully submitted

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

Cc: www.freerjbrennerman.com
Cc: www.freeraheem.com

APPENDIX:
A) Complaint Brief in respect of Judge Lewis A. Kaplan
B) Complaint Brief in respect of Judge Richard J. Sullivan
C) Draft Petition for writ of certiorari (Criminal contempt of Court case)
D) Motion for Rehearing en banc (Criminal contempt of court case)
E) Draft Petition for writ of certiorari (Fraud case)
F) Motion for Rehearing en banc (Fraud case)
G) Complaint Letter submitted in respect of Steven Donziger
H) Brief submitted in respect of Steven Donziger

APPENDIX A

COMPLAINT BRIEF IN RESPECT OF JUDGE LEWIS A. KAPLAN

Judicial Complaint against Judge Lewis A. Kaplan

The undersigned files this complaint pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351-364 against Judge Lewis A. Kaplan of the Southern District of New York for his misconduct in the cases of *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, 15-cv-70 (LAK) and *United States v. The Blacksands Pacific Group, Inc., et. al*., 17-cr-155 (LAK). Complainant alleges Judge Kaplan, in his capacity as the presiding judge over these cases, has violated the Canons of the Code of Conduct for United States Judges, namely Canons 2A, 3 and 3B(3) among others.

The Complainant alleges the statements and actions of Judge Kaplan over the last three years show him to have taken on the role of debt collector for ICBC (London) PLC, a British financial institution and subsidiary of a Chinese financial institution, Industrial and Commercial Bank of China headquartered in Beijing, China, and misused United States Government resources to achieve his objective rather than that of a judge adjudicating a live controversy before him. By these actions, he violated his duty of impartiality and the Court`s obligation to protect Complainant's Constitutional rights under the canons of Judicial conduct. A review of the record shows that throughout this litigation, Judge Kaplan`s rulings have been an "affront" to the law and the administration of justice.

Complainant is mindful that judicial complaints are not a mechanism for challenging the correctness of the merits of substantive or procedural rulings in a case. However, where a judge`s misconduct violates the Canons of the Code of Conduct, such complaints are not merits-based. In these situations there is a duty of officers of the Court to not remain silent or look the other way.

This complaint has been filed over the alarming consequences arising from the deliberate deprivation of Constitutional rights by a judge and the overwhelming racial bias exhibited by the judge.

JUDGE KAPLAN`s IMPROPER RACIAL BIAS, DELIBERATE DEPRIVATION OF CONSTITUTIONAL RIGHTS AND ABUSE OF POWER DURING THE PROCEEDINGS IN THE UNDERLYING CIVIL CASE AND RESULTING CRIMINAL CASE

(See attached Appendix, supporting exhibits and public outreach websites: www.freerjbrennerman.com and www.freeraheem.com)

The Complainant finds that his treatment by Judge Kaplan deserves intense scrutiny. He should be sanctioned for his violations of the Judicial Canons of Conduct. This matter should be addressed by a special investigation committee and/or if Judges of this Circuit believe their prior rulings on appeals would impact their consideration of the complaint, the Court should request the Chief Justice to transfer the complaint.

_____

1 All of the specifics of this complaint are supported in the record and are set forth in the attached Appendix and supporting exhibits as well as at www.freeraheem.com and www.freerjbrennerman.com

2 Canon 2A of the Code of Conduct for United States Judges requires federal judges to show respect for and comply with the law, and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 3 requires that a judge should perform the duties of the office fairly, impartially and diligently, given that the duties of a judicial office take precedence over all other activities. A judge must perform these duties with respect for others, including litigants before her or him, and cannot engage in behavior that is harassing, abusive, prejudiced, or biased. Section 3B(3) of the Code of Conduct for Judges provides that, "A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism."

3 The requirement for judicial impartiality is a requirement worldwide.

4 Commentary to Rule 4 of the Rules for Judicial - Conduct and Judicial-Disability Proceedings gives some examples of non-merits-based rulings. For example, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness -- "the merits" of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merit-related.

APPENDIX B

COMPLAINT BRIEF IN RESPECT OF JUDGE RICHARD J. SULLIVAN

Judicial Complaint against Judge Richard J. Sullivan

The undersigned files this complaint pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351-364 against Judge Richard J. Sullivan of the Second Circuit United States Court of Appeals for his misconduct in the case of *United States v. Brennerman*, 17-cr-337 (RJS). Complainant alleges Judge Sullivan, in his capacity as the presiding judge over the case, has violated the Canons of the Code of Conduct for United States Judges, namely Canons 2A, 3 and 3B(3) among others.

The Complainant alleges the statements and actions of Judge Sullivan over the last three years show him to have taken on the role of debt collector for ICBC (London) PLC and abetting Judge Lewis A. Kaplan rather than that of a judge adjudicating a live controversy before him. By these actions, he has violated his duty of impartiality and the Court`s obligation to protect Complainant's Constitutional rights under the Canons of Judicial Conduct. A review of the record shows that throughout this litigation, Judge Sullivan`s rulings have been an "affront" to the law and the administration of justice.

Complainant is mindful that judicial complaints are not a mechanism for challenging the correctness of the merits of substantive or procedural rulings in a case. However, where a judge`s misconduct violates the Canons of the Code of Conduct, such complaints are not merits-based. In these situations there is a duty of officers of the Court, to not remain silent or look the other way.

This complaint has been filed over the alarming consequences arising from the deliberate deprivation of Constitutional rights by a judge and the overwhelming bias exhibited by the judge.

JUDGE SULLIVAN`s IMPROPER BIAS, DELIBERATE DEPRIVATION OF CONSTITUTIONAL RIGHTS AND ABUSE OF POWER DURING THE PROCEEDINGS IN THE CRIMINAL CASE

(See attached appendix, supporting exhibits and public outreach websites: www. freerjbrennerman.com and www.freeraheem.com)

The Complainant finds that his treatment by Judge Sullivan deserves intense scrutiny. He should be sanctioned for his violations of the Judicial Canons of Conduct. This matter should be addressed by a special investigation committee and or if the Judges of this Circuit believe their prior rulings on appeals would impact their consideration of the complaint, the Court should request the Chief Justice to transfer the complaint.

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1 All of the specifics of this complaint are supported in the record and are set forth in the attached Appendix and supporting exhibits as well as at www.freeraheem.com and www.freerjbrennerman.com.

2 Canon 2A of the Code of Conduct for United States Judges requires federal judges to show respect for and comply with the law, and act at times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 3 requires that a judge should perform the duties of the office fairly, impartially and diligently, given that the duties of judicial office take precedence over all other activities. A judge must perform these duties with respect for others, including litigants before her or him, and cannot engage in behavior that is harassing, abusive, prejudiced, or biased. Section 3B(3) of the Code of Conduct for Judges provides that, "A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism."

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4 Commentary to Rule 4 of the Rules of Judicial-Conduct and Judicial-Disability Proceedings gives some examples of non-merits-based ruling. For example, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness --- "the merits" -- of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related.

APPENDIX C

DRAFT PETITION FOR WRIT OF CERTIORARI
(CRIMINAL CONTEMPT OF COURT CASE)

No. 20-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

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

DRAFT COPY
(PENDING ATTORNEY REVIEW)

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

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IV. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR 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 September 9, 2020.

V. OPINION BELOW

On June 9, 2020, a panel of the Second Circuit affirmed Petitioner`s conviction. *United States v. Brennerman*, -- Fed. Appx. -- No. 18-1033, 2020 WL 3053867 (2d Cir. June 9, 2020) (Summary Order). Mr. Brennerman`s motion for rehearing en banc was denied by an Order of the Second Circuit dated September 9, 2020. *See* 18-1033 Dkt. No. 318.

VI. JURISDICTION

The Court of Appeals' judgment affirming Petitioner`s conviction and sentence was entered on June 9, 2020. *See* 18-1033. Mr. Brennerman`s motion for rehearing en banc was denied on September 9, 2020. *See* 18-1033, Dkt. No. 314; 318. 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 February 9, 2021. The petition is being filed

postmark on or before that date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioner invokes this Court`s jurisdiction under 28 U.S.C.S. 1254(1).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C § 401(3) provides:

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

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. *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. 15-cv-70 (LAK), Dkt. 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.*, 15-cv-70 (LAK), Dkt. No. 1. Based on the loan documents, Judge Kaplan granted ICBC London`s motion for summary judgment against Blacksands. 15-cv-70 (LAK), Dkt. 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* 15-cv-70 (LAK), Dkt. No. 84-2, 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* 15-cv-70 (LAK), Dkt. No. 87.

Subsequently, ICBC London moved for contempt and coercive sanctions against Blacksands. 15-cv-70 (LAK), Dkt. No. 101-103. On October 24, 2016, Judge Kaplan granted ICBC London`s motion holding Blacksands in contempt and imposing coercive sanctions. 15-cv-70 (LAK), Dkt. 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* 15-cv-70 (LAK), Dkt. No. 123 at 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* 15-cv-70 (LAK), Dkt. No. 123 at 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. 15-cv-70 (LAK), Dkt. Nos. 121-123. A contempt hearing was scheduled for December 13, 2016, less than a week later. 15-cv-70 (LAK), Dkt. 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.

15-cv-70 (LAK), Dkt. 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. 15-cv-70 (LAK), Dkt. No. 127-128 (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, 15-cv-70 (LAK), Dkt. No. 134 and found Mr. Brennerman personally in contempt on December 13, 2016. 15-cv-70 (LAK), Dkt. Nos. 139-140. 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. 15-cv-70 (LAK), Dkt. Nos. 139-140.

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, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006) 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).

Judge Kaplan also ignored the federal rule to conduct extra-judicial research into Mr. Brennerman by Googling him. *See* 17-cr-155 (LAK), Dkt. No. 12 (for copy of the May 2, 2017 bail hearing Tr. 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* 17-cr-155 (LAK), Dkt. No. 12-2.

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 (*see* 17-cr-155 (LAK), Dkt. No. 12-2) to advise that an arrest warrant should be issued for Mr. Brennerman. 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* 17-cr-155 (LAK), Dkt. No. 2-4. 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?" *Id.* Dkt. No. 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.

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."

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.* Dkt. No. 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.* Dkt. No. 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* 17-cr-155 (LAK), Dkt. No. 12-3.

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 & 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, 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*, 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 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* 17-cr-155 (LAK), Dkt. 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. They [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.

The Trial and Post-Trial Proceedings

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

Mr. Brennerman was deprived of the very evidence he required to defend himself. Although such evidence (agents of ICBC London requesting

settlement discussion) plainly was relevant to the issue of Mr. Brennerman`s willfulness in failing to comply with the Court`s discovery orders, the District Court refused repeatedly to allow counsel to elicit such evidence on the issue and so the record was devoid of the precise evidence that would have demonstrated the defendant`s lack of intent (*See* 17-cr-155 (LAK), Tr. 269-277; 236-249)

The District Court went a step further and proposed an instruction to the jury that settlement discussions in a civil case did not excuse a defendant`s failure to comply with the court's discovery order absent an order suspending or modifying the requirement to comply (*See* 17-cr-155 (LAK), Tr. 509-510). Defense counsel objected arguing that even if that were technically true, if the parties specifically engaged in settlement discussion with the understanding that discovery would not be pursued, such evidence was certainly relevant to defendant`s intent in not complying with the Court`s order and should have been considered by the jury. The District Court (Judge Kaplan) overruled counsel`s objection and instructed the jury as indicated. (See 17-cr-155 (LAK), Tr. 538-544)

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

The Court of Appeal decision

The Second Circuit found that the district court did not err in its failure to compel ICBC`s production of its entire file because Brennerman did not comply with the rules governing subpoenas under Rule 17(d) of the Federal Rules of Criminal Procedure when he served ICBC`s New York-based attorney, not the ICBC`s London branch. *Id.* at *1. The Court further concluded that, "the prosecution was under no obligation to make efforts to obtain information beyond what it previously collected and turned over to Brennerman." *Id.*

As to the evidence concerning settlement discussions, the Second Circuit found that the district court had allowed Brennerman "to introduce evidence concerning settlement discussions on the condition that he establish his knowledge of the substance of the exhibits and their relationship to the relevant time period..." and that "through cross-examination, Brennerman was able to introduce evidence about the parties' settlement discussions. *Id.* at *2. The Second Circuit found that "the district court did not abuse its discretion in admitting some but not all of this evidence, and Brennerman had failed to point to any specific evidence that would have helped his case had it been submitted." *Id.*

In regard to the admission of the civil contempt order against Brennerman, the Second Circuit found that "the district court correctly determined, the civil contempt orders were relevant to Brennerman`s

willfulness. To minimize any potential prejudicial effect, the district court redacted portions of the orders and instructed the jury on the limited purposes for which it could consider the civil contempt orders in the context of a trial about criminal contempt." *Id*.

The panel denied a motion for rehearing by order dated September 9, 2020. *See* 18-1033, Dkt. No 318.

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 in approving the District Court`s (1) Admission of the civil contempt order against Petitioner; (2) Failure to compel production of certain exculpatory materials; and (3) Preclusion of the admission of evidence pertaining to settlement negotiations, because the issue raised are questions of exceptional importance. This case raise issue of important systemic consequences for the development of the law and administration of justice.

A. Admission of the civil contempt order violated Petitioner`s Constitutional rights where the Court failed to afford him the equal protection guarantee and the prosecution violated his right to due process of law.

In *OSRecovery*, the Second Circuit U.S. Court of Appeals vacated civil contempt adjudicated by Judge Lewis A. Kaplan ("Judge Kaplan") against a party who was not part of the civil case. *OSRecovery, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006). In vacating the contempt order the Court of Appeals stated directly to Judge Kaplan that the Court abused its discretion by holding a non-party in civil contempt propounded against him solely for the purpose of discovery without providing any legal authority or clear explanation for doing so. In 2016, Judge Kaplan ignored the law and held Petitioner, a non-party who was not involved in the underlying case, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, in contempt without providing any legal authority or clear explanation. *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, 15-cv-70 (LAK) (*See* 15-cv-70 (LAK), Dkt. No. 139-140). This time, Judge Kaplan went a step further and referred Petitioner to Manhattan prosecutors to be prosecuted criminally. The prosecution undertook no diligence or investigation prior to initiating criminal contempt charges against Petitioner.

During trial of the criminal contempt of court case, Judge Kaplan permitted the prosecution to present to the jury the civil contempt order erroneously adjudged against Petitioner which was in tension with the law. *See* 17-cr-155 (LAK). Tr. 3-7. Such presentment significantly prejudiced Petitioner, because the judge allowed the presentment of an erroneously adjudged civil contempt order as evidence to the jury (that concluded that

Petitioner must be guilty of criminal contempt), without allowing Petitioner to present the background to the adjudication of the civil contempt order. *See* 17-cr-337 (RJS), Dkt. No. 236, Exhibit 3.

The question of whether the civil contempt order was properly admitted against Petitioner goes beyond a simple analysis of Rules 403 and 404(b) of the Federal Rules of Evidence. Petitioner was a non-party in the civil lawsuit at the time of the order. Because the order was erroneously adjudged against him, its erroneous admission had more serious legal implication above and beyond an abuse of discretion analysis.

The Second Circuit had previously held that "because the power of a district court to impose contempt liability is carefully limited, our review of a contempt order for abuse of discretion is more rigorous than would be the case in other situations in which abuse-of-discretion review is conducted." *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998). "Moreover, we think it is fundamentally unfair to hold [a non-party] in contempt as if he were a party without legal support for treating him, a non-party, as a party but only for the purpose of discovery." *OSRecovery, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006). In *OSRecovery*, the Second Circuit court had found that the district court abused its discretion by holding a person "in contempt as a party without sufficient explanation or citation to legal authority supporting the basis upon which the court relied in treating [him] as a party -

-- for discovery purposes only --- despite the fact that [he] was not actually a party." *Id.* at 93.

Here Judge Lewis A. Kaplan (the same district judge whose contempt order the Second Circuit court found inappropriate in *OSRecovery*) held Petitioner in civil contempt as a non-party and failed to provide any legal authority or present any particular theory for treating him as a party solely for the purpose of discovery. *See ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, 15-cv-70 (LAK) (S.D.N.Y. 2015) at Dkt. No. 139-140. No court orders, subpoenas, or motion to compel were ever directed at Petitioner personally nor was he present during the civil case`s various proceedings.

The erroneous admission of the civil contempt order was more than an evidentiary error. It violated the Second Circuit court`s instructions concerning contempt order against non-parties. On appeal, the Second Circuit affirmed district court`s rulings creating disparity with the Second Circuit`s treatment and review of such order`s and deprived Petitioner his Constitutional right to an equal protection guarantee.

B. Failure to compel production of certain exculpatory materials violated Petitioner`s Sixth Amendment right, where he was deprived of the evidence he required to present a complete defense

Petitioner`s central argument concerning the ICBC production requests is that there existed exculpatory evidence materials that were not provided to him and could not otherwise be compelled due to Rule 17 limitations regarding foreign entities. *See* 17-cr-337 (RJS), Tr. 551-554. The

Second Circuit did not address Petitioner`s argument that, if the government claimed that it had produced all documents in its possession but the omission of the entire file was glaringly obvious, then it follows that the government was aware that relevant information existed and was therefore, withholding material that it could (and should) have obtained, in violation of *Brady*. *See Brady v. Maryland*, 373 U.S. 83 (1963).

Because Petitioner was effectively barred from obtaining relevant evidence, such as the entirety of his communications with ICBC representatives, due to subpoena constraints, he was denied the opportunity to put forth a complete defense.

Because no meaningful inquiry was conducted, either at the district court or before the Second Circuit, concerning the discrepancies between the government`s representations that the production was complete and the obviously incomplete materials produced, the issue of whether *Brady* obligations were flouted by the government remains open. *See Brady v. Maryland*, 373 U.S. 83 (1963). The sanctity of *Brady* obligations cannot be interpreted as anything less than a question of exceptional importance warranting further reconsideration on this point. *See Id*.

C. Preclusion of the admission of evidence pertaining to settlement negotiations (due to failure to permit full settlement negotiation evidence) violated Petitioner`s Constitutional right where he was deprived of evidence he required to present a complete defense

Without the entire ICBC file, Petitioner was precluded from presenting evidence regarding settlement negotiations between Blacksands and ICBC. Petitioner avers that evidence of these negotiations would have convinced the jury that he had not willfully disobeyed any court orders.

Although Petitioner was permitted certain lines of questioning concerning settlement negotiations, the admitted evidence was woefully inadequate to set forth his complete defense. Petitioner was attempting to elicit evidence of settlement discussions with agents of ICBC that, he argued, would have demonstrated that he was not willfully disobeying the district court`s discovery orders but was instead prioritizing settlement with ICBC over Blacksands' discovery obligations. This evidence was not permitted, could not be elicited through cross-examination of witnesses, and was not part of the jury instruction. *See* 17-cr-155 (LAK), Tr. 236-277. Although such evidence was plainly relevant to the issue of Petitioner`s willfulness in failing to comply with the court`s discovery orders, the record was devoid of the precise evidence that would have demonstrated the Petitioner`s lack and intent. The district court exacerbated the harm by instructing the jury that settlement discussions in a civil case did not excuse a defendant`s failure to comply with the court`s discovery order absent an order suspending or modifying the requirements to comply. *See* 17-cr-155 (LAK), Tr. 509-510; 538-544.

The limitation on evidence of settlement negotiations was not merely an evidentiary issues, but rather, a constitutional one which violated Petitioner`s right to present a defense. The violation was compounded by the fact that the district court essentially eviscerated the element of intent in determining whether Petitioner was guilty of criminal contempt. The Second Circuit`s decision failed to address the manner in which the district court`s evidentiary rulings precluded Petitioner`s right to present a complete defense.

The danger of the Second Circuit 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 Court - 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 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

XI. APPENDIX TABLE OF CONTENTS

APPENDIX D

MOTION FOR REHEARING EN BANC
(CRIMINAL CONTEMPT OF COURT CASE)

18-1033(L)

Consolidated with 18-1618

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RAHEEM BRENNERMAN,

Defendant-Appellant,

THE BLACKSANDS PACIFIC GROUP, INC.,

Defendant.

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

PETITION FOR REHEARING *EN BANC* OF DEFENDANT-APPELLANT

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Counsel for Defendant-Appellant

PRELIMINARY STATEMENT

Defendant-Appellant Raheem Brennerman respectfully petitions this Court under Rule 35 of the Federal Rules of Appellate Procedure for rehearing *en banc* of the panel's decision dated June 9, 2020, affirming Brennerman's conviction for criminal contempt. The panel decision on which rehearing *en banc* is requested, *United States v. Brennerman*, ---Fed. Appx.--- No. 18-1033, 2020 WL 3053867 (2d Cir. June 9, 2020) (Summary Order) is attached hereto as Exhibit A.

Brennerman argues that the full Court should rehear the case and examine the panel's decision upholding Brennerman's conviction and approving the district court's 1) admission of a civil contempt order against Brennerman; 2) failure to compel production of certain exculpatory materials; and 3) preclusion of the admission of evidence pertaining to settlement negotiations because the issues raised are questions of exceptional importance. *See Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) (per curiam) (en banc) ("En banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice.").

STATEMENT OF PROCEDURAL HISTORY AND PERTINENT FACTS

Brennerman relies on the statement of facts in the briefing previously filed in this case and incorporates it herein but presents the below facts that are specifically pertinent to the issue of a rehearing.

I. *Blacksands* Lawsuit and Civil Contempt

Brennerman was the CEO and indirect majority shareholder of Blacksands Pacific Group ("Blacksands"), a Delaware-based oil and gas development corporation. In 2015, Blacksands was sued by a London-based bank, ICBC (London) PLC ("ICBC") in connection to a $20

million, 90-day loan agreement entered into between ICBC and Blacksands' subsidiary, Blacksands Alpha Blue, LLC, in 2013. *ICBC London PLC* v. *Blacksands Pacific Group,* 15-CV-70 (LAK) (S.D.N.Y. 2015). ICBC alleged that Blacksands, the loan guarantor, never paid back $5 million withdrawn from the loan. Blacksands had maintained that the loan agreement was just one part of a larger financial arrangement between Alpha Blue and ICBC and that the principal of the loan was supposed to roll over into a 5-year, $70 million revolving credit facility. The district court granted ICBC's motion for summary judgment in lieu of a complaint and a judgment was entered against Blacksands. *ICBC London PLC* v. *Blacksands Pacific Group,* 15-CV-70 (LAK) (S.D.N.Y. 2015) at Dkt. #39.

As part of post-judgment discovery in an effort to locate the company's assets, ICBC served requests and interrogatories on Blacksands on March 24, 2016. Blacksands objected and ICBC filed a motion to compel, which was granted by the district court on August 22, 2016 (the "First Order"). The Order directed Blacksands to comply with all discovery requests within 14 days of the Order. *Id.* at Dkt. #87. Blacksands and ICBC were actively engaged in settlement negotiations at this time, so on September 6, 2016, the deadline of compliance with the First Order, Blacksands' counsel alerted the district court in writing that it had agreed to pay the monetary judgment pending appeal. In anticipation of the payment, ICBC did not immediately seek Blacksands' compliance with the First Order. The district court held two conferences to determine the owed judgment. At the conclusion of the second conference, however, on September 27, 2016, the Court entered an Order (the "Second Order") that Blacksands must either settle or comply with the discovery requests on or before October 3, 2016. It warned that failure to comply might result in the imposition of sanctions as well as civil contempt. *Id.* at Dkt. #92.

The parties failed to reach a settlement and Blacksands failed to comply with the Second Order's discovery request so ICBC filed a motion to hold Blacksands. On October 20, 2016, the district court held Blacksands in civil contempt. The Court did not elect to commence criminal proceedings, but notified the parties that it would refer the matter to the United States Attorney's Office to consider whether to pursue criminal charges against Blacksands as well as Brennerman, the corporation's principal and non-party. ICBC expressed an intention to initiate civil contempt proceedings against Brennerman.

In November 2016, Brennerman and Blacksands provided substantial document production to ICBC. Despite this production, on December 7, 2016, ICBC moved by order to show cause to hold Brennerman in civil contempt. *Id.* at Dkt. #121. On December 13, 2016, a hearing was held outside the presence of Brennerman and counsel, which found Brennerman in civil contempt. *Id.* at Dkt. 139.

II. Criminal Trial of Raheem Brennerman

Subsequently, Brennerman was indicted for criminal contempt in violation of 18 U.S.C. § 401(3). *See United States v. The Blacksands Pacific Group, Inc.,* 17-CR-155 (LAK). In preparation for trial and in support of his defense that he did not willfully disobey court orders but rather was negotiating a settlement with ICBC, Brennerman subpoenaed ICBC for all documents related to Blacksands as well as any communications between ICBC and the Department of Justice. ICBC did not comply. Brennerman filed a motion to compel which was denied on the bases that the subpoena was unenforceable against a foreign bank, ICBC had not been served, and that the documents were already in defendants' possession. The trial commenced on September 6, 2017 and concluded on September 12, 2017, when a jury returned a guilty verdict for two counts of criminal contempt.

III. Appeal of Conviction

Brennerman filed a *pro se* brief with this Court appealing his conviction. Undersigned counsel was appointed to represent Brennerman in connection with the filing of a supplemental reply brief and for oral argument. On May 27, 2020, this Court held telephonic oral argument and on June 9, 2020 issued a summary order denying Brennerman's appeal. *See United States v. Brennerman*, ---Fed. Appx.--- No. 18-1033, 2020 WL 3053867 (2d Cir. June 9, 2020).

This Court found that the district court did not err in its failure to compel ICBC's production of its entire file because Brennerman did not comply with the rules governing subpoenas under Rule 17(d) of the Federal Rules of Criminal Procedure when he served ICBC's New York-based attorney, not the ICBC's London branch. *Id.* at *1. The Court further concluded that, "the prosecution was under no obligation to make efforts to obtain information beyond what it previously collected and turned over to Brennerman." *Id.*

As to the evidence concerning settlement discussions, this Court found that the district court had allowed Brennerman "to introduce evidence concerning settlement discussions on the condition that he establish his knowledge of the substance of the exhibits and their relationship to the relevant time period…" and that "through cross-examination, Brennerman was able to introduce evidence about the parties' settlement discussions." *Id.* at *2. This Court found that "the district court did not abuse its discretion in admitting some but not all of this evidence, and Brennerman has failed to point to any specific evidence that would have helped his case had it been admitted." *Id.*

In regard to the admission of the civil contempt order against Brennerman, this Court found that "the district court correctly determined, the civil contempt orders were relevant to Brennerman's willfulness. To minimize any potential prejudicial effect, the district court

redacted portions of the orders and instructed the jury on the limited purposes for which it could consider the civil contempt orders in the context of a trial about criminal contempt." *Id.*

REASONS FOR GRANTING *EN BANC* RECONSIDERATION

I. Applicable Law

Federal Rule of Appellate Procedure 35(a) provides that an en banc rehearing "will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed.R.App.P. 35(a). "En banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice." *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) (per curiam) (en banc).

II. Discussion

A. Failure to Compel ICBC Production

Brennerman's central argument concerning the ICBC production requests is that there existed exculpatory materials that were not provided to him and could not otherwise be compelled due to Rule 17 limitations regarding foreign entities. This Court did not address Brennerman's arguments that, if the government claimed that it had produced all documents in its possession but the omission of the entire file was glaringly obvious, then it follows that the government was aware that relevant information existed and was, therefore, withholding material that it could (and should) have obtained, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Because Brennerman was effectively barred from obtaining relevant evidence, such as the entirety of his communications with ICBC representatives, due to subpoena constraints, he was denied the opportunity to put forth a complete defense.

Because no meaningful inquiry was conducted, either at the district court or before this Court, concerning the discrepancies between the government's representations that the production was complete and the obviously incomplete materials produced, the issue of whether *Brady* obligations were flouted by the government remains open. The sanctity of *Brady* obligations cannot be interpreted as anything less than a question of exceptional importance warranting rehearing en banc to permit further reconsideration on this point.

B. Failure to Permit Full Settlement Negotiation Evidence

Without the entire ICBC file, Brennerman was precluded from presenting evidence regarding settlement negotiations between Blacksands and ICBC. Brennerman posits that evidence of these negotiations would have convinced the jury that he had not willfully disobeyed any court orders.

Although Brennerman was permitted certain lines of questioning concerning settlement negotiations, the admitted evidence was woefully inadequate to set forth his complete defense. Brennerman was attempting to elicit evidence of settlement discussions with agents of ICBC that, he argued, would have demonstrated that he was not willfully disobeying the district court's discovery orders but was instead prioritizing settlement with ICBC over his discovery obligations. This evidence was not permitted, could not be elicited through cross-examination of witnesses, and was not a part of the jury instructions. *See United States v. The Blacksands Pacific Group, Inc.,* 17-CR-155 (LAK) Tr. 236-277. Although such evidence was plainly relevant to the issue of Brennerman`s willfulness in failing to comply with the court`s discovery orders, the record was devoid of the precise evidence that would have demonstrated the defendant`s lack and intent. The district court exacerbated the harm by instructing the jury that settlement discussions in a civil case did not excuse a defendant`s failure to comply with the

court`s discovery order absent an order suspending or modifying the requirement to comply. Tr. 509-510; 538-544.

The limitation on evidence of settlement negotiations was not merely an evidentiary issue, but rather, a constitutional one which violated Brennerman's right to present a defense. The violation was compounded by the fact that the district court essentially eviscerated the element of intent in determining whether Brennerman was guilty of criminal contempt. The panel's decision failed to address the manner in which the district court's evidentiary rulings precluded Brennerman's right to present a complete defense and rehearing *en banc* is warranted to permit a full examination of this point.

C. Admission of the Civil Contempt Order

The question of whether the civil contempt order was improperly admitted against Brennerman goes beyond a simple analysis of Rules 403 and 404(b) of the Federal Rules of Evidence. Brennerman was a non-party in the civil lawsuit at the time of the order. Because the order was erroneously adjudged against him, its erroneous admission had more serious legal implications, above and beyond an abuse of discretion analysis.

This Court has previously held that "because the power of a district court to impose contempt liability is carefully limited, our review of a contempt order for abuse of discretion is more rigorous than would be the case in other situations in which abuse-of-discretion review is conducted." *Hester Indus., Inc. v. Tyson Foods, Inc.,* 160 F.3d 911, 916 (2d. Cir. 1998). "Moreover, we think it is fundamentally unfair to hold [a non-party] in contempt as if he were a party without sufficient legal support for treating him, a non-party, as a party but only for the purposes of discovery." *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 462 F.3d 87, 94 (2d Cir. 2006). In *OSRecovery,* this Court had found that the district court abused its discretion by

holding a person "in contempt as a party without sufficient explanation or citation to legal authority supporting the bases upon which the court relied in treating [him] as a party—for discovery purposes only—despite the fact that [he] was not actually a party." *Id.* at 93.

Here Judge Lewis A. Kaplan (the same district court judge whose contempt order this Court found inappropriate in *OSRecovery*) held Brennerman in civil contempt as a non-party and failed to provide any legal authority or present any particular theory for treating him as a party solely for the purpose of discovery. *See ICBC London PLC* v. *Blacksands Pacific Group,* 15-CV-70 (LAK) (S.D.N.Y. 2015) at Dkt. #139-140. No court orders, subpoenas, or motions to compel were ever directed at Brennerman personally nor was he present during the civil case's various proceedings.

The erroneous admission of the civil contempt order was more than an evidentiary error. It violated this Court's instructions concerning contempt orders against non-parties. To affirm the district court's rulings would create a disparity with this Court's treatment and review of such orders and would place exceptional burdens on non-parties. Therefore, the Court should rehear the case *en banc* to reconsider this issue.

CONCLUSION

For the foregoing reasons, the Court should grant Brennerman's request for rehearing *en banc*.

Dated: New York, NY
July 17, 2020

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APPENDIX E

DRAFT PETITION FOR WRIT OF CERTIORARI
(FRAUD CASE)

No. 20-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

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

DRAFT COPY
(PENDING ATTORNEY REVIEW)

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

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IV. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR 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 (2d Cir. June 9, 2020). Mr. Brennerman`s motion for rehearing en banc was denied by an Order of the Second Circuit dated July 31, 2020. *See* 18-3546cr Dkt. 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* 18-3546cr Dkt. 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. 15-cv-70 (LAK), Dkt. 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.*, 15-cv-70 (LAK), Dkt. No. 1. Based on the loan documents, Judge Kaplan granted ICBC London`s motion for summary judgment against Blacksands. 15-cv-70 (LAK), Dkt. 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* 15-cv-70 (LAK), Dkt. No. 84-2, 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* 15-cv-70 (LAK), Dkt. No. 87.

Subsequently, ICBC London moved for contempt and coercive sanctions against Blacksands. 15-cv-70 (LAK), Dkt. No. 101-103. On October 24, 2016, Judge Kaplan granted ICBC London`s motion holding Blacksands in contempt and imposing coercive sanctions. 15-cv-70 (LAK), Dkt. 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* 15-cv-70 (LAK), Dkt. No. 123 at 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* 15-cv-70 (LAK), Dkt. No. 123 at 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. 15-cv-70 (LAK), Dkt. Nos. 121-123. A contempt hearing was scheduled for December 13, 2016, less than a week later. 15-cv-70 (LAK), Dkt. 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.

15-cv-70 (LAK), Dkt. 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. 15-cv-70 (LAK), Dkt. No. 127-128 (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, 15-cv-70 (LAK), Dkt. No. 134 and found Mr. Brennerman personally in contempt on December 13, 2016. 15-cv-70 (LAK), Dkt. Nos. 139-140. 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. 15-cv-70 (LAK), Dkt. Nos. 139-140.

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, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006) 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).

Judge Kaplan also ignored the federal rule to conduct extra-judicial research into Mr. Brennerman by Googling him. *See* 17-cr-155 (LAK), Dkt. No. 12 (for copy of the May 2, 2017 bail hearing Tr. 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* 17-cr-155 (LAK), Dkt. No. 12-2.

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 (*see* 17-cr-155 (LAK), Dkt. No. 12-2) to advise that an arrest warrant should be issued for Mr. Brennerman. 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* 17-cr-155 (LAK), Dkt. No. 2-4. 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?" *Id.* Dkt. No. 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.

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."

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.* Dkt. No. 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.* Dkt. No. 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* 17-cr-155 (LAK), Dkt. No. 12-3

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 & 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, 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*, 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 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* 17-cr-155 (LAK), Dkt. 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* 17-cr-337 (RJS), Dkt. Nos. 54, 58-59

The Trial and Post-Trial Proceedings

During trial, following testimony by government sole witness from ICBC London, Julian Madgett (*see* 17-cr-337 (RJS), Tr. 551-554) 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. 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* 17-cr-337 (RJS), DKt. 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* 17-cr-37 (RJS), Tr. 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* 17-cr-337 (RJS), Dkt. 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* 17-cr-337 (RJS), Tr. 384-385); That "this was very preliminary stage of our conversation" (*See* 17-cr-337 (RJS), Tr. 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* 17-cr-337 (RJS), Tr. 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* 17-cr-337 (RJS), Tr. 1060-1061). Testified that FDIC certificate only cover depository accounts and would not cover the Institutional Securities division/subsidiary of Morgan Stanley (*See* 17-cr-337 (RJS), Tr. 1057); That there was no confirmation that Morgan Stanley Smith Barney, LLC was FDIC insured (*see* 17-cr-337 (RJS), Tr. 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* 17-cr-337 (RJS), Tr. 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* 17-cr-337 (RJS), Dkt. No. 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* 17-cr-337 (RJS), Dkt. 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.

United States v. Brennerman, 18-3546, Slip Op. (June 9, 2020) 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.

Id. Slip Op 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.

United States v. Brennerman, 18-3546, Slip Op. 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* 17-cr-337 (RJS), Dkt. 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* 17-cr-337 (RJS), Tr. 387-388; 409) who worked at Morgan Stanley Institutional Securities division (*See* 17-cr-337 (RJS), Tr. 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 17-cr-337 (RJS), Dkt. 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* 17-cr-337 (RJS), Tr. 1059) or Morgan Stanley Institutional Securities division (*See* 17-cr-337 (RJS), Tr. 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* 17-cr-337 (RJS), Tr. 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*, 17-cr-155 (LAK) and in the instant case from which this petition arose (*United States v. Brennerman*, 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 (*See* 17-cr-337 (RJS). Tr. 551-554) 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. 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., 17-cr-155 (LAK), DKt. No. 76; 17-cr-337 (RJS), Dkt. No. 71; 17-cr-337 (RJS), Tr. 551-554; 17-cr-337 (RJS), Tr. 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 v. Whitley*, 514 U.S. 419, 437 (1995) to "learn of any favorable evidence known to the others acting on the government`s behalf in the case, including the police."

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

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 17-cr-337 (RJS), Dkt. No. 71 following testimony by government sole witness from ICBC London, Julian Madgett (*See* 17-cr-337 (RJS), Tr. 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 (*See* 17-cr-337 (RJS). Tr. 617) that the prosecution witness, Julian Madgett had testified that the evidence (ICBC underwriting files) existed with the bank`s file in London, U.K. 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*, 2019 U.S. App. LEXIS 30002 (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 (at 17-cr-337 (RJS), Tr. 551-554) 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. Government had an obligation to collect the evidence after learning of its existence particularly where Petitioner (at 17-cr-337 (RJS), Dkt. no. 71) made request to the Court (for among others) that the Court compel Government to collect the evidence

(ICBC underwriting file). 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.

On appeal, the Second Circuit that recently made decision in "*Scrimo v. Lee*, which stated that "It is a federal law that a criminal defendant has a Constitutional right to present a complete defense" ignored Petitioner`s argument that he was deprived of his Constitutional right to present a complete defense. *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 (*See* 17-cr-337 (RJS),

Tr. 551-554) which clearly highlight government witness, Julian Madgett, confirming that the evidence are extant and with the bank`s file in London, U.K.

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

XI. APPENDIX TABLE OF CONTENTS

APPENDIX F

MOTION FOR REHEARING EN BANC
(FRAUD CASE)

18-3546(L)

Consolidated with 19-497

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RAHEEM BRENNERMAN,

Defendant-Appellant.

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

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

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PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Court upheld Brennerman's conviction and sentence in a Summary Order on June 9, 2020. The Court misapprehended the record with respect to the FDIC-insured status of Morgan Stanley and overlooked Brennerman's argument about the non FDIC-insured personal wealth division (Morgan Stanley Smith Barney, LLC) and the non-FDIC-insured investment division, generalizing that:

> [T]he record did establish that he defrauded Morgan Stanley, an FDIC-insured

> institution, as part of his broader scheme by, among other things, inducing it to issue him a credit card based on false representations about his citizenship, assets, and the nature and worth of his company.

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

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

> It is clear from the indictment that the scheme against ICBC was merely one target of Brennerman's alleged fraud. . . . At trial, the government offered evidence that Morgan Stanley was one of those "other financial institutions." *See* App'x at 608-09 (testimony of Morgan Stanley's Kevin Bonebrake about a January 2013 telephone call with Brennerman discussing financing to develop oil asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *Vebeliunas*, 76 F.3d at 1290.

Id. Slip Op. at 4.

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

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

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

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

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

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

The Court disagreed with Brennerman on the first two points and did not issue a written opinion on the third, writing that,

> The government's discovery and disclosure obligations extend only to information and documents in the government's possession. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (explaining that the *Brady* obligation applies only to evidence "that is known to the prosecutor"). The government

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

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

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

REASONS FOR GRANTING RECONSIDERATION AND REHEARING *EN BANC*

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

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

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

1. Applicable Law

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

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

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

Constructive amendment of an indictment " 'occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them.' " *United States v. LaSpina*, 299 F.3d 165, 181 (2d Cir.2002) (citations omitted). "To prevail on a constructive amendment claim, a defendant must demonstrate that . . . the proof at trial . . . so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *LaSpina*, 299 F.3d at 181 (citations omitted).

2. Discussion

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

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

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

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

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

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

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

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

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

II. The Court Should Grant Rehearing *En Banc* Because the Panel's Decision Conflicts With Settled Law On the Sixth Amendment Rights of A Criminal Defendant to Cross-Examine the Witnesses Against Him and to Present A Complete Defense.

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

A. Applicable Law

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

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

B. Discussion

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

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

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

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

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

CONCLUSION

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

Dated: New York, NY
June 23, 2020

s/ John Meringolo
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APPENDIX G

COMPLAINT LETTER SUBMITTED IN RESPECT OF STEVEN DONZIGER

ASSOCIATION INTERNATIONALE DES JURISTES DÉMOCRATES •ASOCIACIÓN INTERNACIONAL DE JURISTAS DEMÓCRATAS •МЕЖДУНАРОДНАЯ АССОЦИАЦИЯ ЮРИСТОВ-ДЕМОКРАТОВ • تجمع دولي للمحامين الديمقراطيين

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August 31, 2020

Clerk of the Court
United States Court of Appeals
Thurgood Marshall, U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: **Judicial Complaint regarding SDNY District Court Judge Lewis Kaplan**

Dear Clerk:

The undersigned, Jeanne Mirer, President of the International Association of Democratic Lawyers (IADL), and Natasha Lycia Ora Bannan of the National Lawyers Guild (NLG), file this complaint for judicial misconduct against District Court Judge Lewis A. Kaplan of the Southern District of New York. We file along with 37 bar and legal organizations and 205 individual lawyers who have read and endorsed the complaint (hereinafter "Complainants"). Complainants file this complaint pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351-364. The judicial complaint arises out of Judge Kaplan's handling of litigation in the matters of *In re Chevron,* 10-mc-00002 and *Chevron v Donziger et. al.,* 11-cv-0691 over the last ten years.

The Complainants are aware that the Second Circuit has had occasion to rule on many appeals in both these matters. Currently pending before the Circuit is a writ of mandamus, as well as an appeal to orders that are the basis for civil and criminal contempt charges against Mr. Steven Donziger. Complainants ask for a special investigating committee based on the charges herein.

This complaint is supported by an Appendix with supporting exhibits which sets forth the facts referenced in the complaint. The undersigned and the institutions we represent are not counsel for any party in either of the legal actions, nor are we parties. IADL and NLG are bar associations that have been following these cases, along with many Complainants, and both organizations filed an amicus brief in support of the current mandamus petition. Additionally, the undersigned are admitted to practice in the Southern District of New York and the Second Circuit.

INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWY

CHAUSÉE DE HAECHT 55, 1210, BRUXELLES-BRUSSELS BELGIQUE-

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The undersigned declare under penalty of perjury that the statements made in this complaint are true and correct to the best of their knowledge.

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APPENDIX H

BRIEF SUBMITTED
IN RESPECT OF STEVEN DONZIGER

Judicial Complaint against Judge Lewis A. Kaplan

The undersigned file this complaint[1] pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351-364 against Judge Lewis A. Kaplan of the Southern District of New York for his misconduct in the cases of *In re Chevron*, 10-mc-00002 and *Chevron v Donziger et. al*., 11-cv-0691. Complainants allege Judge Kaplan, in his capacity as the presiding judge over these cases, has violated the Canons of the Code of Conduct for United States Judges, namely Canons 2A, 3 and 3B(3).[2]

The Complainants allege the statements and actions of Judge Kaplan over the last ten years show him to have taken on the role of counsel for Chevron in these cases rather than that of a judge adjudicating a live controversy before him. By these actions, he has violated his duty of impartiality under the canons of judicial conduct.[3] A review of the record shows that throughout this litigation, Judge Kaplan's rulings have been in "lock step" with Chevron's interests and requests.

Complainants are mindful that judicial complaints are not a mechanism for challenging the correctness of the merits of substantive or procedural rulings in a case. However, where a judge's misconduct violates the Canons of the Code of Conduct, such complaints are not merits-based. In these situations there is a duty of officers of the Court, not to remain silent or to look the other way.[4]

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[1] All of the specifics of this complaint are supported in the record and are set forth in the attached Appendix and supporting exhibits.

[2] Canon 2A of the Code of Conduct for United States Judges requires federal judges to show respect for and comply with the law, and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 3 requires that a judge should perform the duties of the office fairly, impartially and diligently, given that the duties of judicial office take precedence over all other activities. A judge must perform these duties with respect for others, including litigants before her or him, and cannot engage in behavior that is harassing, abusive, prejudiced, or biased. Section 3B(3) of the Code of Conduct for Judges provides that, "A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism."

[3] The requirement for judicial impartiality is a requirement worldwide.

[4] Commentary to Rule 4 of the Rules for Judicial -Conduct and Judicial-Disability Proceedings gives some examples of non-merits-based ruling. For example, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — "the merits" — of the ruling itself. An allegation that a

This complaint has been filed by lawyers and lawyers organizations worldwide, over their increasing alarm at the punitive lengths to which Judge Kaplan has gone, beyond all bounds of reason, to destroy Steven Donziger both personally and professionally. By extension, he also appears to be blocking access to the remedy for the 30,000 indigenous clients from the Ecuadorian Amazon that Mr. Donziger has represented since 1993. Complainants are very concerned that the persecution of Mr. Donziger by Judge Kaplan and Chevron will have a chilling effect on the work of other human rights lawyers, acting as a warning of the consequences they will suffer should they try to hold major corporations accountable for their human rights violations.

JUDGE KAPLAN'S IMPROPER BIAS DURING THE DISCOVERY LITIGATION AND THE CIVIL RICO ACTION

The case—and now source of this complaint—involves Judge Kaplan's role in facilitating Chevron's efforts to block the enforcement of a judgment obtained and affirmed by three levels of courts in Ecuador, which was adjudicated on a 200,000-page record developed over years of litigation. That case, *Aguinda v ChevronTexaco*, was filed in Ecuador, where both parties agreed to jurisdiction, and where the plaintiffs sought to remedy the contamination from prolonged and pervasive oil pollution by Chevron's predecessor, Texaco, in this region.[5]

Judge Kaplan began to rule over aspects of this case in 2010 in conjunction with Chevron's use of 28 U.S.C. §1782 to hunt for evidence that it could preemptively use to try to discredit the pending Ecuadorian judgment. Chevron believed the judgment would be issued against it in light of the substantial body of evidence developed and preserved in the record before the Ecuadorian court.

Chevron's initial §1782 subpoenas were directed against independent filmmaker, Joseph Berlinger. The subpoenas sought 600 hours of outtakes of the documentary he made called "Crude" which chronicled the oil pollution in the Ecuadorian Amazon by Texaco and the attempts by the people of the region to clean up their environment in the litigation against Chevron. Chevron solicited several other courts to provide other types of evidence, (primarily from expert advisors) by enforcing subpoenas in other

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judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related.

[5] In 1992, prior to the filing of the litigation in Ecuador, litigation was initiated in New York by many of the same plaintiffs. The case was known as *Aguinda et. al. v. Texaco. Aguinda* was dismissed after many years based on *forum non conveniens.* The plaintiffs then sought relief in their own courts with the assistance of Mr. Donziger who had been part of the case from the outset. Chevron acquired Texaco in 2001 prior to the time the Ecuadorian litigation began.

jurisdictions, but no judge other than Judge Kaplan agreed to try to undermine the judicial process in Ecuador, violating principles of comity. After granting Chevron *carte blanche* to all of the outtakes, Judge Kaplan granted Chevron access to all records in Mr. Donziger's possession in the underlying case, including many documents which should have been protected by attorney-client privilege.

Throughout the proceedings, Judge Kaplan's intense bias and personal hostility towards Mr. Donziger, and the case he and his Ecuadorian legal team brought against Chevron, has been palpable. Some of Judge Kaplan's most overt and biased statements in favor of Chevron's positions, not otherwise referenced in this complaint, include:

- Suggesting to Chevron that they could bring a RICO action against Mr. Donziger. Judge Kaplan thereby directly provided litigation strategy to a party in a controversy before him and Chevron subsequently filed a RICO action;
- Making disparaging remarks about the Ecuadorian judiciary and its professionalism and capacity to handle litigation involving a foreign corporation, thus endorsing Chevron's position, and violating comity instead of remaining impartial;
- Making statements suggesting that former Ecuadorian President Rafael Correa was a problem for Chevron as his government was not friendly to private oil interests, thus endorsing Chevron's position, and opining on direct political matters of a foreign country in violation of separation of powers;
- Granting every one of Chevron's invasive discovery requests, including depositions of family members and associates of Mr. Donziger aimed not at collecting the judgment against him, (see *infra)* but seeking information on Mr. Donziger's efforts to secure enforcement of the Ecuadorian judgment outside the United States;
- Appointing a former colleague, Max Gitter, to act as Special Master to oversee discovery, including depositions where Mr. Gitter took on the role of counsel for Chevron in interrogating Mr. Donziger, thus creating the appearance of favoritism and bias as Mr. Gitter effectively acted as counsel to Chevron;
- Requiring Mr. Donziger to pay 50% of the costs of the special masters over his and his clients' objections;
- Expressing open sympathy and preference for Chevron as a global economic actor and making disparaging remarks about Mr. Donziger and his clients;
- Ignoring evidence placed before the Court of Chevron's efforts to bribe a former judge as well as Chevron's fraudulent claim its own oil testing laboratories were independent labs.

After the trial[6] in the RICO case Judge Kaplan issued a 500-page opinion in *Chevron v Donziger*, predictably finding against Mr. Donziger and the other defendants and holding that Mr. Donziger and his Ecuadorian co-counsel had bribed the issuing judge in Ecuador, Judge Zambrano. This purported bribe was to allow the Ecuadorian plaintiffs to "ghostwrite" the judgment favorable to them. Despite Mr. Donziger and the other Ecuadorian plaintiffs' vehement denials of any bribe, Judge Kaplan ruled this alleged bribe rendered the judgment invalid. This finding was nearly exclusively based on the testimony of a former disgraced judge, Judge Guerra, who at trial admitted he told multiple inconsistent versions of his story to Chevron before settling on the one he told at trial (and who later admitted to lying in the RICO trial itself). Judge Kaplan never reconsidered his views once knowing his judgment was based on perjured testimony. Further Judge Kaplan never considered any of the evidence in the record in Ecuador that was built over a many years, and never considered whether the record supported the Ecuadorian judgment.[7]

After the Second Circuit predictably did not reverse the findings of fact in Judge Kaplan's 500-page opinion as "clearly erroneous," thus affirming the decision, Judge Kaplan imposed costs of over $800,000 on Mr. Donziger. More than 90% of these costs were the allocated costs for the Special Masters he and his clients had objected to. Lacking the funds to pay such exorbitant and unnecessary costs, Judge Kaplan issued a default judgment against him. Following this judgment Chevron initiated post-judgment discovery against Mr. Donziger not just to find funds to pay the default judgment but on the theory that he was in civil contempt of Judge Kaplan's RICO Injunction because he continued to help his Ecuadorian clients secure funds needed to enforce the judgment against Chevron in other countries.[8] Although Mr. Donziger had followed what Judge Kaplan on the record allowed him to do,[9] Judge Kaplan changed his position and suddenly denied that his ruling allowed Mr. Donziger to raise funds to enforce the judgment in other countries. This change in position set Mr. Donziger up for contempt charges.

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[6] The RICO trial became a bench, rather than a jury trial after Chevron a few weeks before the start of the trial withdrew its claim for damages, seeking only equitable relief. Judge Kaplan denied Donziger a trial by jury over his objection using Chevron's withdrawal of a claim for damages as an excuse.

[7] The Ecuadorian courts found the evidence supported the verdict.

[8] By the time litigation was started in Ecuador Texaco had taken all of its assets out to Ecuador.

[9] *See* 11-cv-691 Dkt. 1901 (post-injunction decision by Judge Kaplan describing how the injunction does "not prevent Donziger from being paid, just as he has been paid Nothing in the [RICO Injunction] prevents Donziger from continuing to work on the Lago Agrio case. Period.").

JUDGE KAPLAN INITIATES CIVIL AND CRIMINAL CONTEMPT CHARGES

This change in positions by Judge Kaplan resulted in the extreme, biased and draconian decision to issue first civil and then criminal contempt charges against Mr. Donziger in 2019. Specifically, Chevron sought all of Mr. Donziger's electronic devices to seek every communication he has had, regardless of the nature of the communication or whether the communications were privileged in order to find out what Mr. Donziger was doing to raise funds. Mr. Donziger has resisted this unprecedented and disproportionate discovery, including appealing Judge Kaplan's orders to this Circuit and expressing his willingness to be bound by this ruling. However, Judge Kaplan held Mr. Donziger in civil contempt imposing onerous fines. The criminal contempt case is based on the same order for his devices which is the basis of the civil contempt charges.

In light of Judge Kaplan's criminal contempt charges against Mr. Donziger, this complaint has special urgency. August 6, 2020 was the one-year mark of Mr. Donziger's house arrest. These charges are an extension of Judge Kaplan's personal vendetta against Mr. Donziger. Indeed the instant phase of the litigation is riven with more extreme bias. Despite this being a contempt case, Judg Kaplan never recused himself. He also refuses to relinquish control of the civil case. The actions in violation of the Canons of the Code of Conduct for United States Judges are as follows:

- Invoking Rule 42 under the Federal Rules of Criminal Procedure to appoint a private prosecutor when the U.S. Attorney for the Southern District of New York declined Judge Kaplan's request to prosecute Donziger, and subsequent appointment of a private firm to prosecute Mr. Donziger; (see reference *supra*)
- Hand-picking a favored colleague, Judge Preska to adjudicate the criminal contempt case by-passing the random selection process in a criminal case required by the court's internal rules;
- Hand selecting prosecutors from the law firm Seward & Kissel who he knew or should have known had a conflict of interest due to their firm's representation as late as 2018 of the Chevron Corporation and because a significant portion of the firm's business comes from the oil and gas industry. He also failed to disqualify the firm when he was made aware.

Mr. Donziger has filed a writ of mandamus regarding the criminal contempt proceeding. The Complainants find the treatment of Mr. Donziger and his clients by Judge Kaplan deserves intense scrutiny. He should be sanctioned for his violations of the Judicial Canons of Conduct. This matter should be addressed by a special investigation committee and/or if the Judges of this Circuit believe their prior rulings on appeals would impact their consideration of the complaint, the Court should request the Chief Justice to transfer the complaint.

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