# No. _____

IN THE

# Supreme Court of the United States

FRANCISCO ILLARRAMENDI,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION

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

Francisco Illarramendi, Pro Se
Inmate No. 20402-014
Federal Correctional Institution Fairton Camp
P.O. Box 420
Fairton, NJ 08320

# QUESTIONS PRESENTED

The following questions are presented for the Court's review:

1. Can Article III Standing be denied to a Defendant in a civil proceeding who objects to District Court Rulings that directly affect the Defendant's constitutional property and liberty interests both via the civil proceeding itself and through a parallel, and inextricably intertwined criminal proceeding?

2. Can a District Court deny a Defendant in a civil proceeding the right to access and scrutiny of the evidence being used to erroneously justify civil and criminal monetary judgments and penalties against said Defendant as well as enhance the Defendant's sentence of incarceration in a parallel, inextricably intertwined criminal proceeding?

3. Can courts ignore Circuit and Supreme Court precedents as well as the provisions of Fed. R. of Civ. P. 60, while perpetuating a manifest injustice to a Defendant's constitutional rights by granting validity to Receivership claims which violate the principles of Unclean Hands and *In Pari Delicto*, and also United States Government policy towards one of the claimants?

4. Can courts rely on purposely misleading interpretations of fact - or on outright lies made by a plaintiff or a third party - to deny a Defendant standing based on procedural issues?

5. Do Courts have an inherent duty to follow doctrine of this Court that has affirmed the Statute of Limitations boundaries on relief sought in civil actions by the Securities and Exchange Commission?

# LIST OF KEY PARTIES

Francisco Illarramendi – Pro Se Defendant, Appellant and Petitioner at the various corresponding court levels.

Securities and Exchange Commission ("SEC" or the "Plaintiff" or the "Commission") – Plaintiff in the District Court Case and at he Circuit Court level.

Receiver, (the "Receiver"): Includes Mr. John Carney, Court-appointed Receiver in the District Court Case, as well as members of his team. Because this Petition refers to an Interlocutory Ruling of the District Court pursuant to a Motion by the Receiver, the Receiver is the Appellee in the Circuit Court proceedings.

Petroleos de Venezuela, S.A. ("PDVSA") – Oil Company, owned 100% by the Bolivarian Republic of Venezuela ("Venezuela"). As the entity is fully owned and financially consolidated with Venezuela and its officials act in concert with Venezuela's Government Officials, the term is taken to mean either/or, or both together.

[X] All parties to the proceeding do not appear in the caption of the case on the cover page. Apart from those listed above, a list of all parties to the proceeding in the District Court is as follows:

Highview Point Partners, LLC and Michael Kenwood Capital Management, LLC, Defendants

Highview Point Master Fun

Highview Point Master Fund, Ltd., Highview Point Offshore, Ltd., Highview Point LP, Michael Kenwood Asset Management, LLC, MK Energy and Infrastructure, LLC, and MKEI Solar, LP, Relief Defendants.

# TABLE OF CONTENTS



# INDEX TO APPENDICES

# TABLE OF AUTHORITIES

The following authorities are cited in full the first time they appear in the text of this Petition and then subsequently listed by the designation given herein in *Italics*. This list is organized alphabetically according to the *Italics* designation. The pages of this Petition in which reference is made to each case are in [brackets].

Spencer v. Kemna, 523 U.S. 1, 7, 140 L. Ed. 2d 43, 118 S. Ct. 978 – 1998, "*Spencer*" [21]

Spokeo, Inc. v. Robins, 578 U.S.___, ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016); - "*Spokeo*" [16].

Strickland v. Washington, 466 US 668, 802 L. Ed. 2d 674, 104 S. Ct. 2052 – 1984, "*Strickland*" [ix]

U.S. v. Yeung, 672 F. 3d 594, 602, 9th Cir. 2012 - "*Yeung*" [29]

# REFERENCED CASES AT THE DISTRICT AND APPELLATE LEVELS

The decision pertaining to this Petition is an Affirmation of an Interlocutory Order of the District Court for the District of Connecticut. The cases in which the Interlocutory Order and the Affirmation were issued are as follows:

SEC v. Illarramendi et al. – United States Court of Appeals for the Second Circuit, Docket No. 17-53 (the "Circuit Court proceeding").

SEC v. Illarramendi et al. – Case No. 3:11-cv-00078-JBA in the United States District Court for the District of Connecticut (the "District Court case").

In addition to the proceedings listed above, the Court should take notice of the following inextricably intertwined Criminal Matter and Habeas Proceedings as they are directly related to the above cases:

U.S. v. Illarramendi – Case Docket No. 3:11-cr-00041 (SRU) in the District Court for the District of Connecticut (the "Criminal Matter")

U.S. v. Illarramendi – Case Docket No. 3:16-cv-01853 (SRU) – Proceeding related to the Criminal Matter to Vacate the Judgement of Conviction under 28 U.S.C. 2255 due to the Violation of my Constitutional Rights pursuant to Luis v. United States, 578 U.S. No.14-419 – 2016, and Strickland v. Washington, 466 US 668, 802 L. Ed. 2d 674, 104 S. Ct. 2052 – 1984 (the "Habeas Petition")

# OPINIONS BELOW AND JURISDICTION

Francisco Illarramendi, acting Pro Se, respectfully submits this Petition for a Writ of Certiorari to review the Summary Order (the "Order") of the United States Court of Appeals for the Second Circuit which affirmed the District Court Ruling (the "Ruling") described below. The Order of the Second Circuit was issued on November 15th; 2017 and is attached herein as Appendix A. I petitioned the Second Circuit Court for a Rehearing *en banc*. The Second Circuit Court denied my petition for rehearing *en banc* on January 12, 2018. A copy of the Order denying my petition for rehearing *en banc* is attached herein as Appendix C. The District Court's Interlocutory Ruling which gives rise to this Petition was issued on December 9, 2016. The Ruling is attached herein as Appendix B. Throughout this document, both the Circuit Court Summary Order and the District Court Ruling will be jointly defined as the "Opinions Below."

I am an inmate confined to FCI Fairton Camp. Fairton Camp's legal library is limited to a version of LEXIS which is only updated every 6 to 12 months and it does not necessarily contain all published documents. As far as I can ascertain, neither of the Opinions Below have been published.

The jurisdiction of this Court is invoked herein under 28 U.S.C. 1254(1).

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Article III, Section 2, Clause 1 of the U.S. Constitution** states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects

**Federal Rule of Civil Procedure 60 – Relief from a Judgment or Order**, in its applicable portions, provides:

(b): **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (wether previously called intrinsic or extrinsic), misrepresentation or misconduct by an opposing party;

(4) The judgment is void;

(5) The judgement has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) Any other reason that justifies relief.

(c) .**Timing and Effect of Motion.**

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2) and (3) no more than a year after entry of the judgment or order ot the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect thejudgment's finality or suspend its operation.

(d) **Other Powers to Grant Relief** This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C.1655 to a defendant who was not personally notified or the action; or

(3) set aside a judgment for fraud on the court.

**Federal Rule of Evidence 1101. Applicability of the Rules**, in its pertinent parts indicates:

(a) **To Courts and Judges. These rules apply to proceedings before:** United States district courts; United states bankruptcy and magistrate judges; United States courts of appeals; the United States Court of Federal Claims; and the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) **To Cases and Proceedings.** These rules apply in: civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; criminal case and proceedings, and contempt proceedings, except those in which the court may act summarily.

(c) **Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.

(d) **Exceptions.** These rules – except for those on privilege – do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) Grand-jury proceedings; and

(3) Miscellaneous proceedings such as: extradition or rendition; issuing and arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise.

**Federal Rule of Evidence 301. Presumptions in Civil Cases Generally**, states:

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

**28 U.S.C. 2462** establishes that:

A 5-year limitations period applies for an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture.

**Other statutes and rules that merit consideration** in this Petition include:

- United States Constitution VI$^{th}$ and XIV$^{th}$ Amendments
- 18 U.S.C. 1951(a) & 1951(b)(2) – Hobbs Act
- 18 USC 3663$^{a}$ – Mandatory Victims Restitution Act ("MVRA")
- Federal Rules of Civil Procedure 24

# STATEMENT OF THE CASE

The following statements and facts related to the District Court case and the inextricably intertwined cases, most importantly the Criminal Matter and the Habeas Petition, are undisputed in some cases and subject to interpretation in others. To the best of my knowledge, all of the facts and statements contained herein are true and correct.

The District Court case essentially stems from the business activities carried out during the period from Mid-2005 to Late-2010 (the "Relevant Period") at companies which now form part of the so-called Michael Kenwood Receivership (the "Receivership"). During the Relevant Period I was either a partial partner/owner or majority partner/owner in most of the Receivership Companies.

In or around January 2011, the Plaintiff, Securities and Exchange Commission ("SEC") filed a lawsuit against me as Defendant, and several of the companies in the Receivership as Relief Defendants, alleging, among other issues, various violations of securities laws. As part of its lawsuit, the SEC obtained from the District Court the appointment of the Receiver, and the imposition of a Temporary Restraining Order ("TRO"). The TRO encompassed all of my assets; including a large portion which were unequivocally untainted. As described in other parts of the judicial record, this TRO generated a Structural, Constitutional error as defined by this Court in Luis v. United States, 578 U.S. No.14-419 – 2016,

because it denied my Sixth Amendment right to retain counsel of my choice to represent me in the inextricably intertwined Criminal Matter. I have filed a Habeas Petition to request the reversal of my conviction and sentence before the District Court for the District of Connecticut which presided over the Criminal Matter. A decision by that Court is currently pending. However, because the error alleged in this matter is a structural, Constitutional error as defined in *Luis*, it requires reversal ab initio of all related proceedings and material orders of the courts. In this context, as applicable herein, it is my contention that the District Court and the Circuit Court have erroneously relied on collateral estoppel from my plea of guilt in the Criminal Matter, as well as on since-recanted, invalid testimony, to erroneously justify their decision to deny the fact that I have Article III Standing in this matter.

On June 11, 2013, approximately two years after his appointment, the Receiver submitted a Motion to Establish Claim Administration Procedures (District Court case Doc. 709). In response, I filed a Motion for Inclusion of Qualifying and Clarifying Considerations regarding that motion (District Court case Doc. 748), which, in my understanding, the Court never ruled on. The Court then granted the Receiver's Motion on December 6, 2013 (District Court case Doc. 800), effectively approving the Receiver's proposed Net Investment Method ("NIM") for claim valuations. Under the NIM, claims must be calculated and

presented by netting from the gross amount contributed, any distributions received, "***whether those distributions are characterized as payments, capital gains, interest, profit-sharing or otherwise***" (District Court case, Doc. 800). On February 21, 2014, I filed a Motion for a Stay of Execution of any Claim Distributions (District Court case Doc. 857), which was denied by Judge Arterton on March 27, 2014, under the premise that it was extemporaneous and that I would have a chance to object to distributions in the future. On October 16, 2014, the Receiver filed his Motion for Approval of the Distribution Plan (District Court case Doc. 905) and I filed an opposition via a Motion for Extension of Time to File a Response (District Court case Doc. 909). My filing was denied by the Court; who erroneously stated that I did not have Article III Standing to object. Due to my pre-sentencing conditions of incarceration at the time in the Bridgeport Correctional Center, a county facility in Connecticut-without a federal legal library – and the fact I was acting Pro Se and have no legal training – I was effectively foreclosed from participating in the case, despite being the Defendant. Moreover, at the time, I was not being served the Orders of the Court at my place of incarceration and was not aware of my rights to appeal any of the decisions or how to proceed on an appeal as a Pro Se litigant. As an incarcerated, Pro Se Defendant, I was not allowed to attend the hearing at which the Distribution Plan was discussed and thus the Distribution Plan was approved by Judge Arterton despite

my opposition and **without any scrutiny of the evidence underlying the same**. Therefore, I was a Defendant in a civil action, in which there had been no trial or trial-like proceedings, and no evidentiary scrutiny, who was effectively unrepresented at a key portion of the litigation which directly affected my personal and constitutional rights. This approval of the Plan of Distribution implicitly gave credence to the Receiver's unilateral and unscrutinized valuation of the claims presented against the Receivership Companies, most particularly an invalid, fraudulent and overvalued claim by PDVSA.

In parallel to this process, due to representation by counsel who was not of my choice, as described above, I entered what is a structurally-defective guilty plea in the Criminal Matter. Pursuant to that structurally-defective plea, I was sentenced by Judge Underhill, on January 29, 2015, to a period of incarceration of 156 months. Subsequently, Judge Underhill issued a Restitution Order for approximately $370 million. As described more fully in this Petition, the length of my sentence was largely the result of a Loss Enhancement which added more than 11 years to the indicative guidelines range. The Loss Enhancement derives strictly from the Receiver's unilateral determination of claims against the Receivership and was presented as a summary list by way of an expert affidavit. The evidence underlying the affidavit was never scrutinized despite my numerous request that it be fairly reviewed by the Court. The Court did admit that the calculation of loss

was difficult in the case and so it used the Receiver's determination of my alleged, also unscrutinized Gain amount to enhance my sentence. This, in and of itself, was a violation of the sentencing guidelines because the Court can only use Gain as a measure for enhancement if there is a loss. In this case, if any court had examined the evidence it would have been unequivocally clear that there is no loss, and thus no applicability of the enhancement. The Opinions Below are based in part on the determination that because the sentencing judge used gain instead of outright loss, the valuation of the claims by the Receiver are irrelevant, and thus I should not be granted Article III Standing to object to them. However, as described herein, this determination by the Court is simply wrong. The Receiver's claim determination has been used by the courts to assume there is a loss and it is the only reason the Court felt entitled to use gain for sentencing purposes. If, as my objections and the evidence show, the Receiver's determination of the PDVSA claim is erroneous, and the claim is invalid, then there is no loss and therefore no enhancement can be imposed by the Court. The difference, as I highlight below, is that my maximum sentence under the guidelines would have been 24 months. Instead, I was sentenced to 13 years of incarceration, eleven more than warranted under the applicable guideline range if my objections in this case were taken into account. Furthermore, the Restitution Order in the Criminal Matter is geared exclusively, for all intents and purposes, to pay the fraudulent, invalid and overvalued claim

submitted by PDVSA. There was no evidentiary hearing at Sentencing or for Restitution. Judge Underhill relied, for both determinations, almost exclusively, on the affidavit from the Receiver. In turn the Receiver's affidavit was based on the same unscrutinized documentation that was used to produce the Plan of Distribution. To date therefore, all evidence, in all proceedings, has remained unscrutinized.

In 2016, the SEC filed a briefing schedule to complete litigation of the District Court case. As part of the briefing schedule, the SEC eventually filed a Motion for Summary Judgement ("MSJ") against me. Judge Arterton granted Summary Judgment to the Plaintiff and I appealed that decision to the Second Circuit Court of Appeals (Docket No. 17-1506(L), 1893 & 2551(C)). A decision in that proceeding is pending.

Prior to the Plaintiff's MSJ, the Receiver filed his Motion for Approval of the Third Subsequent Distribution under the Plan. The Distribution is, as the Rulings and record reflect, exclusively to pay a portion of the fraudulent, invalid and overvalued claim by PDVSA. Although all my previous oppositions and requests to stay Distributions had been denied, I filed a timely opposition. Judge Arterton then issued the Ruling and I appealed the Ruling. The Circuit Court affirmed the Ruling in November of 2017. I petitioned the Court for a Rehearing

*En Banc* which was denied on January 12, 2018. This Petition for a Writ of Certiorari follows.

The facts described and statements made herein are based on my recollection and belief. Because of my conditions of incarceration, I do not have full and unfettered access to the judicial record or to most of the evidentiary materials that support the facts espoused; therefore, I cannot always cite documents directly. In particular, various facts mentioned are supported by specific testimony or citations in hearings and filings of the District Court case and the related cases described earlier. If this Court feels it requires specific documentary proof to support this Petition, I would respectfully request that it provides me with an unrestricted avenue to gather the evidence and present it via supplemental filings or at oral arguments.

In some cases, particularly given the different viewpoint which the SEC or Receiver may express in their version of events, it may appear that facts stated in this Petition conflict with my Guilty Plea – including its Stipulation of Conduct -, or with my "***solemn declarations in open court carrying a strong presumption of verity,***" – Gonzalez v. U.S. 722 F. 3d 118; 2nd Cir. 2013, quoting Blackledge v. Allison, 431, US 63,74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 – 1997. In this regard, I hereby certify, pursuant to 18 USC 1746, under penalty of perjury, that any discrepancies are due to my ignorance or misunderstanding of pertinent facts,

statues and/or jurisprudence at the time those stipulations or statements were made. In particular, this applies to any prior admission of potential losses to any Claimant or the erroneous contention which has permeated this case regarding its status as a "Ponzi Scheme" or the "Largest Ponzi Scheme in Connecticut History." The evidence and facts of the case, which remain unscrutinized, prove the profitability of the Receivership for all valid Claimants and the fact that there is no loss to any party, and no intent on my part to purposely and freely defraud any valid Claimant or to incur in any type of Ponzi or other scheme to defraud.

I would respectfully request that this Court reflect *de novo* on these facts of the case and avoid being swayed, *a priori*, by the various misrepresentations that are presently disseminated throughout the judicial record. In all cases, these misrepresentations are mainly due to the fact that I have never, heretofore, had a full and fair opportunity to defend myself.

An important point to highlight with regard to the foregoing is that the SEC and the Receiver unequivocally agree that the alleged wrongdoing that gives rise to the SEC's Complaint stem from actions that took place as far back as mid-2005. However, the SEC's Complaint was not filed until almost six years later, in January 2011, therefore making the Complaint inapplicable because it was filed after expiration of the 5-year Statute of Limitations period as defined by this Court in Gabelli v. S.E.C., 568 US 442 454 133 S. Ct. 1216, 185 L. Ed. 2d 297 and

Kokesh v. S.E.C., 137 S. Ct. 1635; 198 L. Ed. 2d 86; 2017 U.S. LEXIS 3557. This violation of the Statute of Limitations period itself merits vacating the Opinions Below and forcing the full dismissal of all extemporaneous proceedings. Both Gabelli and Kokesh are unanimous decisions of this Court and indicate that the Statute of Limitations provides for a five-year maximum time following the first act investigated by a Government agency such as the SEC. As the SEC and the Receiver have widely recognized on the record, that first act took place in mid-2005, more than 5 years before the filing of the SEC Complaint that gave rise to the District Court case. As I have indicated in numerous filings, the SEC Complaint was invalid when filed and the District Court should have dismissed it outright. Failure to do so was a direct violation of this Court's unanimous precedents.

## REASONS FOR GRANTING THE PETITION

The reasons why this Court should grant Certiorari to review and answer the questions presented can be summarized as follows:

1. The Opinions Below improperly deny a Defendant, such as me, Article III Standing to object to orders and decisions in a civil case against him which threaten his Constitutional rights. This this is contrary to applicable jurisprudence of this Court and should not be allowed to stand

because it sets a dangerous precedent against the rights of all defendants in civil proceedings.

2. The Opinions Below are wrong as a matter of fact and law, and they violate: i) the applicability of the Federal Rules of Evidence to all civil cases; ii) the mandates of Fed. R. of Civ. P. 60; iii) various Circuit and District Court governing precedents; and, iv) current policy of the United States Government. This Court should not allow lower courts to whimsically distort the facts of the case and to choose which statutes or rules of law they will follow, particularly when its choices directly threaten a defendant's Constitutional rights.

3. More particularly, the Opinions Below perpetuate a Manifest Injustice by ignoring this Court's unanimous decisions that have defined the applicability of the Statute of Limitations to civil actions brought by a Government agency such as the SEC. This Court should grant Certiorari to correct the errors of the lower courts and instruct them regarding the proper way to calculate time with respect to the Statute of Limitations. The courts below have improperly calculated the statutory period allowed to the SEC for filing its complaint. If this Court does not set the record straight on this matter, future defendants will be subject to the same violation of the statute of limitations.

**Denial of Article III Standing to a Defendant in a Civil Case is a violation of Constitutional Rights**

The Opinions Below erroneously deny me Article III standing to object to the Receiver's proposed Plan of Distribution and the distributions under the same. By denying me Article III Standing, the lower courts have violated the most basic principles of this Court that govern a party's right within the context of a case or controversy. More emphatically, they take those rights away from an indigent defendant in a matter which directly affects his liberty and property interests.

Numerous times, this Court has set out parameters which define the requirements for Plaintiff's to have Article III Standing to bring a case or controversy in the Federal and State courts. The key cases which have defined the parameters of Article III standing include Camreta v. Greene, 563 U.S. 692, 701, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 – 2011, which stated that in order to prove Standing, a party must have a "***personal stake through a continuous interest in the dispute***;" and Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386, 188 L. Ed. 2d 392 – 2014 (citing Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 118 L. Ed. 2d 351 – 1992) which required that a party must show that (i) "***he has suffered or is imminently threatened with a concrete and particularized 'injury in fact';***" (ii) that is "***fairly traceable to the challenged action***"; and, (iii) that is "***likely to be redressed by a favorable judicial decision.***"

More recently, in Town of Chester, New York v. Laroe Estates, Inc. 581 US, 137 S Ct, 198 L Ed 2d 64, 2017 US LEXIS 3555, this Court defined that a litigant seeking to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) had to meet the requirements of Article III Standing. In *Laroe*, this Court cited various precedents to affirm that "***standing to sue is a doctrine rooted in the traditional understanding of a case or controversy***" – Spokeo, Inc. v. Robins, 578 U.S.___, ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016); and clarified that its "***standing doctrine accomplishes this by requiring plaintiffs to 'alleg[e] such a personal stake in the outcome of the controversy as to....justify [the] exercise of the court's remedial powers on [their] behalf***" – Internal quotation marks from Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38, 96 S. Ct. 1917, 48 L. Ed 2d 450 (1976).

The case law quoted thus far, however, is focused on the standing of either a Plaintiff or a third-party intervenor to bring a claim or dispute in a case or controversy before the Courts. My legal research, perhaps due to the limits imposed by incarceration and my lack of legal training, has not been able to identify specific jurisprudence in which the Article III Standing of a Defendant in a case or controversy has either been disputed or has required affirmation by this Court. It seems clear that a defendant in a case or controversy brought against him has inherent Article III Standing to litigate all pertinent issues because they directly

affect him or her personally in a way which complies with all the principles espoused in the jurisprudence cited above.

This Court should take the opportunity to ensure that a Defendant cannot be denied Article III Standing to defend himself in actions brought against him by the Government or third parties. Failure to affirm this inherent right of defendants will give lower courts free rein to pick and choose which rights the Defendant is entitled to rather than follow the Constitution. In this particular case, it is also of particular importance for this Court to reaffirm the Article III Standing of all defendants in civil matters because, as I describe herein, the civil proceeding in which the District Court Ruling was issued is inextricably intertwined with the Criminal Matter; and the erroneous decisions of the District Court in the civil case were used by the Court in the Criminal Matter to justify its sentence of incarceration and order of restitution.

The Plaintiff and the Receiver, as well as the lower courts have repeatedly asserted that I have no standing to object to the distributions because they supposedly do not affect me personally, but this is simply wrong. The determination of validity of claims under the Plan of Distribution, and particularly the distributions with respect to the PDVSA Claim both directly and indirectly, threaten my liberty and property interests as protected under the Fourteenth Amendment to the United States Constitution.

Based on the facts of the District Court case and the related proceedings, the judicial and public records, and the likely possibility that my Habeas Petition (see description in the **Statement of the Case** section above) be granted due to the structural nature of the error contemplated therein, I comply with all of the conditions derived from the *Camreta* and the *Lexmark/Lujan* precedents. These reasons include, but are not limited to:

a. I Have a Continuing Interest in the Dispute that Is Likely to be Redressed by a Favorable Result: The Rulings erroneously deny me standing by stating that "*the Receiver notes that because the Defendant's own funds are separately held in escrow, they will not be affected by the proposed distribution;*" and that "*[I] would not be affected in any way even if [my] Objection was sustained*" – (Ruling at Pp. 3-4). However, this reasoning fails to account for the fact that, by denying me standing and approving the Plan of Distribution and subsequent distributions, the Rulings are effectively giving credence to the fraudulent PDVSA Claim and thus making me responsible, according to the Plaintiff and the Court in the Criminal Matter, for the full amount that is being claimed by PDVSA and by other claimants. If the Rulings stand, they will perpetuate the Court's erroneous granting to PDVSA of payment against its Receiver-allowed

claims, totaling USD527 million[1]. Any portion of these PDVSA claim amounts that cannot be paid from Receivership assets has thus been adjudged by the Court to be my responsibility. Apart from the fact that I am then being saddled with a USD372 million Restitution obligation in the Criminal Matter derived from this invalid claim (see letter "b" below), I am also required to return all of my gains to the Receivership and have been summarily stripped of all my assets and my life's work pursuant to civil judgments in the case that are based on the erroneous validity and value of the PDVSA claim.

Ultimately, the net result of the Rulings therefore is not that I stand to lose only USD6 million that are "***separately held in escrow,***" as the Court and the Receiver state, but that I stand to be liable for more than USD370 million in Restitution which I will have to pay throughout the course of my life after my incarceration. In addition, for various reasons presented in the judicial record, the Rulings also make me relinquish compensation of more than $30 million that I would be entitled to absent the Restitution.

Apart from the undue incarceration referred to further below, this effective liability to my personal patrimony or future income of approximately USD400

[1] The PDVSA Claims, as reflected in the updated amounts for the Plan of Distribution (District Court Case Doc.105-17 – Notice of Third Subsequent Distribution) are broken down into USD110 million allowed under Class 4, General Unsecured Claims, and USD372 million allowed under Class 4a, In-Kind Claims. In addition, PDVSA is also the ultimate beneficiary of the Claim by Fractal Fund Management, which was allowed by the Receiver at USD45 million. The total of PDVSA allowed claims is therefore USD527 million. PDVSA is the only In-Kind claimant. Of its claims, PDVSA has, thus far, erroneously been paid 92% on the Class 4 claims for itself and Fractal, as well as the approximately USD5 million of the In-Kind Claim pursuant to the Third Subsequent Distribution. This totals undue payments thus far of approximately USD150 million.

million makes me ***imminently threatened with a concrete and particularized 'injury in fact'***" that is "***fairly traceable to the challenged action***" and is "***likely to be redressed by a favorable judicial decision***" – *Lexmark/Lujan.*

b. The Rulings Threaten my Liberty and Property Interests as Protected by the 14th Amendment: As reflected in the Opinions Below and the Judicial Record, the District Court case and the Criminal Matter are inextricably intertwined. The Court in the Criminal Matter, without any evidentiary scrutiny, and based strictly on summary information and testimony from a single member of the Receiver's team, Mr. Brian Ong, erroneously determined that there was a calculable loss for purposes of sentencing and restitution. In the case of Sentencing, this ultimately led to an enhancement of my Sentence of incarceration which made it at least 11 years longer than what was warranted by an indicative sentencing range not enhanced by loss. This Court has recognized in Glover v. U.S., 531 US 198, 148 L. Ed. 2d 604, 121 S. Ct. 696 (2001), that "***authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.***" In this respect, the Court has also stated that "***incarceration....constitutes a concrete injury, caused by the conviction and***

***redressable by the invalidation of the conviction***" – Spencer v. Kemna, 523 U.S. 1, 7, 140 L. Ed. 2d 43, 118 S. Ct. 978 – 1998.

This precedent can be applied herein as my enhanced sentence of incarceration resulted from the erroneous loss calculation derived exclusively from the unscrutinized approval of the PDVSA Claim by Judge Arterton in the District Court case. This amount was erroneously confirmed by Opinions Below.

The same applies with respect to the Restitution Order in the Criminal Matter. The Court in that proceeding, four months subsequent to sentencing, held a limited hearing and eventually issued a Restitution Order ordering me to pay approximately USD372 million in Restitution. The Order indicates that I will have to pay Restitution at a rate of 20% of my income, after incarceration, for what is effectively the rest of my life.

As described herein and throughout the judicial record, this amount of Restitution is effectively equivalent to the amount of the fraudulent PDVSA Class 4a claim which is being partially paid by the Distribution approved by the Rulings. At the time of the Restitution Hearing, Judge Underhill, presiding over the Criminal Matter allowed limited testimony from the Receiver's representative, Mr. Brian Ong. In his testimony, Mr. Ong specifically stated that his expert report for the Criminal Matter was based on his work with the

Receiver in the District Court case (Restitution Hearing Transcript, Criminal Matter Doc. 187, P. 45):

> *U.S. Attorney Schechter: "So in connection with your work with the Receiver and Receiver's counsel, at some point you took on the task of calculating [loss]"*
>
> *Mr. Ong: Yes. One of the tasks that we were asked to perform was development of an estimate of [claimant] losses."*
>
> *Schechter: "....how do you go about estimating....."*
>
> *Ong: "Well, the starting point for us were the individual claims that had been filed.....by the various claimants."*

Mr. Ong also stated, among many other things, that if the PDVSA Claim is invalid or zero – as I contend the unscrutinized evidence shows – then there are no losses in the Receivership, and therefore there would not have been an enhanced sentence or a Restitution Order (Ibid, Pp.104-106). .

For all of the foregoing, the Grant of Certiorari is imperative to restore my Article III Standing and correct a Manifest Injustice, as well as preclude lower courts from illegally enhancing sentences for future defendants in similar positions.

**This Court has an obligation to grant Certiorari in order to Instruct Lower Courts not to Arbitrarily Violate Provisions of the Law or its Jurisprudence**

As a direct corollary to the above, the Grant of Certiorari is also merited because the lower courts have violated the applicability of the Federal Rules of Evidence to all civil cases as well as the mandates of Fed. R. of Civ. P. 60, the lower courts' own jurisprudence.

Apart from ensuring Article III Standing to a Defendant who is properly before the courts, this Court should not allow a Defendant to be adversely affected by a judgment which destroys both his property and liberty without the most basic access to scrutinize and dispute the evidence used against him or her. This is even more important because, if the evidence is properly evaluated, it would also ultimately underpin the Habeas Petition and would eliminate the enhancements to my sentence of incarceration and the Restitution Order in the Criminal Matter.

As stated above, the Grant of Certiorari in this case would lead to the strengthening of this Court's doctrine regarding Article III Standing as it would reaffirm the same for Defendants in civil proceedings, particularly when they face criminal consequences by decisions in said civil proceedings. Additionally, the Grant of Certiorari would be appropriate to ensure that lower courts cannot skirt their responsibility to comply with the applicability of the Federal Rules of Evidence to all civil proceedings and of other applicable statues, rules and precedents.

In this case, there has been a combination of a lack of both evidentiary scrutiny and of the application by the lower courts of their own precedents and other rules of law with regards to a claimant or third-party's right for redress in a financial dispute.

In particular, a proper review of the evidence would show that PDVSA is a claimant that comes to the distribution table with Unclean Hands, or who is at least, *In Pari Delicto* with regards to the harm they are seeking to redress. This invalidates their claim at inception under the principles of Second Circuit jurisprudence in National Petrochemical Company of Iran v. The M/T Stolt Sheaf et al., 930 F. 2d 240; 2nd Cir. 1991 ("***under illegal bargains, a perfectly legitimate contract may be rendered unenforceable by its 'direct connection' with an illegal transaction***"); and in the more recent Circuit decision in Republic of Iraq v. ABB et. al., 920 F. Supp 2d 517, 2nd Cir. – 2014, Cert Denied 2015, ("***sovereigns…cannot escape the consequences of their 'representatives' governmental misconduct***").

Thus far, no lower court has ever actually seen, reviewed or scrutinized any of the evidence underlying the Claims or the Distributions to determine their validity or accuracy.

It is clear from the judicial record that neither Judge Arterton, nor Judge Underhill in the Criminal Matter, nor the Judges of the Second Circuit, nor the U.S. Government, nor the SEC, nor any of the Claimants to the Receivership or parties, other than the Receiver, to any of the cases related herein, has every seen or scrutinized the body of evidence underlying the Plan of Distribution.

In my case, even though I am the Defendant and should thus have Standing in the case, I have been denied fair access to the evidentiary materials and have only had access to a partial cadre of documents. My intimate familiarity with all aspects of the Receivership, due to my work during the Relevant Period, and my court-recognized expertise in Venezuela and the particular financial aspects of this case[2], allows me to state, in no uncertain terms, what the evidence would show if scrutinized.

The Opinions Below have thus far confirmed the Manifest Injustice emanating from a perverse "circular reference" that has avoided evidentiary scrutiny. In this context:

a. Judge Arterton stated that the determination of loss in these proceedings was the purview of Judge Underhill in the Criminal Matter (See Transcript of Hearing before Judge Arterton, District Court case Doc. 739, "*the determination of Loss is the purview of the court in the Criminal case*")
b. Judge Underhill, at Sentencing, stated that there was no need to hold an Evidentiary or Fatico hearing to determine loss for purposes of sentencing because the summary information presented in Mr. Ong's affidavit, which, as Mr. Ong himself later testified at Restitution was based on the unscrutinized

[2] At a previous hearing on certain matters in the District Court case, I was trying to secure legal counsel to advise me in the civil portion of the loss calculation issue. Judge Arterton, in denying me that right, states clearly for the record, in reference to my expertise on these issues that "*[he] knows more than any counsel knows.*" (July 3, 2013 Hearing Transcript before Judge Arterton (District Court case Doc. 739, P. 71 at 3).

facts of the District Court case, had already been approved by Judge Arterton via the Plan of Distribution.

c. Subsequently, Judge Arterton, via the Ruling and previous orders denying my numerous objections, further avoided evidentiary scrutiny in the proceedings because the Court in the Criminal Matter had already certified a loss.

The Federal Rules of Evidence clearly state that they are applicable to all civil proceedings. The District Court case is a civil proceeding in which the evidence used to ultimately violate my interests and constitutional rights has not been subjected to the proper evidentiary scrutiny mandated by said rules. There has been no trial or trial-style proceedings and no evidentiary hearings in which I could have a full and fair opportunity to mount my defense or properly cross-examine the expert witnesses against me; and said expert witnesses have not been held to the task of supporting their assertions despite multiple indicia that the evidence shows them to be erroneous.

By avoiding evidentiary scrutiny, the Opinions Below validate a claim while ignoring the ample indications that show that it is fraudulent. To wit, I have complied with the spirit of Federal Rule of Evidence. 301 in the District Court

case, by providing a long list of evidentiary materials that qualify as proof that the PDVSA Claim is fraudulent and invalid[3].

The District Courts in both the Civil Case and Criminal Matter are fully aware, due to my multiple filings, that the evidence of my assertions is presently held, undisclosed, by the Receiver and PDVSA. Fed. R. of Evi. 301 states that "***the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally***."

The lack of evidentiary scrutiny in this case has resulted in the validation of a fraudulent and overvalued claim by PDVSA and the resulting violation of my constitutional liberties and my rights as a Defendant. What has taken place in the lower courts is that: (i) the Receiver was appointed; (ii) the Receiver unilaterally determined his version of the validity and value of the Claims; (iii) the Receiver presented a summary report of his findings to Judge Arterton and the various Claimants without providing any of the underlying evidence; and (iv) Judge Arterton, and later Judge Underhill at Sentencing, accepted the Receiver's valuation of the Claims, his Plan of Distribution and his version of Calculable Loss

[3] Apart from various filings in the Criminal Matter which were incorporated by reference to the Appellate proceedings, most particularly my Restitution Brief (Criminal Matter Doc. 190), the evidentiary basis has been fully described in various filings in the District Court case. These filings, in addition to the Objection that gave rise to the appeal to the Second Circuit, include but are not limited to the Defendant's Request for Clarification and Qualification (Doc. 748), the Defendant's Response to the SEC Filing for Default Entry (Doc. 749), the Defendant's Motion for Court Guidance and Reconsideration (Doc. 765), the Defendant's Motion for a Stay of Distributions (Doc. 857), the Defendant's Motion for a Stay of Distributions (Doc. 900), the Defendant's Motion for Extension of Time to file a Response to the Proposed Plan of Distribution (Doc. 909) and the Defendant's Motion for a Stay of Distributions, Request for an Evidentiary Hearing and Related Miscellaneous Relief (Doc. 992).

without any effective evidentiary scrutiny. In parallel, despite my numerous, valid objections, all of the other parties to the litigation, including the SEC, the U.S. Attorney's Office, the Sentencing Appeals Panel of this Court and various clerks, staff attorneys, Claimants and Claimants' attorneys accepted the Receiver's summary information without having seen any evidence.

Ultimately, the evidence shows that the PDVSA claim is fraudulent or, at best, valued at zero. As mentioned above, this fraudulent nature is derived from the actual Claim itself and from the fact that PDVSA comes to the table as a claimant with Unclean Hands, or at least *In Pari Delicto* with respect to the wrong they are seeking to redress.

As described in the Restitution Hearing Transcript (Criminal Matter Doc. 187, Pp. 86), PDVSA submitted a claim based on the claim instructions provided by the Receiver. The Claim submission clearly stated that "*the foregoing claim is true and accurate*" and it reminded the claimant that "*it is a violation of federal law to file a fraudulent claim.*" Despite these stipulations, as evident from the judicial record, PDVSA filed a fraudulent claim, particularly if one takes into account the effect of the Assignment Agreements which give rise to the same[4].

[4] The Assignment Agreements which give rise to the PDVSA Claim represent a "secondary market" purchase of the rights and are governed by Venezuelan Law. As described in the record of the case, under Venezuelan law, PDVSA was obligated to pay the original holders of the rights in Venezuelan Bolivars at the Official Exchange Rate of 4.30 that was in place when the acquisition took place. The amount paid by PDVSA for the totality of its original claimed amount is therefore a maximum of 2.0 Billion Venezuelan Bolivars. Official disclosure from the Venezuelan Government in parallel, unrelated litigation, clearly states that at the time of the initial Distribution under the Plan, this was equivalent to approximately USD45 million and, more recently, was equivalent to only USD10 million (See Dollar Today, Doc. 1 at 24 – ***"the current....rate is 199 VEB per USD"***). In the context of the Assignment Agreements, PDVSA directly hides these facts from the Courts when it stipulates that:

Moreover, from a standpoint of loss and restitution, to tie in with my Article III Standing as described above, payments to PDVSA under its fraudulent claim also represent an impermissible windfall under Second Circuit precedent in U.S. v. Boccagna, 450 F. 3d 107, 2nd Cir. 2006; U.S. v. Maynard 743 F. 3d 374, 2nd Cir. 2014, and U.S. v. Clark, Lexis 23438 13-992-cr, 2nd Cir. 2014. In addition, several sister circuits have defined Restitution as being limited to the "acquisition cost" of a claim, such as the VEB2.0 billion paid by PDVSA. Most recently, the Tenth Circuit remanded U.S. v. Howard, BL122129 No. 14-1075-cr, 10th Cir. 2015 stating the amount of Restitution depended on the "downstream" or "secondary" buyer's cost and not on the cost to the original loan holder. This precedent is important because, the fact that the original loan holder may have sold his stake to the downstream buyer for a different consideration than what it paid for it, is irrelevant to the determination. The amount owed, *Howard* states, is the amount paid in the secondary market. This is akin to the PDVSA purchase of claim rights, with the difference that, as derived from the Assignment Agreements, by law, PDVSA paid the original holders for 100% of the value of the claim rights, an amount higher than their acquisition cost[5]. The *Howard* opinion, in turn, cites other circuits in supporting its decision including the Ninth Circuit (U.S. v. Yeung, 672

"The terms of the transactions contemplated in this Assignment Agreement, including ...consideration paid therefor and all other financial terms, shall remain confidential..... In the event that any ....disclosure is ordered by the Court...such disclosure will be made in camera, and kept under seal of the Court." (See full description of clause in Case Below Doc. 992, Footnote 6).

[5] In this case, the original clients of the Receivership, the affiliated pension funds of PDVSA, had made their contributions to the Receivership when the Official Exchange Rate was 2.15 VEB per USD. At the time PDVSA purchased the claim rights, the Official Exchange Rate had been reset by PDVSA to 4.30 VEB per USD, representing a 100% windfall to the original clients.

F. 3d 594, 602, 9th Cir. 2012); Eighth Circuit (U.S. v. Chaika, 695 F. 3d 741, 748, 8th Cir. 2012) and Fifth Circuit (U.S. v. Becham, 774 F. 3d 267, 278-79, 5th Cir. 2014). PDVSA paid the equivalent of an exact, calculable amount of VEB2.0 billion to acquire its claim rights. At the time of the initial distributions, that VEB 2.0 billion was equivalent to approximately USD45 million[6]. By analogy to the above-cited case law, and to the *Boccagna*, *Maynard* and *Clark* precedents which make windfalls impermissible, that, and only that, is the maximum amount PDVSA would be entitled to receive if its claim were valid.

As stated above, however, the evidence shows that the PDVSA Claim is in fact invalid at inception because, by nature of its fraudulent claim, it comes to the distribution process with Unclean Hands. This condition of Unclean Hands is also derived from the fact that PDVSA corruptly extorted more than USD400 million from the Receivership in addition to the transactional distributions it should have netted under the NIM. These extorted amounts are almost ten times what PDVSA would be entitled to if its claim was deemed valid. These corrupt bargains were obtained through extortion by PDVSA representatives acting "under color of official right," as defined by USC 1951(a) & USC 1951(b)(2) – (the "Hobbs Act"). Of relevance here, the Hobbs Act defines extortion as "***obtaining property from***

[6] Analogous to this equivalence premise would be the specific instructions of the Mandatory Victim's Restitution Act (18 USC 3663A), as cited by this Court in Robers v. U.S., 572 US, 134 S. Ct., 188 L. Ed. 2d 885 (2014). *Robers* underlines the fact that the alleged "offender must pay an amount equal to....the value of the property." In this case, that amount is equal to VEB2.0 billion or USD45 million dollars at the highest possible valuation.

***another against his will, under color of official right.***" To establish extortion under color of official right, one "***need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts***" - Ocasio v. U.S., 136 S. Ct. 1423, 1428, 194 L. Ed. 2d 520 (2016).

In the present case, PDVSA representatives, acting on behalf of PDVSA and under color of official right, directly and indirectly extorted the Receivership through me for financial gain, making direct threats against my family and third parties. The full information regarding this behavior by PDVSA is broadly described in my Restitution Brief in the Criminal Matter (Doc. 190), which has been incorporated by reference in the judicial record of the lower courts.

PDVSA's Unclean Hands are also evident from the U.S. Government's Motion for a Protective Order (Criminal Matter Doc. 78, Pp. 2 and 5) – "*....individuals have requested that their identities be protected for fear of retaliation by the Venezuelan corporation [(i.e. PDVSA)]*"...and *"the [U.S.] government simply seeks to restrict dissemination of information.....so as to avoid any potential retaliation."* The lower courts have, so far, refused to consider or scrutinize said evidence.

Moreover, to reiterate my previous point, the actions of PDVSA were the direct cause for the injury they are seeking to redress. In this context, the evidence,

once scrutinized, would also show that the PDVSA claim is invalid because, at the very least, it is *In Pari Delicto* with respect to their Claim, under the premises established in Second Circuit doctrine in *Iran* ("***under illegal bargains, a perfectly legitimate contract may be rendered unenforceable by its 'direct connection' with an illegal transaction***"); and in its more recent *Iraq* decision, ("***sovereigns…cannot escape the consequences of their 'representatives' governmental misconduct.***").

PDVSA's Claim seeks to redress the alleged misappropriation or dissipation of funds it contends to have invested. But in fact, PDVSA bears responsibility for the alleged dissipation of any funds it may not have received and so it is not entitled to receive value for their Claim. In this context, the District Court should have followed its own jurisprudence from Harp v. King 266 Conn. 747, 777-78, 835A 2d 953 – Conn 2003 which states that "***a basic principle of agency is…..that the acts of a corporation's agents are attributed to the corporation itself.***" In one of the related civil cases herein in fact, Judge Underhill who is presiding over the Criminal Matter and the Habeas Petition underscored that the doctrine of *In Pari Delicto* "***provides that actions brought on illegal or corrupt bargains must fail if***" – as is the case here – "***the [claimant] has been a significant participant in the subject wrongdoing, bearing at least equal responsibility for the violations [it] seeks to redress***" - In re Flanagan, 415 B. R. 29, D. Conn. 2009.

Conceding that there appears to be a presumption by the Courts that PDVSA is owed money because of my alleged actions, I have presented to the Courts, to the best of my ability given my constraints, the list of evidentiary materials that rebut that presumption. If specific copies of some documents have not been directly submitted, it is because I am an indigent, Pro Se, incarcerated defendant who does not have access to the materials. I have asked for access to the materials and been denied. I have asked for a full and fair opportunity and forum to present the materials and have been denied. If I am not given access to the evidence, together with a forum and opportunity in which to present it, I cannot present it. That does not mean, however, that the evidence does not exist. Part of the evidence is available for review from my submissions to the judicial record of both cases, and part has thus far been held undisclosed by the Receiver and by PDVSA. According to Federal Rule of Evidence 301, the burden of proof still falls on the Plaintiff and the Receiver to dispute my assertions regarding the PDVSA Claim.

In this regard, Certiorari should be granted by this Court so that this type of violation of the Federal Rules of Evidence are not used by lower courts to deny a Defendant the basic right to examine and dispute the evidence used against him or her, and so that lower courts cannot arbitrarily ignore their own governing precedents or those of their Circuit, such as *Iran* and *Iraq*, when it suits their fancy.

In addition to the foregoing, this Court should Grant the Petition for Certiorari to also affirm the principle that under the directives of Fed. R. of Civ. P. 60, the District Court has the authority to reverse the Rulings and prior Orders which approved the Plan and authorized the Distributions to PDVSA. So far, this is another provision of the law which the lower courts have chosen to unjustifiably disregard in these proceedings.

Fed. R. of Civ. P. 60(b)(3) gives the District Court the authority to reverse or change its prior orders in case of a "*fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.*" Also, with regards to the erroneous deprivation of my standing to object to the Plan and the Distributions, Rule 60(b)(6) provides the District Court the authority to reverse the Rulings for "*any other reasons that justifies relief.*" In this context, there is a need for Certiorari to be granted so that the District Court Rulings and the Circuit Court Summary Order are vacated, as per all the various arguments espoused above, in order for the District Court to hold an evidentiary hearing. Said hearing will determine the validity and valuation of the fraudulent PDVSA Claim as well as the Receiver's role in perpetuating PDVSA's fraud at the expense of the non-PDVSA claimants.

If it is determined that the PDVSA Claim is fraudulent, the District Court also has the authority under Fed. R. of Civ. P. 60 to deny any further Distributions

to PDVSA under the Plan and to order disgorgement of any Distributions already paid to PDVSA.

The District Court Rulings and the Circuit Court Summary Order have effectively ignored the provisions of Rule 60, which are a statutory defense against the perpetuation of a Manifest Injustice such as that seen here. Legal tradition in fact dictates that a Court can make a change to its rulings in a civil, equities proceeding, if it finds that doing so is appropriate to foster the interests of Justice. With respect to the Third Subsequent Distribution or any future distributions, the Court can reverse or deny them based on the fraud provisions of Fed. R. of Civ. P. (60)(b)(3). In addition, because the evidence shows that PDVSA has already been paid in full for the maximum value of their claim – and has in fact been paid three times that amount – the guidelines and jurisprudence supporting Fed. R. of Civ. P. (60)(b)(5) can serve to alter the Plan of Distribution itself and even to claw-back overpayments to PDVSA. Rule 60(b)(5) is not subject to a statutory time bar. Ultimately, under the Grant of Certiorari, the interests of Justice and equity would be served herein even without a claw-back or invalidation of the PDVSA claim, by simply restructuring the District Court Order on the Plan of Distribution to cap future distributions to PDVSA and compel the Receiver to use existing assets to pay other valid claimants for the 8% of their allowed claim amount that was unilaterally withheld by the Receiver.

An alternative to the applicability of Rule 60(b)(3) and Rule 60(b)(5), the Court can rely on the guidelines of Rule 60(b)(6) to amend its Rulings and the Plan of Distribution once it has held and evidentiary hearing and determined that the PDVSA Claim is not valid. This portion of Rule 60 would apply because of several extraordinary circumstances which include, but are not limited to the following:

a. Because of the ongoing need to secure approval of future distributions under the Plan, it is clear that the Plan does not obligate the distributions and that it is always subject to change by the District Court;
b. The deterioration of the situation in Venezuela compels a full examination of PDVSA's actions, particularly given sanctions imposed by the Government of the United States;
c. The Habeas Petition invalidates the collateral estoppel that gives rise to many of the premises upon which the Plan was based;
d. The fact that PDVSA has been paid in full for the maximum amount it could ever be owed under the Plan places this District Court in the unusual or extraordinary circumstance of having approved an inequitable outcome which requires correction in the interests of Justice and equity.

This application of Rule 60(b)(6) cannot therefore be considered a circumvention of other parts of the Rule, which are considered mutually exclusive,

because the use of this portion of the Rule stands on its own bases. Moreover, given that the Plan of Distribution was approved less than four years ago and its execution is ongoing, and given the fact that I have filed numerous objections to the same, there is no time constraint to the applicability of Rule 60(b)(6).

**The Opinions Below are contrary to this Court's Doctrine Regarding the Statute of Limitations for Civil Actions brought by a Government Agency**

Finally, this Court should also grant Certiorari because the SEC complaint that gave rise to the District Court civil case, at its inception, was filed outside the Statute of Limitations as defined in by this Court's jurisprudence in *Gabelli* and *Kokesh*. This Court should not allow lower courts to whimsically circumvent such a basic concept as the Statutes of limitation, which as *Gabelli* states, "***set a fixed date when exposure to the specified Government enforcement efforts end***." In particular, *Kokesh* and *Gabelli* both reaffirmed that such limits are ***"vital to the welfare of society" and rest on the principle that "even wrongdoers are entitled to assume that their sins may be forgotten. The statute of limitations at issue here – 28 USC 2462 – finds its roots in a law enacted nearly two centuries ago. In its current form, 28 USC 2462 establishes a 5-year limitations period for an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture***."

The lower courts, as well as the Receiver and the Plaintiff, have given an erroneous interpretation to this Court's decision in *Kokesh* and *Gabelli*, and this Court should clarify these unanimous decisions in order to avoid such errors in the future.

Both the Plaintiff and the Receiver have repeatedly admitted that the actions which gave rise to their complaint stem from the middle of 2005. That is the time from which the 5-year statute of limitations for bringing the SEC action should be calculated. This is because not only have all parties and courts in the proceedings described the Receivership Companies as a single, uninterrupted and ongoing enterprise and have treated all of my actions as a single process, but the fact is that all my actions, whether ultimately deemed right or wrong, stemmed from the same original event of extortion by PDVSA-related individuals and encompassed the single effort to ensure the financial wellbeing of any parties who could be affected.

In this context, it is important to have in mind the full concept underpinning the *Kokesh* decision, which is the language used by the Justices of this Court in *Gabelli*. *Gabelli* effectively held that the fraud discovery rule which the Commission would hope justifies disgorgement in this case, should not be extended to the Government. In this regard, the Supreme Court stated therein that this was because "***the Government is a different kind of plaintiff. The SEC's very purpose, for example, is to root out fraud, and it has many legal tools at hand to***

***aid in that pursuit.***" Furthermore, "***deciding when the Government knew or reasonably should have known of a fraud would also present particular challenges for the courts, such as determining who the relevant actor is in assessing the Government knowledge, whether or how to consider agency priorities and resource constraints in deciding when the Government reasonably should have known of a fraud and so on. Applying a discovery rule to Government penalty actions is far more challenging than applying the rule to suits by defrauded victims, and the Court declines to do so.***"

The *Gabelli* applicability in this context is clear. The time to start calculating the period of limitations is mid-2005. The SEC had ample chance to investigate and present charges well before the post-statutory-period date of 2011 in which it brought its complaint[7]. The Commission cannot claim to be a victim in this matter and thus is not subject to the discovery rule exemption. Therefore, the original complaint should have been dismissed *ab initio*. In not dismissing the original SEC complaint, the District Court violated the unanimous mandate of this Court regarding the applicability of the Statute of Limitations.

Ultimately, the District Court should have avoided the whole proceedings by determining that the SEC Complaint was extemporaneous. Despite my numerous references to this reality throughout the record, the lower courts have ignored it.

[7] It should be noted that Highview Point, one of the Receivership entities, submitted registration materials to the SEC in or around late 2005 and was approved for registration in or around mid 2006.

The Grant of Certiorari will reiterate that this Court's applicable Statue of Limitations doctrine for this case and all future cases should not be arbitrarily ignored by lower courts. This will serve the interest of Justice. It will also serve the judicial economy by avoiding the commencement of unnecessary or inappropriate litigation improperly brought by agencies of the Government such as the SEC.

## CONCLUSION

For all of the foregoing, in the interests of Justice and to ensure that the Constitution and the Laws of the United States, as interpreted by applicable jurisprudence, are properly adhered to by all courts, I respectfully request that this Honorable Supreme Court of the United States grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully given at Fairton on June 8, 2018,

Francisco Illarramendi
Inmate No. 20402-014
Federal Correctional Institution
Fairton Camp
P.O. Box 420
Fairton, NJ 08320