No. 19-392

IN THE
Supreme Court of the United States

MARTIN A. ARMSTRONG,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, UNITED STATES COMMODITY FUTURES TRADING COMMISSION, TANCRED SCHIAVONI, IN HIS CAPACITY AS TEMPORARY RECEIVER, AND THE UNITED STATES OF AMERICA,
Respondents.

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

BRIEF IN OPPOSITION OF TEMPORARY RECEIVER TANCRED SCHIAVONI

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QUESTION PRESENTED

Whether certiorari should be granted to address two questions that:

- are irrelevant to the facts of the case as is conclusively established by factual findings affirmed on appeal;
- were not properly preserved in the proceedings below; and
- implicate no judicial conflict at all, much less a conflict among federal circuit courts or state courts of last resort.

CORRECTION TO LIST OF PARTIES

The caption on the cover of the petition for a writ of certiorari incorrectly identifies the respondent receiver as Alan M. Cohen. On July 16, 2019, the district court granted Cohen's motion to withdraw as receiver and appointed Tancred Schiavoni as substitute receiver. Order at 10, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. July 16, 2019), ECF No. 533. The caption of this brief has been corrected to identify Schiavoni as receiver. The receiver has been a party to all proceedings below, including in the court of appeals, where he briefed and argued the appeal.

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INTRODUCTION

Both Questions Presented in the petition for certiorari rest on the same twin premises, *viz.*, the frozen and seized assets at issue were owned by petitioner and untainted by any criminal offenses. Both premises are unambiguously false. Factual findings controlling at this stage—but almost entirely unmentioned by petitioner—conclusively establish that the assets were neither owned by petitioner nor untainted. Rather, the assets at issue belonged to corporations in which petitioner possessed no ownership interest, and they were directly connected to the fraudulent schemes in which those corporations participated. This case accordingly presents no question as to whether the freezing of these assets denied petitioner's claimed right to counsel of choice, nor whether the failure to "return" the assets to petitioner denied him due process.

The foregoing facts are by themselves reason enough to deny the petition. But there are other reasons, too. Many others:

- Petitioner argues that under the Sixth Amendment, he was entitled to a distribution of receivership assets for use in his criminal case, but in the proceedings below, petitioner both forfeited and explicitly waived any claims to receivership assets;
- Petitioner never asserted, in the proceedings below, any Fifth Amendment due process objection to the disbursement of the assets under control of the receivership;

- Petitioner nevertheless was afforded, and availed himself of, an opportunity in 2017 to visit lockers where certain physical assets were stored to obtain any genuinely personal items;
- Petitioner does not even purport to identify a circuit conflict on the waived and non-presented question whether the receiver violated due process by failing to "return" some of the assets in the receivership;
- The alleged conflict petitioner does identify does not actually exist, and the cases he relies on are not decisions of federal courts of appeal or state courts of last resort; and
- The only remedy petitioner seeks on his Sixth Amendment claim is a distribution of receivership assets, but providing him those assets would not remedy the alleged failure to allow him his counsel of choice in the now-completed criminal case.

For these reasons and for others identified by the Government, the petition should be denied.

STATEMENT OF THE CASE

More than twenty years ago, petitioner engaged in a scheme to use two different corporations to sell hundreds of millions of dollars in fraudulent promissory notes to investors. To avoid detection of his scheme, petitioner ensured that he was not listed as a shareholder of the corporations and that none of the corporations' assets were titled in his name.

In 1999, petitioner was both criminally indicted and civilly sued by the Government in connection

with this fraudulent scheme. The relevant aspects of these parallel enforcement proceedings are described below.

A. Initiation Of Parallel Enforcement Proceedings And Asset Freeze

On September 13, 1999, the U.S. Attorney's Office for the Southern District of New York obtained a warrant to arrest petitioner. He was subsequently criminally indicted for securities fraud, wire fraud, and conspiracy to commit those crimes in connection with his scheme to sell fraudulent promissory notes. *See* Sealed Indictment, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Sept. 29, 1999), ECF No. 5.

The same day the arrest warrant was issued, the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") filed separate civil suits against both petitioner and the two corporations he used to perpetrate his fraud—Princeton Economics International Ltd. ("PEIL") and Princeton Global Management Ltd. ("PGM"). *See* Complaint, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. Sept. 13, 1999), ECF No. 1; Complaint, *CFTC v. PGM*, No. 99-cv-9669 (S.D.N.Y. Sept. 13, 1999), ECF No. 1.

Immediately after filing those suits, the SEC and CFTC moved to freeze the defendants' assets and to establish a receivership to manage the assets owned by the corporate defendants. The district court granted the motions and entered a temporary restraining order (later converted to a preliminary injunction), appointing Alan Cohen as receiver and giving him the authority to marshal the assets and property belonging to the corporate defendants and their

subsidiaries. *See SEC v. PEIL*, 84 F. Supp. 2d 443, 443 (S.D.N.Y. 2000). Cohen was succeeded by appointment of respondent Tancred Schiavoni on July 16, 2019. *See supra* at ii.

B. Administration Of The Receivership And Interim Distribution

Pursuant to the district court's order, the receiver began to collect the corporate defendants' assets. First, the receiver took control of the corporate defendants' bank and brokerage accounts. C.A. Suppl. App. SA-42.[1] All but one of those accounts were held in the name of the corporate defendants and their subsidiaries or affiliates—not petitioner. *Id.*[2] And petitioner was not a shareholder in any of those corporations. *Id.* at SA-29. Thus, petitioner—neither an account holder nor even a shareholder in the account holders—had no ownership interest in the bank and brokerage accounts placed in the receivership.

In addition to these cash assets, the receiver also took possession of several of the corporate defendants' non-cash assets, including, among others, a beach

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[1] "C.A. Suppl. App." refers to supplemental appendices filed by the receiver in this appeal. *See* Supplemental Appendix, *SEC v. PEIL*, No. 17-3572 (2d Cir. Oct. 10, 2018), ECF Nos. 134-136.

[2] Only one account was purported to be denominated in petitioner's name, and petitioner was invited to claim some or all of the funds in that account. C.A. Suppl. App. SA-42 n.59. In settling with the CFTC and receiver, petitioner explicitly agreed in the Consent Order he signed to convey the balance of this alleged 401(k) account, which was funded by monies diverted from noteholder accounts, to the receivership. *See* Consent Judgment at 8-9, 14, *CFTC v. PGM*, No. 99-cv-9669 (S.D.N.Y. June 24, 2008), ECF No. 110.

house and multiple storage facilities. *Id.* at SA-50-56. Like the bank and brokerage accounts, these non-cash assets belonged to the corporate defendants and their subsidiaries, not petitioner: the deed for the beach house was issued in the name of one of the corporate defendants, *id.* at SA-51, and the storage facilities were leased in the name of one of the subsidiaries, *id.* at SA-55.[3]

In 2001, the receiver filed a report with several volumes of exhibits, documenting these efforts to collect the corporate defendants' assets and providing an inventory of the assets collected to that point. *Id.* at SA-388-406. The report also used expert forensic accounting techniques to trace all of the assets held in the receivership to the investors petitioner had defrauded—the Princeton noteholders. *Id.* at SA-412-433.

After submitting the report, the receiver began to negotiate with the defrauded investors and was ultimately able to broker a global settlement with them on behalf of the corporate defendants. To effectuate that settlement, the receiver moved in 2003 for authorization for an interim distribution of approximately $56 million of the corporate funds held in the receivership. *Id.* at SA-5, SA-13.

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[3] The receiver also attempted to collect from petitioner approximately $15 million worth of rare coins, gold bullion bars and coins, and various antiquities—all purchased with corporate funds. Petitioner refused to produce these items after being ordered to do so, resulting in a lengthy incarceration for civil contempt. *See Armstrong v. Guccione*, 470 F.3d 89, 94-96 (2d Cir. 2006).

The district court held three separate hearings on the receiver's motion. *Id.* at SA-6. Although petitioner, along with his counsel, attended each hearing, he never asserted a claim to, or introduced evidence of, his personal ownership interest in the funds held in the receivership. *Id.* at SA-8.

On January 12, 2004, the district court entered an order authorizing the interim distribution. *Id.* at SA-5-12. The court noted that, despite being given the opportunity to do so, petitioner had not asserted a personal claim to the funds. *Id.* at SA-8. Nor had anyone claiming to be a shareholder of the corporate defendants objected to the receiver's motion. *Id.* Accordingly, the court approved the interim distribution, finding that the funds distributed were "the exclusive property of the Princeton Noteholders." *Id.*

C. Guilty Plea And Settlement With Agencies

Two years after the interim distribution, on August 17, 2006, petitioner pleaded guilty to conspiracy to commit securities, commodities, and wire fraud pursuant to an agreement with the Government. *See Armstrong v. Guccione*, 470 F.3d 89, 96 (2d Cir. 2006). On April 10, 2007, the district court sentenced him to 60 months' incarceration and three years' supervised release and ordered him to pay $80 million in restitution. *See* Final Judgment, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Apr. 10, 2007), ECF No. 150. With that sentence, petitioner would be released from prison in 2012 and would complete his term of supervision in 2015.

Shortly after petitioner entered a guilty plea in his criminal case, he settled his civil cases with the SEC and CFTC. In June and July of 2008, the parties entered into, and the court approved, consent judgments memorializing their settlement agreements. *See* Consent Judgment, *CFTC v. PGM*, No. 99-cv-9669 (S.D.N.Y. June 24, 2008), ECF No. 110 ("CFTC Consent Judgment"); Consent Judgment, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. July 22, 2008), ECF No. 435 ("SEC Consent Judgment"). As part of both agreements, petitioner explicitly waived his right to appeal. CFTC Consent Judgment at 2, 4; SEC Consent Judgment at 4. He also agreed not to "hinder or delay the actions of the receiver to seek and obtain approval of a plan of distribution." CFTC Consent Judgment at 4; SEC Consent Judgment at 6. And in the CFTC Consent Judgment, petitioner expressly agreed that the judgment would "release[] any and all claims, demands, rights and causes of action … that [petitioner] in any capacity may now have or hereafter acquire against ... the Court-appointed Receiver." CFTC Consent Judgment at 2.

D. Final Distribution And Settlement With Receiver Waiving Petitioner's Claims To Receivership Assets

On March 12, 2007, the receiver submitted a second report, again attaching several volumes of appendices in support. C.A. Suppl. App. SA-18-132. This report, like the 2001 report, traced the assets held in the receivership to the Princeton noteholders. *Id.* at SA-56-62. It also provided an even more comprehensive inventory of the non-cash assets held in the receivership, including the items in the beach house and

the storage lockers. *Id.* at SA-41-56, SA-112-114, SA-121-132.

Based on this report, on June 20, 2008, the receiver moved for an order authorizing a final plan of distribution for the assets remaining in the receivership. *Id.* at SA-133-136. The court set a hearing date and a "bar" date—a date before which any claims or objections to the plan would need to be filed, or else waived. *Id.* at SA-143-144, SA-188.

Petitioner's counsel filed only a single claim before the bar date—a claim for attorneys' fees on their own behalf and for unspecified personal property on petitioner's behalf. *Id.* at SA-190-237. Shortly thereafter, petitioner, his counsel, and the receiver entered into a stipulated settlement agreement. As part of that settlement, the receiver agreed to pay $900,000 of petitioner's attorneys' fees. *Id.* at SA-256. In exchange, petitioner and his counsel agreed that they would withdraw the claim, *id.*, and that their right to submit arguments or evidence in support of claims for fees and allegedly personal property would be "extinguished with prejudice," *id.* at SA-257. Petitioner filed no other claim prior to the bar date.

On September 29, 2008, the district court held a hearing on the final distribution plan at which interested parties were permitted to present evidence and object to the plan. *Id.* at SA-265. Petitioner did not object to the plan or offer any evidence suggesting the assets to be distributed were his own.

The next day, on September 30, 2008, the court issued an order authorizing the final distribution plan. The court noted that no claims had been filed (without being withdrawn) prior to the bar date and found that

the assets in the receivership "represent[ed] property originally taken from the Princeton Noteholders or [were] the product of property originally taken from the Princeton Noteholders."[4] Accordingly, the court approved the final distribution plan and authorized the receiver to take any action necessary to implement the plan. *Id.* at SA-257. The court made clear that any future claims against the receiver or the receivership property were "forever barred, estopped, and permanently enjoined." *Id.* at SA-270.

E. Petitioner's Access To Storage Lockers

In 2017, the receiver, having distributed most of the assets pursuant to the district court's order, arranged for petitioner to inspect the contents remaining in the corporate defendants' storage lockers in New Jersey and Pennsylvania. Pet. App. 4. Even though petitioner had waived his rights to any assets remaining in the receivership, petitioner was invited to claim any items from the storage lockers that he alleged were personal, *i.e.*, not acquired with corporate funds. C.A. App. A234.[5] Petitioner visited the lockers on two different occasions and thanked the receiver for permitting him to "take whatever [he] want[ed]." *Id.* at A253. Following his visits, petitioner requested that the remaining contents of the lockers be shipped to Florida. *See id.* The receiver refused, and petitioner made no further attempts to

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[4] This finding—contained in the final plan of distribution, C.A. Suppl. App. SA-293—was expressly adopted by the court in its order approving the distribution, *id.* at SA-269.

[5] "C.A. App." refers to the appendix petitioner filed in this appeal. *See* Appendix, *SEC v. PEIL*, No. 17-3572 (2d Cir. July 11, 2018), ECF Nos. 105-106.

identify any allegedly personal property contained in the storage lockers.

F. The Decisions Below

Shortly after permitting petitioner to access the storage lockers, the receiver moved to wind up the receivership and to be discharged. Petitioner objected to the receiver's motion, arguing that the nearly 17-year-old freeze of corporate assets in the civil case had violated his Sixth Amendment rights by denying him counsel of choice in his criminal case. He also asserted that the receiver had yet to return some unidentified personal property of his. He did not, however, contend that this alleged failure to return his personal property violated his due process rights under the Fifth Amendment. *See* Opposition to Motion to Authorize Case Closure, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. Aug. 31, 2017), ECF No. 490.

The district court granted the receiver's motion over petitioner's objections. Pet. App. 10-13. Petitioner's Sixth Amendment claim, the court reasoned, amounted to a challenge to the final distribution plan because judgment had long ago been entered in petitioner's criminal case. But petitioner had waived his right to make any such challenge by failing to object to the plan prior to its 2008 approval. Pet. App. 12. Moreover, the court found no basis in the record for petitioner's assertion that the receiver had failed to return his personal property. Pet. App. 12.

Petitioner appealed the district court's order, and the receiver and the Government moved to dismiss the appeal. They argued that to the extent petitioner

sought, as part of his Sixth Amendment claim, to challenge his criminal conviction and sentence, that challenge was not appropriate in the civil case. *See* Receiver's Motion to Dismiss, *SEC v. PEIL*, No. 17-3572 (2d Cir. Dec. 20, 2017), ECF No. 30. If, on the other hand, petitioner was simply seeking funds from the receiver, then he had waived any such challenge by failing to object to the final distribution plan and by waiving his right to appeal in the civil cases. *Id.* at 18-25.

On April 11, 2018, the court of appeals dismissed the appeal in part. The court declared four of petitioner's arguments to be frivolous, dismissed them from the appeal, Pet. App. 8-9, and later imposed sanctions barring petitioner from filing further appeals without leave of court, *see* Sanctions Order, *SEC v. PEIL*, No. 17-3572 (2d Cir. July 31, 2019), ECF No. 216.[6] The court allowed petitioner to proceed only in challenging the receiver's alleged failure to return petitioner's personal property. Pet. App. 8-9. Petitioner briefed that challenge, arguing that the receiver's alleged failure to return his personal property violated the terms of the consent judgments. As in the district court, however, petitioner never argued that the receiver had violated his Fifth Amendment due process

[6] Years before, petitioner had attempted to appeal his own settlement with the SEC and CFTC and to recuse all the judges of the Southern District of New York. The court of appeals issued orders rejecting those challenges as frivolous and warning petitioner that further frivolous appeals would result in sanctions. Order, *CFTC v. PGM*, No. 08-cv-5899 (2d Cir. Apr. 10, 2009); Order, *SEC v. PEIL*, No. 08-cv-5902 (2d Cir. Apr. 10, 2009). The sanctions order in this appeal followed from that prior order.

rights. *See* Appellant's Brief, *SEC v. PEIL*, No. 17-3572 (2d Cir. July 11, 2018), ECF No. 107.

On April 23, 2019, the court of appeals affirmed, holding that the district court did not abuse its discretion in authorizing case closure over petitioner's objection. Pet. App. 5. According to the court of appeals, the district court "reasonably found that the receiver gave [petitioner] an adequate opportunity to reclaim any personal possessions by giving [him] and his son unrestricted access to take whatever they wanted from the storage lockers, not limiting the time they spent doing so, and refusing only [petitioner's] demand to have the whole lot shipped to [him] in Florida, which would have caused further delay, expense, and risk to the assets." Pet. App. 5 (internal quotations omitted).

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT RAISE EITHER OF THE QUESTIONS PRESENTED

Petitioner presents two questions for review: (1) "whether the constitutional right to counsel of choice extends to cases where a criminal defendant's assets are frozen as part of a parallel civil enforcement action" and (2) "whether the failure to return untainted personal property to a defendant violates the constitutional guarantee of due process." Pet. i. Both questions depend on the twin premises that the assets held in the receivership were owned by the "criminal defendant[]" and were "untainted." Because neither premise is true here, neither Question Presented bears any relevance to this case.

Petitioner's first question seeks an extension of the holding in *Luis v. United States*, 136 S. Ct. 1083 (2016), "that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Id.* at 1088 (plurality opinion). According to petitioner, that rule should apply not only where the defendant's untainted assets are frozen in his criminal proceeding, but also where they are frozen in a parallel civil proceeding.

The rule announced in *Luis*, however, depends on two essential factual predicates: the assets must be "untainted" and must "belong[] to the defendant, pure and simple." *Id.* at 1090. In holding that the Government violated the defendant's Sixth Amendment right to counsel of her choice by freezing her untainted assets, the *Luis* plurality distinguished *United States v. Monsanto*, 491 U.S. 600 (1989), which *upheld* a pretrial asset restraint. *Luis*, 136 S. Ct. at 1087-88 (plurality opinion) (citing *Monsanto*, 491 U.S. at 614). According to the plurality, *Monsanto* was distinguishable because the property there was "tainted," *i.e.*, "the Government had probable cause to believe [the property] was the proceeds of, or traceable to a crime." *Id.* at 1091-92. And because "title to those tainted assets" vested in the Government "as of the time of the crime," the defendants "consequently had to concede that the disputed property was in an important sense the Government's"—not the defendants'—"at the time the court imposed the restrictions." *Id.* Unlike in *Monsanto*, the plurality explained, a Sixth Amendment violation occurred in *Luis* because the property there was "untainted" and "belong[ed] to the defendant, pure and simple." *Id.* at

1090. Accordingly, whether it extends to civil proceedings or not, the *Luis* rule applies only where the assets at issue are both untainted and owned by the defendant.

The same is true for the rule petitioner seeks in his second Question Presented, which asks whether "the failure to return untainted personal property to a defendant violates the constitutional guarantee of due process." Pet i. By its terms, the question requires the property at issue to be the "untainted personal property" of the defendant. Petitioner himself never suggests that the seizure of tainted property not belonging to him would in any way implicate due process concerns. Nor could he: this Court already held in *Monsanto* that a pretrial restraint of tainted assets does not constitute a Fifth Amendment due process violation. *See* 491 U.S. at 614-16.

Both Questions Presented thus require the same two predicate facts: the assets at issue must (1) belong to petitioner and (2) be untainted. Neither fact is true here.

To start, the assets held in the receivership never belonged to petitioner. In the several multi-volume reports filed with the court, the receiver described in detail all of the assets that he seized and transferred to the receivership. C.A. Suppl. App. SA-41-56 (2007 report describing assets seized); *id.* at SA-388-406 (2001 report describing same). The cash assets, including bank and brokerage accounts, all were "denominated in the names of the [corporate defendants] and their subsidiaries and affiliates." *Id.* at SA-42. "None of [those accounts] were denominated in the

name of [petitioner] or family members of [petitioner]." *Id.* Similarly, the non-cash assets—including the storage lockers and beach house—"all were purchased with funds from corporate accounts," not from any of petitioner's personal accounts. *Id.*

Petitioner has no basis for claiming the corporate defendants' assets as his own: as the receiver reported to the district court, petitioner never claimed to be a shareholder of those corporations nor did he claim to have any interest in them. *See id.* at SA-29. He accordingly has no personal ownership interest in the assets.[7]

In addition to being owned by other entities, all of the assets held in the receivership were tainted—that is, traceable to the proceeds of the criminal offense. As part of his efforts, the receiver sought to authorize two distributions of the assets he held—one interim and one final. Each time, the receiver submitted multi-volume reports in support of his proposed plans of distribution. Those reports used expert forensic accounting techniques to trace all of the assets held in the receivership to the investors who were the victims of the promissory note fraud. *See id.* at SA-18-132 (report prior to final distribution); *id.* at SA-373-439 (report prior to interim distribution). In approving the interim distribution, the district court explicitly found that the funds distributed were "the exclusive property of the Princeton Noteholders." *Id.* at SA-8. And again in 2008, the district court approved the final

[7] Indeed, an essential element of petitioner's fraud was to separate himself from the companies where assets were deposited.

distribution, finding that the assets in the receivership "represent[ed] property originally taken from the Princeton Noteholders or [were] the product of property originally taken from the Princeton Noteholders." *Id.* at SA-269, SA-293. Petitioner asserted no objection at the time to these findings.

The foregoing factual conclusions—all amply supported by the evidence and affirmed by the court of appeals—are of course binding at this stage of the proceeding. *See Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996); *United States v. Johnston*, 268 U.S. 220, 227 (1925). And they flatly contradict the factual assertions on which petitioner rests his case for certiorari. According to petitioner's account, the receiver seized untainted assets belonging to him, auctioned off that untainted personal property, used the proceeds to make the distributions to the noteholders, and failed to return personal property that was not auctioned off. *See, e.g.*, Pet. 9, 14, 24, 28. Nothing in that account is accurate. It is enough that petitioner fails to cite any evidence supporting it, *see CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 461 n.2 (2008) (rejecting claim because "respondent cites no record evidence"), but the more serious problem is that the controlling factual findings establish the opposite: the only assets seized by the receiver were owned by corporate entities distinct from petitioner and the seized assets were all connected to the criminal offenses.

In an effort to escape the overwhelming record against him, petitioner complains that he "had no recourse to protest" these findings and that "objections

to the asset freeze fell on deaf ears in the civil actions." Pet. 26. Not so. Petitioner was afforded several opportunities to protest both the interim and final distributions of assets within his civil case. There were at least three hearings prior to the interim distribution and one before the final distribution—all attended by petitioner and his counsel—at which the district court permitted interested parties to object to the receiver's findings or to assert claims to the assets. C.A. Suppl. App. SA-6 (interim distribution); *id.* at SA-265 (final distribution). Prior to the final distribution, the court set a bar date, making clear that any claim not filed in advance of that date would be waived. *Id.* at SA-143-144, SA-188. Petitioner did not avail himself of these opportunities to rebut the receiver's extensive evidence tracing the assets to the defrauded noteholders. And the one time petitioner did assert a claim to the receivership assets (through his counsel prior to the final distribution), he withdrew that claim before the bar date and agreed explicitly to waive any such claim in the future. *Id.* at SA-256-257.

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In sum, both of petitioner's Questions Presented require that the assets held in the receivership be owned by petitioner and be untainted. Because neither fact is true here, the Questions Presented are irrelevant to this case. The petition should be denied.

II. NEITHER QUESTION PRESENTED WAS PROPERLY PRESERVED BELOW

In addition to being irrelevant on the facts of this case, the issues petitioner raises were not properly

preserved in the proceedings below and hence are forfeited here. *See United States v. Stitt*, 139 S. Ct. 399, 407 (2018) (this Court is "a court of review, not of first view"); *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below."); *United States v. Williams*, 504 U.S. 36, 41 (1992) (declining to address issue "not pressed or passed upon below").

At no point in any proceeding below did petitioner argue that the receiver violated his Fifth Amendment due process rights by failing to "return" property to him. Petitioner instead focused solely on the consent judgments, contending that the receiver's conduct violated those orders. The courts below rightly rejected that argument, and petitioner does not repeat it here. The new Fifth Amendment Due Process Clause argument he does make is forfeited.

Petitioner also failed to preserve his Sixth Amendment argument that *Luis* applies in civil enforcement proceedings, which is fundamentally a claim that he was entitled to a distribution of the receivership's assets for use in defending his criminal case. As the courts below found, petitioner both forfeited and affirmatively waived that argument. Pet. App. 8, 12.

First, petitioner failed to assert any objection to the final distribution plan before it was approved in 2008. Pet. App. 12. As described above, *supra* at 7-8, when the receiver proposed a final plan for distribution of assets, the district court set a bar date, before which any claims to the receivership assets would need to be filed, or else waived. C.A. Suppl. App. 143-144, SA-188. Petitioner (through his counsel) *withdrew* the only claim that he filed before the bar date

and so waived any future claims he may otherwise have had. *Id.* at SA-267.

Second, even beyond that forfeiture, petitioner also explicitly agreed in settlement agreements with the SEC, CFTC, and the receiver that he would forgo any further claims to the receivership assets. Pet. App. 8. In his agreements with the SEC and CFTC, petitioner waived his right to appeal and agreed not to "hinder or delay" the receiver's attempts to distribute the remaining assets. CFTC Consent Judgment at 2, 4; SEC Consent Judgment at 4, 6. He also explicitly agreed in the CFTC Consent Judgment to "release[] any and all claims, demands, rights and causes of action … that [he] in any capacity may now have or hereafter acquire against ... the Court-appointed Receiver." CFTC Consent Judgment at 2.

Petitioner then entered into a settlement agreement with the receiver himself. There, in exchange for $900,000 in attorneys' fees, petitioner agreed that his right to submit arguments or evidence in support of claims for attorneys' fees and any alleged personal property would be "extinguished with prejudice." C.A. Suppl. App. SA-257; *see* Pet. App. 4.

Finally, despite petitioner's affirmative waiver of any remaining claims to the assets held in the receivership, the receiver *still* arranged for petitioner to inspect the lockers and invited him to claim anything personal to him. C.A. App. A239-41. Petitioner was given unrestricted access to the storage lockers for whatever amount of time he needed and was permitted, as petitioner acknowledged, to "take whatever [he] want[ed]," *id.* at A253. The receiver refused pe-

titioner only when he demanded that the entire contents of the lockers be shipped to Florida. *See id*. According to petitioner, allowing him repeated access to the lockers and opportunities to remove whatever he wanted from those lockers was not enough: the receiver also was required to provide petitioner with a "comprehensive inventory of all assets seized pursuant to the 1999 freeze order and subsequent injunction." Pet. 29. But, contrary to petitioner's assertion, the receiver actually did provide him two inventories: the receiver furnished him with detailed lists of property in the 2001 interim report and again in the final report in 2007. C.A. Suppl. App. SA-41-56, SA-112-114, SA-121-132, SA-388-406.

Petitioner thus triply waived any claim that he was entitled to a distribution of receivership assets under the Sixth Amendment. The courts below correctly denied petitioner a fourth bite at the apple.

III. THERE IS NO RELEVANT JUDICIAL CONFLICT ON EITHER QUESTION PRESENTED

In addition to being irrelevant and unpreserved, neither Question Presented implicates a conflict among courts of appeals or state courts of last resort. On the due process question, petitioner does not even purport to identify a judicial conflict of any kind. As to the question whether *Luis* applies in parallel civil enforcement proceedings, petitioner asserts that the decision below deepens an existing conflict among courts. Pet. 22-25. It does not.

As an initial matter, as described above, because petitioner both forfeited and affirmatively waived his

rights to challenge the distribution of receivership assets, neither court below addressed the merits of the question whether his lack of access to those assets violated his Sixth Amendment rights. Given the absence of an opinion addressing the merits, petitioner cites a 2003 unpublished order in petitioner's *criminal case* in support of his theory that this *civil case* deepened an existing conflict among lower courts. Pet. 24 (citing Order, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. June 20, 2003), ECF No. 82). That order—taken from a completely different case—has little bearing here, and petitioner in any event mischaracterizes it. Nowhere in that order does the district court discuss the application of *Luis* or *Monsanto* in civil enforcement proceedings, let alone announce a holding in conflict with other courts. Instead, that order rejects petitioner's request for a stay in his civil case, explaining that "the motion for a stay should be made in the case in which the order sought to be stayed was entered, not in the present criminal case." Order at 1, *United States v. Armstrong*, No. 99-cr-997 (June 20, 2003), ECF No. 82.

Leaving that irrelevant order aside, the remaining cases cited by petitioner do not establish any judicial conflict, much less a conflict meriting review. Petitioner relies almost entirely on district court decisions, citing only one decision from a state court of last resort—*Estate of Lott v. O'Neill*, 165 A.3d 1099 (Vt. 2017)—with a holding on the merits of the Sixth Amendment question petitioner seeks to raise.[8] Disagreement mainly involving district court decisions is

[8] Petitioner cites one court of appeals merely observing that "[d]istrict courts in this circuit have found that a defendant may

normally no basis for certiorari, and here there is not even disagreement.

According to petitioner, *Lott* and a decision from the Northern District of California—*United States v. Feathers*, 2016 WL 7337518 (N.D. Cal. Dec. 19, 2016)—have held that *Luis* does not apply to parallel civil proceedings, ostensibly in conflict with several other district court decisions applying *Luis* in civil cases. Pet. 23-25 (citing *FTC v. Johnson*, 2015 WL 8751693 (D. Nev. Dec. 14, 2015); *SEC v. McGinn*, 2012 WL 1142516 (N.D.N.Y. Apr. 4, 2012); *CFTC v. Walsh*, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010)). But *Feathers* and *Lott* did not adopt a categorical rule at odds with the other cases petitioner cites. They instead declined to apply *Luis* for procedural reasons specific to their circumstances.

In *Feathers*, the district court declined even to address the merits of the defendant's Sixth Amendment claim. The court entered summary judgment for the Government in a civil case against the defendant, finding that the defendant had committed civil fraud and that he had no ownership interest in the funds held in the receivership. 2016 WL 7337518, at *6-7. The defendant appealed that ruling in his civil case, and while the civil appeal was pending, moved in his criminal case for the release of the same receivership funds. *Id.* at *7. The court in the criminal case held

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also have the right to a *Monsanto*-like hearing in the civil context." Pet. 25 (quoting *United States v. Bonventre*, 720 F.3d 126, 130 (2d Cir. 2013)). The *Bonventre* court did not endorse the lower courts' equivocal expressions of that principle; it simply assumed the principle exists and considered how it applies.

that it did not have jurisdiction to consider the defendant's motion. *Id.* The valid notice of appeal in the civil case, the court reasoned, divested the court of jurisdiction to reconsider the issues resolved in that case and pending on appeal—namely, whether the defendant had an ownership interest in the funds held in the receivership. *Id.* Accordingly, the court concluded that it lacked jurisdiction and declined to address the merits of the criminal defendant's Sixth Amendment claim, without ever stating or implying that *Luis* cannot apply in a civil enforcement proceeding.

Lott is similarly tied to the specific facts of that case. In *Lott*, a private plaintiff brought a civil wrongful death action against a defendant while a criminal case against that same defendant was pending. 165 A.3d at 1101. The civil plaintiff obtained an attachment freezing the defendant's assets, including funds the defendant had set aside for her criminal defense. *Id.* The defendant challenged the attachment, arguing that it ran afoul of *Luis*. *Id.* The court rejected the defendant's challenge, but not because *Luis* was categorically inapplicable in civil proceedings. The court instead held that *Luis* does not apply where—as in *Lott*—a *private plaintiff*, rather than the Government, had initiated and prosecuted the parallel civil proceeding. That holding does not conflict in any way with the cases petitioner identifies, all of which involve civil enforcement proceedings initiated by the Government. Pet. 24-25 (citing cases initiated by the CFTC, FTC, SEC, and DOJ).

Neither Question Presented, in short, implicates a judicial conflict requiring resolution by this Court.

IV. DISTRIBUTION OF RECEIVERSHIP ASSETS WOULD NOT REMEDY THE SIXTH AMENDMENT CLAIM PETITIONER ASSERTS

The only relief petitioner seeks on his Sixth Amendment claim is a distribution of assets from the receivership. That relief, however, does not and cannot remedy the injury he asserts, *i.e.*, the alleged deprivation of his right to counsel in his criminal case. Petitioner pleaded guilty in his criminal case in 2007, was released from custody in 2012, and finished his term of supervised release in 2015. Given that petitioner is no longer in custody and has already served his entire sentence, the only way to remedy any deprivation of petitioner's right to counsel at this point would be for petitioner to attempt to withdraw his guilty plea and vacate his conviction.

But petitioner does not seek that remedy here. He instead attempts to claw back funds the receiver has already distributed to the defrauded investors. Even assuming that petitioner would have used those assets to pay for counsel in his criminal case while that case was ongoing, he cannot possibly do so now given that he finished serving his criminal sentence more than four years ago.[9]

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[9] Moreover, any attempt by petitioner to seek the appropriate remedy—withdrawal of his guilty plea—would require this Court to determine whether *Luis*, which was decided in 2016, applies retroactively to petitioner's criminal conviction, which became final long before that. That question was not considered below and has been fully addressed by only one court of appeals,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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which concluded that *Luis* did not warrant retroactive application. *See United States v. Hopkins*, 920 F.3d 690, 701 (10th Cir. 2019).