No. 19-392

In the Supreme Court of the United States

MARTIN A. ARMSTRONG, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
DOMINICK V. FREDA
Assistant General Counsel
STEPHEN G. YODER
Senior Litigation Counsel
CATHERINE A. BRODERICK
Senior Appellate Counsel
Securities and Exchange Commission
Washington, D.C. 20549

DANIEL J. DAVIS
General Counsel
ROBERT A. SCHWARTZ
Deputy General Counsel
MARTIN B. WHITE
Assistant General Counsel
Commodity Futures Trading Commission
Washington, D.C. 20581

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court correctly rejected petitioner's request for the release of civil-receivership funds to pay for his criminal counsel of choice after petitioner had pleaded guilty and completed his criminal sentence, and had waived all claims against the receiver in settling a claim for attorneys' fees.

2. Whether the district court's order closing the receivership after giving petitioner multiple opportunities to retrieve personal property violated petitioner's rights under the Due Process Clause.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Armstrong v. *Guccione*, No. 04-cv-6943 (Mar. 6, 2007)

United States Court of Appeals (2d Cir.):

CFTC v. *Princeton Global Mgmt.*, No. 04-3073 (July 23, 2004)

Supreme Court of the United States:

Armstrong v. *CFTC*, No. 01-10803 (Oct. 7, 2002) (denying petition for a writ of certiorari), rehearing denied (Dec. 2, 2002)

In re Armstrong, No. 04-5349 (Oct. 4, 2004) (denying petition for a writ of mandamus and/or prohibition)

In re Armstrong, No. 05-7553 (Jan. 9, 2006) (denying petition for a writ of mandamus and/or prohibition)

In re Armstrong, No. 05-11474 (Oct. 2, 2006) (denying petition for a writ of mandamus and/or prohibition), rehearing denied (Dec. 4, 2006)

In re Armstrong, No. 06-11154 (June 4, 2007) (denying petition for a writ of habeas corpus)

Armstrong v. *Guccione*, No. 06-1278 (Oct. 29, 2007) (denying petition for a writ of certiorari)

In re Armstrong, No. 08-5758 (Oct. 6, 2008) (denying petition for a writ of mandamus and/or prohibition)

In re Armstrong, No. 09-7470 (Dec. 7, 2009) (denying petition for a writ of habeas corpus)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statute:

Miscellaneous:

In the Supreme Court of the United States

No. 19-392

MARTIN A. ARMSTRONG, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 767 Fed. Appx. 166. The motion order of the court of appeals (Pet. App. 7-9) is unreported. The order of the district court (Pet. App. 10-13) is not published in the Federal Supplement but is available at 2017 WL 6729861. Additional relevant orders of the court of appeals are unreported but are reproduced in an appendix to this brief. App., *infra*, 1a-6a, 7a-9a.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2019. On June 27, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 20, 2019, and the petition was filed on September 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner engaged in a multi-billion-dollar fraud for which he was criminally convicted and subject to civil enforcement actions by the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). In the civil actions, the government obtained orders (a) freezing corporate assets that had been purchased with the proceeds of the fraud, and (b) appointing a receiver to distribute the assets to the fraud victims. Petitioner ultimately pleaded guilty in the criminal case, settled the civil cases, and waived his right to object to the receiver's plan to distribute the assets. When the receiver moved to close the case, petitioner claimed that the asset freeze had resulted in a denial of his Sixth Amendment right to counsel, and that the receiver had denied him an adequate opportunity to retrieve certain personal property. The district court rejected those claims, Pet. App. 10-13, and the court of appeals affirmed, *id.* at 1-6.

1. In September 1999, petitioner was arrested on a criminal complaint charging him with securities fraud. *Armstrong* v. *Guccione*, 470 F.3d 89, 93 (2d Cir. 2006), cert. denied, 552 U.S. 989 (2007). The complaint alleged that petitioner "had persuaded Japanese investors to entrust approximately $3 billion to various companies controlled by him * * * on the understanding that [he] would invest in United States securities * * * while hedging against any exchange-rate risk inherent in the conversion between yen and dollars." *Ibid.* Petitioner "engaged in risky and speculative trading and, as a result, lost nearly $1 billion." *Ibid.* "To hide the losses, [petitioner] schemed * * * to create fraudulent account statements and account-value confirmations that were presented to the Japanese investors." *Ibid.* "Over time,

the investment program turned into a massive pyramid (Ponzi) scheme, in which [petitioner] used the cash flow generated by new-investor money to pay off old investors and mask the massive investment losses." *Ibid.*

Petitioner was subsequently indicted on 24 related counts of conspiracy to commit securities fraud, commodities fraud, and wire fraud. See *Guccione*, 470 F.3d at 93. In 2006, petitioner pleaded guilty to one of the counts. See Judgment, *United States* v. *Armstrong*, No. 99-cr-997 (S.D.N.Y. Apr. 10, 2007). The district court sentenced him to 60 months of imprisonment, to be followed by three years of supervised release, and ordered him to pay $80 million in restitution. *Ibid.* He completed his sentence in September 2011. See Federal Bureau of Prisons (BOP), U.S. Dep't of Justice, *Find an Inmate*, https://www.bop.gov/inmateloc (BOP Register No. 12518-050).

2. a. On the same day that petitioner was arrested, the SEC and the CFTC instituted civil enforcement actions against him and the companies he controlled. See *Guccione*, 470 F.3d at 93. The agencies sought a temporary restraining order to, *inter alia*, freeze the assets of the companies petitioner controlled and require him to turn over various corporate records and assets. See *ibid.* The district court issued the requested temporary restraining order (followed by a preliminary injunction) and appointed a receiver to marshal and preserve the corporate assets. *Ibid.*; see *SEC* v. *Princeton Econ. Int'l Ltd.*, 84 F. Supp. 2d 443, 444 (S.D.N.Y. 2000).[1]

---

[1] Petitioner refused to turn over "approximately $15 million in corporate assets," including "102 gold bars, 699 gold bullion coins, a bust of Julius Caesar, and [other] rare coins valued at $12.9 million." *Guccione*, 470 F.3d at 94. The district court ordered respondent

The receiver took possession of numerous intangible and tangible assets, including office furniture and equipment, that had been purchased with funds from corporate accounts. See Pet. App. 2-3. The tangible, non-cash corporate assets were held in storage units in Pennsylvania, New Jersey, and New York. See *id.* at 3. The receiver detailed the contents of those units in periodic reports that were shared with petitioner. See *ibid.* After four hearings, the district court found that the assets seized had been purchased with investors' funds and therefore were owned exclusively by the victims of petitioner's fraud. D. Ct. Doc. 316, at 4 (Jan. 13, 2004).[2] Petitioner continued to receive notice about the property in the storage units, but he did "not express[] an interest in inspecting these items." D. Ct. Doc. 383, at 61 (Mar. 12, 2007).

b. In 2008, petitioner settled the SEC and CFTC civil actions against him. D. Ct. Doc. 435 (July 22, 2008) (SEC Settlement); see D. Ct. Doc. 110, *CFTC* v. *Princeton Global Econ. Int'l Ltd.*, No. 99-cv-9669 (S.D.N.Y. June 24, 2008) (CFTC Settlement). In both settlements, petitioner waived any right to appeal from the judgments embodying those agreements. SEC Settlement 6; CFTC Settlement 2. Petitioner also agreed not to hinder or delay the receiver's efforts to seek or obtain approval of a plan to distribute the seized corporate assets to the victims of his fraud. SEC Settlement 6; CFTC Settlement 4.

---

detained in civil contempt for defying the order. See *id.* at 95. Petitioner refused to comply with the order and was detained in civil contempt for more than five years. See *ibid.*

[2] Unless otherwise indicated, references to the district-court docket are to the docket in No. 99-cv-9667 (S.D.N.Y. Sept. 13, 1999).

The SEC settlement gave petitioner an opportunity to reclaim any "property that belongs to him" before the assets were distributed. SEC Settlement 3. To do so, petitioner was required to file a proof of claim objecting to the receiver's proposed final plan of distribution before the bar date of August 14, 2008. *Id.* at 2; see Pet. App. 3. Petitioner's counsel filed a claim for attorneys' fees on their own behalf and unspecified personal property on petitioner's behalf. See D. Ct. Doc. 438 (Aug. 5, 2008). Counsel later withdrew that claim pursuant to a settlement agreement between petitioner, his counsel, and the receiver that was approved by the district court. D. Ct. Doc. 444 (Sept. 24, 2008). In that agreement, petitioner waived any claim to the remaining receivership assets in exchange for payment of his attorneys' fees in the amount of $900,000. C.A. Supp. App. 256-257; see Pet. App. 3-4. The district court then approved the final distribution plan and directed the receiver to execute it. See D. Ct. Doc. 451, at 7 (Sept. 30, 2008).

c. Despite having waived his right to appeal from the consent judgments, petitioner filed appeals in both civil actions. See App., *infra*, 8a. Petitioner also moved "for leave to proceed *in forma pauperis*, for bail or stay of his criminal sentence, to recuse the judges of the United States District Court for the Southern District of New York, and for a temporary restraining order barring his continued imprisonment." *Ibid.* The court of appeals dismissed the appeals for failure "to raise a non-frivolous issue." *Ibid.* In particular, the court stated that petitioner's "challenges to the criminal proceedings and his criminal sentence are not cognizable in these appeals in the civil proceedings." *Ibid.* The court also "warned [petitioner] that any future filings of frivolous, meritless, or duplicative appeals * * * related to

the civil and criminal proceedings discussed in this order may result in the imposition of a leave-to-file sanction." *Id.* at 9a.

3. In 2017, after executing the distribution plan, the receiver sought to close the receivership. See Pet. App. 11. As part of those efforts, the receiver "arranged for [petitioner] to inspect the contents of the storage" units and remove any remaining personal property. *Id.* at 4. Over the course of two days, petitioner and his son removed a carload of books, magazines, photo albums, coin and stamp catalogs, travel mugs, and other items that he identified as personal property. See *ibid.*

Petitioner then demanded that the receiver send the remaining contents of the storage units to him in Florida. Pet. App. 4. The receiver, "understandably, did not arrange for such shipping," but instead moved for orders closing the case. *Ibid.* Petitioner objected to the receiver's motion. *Id.* at 11. Among other claims, petitioner contended that the asset freeze entered at the outset of his civil case in 1999 had the effect of denying him his counsel of choice in his criminal proceeding, and that the receivership assets in storage included personal property that had not been returned to him. See *ibid.*

The district court granted the receiver's motion. Pet. App. 11-13. The court held that petitioner had "waived his right to object" to the distribution of the frozen assets by not filing a claim before the plan was approved in 2008. *Id.* at 12. The court also observed that the distribution of the assets could not have affected petitioner's guilty plea in his criminal case, which had been entered before the plan was approved. *Ibid.* The court likewise rejected petitioner's objections con-

cerning his personal property. The court noted that petitioner had been given access to the storage units, had retrieved numerous items that he identified as personal property, and had been refused only when he requested that "the whole lot" of remaining non-cash assets be shipped to him in Florida. *Id.* at 4 (citation omitted). The court accordingly discharged the receiver and closed the case. See *id.* at 13.

4. The court of appeals affirmed. Pet. App. 1-6. A motions panel first dismissed as frivolous four of the five arguments that petitioner had asserted on appeal, including his right-to-counsel argument. *Id.* at 8-9. The merits panel then issued an unpublished summary order upholding the district court's finding that the receiver had afforded petitioner "an adequate opportunity to reclaim any personal possessions" from the storage units. *Id.* at 5.

In response to the aspects of petitioner's appeal that it had deemed frivolous, the court of appeals issued an additional order requiring petitioner to obtain leave of court before filing additional appeals or motions. App., *infra*, 6a. Of particular relevance here, the court rejected petitioner's explanation for why he had raised his right-to-counsel argument only in a civil proceeding years after his criminal case had ended. *Id.* at 3a-5a. The court noted that petitioner relied on this Court's holding in *Luis* v. *United States*, 136 S. Ct. 1083 (2016), that "pretrial restraint of a criminal defendant's untainted assets needed to retain counsel of choice violates the Sixth Amendment." App., *infra*, 3a. The court explained, however, that petitioner was not "seeking funds to be able to retain counsel for his criminal proceeding." *Id.* at 4a. Rather, petitioner was "effectively seeking damages under *Luis* on the theory that he was

improperly denied some [r]eceivership funds at the time of his criminal proceeding, which culminated in his guilty plea in 2007." *Ibid.* The court rejected as "unreasonable" that effort "to claw back [r]eceivership funds at the close of this proceeding," and it explained that petitioner could not use "*Luis* to revive arguments he could have brought earlier." *Ibid.* In sum, the court explained, petitioner's "*Luis* argument boils down to nothing more novel than his insistence that the [r]eceiver improperly held certain assets—an objection he could have asserted in the [d]istrict [c]ourt prior to its approval of the [distribution plan] in 2008." *Id.* at 5a.

ARGUMENT

Petitioner contends (Pet. 18-26) that his Sixth Amendment right to counsel in a criminal prosecution entitles him to object to the final distribution of civil-receivership assets, long after his criminal case has ended and despite his express waiver of such a challenge. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of any other court. Petitioner also contends (Pet. 26-31), for the first time in this Court, that the receiver violated his rights under the Due Process Clause by failing to give him an adequate opportunity to reclaim his personal property. That fact-specific claim is forfeited and is unsupported by the record. Further review is not warranted.

1. Petitioner contends (Pet. 18-26) that the asset-freeze orders in the SEC and CFTC civil actions resulted in a denial of his Sixth Amendment right to counsel in his criminal prosecution. That claim lacks merit and does not warrant this Court's review.

a. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right

* * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. As relevant here, the Sixth Amendment "guarantees a [criminal] defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Luis* v. *United States*, 136 S. Ct. 1083, 1089 (2016) (plurality opinion) (quoting *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624 (1989)). A criminal defendant, however, "'has no Sixth Amendment right to spend another person's money' for legal fees—even if that is the only way to hire a preferred lawyer." *Kaley* v. *United States*, 571 U.S. 320, 326 (2014) (quoting *Caplin & Drysdale*, 491 U.S. at 626).

Under those principles, the government may "freeze assets of an indicted defendant 'based on a finding of probable cause to believe that the property will ultimately be proved forfeitable,'" and the defendant will have no Sixth Amendment right to access those funds to pay a lawyer. *Kaley*, 571 U.S. at 327 (quoting *United States* v. *Monsanto*, 491 U.S. 600, 615 (1989)); see *Luis*, 136 S. Ct. at 1091 (plurality opinion). The government may not, however, freeze "legitimate, untainted assets needed to retain counsel of choice." *Luis*, 136 S. Ct. at 1088 (plurality opinion); see *id.* at 1096 (Thomas, J., concurring in the judgment) ("I agree with the plurality that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice.").

Petitioner contends (Pet. 24-26) that the asset-freeze orders entered in the civil actions resulted in a denial of his right to criminal counsel of choice as construed in *Luis*. The most fundamental defect in that claim is that it is untimely. Petitioner raised his Sixth Amendment claim in response to the receiver's motion to close the

case in 2017, a decade after he had pleaded guilty in his criminal case and six years after he had completed his prison sentence. D. Ct. Doc. 490 (Aug. 31, 2017); see Pet. App. 11; p. 3, *supra*. Unlike in *Luis*, *Kaley*, *Monsanto*, and other cases involving Sixth Amendment challenges to asset-freeze orders, there is no prospect that petitioner could use the assets to pay for his criminal defense. Petitioner thus is "not in fact seeking funds to be able to retain counsel for his criminal proceeding," but instead is "effectively seeking damages * * * on the theory that he was improperly denied some [r]eivership funds at the time of his criminal proceeding." App., *infra*, 4a. The court of appeals correctly held that there is no constitutional basis for such a claim. *Id.* at 4a-5a.

Petitioner's Sixth Amendment claim has also been waived. Petitioner's assertion that he should have been allowed to use frozen assets for his defense "boils down to nothing more novel than his insistence that the [r]eceiver improperly held certain assets—an objection [petitioner] could have asserted in the [d]istrict [c]ourt prior to its approval of the [f]inal [p]lan of [d]istribution in 2008." App., *infra*, 5a. Petitioner not only failed to raise such a challenge, but affirmatively waived any claim to the remaining receivership assets in exchange for payment of his attorneys' fees. C.A. Supp. App. 256-257; see Pet. App. 3-4. The court of appeals correctly held that petitioner "cannot use the Supreme Court's recent decision in *Luis* to revive arguments he could have brought earlier." App., *infra*, 4a.[3]

---

[3] Petitioner made a version of his current argument in 2009 when he asserted "that he had been denied counsel of choice in his criminal case as a result of the SEC's 'deliberate design' to freeze assets in order to leave no money for attorney's fees." App., *infra*, 4a. But the court of appeals rejected that claim as frivolous, see *id.* at 8a-9a,

In addition, petitioner does not satisfy key aspects of the right-to-counsel claim he asserts. Under *Luis*, the government may not freeze "legitimate, untainted assets needed to retain counsel of choice." 136 S. Ct. at 1088 (plurality opinion). But petitioner does not seriously contest the district court's finding, made after four hearings, that the assets seized had been purchased with investors' funds and therefore belonged exclusively to the victims of petitioner's fraud. D. Ct. Doc. 316, at 4. Because the assets were not "legitimate" or "untainted," petitioner had no Sixth Amendment right to use them for his defense. *Luis*, 136 S. Ct. at 1088 (plurality opinion). Petitioner also did not establish that the assets were "needed to retain counsel of choice." *Ibid.* To the contrary, the record—particularly the settlement allowing the receiver to pay $900,000 in attorney's fees—suggests that the additional assets petitioner now seeks were not needed for that purpose. See C.A. Supp. App. 256-257; see also Pet. App. 11 (noting that petitioner had been "amply represented by an able team of four lawyers") (citation omitted).

b. Petitioner contends (Pet. 22-26) that the Court should grant review to resolve a purported disagreement among lower courts about the scope of the Sixth Amendment right recognized in *Luis*. That argument is unpersuasive. Petitioner does not identify any case in which funds were released for the representation of a criminal defendant who, like petitioner, had already pleaded guilty and completed his sentence—let alone

---

and petitioner did not file a petition for a writ of certiorari seeking this Court's review at that time. Petitioner asserts (Pet. 10) that he made another similar objection in the district court in 2003, but he does not substantiate that claim or suggest that he sought any further review.

had also waived the right to contest distribution of the frozen assets in a settlement involving the payment of attorneys' fees. This case accordingly does not implicate any conflict that might warrant further review.

Petitioner suggests (Pet. 22) more generally that lower courts have "reached divergent conclusions" about whether "the constitutionally required right to counsel of choice applies where a criminal defendant's assets necessary to secure counsel of choice are frozen as part of parallel civil enforcement proceedings." Even if that question were properly presented here, there would be no conflict warranting review. Since this Court's 1989 decision in *Monsanto*, "the lower courts have generally provided a hearing to any indicted defendant seeking to lift an asset restraint to pay for a lawyer," even if that restraint is imposed in a civil case. *Kaley*, 571 U.S. at 324; see, *e.g.*, *United States* v. *Bonventre*, 720 F.3d 126, 129-132 (2d Cir. 2013); *United States* v. *Farmer*, 274 F.3d 800, 805-806 (4th Cir. 2001); *United States* v. *Michelle's Lounge*, 39 F.3d 684, 700-701 (7th Cir. 1994). The decision on which petitioner relies most heavily (Pet. 23-25), *CFTC* v. *Walsh*, No. 09-cv-1749, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010), falls squarely in this line of authority. See *id.* at *2-*3.[4]

---

[4] See also, *e.g.*, *FTC* v. *4 Star Resolution, LLC*, No. 15-cv-112, 2016 WL 768656, at *1-*2 (W.D.N.Y. Feb. 29, 2016); *SEC* v. *Ahmed*, No. 15-cv-675, 2016 WL 10568257, at *2-*5 (D. Conn. Feb. 18, 2016); *FTC* v. *Johnson*, No. 10-cv-2203, 2015 WL 8751693, at *3 (D. Nev. Dec. 14, 2015); *United States* v. *Fishenko*, No. 12-cv-626, 2014 WL 4804041, at *1-*2 (E.D.N.Y. Sept. 25, 2014); *United States* v. *Greenwood*, 865 F. Supp. 2d 444, 446-451 (S.D.N.Y. 2012); *SEC* v. *McGinn*, No. 10-cv-457, 2012 WL 1142516, at *1-*7 (N.D.N.Y. Apr. 4, 2012); *SEC* v. *FTC Capital Mkts., Inc.*, No. 09-cv-4755, 2010 WL 2652405, at *6-*10 (S.D.N.Y. June 30, 2010); *SEC* v. *Sekhri*, No. 98-cv-2320,

Petitioner cites (Pet. 24) several post-*Luis* decisions in which lower courts have denied the release of untainted funds. But the record-specific results in those cases do not reflect any disagreement about the proper application of *Luis*. In *United States* v. *Feathers*, No. 14-cr-531, 2016 WL 7337518 (N.D. Cal. Dec. 19, 2016), the district court held that it lacked jurisdiction to consider the release of funds previously restrained in a parallel civil proceeding because the civil proceeding had proceeded to final judgment and the defendant's appeals were pending. *Id.* at *7-*9. In *Estate of Lott* v. *O'Neill*, 165 A.3d 1099 (Vt. 2017), the Vermont Supreme Court held that the Sixth Amendment did not require lifting a prejudgment attachment of assets in a civil wrongful-death action by a private plaintiff so that the defendant could use those assets to pay for counsel of choice in defending against criminal homicide charges stemming from the same death. *Id.* at 1100-1101. And in the cited decision from petitioner's own criminal case, the district court simply denied petitioner's request for a stay of an order of civil contempt in the parallel civil proceedings against him, without prejudice to renewal before the judge presiding over those civil cases. See D. Ct. Doc. 82, *United States* v. *Armstrong*, No. 99-cr-997 (S.D.N.Y. June 20, 2003). Those decisions do not reflect any disagreement on the broader question petitioner poses (Pet. i, 18-19) about whether the right recognized in *Luis* applies to asset freezes in civil cases.

2. Petitioner also contends (Pet. 26-31) that the receiver's handling of the assets that had been seized and placed in storage violated his rights under the Due Process Clause. Petitioner did not raise a constitutional

---

2000 WL 1036295, at *2 (S.D.N.Y. July 26, 2000); *SEC* v. *Coates*, No. 94-cv-5361, 1994 WL 455558, at *3-*4 (S.D.N.Y. Aug. 23, 1994).

due process claim below. He has accordingly forfeited any such claim, and this Court should not consider it in the first instance. See, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

In any event, petitioner received the "'notice and an opportunity to be heard'" that the Due Process Clause requires for "individuals whose property interests are at stake." *Dusenbery* v. *United States*, 534 U.S. 161, 167 (2002) (citation omitted). The court of appeals explained that petitioner had been provided an "adequate opportunity to reclaim any personal possessions" from the storage units in which the seized assets had been held for 17 years. Pet. App. 5. The receiver held numerous hearings on the nature of the assets and offered petitioner multiple opportunities to inspect and identify personal property, but neither petitioner nor his counsel expressed any interest in doing so. See D. Ct. Doc. 383, at 61. In settling his claim for attorneys' fees in 2008, moreover, petitioner agreed to withdraw his claim for personal property and to waive any further claims to the receivership assets. See C.A. Supp. App. 256-257.

Petitioner was nonetheless given a further chance to retrieve personal property when the receiver granted his request for access to the storage units in August 2017. Petitioner and his son received "unrestricted access to 'take whatever [they] want[ed]' from the storage lockers," and the receiver declined only to ship the full contents of the units to petitioner in Florida. Pet. App. 5 (citation omitted; brackets in original). The court of appeals correctly held that the district court had acted within its lawful discretion in addressing petitioner's desire to reclaim personal property. *Ibid.* Petitioner's claim of a Due Process Clause violation is insubstantial, and petitioner identifies no decision in which any court

has found a constitutional violation on similar facts. Further review is not warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
DOMINICK V. FREDA
Assistant General Counsel
STEPHEN G. YODER
Senior Litigation Counsel
CATHERINE A. BRODERICK
Senior Appellate Counsel
Securities and Exchange Commission

DANIEL J. DAVIS
General Counsel
ROBERT A. SCHWARTZ
Deputy General Counsel
MARTIN B. WHITE
Assistant General Counsel
Commodity Futures Trading Commission

FEBRUARY 2020

---

[5] Petitioner suggests in passing (Pet. 6 n.1, 26) that his fraud may have been outside the scope of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b). But "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) (citation omitted). Any such collateral attack on petitioner's criminal conviction, moreover, is outside the scope of the question presented and was neither pressed nor passed upon below.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 17-3572-cv and 17-3576-cv

SECURITIES AND EXCHANGE COMMISSION, UNITED STATES COMMODITY FUTURES TRADING COMMISSION, PLAINTIFFS-APPELLEES

ALAN M. COHEN, RECEIVER-APPELLEE

UNITED STATES OF AMERICA, INTERVENOR

v.

MARTIN A. ARMSTRONG, DEFENDANT-APPELLANT

PRINCETON ECONOMICS INTERNATIONAL, LTD., PRINCETON GLOBAL MANAGEMENT LTD., DEFENDANTS

July 31, 2019

ORDER

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of July, two thousand nineteen.

Present: ROBERT D. SACK, PETER W. HALL, CHRISTOPHER F. DRONEY, *Circuit Judges*

We find that the imposition of a leave-to-file sanction is appropriate in light of Appellant's litigation history.

This Court's procedure for imposing leave-to-file sanctions involves three stages: (1) the court notifies the litigant that the filing of future frivolous appeals, motions, or other papers might result in sanctions, *see Sassower v. Sansverie*, 885 F.2d 9, 11 (2d Cir. 1989); (2) if the litigant continues to file frivolous appeals, motions, or other papers, the court orders the litigant to show cause why a leave-to-file sanction order should not issue, *see In re Martin-Trigona*, 9 F.3d 226, 229 (2d Cir. 1993); and (3) if the litigant fails to show why sanctions are not appropriate, the court issues a sanctions order, *see Gallop v. Cheney*, 667 F.3d 226, 227 (2d Cir. 2012) (*per curiam*).

In April 2009, this Court denied Appellant's motions for bail or stay of his criminal sentence, for leave to proceed *in forma pauperis*, for a temporary restraining order barring his continued imprisonment, and to recuse all the judges of the United States District Court for the Southern District of New York from his case. We dismissed Appellant's appeals as frivolous and warned him that "any future filings of frivolous, meritless, or duplicative appeals, motions, petitions, or other papers related to the civil and criminal proceedings discussed in this order may result in the imposition of a leave-to-file sanction, under which Armstrong will be required to obtain permission from this Court prior to filing any further submissions in this Court." April 10, 2009 Order (Supp. App. 321).

In Appellant's instant appeal, the Motions Panel dismissed four of the five issues noticed for appeal: (1) whether Appellant's Sixth Amendment rights were violated in the parallel criminal proceedings, (2) whether

the Receiver had the authority to dissolve foreign corporations, (3) whether the Receiver had the authority to dissolve a non-party domestic corporation, and (4) whether the Receiver had the authority to dispose of files without providing them to Appellant. *See* Dkt. 11, 86. The Motions Panel left Appellant's personal property claim as the sole issue on appeal and warned him "that his failure to adhere to the limitation on his appellate brief imposed by the present order may result in the imposition of serious sanctions." Dkt. 86. The Motions Panel referred to this panel Appellees' motions for Rule 38 and leave-to-file sanctions.

In April 2019, we ordered Appellant to show cause why sanctions, including a leave-to-file requirement, should not be imposed. *See* Dkt. 202. We explained that in addition to raising four frivolous issues on appeal, Appellant failed to abide by the Motions Panel's admonition not to exceed the permitted scope of appeal in his appellate brief.

On May 17, 2019, Petitioner filed a response to the order to show cause ("Resp."). Appellant principally argues that it was reasonable to raise Issue (1) because he was entitled to challenge the asset freeze as a violation of his Sixth Amendment right to counsel under *Luis v. United States*, 136 S. Ct. 1083 (2016) (holding that pretrial restraint of a criminal defendant's untainted assets needed to retain counsel of choice violates the Sixth Amendment). Appellant acknowledges that the receivership is a civil proceeding but argues that his *Luis* objection was appropriate because "the issue of available funds to retain counsel of choice arose because of the *parallel* criminal and civil proceedings" and the Re-

ceiver's improper sale of certain untainted assets impaired Appellant's criminal defense. Resp. 10. Appellant contends that because he could have used funds improperly held by the Receiver to retain counsel of choice in his criminal proceeding, "not only was his criminal conviction called into question, the question arose whether Armstrong was entitled to the return of any of those funds"—and "[i]f there were a time that the issue could be raised before the cash was distributed, it would have to be then," *i.e.*, as an objection to closure of the receivership in 2017. *Id.* at 8, 10.

That argument is unpersuasive for several reasons. First, as we explained in our 2009 order, this appeal of the closing orders in the civil receivership proceeding is not the proper vehicle for Appellant to challenge his parallel criminal proceeding. *See* April 10, 2009 Order (Supp. App. 321). Second, Appellant is not in fact seeking funds to be able to retain counsel for his criminal proceeding. Instead, Appellant is effectively seeking damages under *Luis* on the theory that he was improperly denied some Receivership funds at the time of his criminal proceeding, which culminated in his guilty plea in 2007. Appellant's attempt to use *Luis* to claw back Receivership funds at the close of this proceeding is unreasonable. Third, Appellant cannot use the Supreme Court's recent decision in *Luis* to revive arguments he could have brought earlier—indeed, arguments he did bring earlier: in one of the motions filed by Appellant in 2009, he argued that he had been denied counsel of choice in his criminal case as a result of the SEC's "deliberate design" to freeze assets in order to leave no money for attorney's fees. Case No. 08-5902, Resp. to Request for Injunctive Relief Against Further Litig.,

Ex. B, at 3; *see also id.* at 3. Appellant's *Luis* argument boils down to nothing more novel than his insistence that the Receiver improperly held certain assets—an objection he could have asserted in the District Court prior to its approval of the Final Plan of Distribution in 2008.[1]

Appellant casts Issue (2) as a challenge to the District Court's subject matter jurisdiction. Appellant argues that the District Court lacked subject matter jurisdiction over the property of Princeton Economics International, Ltd. ("PEI") because PEI is a foreign corporation. *See* Resp. 36-38 (citing *Booth v. Clark*, 58 U.S. 322 (1854), and *Great W. Mining & Mfg. Co. v. Harris*, 198 U.S. 561 (1905)). *Booth* and *Harris* both concern a receiver's right to sue in a foreign jurisdiction. Neither case bears on the validity of the Memorandum of Agreement between the Receiver and the Joint Provisional Liquidators of the Turks & Caicos, where PEI was incorporated, regarding the PEI assets. Appellant raises no colorable basis for challenging the District Court's subject matter jurisdiction.

Appellant advances no comprehensible argument with respect to whether it was reasonable to raise Issues (3) and (4).

---

[1] The District Court considered Appellant's Sixth Amendment right-to-counsel objection to closure of the receivership and rejected it, noting that Appellant was "amply represented by an able team of four lawyers . . . and several paralegals" in his criminal proceedings. Sp. App. 6 (quoting Judge Keenan's Order, dated August 15, 2006, issued in the parallel criminal proceedings, *see* No. 99 Cr. 997 (JFK), Dist. Dkt. 135).

Accordingly, for the reasons discussed, there is presented no basis for questioning the Motions Panel's dismissal of Issues (1) - (4) as frivolous, consistent with this Court's reasoning in our April 2009 order.

Finally, Appellant offers no persuasive justification for exceeding the permitted scope of appeal. *See* Resp. 37-38. Nor do we find persuasive Appellant's argument that because his counsel did not represent him and was on temporary leave from Proskauer Rose in 2009, "[t]here would have been no way by which [counsel] could have become aware of the 2009 Mandate." *Id.* at 42.

Because the instant appeal was not entirely frivolous, however, the Court declines to impose Rule 38 monetary sanctions beyond the usual costs awarded to a prevailing party.

Upon due consideration, because Appellant has failed to show cause why a leave-to-file sanction should not be imposed, it is hereby ORDERED that the Clerk of the Court refuse to accept for filing from Appellant any document purporting to be a future appeal or a motion related in any way to an existing appeal, or an initiation of another proceeding in this Court unless he first obtains leave of the Court to do so.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 08-5899-cv

COMMODITY FUTURES TRADING COMMISSION,
PLAINTIFF-APPELLEE

v.

PRINCETON GLOBAL MANAGEMENT LTD. AND
PRINCETON ECONOMICS INTERNATIONAL LTD.,
DEFENDANTS

No. 08-5902-cv

SECURITIES AND EXCHANGE COMMISSION,
PRINCETON ECONOMICS INTERNATIONAL LTD.,
PRINCETON GLOBAL MANAGEMENT, LTD.,
PLAINTIFFS-APPELLEES

v.

MARTIN A. ARMSTRONG, DEFENDANT-APPELLANT

[Filed: Apr. 10, 2009]
[Electronically filed: May 4, 2009]

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl

Street, in the City of New York, on the [10th] day of [April], two thousand nine,

Present: HON. DENNIS JACOBS, *Chief Judge*, HON. JOHN M. WALKER, JR., HON. PIERRE N. LEVAL, *Circuit Judges*.

[A TRUE COPY

Catherine O'Hagan Wolfe, Clerk

By /s/ [ILLEGIBLE]
Deputy Clerk]

The Appellant, Martin A. Armstrong, proceeding *pro se*, moves for leave to proceed *in forma pauperis*, for bail or stay of his criminal sentence, to recuse the judges of the United States District Court for the Southern District of New York, and for a temporary restraining order barring his continued imprisonment. The Appellees, through counsel, move to dismiss the appeals on the ground that Armstrong waived his right to appeal, as set forth in a provision of the consent judgment, or, in the alternative, for summary affirmance. The Appellees also move for the imposition of a leave-to-file sanction against Armstrong. These two appeals, captioned above, are CONSOLIDATED for the purposes of this order.

Upon due consideration, it is hereby ORDERED that Armstrong's motions are DENIED and the Appellees' motions to dismiss are GRANTED. Armstrong has failed to raise a non-frivolous issue on appeal, as: (1) his challenges to the criminal proceedings and his criminal sentence are not cognizable in these appeals in the civil proceedings; (2) the appeal of the civil contempt ruling is barred by the law of the case doctrine, since

this Court already has addressed that matter and Armstrong has not presented adequate grounds for revisiting that determination, *see Armstrong v. Guccione*, 410 F.3d 89 (2d Cir. 2006); *Rezzonico v. H&R Block, Inc.,* 182 F.3d 144, 149 (2d Cir. 1999); and (3) any challenges to the civil proceedings are precluded by the terms of the consent judgment, which includes an explicit waiver of the right to appeal, *see United States v. Int'l Bhd. of Teamsters,* 931 F.2d 177, 182 n.1 (2d Cir. 1991); *see also Drywall Tapers and Pointers of Greater New York, Local Union 1974 of I.U.P.A.T., AFL-CIO v. Nastasi and Assoc. Inc.*, 488 F.3d 88, 92 (2d Cir. 2007) (holding that an appeal from a consent injunction generally is unavailable because the "parties are held to have waived any objections to issues included in the injunction"). Although a challenge to subject matter jurisdiction may survive a consent judgment, Armstrong has failed to state any valid basis for such a challenge. *See Drywall Tapers,* 488 F.3d at 93.

As to the Appellees' motions for imposition of a leave-to-file sanction, upon due consideration, it is ORDERED that the motion is GRANTED, in part, to the extent that Armstrong hereby is warned that any future filings of frivolous, meritless, or duplicative appeals, motions, petitions, or other papers related to the civil and criminal proceedings discussed in this order may result in the imposition of a leave-to-file sanction, under which Armstrong will be required to obtain permission from this Court prior to filing any further submissions in this Court. *See Sassower v. Sansverie,* 885 F.2d 9, 10 (2d Cir. 1989).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By /s/ [ILLEGIBLE]