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

PETITION FOR REHEARING

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Pro Se

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PETITION FOR REHEARING

Prior to the decision below, no federal court had ever allowed a district court presiding over an equity proceeding to invade a parallel criminal proceeding in another district court—let alone to do so in a way that stripped the defendant in a criminal case of his fundamental constitutional rights. If such a practice were countenanced, not only would a criminal defendant's right to *Brady* material go by the wayside, but his Sixth Amendment right to counsel of choice and Fifth Amendment right to due process—especially in the context of parallel governmental contempt proceedings—would be rendered worthless. Because that is the basic consequence of the decision below, the Court should reconsider its denial of certiorari and grant the petition to address the flagrant constitutional violations visited on Armstrong in these proceedings.

REASONS FOR GRANTING RECONSIDERATION

I. An Equity Proceeding Cannot Compromise A Parallel Criminal Proceeding.

After Armstrong self-surrendered to federal officers on September 13, 1999, in connection with trumped-up allegations of criminal securities fraud, the SEC and CFTC initiated civil injunctive actions premised on the same basic facts as the criminal indictment (which was not filed until after Armstrong self-surrendered). In January 2000, the district court presiding over those equity proceedings (Judge Owen) ordered that funds paid to Armstrong's *criminal* counsel of choice be clawed back and turned over to a receiver. *SEC v. PEIL*, 84 F. Supp. 2d 443 (S.D.N.Y.

2000). That order had an obvious consequence: It left Armstrong unable to use funds—not shown to be tainted—to secure counsel of choice *in his criminal defense*. The civil equity court's interference with Armstrong's criminal defense thus violated not only Armstrong's right to counsel of choice, but his right to due process. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (structural error; no prejudice as to effectiveness of counsel need be shown); *Luis v. United States*, 136 S. Ct. 1083 (2016). That fundamental constitutional deprivation cannot be countenanced.

1. From the days of the English High Court of Chancery to now, no court has ever authorized such a practice. The equity jurisdiction of the federal courts is limited to that which was exercised by the English Court of Chancery at the time the Constitution was adopted and the Judiciary Act of 1789 was enacted. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). And that jurisdiction does not extend to interfering with criminal proceedings—let alone doing so in a way that flouts criminal defendants' constitutional rights.

Since at least the 1880s, the federal courts have recognized that a court of equity has no jurisdiction to interfere with a criminal case. *See, e.g.*, *In re Sawyer*, 124 U.S. 200, 210 (1888) ("[A] court of equity ... has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors."); *Suess v. Noble*, 31 F. 855, 856-57 (C.C.S.D. Iowa 1887) ("Courts of equity ... deal only with civil and property rights. They have no jurisdiction to give relief in criminal cases."). That is for a simple reason: If such a practice by courts of equity were permitted to

continue, then a criminal defendant's fundamental rights to due process and criminal counsel of choice would both be a nullity.

2. Yet that is precisely what transpired here. Try as he might, Armstrong was rebuffed at every turn, and ultimately was prohibited from raising this issue in earnest in either of the proceedings below. *See* Pet. for Writ of Certiorari at 1-2; Reply Brief for Pet'r at 2-3. The Constitution does not—and cannot—tolerate this sort of government manipulation. *See SEC v. HealthSouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003).

Making matters worse, the "civil" confinement to which Armstrong was subjected ultimately was extended *at the request of the criminal prosecutors.* Indeed, the government did not even try to hide its machinations. In June 2005, after the guilty pleas by Republic New York Securities Corporation (RNYSC) and the officers in its Futures Division, the prosecutor handling Armstrong's *criminal* case told the district judge handling the *civil* proceedings (Judge Owen) that Armstrong's "civil" contempt needed to continue because the United States Attorney's Office for the Southern District of New York (USAO) planned to seek contribution from Armstrong in the criminal case to reimburse HSBC. *See* Transcript of Proceedings, *SEC v. PEIL,* No. 99-cv-9667 (S.D.N.Y. June 24, 2005). The USAO was thus using the civil proceedings to further its criminal remedies.

That sort of governmental misuse of process is blatantly unconstitutional. *See, e.g., United States v. Razmilovic*, 419 F.3d 134 (2d Cir. 2005) (criminal authorities cannot utilize the civil side of the court in

a parallel proceedings to acquire additional assets or to exact further criminal restitution). It was a violation of due process to engage in such practices.

3. The government has sought to justify its constitutional violations by insisting that this case is one of fraud of the highest magnitude—that the Princeton Notes (the instruments that formed the basis of its case) exceeded $3 billion. Even if that were true, however, it would be of no moment; even perpetrators of large frauds are entitled to constitutional rights. But the government has overplayed its hand.

The government failed to mention that $2.4 billion in notes had already been redeemed before this case commenced; that another $520 million in futures, options, and foreign-exchange trading losses had occurred at RNYSC's Philadelphia Futures Division[1]; or that a further $42 million in commissions were paid to RNYSC, an affiliate of Republic National Bank (Republic). The government likewise failed to point

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[1] Unbeknownst to Armstrong and RNYSC, the president of Republic's Philadelphia Futures Division allowed the allocation of losing trades to Armstrong's accounts—conduct for which that officer later pled guilty. Transcript of Proceedings at 28, *United States v. Rogers*, No. 04-cr-708 (S.D.N.Y. July 27, 2004). Importantly, Armstrong was not involved in those practices. *See* Transcript of Proceedings at 15, *United States v. Ludwig*, No. 04-cr-742 (S.D.N.Y. 2004). In fact, a tape recording that surfaced in 2012 or 2013 states that RNYSC had been using the money of PEIL (one of Armstrong's civil codefendants) rather than its own capital. The Futures Division later acknowledged its movement of debits among accounts. *See* Transcript of Conversation Between Martin A. Armstrong and Maria Toczlowski (Aug. 1999).

out that, when HSBC sought to acquire Republic in 1999, its owner lowered the price to restore $450 million—which he was thought to have taken, *see* Dominick Dunne, *Death in Monaco*, Vanity Fair (Dec. 2000), https://bit.ly/343fQ3J—or that HSBC paid the United States $606 million in restitution in 2002 in connection with its role.

Add it all up, and according to the USAO *itself*, the victims of the Princeton Notes "fraud" were made whole. *See* Transcript of Proceedings, *United States v. Republic N.Y. Secs. Corp.*, No. 01-cr-1180 (S.D.N.Y. Dec. 11, 2001).[2] In fact, although the government placed the exchange-rate risk on HSBC between the time of its plea and sentencing, *see* Transcript of Proceedings at 10-11, *United States v. Republic N.Y. Secs. Corp*, No. 01-cr-1180 (S.D.N.Y. Dec. 11, 2001), the payment by HSBC actually netted it a *$400 million windfall*, given the change in exchange rates between Japanese yen and the U.S. dollar.

So, whatever one might say about the financial conduct underlying the charges, the indisputable fact is that the "victims" of the "fraud" were made whole (if not more than whole).[3] In fact, the CFTC had tried to

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[2] Excluded from the restitution were Japanese companies that had made profits on their notes for which no restitution was owed. Also excluded was any company that had engaged in fraud or crimes in Japan. *See* Transcript of Proceedings at 13-14, *United States v. Republic N.Y. Secs. Corp.*, No. 01-cr-1180 (S.D.N.Y. Dec. 11, 2001).

[3] The receiver also made an interim $56.6-million distribution to the investors. Together with HSBC's payment, Armstrong's restitution was therefore deemed satisfied. *See* Judgment in a Criminal Case §F (Schedule of Payments), *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Apr. 10, 2007).

claim $35 million more.[4] And even after the criminal judgment was entered, when the government tried to extract further restitution from Armstrong, the district court denied it.[5] Yet the government even now tries to hang Armstrong for the misdeeds of others.

II. The Government Knew Armstrong Did Not Take Money It Ordered Him To "Pay Back."

The government knew all along that Armstrong did not take the money. Indeed, in tape-recorded conversations that were found after Armstrong was released from prison, Armstrong can be heard questioning an officer at RNYSC about who took the money, how RNYSC could be using the Princeton notes as capital instead of its own money, and who at RNYSC was moving funds among accounts to cover debits. *See* Transcript of Conversation Between Martin A. Armstrong and Bobby Williamson (Sept. 7, 1999) (Williamson said "I know it is not you" when discussing futures trades and movement of money between accounts to cover debits; the Futures Division was lying to Armstrong.); *see also* Transcript of Conversation Between Martin A. Armstrong and Maria Toczloski (Aug. 1999). Yet the government had

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[4] In December 2004, the CFTC showed up unannounced in Armstrong's cell without his counsel present and demanded that Armstrong relinquish the $35 million remaining as a penalty. He refused.

[5] Order, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Apr. 24, 2007) ("The court will not change the Judgement in the way the [government] urges because the creditors [investors] are not entitled to be paid twice.").

withheld this evidence at the time of the criminal proceedings.[6]

The government was well aware of that fact. Indeed, in a reverse proffer session in April 2000, Assistant United States Attorney (AUSA) Richard Owens told Armstrong that the government knew he did not take the money. But, given the interest of the Japanese government in Cresvale-Tokyo, a registered broker-dealer in Japan and a later affiliate of PEIL in Japan,[7] as well as the high-profile nature of this case and the merger of Republic National Bank (the oldest Lebanese private bank) with HSBC (the largest Asian

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[6] At the outset of the proceedings, the SEC Receiver and the Joint Provisional Liquidators (JPLs) overseeing the demise of PEIL in the Turks & Caicos entered into a Memorandum of Agreement (MOA) in October 1999, approved by the district court (Judge Owen), in which it was agreed that any exculpatory evidence would be withheld from Armstrong. By blocking the release of exculpatory evidence, a court sitting in equity presiding over the SEC and CFTC cases again overrode Armstrong's constitutional rights to *Brady* material in the criminal case.

[7] Cresvale International, Ltd (Cresvale), a Cayman Islands corporation, operated a registered broker-dealer in Japan, called Cresvale-Tokyo, a subsidiary of Cresvale Far East, organized under the laws of Hong Kong as a securities broker-dealer. In the 1990s, PEIL began providing Cresvale-Tokyo with forecasting information, which Cresvale repackaged and translated into Japanese. In 1995, PEIL was requested by the Japanese government to purchase Cresvale-Tokyo as a bail-out from French Banc Palais when that bank was experiencing financial difficulty. PEIL did so with approval of the Japanese government. Cresvale later became the entity about which the Japanese government (FSA) in August 1999 reported the $1 billion in note problems to both RNYSC and Federal Reserve Bank of New York, which provoked the instant case.

bank in the world), the government stated that it would not drop the charges.

The SEC receiver, emboldened by the USAO's decision not to drop the charges against Armstrong, told the district court presiding over the civil enforcement matter that there was possibly yet another fraud that *predated* the allegations in the SEC complaint and the criminal indictment regarding RNYSC. Despite RNYSC's guilty plea and payment of restitution, the receiver implored the district court (Judge Owen) that "[l]osses that occurred [prior to Republic] are not embraced within the restitution by HSBC," for which "there is no ... description of criminal liability." Transcript of Proceedings at 17, *SEC v. PEIL,* No. 99-cv-9667 (S.D.N.Y. Jan. 7, 2002). On that ground, the district court was encouraged to continue Armstrong's civil contempt, even though there were no allegations of such conduct in the criminal case,[8] nor were there any such allegations of earlier misconduct in the SEC/CFTC civil enforcement cases.

The contempt ran another five years without any attempt by the government to amend the original SEC and CFTC complaints. The district court simply relied on the representations of the receiver of a possible earlier fraud, though no proof was ever offered or made. The continued contempt—and the confinement

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[8] AUSA Owens stated to the criminal court that losses that occurred earlier (1992-1995) and even losses that occurred after 1995 but prior to the false NAV letters "are not embraced within the restitution by HSBC." Transcript of Proceedings, *SEC v. PEIL,* No. 99-cv-9667 (S.D.N.Y. Jan. 7, 2002).

that followed—was a violation of due process under the Fifth Amendment. [9]

III. The Government Threatened Continued Contempt Unless Armstrong Pled To Conspiracy.

An official at New York City's Metropolitan Correctional Center (MCC) advised Armstrong that, because the government lacked evidence to convict him, the MCC had been instructed to hold Armstrong "until he relented, gave in or simply broke down and admitted to the crimes he was accused of." Declaration of Oliver Brown at 4, *Armstrong v. SEC,* No. 09-1260 (D.C. Cir. Aug. 26, 2011).[10] That is precisely what transpired.

In 2006, the government falsified charges of conduct inside the MCC regarding a wall vent as a basis to place Armstrong in solitary confinement (called the "SHU," a droll acronym for "special housing unit") for eight days.[11] The government again

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[9] The irony of it all is that the continued civil contempt had nothing to do with Armstrong secreting away any money, but rather a missing coin collection worth $1.3 million, gold bars and basalt bust of Julius Caesar. Those coins have now surfaced in another case in Philadelphia in which a coin shop owner claims they are his. *Antoniaks v. Armstrong*, No. 18-1263 (E.D. Pa. filed Mar. 27, 2018).

[10] Oliver Brown, an MCC official, came forward with this information and signed a declaration in 2011—on the verge of Armstrong's release from prison—11 years after the contempt began. *See* Declaration of Oliver Brown, *Armstrong v. SEC,* No. 09-1260 (D.C. Cir. Aug. 26, 2011).

[11] The same MCC officer who advised that Armstrong had to be held until he broke or relented, *see* n.10, *supra*, has stated that there was no basis for such fictitious confinement, and the MCC

restricted Armstrong's access to his CJA criminal counsel and removed his trial preparation materials from his cell in the SHU. The USAO threatened him with continued confinement in the SHU for civil contempt in the parallel SEC/CFTC cases—including during his criminal trial—if he refused to plead guilty, which he had already refused twice, and then threatened 135 years in jail unless he pled. This was a clear abuse of process.

Ultimately, facing the prospect of being returned indefinitely to the SHU, Armstrong agreed to plead to a conspiracy with Republic and to a five-year sentence, if he were permitted to seek credit for the seven years he had already served.[12] In his allocution, which was scripted by the USAO and which Armstrong was forced to read *en haec verba,* Armstrong stated that "among the things that were represented to investors *by my agents in Japan*" was that investor monies would be held in segregated accounts at RNYSC and would not be available to Republic for its own benefit. At no point was Armstrong required to say that he took any money. Transcript of Proceedings at 20, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Aug. 17, 2006).

As part of that plea, Armstrong also was required to waive his right to *Brady* material—including exculpatory material that had been withheld from him

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failed to adhere to all protocols to support it, including lack of photographs and written report.

[12] The district court refused to grant credit for the seven years in contempt. Thus, Armstrong served twelve years for a crime carrying a mandatory sentence of five years.

throughout the entire proceedings based on the MOA. Section 13(b) of the MOA, signed in October 1999 one month after the criminal complaint, provided that "[t]he Receiver and the JPLs acknowledge and agree that they shall not and they shall direct their respective agents and representatives not to provide any non-public information regarding [PEIL or Cresvale] to Martin Armstrong...." The district court presiding over the equity proceeding (Judge Owen) had approved the MOA on October 15, 1999. Mem. of Agreement, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y.), Dkt. 38. Thus, the equity court blocked production of exculpatory information to a criminal defendant. By these and other baleful practices, the government abused its powers throughout this poignant saga. Sparing no indignity, it trampled repeatedly on Armstrong's constitutional rights.

The Second Circuit has recognized that a contempt "may not, via a fiction, be substituted for a criminal pro[ceeding] so as to deprive a man of a basic constitutional right...." *In re Luma Camera Service*, 157 F.2d 951, 953-54 (2d Cir. 1946), *vacated on other grounds by Maggio v. Zeitz*, 333 U.S. 56 (1948); *see Maggio*, 333 U.S. at 80 n.1 (Black, J., concurring) ("We would note, too, that one consequence of the fiction is that the respondent may be twice punished for the same offense.").[13]

It was a violation of Armstrong's rights to due process to use the threat of continued civil contempt to force a guilty plea.

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[13] *See* n.12, *supra*.

CONCLUSION

Where the government controls both the civil and criminal proceedings, the need for strict adherence to and protection of a defendant's constitutional rights must be paramount. *See, e.g.*, *HealthSouth*, 261 F. Supp. 2d at 1326. The practices the government employed in this case amount to flagrant violations of the Constitution, and cannot be countenanced. For the foregoing reasons, the Court should grant this petition and grant the petition for writ of certiorari.

Respectfully submitted,

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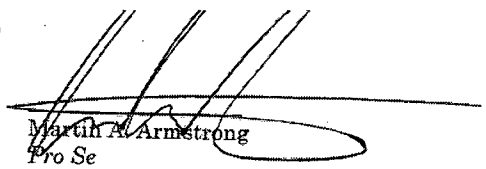
April 3, 2020

CERTIFICATE

Pursuant Supreme Court Rule 44, I hereby certify that the petition for reconsideration filed herewith has been presented in good faith and not for delay. It raises issues of intervening circumstances that came to light after my release from prison and also presents other substantial grounds not previously presented in the initial petition for writ of certiorari.

Dated: April 3, 2020



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