

No. 19A50

UNITED STATES SUPREME COURT

Frank Louis Amodeo,
Petitioner,
v.

United States of America
Respondent,

On Petition for Writ of Certiorari to the 11th Circuit Court of Appeal Nos.: 15-12643
& 16-15867

Petition for Writ of Certiorari

Brian D. Horwitz, Esq.,
VATIC LAW, LLC
3236 Lake George Cove Dr.
Orlando, FL 32812
(407) 373-9690
bhorwitz@vaticlaw.com
Attorney for Applicant/Petitioner

QUESTIONS PRESENTED

1.

This Court's jurisdictional-sequencing decisions establish that a federal court may resolve a case on any non-merits question. This Court holds that there is no absolute jurisdictional hierarchy for deciding the non-merits question. The Eleventh Circuit, however, concludes that Article III standing must be decided first.

Must a federal court resolve standing issues before resolving other dispositive, non-merits questions?

2.

In 2014, without statutory authority, the district court partially vacated a 2009 final order of forfeiture. The criminal case defendant appealed that decision, arguing the district court lacked subject matter jurisdiction. The appeals court dismissed the appeal for lack of standing.

- Does a criminal case defendant always have constitutional standing in the criminal case?
- Does a citizen's interest in ensuring Article III judicial power was not abused create constitutional standing?
- Did the appellate court deny the defendant due process by dismissing without allowing the defendant opportunity to prove a possessory interest?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

The petitioner is an individual, not a corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
INDEX TO APPENDICES.....	vi
TABLE OF AUTHORITIES.....	vii
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT.....	6
REASON 1: The Eleventh Circuit declared that a federal court must first decide any issue of standing before resolving other threshold, non-merit questions, which would dispose of an appeal. The Eleventh Circuit rule conflicts with the jurisdictional sequencing decisions of this Court and conflicts with rules adopted by the other federal courts of appeal.....	6
REASON 2: The Eleventh Circuit adopts a too narrow definition of standing. A definition that illuminates three related and unresolved questions regarding when a criminal defendant not have constitutional standing to participate in a criminal forfeiture proceeding.....	10
CONCLUSION	15

APPENDIX

Eleventh Circuit's February 21, 2019 Opinion.....	App. 1
Eleventh Circuit's April 24, 2019 Denial of Petition for Rehearing.....	App. 7
Middle District of Florida's September 17, 2014 Order.....	App. 8
Supplemental Questions from the Eleventh Circuit.....	App. 9
Further Supplemental Question from the Eleventh Circuit	App. 11
Order Dismissing Indictment Against Aqmi Strategy.....	App. 12
Order Identifying Amodeo as AQMI's Representative (and the United States' Memorandum requesting the same).....	App. 13
2015 Guardianship Order Appointing Successor Guardian.....	App. 26
April 2015 District Court Order Confirming Amodeo's Incapacity.....	App. 28
Preliminary Order of Forfeiture entered by the District Court on October 2, 2008.....	App. 31
Final Order of Forfeiture entered by the District Court on April 4, 2009.....	App. 40
Order entered by the District Court on March 11, 2014 vacating portions of the Final Order of Forfeiture.....	App. 43

TABLE OF AUTHORITIES

Citizen Ctr. v. Gessler, 770 F.3d 900.....	8
Estate of Cummings v. Cmtys. Health Svcs. 881 F.3d 793 (10th Cir. 2018)....	6,8
Ex Parte McCardle, 74 U.S. 506 (1868).....	10
Florida Wildlife v. United States Army Corps of Eng'rs, 859 F.3d 1306 (11th Cir. 2017).....	8
Intec USA, LLC v. Engle, 467 F.3d 1038 (7th Cir. 2006).....	8
Levin v. Commerce Energy, Inc., 560 U.S. 413 (2019).....	7-9
Mitchell v. Maurer, 293 U.S. 237 (1934).....	10
Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999)	7
Sanchez v. United States, 740 F.3d 47 (1st Cir. 2014).....	7,8
Sanja v. Navig8 Ship Management 882 F.3d 96 (5 th Cir. 2018).....	8
Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007)...	6,7,9
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).....	7,10
United States v. Amodeo, 44 F.3d 14 (2d Cir. 1995).....	14
United States v. Amodeo, 916 F.3d 967 (11th Cir. 2019).....	7,11,13
United States v. AQMI, Dist. No. 6:08-cr-0231-JA-KRS (M.D. Fla. 2009)..	12

TABLE OF CONSTITUTIONAL ARTICLES

U.S. Constitution, Article III.....	2,5,6,11,13,14
-------------------------------------	----------------

TABLE OF RULES

Federal Rules of Criminal Procedure, Rule 32.2.....	2,11,12,13
---	------------

TABLE OF FLORIDA STATUTES

Florida Statutes §744.441.....	3
--------------------------------	---

PETITION FOR A WRIT OF CERTIORARI

Frank Louis Amodeo petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 916 F.3d 967 (11th Cir. 2019), and is found at App. 1. The order denying petitioner's timely petition for rehearing was entered April 24, 2019, and is found at App. 7.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Justice Thomas granted an extension of time until September 21, 2019 on July 17, 2019, in Application No. 19A50.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

U.S. Constitution Article III, § 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;— to Controversies between two or more States;— between a State and Citizens of another State;— between Citizens of different States;— between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Statutory Provision

Fed. R. Crim. P. 32.2.(c)(2): When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant had an interest in the property.

STATEMENT OF THE CASE

On August 6, 2008, the United States indicted Frank L. Amodeo for various tax related crimes committed by a corporation of which he was not a shareholder, director, officer, or statutory controlling person.¹ Prior to the indictment, in June of 2008, the State of Florida had declared Mr. Amodeo mentally incapacitated and appointed an emergency guardian. He was further admitted as a patient at the Harvard - affiliated McLean Hospital. In September 2008, Mr. Amodeo appeared before the district court to enter a guilty plea, but was assisted only by conflicted counsel, and was not receiving proper medical treatment. Despite his continuing incapacity, and despite the fact that the State Court was not consulted (to provide approval for the execution of a contract on behalf of an incapacitated ward) as required by Florida Statutes §744.441 *et. seq.*, conflicted counsel permitted Mr. Amodeo to sign a plea agreement and enter a guilty plea. As a result of the plea agreement, a preliminary-stage forfeiture order was entered in October of 2008. (App. 31).

In May of 2009, the district court accepted Mr. Amodeo's guilty plea and sentenced him to 270 months imprisonment. Later, in July of 2009, the district court entered a final order of forfeiture that was materially different than the preliminary order of forfeiture. (App. 40). At the time of the motions for and entry of the Final Order of Forfeiture, the State of Florida had not restored Mr. Amodeo's capacity and the district court refused to appoint Mr. Amodeo counsel. In 2013, under a Bureau of Prisons auspices, the State of Florida conducted a capacity

¹ The taxpayer, AEM, Inc., requires a state-licensed individual to control the bank accounts and

evaluation of Amodeo. The state refused to restore Mr. Amodeo's capacity.

In 2014, in order to avoid defending two purportedly-forfeited corporations in a lawsuit, the United States sought to vacate the final forfeiture order and return the corporations to the pre-forfeiture stage of the proceedings. The government served Mr. Amodeo with the motion for partial *vacatur*. The district court granted the partial *vacatur* motion. Before that order became final, Mr. Amodeo, acting *pro se*—despite his continuing lack of legal capacity—moved for reconsideration and objected to the district court's order. More precisely, Mr. Amodeo brought to the district court's attention that it lacked power and authority (subject-matter jurisdiction) to modify a final order of forfeiture after the criminal judgment had become final.

The district court ordered a reply from the government and permitted Mr. Amodeo to respond. Thereafter, the district court decided Mr. Amodeo did not have standing to participate in these proceedings, since he had no interest in the final-stage forfeiture proceedings or order, and granted the motion vacating the forfeiture as to AQMI Strategy Corporation and Nexia Strategy Corporation. (App. 43)

In September of 2014, Amodeo filed a notice of appeal. The district court did not transmit the notice to the court of appeal until the following June (2015). Over the next nearly four years, several briefs were filed. On two occasions, the appeals court issued supplemental questions. (App. 9 and 10).

In January of 2019, the Eleventh Circuit held Oral Arguments. Thereafter, in a published opinion, the Eleventh Circuit dismissed the appeal, concluding that Mr. Amodeo lacked standing to appeal, thus whether the district court had

subject-matter jurisdiction could not be reviewed. (App. 1).

ARGUMENT 1: The Eleventh Circuit decided that a federal court must first decide any issue of standing before resolving other threshold, non-merit questions, which would dispose of an appeal. The Eleventh Circuit rule conflicts with the jurisdictional-sequencing decisions of this Court and conflicts with the rules adopted by the other federal courts of appeal.

In *Amodeo*, the Eleventh Circuit adopted a rule that conflicts directly with this Court's jurisdictional-sequencing decisions, and the sequencing rule of the majority of its sibling circuit courts of appeals. See, e.g., *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). Rosenbaum's concurrence articulates the Eleventh Circuit's departure from this Court and the rest of the courts of appeals' rules, "I respectfully disagree with the panel's opinion that Article III standing must always be determined first when more than one non-merits question is immediately obvious." *Amodeo* at 974. The Eleventh Circuit elevated standing over all other non-merits and jurisdictional questions, this a contrarian position to that of all other circuits to have decided the issue, as well as diametrically opposite of this Court's decisions. *Id.*, see, e.g., *Estate of Cummings v. Cnty. Health Svs.*, 881 F.3d 793, 798 (10th Cir. 2018).

This Court "explained that 'a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.'" *Amodeo* at 974 (quoting *Sinochem* at 431). This Court emphasized that "there is no mandatory sequencing of jurisdictional issues." *Id.* Nevertheless, the Eleventh Circuit concluded that "Article III standing must always be determined first...." *Id.* at

973-74 ("Amodeo protests that it would be perverse if the district court could enter an order without jurisdiction and with no possibility of review....").

The Eleventh Circuit's mandatory sequence stands in diametric opposition to this Court's holdings. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *Sinochem*, 549 U.S. at 422. Historically, this Court's authority supported the Eleventh Circuit's reasoning, but in the above trilogy of cases, this Court reworked the once unblemished principle that "Article III is always an antecedent question...." *Steel Co.*, 523 U.S. at 1101; *see also Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 419 (2019)(this Court clarified that "the proper course" for courts that can "readily determine" a jurisdictional non-merits ground for dismissal is "to dismiss on that ground.").

In an attempt to revive Article III standing's primacy among non-merits, threshold issues, the Eleventh Circuit dives back in time, relying on a line of ancient precedent. *Amodeo*, 916 F.3d at 971. In doing so, it not only places itself in stark opposition to this Court's current holdings, but also puts itself in conflict with the majority of its sibling circuit courts of appeal.

Unlike the Eleventh, other circuits have taken the "leeway" offered by this Court and applied it to such potential bars to litigation as exhaustion, immunity, and timeliness. *See Sanchez v. United States*, 740 F.3d 47, 51 (1st Cir. 2014). Among these circuits are the First, Seventh and the Tenth Circuits. *Sanchez*,

740 F.3d at 51, *Estate of Cummings*, 881 F.3d at 798 (quoting *Citizen Ctr. v. Gessler*, 770 F.3d 900, 906 (10th Cir. 2014)(addressing mootness before standing "[b]ecause there is no mandatory sequencing of nonmerits issues..."); *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)(the jurisdictional sequence or hierarchy "is vital only if the court proposes to issue a judgment on the merits").

The Fifth Circuit, on the other hand, takes a position different from both the Eleventh and the First. The Fifth finds "that federal courts address subject-matter jurisdiction at the outset in 'mine-run cases' and reach other issues first only where the jurisdictional issue is difficult to determine and the other grounds are relatively less burdensome." *Sanja v. Navig8 Ship Management*, 882 F.3d 96, 100 (5th Cir. 2018) .

Amodeo's case illuminates the lower court's struggles in applying this Court's jurisdictional sequencing jurisprudence. *See Florida Wildlife v. United States Army Corps of Eng'rs*, 859 F.3d 1306 (11th Cir. 2017) (Tjiflat, J. concurring) ("the lower courts have expressed both uncertainty and disagreement over the proper interpretation of the resequencing doctrine."). The Eleventh Circuit noted further a continuing conflict over when it is appropriate to dismiss a case on non-jurisdictional grounds. *Id.* at 1322-25 (discussing this Court's opinion in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010)).

It is worth noting that in this jurisdictional-sequencing trilogy, especially *Sinochem*, this Court pronounced that "a district court... may dispose of an

action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrants." *Sinochem*, 549 U.S. at 432. This Court, however, also recognized that when a district court can readily determine it lacks subject-matter jurisdiction, then the "proper course" is to dismiss on that ground first. Justices Thomas and Scalia note that simply because a court "may dismiss on a non-merits ground before deciding a jurisdictional ground, does not mean it "should." *Levin*, 560 U.S. at 434.

ARGUMENT 2: The Eleventh Circuit adopts a too narrow definition of standing. A definition that illuminates three related and unresolved questions regarding when a criminal defendant not have constitutional standing to participate in a criminal forfeiture proceeding.

This Court holds that a federal court must first satisfy itself of its own jurisdiction. "Without jurisdiction, the court cannot proceed at all in any cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex Parte McCardle*, 74 U.S. 506, 514 (1868)).

Here, the appeals court overlooked its duty to review not only its jurisdiction, but also that of the district court below. "An appellate federal court must satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). This duty brings us back to the proper sequence of jurisdictional questions.

In 2014, when the government filed its motion to vacate the final forfeiture order, it served Amodeo, bringing him into the contest. Amodeo pointed out to the district court that it lacked jurisdiction over the subject matter. Without considering whether it had jurisdiction, the district court concluded that Amodeo lacked standing and disregarded Amodeo's alert that the district court itself did not have jurisdiction.

During the course of the proceedings, Amodeo articulated three bases for his interest in the action: (1) the securities representing ownership of the corporation were never forfeited, therefore Amodeo had possession (and still does) of AQMI (as the Preliminary Forfeiture Order only provided for the

forfeiture of Amodeo's interest in the assets of the entities, not the entities themselves); (2) the government invoked federal court jurisdiction and served Amodeo as the criminal-case defendant, thus he has no burden to prove standing; and (3) as a citizen he had a public interest in preventing federal courts from issuing unlawful orders and as well as willfully exceeding its jurisdiction.

This leads to the thrust of Mr. Amodeo's challenge: the district court lacked statutory authority and power (subject-matter jurisdiction) to vacate the final order of forfeiture. *Amodeo*, 916 F.3d at 971. Since a district court has an affirmative duty to examine its own jurisdiction, the district court should first determine whether it has subject-matter jurisdiction, regardless of whether the parties raise the issue.

At the most refined level of analysis, this rule shows it did not matter whether Mr. Amodeo had standing to participate in the proceeding or was merely an angel on the court's shoulder whispering "check your jurisdiction." Once on notice (even if *sua sponte* notice), the district court had a duty to check its subject-matter jurisdiction, regardless of Mr. Amodeo's standing.

Moreover, even under this Court's flexible jurisdictional-sequencing decisions, the district court should have reached the purely legal subject-matter jurisdiction inquiry first. The district court needed only to review Federal Rules of Criminal Procedure Rule 32.2 to learn there was no statutory authority for

the court to modify a final forfeiture order.

At which point, without asking either the United States to respond or Mr. Amodeo to reply, (Dist. Doc. 210), the district court should have dismissed the action for lack of subject-matter jurisdiction.

Finally, it is not disputed that Amodeo had continuous possession not only of the AQMI common stock, but also the corporation. Despite the purported forfeiture (and it should be noted again that the POF did not even purport to forfeit the common stock or the corporation), the government never attempted any seizure. This reality is confirmed by the fact that the government and district court required Amodeo's presence in the AQMI criminal proceedings (*United States v. AQMI*, Dist. No. 6:08-cr-0231-JA-KRS (M.D. Fla. 2009), Doc. 89) (App. 13). The indictment against AQMI was dismissed immediately after Amodeo's demand on behalf of AQMI for a jury trial. (App. 12).

Amodeo's possession of the corporation alone should have been sufficient for standing. The Eleventh Circuit implicitly rejects the sufficiency of possession as a source of standing and puts itself in conflict with other circuit courts to have addressed the issue.

Criminal Defendants

A textually principled reading of Article III reveals that constitutional standing does not apply in the context of a federal criminal proceeding. U.S. Const. Article III § 2. The provision provides that the judicial power extends to any case involving the United States law that encompasses a controversy

involving the United States ("to Controversies, to which the United States shall be a Party"). The United States had standing. Amodeo was the defendant and respondent. There is no principled reason Amodeo did not have standing. Stated otherwise, Amodeo did not ask to be indicted, nor did Amodeo request the district court to vacate the forfeiture order. *Amodeo*, 916 F.3d at 971. The United States invoked the district court's authority, not Amodeo. Amodeo merely responded to the United States's actions—thus common sense, logic, and the Constitution indicate that, once hauled into court, Amodeo had standing to participate in the proceedings.

Amodeo recognizes that Rule 32.2 contains language that makes it conceivable Amodeo (as the defendant, as opposed to as the citizen or the possessor of an asset) lacked statutory standing to challenge final forfeiture proceedings. Fed. R. Crim. P. 32.2 (d). But that statutory jurisdiction analysis never occurred. *Amodeo*, 916 F.3d at 970 (the government did not seek to substitute assets). The district court acted to release assets, not add them, to the forfeiture.

Moreover, if the district court had conducted a statutory analysis, it necessarily would have dredged up the defects in the preliminary forfeiture order, both the failure to include forfeited items in the preliminary forfeiture order and the subsequent rescission of the plea agreement (with its attendant forfeiture consent) by the guardian appointed by the State of Florida.

Put differently, if the district court had brought into contention whether

Amodeo had statutory standing, then evidentiary proceedings would have been required. As adjudicated, Amodeo has been denied notice of the issues and a meaningful opportunity to be heard.

Public Interest

The Second Circuit recognized that a non-party's public interest in a federal court's performance of its Article III functions generated a sufficiently tangible interest that a non-party would have standing to be heard, even in a non-criminal action. See *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995) (public interest in judicial document allowed third parties to prevent the court from sealing the document).²

Below, the district court chose to take jurisdiction over a judgment and property without any statutory authorization. Quite simply, no statute or rule permits the district court to modify a final forfeiture order. See Fed. R. Crim. P. 32.2 (2019).

A review of the rule reveals that Congress only authorized the district court to modify a final forfeiture order when substitute assets are involved. Fed. R. Crim. P. 32.2(e). This action did not involve any allegations of substitute assets; the district court took an action the law did not authorize.

Consequently, Amodeo, or any citizen, had a right to bring the *ultra vires* action to the district court's attention. When the district court persisted in the

² Anthony Amodeo in the Second Circuit action has no relation, biological or legal, to the Frank Amodeo in these proceedings.

action (effectively usurping jurisdiction), then Amodeo (or anyone) had a sufficient "public harm" to appeal the ruling that exceeded the district court's Article III powers.

This court should grant the writ, reverse the Eleventh Circuit's opinion, and require the district court to dismiss the action for lack of subject-matter jurisdiction.

CONCLUSION

This Court's guidance as to what order a federal court should decide threshold non-merits questions is required, as the circuits are in conflict with each other, and the Eleventh Circuit adopted a rule that runs afoul of this Court's decisions, conflicts with its sibling circuits, and generates the perverse result that a district court may issue an unlawful order that can never be reviewed. This Court should grant the writ, resolve the circuit conflict, and bring a rational order to the sequence for resolving threshold jurisdictional questions.

Respectfully submitted,

/s Brian Horwitz _____
Brian D. Horwitz, Esq.,
FL Bar No. 37077
counsel for Guardian
Charles Rahn for
Frank L. Amodeo
3236 Lake George Cove Dr.
Orlando FL 32812
bhorwitz@vaticlaw.com
(407) 373-9690

September 20, 2019