

OCT 18 2019

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19-6571
No. 18-_____

IN THE
Supreme Court of the United States

FRANCISCO ILLARRAMENDI,

Petitioner,

v.

JOHN J. CARNEY,

IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR HIGHVIEW POINT PARTNERS, LLC, MICHAEL KENWOOD GROUP, LLC, MK MASTER INVESTMENTS LP, MK INVESTMENTS, LTD., MK OIL VENTURES LLC, MICHAEL KENWOOD CAPITAL MANAGEMENT, LLC, MICHAEL KENWOOD ASSET MANAGEMENT, LLC, MKENERGY AND INFRASTRUCTURE, LLC, MKEI SOLAR, LP, MK AUTOMOTIVE, LLC, MK TECHNOLOGY, LLC, MICHAEL KENWOOD CONSULTING, LLC, MK INTERNATIONAL ADVISORY SERVICES, LLC, MKG ATLANTIC INVESTMENT, LLC, MICHAEL KENWOOD NUCLEAR ENERGY, LLC, MYTCART, LLC, TUOL, LLC, MK CAPITAL MERGER SUB, LLC, MK SPECIAL OPPORTUNITIES FUND, MK VENEZUELA, LTD., SHORT TERM LIQUIDITY FUND I, LTD.,

Plaintiff – Appellee,

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

PETITION FOR A WRIT OF CERTIORARI

Francisco Illarramendi, Pro Se

Inmate No. 20402-014

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QUESTIONS PRESENTED

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

1. Do lower courts have an inherent duty to properly apply doctrine of this Supreme Court that confirms the applicability of the Statute of Limitations - as codified by 28 U.S.C. 2462 - to relief sought in civil actions by the Securities and Exchange Commission?
2. Can Summary Judgement be granted to a Plaintiff pursuant to collateral estoppel from a defendant's guilty plea and conviction in a parallel, and inextricably intertwined criminal proceeding, if the plea and conviction are invalid and under collateral attack due to structural errors that occurred at inception of the proceeding and which mandate automatic reversal *ab initio*?
3. Can lower courts arbitrarily ignore the mandate of this Court – most recently reaffirmed in Tolan v. Cotton, 572 US, 134 S. Ct., 188 L Ed 2d 895, 2014 US LEXIS 3112 - which requires that "*in ruling on a motion for summary judgment, 'the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor*" – particularly when the evidence clearly supports the non-movant's position?

REFERENCED CASES AT THE DISTRICT AND APPELLATE LEVELS AND LIST OF KEY PARTIES

The decision pertaining to this Petition is an Affirmation of the Grant of the Plaintiff's Motion for Summary Judgment ("MSJ"), in a case brought against me by a Court-Appointed Receiver (the "Plaintiff" or "Receiver") in a parallel and inextricably intertwined case filed against me in the District Court for the District of Connecticut by the United States Securities and Exchange Commission ("SEC").

The applicable lower court cases are the following:

Carney v. Illarramendi et al. – United States Court of Appeals for the Second Circuit, Docket No. 18-1334 - (the "Circuit Court Proceeding").

District Court for the District of Connecticut (Judge Stephan R. Underhill) in the case of Carney v. Illarramendi et al. – Case No. 3:12-cv-00165-SRU (the "District Court Case")

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

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

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

U.S. v. Illarramendi – Case Docket No. 3:16-cv-01853 (SRU) – Proceeding related to the Criminal Matter to Vacate the Judgement of Conviction under 28 U.S.C. 2255 due to the Violation of my Constitutional Rights (the “Habeas Petition”).

List of Key Parties

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

Receiver, (the “Plaintiff” or the “Receiver”): Includes Mr. John Carney, Plaintiff in the District Court Case and Court-appointed Receiver in the SEC Case, as well as members of his team.

Securities and Exchange Commission (“SEC” or the “Commission”) – Plaintiff in the SEC Case.

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

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TABLE OF AUTHORITIES

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

B&B Hardware, Inc. v. Hargis Indus., 575 US, 135 S. Ct., 191 L Ed 2d 222, 2015 US LEXIS 2119, “*Hargis*” [15]

Blackledge v. Allison, 431, US 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 – 1997, “*Blackledge*” [13]

Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 – 1969, “*Boykin*” [22, 30]

Tolan v. Cotton, 572 US, 134 S. Ct., 188 L Ed 2d 895, 2014 US LEXIS 3112, “*Cotton*” [ii, 16, 29, 31, 36, 39]

Dixon v. U.S., 548 U.S. 1, 126 S Ct. 2437, 165 L Ed 2d 299 - 2006 U.S. LEXIS 489, “*Dixon*” [38]

Gabelli v. S.E.C., 568 US 442 454 133 S. Ct. 1216, 185 L. Ed. 2d 297 – “*Gabelli*” [17, 18, 19, 20, 21]

Gonzalez v. U.S., 722 F. 3d 118; 2nd Cir. 2013, “*Gonzalez*” [13]

National Petrochemical Company of Iran v. The M/T Stolt Sheaf et al., 930 F. 2d 240; 2nd Cir. 1991, “*Iran*” [11, 36].

Republic of Iraq v. ABB et. al., 920 F. Supp 2d 517, 2nd Cir. – 2014, Cert Denied 2015, “*Iraq*” [11, 36]

Kokesh v. S.E.C., 137 S. Ct. 1635; 198 L. Ed. 2d 86; 2017 U.S. LEXIS 3557 – “*Kokesh*” [17, 18, 19, 21]

Lee v. United States, 582 US, 137 S. Ct. 198 L Ed 2d 476, 2017 US LEXIS 4045, “*Lee*” [22, 30]

Luis v. United States, 578 U.S. No.14-419 – 2016, “*Luis*” [5, 8, 9]

U.S. v. Marcus, 560 U.S. 258, 262, 130 S. Ct. 2159, 176 L. Ed. 2de 1012 – 2010, “*Marcus*” [20]

McCoy v. Louisiana, 2018 US LEXIS 2802, No. 16-8255 (decided May 14, 2018), “*McCoy*” [16, 23]

Medina v. California, 505 U.S. 437, 446, 448, 112 S. Ct. 2572, “*Medina*” [25, 26]

Motores Venezolanos, C.A. – Motorvenca, Constitutional Chamber of the Supreme Court of Justice of the Bolivarian Republic of Venezuela – November 2, 2011 – (See Sentencing Exhibits – Criminal Matter Doc. 165) – “*Motorvenca*” [34]

Ocasio v. U.S., 136 S. Ct. 1423, 1428, 194 L. Ed. 2d 520 - 2016, “*Ocasio*” [38].

District Attorney’s Office for the Third Judicial District et al. v. Osborne, 557 US 52, 129 S Ct 2308, 174 L Ed 2d 38 – 2009, “*Osborne*” [25]

Strickland v. Washington, 466 US 668, 802 L. Ed. 2d 674, 104 S. Ct. 2052 – 1984, “*Strickland*” [8, 27]

Weaver v. Massachusetts – 137 S. Ct. 1899; 198 L. Ed. 2d 420 - 2017 U.S. LEXIS 4043, “*Weaver*” [16, 23]

OPINIONS BELOW AND JURISDICTION

Francisco Illarramendi, acting Pro Se, respectfully submits this Petition for a Writ of Certiorari to review the Summary Order (the “Order”) of the United States Court of Appeals for the Second Circuit which affirmed the District Court Ruling that Granted Summary Judgment to the Plaintiff in the District Court Case (the “Summary Judgment”).

The Order was issued on May 28; 2019 and is not published¹. A copy of the Order, as received from the Circuit Court, is attached herein as Appendix A. I petitioned the Second Circuit Court for a Rehearing *en banc*. The Second Circuit Court denied my petition for rehearing *en banc* on July 23, 2019. A copy of the Order denying my petition for rehearing *en banc* is attached herein as Appendix C.

The Summary Judgment was issued by the District Court on March 26, 2018 and is published under identifier 2018 U.S. Dist. LEXIS 48855. The published version is attached herein as Appendix B.

Throughout this document, both the Circuit Court Summary Order and the District Court Summary Judgment will be jointly defined as the “Opinions Below.”

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

¹ Please note that I am a Pro Se, incarcerated Defendant and so I only have limited access to a Lexis Electronic Law library which is generally only updated on a quarterly basis and which may not contain all published opinions. As far as I could ascertain, the Order is not published in the version of Lexis available to me. I do not have access to any other source of legal publications at this time.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2462 establishes that:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon

Federal Rule of Civil Procedure 56 – Summary Judgement, in its pertinent parts indicates:

(a) **Motion for Summary Judgment:** A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

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

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

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

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

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

- (1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
- (2) Grand-jury proceedings; and
- (3) Miscellaneous proceedings such as: extradition or rendition; issuing and arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise.

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

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

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

- United States Constitution VIth Amendment
- 18 U.S.C. 1951(a) & 1951(b)(2) – Hobbs Act
- 18 USC 3663^a – Mandatory Victims Restitution Act (“MVRA”)

STATEMENT OF THE CASE AND THE FACTS

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

The Circuit Court Proceeding is directly derived from the District Court Case, which stems from the business activities carried out during the period from October 2005 to January 2011 (the “Relevant Period”) at companies which now form part of the so-called Michael Kenwood Receivership (the “Receivership”). During the Relevant Period I was either a partial partner/owner or majority partner/owner in most of the Receivership Companies.

In or around January 2011, more than five years after the beginning of the Relevant Period, the Plaintiff in the SEC Case, the U.S. Securities and Exchange Commission (“SEC”) filed an extemporaneous lawsuit against me as Defendant and several of the companies in the Receivership as Relief Defendants, alleging, among other issues, various violations of securities laws. In parallel, the U.S. Attorney’s Office for the District of Connecticut was pursuing criminal charges against me in a process that derived into the inextricably intertwined Criminal Matter. As part of the SEC lawsuit, the District Court appointed the Receiver, and

imposed a Temporary Restraining Order (“TRO”). The TRO encompassed all of my assets; including a large portion which were unequivocally untainted. As described in the Habeas Petition, the TRO generated a Structural, Constitutional error as defined by this Supreme Court in Luis v. U.S., 578 US – No. 14-419 – 2016, because it denied my Sixth Amendment right to retain counsel of my choice to represent me in the inextricably intertwined Criminal Matter (see below, **The Habeas Petition and the Criminal Matter**).

On June 11, 2013, approximately two years after his appointment, the Receiver submitted a Motion to Establish Claim Administration Procedures in the District Court Case (SEC Case Doc. 709). The Court granted the Receiver’s Motion on December 6, 2013 (SEC Case Doc. 800), effectively approving the Net Investment Method (“NIM”) for claim valuations. The District Court stated in its approval that, under the NIM, claims must be calculated and presented by netting from the gross amount contributed, any distributions received, “*whether those distributions are characterized as payments, capital gains, interest, profit-sharing or otherwise*” (District Court Case, Doc. 800). On February 21, 2014, I filed a Motion for a Stay of Execution of any Claim Distributions (*Ibid*, Doc. 857), which was denied by Judge Arterton on March 27, 2014, under the premise that it was extemporaneous and that I would have a chance to object to distributions in the future. On October 16, 2014, the Receiver filed his Motion for Approval of the

Distribution Plan (*Ibid*, Doc. 905) and I filed an opposition via a Motion for Extension of Time to File a Response (*Ibid*, Doc. 909). My filing was, once again, denied by the Court, erroneously stating that I did not have standing to object. As an incarcerated, Pro Se Defendant, I was not allowed to attend the Hearing at which the Distribution Plan was discussed and the Distribution Plan was thus approved by Judge Arterton despite my opposition and **without any scrutiny of the evidence underlying the same**. Therefore, I was a Defendant in a civil action, in which there had been no trial or trial-like proceedings, and no evidentiary scrutiny, who was effectively unrepresented at a key portion of the litigation.

In turn, because of the inextricably intertwined nature of the cases, those decisions directly affected my personal and constitutional rights. The approval of the Plan of Distribution implicitly and erroneously gave credence to the Receiver's unilateral and unscrutinized valuation of the claims presented against the Receivership Companies, most particularly the invalid, fraudulent and overvalued claim by PDVSA.

The Habeas Petition and the Criminal Matter

In parallel to this process, due to representation by Counsel who was not of my choice, I entered a structurally-defective guilty plea in the Criminal Matter. Pursuant to that structurally-defective plea, I was sentenced by Judge Underhill, on January 29, 2015, to a period of incarceration of 156 months. Subsequently, Judge

Underhill issued a Restitution Order for approximately \$370 million. The length of my sentence was largely the result of an erroneously calculated Loss Enhancement which added more than 11 years to the indicative guidelines range. Furthermore, for all intent and purposes, the Restitution Order is to be applied exclusively to cover the fraudulent, invalid and overvalued claim submitted by PDVSA. As the record clearly shows, **there was no evidentiary hearing at Sentencing or at Restitution.** Judge Underhill relied, for both determinations, almost exclusively, on an affidavit from Receiver team-member Mr. Brian Ong. In turn, Mr. Ong's affidavit was based on the same unscrutinized documentation that was used by the Receiver to produce the Plan of Distribution in the District Court Below. **To date, all evidence, in all proceedings, has remained unscrutinized.**

Because applicable law and jurisprudence emanated from the Supreme Court prior to finality of my conviction unequivocally indicates that my guilty plea, judgement of conviction and sentence are unconstitutional, in November of 2016 I filed the Habeas Petition.

The Habeas Petition centers on two Grounds for Relief:

I. Constitutional Error derived from the denial of my Sixth Amendment Right to select counsel of choice in criminal proceedings, due to the fact that my untainted assets were frozen by a pre-trial Temporary Restraining Order

(the “TRO”) in contravention of the Supreme Court’s intervening decision in Luis v. U.S., 578 US – No. 14-419 – 2016.

II. Constitutional Error derived from the denial of my Sixth Amendment Right to a Fair Trial due to Ineffective Assistance of Counsel (“IAC”) under the Performance and Prejudice Prongs of Strickland v. Washington, 466 US 668, 802 L. Ed 2d 674, 104 S. Ct. 2052 – 1984.

At present, the Habeas Petition is still pending deliberation by the District Court. After my initial filing (Doc. 1),² the District Court ordered the Government to respond and the Government submitted an Opposition to the Habeas Petition (Doc. 10). I subsequently filed an Initial Reply and a Supplemental Reply to said Opposition (Docs. 12 & 15 respectively). In parallel, on June 20, 2017, the District Court issued an Order (Doc. 14) indicating its interpretation that the Habeas Petition alleges that I “*had been deprived of counsel of [my] choice and had, as a result, received ineffective assistance of counsel in the course of entering [my] guilty plea.*” This Order also stated that the Habeas Petition “*raises complex legal issues that would likely benefit from the assistance of counsel;*” and offered to appoint counsel to represent me if I filed a motion to that effect within thirty days of the Court’s order. For various reasons that are too broad to be addressed herein, I filed a Motion for Appointment of Stand-by Counsel (Doc. 16). Said motion was

² The document numbers listed in this section all refer to docket entries in the Habeas Petition proceedings.

denied by the District Court as it viewed that “*the nature of the arrangement for stand-by counsel requested.....risks inefficiency and confusion regarding.....the respective roles.*” (Doc. 20) The Court states in its denial that it is still willing to appoint counsel under the CJA pursuant to 18 U.S.C. 3006A. As described in the record of the Circuit Court Proceeding, it appears inappropriate for a court to attempt to solve a constitutional violation by imposing the same structural error that gave rise to said violation in the first place. This is why I find it unreasonable to accept the appointment of CJA counsel to represent me in the Habeas Petition given that said counsel, once again, would not be the counsel of choice which, under *Luis*, is guaranteed by the Constitution.

In this respect, I have clarified for the District Court, as pertinent herein, that Ground I for relief of the Habeas Petition focuses mainly on the deprivation of counsel of choice as a structural error derived from the TRO. Ground I does not, necessarily focus on IAC except as regards the effects of IAC on the Counsel of Choice issue.

As part of the Habeas Petition, I requested that the District Court grant me temporary release pending its deliberations, particularly due to the structural nature of the various errors which underpin the petition. The District Court denied the relief sought, indicating that it is not empowered to grant release to a sentenced inmate. I appealed that decision to the Second Circuit and was denied without an

explanation. A Petition for Certiorari to this Honorable Court for review of that decision, was also denied.

The Record of the Habeas Petition is extensive. The Habeas Petition is based on several structural errors either committed by the courts or arising from IAC. It also comprises several non-structural, standard IAC errors. **The Habeas Petition unequivocally shows that my incarceration is unconstitutional and my conviction and sentence should be vacated immediately.** Because of the breadth and quantity of arguments that support the Habeas Petition, it is impossible to properly summarize them within the space allotted to this Petition. The record of the case is available for this Court upon request from the District Court or the Second Circuit Court of Appeals. **The merit of the Habeas Petition is particularly important because, when it is granted, it will negate the collateral estoppel of the Criminal Matter.**

PDVSA and the Affirmative Defenses

As stated throughout the record, one of the key issues contemplated in the in these proceedings pertains to the Claim presented by PDVSA. PDVSA is wholly-owned (100%) by the Government of Venezuela and forms a single consolidated entity with the same for purposes of accounting and financial management under the Venezuelan Treasury governance. Therefore, the valuation of PDVSA's claim

requires consideration of key jurisprudence and legal parameters in Venezuela which govern the acquisition of PDVSA's claim rights and repayment thereof.

As part of my defense, I have also cited that extortionate and corrupt practices by PDVSA and its officials, acting under color of official right, have negated the validity of PDVSA's claims under Second Circuit doctrine in cases such as National Petrochemical Company of Iran v. The M/T Stolt Sheaf et al., 930 F. 2d 240; 2nd Cir. 1991 and Republic of Iraq v. ABB et. al., 920 F. Supp. 2d 517, 2nd Cir. 2014, Cert. Denied 2015. This corrupt extortion by PDVSA also gave rise to the Affirmative Defenses of Duress and Necessity, which exonerate me of guilt in any actions which may be deemed against applicable law. In this context, I discuss below some of the facts which support the existence and validity of the Affirmative Defenses in these proceedings, despite the District Court's decision to ignore their applicability when deliberating on the MSJ.

It is my position that any wrongdoing which may be judged to be a result of my actions was strictly due to factors that give rise to of the Affirmative Defenses of Duress and Necessity. The Affirmative Defenses resulted specifically from extortion carried out against me by PDVSA representatives under color of official right in violation of 18 U.S.C. 1951 (the "Hobbs Act"). The evidence of extortion and duress in the public and judicial record is incontrovertible, as would be proven if appropriate evidentiary scrutiny takes place.

**Certain Factual Findings of the various opinions in this and related cases are
Erroneous and Misleading**

The Opinions Below rely on an interpretation of facts and events that is patently erroneous. I must therefore express my vehement disagreement with the portrayal of my actions, my motives for acting, and the results of my actions. In particular, I must categorically disagree with the interpretation of the various financial parameters and facts of the litigation and the assumption that my actions caused a loss in the Receivership Companies; as well as, most importantly the attempt to convey that I was afforded [my] right to counsel in the criminal proceedings. As the Habeas Petition clearly spells out, after imposition of the TRO I was not represented by Counsel of Choice in any proceeding before any court and thus none of the actions or defenses undertaken by counsel can be considered valid because they are all a violation of my right to counsel as protected by the Sixth Amendment to the Constitution.

It is physically impossible, given time and space constraints, to address and dispel all the erroneous statements of the lower courts that are contained in the Opinions Below. In this context, failure to specifically address herein certain items or facts which may be misstated in the Opinions Below does not represent acquiescence on my part to any of those opinions' premises, statements or

conclusions and should not be viewed as a waiver of my rights to object to any unaddressed findings at a later date.

Certified Veracity of my Statements

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

In some cases, particularly given the different viewpoint which the Opinions Below, the SEC or the Receiver may express in their version of events, it may appear that facts stated in this Brief conflict with my Guilty Plea – including its Stipulation of Offense Conduct -, or with my *“solemn declarations in open court carrying a strong presumption of verity,”* – Gonzalez v. U.S. 722 F. 3d 118; 2nd Cir. 2013, quoting Blackledge v. Allison, 431, US 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 – 1997. In particular, apart from the Guilty Plea and Stipulation of Offense

Conduct, the Opinions Below rely partially on statements with respect to the potential losses in the Receivership Companies that I made during testimony at a hearing before Judge Arterton in the SEC Case (see SEC Case Doc. 1062, Pp. 4-6). In this regard, I hereby certify, pursuant to 18 USC 1746, under penalty of perjury, that any discrepancies are due to my ignorance or misunderstanding of pertinent facts, statutes and/or jurisprudence at the time I made any stipulations or statements. In particular, this applies to any prior admission of potential losses to any Claimant or the erroneous contention which has permeated this case regarding its status as a “Ponzi Scheme” or the “Largest Ponzi Scheme in Connecticut History.” The evidence and facts of the case, **which remain unscrutinized despite years of litigation**, prove the profitability of the Receivership for all valid Claimants and the fact that there is no loss to any party, and no intent on my part to purposely and freely defraud any valid Claimant or to incur in any type of Ponzi or other scheme to defraud.

Based on the foregoing, I would request that this Court reflect *de novo* on the facts of the case and avoid being swayed, *a priori*, by the various misrepresentations that have been erroneously disseminated throughout the judicial record as contained in the Opinions Below. In all cases, these misrepresentations have thus far been lent credence by the courts mainly due to the fact that I have never, heretofore, had a full and fair opportunity to defend myself.

REASONS FOR GRANTING THE PETITION

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

1. The Opinions Below blatantly disregard Supreme Court jurisprudence regarding the applicability of the Statute of Limitations to civil actions brought by a Government agency such as the SEC. This Court should grant Certiorari to correct the errors of the lower courts and instruct them regarding the proper way to calculate time with respect to the Statute of Limitations. If this Court does not set the record straight on this matter, a Manifest Injustice will be perpetuated in my case; and future defendants before the District of Connecticut and the Second Circuit Court of Appeals will be subject to similar errors and violations of their rights.
2. The Opinions Below improperly apply the doctrine of Collateral Estoppel³ by using the structurally unconstitutional guilty plea and judgment of conviction to support the grant and affirmation of the MSJ. This Supreme Court should grant Certiorari to ensure that lower courts cannot arbitrarily grant summary judgment in civil proceedings by relying on presumably invalid decision in parallel cases, particularly

³ This Supreme Court has equated the term "*Collateral Estoppel*" with the more appropriate term "*Issue Preclusion*" - B&B Hardware, Inc. v. Hargis Indus., 575 US, 135 S. Ct., 191 L Ed 2d 222, 2015 US LEXIS 2119. Because the SEC and the lower courts refer only to "*Collateral Estoppel*" in the MSJ and the Opinions Below respectively, it is the term used herein.

when the invalid nature of said decisions stems from structural⁴ violations of constitutional rights; as these structural errors do not require a showing of prejudice to merit reversal.

3. The Opinions Below improperly violate the key principle confirmed by this court in Tolan v. Cotton, 572 US, 134 S. Ct., 188 L Ed 2d 895, 2014 US LEXIS 3112, that “*in ruling on a motion for summary judgment, ‘the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor’*.” This Supreme Court should grant Certiorari to reaffirm this doctrine and ensure that lower courts adhere to the strict juridical standards for the grant of summary judgment.

A more detailed explanation of the premises which support the grant of Certiorari in the instant case follows.

1. The Opinions Below violate this Court’s Doctrine Regarding the Statute of Limitations for Civil Actions brought by a Government Agency

It is important to highlight upfront that the lower courts, the SEC and the Receiver unequivocally agree that the alleged wrongdoing that gives rise to the SEC’s Complaint in the SEC Case, and which in turn gave way to the District Court Case, stem from actions that took place in the year 2005. However, the

⁴ Structural violations as defined by this Supreme Court in various cases as the type of errors which do not require a showing of prejudice (i.e., are not subject to harmless error analysis) in order to merit reversal of a conviction. This doctrine has most recently been reaffirmed and expanded upon by this Court in Weaver v. Massachusetts – 137 S. Ct. 1899; 198 L. Ed. 2d 420; 2017 U.S. LEXIS 4043 and McCoy v. Louisiana, 2018 US LEXIS 2802, No. 16-8255 (decided May 14, 2018).

SEC's Complaint was not filed six years later, in 2011. Therefore, the SEC Complaint is inadmissible at inception because it was filed after expiration of the 5-year Statute of Limitations period as defined by this Court in Gabelli v. S.E.C., 568 US 442 454 133 S. Ct. 1216, 185 L. Ed. 2d 297 and Kokesh v. S.E.C., 137 S. Ct. 1635; 198 L. Ed. 2d 86; 2017 U.S. LEXIS 3557. In turn, the Receiver's appointment is extemporaneous and invalid and he was therefore never empowered to bring forth the District Court Case against me. This makes all of these proceedings invalid.

This violation of the Statute of Limitations period itself merits vacating the Opinions Below and forcing the full dismissal of all extemporaneous proceedings. Both *Gabelli* and *Kokesh* are unanimous decisions of this Court and indicate that the Statute of Limitations provides for a five-year maximum time following the first act investigated by a Government agency such as the SEC. As the SEC and the Receiver have widely recognized on the record, that first act took place in 2005, more than 5 years before the filing of the SEC Complaint that gave rise to the District Court Case. As I have indicated in numerous filings, the SEC Complaint was invalid when filed and the District Court should have dismissed it outright. This Court should therefore primarily grant Certiorari because the SEC complaint that gave rise to the District Court Case, at its inception, was filed outside the Statute of Limitations as defined in by this Court's jurisprudence in

Gabelli and *Kokesh*. This Court should not allow lower courts to whimsically circumvent a basic concept such as Statutes of Limitation, which as *Gabelli* states, “*set a fixed date when exposure to the specified Government enforcement efforts end.*” In particular, *Kokesh* and *Gabelli* both reaffirmed that such limits are “*vital to the welfare of society*” and rest on the principle that “*even wrongdoers are entitled to assume that their sins may be forgotten. The statute of limitations at issue here – 28 USC 2462 – finds its roots in a law enacted nearly two centuries ago. In its current form, 28 USC 2462 establishes a 5-year limitations period for an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture.*”

The lower courts, as well as the Receiver and the Plaintiff, have given an erroneous interpretation to this Court’s decisions in *Kokesh* and *Gabelli*, and this Court should clarify these unanimous decisions in order to correct the Manifest Injustice against me which has evolved from that error and also to avoid such errors in the future.

As stated earlier, both the Plaintiff and the Receiver have repeatedly admitted that the actions which gave rise to their complaint stem from the year 2005. That is the time from which the 5-year statute of limitations for filing the SEC Complaint should be calculated. This is because not only have all parties and courts in the proceedings described the Receivership Companies as a single,

uninterrupted and ongoing enterprise and have treated all of my actions as a single process, but the fact is that all my actions, whether ultimately deemed right or wrong, stemmed from the same original event of extortion by PDVSA-related individuals and encompassed the single effort to ensure the financial and physical integrity of any parties who could be affected.

In this context, it is important to have in mind the full concept underpinning the *Kokesh* decision, which is the language used by the Justices of this Court in *Gabelli*. *Gabelli* effectively held that the fraud discovery rule which the Commission is using to justify its complaint in this case should not be extended to the Government. This Supreme Court stated in *Gabelli* that “*the Government is a different kind of plaintiff. The SEC’s very purpose, for example, is to root out fraud, and it has many legal tools at hand to aid in that pursuit.*” Furthermore, “*deciding when the Government knew or reasonably should have known of a fraud would also present particular challenges for the courts, such as determining who the relevant actor is in assessing the Government knowledge, whether or how to consider agency priorities and resource constraints in deciding when the Government reasonably should have known of a fraud and so on. Applying a discovery rule to Government penalty actions is far more challenging than applying the rule to suits by defrauded victims, and the Court declines to do so.*”

The *Gabelli* applicability in this context is clear. The year to start calculating the period of limitations is 2005. The SEC had ample chance to investigate and present charges well before the post-statutory-period date of 2011 in which it brought its complaint⁵. The Commission cannot claim to be a victim in this matter and thus is not subject to the discovery rule exemption. Therefore, the original complaint should have been dismissed *ab initio*. In not dismissing the original SEC complaint, the District Court violated the unanimous mandate of this Court regarding the applicability of the Statute of Limitations. Ultimately, the District Court should have avoided the whole proceedings by determining that the SEC Complaint was extemporaneous. Despite my numerous references to this reality throughout the record, the lower courts have ignored it or have arbitrarily applied the period of limitation improperly by limiting it to the disgorgement component of the District Court Summary Judgment. In this context, the lower courts cannot have it both ways. By accepting the applicability of the limitation statute to the amount of disgorgement or financial penalty, but not accepting it to deny the validity of the initial complaint, the courts are applying the law unevenly and ultimately also violating the spirit of Plain Error review which calls for courts to review errors when they “*seriously affect the fairness, integrity or public reputation of judicial proceedings*” U.S. v. Marcus, 560 U.S. 258, 262, 130 S. Ct.

⁵ It should be noted that Highview Point, one of the Receivership entities, submitted registration materials to the SEC in or around late 2005 and was approved for registration in or around mid 2006.

2159, 176 L. Ed. 2de 1012 - 2010. The Manifest Injustice that results from this uneven application of Supreme Court jurisprudence and the Statute of Limitations calls for an outright dismissal of the District Court Case and an admonition to the lower courts to properly apply the law in the future so that they do not arbitrarily disregard applicable statutes and precedents in their decisions. The ultimate result of properly applying the Statute of Limitations in these proceedings is the dismissal of the SEC's Complaint in the District Court Case, with the resulting invalidation of all allegations and erroneous judicial decisions that have resulted therefrom.

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

2. The Opinions Below Improperly Apply the Doctrine of Collateral Estoppel

Even if the SEC's Complaint had been filed within the statutory period as defined by this Supreme Court in *Kokesh* and *Gabelli*, the District Court's grant of Summary Judgment is legally erroneous because it improperly applies the doctrine of Collateral Estoppel.

At the heart of the various cases described above is the chronology of events. The Opinions Below portray that I am collaterally estopped from litigating the issues of the MSJ because of the Judgment of Conviction in the Criminal Matter. However, this ignores the fact that said Judgment of Conviction, when legally evaluated in the instant case, must be assumed to be unconstitutional and therefore invalid for purposes of collateral estoppel.

As described in the record of the Habeas Petition, the chronology of events shows an unequivocal violation of my Sixth Amendment right to use my untainted assets to retain counsel of my choice to represent me at the inception of the Criminal Matter. Said violation occurred before the plea of guilt that gives rise to the Judgment of Conviction and which the District Court is using to apply collateral estoppel in the District Court Case. In addition, the constitutional violations in the Criminal Matter invalidated the conviction and plea for various other reasons, including the fact that my guilty plea was not knowing and voluntary⁶. The District Court's grant of Summary Judgment based on collateral estoppel from an unconstitutional conviction can only be defined by reference to the popular concept of putting the cart in before the horses. The record shows that the conviction is fruit of a poisoned tree and invalid at inception and that the lower courts should not base any deliberations regarding summary judgment proceedings

⁶ See Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 – 1969 and Lee v. United States, 582 US, 137 S. Ct. 198 L Ed 2d 476, 2017 US LEXIS 4045.

in parallel civil actions on said conviction until the Habeas Petition is enjoys finality.

The Habeas Petition gives faith of the fact that the various errors which occurred in the Criminal Matter have been described in Supreme Court jurisprudence, most recently in McCoy v. Louisiana, 2018 US LEXIS 2802, No. 16-8255 (decided May 14, 2018) and in Weaver v. Massachusetts – 137 S. Ct. 1899; 198 L. Ed. 2d 420 - 2017 U.S. LEXIS 4043, as meriting reversal of a defendant's conviction. This is so, even if, in the case of the structural errors described, they may ultimately be traced to counsel ineffectiveness and raised in the habeas context. A more detailed explanation of this issue can be found in the record of the Habeas Petition and the RPHA Appeal, particularly in my Third Supplemental Filing to Update the Record (RPHA Appeal, Second Circuit Docket No. 18-35, Doc. 45).

Ultimately, this means that if, as the District Court has assumed and the record reflects, the Habeas Petition has merit, then everything that happened in the Criminal Matter is invalid and unconstitutional; and all judicial findings related to the Criminal Matter or derived thereof, in the District Court Case and at the appellate level, are also invalid and unconstitutional. To wit, because the Habeas Petition has been found by the lower courts to have merit, then:

- The imposition of the TRO over my untainted assets in the District Court Case is invalid and unconstitutional;
- The cooperation agreements I entered into with the Government and the SEC are invalid and unconstitutional;
- The use of any evidence gathered by the Government, the SEC or the Receiver pursuant to my cooperation is invalid and unconstitutional;
- The indictment via information in the Criminal Matter is invalid and unconstitutional;
- The change of plea hearing before Judge Underhill in the Criminal Matter is invalid and unconstitutional;
- The guilty plea in the Criminal Matter, and its stipulation of conduct, are invalid and unconstitutional;
- The statements made before Judge Arterton in open court in the District Court Case as part of the above-mentioned, invalid cooperation agreements, are invalid and unconstitutional;
- The sentencing proceedings in the Criminal Matter are invalid and unconstitutional;
- My sentence of conviction in the Criminal Matter is invalid and unconstitutional;

- The Restitution Order in the Criminal Matter is invalid and unconstitutional; and,
- All other material orders, findings, judicial conclusions or actions by the courts that are derived from the Criminal Matter or from the District Court Case are invalid and unconstitutional.

Based on this reality, the Habeas Petition is clearly a threshold question that takes primacy over the MSJ. The lower courts should be compelled by the interests of fairness and Justice to resolve the threshold Habeas Petition question before resolving a civil matter of lesser importance which depends directly on said Habeas Petition. This is analogous to the principle recognized by the Supreme Court in various cases and summarized clearly in District Attorney's Office for the Third Judicial District et al. v. Osborne, 557 US 52, 129 S Ct 2308, 174 L Ed 2d 38 (2009) when it cites Medina v. California, 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). The lower courts should await the resolution of the post-conviction relief claim in the Habeas Petition in order to not "*offend*" principles "*of justice so rooted in traditions and conscience of our people as to be ranked fundamental*" or transgress "*any recognized principle of fundamental fairness in operation.*"

The right to counsel of choice is among the most fundamental principles of constitutional due process contained in the laws of the United States. The Habeas

Petition was filed in November of 2016, almost two years ago and prior to the MSJ. That the District Court has delayed its deliberations on the Habeas Petition and yet granted the MSJ knowing that the legal bases for the District Court Order would likely be overturned by the outcome of the Habeas Petition is a clear violation of a “*recognized principle of fundamental fairness in operation*” – *Medina*. The interest of Justice mandated that the Habeas Petition be decided with finality by the courts before the grant of Summary Judgment in the District Court Case. Otherwise the lower courts have effectively granted and affirmed the MSJ based on the collateral estoppel from a Criminal Matter that must be assumed to be invalid and unconstitutional because they are tainted by structural errors at inception of the proceedings.

To be clear, the validity of my guilty plea and the Judgment of Conviction in the Criminal Matter is presently in question pursuant to the Habeas Petition. The fact that the Habeas Petition has arisen from a structural error at inception of the process calls for judicial restraint. If there was no concurrent attack on my guilty plea and Judgement of Conviction, the lower courts would, understandably, not be required to assume that the conviction should be overturned in the near future.
However, in this case, the Habeas Petition is concurrently being deliberated upon by the same District Court which granted of Summary Judgment. Moreover, said Habeas Petition is based, at least partially, on a structural error derived from an

order of that same District Court. It is morally and juridically unacceptable for the District Court to base the grant of Summary Judgment on collateral estoppel from a guilty plea that is defective due to an error that it caused or allowed, and which it gets to decide upon at its leisure because the 2255 Statute does obligate it to decide the Habeas Petition on a timely basis.

The District Court in the Criminal Matter, in reviewing the Habeas Petition has clearly stated that it “*raises complex legal issues*” (see Habeas Petition, Doc. 14). Moreover, as described above, the petition contemplates not just one but several, distinct, structural errors, apart from the numerous instances of IAC that give rise to *Strickland* errors. This gives the petition a high likelihood of success which should not be ignored by the lower courts.

Given the severe indictment of the validity of the guilty plea and judgment of conviction represented by the Habeas Petition, the District Court should have exercised judicial restraint and decided the Habeas Petition prior to granting Summary Judgement because the Habeas Petition presents a key, threshold question for determining the applicability of collateral estoppel. The Grant of Certiorari is therefore merited and necessary to avoid a Manifest Injustice and ensure that the threshold question of the Habeas Petition be resolved according to applicable law before the MSJ is deliberated upon.

3. The Opinions Below violates the doctrine which mandates deference to the non-movant in a summary judgement context

Apart from the invalid use of collateral estoppel described above, the only other essential basis advanced by the District Court to support its grant of the MSJ is limited statements I made in open court in the SEC Case. These statements are unavailing in support of the Order. I recanted those statements early in the process because they were factually erroneous as they were based on a layman's misunderstanding of the legal parameters that govern the financial aspects of the District Court Case and the Criminal Matter.

In addition: i) the statements have been amply clarified and corrected in subsequent portions of the record; and, ii) the Court can determine the reality of the situation from the available evidence if it holds a fair and full evidentiary hearing.

This aspect of the case applies also to my various filings in opposition to the MSJ and other orders emanated from the lower courts in the various cases, and encompasses both the financial parameters of the Receivership and the applicability of the Affirmative Defenses of extortion and duress which I have advanced as exonerating factors with regards to my actions. Regardless of what any court decides or how many times the Receiver and the SEC repeat misleading statements, all of the material allegations made by the SEC in its case and by the Receiver in the MSJ and various other filings with regard to the reasons for my

behavior and intentions are simply untrue. Anything that any court says or that the record reflects which is contrary to the truth as I have clarified it in multiple filings will never be true, notwithstanding what this Court may believe or the Receiver or anyone else may say.

The public and judicial records are particularly ample with regards to the credibility of my position with respect to the financial parameters of the case, the lack of a loss at the Receivership Companies and the exonerating aspects of the Affirmative Defenses. The Opinions Below basically imply that my clarification of my position on loss and my interpretation of my actions are self-serving statements. This off-hand dismissal of my own statements and the numerous pieces of evidence ignored by the lower courts decry their failure to adhere to Supreme Court doctrine which unequivocally states that "*in ruling on a motion for summary judgment, ‘the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor’*" – Cotton.

Apart from the myriads of filings in the Criminal Matter, including the Habeas Petition, which give faith of the fact that I corrected my statements, I have filed numerous documents in the SEC Case including my Request for Clarification and Qualification (Doc. 748)⁷; Response to the SEC Filing for Default Entry (Doc. 749); Motion for Court Guidance and Reconsideration (Doc. 765); Motion for a

⁷ Document numbers in this section correspond to Docket entries in the SEC Case.

Stay of Distributions (Doc. 857); Motion for a Stay of Distributions (Doc. 900); Motion for Extension of Time to File a Response (Doc. 909); Motion for Preservation of Records (Doc. 982); and Motion for a Stay of Distributions, Request for an Evidentiary Hearing and Related Miscellaneous Relief (Doc. 994). These and several other filings give faith of the fact that I was not fully cognizant of how loss was calculated at the time I made my statements in open court.⁸ Since the time I made those statements, I have repeatedly requested that the District Court allow a process of evidentiary scrutiny to verify my position. All of my requests have been summarily denied despite the fact that the Federal Rules of Evidence apply to all civil proceedings.

My corrected statements have been clear in showing that my lack of understanding referred to the legal application of the financial parameters of the case. Once I fully understood the applicability of the court-approved NIM used by the Receiver to value the claims in the District Court Case, as well as other principles such as proximate loss causation, it was clear to me that there was no loss in the Receivership Companies and that the claim by PDVSA, as detailed further below, was invalid and overvalued. My revised position was then further underpinned by the applicability of the so-called Assignment Agreements to the

⁸ By analogy, when I pleaded guilty and signed the stipulation of conduct which refers to “*potential losses*” in the Receivership Companies, I was also ignorant of the way loss is calculated and of the sentencing enhancement effects of loss. This fact, derived from counsel ineffectiveness, is one of the grounds of the Habeas Petition which merits automatic reversal because under *Boykin* and most recently *Lee*, my plea was not knowing and voluntary.

PDVSA Claim which I have described amply on the record. I have repeatedly brought these points to the attention of the lower courts but have thus far been ignored and not granted the deference mandated by the *Cotton* doctrine. In this context, Certiorari should also be granted to ensure that judicial proceedings do not unfairly prejudice non-movants by arbitrarily ignoring key jurisprudence of this Supreme Court.

If, as *Cotton* directs, the lower courts had acted to ensure that “*in ruling on a motion for summary judgment, ‘the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor,*” the District Court should at least have undergone a thorough examination of the evidence to contrast it against my position and that of the Plaintiff before granting the MSJ. In this regard, by following *Cotton*, the lower courts would have to give *prima facie* credit to my positions rather than dismiss them outright and would thus have to agree in principle that:⁹

A. The PDVSA Claim is invalid, that there is no loss in the Receivership Companies and that, therefore, my compensation during the Relevant Period

⁹ As further evidence of the strength of my arguments and the need for the *Cotton* doctrine to be properly applied, this Court should be aware that, at a hearing on certain matters in the SEC Case, I was trying to secure legal counsel to advise me in the civil portion of the loss calculation issue. Judge Arterton, in denying me that right, states clearly for the record, in reference to my expertise on these issues that “[he] knows more than any counsel knows.” (July 3, 2013 Hearing Transcript before Judge Arterton (SEC Case Doc. 739, P. 71 at 3).

was not only appropriate, but was in fact was below the parameters dictated under the statutory framework of the entities that make up the Receivership.

- B. The current assets available in cash in the Receivership Companies are sufficient to pay all valid claimants.
- C. Because the PDVSA Claim is zero, or invalid, as the unscrutinized evidence shows, the available funds should be used to compensate the unpaid portion of non-PDVSA claims and, in turn, no further money would be owed to any claimant.
- D. The Government of Venezuela implemented exchange and currency controls (the “Currency Controls”)¹⁰ in early 2003, under a legal framework that was in place throughout the Relevant Period of this case, particularly at the times of distributions made to PDVSA by the Receivership Companies. A key part of the Currency Controls is that the Government sets the official exchange rate and allows for the free trading of USD vs. VEB at various levels or tiers of free-market rates. The Official Exchange rate applies to basic imports such as foods and medicines, so the majority of the Venezuelan people and corporations do not have access to what is, for all intents and purposes, a preferred rate of exchange with which to acquire USD. Because of economic mismanagement, the differentials between the official and parallel exchange rates have grown

¹⁰ A full explanation of the system of Currency Controls as applies to the PDVSA Claim and this proceeding is included in my Restitution Brief (Criminal Matter Doc. 190) which has been incorporated by reference through filings in the District Court Case. If this Circuit Court requires, I can provide a copy of the Document upon request.

over time. As applies to the PDVSA Claim, at the moment of the acquisition of their Claim, the differential was approximately five times (4.30 VEB per USD Official Rate vs. 21 VEB per USD Parallel rate), at the moment of the first Distribution under the Receiver's Plan, the differential was approximately ten times (4.30 vs. 45); and at the time of subsequent distributions in the SEC Case, the differential had reached at least 50 times or more (4.30 vs. 200)¹¹.

E. One of the characteristics of the Currency Controls is that Venezuelan Government entities such as PDVSA are obligated to discharge all USD-denominated monetary obligations with their own affiliates or other Government entities, or with domestic private parties, in VEB at the Official Exchange rate. In the District Court Case, PDVSA acquired its claim rights from its affiliated Pension Funds, through a subrogation documented via Assignment Agreements (See Sentencing Exhibits - Criminal Matter Doc. 165) that gave rise to a monetary obligation. The Assignment Agreements were governed by Venezuelan Law, and thus, even though they stipulated an amount in USD which PDVSA later used for its Claim, PDVSA was obligated to pay for the rights in VEB. A judicial decision by the Venezuelan Supreme Court issued at the time the Assignment Agreements were finalized, dictated specifically in this context that in cases such as this one, in which PDVSA

¹¹ In recent weeks, the Venezuelan Government has reworked the exchange control system and the rate has, on information and belief, increased in the official rate (now called DICOM) to 61 bolivars per dollar, while the free-market rate is approximating more than 6 million bolivars.

purchased claim rights from its own affiliates, “*the currency which was initially stipulated as currency of payment becomes a currency of reference in terms of the official exchange rate in place on the due date of the payment.* This means that, if the parties have established an obligation in foreign currency payable in Venezuela” - under Venezuelan law in this case – “*the foreign currency, when paid, becomes a tabulator with which to convert the debt in bolivars.*” To effect payment, “*the parties may first deliver the currencies to [an] exchange operator and obtain bolivars to pay the debt, or directly provide for payment to the debtor in the official currency (bolivars).*”

- Decision Rendered by the Constitutional Chamber of the Supreme Court of Justice, Motores Venezolanos, C.A. – Motorvenca, November 2, 2011 – (See Sentencing Exhibits – Criminal Matter Doc. 165).

F. The judicial record reflects the fact that PDVSA acquired its claim rights from the original clients of the Receivership, mainly its own pension funds, via the Assignment Agreements, at a maximum total amount of VEB2.0 billion. This amount, given the duality of Exchange Rates between the Official and Parallel VEB rates described above, was equivalent, at the time of the first Distributions under the Plan, to approximately \$45 million. That is the absolute maximum amount to which PDVSA would be entitled under its claim if said Claim enjoyed validity.

G. In addition to the foregoing, the value of the PDVSA claim is also impacted by the following factors which would be proven by the heretofore unscrutinized evidence:

- i. PDVSA received distributions of more than \$600 million during the Relevant Period. These distributions should be subtracted from their submitted claim value under the Court-approved NIM. This would bring the value of PDVSA's claim to zero.
- ii. PDVSA purposely overstated the market value of the so-called Cheyne Shares which were classified by the Receiver as part of their in-kind claim. This overvaluation not only leads to a \$150 million overstatement of the gross PDVSA claim amount, but is also a direct violation of the claimant's duty to be truthful in their claim and makes PDVSA a party that comes to the table with Unclean Hands under Second Circuit doctrine; in turn making the PDVSA claim invalid at inception.
- iii. By way of extortion, PDVSA officials and their representatives stole more than \$400 million from the Receivership Companies. These amounts are detailed by the Receiver in filings before the District Court in related cases. This extortionate theft once again makes PDVSA a party that comes to the distribution table with unclean hands or, who is at least, *In Pari Delicto*, with equal or greater responsibility for the wrong they are seeking to

redress.¹² By stealing over \$400 million from the Receivership Companies via extortionate practices, PDVSA has unilaterally and illegally deprived the Receivership of assets which would be sufficient to pay the full value of its claim if it were deemed valid; even if it was erroneously valued at its highest possible amount by ignoring the applicable deductions described herein.

H. Based on all these realities, the fact is that the evidence shows a significant gain in the Receivership. This means that all transfers I received are most certainly not fraudulent, or stolen or part of any Ponzi scheme as alleged by the Receiver.

From all of the foregoing, it is clear that the lack of evidentiary scrutiny has resulted in the arbitrary avoidance of the *Cotton* doctrine to ensure that ensure that “*in ruling on a motion for summary judgment, ‘the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor;*” in addition, it has led to the validation of a fraudulent and overvalued claim by PDVSA and the resulting violation of my constitutional liberties and my rights as a Defendant.

The *Cotton* doctrine is also violated when the lower courts evaluate the validity and applicability of the Affirmative Defenses. In effect, the District Court erroneously denies the exonerating effect of the Affirmative Defenses while failing to provide me with an adequate forum to present evidence of the same.

¹² See Second Circuit Court of Appeals decisions in National Petrochemical Company of Iran v. The M/T Stolt Sheaf et al., 930 F. 2d 240; 2nd Cir. 1991 and Republic of Iraq v. ABB et. al., 920 F. Supp. 2d 517, 2nd Cir. 2014.

Evidentiary review would incontrovertibly prove the exonerating effect of the Affirmative Defenses on any wrongdoing that could be attributed to my actions. The Affirmative Defenses ultimately exonerate me from any guilt in the District Court case and or the Criminal Matter and they should be properly evaluated by the Courts in a forum that avoids the dangers that they pose to others and to me.

As described above, the evidence heretofore unscrutinized, indicates that the PDVSA Claim is fraudulent. This fraudulent nature is derived from the actual Claim itself and from the fact that PDVSA comes to the table as a claimant with Unclean Hands, or at least *In Pari Delicto* with respect to the wrong they are seeking to redress. The evidence shows, that PDVSA's Unclean Hands are partly derived from the fact that PDVSA corruptly extorted more than USD400 million from the Receivership in addition to the transactional distributions it should have netted under the NIM. These extorted amounts are almost ten times what PDVSA would be entitled to if its claim was deemed valid. These corrupt bargains were obtained through extortion by PDVSA representatives acting "*under color of official right*," as defined by USC 1951(a) & USC 1951(b)(2) – (the "Hobbs Act"). Of relevance here, the Hobbs Act defines extortion as "*obtaining property from another against his will, under color of official right*." To establish extortion under color of official right, one "**need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in**

return for official acts" - Ocasio v. U.S., 136 S. Ct. 1423, 1428, 194 L. Ed. 2d 520 – 2016. In the present case, as the Receiver himself has documented in related actions at the District Court level that PDVSA representatives, acting on behalf of PDVSA and under color of official right, directly and indirectly extorted the Receivership through me for financial gain, making direct threats against my family and third parties. PDVSA's Unclean Hands are also evident from the U.S. Government Motion for a Protective Order filed during sentencing proceedings (Criminal Matter Doc. 78, Pp. 2 and 5) – “....*individuals have requested that their identities be protected for fear of retaliation by the Venezuelan corporation [i.e. PDVSA]*” and “*the [United States] government simply seeks to restrict dissemination of information.....so as to avoid any potential retaliation.*”

In this context, I would ask that this Honorable Court take into account its finding in Dixon v. U.S., 548 U.S. 1, 126 S Ct. 2437, 165 L Ed 2d 299 - 2006 U.S. LEXIS 489 that the Affirmative Defenses of Necessity and Duress excuse a violation of law if “***the harm which will result from compliance with the law is greater than that which will result from a violation of it.***” This is precisely the situation that I found myself in from the beginning of the Relevant Period. A clear parallel to my case, apart from the numerous criminal proceedings opened in the United States and abroad against various member of the Venezuelan Government over the last year specifically for extortionate and corrupt acts by PDVSA, the

above-mentioned HNR Case details similar extortionate practices to those which PDVSA used to victimize me and the Receivership Companies.

To comply with *Cotton* therefore, with respect to both the value of claims – which determine the applicability of the monetary disgorgement and other penalties granted in the MSJ - and the Affirmative Defenses – which exonerate me from any wrongdoing - , the District Court should have scrutinized the evidence to test whether or not my positions correspond to the factual reality of the matter. By simply dismissing my position, the lower courts willfully ignore the *Cotton* doctrine.

As stated above, no court of competent jurisdiction, in any of the cases, has scrutinized the evidence cited by the SEC or the Receiver in their various filings. In parallel, the courts have ignored all of my filings and statements, particularly those that clarify my initial position with respect to the issue of loss in the Receivership. This has resulted in a Manifest Injustice which calls for the grant of Certiorari to ensure that the *Cotton* doctrine is adhered to and the lower courts properly weighs my statements and the evidence when deliberating on the MSJ.

CONCLUSION

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

Respectfully given at Fairton on October 18, 2019,



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