No. 11-813

In the Supreme Court of the United States

ALVIN M. THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari is untimely.

2. Whether the district court correctly rejected petitioner's contention that, notwithstanding his unconditional guilty plea, the government violated his Sixth Amendment right to the counsel of his choice by filing a *lis pendens* notice as to certain real property that petitioner might have sold to pay for private counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the Federal Reporter but is reprinted in 440 Fed. Appx. 148.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2011. A petition for rehearing was denied on September 26, 2011 (Pet. App. 21-22). The petition for a writ of certiorari was not filed until December 27, 2011, and is out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following an unconditional guilty plea in the United States District Court for the Western District of Penn-

sylvania, petitioner was convicted on one count of conspiring to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846, and on two counts of distributing and possessing with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to serve 240 months in prison, to be followed by ten years of supervised release. Pet. App. 11-12. The court of appeals affirmed. *Id.* at 1-8.

1. From 1998 to 2006, petitioner conspired to supply cocaine to dealers in the Pittsburgh, Pennsylvania, area. Gov't C.A. Br. 6. In 2006, petitioner sold 20 kilograms of cocaine to individuals in the Pittsburgh area who were cooperating with law enforcement. *Id.* at 6-7.

In August 2006, a federal grand jury in the Western District of Pennsylvania returned a three-count indictment charging petitioner and a co-defendant with conspiracy and drug-trafficking offenses. Gov't C.A. Br. 4. In addition, the indictment sought forfeiture under 21 U.S.C. 853(a)(1) of a house, located at 24 Kenmare Hall, N.E., in Atlanta, Georgia (the Kenmare Hall property), that petitioner had purchased with drug proceeds, as well as $1 million in cash. Gov't C.A. Br. 4; Pet. App. 2. The government subsequently identified a second property belonging to petitioner, located at 1658 Willis Mill Road, S.W., in Atlanta (the Willis Mill Road property), as a substitute asset potentially subject to forfeiture under 21 U.S.C. 853(p)(2). Pet. App. 2-3. The government filed *lis pendens* notices for both properties with the Clerk of the Superior Court of Fulton County, Georgia.[1] *Id.* at 3.

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[1] A *lis pendens* is "[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any

2. In November 2008, petitioner sent a letter to the district court expressing dissatisfaction with his court-appointed counsel. Pet. App. 3. He stated that he did not believe that his attorney had conducted an adequate investigation into the facts of his case. See Gov't C.A. Br. 9-10. Petitioner proposed that the assets whose forfeiture the government sought in the indictment could be sold to pay for private counsel. Pet. App. 3. The district court ordered instead that a new attorney be appointed for petitioner. *Ibid.*; see also *id.* at 7.

3. In February 2010, petitioner entered an unconditional plea of guilty to all counts in the indictment. Pet. App. 3. During the plea hearing, petitioner testified that he was satisfied with the services of his counsel. *Ibid.* The district court determined that petitioner's guilty plea was knowing and voluntary. *Id.* at 3-4.

At the plea hearing, the government informed the district court that it no longer intended to seek forfeiture of either of petitioner's houses because the properties had been found to have little or no value.[2] Pet. App. 4, 39. The government stated that it had already released the *lis pendens* on one of petitioner's properties and that it would soon do so for the other. *Id.* at 39.

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interests acquired during the pendency of the suit are subject to its outcome." *Black's Law Dictionary* 1015 (9th ed. 2009). For federal litigation concerning real property, Congress has required compliance with applicable state laws governing *lis pendens* notices. See 28 U.S.C. 1964; see also *Hamilton* v. *Smith*, 808 F.2d 36, 37 (10th Cir. 1986) (per curiam) ("The propriety of filing a notice of *lis pendens* from a federal lawsuit is a matter governed by state law.").

[2] Appraisals ordered by the government revealed that petitioner had less than $20,000 in equity in the Willis Mill Road property and that he owed more than $160,000 on the Kenmare Hall property. See Gov't C.A. Br. 10.

After the hearing, petitioner filed a motion for an order requiring the government to justify the filing and subsequent release of the *lis pendens* notices. Pet. App. 4. Petitioner argued that the government had abused the forfeiture process and had filed the *lis pendens* notices in order to deny petitioner access to funds to hire private counsel, thereby violating his Sixth Amendment rights to the counsel of his choice. *Ibid.* At petitioner's sentencing hearing in September 2010, the district court denied the motion and sentenced petitioner to serve 240 months in prison. *Ibid.*; see *id.* at 24-35.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1-8. The court rejected petitioner's argument that the government had violated his Sixth Amendment right to the counsel of his choice by filing the *lis pendens* notices. *Id.* at 5-8. The court explained that, under this Court's decision in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626-633 (1989), a defendant has no Sixth Amendment right to demand the release of assets subject to forfeiture in order to hire the counsel of his choice. Pet. App. 5. Because the Kenmare Hall property was subject to forfeiture under 21 U.S.C. 853(a)(1), petitioner had "no right to liquidate" it because the property was no longer "rightfully his." Pet. App. 6. The court observed that "[t]he fact that the government ultimately chose not to proceed against the property is irrelevant." *Ibid.* Under these circumstances, the court explained, the *lis pendens* notice itself was "a formality that had no impact." *Ibid.*

The court of appeals also rejected petitioner's argument that the *lis pendens* on the Willis Mill Road property was improper under Georgia law. Pet. App. 6-8. Petitioner argued that, as a substitute asset under 21 U.S.C. 853(p)(2), the Willis Mill Road property was

not itself tainted property subject to forfeiture or pending litigation and thus should not have been the subject of a *lis pendens*. *Id.* at 6. The court concluded that this argument was "waived" because petitioner had failed to raise it before the district court. *Id.* at 7. And in any event, the court explained, the *lis pendens* on the Willis Mill Road property could not have interfered with petitioner's Sixth Amendment rights because such a notice does not restrict the sale of property. *Id.* at 8. A *lis pendens*, the court observed, is not a lien or other legal restraint; it "simply serves to notify prospective purchasers or other interested persons * * * that particular property is the subject of pending litigation." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 28-34) that the government's filing of a *lis pendens* notice on the Willis Mill Road property violated his Sixth Amendment right to the counsel of his choice by preventing him from selling the property to pay for private counsel. The petition for a writ of certiorari is untimely and should be denied on that basis. In any event, the court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The petition for a writ of certiorari is untimely. The court of appeals issued its decision on July 28, 2011. Pet. App. 1. Petitioner timely filed a petition for rehearing en banc, which was denied on September 26, 2011. See *id.* at 21-22. The 90-day period for filing a petition for a writ of certiorari thus expired on December 26, 2011 (Monday). See Sup. Ct. R. 13.1, 13.3. The petition, however, was not filed until Tuesday, December 27, 2011, and it is therefore out of time. Although this Court has discretion to consider an untimely petition for

a writ of certiorari in a criminal case if "the ends of justice so require," *Schacht* v. *United States*, 398 U.S. 58, 63-65 (1970); see also *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007), petitioner offers no explanation or justification for the untimeliness of his petition and none is apparent from the record. The Court should therefore deny the petition as untimely.

2. Even if the petition were timely, it would not warrant this Court's review. The court of appeals correctly rejected petitioner's fact-bound Sixth Amendment claim.

a. As an initial matter, petitioner's contention is foreclosed by his unconditional guilty plea. Under this Court's decision in *Tollett* v. *Henderson*, 411 U.S. 258 (1973), a guilty plea constitutes "a break in the chain of events which has preceded it in the criminal process." *Id.* at 267. Accordingly, a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Ibid.* Rather, a defendant seeking to raise such "antecedent constitutional violations," *id.* at 266, is limited to attacks on the knowing, voluntary, and intelligent character of the guilty plea. When the plea was counseled, as it was here, the defendant must ordinarily establish that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). Petitioner does not allege ineffective assistance of counsel in connection with his guilty plea; to the contrary, he testified during the plea hearing that he was satisfied with the representation provided by his court-appointed counsel. See Pet. App. 3. Petitioner's unconditional guilty plea thus forecloses his effort to challenge the *lis pendens*—which had been filed more than a year earlier,

see *ibid.*—as a violation of his Sixth Amendment right to the counsel of his choice.

Contrary to petitioner's argument (Pet. 24-28), the adequacy of the *lis pendens* did not implicate the district court's subject-matter jurisdiction. The district court had subject-matter jurisdiction over petitioner's prosecution under 18 U.S.C. 3231, which grants the district courts of the United States original jurisdiction "of all offenses against the laws of the United States."[3] Similarly, petitioner errs (Pet. 30-31) in contending that, under *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006), his Sixth Amendment claim involves a "structural" error that may be addressed on appeal without regard to his unconditional guilty plea. This Court held in *Gonzalez-Lopez* that an admitted violation of a defendant's Sixth Amendment right to the counsel of his choice was not subject to harmless-error analysis. See *id.* at 148-152. The Court did not suggest that any assertion of a violation of that right will survive a defendant's unconditional plea of guilty.

b. Even aside from petitioner's guilty plea, the court of appeals correctly held that petitioner failed to preserve his contention that the *lis pendens* on the Willis Mill Road property was invalid under Georgia law because that house was not itself tainted property subject to forfeiture under 21 U.S.C. 853(a)(1). Pet. App. 6-8. Petitioner did not raise that argument before the dis-

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[3] The Seventh Circuit's decision in *United States* v. *$506,231 in U.S. Currency*, 125 F.3d 442 (1997), on which petitioner relies (Pet. 24), involved a civil forfeiture action in which a state court had previously asserted jurisdiction over the same res. See 125 F.3d at 447. The jurisdictional principles that govern such disputes do not apply in cases in personam, such as this criminal prosecution. See *Penn Gen. Cas. Co.* v. *Pennsylvania*, 294 U.S. 189, 195 (1935).

trict court.[4] And although petitioner contends (Pet. 9-19) that the court of appeals erred in characterizing his default as an issue of "waiver" rather than "forfeiture," see *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (distinguishing waiver from forfeiture), that case-specific ruling presents no recurring issue meriting further review.

In any event, petitioner identifies no plain error that would warrant overlooking his default. To prevail on plain-error review, petitioner bears the burden of showing (1) an error that is (2) clear or obvious and (3) affects substantial rights and that (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. See Fed. R. Crim. P. 52(b); *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010). No such error occurred here. Petitioner entered an unconditional guilty plea after testifying that he was satisfied with the representation provided by his court-appointed counsel. Pet. App. 3. Petitioner had not indicated an interest in retaining private counsel since the district court appointed a new attorney for him in 2008, see *ibid.*, and the district

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[4] Petitioner is correct that the district court "addressed the *lis pendens* issue at sentencing" (Pet. 18) in general terms and stated that petitioner had "preserved" the issue for appeal "to the extent [petitioner could] preserve it" in light of his guilty plea. Pet. App. 35. The court addressed the question, however, only to reject petitioner's general contention that the *lis pendens* notices operated to "freeze" petitioner's assets. See *id.* at 26 ("[T]he lis pendens simply is telling the world, be on notice. It is not a lien. It does not freeze the property. It doesn't do any such thing."). See generally *id.* at 24-35. Petitioner did not make, and the district court did not address, the more targeted argument that petitioner advances here—*i.e.*, that the *lis pendens* on the Willis Mill Road property was invalid under Georgia law because that property was merely a substitute asset in which the government lacked any ripe legal interest. See Pet. 28-34.

court had no reason to believe that petitioner still wished to do so—let alone that petitioner believed he was unable to do so because of the *lis pendens* on the Willis Mill Road property. As the court of appeals observed, petitioner never sought to lift the *lis pendens* or challenge the government's compliance with the requirements of Georgia law.[5] *Id.* at 7. Nor did petitioner elaborate on his financial circumstances or otherwise provide support for his contention that the *lis pendens* materially interfered with his ability to obtain the counsel of his choice. *Ibid.* Under these circumstances, the district court did not commit plain error in failing to order, on its own motion, that the government release the *lis pendens* on the Willis Mill Road property.

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[5] This case is therefore unlike *United States* v. *Parrett*, 530 F.3d 422 (6th Cir. 2008), or *United States* v. *Jarvis*, 499 F.3d 1196 (10th Cir. 2007). See Pet. 20-21. In those cases, the defendant timely objected to *lis pendens* notices placed on substitute assets before trial, the district court squarely addressed the question, and the court of appeals entertained an interlocutory appeal to determine whether the *lis pendens* notices were proper. Although the courts of appeals have generally held that 21 U.S.C. 853 does not authorize the pre-trial restraint of untainted substitute assets, see *Parrett*, 530 F.3d at 430-431 (citing cases), the propriety of a *lis pendens* in such circumstances is ultimately a question of state law, see *id.* at 431-432, and petitioner's failure to raise the issue in the district court precluded a careful examination of that question here. At a minimum, the district court did not commit plain error in failing to raise and resolve that question of Georgia law *sua sponte*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2012