

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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ALVIN THOMAS,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

In *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911-12 (2017), this Court left open the question of whether a claim of ineffective assistance of counsel on collateral review alleging that counsel's deficient performance resulted in structural error leading to fundamental unfairness requires automatic reversal or a showing of actual prejudice.

In *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006), this Court held that the denial of a defendant's right to counsel of choice results in structural error because the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."

The question presented is this: **Is automatic reversal required where a defendant was denied counsel of choice due to the ineffective assistance of counsel?**

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Alvin Thomas respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Third Circuit's affirmance of the United States District Court for the Western District of Pennsylvania's denial of Mr. Thomas's motion to vacate his sentence pursuant to 28 U.S.C. § 2255.

### OPINIONS BELOW

The opinion of the court of appeals affirming the denial of Mr. Thomas's § 2255 motion (App. A) is unreported. *United States v. Thomas*, No. 16-4069, 2018 WL 4846325 (3d Cir. Oct. 4, 2018). The Western District of Pennsylvania's opinion denying Mr. Thomas's § 2255 motion (App. B) is unreported. *United States v. Thomas*, No. 06-CR-299-1, 2016 WL 4734707 (W.D. Pa. Sept. 9, 2016).

### JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 2255(a). The court of appeals had appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253(a) and issued its opinion affirming the denial of Mr. Thomas's § 2255 motion on October 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

21 U.S.C. § 853 provides, in pertinent part:

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

- (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
- (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation . . .

\* \* \*

(p) Forfeiture of substitute property

(1) In general. Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

- (A) cannot be located upon the exercise of due diligence;
- (B) has been transferred or sold to, or deposited with, a third party;
- (C) has been placed beyond the jurisdiction of the court;
- (D) has been substantially diminished in value; or
- (E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

\* \* \*

28 U.S.C. § 2255(a) provides that federal prisoners “may move the court which imposed the sentence to vacate, set aside or correct the sentence” on “the

ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a).

### **STATEMENT OF THE CASE**

Petitioner Alvin Thomas’s trial counsel was deficient in failing to challenge the Government’s pretrial filing of a *lis pendens* against real property that was only identified as a substitute asset. As a result, Mr. Thomas was unable to sell this property and use the proceeds to retain counsel of his choice as guaranteed by the Sixth Amendment.

When Mr. Thomas challenged this denial of his right to counsel of choice due to counsel’s ineffectiveness in postconviction proceedings under 28 U.S.C. § 2255, the Third Circuit held, without addressing counsel’s performance, that Mr. Thomas was not entitled to relief because he could not establish that he was prejudiced. The Third Circuit’s reasoning relied on *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). App. A at 12-13. But *Weaver* left open the question of whether a fundamentally unfair structural error resulting from counsel’s ineffectiveness requires automatic reversal or a showing of actual prejudice on collateral review. This Court should grant certiorari to address the important question of whether the denial of a defendant’s Sixth Amendment right to counsel of choice due to counsel’s deficient performance requires automatic reversal.

### A. Indictment through Direct Appeal

On August 30, 2006, a grand jury returned a three-count indictment against Mr. Thomas, charging him with conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846, and two counts of distribution and possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(ii). At his September 13, 2006 arraignment, Assistant Federal Public Defender Thomas Livingston of the Federal Public Defender for the Western District of Pennsylvania was appointed as counsel for Mr. Thomas.<sup>1</sup>

The indictment contained forfeiture allegations, pursuant to 21 U.S.C. §§ 853(a) and (p), that Mr. Thomas acquired real property located at 24 Kenmare Hall N.E., Atlanta, Georgia 30324 (the “Kenmare Hall property”) and \$1,000,000 from these violations. The Government further stated in the indictment that if this property could not be seized for the various reasons stated in 21 U.S.C. § 853(p)(1), it intended to seek forfeiture of substitute property pursuant to the substitute property provision of 21 U.S.C. § 853(p)(1), but did not initially identify any substitute assets. The Government filed a *lis pendens* on the Kenmare Hall property in the Superior Court of Fulton County, Georgia.

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<sup>1</sup> Mr. Livingston continued to represent Mr. Thomas through June 6, 2008, when his motion to withdraw as counsel was granted. Thereafter, through the time of sentencing, Mr. Thomas was represented in the District Court by a series of four appointed attorneys through the time of his guilty plea and sentencing. The ineffective assistance of counsel claim in this appeal pertains only to Mr. Livingston, who hereafter is referred to as “counsel” or “trial counsel.”

On September 19, 2006, the Government filed a Bill of Particulars with Respect to Forfeiture Count identifying 1658 Willis Mill Road, Atlanta, Georgia 30311 (the “Willis Mill property”) as a substitute asset:

Since the filing of the Indictment, agents of the Bureau of Immigration and Customs Enforcement have located an additional piece of property, which the government is seeking forfeiture of **pursuant to the substitute assets provision** of the forfeiture allegation. The piece of property that the government is seeking is located at 1658 Willis Mill Road, Atlanta, Georgia, 30311, including all appurtenances and improvements thereto.

Bill of Particulars (emphasis added); *see also United States v. Thomas*, 440 F. App’x 148, 150 (3d Cir. 2011).

On September 26, 2006, the Government filed a *lis pendens* on the Willis Mill property in the Superior Court of Fulton County, Georgia.

Substitute assets are, by definition, untainted and unrelated to any crime for which the Government is seeking the criminal forfeiture of tainted property. Pursuant to § 853(p), the Government may seek the forfeiture of “substitute property” only if tainted property specified under § 853(a) is unavailable.

The Government in this case never alleged that the Willis Mill property was tainted or related to the offenses that Mr. Thomas was charged with committing, and never alleged that the tainted assets (the Kenmare Hall property and \$1,000,000) were unavailable. Yet counsel never challenged the Government’s pretrial *lis pendens* against the Willis Mill property, a substitute asset, as improper under federal or state law. Mr. Thomas informed his counsel that he wished to

challenge the legality of the *lis pendens* so that he could sell the real property and use the proceeds to retain counsel of his choice, but counsel still did not act.

In June 2008, the district court granted Attorney Livingston's Motion to Withdraw as Counsel and appointed new counsel.

On February 23, 2010, Mr. Thomas pled guilty to all three counts in the indictment. During the change of plea hearing, the Government informed the district court that it had lifted the *lis pendens* on Kenmare Hall property and also intended to do so on the Willis Mill property because "forfeiture is not an issue" and "I'm not going to seek forfeiture in this case." JA078.<sup>2</sup> On September 1, 2010, the district court sentenced Mr. Thomas to 240 months' imprisonment.

On July 28, 2011, Mr. Thomas's conviction and sentence were affirmed on direct appeal. *United States v. Thomas*, 440 F. App'x 148 (3d Cir. 2011). This Court denied Mr. Thomas's petition for a writ of certiorari on June 4, 2012. *Thomas v. United States*, 566 U.S. 1034 (2012).

## B. Section 2255 Proceedings

Mr. Thomas timely filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody on June 3, 2013. Mr. Thomas asserted, among other claims, that the Government's *lis pendens* improperly interfered with his right to sell the Willis Mill property, and that counsel was ineffective for failing to challenge the Government's filing of this *lis*

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<sup>2</sup> Citations to "JA \_\_\_\_" refer to the Joint Appendix filed in the Third Circuit below on March 5, 2018.

*pendens*, thereby denying him his Sixth Amendment right to counsel—a structural error—because he was unable to sell real property that would have provided funds to pay for counsel of his choice.

Mr. Thomas proffered several documents in support of this claim, including a copy of the *lis pendens* notice filed by the Government on the Willis Mill property in the Superior Court of Fulton County, Georgia on September 26, 2006, JA224-25; an August 9, 2006 purchase and sale agreement with Division 1 Home Builders to sell the Willis Mill property for \$300,000, JA226-28; a copy of an August 10, 2006 earnest money deposit check of \$2,000 from Division 1, JA229; an October 7, 2013 affidavit of Carlton Jenkins stating he was interested in buying the Willis Mill property in the Fall of 2006 but decided not to when he discovered the *lis pendens*, JA402-03; an October 9, 2013 affidavit of Mr. Thomas, stating, “During the course of pretrial in WDPA (case 06-299)[,] I advised each attorney appointed to my case that Willis Mill (substitute asset) was under a sale contract for \$300,000.00. Moreover, I was in possession of a \$2,000.00 earnest money deposit (substitute asset) which was made on the Willis Mill land toward its purchase,” JA348; and a December 21, 2008 appraisal of the Willis Mill property at a value of \$185,000, JA356.

After additional filings, the district court denied the § 2255 Motion on September 9, 2016. App. B at 14. The court declined to issue a certificate of appealability. *Id.* at 15.

Mr. Thomas timely appealed, and the Third Circuit issued a Certificate of Appealability as to two claims: whether (1) the *lis pendens* filed against the Willis Mill property violated Mr. Thomas's Sixth Amendment right to retain counsel of his choice, and (2) whether counsel was ineffective for failing to raise that claim. App. A at 4.

The Third Circuit affirmed the Western District of Pennsylvania's denial of Mr. Thomas's § 2255 Motion on October 4, 2018. *Id.* at 14. Regarding "Thomas's § 2255 claim that attorney Livingston rendered ineffective assistance of counsel" for failing to challenge the *lis pendens* filed against the Willis Mill property, the Third Circuit did not address whether counsel performed deficiently, instead rejecting the claim on that basis that "Thomas simply cannot meet his burden to show that any deficiency in [counsel's] performance caused him prejudice." *Id.* at 11 & 14.

The Third Circuit noted that "Thomas argues that he need not show prejudice on his ineffective assistance of counsel claim because the denial of a defendant's Sixth Amendment right to counsel of his choice is a structural error that is presumptively prejudicial." *Id.* at 12. But, citing *Weaver*, 137 S. Ct. at 1911, the Third Circuit panel wrote "When a defendant on collateral review raises an ineffective assistance of counsel claim involving counsel's failure to raise a structural error, the defendant will typically bear the burden to show both deficient performance of counsel and prejudice under the familiar *Strickland* framework." App. A at 12. The panel went on to hold that "The alleged error here was not the type that necessarily 'results in fundamental unfairness' and so 'Thomas must

show actual prejudice to prevail on his ineffective assistance of counsel claim.” *Id.* at 13 (citing *Weaver*, 137 S. Ct. at 1908).

### **REASONS FOR GRANTING THE PETITION**

#### **I. The Court Should Grant Certiorari to Resolve the Important Question of Whether the Denial of a Defendant’s Right to Counsel of Choice Resulting from Ineffective Assistance of Counsel Is a Structural Error Causing Fundamental Unfairness and Requiring Reversal on Collateral Review.**

The Third Circuit’s rejection of Mr. Thomas’s claim that his appointed counsel’s ineffectiveness resulted in the denial of his right to counsel of choice rested on the conclusion that Mr. Thomas “must show actual prejudice to prevail on his ineffective assistance of counsel claim” because the underlying denial of his right to counsel of choice is not a structural error of “the type that necessarily ‘results in fundamental unfairness.’” App. A at 13 (citing *Weaver*, 137 S. Ct. at 1908).

Such a holding is not compelled by *Weaver*. To the contrary, the reasoning of *Weaver*, considered with this Court’s holding in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), indicates that the denial of a defendant’s right to counsel of choice due to counsel’s deficient performance is a structural error resulting in fundamental unfairness that requires no showing of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), to necessitate reversal. This Court should grant certiorari to resolve this important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. Rule 10(c).

In *Weaver*, this Court addressed, for the first time, whether a claim of ineffective assistance of counsel resulting in structural error requires a showing of *Strickland* prejudice. But this Court’s holding in *Weaver* addressed only a single

type of structural error: the denial of a public trial. The Court concluded, “[W]hen a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically.” 137 S. Ct. at 1911. An additional showing of *Strickland* prejudice is required in that context because, “although the public-trial right is structural, it is subject to exceptions,” *id.* at 1909, and it does not always result in fundamental unfairness. *Id.* at 1909-10.

The Court noted that “[n]either the reasoning nor the holding here calls into question the Court’s precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process,” and that, with regard to these other structural errors, “this opinion does not address whether the result should be any different if the errors were raised in an ineffective-assistance claim on collateral review.” *Id.* at 1911-12. This case presents this Court with the opportunity to resolve this important question of federal law as it pertains to a defendant’s fundamental Sixth Amendment right to counsel of his choice.

The denial of this right does indeed result in fundamental unfairness. As this Court recognized in *Gonzalez-Lopez*, “The right to select counsel of one’s choice . . . has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial. It has been regarded as the *root meaning* of the constitutional guarantee.” 548 U.S. 140, 147-48 (2006) (emphasis added). This Court continued, “We have little trouble concluding that erroneous deprivation of the right to counsel of choice,

with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” 548 U.S. at 150 (quotations and citation omitted). Thus, “the Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that *a particular guarantee of fairness* be provided—to wit, that the accused be defended by the counsel he believes to be best.” 548 U.S. at 146 (emphasis added). Consequently, “the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right [is] violated [when] the deprivation of counsel [is] erroneous. No additional showing of prejudice is required to make the violation ‘complete.’” *Id.* at 146. Instead, “[d]eprivation of the right is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.” *Id.*

This Court recently reaffirmed that “we have considered the wrongful deprivation of the right to counsel a ‘structural’ error that so ‘affects the framework within which the trial proceeds’ that courts may not even ask whether the error harmed the defendant.” *Luis*, 136 S. Ct. at 1089 (quoting *Gonzalez-Lopez*, 548 U.S. at 148) (internal quotation marks and alteration omitted). It is clear that this right is fundamental: “We . . . emphasize that the constitutional right at issue here is fundamental: ‘[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire.’” *Luis*, 136 S. Ct. at 1089 (quoting *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 (1989)).

This Court’s holdings in *Gonzalez-Lopez* and *Luis* strongly suggest that the denial of a defendant’s right to counsel of choice is a structural error that always results in fundamental unfairness, because it results in the denial of “a particular guarantee of fairness,” *Gonzalez-Lopez*, 548 U.S. at 146, of the Sixth Amendment, where “the constitutional right at issue here is fundamental.” *Luis*, 136 S. Ct. at 1089. This Court should grant certiorari to determine the question left open in *Weaver*, whether such structural error resulting in fundamental unfairness requires any additional showing of *Strickland* prejudice when a collateral claim raises counsel’s ineffectiveness as the cause of this error. Without this Court’s intervention, appellate courts will continue to resolve this important federal question in different ways. The Third Circuit’s decision is already in conflict with the Supreme Court of Iowa. *See* Sup. Ct. R. 10(a). Contrary to the Third Circuit’s holding below, the Supreme Court of Iowa has held that, after *Weaver*, no additional showing of prejudice should be required when an attorney’s ineffectiveness results in the denial of a defendant’s right to counsel of choice. *Krogmann v. State*, 914 N.W.2d 293, 324 (2018). As in this case, the government in *Krogmann* restrained the defendant’s assets, and the defendant’s appointed lawyer failed to challenge this pretrial restraint so that the defendant could finance his defense and retain counsel of his choice. *Id.* at 307-08. The court in *Krogmann* noted that the right to counsel of choice “truncated by the State in this case [is] not minor or inconsequential,” and, “[u]nlike in *Weaver*, the constitutional error here affected the entire proceeding and not just two days of pretrial jury voir dire.” *Id.* at

324. The court further noted that, unlike in *Weaver*, the purpose of the right to counsel of choice is “to protect the liberty and autonomy of the criminal defendant and ensure fairness in criminal proceedings.” *Id.* Finally, the Supreme Court of Iowa noted, “Most recently, in *McCoy*, the Supreme Court, on review of a postconviction proceeding, did not require a showing of *Strickland* prejudice when the defendant’s trial counsel infringed the defendant’s Sixth Amendment right to be master of his own defense.” *Id.* at 324 (citing *McCoy v. Louisiana*, 138 S. Ct. 1500, 1510-11 (2018)).

In *McCoy*, as in this case, trial counsel’s violation of the defendant’s Sixth Amendment right implicated the “client’s autonomy, not counsel’s competence,” so this Court reasoned, “we do not apply our ineffective-assistance-of-counsel jurisprudence.” *McCoy*, 138 S. Ct. at 1510-11. Although “[t]o gain redress for attorney error, a defendant ordinarily must show prejudice,” “the violation of McCoy’s protected autonomy right was complete when the court allowed counsel to usurp control of an issue with McCoy’s sole prerogative.” *Id.* at 1511. Just as in *McCoy*, counsel’s error here denied Mr. Thomas his autonomous and fundamental Sixth Amendment right to counsel of choice, and this Court held that such a violation required reversal without any showing of prejudice.

The Third Circuit below did not address the facts of this case and whether Mr. Thomas’s counsel performed deficiently, instead concluding, as a matter of law, that Mr. Thomas was required to show he was prejudiced by the denial of his right to counsel of choice due to counsel’s ineffectiveness. App. A at 12-13. This

conclusion was flawed, or at least deserving of review by this Court, as this Court's decisions in *Weaver* and *Gonzalez-Lopez*, as well as *Luis* and *McCoy*, suggest that automatic reversal is required where a defendant was denied counsel of choice due to the ineffective assistance of counsel. The Court should clarify this important federal question and remand this case for further factual findings under the proper legal standard.

### CONCLUSION

For the foregoing reasons, Petitioner Alvin Thomas respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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