Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RECH,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Second Circuit

JONATHAN I. EDELSTEIN
EDELSTEIN & GROSSMAN
501 Fifth Avenue, Suite 514
New York, NY 10017
Tel.: (212) 871-0571
Fax: (212) 922-2906
Email: jonathan.edelstein.2@gmail.com

Counsel of Record

STATEMENT OF QUESTIONS PRESENTED

1. Was petitioner deprived of his right to counsel of choice by virtue of the lack of timely notice to him that funds had been released with which he could retain counsel?

2. Was petitioner's right to counsel unacceptably impaired by his incarceration out of state for a substantial part of the pendency of the district court proceedings?

3. Was petitioner entitled to suppression due to the failure to preserve and/or disclose body-worn camera footage depicting the search of his home?

4. Did the district court err in awarding restitution to the Small Business Administration given that the full amount of the alleged fraudulent Paycheck Protection Program loan had been recovered?

5. Should petitioner's conviction be voided due to the district court's failure to exclude speedy trial time on the record?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and petitioner Michael Rech.

TABLE OF CONTENTS

Statement of Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below vii

Jurisdictional Statement viii

Constitutional Provisions and Statutes at Issue ix

Statement of Facts 1

A. Charges and Procedural History 1

B. Issues Relevant to the Petition 3

Reasons for Granting the Writ 6

I. PETITIONER'S RIGHT TO COUNSEL OF CHOICE WAS IMPAIRED BECAUSE HE WAS NOT TIMELY INFORMED THAT FUNDS WERE AVAILABLE AND BECAUSE HE WAS INCARCERATED OUT OF STATE FOR A SUBSTANTIAL PART OF THE PROCEEDINGS 6

II. SUPPRESSION SHOULD HAVE BEEN GRANTED DUE TO THE FAILURE TO PRESERVE AND/OR DISCLOSE BODY-WORN CAMERA FOOTAGE OF THE SEARCH OF PETITIONER'S HOME 9

III. NO RESTITUTTION AWARD SHOULD HAVE ISSUED WHERE THE FULL AMOUNT OF THE ALLEGEDLY FRAUDULENTLY OBTAINED PROCEEDS WAS RECOVERED 11

IV. THE DISTRICT COURT'S FAILURE TO EXCLUDE SPEEDY TRIAL TIME ON THE RECORD SHOULD HAVE RESULTED IN DISMISSAL 12

Conclusion 14

Appendix ..... App. 1

Second Circuit Opinion dated December 19, 2024 ..... App. 1

TABLE OF AUTHORITIES

Cases:

Arizona v. Youngblood, 488 U.S. 51 (1989) 10

Arsenault v. Massachusetts, 393 U.S. 5 (1968) 8

Bloate v. United States, 559 U.S. 196 (2010) 13

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 7

Davis v. United States, 564 U.S. 229 (2011) 9

Luis v. United States, 578 U.S. 5 (2016) 7

Powell v. Alabama, 287 U.S. 45 (1932) 6

Robers v. United States, 572 U.S. 639 (2014) 12

United States v. Cronic, 466 U.S. 658 (2984) 8

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 6,7,8

United States v. Monsanto, 491 U.S. 600 (1989) 7

United States v. Patane, 542 U.S. 630 (2004) 10

United States v. Rech, 2024 WL 5165454 (2d Cir. 2024) vii

Zedner v. United States, 547 U.S. 489 (2006) 13

Statutes and Rules:

U.S. Const. Amend. 4 ..... ix,9

U.S. Const. Amend. 5 ..... ix,9

U.S. Const. Amend. 6 ..... ix,9

18 U.S.C. § 1343 1

18 U.S.C. § 1344 1

18 U.S.C. § 1956 1

18 U.S.C. § 1957 1

18 U.S.C. § 3161 ..... ix,12,13

18 U.S.C. § 3663A x,12

18 U.S.C. § 3664 ..... x,11

21 U.S.C. § 853 ..... 7n

28 U.S.C. § 1254 viii

OPINIONS BELOW

United States v. Rech,
Docket Nos. 23-6477(L), 23-7364(Con)
2024 WL 5165454 (2d Cir. 2024)

Decision: December 19, 2024

The decision of the Court of Appeals was an affirmance of the judgment conviction and sentence imposed by the United States District Court for the Western District of New York (Hon. Charles J. Siragusa, J.) entered October 6, 2023, convicting petitioner following a jury trial of bank fraud (three counts), wire fraud (eight counts), money laundering (24 counts) and sentencing him to 57 months' imprisonment followed by three years of supervised release.

No petition for rehearing and/or rehearing en banc was filed in the circuit court.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for certiorari from a final judgment of the United States Court of Appeals for the Second Circuit in a criminal case. The instant petition is timely because the Second Circuit's decision affirming petitioner's conviction and sentence was issued on December 19, 2024; petitioner made a timely application to extend the time to file a certiorari petition (No. 24A855); and by order of March 7, 2025, the Hon. Justice Sonia Sotomayor extended the time to petition for certiorari until May 19, 2025.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 3161(7)(A)

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C § 3663A(b)

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

18 U.S.C. § 3664(f)(1)(A)

In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

STATEMENT OF FACTS

A. Charges and Procedural History.

On May 13, 2021, a 36-count indictment was lodged against petitioner Michael Rech in the Western District of New York (Dkt. 11),[1] which was subsequently augmented to 40 counts in a superseding indictment filed on September 2, 2021 (Dkt. 22). The charges of the superseding indictment included six counts of bank fraud under 18 U.S.C. § 1344(2), eight counts of wire fraud under 18 U.S.C. § 1343, 24 counts of money laundering under 18 U.S.C. § 1956(a)(1)(B)(ii), and two counts of money laundering under 18 U.S.C. § 1957(a).

The gravamen of the charges was that, during the Covid-19 pandemic, Rech submitted applications for Paycheck Protection Program ("PPP") loans on behalf of two companies he controlled, namely Guardian of Humanity, Inc. and Eclipse Advisors, LLC, and that he falsely stated that these companies had employees and payroll expenses when in fact they did not. (Dkt. 22, ¶¶ 1-14). It was alleged that, by such means, Rech obtained approximately $277,500 in loan proceeds and unsuccessfully sought to obtain approximately an additional $600,000.

Prior to trial, Counts 21, 23 and 35 of the superseding indictment, charging bank fraud with respect to ReadyCap Lending, were dismissed (Dkt. 106), and the 37 remaining counts were renumbered for submission to the jury.

---

[1] References to "Dkt." refer to the ECF docket number in Western District of New York case 6:21-CR-06080-CJS-MWP, which is available electronically via PACER.

The case against Rech went to trial before the Hon. Charles J. Siragusa and a jury on November 15, 2022 and concluded with a verdict on November 22, 2022. (Dkt. 142-46). On September 23, 2023, Rech appeared for sentencing before the Hon. Siragusa. (Dkt. 187). Following the sentencing hearing, the district court sentenced Rech to 57 months of imprisonment followed by three years of supervised release, and ordered *inter alia* that he pay $277,500 in restitution to the Small Business Administration. (Dkt. 182). Judgment was entered accordingly. (Id.)

Petitioner timely appealed from the judgment (Dkt. 184). In the Second Circuit Court of Appeals, petitioner submitted a counseled brief and, with the permission of the Court, a supplemental pro se brief which addressed *inter alia* the issues raised on this certiorari petition. The government filed an opposition brief to which petitioner replied.[2]

By order dated December 19, 2024, the Second Circuit affirmed Rech's conviction and sentence. (App. 1-7).[3] The court stated that it had "carefully considered each of [the] arguments" raised by Rech in his pro se supplemental brief, but was "not persuaded" that those arguments warranted reversal. (App. 4). The court specifically addressed only those claims relating to sufficiency and ineffective assistance of counsel and addressed Rech's other claims only in passing. (App. 6).

---

[2] All briefs filed in the Second Circuit are available electronically via PACER and copies will be submitted to this Court upon request.

[3] Citations to "App." refer to the Appendix to this Petition.

No application for rehearing and/or rehearing en banc was made.

Petitioner timely moved in this Court for a 60-day extension of time to petition for certiorari (No. 24A855) and, by order dated March 7, 2025, the Hon. Justice Sonia Sotomayor extended the time to file a petition until May 19, 2025.

B. Issues Relevant to the Petition.

The record of the district court proceedings is highly voluminous and, therefore, petitioner calls the Court's attention to the following issues that are relevant to the questions of law raised in this Petition:

On March 26, 2021, a search warrant was executed at Rech's residence at 5 Hilltop Drive, North Chili, New York, by a team of IRS criminal investigators of which Special Agent Jeffrey Caraher was team leader. (Dkt. 49 at 81). About 40 minutes prior to the search, entry was made by a Homeland Security Investigations (HSI) SWAT team. (Id. at 84). The members of the SWAT team handcuffed Rech and held him against his will. Both the SWAT team and the subsequent IRS search team wore body-worn cameras but no footage was preserved and/or disclosed to Rech.[4] Hence, in his suppression motions (Dkt. 30, 56) and the subsequent evidentiary hearing (Dkt. 49), Rech was unable to contend that the law enforcement officers ignored his invocation of his Miranda rights and coerced him to provide access codes and combinations by threatening to destroy his property. Rech was also unable to

[4] Rech notes that law enforcement misled the district court in this regard by claiming that the sheriffs didn't wear body cams, when the sheriff's department was not even part of the search.

show that valuable property outside the scope of the warrant was seized, which was never used as evidence at trial and has not been returned.

During the search, the officers allegedly recovered firearms and also seized $193,604.62 in United States currency. (Dkt. 182 at 8). At or about the same time, $83,895.38 was seized from Citizens Bank account number 401369-8144, then belonging to Rech. (Id.) In addition to these amounts – which comprised the full amount of the allegedly fraudulent PPP loan – further monies totaling more than $90,000 were seized from the Citizens Bank account and/or other accounts belonging to Rech, representing the entirety of the funds and resources available to him.

Due to the seizure of all his monies, Rech was unable to retain counsel and an attorney was appointed to represent him pursuant to the Criminal Justice Act ("CJA"). Rech sought release of the funds that had been seized over and above the amount of the PPP loan, and ultimately, the amount of $91,740 was released and made available. By the time Rech was informed of such release, however, he had been incarcerated, trial was close, further adjournments were not available, and there was insufficient time to retain an attorney who could effectively represent him at trial.

Additionally, although the amount seized from Rech was more than the total PPP loan proceeds – in effect, he had spent none of it – and that amount was in federal custody and presumably returned to the SBA, the judgment required him to pay $277,500 to the SBA in restitution. (Dkt. 182 at 7).

Further, beginning on November 4, 2021, Rech was detained and his pretrial

release was revoked due to allegedly possessing a firearm, silencer, and pistol kit,[5] and was incarcerated for the remainder of the district court proceedings including pretrial, trial, and sentencing. For much of this period, Rech was incarcerated at a private facility in the State of Ohio that was under contract to house federal detainees and prisoners. This facility was more than 200 road miles from Rochester, New York, where his trial was pending and where his attorney had his office. Visits were an approximate eight-hour round trip. Moreover, for part of the period in question, the prison was under restriction due to the Omicron variant of Covid, which surged throughout the country during the winter of 2021-22, as well as subsequent Omicron variants which swept through the United States during the spring and summer of 2022. These restrictions frequently affected movement within the prison including the ability to make telephone calls and/or schedule legal conference calls. This resulted in Rech's ability to consult with counsel during the critical stages of the case being extremely limited.

Finally, it is noted that Rech was arraigned before Magistrate Judge Payson of the Western District of New York on March 26, 2021 (Dkt. 4) and trial commenced on November 15, 2022 (Dkt. 111), a period of some seventeen and a half months.

[5] Rech appealed the revocation of bail, arguing that the firearm was an antique collector's item, the alleged silencer was in fact a commercially-available solvent trap and was still in its original packaging, and the pistol kit had been ordered prior to Rech's arrest and was still in its original packaging. However, this appeal became moot before being decided due to the commencement of Rech's trial. There has been no appellate adjudication on the merits of the allegations upon which Rech's bail was revoked, and he continues to deny that he violated any conditions of release.

Written "ends of justice" speedy trial orders exist for the periods May 25 to July 7, 2021 (Dkt. 16), September 9 to October 18, 2021 (Dkt. 25), April 28 to May 3, 2022 (Dkt. 70), June 2 to July 12, 2022 (Dkt. 79), July 12 to August 2, 2022 (Dkt. 86), and September 26 to November 7, 2022 (Dkt. 88). No written orders exist for the remaining time periods, which total well in excess of 70 days, and as set forth in Rech's pro se briefs to the Second Circuit, no reason for excluding those time periods was articulated on the record.

Now, for the reasons below, Rech requests that this Court grant certiorari and that, upon review, it vacate the judgment of conviction and sentence. It is emphasized that the issues in this Petition do not pertain to Rech alone, but instead are commonplace throughout the Western District of New York and the nation, and that certiorari is necessary to ensure uniformity of decision and resolution.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S RIGHT TO COUNSEL OF CHOICE WAS IMPAIRED BECAUSE HE WAS NOT TIMELY INFORMED THAT FUNDS WERE AVAILABLE AND BECAUSE HE WAS INCARCERATED OUT OF STATE FOR A SUBSTANTIAL PART OF THE PROCEEDINGS

"It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53 (1932). Thus, "an element of [the] right [to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him." United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). Indeed, so important is the right to counsel of one's choice that an improper deprivation

thereof can never be harmless. Id. at 146. This right "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." Id.

The right of a defendant to use funds to retain counsel of choice is, to be sure, not unlimited – as this Court has held, ill-gotten gains which are subject to forfeiture can permissibly be restrained where the requisite showing is made. See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989). But this Court subsequently held in no uncertain terms that *legitimate, untainted* funds held by a defendant cannot be restrained pretrial simply because they might in the future be sought as substitute assets, and that the restraint of such funds violates the Sixth Amendment. Luis v. United States, 578 U.S. 5, 14-21 (2016). Untainted, non-contraband assets are "still [the defendant's], free and clear." Id. at 17. And as such, they may not be restrained so as to impair a right "that is a fundamental constituent of due process of law." Id. at 19.[6]

In this case, as detailed above, the federal agents who raided Rech's house and seized his bank accounts on March 26, 2021 seized considerably more – indeed, in excess of $90,000 more – than the $277,500 Rech allegedly obtained through fraud. Thus, the seizure and resulting restraint went well beyond the maximum amount that could possibly represent ill-gotten gains, and well into the realm of untainted

[6] It is noted as well that the warrant under which the funds were seized did not cite 21 U.S.C. § 853(e)(1)(A).

assets that should have been immediately available to Rech to use for retention of counsel of his choice. To be sure, the sum of $91,740 was *eventually* returned – but by that time, due to the government's foot-dragging and due to further delays in informing Rech that the money had been released, the case had reached a point where trial was close, adjournments were likely unavailable, and insufficient time remained in practical terms for Rech to retain an attorney who would have limited time to get up to speed. This Court should therefore grant certiorari on the issue of whether the funds were restrained for such a long time as to, in practical effect, violate Luis and require relief under Gonzalez-Lopez and its progeny.

Moreover, the deprivation in this case was particularly acute given that Rech was detained beginning November 4, 2021 and that for a substantial part of the period between then and the time of sentencing, he was incarcerated in a contract facility that was two states, more than 200 road miles, and four hours' one-way travel from his appointed counsel's office and from the place of trial. This combined with Covid restrictions on both visitation and internal movement (including the ability to make phone calls) prevented him, in practical terms, from consulting with counsel in any meaningful way and drastically impeded the ability of counsel to act effectively on his behalf. This Court should thus grant certiorari on a second right-to-counsel issue, namely whether he was effectively abandoned or deprived of counsel during critical stages of the case. See, e.g., United States v. Cronic, 466 U.S. 658 (1984); Arsenault v. Massachusetts, 393 U.S. 5 (1968).

II. SUPPRESSION SHOULD HAVE BEEN GRANTED DUE TO THE FAILURE TO PRESERVE AND/OR DISCLOSE BODY-WORN CAMERA FOOTAGE OF THE SEARCH OF PETITIONER'S HOME

Second, petitioner submits that his Fourth, Fifth and Sixth Amendment rights were violated by the failure of the HSI and IRS agents who conducted the March 26, 2021 search of his home to preserve and disclose body-worn camera footage. As a result of the disposal and/or nondisclosure of the BWC footage, petitioner was unable to plead and prove that his Miranda rights were violated, that the agents continued to interrogate him after he invoked those rights, that the agents obtained access codes and combinations through coercion resulting in further seizures, and that the agents seized valuable property which was outside the scope of the warrant , was never used as evidence at trial, and has as yet not been returned.

This Court has frequently remarked that the purpose of suppression is to deter law enforcement misconduct. See, e.g., Davis v. United States, 564 U.S. 229, 236 (2011). "[T]he exclusionary rule is a prudential doctrine… created by this Court to compel respect for the constitutional guaranty." Id. (citations omitted). As such, suppression must "pay its way" by yielding "appreciable deterrence" of an important constitutional requirement. See id.

Petitioner submits that deterrence is a particularly important factor where body-worn camera footage is concerned. Body-worn cameras are peculiarly within the control of the police. Individual officers have almost unlimited ability to manipulate what part of their conduct is recorded and what part is not – they can turn the

cameras off, overwrite footage that they don't want to see the light of day, or arrange for the footage to be "lost" or otherwise disposed of. Missing body cam footage is a recurring problem in criminal cases, particularly in search-and-seizure and/or interrogation situations where police often do not wish their conduct to be closely examined. Petitioner thus submits that the failure to preserve and disclose body cam footage should be considered particularly worthy of the "prophylactic," see United States v. Patane, 542 U.S. 630, 638 (2004), of the exclusionary rule.

To be sure, petitioner recognizes that in Arizona v. Youngblood, 488 U.S. 51 (1989), this Court held that the loss of evidence does not require suppression in and of itself absent a showing of bad faith. However, petitioner submits that in cases where law enforcement officers fail to preserve body-worn camera footage, bad faith should be presumed. Again, such footage is peculiarly within the nearly absolute control of the police, and their nearly absolute power to lose or dispose of it is matched by their equally absolute power to preserve it. It is well within the capability of law enforcement to establish procedures for retention, preservation and disclosure of body cam footage and to have failsafes such as automatic download and backup to make sure that the footage is not "accidentally" erased or lost. Moreover, where a search and seizure has taken place, and/or where law enforcement has engaged a handcuffed and detained suspect in custodial interrogation, law enforcement agencies – particularly federal agencies which pride themselves in their professionalism and training – are plainly and unmistakably on notice that all body-worn camera

recordings must be preserved. This Court should thus grant certiorari on the issue of whether to apply an exclusionary rule and/or a presumption of bad faith in cases where, after a search, seizure and/or interrogation, the body-worn camera footage thereof is not preserved and disclosed.

III. NO RESTITUTION AWARD SHOULD HAVE ISSUED WHERE THE FULL AMOUNT OF THE ALLEGEDLY FRAUDULENTLY-OBTAINED PROCEEDS WAS RECOVERED

In this case, Rech was charged with fraudulently obtaining a $277,500 Paycheck Protection Program loan from the SBA. He didn't spend a dime of the money. On March 26, 2021, when Rech's house was raided and his bank accounts seized, the full amount of the loan and then some were recovered. The law enforcement officers who conducted the searches and seizures were federal, and the funds were reverted to federal custody. Every penny the Treasury had disbursed to Rech was, from that date onward, back in the possession of the Treasury. Under those circumstances, a restitution award in the judgment was unnecessary and impermissible.

Under 18 U.S.C. § 3664(f)(1)(A), restitution is pegged to "the full amount of each victim's losses." Although restitution is not affected by compensation paid to a victim by insurance, see 18 U.S.C. § 3664(f)(1)(B) – in which case the restitution is made payable to the insurance carrier, see 18 U.S.C. § 3664(j)(1) – compensation obtained by the victim *from the defendant* as a result of a state or federal lawsuit does result in a reduction, see 18 U.S.C. § 3664(j)(2). Moreover, restitution is also to

be reduced by the value of "any part of the property that is returned." See 18 U.S.C. § 3663A(b)(1)(B). This Court has held that while the restitution statutes must be interpreted as written, it is important for the courts to "avoid [either] an undercompensation or a windfall." Robers v. United States, 572 U.S. 639, 644 (2014). The two extremes – where the victim is not made whole, and where the victim is made more than whole and is better off than if the crime had never happened – are to be avoided.

In this case, the district court's restitution order represented the "windfall" extreme. By the time the judgment was issued, the Treasury had had all its money back for two and a half years. Presumably that money was available to be disbursed to the SBA or any other federal agency in need of it – and in any event, money is fungible, and a recovery to the Treasury is a recovery to the Treasury regardless of any internal accounting procedures. Any requirement that Rech pay restitution to the SBA was thus a windfall given that the full amount of the loan had recovered and Rech owed nothing more. Petitioner submits that this Court should grant certiorari, vacate the judgment, and remand for entry of judgment without restitution.

IV. THE DISTRICT COURT'S FAILURE TO EXCLUDE SPEEDY TRIAL TIME ON THE RECORD SHOULD HAVE RESULTED IN DISMISSAL

Finally, petitioner's conviction should be voided due to noncompliance with the Speedy Trial Act. As the Court is well aware, 18 U.S.C. § 3161(c)(1) requires that the trial of any indictable federal offense, with exceptions not pertinent here, shall commence within 70 days of the defendant's arraignment. This period is subject to a

number of exclusions, including a general "ends of justice" exclusion, see 18 U.S.C. § 3161(h)(7)(A), but where a district court invokes the "ends of justice" provision, it must "set[] forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial, see id.; see also Bloate v. United States, 559 U.S. 196, 199 (2010) (requiring "case-specific findings").

In this case, as detailed above, written "ends of justice" orders were issued for several time periods. (Dkt. 16, 25, 70, 79, 86, 88). There are numerous other pretrial time periods, however, for which written orders were not issued, and those time periods total well in excess of 70 days. Moreover, as detailed in Rech's supplemental pro se briefs to the Second Circuit, there was also no oral, on-the-record articulation of the reasons why the ends of justice outweighed Rech's right to a speedy trial during those periods.

Notably, this Court has held that where a district court fails to make the required findings concerning speedy trial exclusion, harmless error review is inapplicable. Zedner v. United States, 547 U.S. 489, 508-09 (2006). "A straightforward reading of [§ 3161] leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed." Id. at 508. This Court should thus grant certiorari on the issue of whether dismissal of the charges

against Rech was required under the Speedy Trial Act.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and remand for such remedies as may be appropriate.

Dated: New York, NY
May 14, 2025

JONATHAN I. EDELSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand twenty-four.

PRESENT: GUIDO CALABRESI,
RAYMOND J. LOHIER, JR.,
MICHAEL H. PARK,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. Nos. 23-6477-cr,
23-7364-cr

MICHAEL RECH,

Defendant-Appellant.

FOR APPELLANT:	Jonathan I. Edelstein, Edelstein & Grossman, New York, NY
FOR APPELLEE:	Sean C. Eldridge, Assistant United States Attorney, *for* Trini E. Ross, United States Attorney for the Western District of New York, Rochester, NY

Appeal from a judgment of the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Defendant-Appellant Michael Rech appeals from the October 6, 2023 judgment of the United States District Court for the Western District of New York (Siragusa, *J.*), convicting him, following a jury trial, of three counts of bank fraud in violation of 18 U.S.C. § 1344(2), eight counts of wire fraud in violation of 18 U.S.C. § 1343, and several counts of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(ii) and 1957(a), all related to fraudulent Paycheck Protection Program loan applications. The District Court sentenced Rech principally to 57 months' imprisonment. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

I. Intended Loss

Rech contends that the District Court committed procedural error by applying the "intended loss" definition in the commentary to § 2B1.1(b)(1) of the United States Sentencing Guidelines to his advisory Guidelines range. This resulted in a 14-level increase in Rech's total offense level. *See* U.S.S.G. § 2B1.1 cmt. n.3(A) (defining "loss" as "the greater of actual loss or intended loss"). Rech claims that the Guidelines commentary is no longer authoritative in light of the Supreme Court's decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019). Under *Kisor*, Rech maintains, we defer to the Guidelines commentary only when a Guideline is genuinely ambiguous. And the term "loss" in § 2B1.1, Rech asserts, unambiguously refers to actual rather than intended loss. We are not persuaded.

We review this challenge under a "deferential abuse-of-discretion standard." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (quotation marks omitted). "This standard incorporates *de novo* review of questions of law, including our interpretation of the Guidelines." *United States v. Yilmaz*, 910 F.3d 686, 688 (2d Cir. 2018). "A sentence is procedurally unreasonable if the district court fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory,

fails to consider the [18 U.S.C.] § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Smith*, 949 F.3d 60, 66 (2d Cir. 2020) (quotation marks omitted). While this appeal was pending, we decided *United States v. Rainford*, 110 F.4th 455 (2d Cir. 2024), which squarely forecloses Rech's argument. In *Rainford*, we held that the Guidelines commentary that includes "intended loss" in the definition of "loss" remains authoritative after *Kisor*. *See id.* at 475 & n.5; *see also United States v. Zheng*, 113 F.4th 280, 299–300 (2d Cir. 2024). We therefore conclude that the District Court properly deferred to the Guidelines commentary interpreting "loss" under § 2B1.1(b)(1).

II. *Pro Se* Challenges

Rech independently filed two *pro se* supplemental briefs, mounting several challenges related principally to his trial and various motions he filed. We have carefully considered each of his arguments. Although we review *pro se* submissions liberally and interpret them "to raise the strongest arguments that they suggest," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (quotation marks omitted), we are not persuaded that any of these additional arguments warrants reversal. Most significantly, Rech believes that the evidence

adduced at trial was insufficient to support his conviction because it failed to show his involvement in the fraudulent loan applications.

"A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States v. Landesman*, 17 F.4th 298, 319 (2d Cir. 2021) (cleaned up). Here, we review evidence adduced at trial "in the light most favorable to the prosecution," and we will uphold a conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Capers*, 20 F.4th 105, 113 (2d Cir. 2021) (quotation marks omitted). We "defer to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Lewis*, 62 F.4th 733, 744 (2d Cir. 2023) (quotation marks omitted).

With these principles in mind, we conclude that the evidence adduced at trial was sufficient to support Rech's conviction. The Government presented overwhelming evidence of Rech's knowing participation in the fraudulent loan application scheme. The evidence included Rech's signatures on fraudulent loan applications, fraudulent documents found on his laptop and in his office, bank records showing his withdrawals of the amount of the loans, IP addresses used to sign and submit fraudulent applications that were traced to his residence, and

testimony from lenders who relied on the fraudulent applications that were submitted.

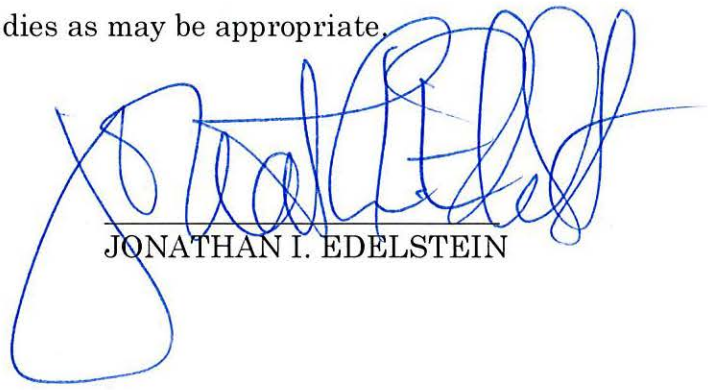
Rech also argues that his trial counsel provided constitutionally ineffective assistance by, among other things, failing to properly review the Government's evidence. We decline to consider this claim on direct appeal. *See United States v. Wellington*, 417 F.3d 284, 288 (2d Cir. 2005); *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003). Where the appellate record does not include "facts necessary to adjudicate a claim of ineffective assistance of counsel, our usual practice is not to consider the claim on the direct appeal, but to leave it to the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255." *United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006). Should Rech choose to pursue his ineffective assistance claim, habeas proceedings will provide "the forum best suited to developing the facts necessary to determining the adequacy of representation." *See Massaro v. United States*, 538 U.S. 500, 505 (2003). Accordingly, we reject this claim on direct appeal without prejudice to Rech's right to pursue it in a collateral proceeding.

against Rech was required under the Speedy Trial Act.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and remand for such remedies as may be appropriate.

Dated: New York, NY
May 14, 2025



JONATHAN I. EDELSTEIN