No.

IN THE SUPREME COURT OF THE UNITED STATES

DONTE McCLELLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

BROOKS HOLLAND
Counsel of Record under the Criminal Justice Act
721 N. Cincinnati Street
Spokane, WA 99202
Telephone: 917.719.1660
Email: bhollandcja@gmail.com

Attorney for Petitioner
DONTE McCLELLON

QUESTIONS PRESENTED

(1) Whether the relevant conduct provisions of the U.S. Sentencing Guidelines direct courts to consider intended as well as actual loss under pre-2024 U.S. Sentencing Guideline § 2B1.1, regardless of whether the Guideline comment is authoritative.

(2) Whether a court of appeals violates due process of law by denying a criminal defendant's motion to file a supplemental appellate brief when the court discharges the defendant's appellate counsel but accepts discharged counsel's opening brief, requiring substitute counsel to advocate solely from discharged counsel's brief.

PARTIES

(1) Donte McClellon, Petitioner-Defendant[1]

(2) United States, Respondent-Plaintiff

RELATED PROCEEDINGS

(1) United States District Court, Western District of Washington: *United States v. McClellon*, No. 2:22-cr-00073

(2) United States Court of Appeals for the Ninth Circuit: *United States v. McClellon*, No. 24-3406 (this direct appeal from trial and sentence)

(3) United States Court of Appeals for the Ninth Circuit: *United States v. McClellon*, Nos. 26-4018, 26-4019, 26-4020, 26-5005 (pending appeal from post-sentence orders and supervised release judgment)

[1] Petitioner in the courts below requested that counsel identify Petitioner in filings by his first and last name, Donte McClellon.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

I. DISTRICT COURT PROCEEDINGS 2

II. APPELLATE PROCEEDINGS 5

REASONS FOR GRANTING THE PETITION 8

A) Petitioner requests review of whether Guideline § 1B1.3 authorized the Court of Appeals to consider intended but unrealized loss regardless of the commentary to Guideline § 2B1.1 9

B) Petitioner requests review of whether the Court of Appeals' order denying the motion to file a supplemental brief impermissibly prevented substitute appellate counsel from advocating competently, diligently, and from independent professional judgment 15

CONCLUSION 22

APPENDIX:

APPENDIX A — MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 18, 2026 ..... 1a

APPENDIX B — ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND RELATED MOTION TO SUPPLEMENT 7a

ORDER FILED FEBRUARY 12, 2026 ..... 8a

ORDER FILED APRIL 24, 2025 ..... 10a

RELATED MOTION TO SUPPLEMENT,
DATED DECEMBER 24, 2025 ..... 12a

APPENDIX C — UNITED STATES' OPPOSITION TO MOTION TO FILE SUPPLEMENTAL OPENING BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 2, 2026 ..... 19a

TABLE OF AUTHORITIES

Cases:

Allen v. Commonwealth,
410 S.W.3d 125 (Ky. 2013) 19

Apprendi v. New Jersey,
530 U.S. 466 (2000) 19, 20

Cuyler v. Sullivan,
446 U.S. 335 (1980) 17-18

Ellingburg v. United States,
607 U.S. 163 (2026) 6, 19, 20

Evitts v. Lucey,
469 U.S. 387 (1985) 9, 17, 18, 20

Faretta v. California,
422 U.S. 806 (1975) 3, 6, 17

Garza v. Idaho,
586 U.S. 232 (2019) 17

Kisor v. Wilkie,
588 U.S. 558 (2019) 8, 12

McCoy v. Louisiana,
584 U.S. 414 (2018) 6, 17, 19, 20

Stinson v. United States,
508 U.S. 36 (1993) 8, 14

United States v. Banks,
55 F.4th 246 (3d Cir. 2022) 8

United States v. Boler,
115 F.4th 316 (4th Cir. 2024) 8

United States v. Goodwin,
770 F.2d 631 (7th Cir. 1985) 17

United States v. Gougher,
835 Fed.Appx. 231 (9th Cir. 2020), *cert. denied,* 145 S.Ct. 340 (2024) 19

United States v. Hackett,
123 F.4th 1005 (9th Cir. 2024) 8

United States v. Katz,
2026 WL 1952743 (July 1, 2026) 19

United States v. Kirilyuk,
No. 24-3429, 2025 WL 3034694 (9th Cir. 2025) 8

United States v. McClellon,
2026 WL 1759508 (9th Cir. 2026) 1

United States v. Molina,
2024 WL 4616203 (9th Cir. 2024) 19

United States v. Read,
918 F.3d 712 (9th Cir. 2019) 17, 19

United States v. Roof,
10 F.4th 314 (4th Cir. 2021) 19

United States v. Yafa,
136 F.4th 1194 (9th Cir. 2025) 10

Statutes:

18 U.S.C. § 1343 ..... 1, 2

18 U.S.C. § 1344 ..... 1, 2

28 U.S.C. § 1254(1) 1

Rules:

A.B.A. Model Rule of Professional Conduct 1.1 16

A.B.A. Model Rule of Professional Conduct 1.2(a) 16

A.B.A. Model Rule of Professional Conduct 1.3 16

A.B.A. Model Rule of Professional Conduct 3.1 18-19

Other Authorities:

U.S.S.G. § 1B1.3 ..... 2, 7-14

U.S.S.G. § 1B1.3(a)(3) 7, 11, 12

U.S.S.G. § 1B1.3, comment 6(B) 12

U.S.S.G. § 1B1.3, comment 8 12

U.S.S.G. § 2B1.1 ..... 2, 4, 5, 7-11, 13, 14

U.S.S.G. § 2B1.1(b)(1)(A) 4

U.S.S.G. § 2B1.1, comment 3(A) 4, 5, 7, 12

U.S.S.G. § 2B2.1 ..... 2, 14

U.S.S.G. § 2X1.1 ..... 2, 12, 13, 14

U.S.S.G. Amendment 827 (eff. Nov. 1, 2024), *available at* https://www.ussc.gov/guidelines/amendment/827 (last visited Oct. 19, 2026) 4, 11

OPINIONS BELOW

The Court of Appeals issued a memorandum decision on June 18, 2026, in *United States v. McClellon*, 2026 WL 1759508 (9th Cir. 2026). *See* App. 2.[2] The Court of Appeals also issued an unpublished order under Docket Entry 88 in Court of Appeals Case Number 24-3406. *See* App. 8.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is also timely for review, because on September 10, 2026, the Honorable Justice Elena Kagan granted an extension for the petition to and including October 28, 2026. *See* Sup. Ct. R. 30(1).

STATUTORY PROVISIONS

18 U.S.C. § 1343 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1344 provides in pertinent part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice–
>
> (1) to defraud a financial institution; or

[2] "App." refers to Petitioner's consecutively paginated Appendix filed in this Court. "ER" refers to the Excerpts of Record filed in the Court of Appeals. "AER" refers to the additional excerpts of record by volume Petitioner had moved to file in the Court of Appeals with the supplemental brief.

> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Other provisions cited in petition:

U.S. Sentencing Guideline § 1B1.3.

U.S. Sentencing Guideline § 2B1.1 (Nov. 2023 Manual).

U.S. Sentencing Guideline § 2B2.1.

U.S. Sentencing Guideline § 2X1.1.

STATEMENT OF THE CASE

This appeal arises from Petitioner's conviction in the United States District Court for the Western District of Washington of three counts of wire fraud and two counts of bank fraud. *See* 18 U.S.C. §§ 1343 & 1344. The fraud charges stemmed from Petitioner's applications for COVID-related Paycheck Protection Program (PPP) loans. Petitioner proceeded to a four-day jury trial. The jury convicted Petitioner of all counts, and the district court sentenced Petitioner to 42 months in prison with 36 months of supervised release. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals rejected Petitioner's appeal.

I. DISTRICT COURT PROCEEDINGS

Throughout the proceedings in the district court, Petitioner was an engaged client, actively participating with *pro se* filings, discussions with the district court, and requests to substitute counsel. Furthermore, as part of

Petitioner's efforts to participate in his own defense, Petitioner repeatedly requested to proceed with "hybrid" representation, including prior to trial, during trial, and at sentencing:

- November 7, 2023: Status conference
- January 2, 2024: Pretrial conference
- January 10, 2024: Colloquy regarding Petitioner testifying at trial
- January 11, 2024: Colloquy regarding delivery of closing argument
- May 29, 2024: Sentencing

1-AER-97-106; 4-AER-721-778; ER-20-22, 36. These requests often accompanied a motion to substitute defense counsel or discussion with the district court of whether Petitioner wanted to proceed *pro se* under *Faretta v. California*, 422 U.S. 806 (1975). Petitioner did not want to proceed without counsel altogether, but he objected to having no direct voice in his defense, and to how his counsel were defending him. Petitioner instead wanted to define and advocate his objectives for trial with the assistance of counsel. For example, Petitioner explained in one exchange with the district court:

> THE COURT: Would you like to represent yourself in this case, as opposed to substituting counsel?
>
> PETITIONER: I wouldn't know how to represent myself in that regard. I don't have any training. I don't have any sort of understanding on how to run a trial or—I'm not familiar with the procedures on how to do that, especially, I have—so that's why I have presented the Court with a hybrid representation model, so that there's a blend of the two.

4-AER-750-51.

The district court denied Petitioner's requests for hybrid representation in each instance. The district court instead extended

Petitioner the choice of proceeding *pro se* without any counsel or in a traditional representational model under which Petitioner could not directly advocate for himself. With repeated objection, Petitioner proceeded with counsel—although substituting defense counsel on more than one occasion. App. 20-22. As a result, Petitioner did not address the trial jury directly, and the district court denied or struck Petitioner's *pro se* filings.

At Petitioner's sentencing, one issue was the correct amount of "loss" the district court should attribute to Petitioner's fraud convictions under U.S. Sentencing Guideline § 2B1.1. Under the 2023 Sentencing Guidelines applicable at the time, Guideline § 2B1.1 was silent on whether loss included unrealized but intended loss.[3] Comment 3(A) to Guideline § 2B1.1, however, provided that "loss is the greater of actual loss or intended loss." The government argued to include intended loss for loans Petitioner sought but that banks denied. Petitioner objected that the district court should not add denied loans as intended loss. ER-96. The district court did include intended loss in its calculation, increasing Petitioner's Guidelines offense level by two levels. ER-39, 72.

At sentencing, the district court also entered a mandatory restitution judgment in the amount of $490,840.92. The district court determined this restitution amount by a preponderance of the evidence. ER-76-78.

[3] In 2024, subsequent to Petitioner's sentencing, Guideline Amendment 827 amended Guideline § 2B1.1 so that the Guideline itself now provides, "Loss is the greater of actual loss or intended loss." U.S.S.G. § 2B1.1(b)(1)(A). *See* U.S.S.G. Amendment 827 (eff. Nov. 1, 2024), *available at* https://www.ussc.gov/guidelines/amendment/827 (last visited Oct. 19, 2026).

II. APPELLATE PROCEEDINGS

The Court of Appeals appointed new counsel for Petitioner's direct appeal. Petitioner and former appellate counsel did not agree on the issues to raise for appeal, prompting Petitioner to file several *pro se* pleadings and former counsel to move unsuccessfully to withdraw. *See* Court of Appeals Docket Entries 9, 16, 19, 22, 29. Former counsel's opening brief ultimately raised one claim of error: the district court improperly treated comment 3(A) to Guideline § 2B1.1 as controlling in calculating intended loss when the Guideline unambiguously authorized only actual loss. *See* Court of Appeals Docket Entries 24, 25, 28. In response, Petitioner objected and moved to proceed with "hybrid representation" on appeal and for permission to file his own brief. *See* Court of Appeals Docket Entries 37, 38. Petitioner also filed a bar complaint against former counsel asserting a conflict of interest. *See* Court of Appeals Docket Entry 41.

Petitioner moved for appointment of substitute counsel, detailing the appellate issues that Petitioner wished to argue. *See* Court of Appeals Docket Entry 45. Former counsel again moved to withdraw. *See* Court of Appeals Docket Entry 44. The Court of Appeals granted these motions and discharged former counsel. *See* Court of Appeals Docket Entry 48, 49. The order, however, maintained discharged counsel's opening brief: "The opening brief has been filed. The answering brief is due June 13, 2025. The optional reply

brief is due 21 days after the answering brief is served." The Court of Appeals appointed substitute counsel. *See* Court of Appeals Docket Entry 50, 51.

As the appeal proceeded, substitute counsel moved for additional time to file a motion to file a supplemental brief along with a reply brief. The Court of Appeals granted these extensions. *See* Court of Appeals Docket Entry 70, 75. Substitute counsel ultimately moved to file a supplemental brief to accompany Petitioner's reply brief addressing the sentencing issue. App. 12. With the motion to supplement, substitute counsel filed a proposed supplemental brief and excerpts of record raising two additional issues beyond the opening brief: (1) the district court erred in denying Petitioner's repeated requests to proceed with "hybrid representation" in violation of *Faretta*, 422 U.S. 806, and *McCoy v. Louisiana*, 584 U.S. 414 (2018); and (2) the district court committed plain error in imposing criminal restitution based solely on judicial fact-finding by a preponderance of evidence. *See Ellingburg v. United States*, 607 U.S. 163 (2026).

The Court of Appeals in a summary order denied the motion to supplement, ruling: "The December 24, 2025 opposed Motion of Defendant-Appellant to File Supplemental Brief & Excerpts of Record [Dkt. No. 77] is DENIED." App. 8. The Court of Appeals also denied or struck *pro se* relief that Petitioner had requested. The Court of Appeals cited to two circuit authorities regarding "hybrid" representation, but the citations appear in the

paragraph addressing Petitioner's *pro se* motions, not in relation to Petitioner's motion through substitute counsel to file a supplemental brief.

In a subsequent memorandum decision, the Court of Appeals rejected Petitioner's argument that the district court should not have considered intended loss under Guideline § 2B1.1. App. 2. The court, however, did not rely on comment 3(A) to Guideline § 2B1.1 as authority. Instead, the court affirmed by holding that Guideline § 1B1.3's general definition of "relevant conduct" itself authorizes inchoate theories for offense conduct elsewhere in the Guidelines, including intended but unrealized loss in Guideline § 2B1.1. The court grounded this interpretation in Guideline § 1B1.3's language focusing on "all harm that resulted from acts and omissions … and all harm that was the object of such acts and omissions." U.S.S.G. § 1B1.3(a)(3). "Section 1B1.3," the Court of Appeals concluded, "therefore instructs courts to consider not only the harm that the defendant actually caused, but also the intended harm associated with his acts and omissions." App. 5. The Court of Appeals thus elided the question of whether the district court should have deferred to the Guidelines commentary.

REASONS FOR GRANTING THE PETITION

This petition raises two questions presented. The first question presents an issue that has divided circuits: whether "loss" in pre-2024 Guideline § 2B1.1 includes intended loss, as the commentary directed, or only actual loss. *See* Sup. Ct. R. 10(a); *United States v. Hackett*, 123 F.4th 1005 (9th Cir. 2024) (adopting intended loss with dissent); *United States v. Boler*, 115 F.4th 316 (4th Cir. 2024) (adopting intended loss with dissent); *United States v. Banks*, 55 F.4th 246, 258 (3rd Cir. 2022) (rejecting intended loss); *United States v. Kirilyuk*, No. 24-3429, 2025 WL 3034694 (9th Cir. 2025) (adopting intended loss with dissent). This question relates directly to a case currently pending in this Court, *Beaird v. United States*, No. 25-5343, in which this Court granted certiorari to decide whether *Stinson v. United States*, 508 U.S. 36 (1993), remains the governing rule for deference to Guidelines commentary, or is superseded by *Kisor v. Wilkie*, 588 U.S. 558 (2019). The Court of Appeals evaded this precise issue in Petitioner's appeal, however, by adopting a novel interpretation of the Guidelines *in toto*: Guideline § 1B1.3 permits courts to treat *every* Guideline provision defining offense conduct as including inchoate theories of conduct, regardless of the specific Guideline provision.

The second question presents a modest, procedural request for relief: remand to the Court of Appeals for that court to consider Petitioner's supplemental brief in the first instance. This question, if certiorari is granted,

would not require this Court to decide the appellate claims in the supplemental brief on the merits. Rather, this question asks this Court to determine whether and when a court of appeals' authority over briefing schedules unconstitutionally interferes with substitute appellate counsel's responsibility to advocate competently, diligently, and with independent professional judgment, resulting in ineffective assistance of appellate counsel in violation of the Due Process Clause. *See Evitts v. Lucey*, 469 U.S. 387, 393-96 (1985).

Both questions present significant federal questions meriting this Court's review. *See* Sup. Ct. R. 10(c). For the following reasons, Petitioner respectfully requests that this Court grant certiorari to consider these questions on the merits.

A) Petitioner requests review of whether Guideline § 1B1.3 authorized the Court of Appeals to consider intended but unrealized loss regardless of the commentary to Guideline § 2B1.1.

Although the intended loss sentencing issue may seem like a humble legal issue, the Court of Appeals' resolution of this issue was not humble at all. To the contrary, unlike the other circuits addressing this same issue, the Court of Appeals here ignored whether the explicit commentary to Guideline § 2B1.1 should govern, and instead supercharged the relevant conduct provisions in Guideline § 1B1.3 to transform all offense conduct in Guideline Chapters 2 and 3 into inchoate theories for offense conduct and harm.

This petition thus seeks more than mere error correction of a Guideline offense-level calculation. This petition does not even necessitate that this

Court decide whether the Court of Appeals was correct in its underlying premise that the district court properly considered intended loss as well as actual loss under the 2023 Guidelines. This petition instead asks this Court to confirm that the Court of Appeals' broad interpretation of Guideline § 1B1.3 as the solution, presumably to avoid the circuit split on whether to defer to the available Guideline comment, was incorrect as a matter of law and creates a risk of future erroneous interpretations and applications of the Guidelines. The potential scope of this holding therefore merits intervention by this Court.

The Court of Appeals cited almost no authority for its broad interpretation of Guideline § 1B1.3, citing only *United States v. Yafa*, 136 F.4th 1194, 1198 (9th Cir. 2025), as support. *Yafa*, however, found only that Guideline § 1B1.3 "adds further ambiguity" about whether Guideline § 2B1.1 includes intended loss as part of *Kisor* analysis for deferring to the commentary. *See Yafa*, 136 F.4th at 1198. By contrast, the Court of Appeals here held that Guideline § 1B1.3 *eliminates ambiguity* about the scope of Guideline § 2B1.1 in reaching intended but unrealized loss—and whether any other offense conduct in the Guidelines reaches inchoate harms. This reading of the relevant conduct provisions thus was not simply "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court of Appeals invented from whole cloth an inchoate harm theory for all of the Guidelines. This broad reading of the Guidelines lacked support in the literature.

Notably, in reaching this novel conclusion, the Court of Appeals did not acknowledge that the Sentencing Commission itself appeared to believe that Guideline § 1B1.3 alone did not answer this question of intended loss for Guideline § 2B1.1. To the contrary, the Commission added intended loss explicitly to the pre-2024 commentary, and moved this language to Guideline § 2B1.1 itself in 2024. *See* U.S.S.G. Amendment 827 (eff. Nov. 1, 2024), *available at* https://www.ussc.gov/guidelines/amendment/827 (last visited Oct. 19, 2026). This legislative history suggests several inferences about Guideline § 2B1.1. One of these inferences, however, is not that this legislative work was unnecessary because Guideline § 1B1.3 already does all of the work.

Instead, Guideline § 1B1.3, like most general provisions to statutory codes, offers interpretative guidance for specific provisions, not discrete substantive rules. Guideline § 1B1.3(a)(3)'s reference to "all harm that was the object of such acts and omissions" therefore does not offer a free-standing inchoate theory for offense conduct under the Guidelines. Rather, this general provision informs courts that they should consider as relevant all harms that were the object of a defendant's conduct, but consistent with the scope of the specific offense conduct defined by each provision of Guidelines Chapters 2 and 3.

Even the government did not espouse the Court of Appeals' broad reading of the relevant conduct provisions. The government did cite to

Guideline § 1B1.3, but argued that these provisions reinforced the government's interpretation of Guideline § 2B1.1 as ambiguous so that the district court should defer to comment 3(A) as authoritative even under *Kisor*. The Court of Appeals instead cut this comment out of the equation.

This broad-ranging precedent could invite interpretative mischief. For example, the Court of Appeals' interpretation of Guideline § 1B1.3 could render Guideline § 2X1.1 superfluous. Guideline § 2X1.1 governs inchoate offense conduct, such as an attempt, that is not governed by a specific offense Guideline. Under the Court of Appeals' holding, however, no offense Guideline would need to address inchoate conduct to separate it from Guideline § 2X1.1, because all conduct in Guideline Chapters 2 and 3 necessarily would encompass "all harm that was the object of such acts and omissions." U.S.S.G. § 1B1.3(a)(3). Yet, the commentary to Guideline § 1B1.3 itself observes that inchoate offenses and situations such as an unsuccessful theft should reference Guideline § 2X1.1. *See* U.S.S.G. § 1B1.3, comment 6(B) ("The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with § 2X1.1 … and the applicable offense guideline") and comment 8 ("In the case of a partially completed offense [e.g., an offense involving an attempted theft of $800,000 and a completed theft of $30,000], the offense level is to be determined in accordance with § 2X1.1 … whether the conviction is for the substantive offense, the inchoate offense …, or both").

The Court of Appeals' holding also adds uncertainty to specific offense conduct in the Guidelines that does not contemplate intended but unrealized harms. For example, Guideline § 2B2.1(a) sets a base offense level for burglary of a structure at 12, but elevates the offense level to 17 for burglary of a residence. Under the Court of Appeals' holding, if a defendant burglarized a structure that was not a residence, but had intended to burglarize a residence, Guideline § 1B1.3 arguably could authorize an offense level of 17 because a residential burglary was the "object" of the defendant's conduct, even though the Guideline itself does not contemplate an inchoate theory for this offense level. Rather, an attempted burglary of a residence could be at most an offense level of 14 in accordance with Guideline §§ 2X1.1(b)(1) and 2X1.1(b)(2), Guideline provisions that the Court of Appeals' holding completely ignores.

Even more germane to the Court of Appeals' decision here, Guideline § 2B2.1(b)(2) adds offense levels to a burglary due to economic "loss." This provision includes a similar loss grid to the loss grid in Guideline § 2B1.1:

(2) If the loss exceeded $5,000, increase the offense level as follows:

	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **1**
(C)	More than $20,000	add **2**
(D)	More than $95,000	add **3**
(E)	More than $500,000	add **4**
(F)	More than $1,500,000	add **5**
(G)	More than $3,000,000	add **6**
(H)	More than $5,000,000	add **7**
(I)	More than $9,500,000	add **8.**

According to the Court of Appeals' holding, if a burglar intended more than $20,000 in loss, but caused no actual loss, Guideline § 1B1.3 still would authorize two additional offense levels. Comment 2, however, provides that loss from a burglary "means the value of the property taken, damaged, or destroyed," with no reference to loss that is intended but unrealized. Yet, the asymmetrical Guideline comments defining intended but unrealized loss between Guideline §§ 2B1.1 and 2B2.1 carry no meaning under the Court of Appeals' holding, because Guideline § 1B1.3 universally imposes inchoate liability on all offense conduct. This holistic construction of the Guidelines to resolve the proper interpretation of specific offense conduct was error.

The point to this petition, consequently, is not whether the Court of Appeals was ultimately correct to conclude that Petitioner's offense conduct did or did not include intended loss. The Court of Appeals could revisit this question on remand. The point instead is that the Court of Appeals erred to answer this question with *this* solution: Guideline § 1B1.3 supercharges all offense conduct in Chapters 2 and 3 to include inchoate theories, such as an attempt, regardless of whether those specific provisions authorize it, and without reference to Guideline § 2X1.1.

The Court of Appeals did not need to resolve this question with such a blunt instrument. The other circuits have addressed the question by interpreting Guideline § 2B1.1 and its relevant comment under *Stinson* and *Kisor*. When the Court of Appeals decided this case on June 18, 2026, this

Court had already granted certiorari in *Beaird*, which will clarify whether lower courts should defer to Guideline commentary. In this context, Petitioner respectfully requests that this Court grant certiorari to decide this question on the merits, or summarily vacate and remand for the Court of Appeals to reconsider this question in light of this Court's impending decision in *Beaird*.

B) Petitioner requests review of whether the Court of Appeals' order denying the motion to file a supplemental brief impermissibly prevented substitute appellate counsel from advocating competently, diligently, and from independent professional judgment.

The Court of Appeals denied Petitioner's motion to file a supplemental brief, declining to decide any appellate issue on the merits beyond the single sentencing issue that discharged appellate counsel had raised in the opening brief. App. 2. The Court of Appeals reached this decision despite the fact that it discharged former appellate counsel due to a conflict with the client precisely about the scope of issues for appeal. By handcuffing substitute appellate counsel's representation and advocacy in this manner without a countervailing record of necessity, the Court of Appeals abused the discretion inherent in its authority over briefing schedules and denied Petitioner due process of law. This serious deprivation of constitutional rights warrants review by this Court.

Petitioner's motion to file a substitute brief makes the case for the reasonableness and necessity of filing a substitute brief. App. 12.[4] Once appointed, substitute counsel was ethically obligated to exercise independent judgment in advising Petitioner on the objectives of representation, and to pursue those objectives competently and diligently as a zealous advocate. *See* A.B.A. Model Rules of Professional Conduct ("Model Rules") 1.1, 1.2(a), and 1.3. This necessary lawyer-client relationship to maintain the effective assistance of counsel does not fit into a fixed doctrinal paradigm. Rather, this relationship spans a decision-making spectrum that adapts the relationship to the individual circumstances of the client and the factual and legal circumstances of the specific case. Some clients may defer more to counsel's advice, even on the central objectives of representation. Other clients vigorously guard their decision-making autonomy, even against their lawyer's diligent counsel.

Here, Petitioner's appeal invited judicial review of a four-day federal jury trial and a carceral sentence, a significant representational matter. Petitioner made clear throughout his trial and appellate records and filings that he was an engaged party in his case who wished to exercise informed agency in defining his objectives for representation, including on appeal. The client's agency and the resulting disputes about the scope of this appeal led the Court of Appeals to discharge former appellate counsel. Substitute

[4] Along with a proposed substitute brief, Petitioner filed proposed excerpts of record to supply the necessary record for the substitute brief's arguments.

counsel consulted extensively with Petitioner about the scope of appeal and, fulfilling ethical responsibilities to both the client and the court, maintained the opening brief but moved to supplement with two additional appellate claims. One of these appellate claims directly addressed Petitioner's efforts to maintain informed agency through hybrid representation to define the objectives of representation at trial. *See McCoy v. Louisiana*, 584 U.S. 414, 421-26 (2018); *United States v. Read*, 918 F.3d 712, 720-21 (9th Cir. 2019); *see also Faretta v. California*, 422 U.S. 806 (1975).

Courts cannot arbitrarily interfere with this necessary lawyer-client relationship. *Cf. e.eg.*, *United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir. 1985) (holding that "[a] trial judge must take great care not to assume the functions of trial counsel"). Appellate courts similarly cannot interfere through unreasonable procedural rules that preclude effective advocacy by counsel. *See Lucey*, 469 U.S. at 393-96. Although appellate counsel cannot pursue frivolous claims on appeal, *see Garza v. Idaho*, 586 U.S. 232, 241 n. 8 (2019), counsel cannot disregard a client's legitimate objectives for appeal. *See id.* at 238-47. To the contrary, appellate counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Lucey*, 469 U.S. at 394. Yet, by requiring substitute counsel to advocate solely from discharged counsel's opening brief, the Court of Appeals obligated substitute counsel to carry discharged counsel's conflict with Petitioner, *cf. Cuyler v. Sullivan*, 446 U.S. 335, 348

(1980), and added the conflict that substitute counsel could not exercise independent judgment in advising and advocating for Petitioner. *Cf. Lucey*, 469 U.S. at 394-96. Petitioner's counseled supplemental brief would have resolved these conflicts.

The government's opposition to the motion to supplement did not establish countervailing prejudice or other good cause for the Court summarily to deny the motion to supplement. App. 19-25. Petitioner's own motion acknowledged that the government should have a full and fair opportunity to respond to any supplemental filings. App. 17. The government's concern for Petitioner's *pro se* advocacy and discharge of other lawyers does not justify representational handcuffs on the role of substitute counsel whom the court appoints. The government characterized the motion to supplement as "belated," App. 22, but not for substitute counsel, who used the time since appointment to evaluate the entire case and advise Petitioner on the disputed scope of appeal. Indeed, the Court of Appeals itself granted two extensions for the motion to supplement, producing the two issues that the supplemental brief raised. The record contains no objection from Petitioner to the proposed supplemental brief, a notable silence in this matter.

The government's opposition did evidence that the representation and restitution issues were legitimately subject to debate, App. 24-25, but these issues were not frivolous and have not been resolved by this Court. *Cf.* Model

Rules 3.1. For example, the precise definition of "hybrid" representation remains uncertain, including the standard of review when hybrid representation seeks to maintain client control over representational objectives at trial under *McCoy*. *Cf. e.g.*, *United States v. Gougher*, 835 Fed.Appx. 231, 234-35 (9th Cir. 2020) (judicial control over speaking in court), *cert. denied* 145 S.Ct. 340 (2024); *id.* at 236-37 (Collins, J., concurring); *Read*, 918 F.3d at 720 (insanity defense); *United States v. Roof*, 10 F.4th 314, 350-53 (4th Cir. 2021) (mental health mitigation evidence); *United States v. Molina*, 2024 WL 4616203, at *1 (9th Cir. 2024) (entrapment defense); *see also Allen v. Commonwealth*, 410 S.W.3d 125, 133-34 (Ky. 2013) (recognizing state constitutional right to proceed by hybrid representation); Peter A. Joy & Kevin C. McMunigal, *Ethical Responsibilities of Standby Counsel*, CRIMINAL JUSTICE MAGAZINE (July 20, 2021) (observing that "there is considerable confusion among both judges and defense counsel concerning the ethical obligations of and limitations on standby counsel"). The restitution issue turns on whether this Court's recent decision in *Ellingburg v. United States*, 607 U.S. 163 (2026), extends *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to restitution judgments. This question has already produced dissents in circuit courts, including in the Ninth Circuit. *See United States v. Katz*, 2026 WL 1952743, at *2-3 (July 1, 2026) (Christen, J., concurring) (arguing this position, and noting, "I am not alone in expressing this view—several dissents have made the same argument in greater detail").

The point of a briefing schedule is to permit the adversary process to adjudicate exactly these kinds of disputed appellate claims, and to make a record for potential Supreme Court review on the merits. The Court of Appeals' summary order blocking this process did not explain its decision, except for a citation to Ninth Circuit authority involving "hybrid" representation that predates and does not address *McCoy* and the other sources cited by Petitioner in his motion and supplemental brief. *See* App. 8. These citations also appear to be directed to Petitioner's *pro se* advocacy, not to the motion to supplement. The Court of Appeals' order did not mention restitution under *Ellingburg* at all. Of course, the Court of Appeals has administrative discretion to enforce a briefing schedule. But not at the expense of Petitioner's right to the effective assistance of appellate counsel under the Due Process Clause. *Cf. Lucey*, 469 U.S. at 393-405.

The Court of Appeals' order presents an appropriate case for certiorari. The relief Petitioner seeks is modest, only remand with directions that the Court of Appeals permit and adjudicate a substitute brief on the merits. The ultimate issues, however, are significant federal questions: whether *McCoy* enforces only a guilt-innocence dichotomy where the objectives of representation extend only to a generic "not guilty" position at trial and counsel decides everything else, and whether *Ellingburg* extends *Apprendi* to criminal restitution judgments. The hybrid representation issue in particular merits further judicial clarification and guidance as artificial intelligence

technologies further empower clients to participate directly in decision-making and advocacy. In this context, as a purely procedural question seeking judicial review on the merits, this question presented would be amenable to certiorari and summary vacatur and remand.

CONCLUSION

For all of these reasons, Petitioner respectfully asks this Court to grant a writ of certiorari on both of these questions presented.

Dated: October 28, 2026

Respectfully submitted,

Brooks Holland

Counsel of record for Donte McClellon
Appointed under the Criminal Justice Act

721 N. Cincinnati Street
Spokane, WA 99202
(917) 719-1660 | bhollandcja@gmail.com

Admissions: New York
U.S. Court of Appeals for the Ninth Circuit
U.S. Court of Appeals for the Armed Forces

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 18, 2026 . . . . . 1a

APPENDIX B — ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND RELATED MOTION TO SUPPLEMENT. 7a

ORDER FILED FEBRUARY 12, 2026 . . . . . 8a

ORDER FILED APRIL 24, 2025 . . . . . 10a

RELATED MOTION TO SUPPLEMENT, DATED DECEMBER 24, 2025 . . . . . 12a

APPENDIX C — UNITED STATES' OPPOSITION TO MOTION TO FILE SUPPLEMENTAL OPENING BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 2, 2026 . . . . . 19a

Appendix A:
Court of Appeals
Memorandum Decision

NOT FOR PUBLICATION

FILED

JUN 18 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. Mr. DONTE JAMAL MCCLELLON, Defendant - Appellant.	No. 24-3406 D.C. No. 2:22-cr-00073-LK-1 MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Lauren J. King, District Judge, Presiding

Argued and Submitted March 13, 2026
Portland, Oregon

Before: COLLINS and LEE, Circuit Judges, and FITZWATER, District Judge.**

A jury convicted Donte McClellon ("McClellon") of three counts of wire fraud, 18 U.S.C. §§ 1343 and 2, and two counts of bank fraud, 18 U.S.C. §§ 1344(2) and 2, for obtaining Paycheck Protection Program ("PPP") loans using false information. McClellon appeals his sentence of 42 months of imprisonment and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

three years of supervised release. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm.[1]

McClellon appeals his sentence based on the argument that the district court improperly relied on the definition of "loss" in Application Note 3 of § 2B1.1 of the United States Sentencing Guidelines ("U.S.S.G.") (2023 ed.). He maintains that "loss," as used in § 2B1.1, does not encompass "intended loss," and that the district court therefore erred by including "intended loss" in its loss calculation.[2]

1. Ordinarily, "[w]e review the district court's interpretation of the Sentencing Guidelines *de novo*[.]" *United States v. Rodriguez*, 162 F.4th 1016, 1019 (9th Cir. 2025) (emphasis added). But when the defendant fails to adequately preserve his objection to the district court's interpretation of the Sentencing

[1] On March 25, 2026 and on May 26, 2026, McClellon filed in the district court two additional notices of appeal from certain subsequent orders issued by the district court in the underlying criminal case. Although each of those documents is styled simply as a "Notice of Appeal" from the challenged orders, they were docketed in the district court as amendments of the notice of appeal associated with this appeal, and they have likewise been entered on the docket of this appeal. Because these two additional notices of appeal are not properly considered to be amendments of the notice of appeal associated with this appeal, and because we decline to consolidate any such additional appeals with this case, the Clerk of the Court is directed to strike those documents (Dkt. Nos. 94 and 95) from the docket of this case and to otherwise process those notices of appeal in the ordinary course.

[2] The district court sentenced McClellon according to the 2023 Sentencing Guidelines. The United States Sentencing Commission has since amended the Sentencing Guidelines to move the "intended loss" language from the commentary to the text of the Guidelines. *See* U.S.S.G. § 2B1.1 (2024 ed.).

Guidelines, we review only for plain error. *United States v. Hackett*, 123 F.4th 1005, 1010 (9th Cir. 2024).

2. The Government contends that we should review the district court's interpretation of § 2B1.1 for plain error because McClellon failed to adequately raise his legal objection in the district court. We need not decide this question, however, because, even if we assume that McClellon preserved his objection, we would affirm his sentence on *de novo* review.

3. Because we conclude that U.S.S.G. § 1B1.3—the relevant conduct guideline—incorporates the concept of "intended loss," we need not rely on Application Note 3(A) of § 2B1.1. As relevant here, § 1B1.3 provides that a defendant's offense level shall be determined on the basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," including acts and omissions that "were part of the same course of conduct or common scheme or plan as the offense of conviction," as well as "all harm that resulted from [such] acts and omissions" and "all harm that was *the object of* such acts and omissions." U.S.S.G. § 1B1.3(a) (2023 ed.) (emphasis added). When the "object of" language was first added to § 1B1.3, "object" meant "[e]nd aimed at, the thing sought to be accomplished." *Object*, Black's Law Dictionary (5th ed. 1979); *see also Object*, The American Heritage Dictionary 904

(New College ed. 1978) ("The purpose, aim, or goal of a specific action or effort"); U.S.S.G. app. C, amend. 3 (effective Jan. 15, 1988). Section 1B1.3 therefore instructs courts to consider not only the harm that the defendant actually caused, but also the intended harm associated with his acts and omissions. *See, e.g.*, *United States v. Yafa*, 136 F.4th 1194, 1198 (9th Cir. 2025) (explaining that "§ 1B1.3's broad directive," when read alongside § 2B1.1, "strongly suggests that 'loss' is not limited to only that loss which is identifiable and clearly calculable").

4. Here, the district court did not err by including in the loss calculation the amount of loans that McClellon sought as part of his scheme to obtain PPP loans using false information, i.e., the intended loss. In the district court, McClellon challenged the inclusion of two loans that were denied. The district court also included a third loan that the target bank clawed back based on the suspicion that McClellon was engaged in PPP fraud. McClellon's "object" in applying for these loans was to obtain the same loan amounts that he now contends should have been excluded from the district court's loss calculation. And McClellon took substantial steps toward this "object" when he submitted false information in his loan applications. Section 1B1.3 therefore required the district court to consider these three loan amounts when determining the amount of loss. Accordingly, the district

court did not err in calculating the loss by including the intended loss associated with these loan amounts.

Regardless whether we review the sentence for plain error or *de novo*, we hold that the sentence should be affirmed.

AFFIRMED.

Appendix B:
Court of Appeals Orders
And Related Motion to Supplement

FILED

FEB 12 2026

MOLLY C. DWYER, CL
U.S. COURT OF APPE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DONTE JAMAL MCCLELLON, Defendant - Appellant.	No. 24-3406 D.C. No. 2:22-cr-00073-LK-1 Western District of Washington, Seattle ORDER

The December 24, 2025 opposed Motion of Defendant-Appellant to File Supplemental Brief & Excerpts of Record [Dkt. No. 77] is DENIED.

The January 6, 2025 *pro se* Motion of Defendant-Appellant to File Supplemental Brief with Writ of Mandamus [Dkt. No. 19] is DENIED, and Defendant-Appellant's March 24, 2025 *Pro Se* Supplemental Opening Brief with Writ of Mandamus [Dkt. No. 35] is STRICKEN. *See United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994) ("A defendant does not have a constitutional right to 'hybrid' representation."); *United States v. Bergman*, 813 F.2d 1027, 1030 (9th Cir. 1987) ("A criminal defendant does not have an absolute right to both self-representation and the assistance of counsel." (emphasis omitted)).

This order is entered by the undersigned at the direction of the assigned panel.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 24 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DONTE JAMAL MCCLELLON, Defendant - Appellant.	No. 24-3406 D.C. No. 2:22-cr-00073-LK-1 Western District of Washington, Seattle ORDER

Before: GRABER, H.A. THOMAS, and JOHNSTONE, Circuit Judges.

The motion (Docket Entry No. 43) to file under seal and ex parte the motion to withdraw as counsel is granted. The clerk will maintain under seal and ex parte the motion at Docket Entry No. 44.

The motion (Docket Entry No. 44) by Gene Vorobyov to withdraw and to appoint new counsel is granted. *See* 18 U.S.C. § 3006A.

Within 14 days of identifying counsel, the appointing authority for the Western District of Washington is requested to send counsel's contact information to counselappointments@ca9.uscourts.gov.

The opening brief has been filed. The answering brief is due June 13, 2025. The optional reply brief is due 21 days after the answering brief is served.

The motion (Docket Entry No. 19) for leave to submit a pro se supplemental brief and the pro se supplemental opening brief (Docket Entry No. 35) are referred

to the panel assigned to hear the merits of this appeal. The pro se motions (Docket Entry No. 38, 40, 41 & 42) for leave to submit additional pro se briefing are denied. The court will take no action on the remaining pro se motions (Docket Entry Nos. 37, 39, 45, 46 & 47).

The court will not grant further motions to substitute appointed counsel absent extraordinary circumstances, nor will the court entertain any pro se motion for reconsideration of this order.

The clerk will serve this order on former counsel and appellant individually.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States, Appellee v. Donte McClellon, Appellant	**Court of Appeals No. 24-3406** District Court No. 2:22-cr-00073 Western District of Washington Motion to File Supplemental Brief & Excerpts of Record

Undersigned counsel was appointed on April 28, 2025, as substitute appellate counsel for Donte McClellon. *See* Court of Appeals Docket Entries 48 and 51. Mr. McClellon was convicted of fraud offenses following a four-day jury trial in the United States District Court for the Western District of Washington (King, J.). *See* District Court Docket Entries 239, 243, 246, and 249. The District Court sentenced Mr. McClellon to 42 months in prison. *See* District Court Docket Entry 298. Mr. McClellon filed a timely notice of appeal on May 29, 2025. *See* District Court Docket Entry 300. Mr. McClellon has been released from custody and is currently serving post-release supervision in the Western District of Washington.

This appeal has an unusual procedural history. Prior to appellate counsel's appointment, former counsel had filed an opening brief, and the Government has responded. *See* Court of Appeals Docket Nos. 24 & 55. The reply brief was filed on December 24, 2025. Appellate counsel respectfully moves to file with this reply brief

a supplemental brief and excerpts of record. *See* Court of Appeals Docket No. 75. *Cf.* Fed. R. App. Proc. 28(c).[1]

The filed opening brief raises one sentencing issue, arguing that the District Court should have considered only actual loss, not intended loss, in calculating Mr. McCellon's Guidelines total offense level. *See* Court of Appeals Docket No. 24. Mr. McClellon filed *pro se* motions objecting to this brief and sought new counsel to raise appellate issues relating to his judgment of conviction and sentencing conditions. Mr. McClellon also filed a *pro se* supplemental brief. *See* Court of Appeals Docket Nos. 20, 23, 29, 35, 37-43, 45-47. Prior appellate counsel moved to withdraw. *See* Court of Appeals Docket No. 44. This Court granted prior counsel's motion and appointed current counsel, noting, "The Opening Brief has been filed … [¶] The court will not grant further motions to substitute appointed counsel absent extraordinary circumstances, nor will the court entertain any *pro se* motion for reconsideration of this order." *See* Court of Appeals Docket Nos. 48 & 49.

Former appellate counsel effectively briefed the submitted sentencing issue. Substitute counsel on appointment, however, maintained a duty to exercise diligence and independent professional judgment in advising and advocating for Mr. McClellon on appeal. *See* A.B.A. Model Rules of Professional Conduct ("Model Rule") 1.3 and 2.1. Moreover, although counsel maintains responsibility to

[1] Counsel has separately filed the reply brief and supplemental brief and excerpts of record along with this motion.

determine which claims to pursue on appeal, *see Jones v. Barnes*, 463 U.S. 745, 751-54 (1983), counsel must consult effectively and independently with Mr. McClellon to ensure that Mr. McClellon's appellate position aligns with his objectives for the representation and gives him an opportunity to be heard through counsel. *See* Model Rules 1.2(a) and 1.4; *cf. Garza v. Idaho*, 586 U.S. 232, 240-41 (2019). Consequently, substitute counsel has extensively consulted with Mr. McClellon to identify appellate issues.

From counsel's consultations with Mr. McClellon and diligent review of the record, counsel has identified two issues for appeal: (1) the District Court's repeated denial of Mr. McClellon's request to proceed with "hybrid" representation, denying him the autonomy to present his chosen defense, *see United States v. Read*, 918 F.3d 712, 720-21 (9th Cir. 2019); and (2) the imposition of mandatory restitution without the constitutional protections required for additional punishment. *Cf. Ellingburg v. United States*, U.S. Supreme Court No. 24-482 (pending). Counsel also has identified excerpts of record that would be relevant to these supplemental claims. Counsel further has selected relevant excerpts to Mr. McClellon's *pro se* brief that were not available to Mr. McClellon when he filed his *pro se* brief while incarcerated.[2] Mr. McClellon through this motion respectfully seeks permission to file these supplemental claims and excerpts along with the reply brief.

[2] Counsel has reviewed this *pro se* brief and the proposed supplemental briefing does not duplicate the arguments in this *pro se* brief.

Mr. McClellon recognizes that authority to raise new claims in a supplemental brief is not automatic and requires permission with good cause. *See e.g.*, *United States v. Durham*, 795 F.3d 1329, 1330-31 (11th Cir. 2015); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1127 (9th Cir. 2014). Mr. McClellon requests permission in the interests of justice and efficiency, and due to the lack of prejudice to the Government. As the supplemental brief recounts, Mr. McClellon repeatedly expressed his desire to proceed with "hybrid" counsel prior to trial, during trial, and at sentencing, which the District Court denied. The Government had repeated notice of these preserved objections. Mr. McCellon expected that an appellate court would review these rulings that directly affected his autonomy as the person defending himself against these charges. As the supplemental brief explains, Mr. McClellon viewed hybrid representation as essential for him to present his defense of choice. *See Read*, 918 F.3d at 720-21.

The disagreement underlying Mr. McClellon's conflict with former appellate counsel apparently involved this question of the scope of Mr. McClellon's appeal. If substitute counsel cannot raise claims that counsel deems amenable to judicial review, counsel could face difficult limitations to this lawyer-client relationship, as counsel will be constrained to advocating the existing record without exercising independent judgment. The Court already directed that it will not readily substitute counsel again. Counsel thus revisited the scope of appeal that generated a conflict with former appellate counsel in preparing this supplemental brief.

The record in this case is consequently distinguishable from cases where a party seeks to raise a new substantive claim in a supplemental brief for reasons that are not rooted in the lawyer-client relationship itself or another substantial equity interest. *Cf. e.g.*, *Joseph v. United States*, 135 S. Ct. 705, 705-07 (2014) (Statement of Kagan, J., respecting denial of *certiorari*, joined Ginsburg and Breyer, JJ.). Rather, this case is more analogous to the circumstance where this Court rejects a brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), appoints new counsel, and orders counsel to consider supplemental briefing on one or more issues, but leaving to substitute counsel's judgment which issues to brief from independent review of the record. *Cf. e.g.*, *United States v. Garcia-Villalba*, 585 F.3d 1223, 1227 (9th Cir. 2009). The difference in this case is that Mr. McClellon is not seeking to strike an *Anders* brief as inadequate, but rather to supplement the opening brief as not holistic to Mr. McClellon's objectives as the client on appeal.

Supplemental briefing to address these claims on direct appeal also could obviate the need for subsequent litigation of the claims as collateral challenges, promoting efficiency. Counsel acknowledges that briefing at some point must come to a close. Here, however, the Government would not be prejudiced by this supplemental briefing. The Government has been aware of Mr. McClellon's claims though his *pro se* advocacy at trial and on appeal. Mr. McClellon's hybrid representation claim even appears in the excerpts that accompanied the opening brief. ER-21-22, 36. The briefing process is still not complete, as Mr. McClellon filed

a reply brief on this same date. Mr. McClellon further is limiting supplemental briefing to this preserved hybrid representation issue and a constitutional claim regarding restitution. The filed opening brief contains 5,820 words. Mr. McClellon has limited the supplemental brief to 2,797 words, so the briefs in combination do not exceed the 14,000-word limitation for principal briefs. *See* CIRCUIT RULE 32-1(a). Mr. McClellon also acknowledges that the Government should receive an opportunity to respond to these supplemental claims on the merits.

For these reasons, Mr. McClellon respectfully moves this Court to accept the filed supplemental brief and supplemental excerpts of record along with Mr. McClellon's filed reply brief.

Respectfully submitted: December 24, 2025

/s/ Brooks Holland

_____

Brooks Holland
721 N. Cincinnati Street
Spokane, WA 99202
+1 (646) 397-5405 | hollandb@gonzaga.edu
Attorney for Donte McClellon

CERTIFICATE OF SERVICE

Appellate counsel certifies that this motion is being served upon the Government through the Court of Appeals' ECF email system.

Dated: December 24, 2025

/s/ Brooks Holland

_____

Brooks Holland
Attorney for Donte McClellon

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DONTE MCCLELLON, Defendant-Appellant.	C.A. No. 24-3406 D.C. No. 2:22-cr-00073-LK Western District of Washington

UNITED STATES' OPPOSITION TO MOTION TO FILE SUPPLEMENTAL OPENING BRIEF

A jury convicted defendant Donte McClellon of three counts of wire fraud and two counts of bank fraud after he fraudulently obtained more than $500,000 from COVID-19 relief programs. ER-3. In May 2024, the district court sentenced McClellon to 42 months in prison and three years of supervised release. *Id.* McClellon appealed. He filed his opening brief in February 2025, in which he raised one sentencing issue. Dkt. No. 24. McClellon then fired his lawyer, the ninth to represent him in these proceedings. Dkt. No. 48. When it granted counsel's motion to withdraw, this Court directed that "[t]he opening brief has been filed." Dkt. No. 48.

Nevertheless, ten months later, McClellon seeks leave to file a supplemental opening brief raising two additional issues. Dkt. No. 77.1 (hereinafter "Mot."). The motion should be denied for three reasons.

1. First, McClellon's motion reflects a pattern of recalcitrance and delay that has plagued this case through the district court and now on appeal—further delay would prejudice the government and the Court. McClellon cycled through four sets of counsel (eight lawyers in total) in the district court, which contributed to a 19-month delay between indictment and trial. *See United States v. McClellon*, No. 2:22-cr-00073-LK, Dkt. No. 203, at 3–4 (W.D. Wash. Dec. 20, 2023) (order denying motion to dismiss on Speedy Trial Act grounds, summarizing procedural history). McClellon was indicted in May 2022. The court appointed federal public defenders in the Western District of Washington to represent him, but his conflicts with those lawyers led to their discharge in early 2023. *Id.*, Dkt. No. 85. The court appointed two new lawyers, whom McClellon tried to fire, unsuccessfully, four times. *Id.*, Dkt. No. 98, 106 & 118. The court appointed a third lawyer to assist. *Id.*, Dkt. No. 123. That generation of lawyers eventually withdrew shortly before a December 2023 trial date. *Id.*, Dkt. No. 148. The court appointed a third

group of lawyers to represent McClellon for trial, and a different lawyer to represent him at sentencing. *Id.*, Dkt. Nos. 149 & 265.

McClellon's persistent conflicts with multiple sets of counsel significantly delayed trial. Each new set of lawyers sought and obtained a lengthy continuance to get up to speed on the case. Finally, after a 19-month delay, a jury convicted McClellon of all counts. ER-3. After trial, McClellon submitted multiple pro se filings that the district court struck because he was represented by counsel. *See, e.g.*, *United States v. McClellon*, No. 2:22-cr-00073-LK, Dkt. No. 273 (W.D. Wash.).

These patterns continued in this Court. The district court appointed McClellon new counsel for appeal. Dkt. No. 7. McClellon filed a pro se motion to fire that lawyer almost immediately, and the Court suspended briefing. Dkt. No. 9. The Court eventually denied the motion and immediately received a pro se motion for reconsideration and request to file a pro se opening brief. Dkt. Nos. 13 & 14. The Court ordered that "McClellon's request to file a pro se supplemental brief is denied. No further pro se motions to replace counsel, or to otherwise clarify or reconsider this order or the court's order of September 16, 2024, will be entertained." Dkt. No. 16. After several more pro se filings and additional

delays, a motions panel permitted McClellon to file his own opening brief (in addition to counsel's) and left it up to the merits panel whether to consider the pro se submission. Dkt. No. 22. Counsel filed McClellon's opening brief in February 2025. Dkt. No. 24. McClellon filed his supplemental brief in March 2025. Dkt. No. 35.

McClellon submitted several more pro se filings in April 2025, which again paused proceedings. Dkt. Nos. 37–46. The Court ultimately permitted his appellate attorney to withdraw, and new counsel was appointed in late April. Dkt. No. 51. The government filed its answering brief in June. Dkt. No. 57. The case has now been set for oral argument in Portland on March 13, 2026. Dkt. No. 80.

Yet McClellon, through new counsel, belatedly asks the Court to let him file a new supplemental opening brief—in addition to the pro se opening brief he filed in March 2025. That request would further delay an already much-delayed appeal: The government would need to respond to the brief, and McClellon would reply, requiring the rescheduling of oral argument. Contrary to McClellon's argument, such delay would prejudice the government and the Court, while rewarding McClellon for the same

tactics that significantly delayed trial in the district court. Briefing must at some point end. That time is now.

2. Second, there is no reason to permit McClellon a third opening brief. McClellon submitted a pro se supplemental brief in March 2025. Dkt. No. 35. That 52-page brief principally focuses on the Speedy Trial Act. *See id.* at 3–4. It did not address either issue McClellon now seeks to raise in his new, supplemental opening brief. Between the opening brief filed by original appellate counsel and the pro se supplemental brief, McClellon has had every opportunity to thoroughly brief his appeal. It's no surprise, then, that when the Court later granted counsel's motion to withdrew, it said in its order that the "opening brief has been filed." Dkt. No. 48. McClellon offers no principled reason to deviate from that order.

Contrary to McClellon's argument, this situation is not like one in which counsel files a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and the court directs new counsel to newly brief substantive issues. *See* Dkt. No. 77.1, at 5 (making this argument). McClellon had appellate counsel. That lawyer reviewed the record, located what he believed to be a meritorious issue, and filed a substantive opening brief, not an *Anders* brief. It is counsel's responsibility to determine which

issues to raise on appeal. *Jones v. Barnes*, 463 U.S. 745, 751–53 (1983); *see also* Dkt. No. 22. Counsel fulfilled that responsibility here. In any event, McClellon has already submitted a brief on his own behalf—his pro se supplemental brief—in which he could have raised the issues he now includes in his proposed supplemental brief. *See* Dkt. No. 22. McClellon should not get a third bite at the apple.

3. Finally, neither issue raised in McClellon's proposed supplemental brief is meritorious. On hybrid representation: the district court properly denied McClellon's repeated requests that he be allowed to participate in the trial as co-counsel alongside his appointed counsel. A "defendant does not have a constitutional right to 'hybrid' representation' at trial." *United States v. Oleno*, 62 F.3d 1180, 1193 (9th Cir. 1995). It is up to the district court's sound discretion whether to grant hybrid representation, and that decision is reviewed for abuse of discretion. *Id.* There was none here. The district court was best positioned to evaluate McClellon's request for hybrid representation: the court presided over the case for 19 months, read many pages of McClellon's pro se filings, and listened to him argue during sealed proceedings. *See, e.g.*, 4-AER-735, 743. The record shows that the court

carefully considered and denied McClellon's request for hybrid representation multiple times. 4-AER-750, 776. And, other than a mere desire to "articulate [his] point of view," 4-AER-735, McClellon offers no "'special need' requiring the district court to permit him to participate at trial." *Oleno*, 62 F.3d at 1193. The district court correctly denied hybrid representation.

McClellon's restitution issue fares no better. McClellon argues the district court erred when it imposed a restitution judgment based on a preponderance of the evidence. He cites a currently pending Supreme Court case, *Ellingburg v. United States*. U.S. Supreme Court No. 24-482. But as McClellon acknowledges, he did not object below, so this Court's review is for plain error. Even if the district court erred (it didn't), that error would not be plain. This Court has long held that any dispute as to the amount or type of restitution "shall be resolved by the court by the preponderance of the evidence." *United States v. Dadyan*, 76 F.4th 955, 960 (9th Cir. 2023). *Following* longstanding precedent, as the Court did here, is by definition not plain error. *See id.* at 961 (noting the Court's precedent would foreclose an argument that restitution must be found by a jury beyond a reasonable doubt); *cf. United States v. Gnirke*, 775 F.3d

1155, 1164 (9th Cir. 2015) (error "cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results").

* * *

For the foregoing reasons, the government respectfully requests the Court deny McClellon's motion to file a supplemental opening brief.

January 2, 2026

Respectfully submitted,

CHARLES NEIL FLOYD
United States Attorney
Western District of Washington

s/ Lauren Watts Staniar
LAUREN WATTS STANIAR
Assistant United States Attorney
700 Stewart Street, Suite 5220
Seattle, Washington 98101