

No. 26A_____

Court of Appeals No. 24-3406

IN THE SUPREME COURT OF THE UNITED STATES

DONTE McCLELLON,
Applicant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO
FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**APPLICATION TO THE HONORABLE
ELENA KAGAN AS CIRCUIT JUSTICE**

Brooks Holland

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Appointed under the Criminal Justice Act

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Supreme Court Rule 13.5, Applicant Donte McClellon respectfully requests an extension of 42 days within which to file a petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit, No. 24-3406. Applicant's petition is presently due on September 16, 2026. This extension would extend the time to file the petition to Wednesday, October 28, 2026.

Counsel appears in this Court as appointed counsel under the Criminal Justice Act. *See* 18 U. S. C. § 3006A and Supreme Court Rule 9.1.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

Applicant seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit in *United States v. Donte McClellon*, No. 24-3406, entered on June 18, 2026. The Ninth Circuit's memorandum decision is submitted as Exhibit A. Two related orders of the Ninth Circuit and Applicant's related motion are submitted as Exhibit B.

JURISDICTION

The Court of Appeals entered judgment on June 18, 2026. No party filed a petition for panel rehearing or rehearing *en banc*.

This Court has jurisdiction over a timely petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1). Applicant's present time to file a petition for

a writ of certiorari expires on September 16, 2026. This application is being filed at least ten days prior to that date. *See* Supreme Court Rule 13.5.

REASONS JUSTIFYING AN EXTENSION OF TIME

This appeal arises from Applicant's conviction of wire fraud and bank fraud following a four-day jury trial in the United States District Court for the Western District of Washington. The fraud charges stemmed from Applicant's allegedly fraudulent applications for COVID-related Paycheck Protection Program loans. Applicant anticipates that his petition for certiorari will present questions addressing the following issues.

First, the District Court calculated Applicant's offense level under the U.S. Sentencing Guidelines to include Applicant's intended loss from fraud, not just actual loss. At the time, the 2023 Sentencing Guidelines authorized the inclusion of intended loss only in the commentary. Applicant anticipates presenting a sentencing question challenging the use of intended loss under the 2023 Sentencing Guidelines. The Ninth Circuit affirmed on the ground that Guideline § 1B1.3 itself incorporates intended loss, eliding whether it owed deference to the commentary to Guideline § 2B1.1. This issue, however, is closely related to *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. The specific issue of whether courts should defer to Guidelines commentary on intended loss has produced a circuit split and generated dissents in

decisions adopting the Government’s position. *See e.g., 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).

Second, the Ninth Circuit appointed counsel to substitute for Applicant’s former appellate counsel when both former counsel and Applicant sought former counsel’s withdrawal. The Ninth Circuit, however, accepted the opening brief from former counsel that had generated the dispute with Applicant. In a motion to supplement that brief and the excerpts of record, current counsel raised additional trial issues for appellate review, including whether the District Court’s denial of Applicant’s requests to proceed with “hybrid” representation denied Applicant his constitutional right to choose his defense under *McCoy v. Louisiana*, 584 U.S. 414 (2018). The motion emphasized that substitute counsel needed a reasonable opportunity to exercise independent judgment to advocate for Applicant on appeal.

The Court of Appeals denied this motion to supplement, leaving counsel to advocate only the sentencing issue raised by another attorney whom the Court of Appeals had discharged. The Court of Appeals’ summary denial of Applicant’s motion to supplement therefore presents a substantial federal question of how extensively courts of appeals can control the

independent judgment of substitute counsel and limit defense advocacy in this context without violating the Sixth Amendment.

Applicant respectfully seeks the requested extension to prepare this petition for a writ of certiorari for the following reasons:

1. Counsel is a sole practitioner appointed under the Criminal Justice Act. Counsel is also a Professor of Law at Gonzaga University School of Law.¹ Since the Ninth Circuit issued its decision on June 18, 2026, counsel has been engaged in other Ninth Circuit appellate matters and academic work:

- Filed a Ninth Circuit reply brief in *United States v. Brooks*, No. 25-6630, on July 8, 2026;
- Filed a Ninth Circuit opening brief in a complex trial matter and a supervised release violation judgment in *United States v. Robinson*, Nos. 24-2482 and 24-2487, on July 17, 2026;
- Delivered a keynote ethics lecture and facilitated a judicial ethics workshop at the annual conference of the National Council of Juvenile and Family Court Judges on July 21, 2026;
- Presented oral argument in the Ninth Circuit in *United States v. Pigida*, Nos. 24-3223 and 24-3224, an appeal from a complex, eleven-day fraud jury trial, on August 3, 2026;
- Resumed full-time teaching at Gonzaga University School of Law on September 1, 2026.

Moreover, in the time requested for this extension, counsel will:

- Participate in an ethics conference for the Washington State Bar Association on September 16, 2026, and deliver a webinar on the October 2025 Term of the U.S. Supreme Court for the American

¹ Gonzaga University and the School of Law are not involved in counsel's representation of Mr. McClellon. Counsel appears in his individual professional capacity as Criminal Justice Act counsel.

Bar Association and National Legal Aid and Defender Association on October 5, 2026;

- Review the answering brief and file a reply brief in *United States v. Robinson*, Nos. 24-2482 and 24-2487, by October 7, 2026;

2. *Beaird* is scheduled for oral argument in this Court on October 13, 2026. The requested extension to October 28, 2026, would permit counsel to consider oral argument in *Beaird* before finalizing Applicant's petition presenting an intended-loss challenge.

3. Applicant's motion to file supplemental briefing and raise the hybrid representation-*McCoy* claim was grounded in Applicant's active engagement in his own defense. Applicant's current federal detention, however, has materially restricted counsel's ability to communicate with Applicant concerning the petition. Meaningful client consultation is particularly important here because this anticipated question in the petition concerns the decision-making authority of counsel and client under the Sixth Amendment. The Bureau of Prisons projects Applicant's release on September 30, 2026.² The requested extension would permit meaningful consultation following Applicant's release before counsel finalizes the petition.

² Release date obtained at https://www.bop.gov/mobile/find_inmate/ (last visited September 4, 2026).

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that an order be entered extending the time within which to file a petition for a writ of certiorari to and including October 28, 2026.

Dated: September 5, 2026

Respectfully submitted,

Brooks Holland



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