

Appendix A:
Court of Appeals
Memorandum Decision

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 18 2026

FOR THE NINTH CIRCUIT

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

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, CLERK
U.S. COURT OF APPEALSUNITED 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,

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

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. McClellon'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. McClellon 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

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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