Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEIHINAHINA SULLIVAN, Defendant-Appellant.	Nos. 23-573, 23-575 D.C. Nos. 1:17-cr-00104-JMS-KJM-1 1:21-cr-00096-JMS-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
J. Michael Seabright, District Judge, Presiding

Submitted October 9, 2024**
Honolulu, Hawaii

Before: MURGUIA, Chief Judge, and GRABER and MENDOZA, Circuit Judges.

Leihinahina Sullivan timely appeals her conviction. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1. We review de novo "'whether an appellant has waived [the] right to appeal' pursuant to the terms of a plea agreement." *United States v. Wells*, 29 F.4th 580, 583 (9th Cir. 2022) (citation omitted). Sullivan's breach-of-plea-agreement and ineffective-assistance-of-counsel claims are not barred by the appeal waiver. We have held that "[a] defendant is released from his or her appeal waiver if the government breaches the plea agreement," *United States v. Hernandez-Castro*, 814 F.3d 1044, 1045 (9th Cir. 2016), and the agreement provides that Sullivan may bring "a challenge . . . based on a claim of ineffective assistance of counsel." Moreover, assuming without deciding that the plea waiver does not apply to Sullivan's challenge to the revocation of her pro se status, this panel finds the district court's post-plea revocation of Sullivan's pro se status was proper. *See United States v. Atherton*, 106 F.4th 888, 897–98 (9th Cir. 2024).

2. The government did not breach the plea agreement with statements made at sentencing. "A defendant's claim that the government breached its plea agreement is generally reviewed de novo." *United States v. Whitney*, 673 F.3d 965, 970 (9th Cir. 2012). But because Sullivan's counsel did not move to withdraw Sullivan's plea due to the government's alleged breach, we review for plain error. *Id.*

At sentencing, the government referred to Sullivan as a "one-woman criminal enterprise" and asserted that "[t]he truly staggering amount of criminal

activity that Sullivan engaged in for over a decade is not reflected fully in the Guidelines calculation in this case." After discussing incidents of unproven or uncharged offenses—including fraud, theft, and forgery—the government continued: "[t]he Guidelines calculation and the Court's commensurate findings fall substantially short of covering the scope and impact of Sullivan's conduct in this case." Sullivan argues that the government was precluded from making those statements at sentencing because the plea agreement states that "the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior."

Contrary to Sullivan's claim, these statements did not breach the plea agreement. The quoted provision in the plea agreement was not a promise to avoid discussion of uncharged and unproven offenses. *See United States v. Streich*, 560 F.3d 926, 930 (9th Cir. 2009) (holding that it was not a breach when the government based its sentencing recommendation on uncharged conduct, despite a provision in the plea agreement stating that the government would not prosecute the defendant for additional offenses). Indeed, other portions of the plea agreement explained that several issues were unresolved and would be discussed at sentencing.

Further, the district court properly considered the type of material that the government discussed at sentencing. *See* 18 U.S.C. § 3661 ("No limitation shall be

placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *United States v. Christensen*, 732 F.3d 1094, 1104 n.2 (9th Cir. 2013) ("[A] sentencing court may rely on any evidence relating to a defendant's background, character, and conduct when considering the sentencing factors found in 18 U.S.C. § 3553(a).").

3. "We have never definitively articulated the standard of review that applies to a defendant's claim on direct appeal of a criminal conviction that [the defendant's] Sixth Amendment right to self-representation was violated." *United States v. Engel*, 968 F.3d 1046, 1049 (9th Cir. 2020). The Second, Third, Fifth, Eighth, and Tenth Circuits employ a de novo review, and the Seventh Circuit reviews for abuse of discretion. *Id.* at 1049–50. Because the district court's revocation of Sullivan's pro se status was proper under either standard, we need not resolve this debate.

"[T]he right to self-representation is not absolute[.]" *United States v. Johnson*, 610 F.3d 1138, 1144 (9th Cir. 2010). "A district court 'may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct,' or who is unable or unwilling 'to abide by rules of procedure and courtroom protocol.'" *Engel*, 968 F.3d at 1050 (internal citation omitted) (first quoting *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975); and

then quoting *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984)). And "serious and obstructionist misconduct" may include "engag[ing] in heated discussions with the judge" and failing to obey the court's rulings. *Id.* at 1050–51 (internal quotation marks and citations omitted).

The district court revoked Sullivan's pro se status because she disrupted courtroom proceedings on many occasions by arguing with the judge so intensely that the proceedings were paused, and because she lacked candor with the court. Her conduct certainly amounted to "serious and obstructionist misconduct." *Id.* Plus, Sullivan failed to obey the court's rulings by continuing to file untimely motions or motions on issues previously ruled on by the court. *See id.* at 1051 ("Had Engel repeatedly violated the court's orders, that might be sufficiently disruptive to revoke his pro se status.").

4. Finally, Sullivan and appointed counsel did not have a conflict of interest requiring a remand for resentencing. "A claim that trial counsel had a conflict of interest with the defendant is a mixed question of law and fact and is reviewed de novo by the appellate court." *United States v. Walter-Eze,* 869 F.3d 891, 900 (9th Cir. 2017) (quoting *United States v. Nickerson*, 556 F.3d 1014, 1018 (9th Cir. 2009)). The record on appeal is sufficiently developed to permit review on direct appeal. *See United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000) (noting that, "when the record on appeal is sufficiently developed to permit review

and determination of the" ineffective assistance of counsel claim, it may be reviewed on direct appeal (citation omitted)).

When an "actual conflict" exists between a defendant and the defendant's lawyer, the Sixth Amendment protects that defendant from forced representation by that lawyer. *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994). Sullivan argues that her counsel operated under an "actual conflict." We disagree. "'[A]n actual conflict of interest' mean[s] precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens v Taylor*, 535 U.S. 162, 171 (2002). Here, counsel's performance was not affected. For instance, counsel advocated for a sentence of 84 months, which was well below the Guidelines calculation and the probation department's recommendation.

Moreover, the civil suit on which Sullivan relies was dismissed with prejudice before counsel was served. And Sullivan has an extensive history with six prior lawyers: one retained counsel, three appointed counsel, and two appointed standby counsel. We have previously declined to find an actual conflict of interest under similar circumstances. *See United States v. Plascencia-Orozco*, 852 F.3d 910, 916–18 (9th Cir. 2017) (upholding the district court's decision to deny a defendant's request for new counsel, even though the defendant had filed a state bar complaint against his attorney, where (1) the defendant had a history of filing similar complaints against prior counsel and (2) the defendant's requests amounted

to "dilatory tactics rather than genuine complaints about his attorneys' performance"). The district court did not err in refusing to remove appointed counsel.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEIHINAHINA SULLIVAN, Defendant-Appellant.	Nos. 23-573, 23-575 D.C. Nos. CR 17-00104-JMS, 21-00096-JMS ORDER

Before: MURGUIA, Chief Judge, and GRABER and MENDOZA, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing. Judge Graber recommended denying the petition for rehearing en banc, and Chief Judge Murguia and Judge Mendoza so voted. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 40.

The petition for panel rehearing and rehearing en banc (Dkt. 57) is DENIED.

Appendix B

No.s 23-573 & 23-575

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEIHINAHINA SULLIVAN,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Hawaii
No.s CR 17-00104 JMS & 21-00096 JMS
Hon. J. Michael Seabright

APPELLANT'S CONSOLIDATED OPENING BRIEF

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INTRODUCTION

Leihinahina Sullivan is a fifty-two year old mother of two convicted of multiple fraud-related offenses and currently serving a total term of 204 months—17 years—imprisonment. Throughout most of the trial court proceedings, Ms. Sullivan represented herself, much to the obvious consternation of the Court and government. Following nearly four and a half years of active and contentious litigation, Ms. Sullivan entered into a plea agreement she believed would benefit her in several ways. As she would learn, her belief was very much unjustified.

During her many plea colloquies, Ms. Sullivan focused intently on the limited and specific factual stipulations concerning each of the fraud offenses to which she pled guilty: tax, credit card, and financial aid-related. But those limited and specific stipulations were preceded by broad admissions of participation in these three different fraudulent schemes that were unbounded in terms of loss amounts, number of victims, time-frames, and the scope of relevant conduct thereto.

As a result, although Ms. Sullivan's plea agreement expressly mentioned less than $3 thousand in losses she was ultimately sentenced based on a total loss amount of more than $3 million. Although the government dismissed 57 counts against Ms. Sullivan, all of these offenses were taken into consideration at

sentencing. And the plea agreement included an extremely broad and wholly one-sided appeal waiver.

Shortly after Ms. Sullivan entered her guilty pleas, she moved to withdraw them. Subsequently, the Court revoked Ms. Sullivan's pro se status. Ms. Sullivan's Sixth Amendment right to represent herself was not revoked due to any significant mental illness or any fear or likelihood that she would disrupt any trial. Rather, Ms. Sullivan's constitutional right to proceed pro se was denied as a result of her ongoing, voluminous, and repetitive filings.

Counsel was appointed over Ms. Sullivan's objection, then promptly and repeatedly moved to withdraw after Ms. Sullivan alleged he was ineffective. Counsel openly worried about malpractice and accused Ms. Sullivan of intentionally fabricating and staging claims against him. Counsel explained that he could not continue representing Ms. Sullivan while at the same time defending himself against her allegations. The Court ordered appointed counsel to do just that.

Just as Ms. Sullivan was finally about to be sentenced, the government submitted sentencing materials arguing forcefully that the charges in the plea agreement did not adequately reflect the seriousness of her actual offense behavior, citing a litany of uncharged and unproven other offenses. The government's

argument contravened a stipulation in the plea agreement to the contrary. Appointed counsel recognized as much but failed to move to withdraw Ms. Sullivan's plea on this ground.

Ms. Sullivan cut an unpopular figure in the district court. But none of her actions justified revocation of her right to present her own defense at sentencing, forcing counsel with an actual conflict of interest that adversely affected his performance on her, or plainly breaching her plea agreement in a manner that affected her substantial rights and seriously affected the fairness of the proceedings.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. Ms. Sullivan timely appealed. 9-ER-2158; 9-ER-2161; Fed. R. App. P. 4(b)(1)(A)(i). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's judgments at 1-ER-2; 1-ER-20.

BAIL STATUS STATEMENT

Ms. Sullivan is currently in federal custody. Her anticipated release date is January 26, 2035.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

(I.) Whether the appeal waiver in Ms. Sullivan's plea agreement bars consideration of the issues raised herein where the government plainly breached the same agreement, the Sixth Amendment was violated when the District Court revoked Ms. Sullivan's right to present her own defense and then forced counsel with an actual conflict of interest that adversely affected his performance on her, and enforcement of the waiver would result in a miscarriage of justice.

(II.) Whether the government plainly breached the plea agreement stipulation that the charges to which Ms. Sullivan pled guilty adequately reflected the seriousness of her actual offense behavior by arguing at sentencing that these offenses (and the relevant conduct thereto) did *not* reflect an adequate sentence because Ms. Sullivan was "a one-woman criminal enterprise" who also committed a plethora of uncharged and unproven offenses distinct from those to which she had pled and that were unaccounted for as a result. Whether this breach of the plea agreement affected Ms. Sullivan's substantial rights where there is a reasonable probability that the error affected the sentencing. And whether this breach of the

plea agreement seriously affected the fairness, integrity, or public reputation of the judicial proceedings where the breach was deliberate and the integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement.

(III.) Whether the District Court erred in revoking Ms. Sullivan's Sixth Amendment right to personally control her defense where she was competent to represent herself and there was no risk of her disrupting a trial, but she filed continual motions that were often frivolous, abusive, vexatious, meritless, duplicative, conclusory and/or illogical.

(IV.) Whether the District Court erred in forcing appointed counsel to advocate on Ms. Sullivan's behalf prior to and at sentencing while actively defending himself against allegations of ineffective assistance. Whether counsel's divided loyalties adversely affected his representation where he argued to the Court that Ms. Sullivan's allegations were a malicious and false attempt to stage a future malpractice lawsuit against him and noted the government's breach of Ms. Sullivan's plea agreement but did not move to withdraw her plea. And whether counsel's actual conflict of interest which adversely affected his representation of Ms. Sullivan up to and including sentencing requires reversal and remand for resentencing.

STATEMENT OF THE CASE

I. Pre-plea

Leihinahina Sullivan was initially Indicted on February 15, 2017. 9-ER-2149. The original Indictment charged eleven counts of false claims (involving a federal tax fraud scheme), wire fraud (involving a state tax fraud scheme), and aggravated identity theft (involving the use of another person's means of identification in connection with the state tax fraud scheme). 9-ER-2149. Between November 8, 2017, and December 26, 2019, the original Indictment was superseded on four occasions. 9-ER-2129, 2080, 2041; 8-ER-1872.

The First Superseding Indictment charged fifty-five counts. 9-ER-2129-46. In summary, the First Superseding Indictment charged:

Counts	Charges	Description
1-7	Wire and Mail Fraud	Involving the initially charged federal and state tax fraud schemes
8-28	False Claims	Involving the same federal tax fraud scheme
29-34	Wire Fraud	Involving a financial aid for college-bound students fraud scheme
35-45	Wire Fraud	Involving a credit-card fraud scheme
46-51	Aggravated Identity Theft	Involving the use of other persons' means of identification in connection with the federal and tax fraud scheme as well as the credit card scheme

Counts	Charges	Description
52-55	Money Laundering	Involving the proceeds of these fraud schemes

Id.

A second superseding indictment was handed down four months later charging an additional false claims count (involving the same federal tax fraud scheme but occurring after Ms. Sullivan's original indictment) and two additional wire fraud counts (involving the credit card scheme and also allegedly occurring after Ms. Sullivan's original indictment). 9-ER-2080-97.

A third superseding indictment added counts of obstructing an official proceeding and a charge of extortion, all allegedly occurring after Ms. Sullivan's original indictment. 9-ER-2058-60. These new charges involved allegedly submitting false declarations to the Court in this case as well as attempting to extort a witness. *Id.* The fourth superseding indictment amended some of the then-existing charges but did not add any additional counts. 8-ER-1872-91.

Following the First Superseding Indictment, the government sought to revoke Ms. Sullivan's pretrial release and asked for an evidentiary hearing regarding the same. 9-ER-2112, 2128. To that point, Ms. Sullivan was represented by retained counsel. 10-ER-2217-29. In response, the defense submitted a memorandum opposing the government's motion and attaching several

declarations. 9-ER-2101. Submission of these declarations was the conduct underlying the obstruction charge filed in the Third Superseding Indictment. 9-ER-2058. The government asserted Ms. Sullivan's retained counsel would likely be a witness regarding this offense and moved to disqualify him from further representation. 9-ER-2066. Before the Court ruled on the government's motion, retained counsel moved to withdraw and his motion was granted. 9-ER-2065. Thereafter, the Court appointed counsel to represent Ms. Sullivan. 9-ER-2064.

In August of 2019, Ms. Sullivan began filing her own pleadings, despite the fact that she was then represented by appointed counsel. *See, e.g.*, 9-ER-2038. On August 9, 2019, Ms. Sullivan's appointed counsel informed the Court that Ms. Sullivan wanted to represent herself. 9-ER-2036. The Court held two hearings pursuant to *Faretta v. California* to determine whether Ms. Sullivan's waiver of her Sixth Amendment right to be represented by counsel was truly knowing, intelligent, and voluntary. *See,* 9-ER-1985, 1959. The initial hearing included a roughly hour-and-a-half long discussion with Ms. Sullivan about the many dangers and disadvantages of self-representation. *See,* 9-ER-1985, 1986. The Court's initial inquiry was thorough and included a detailed discussion concerning the pending charges and the possible penalties. *See,* 9-ER-1995 line 1-2012 line 12. A week later and prior to granting Ms. Sullivan's request to proceed pro se, the Court

held another *Faretta* hearing again confirming that Ms. Sullivan's request to represent herself was unequivocal, knowing, intelligent, and voluntary. 9-ER-1959, 1974 line 15-75 line 7.

From September 11, 2019, until June 21, 2021, Ms. Sullivan represented herself and filed more than 200 pleadings pertaining to a multitude of issues. 10-ER-2262-452, 11-ER-2454-95. Among others, Ms. Sullivan raised issues concerning her detention and ability to mount her defense, provision of discovery, speedy trial, the Fourth Amendment, due process, the Eighth Amendment, and motions to reconsider all of the same. *Id.* Ms. Sullivan also filed numerous motions to dismiss standby counsel, to recuse various judges, for sanctions, and to dismiss for outrageous governmental misconduct. *Id.* Many of Ms. Sullivan's motions were filed after her motions deadline had passed and were characterized by the Court as frivolous, abusive, vexatious, meritless, repetitive, duplicative, conclusory, and/or illogical. 8-ER-1861, 1864; *see also,* 10-ER-2256-452; 11-ER-2454-64. The Court warned Ms. Sullivan on numerous occasions that continued filings of this sort could result in termination of her self-representation. 8-ER-1862-64.

Ms. Sullivan's pro se motions were not all unsuccessful. *See, e.g.,* 10-ER-2256-452; 11-ER-2454-64. Among others, the Court granted Ms. Sullivan's

motions to dismiss standby counsel, for various accommodations allowing her to prepare her defense while incarcerated (including authorizing the payment of experts at public expense), to compel production of particular discovery, to dismiss certain charges for violation of the speedy trial act, to continue trial, to sever offenses, to suppress evidence, and to release her from custody. *See,* 9-ER-1958, 1949, 1948, 1922, 1897; 8-ER-1895, 1870, 1868, 1865, 1832, 1773, 1683; 7-ER-1594.

On June 17, 2020, while Ms. Sullivan was representing herself and prior to her guilty plea, the Court directed the parties to file briefing concerning Ms. Sullivan's competency to represent herself during trial pursuant to *Indiana v. Edwards.* 8-ER-1779, 1792 line 5-18. The government agreed then that the facts concerning Ms. Sullivan's conduct and self-representation *did not* warrant any finding that she was incompetent to continue to proceed pro se. 8-ER-1766, 1767. The Court took no action as a result. 8-ER-1766.

On September 21, 2020, the Court held a status conference to ensure the parties were still on track for trial. 8-ER-1733, 1735; 13-ER-2928. During a sealed portion of that hearing, Ms. Sullivan indicated that she intended "to bring in psychiatric testimony . . . for the jury to consider in determining my innocence or guilt." 13-ER-2929 lines 10-12. Standby counsel then volunteered he had received

"confidential medical information from" Ms. Sullivan indicating that she suffered from "a significant mental illness." 13-ER-2929 line 23-2930 line 22. Standby counsel also offered that Ms. Sullivan was seeing a psychotherapist who at one point opined that she could not go through a trial without having a breakdown. 13-ER-2931 line 1-2. "As an officer of the court," standby counsel pointed out that he "could see that creating a mistrial situation." 13-ER-2931 lines 5-7. Standby counsel filed a Notice of Intent to Offer Expert Testimony, purportedly on Ms. Sullivan's behalf. 8-ER-1730. The next day, Ms. Sullivan withdrew this notice. 8-ER-1727.

On this basis, the Court ordered an examination to determine both Ms. Sullivan's competence to stand trial as well as her competence to continue representing herself. 8-ER-1685, 1687, 1697 line 1-1698 line 11. The parties jointly recommended the evaluation be completed by Dr. Reneau Kennedy. 8-ER-1684. Dr. Kennedy found Ms. Sullivan was competent to stand trial. 13-ER-2925. The Court agreed, finding this matter to be straightforward. 8-ER-1670, 1673 lines 6-7.

Regarding Ms. Sullivan's competence to represent herself, Dr. Kennedy questioned "whether Mrs. Sullivan recognizes her limitations in organization and execution, and whether she respects the authority and direction of the court." 13-

ER-2924. Further, Dr. Kennedy focused on the risk that the public might not perceive Ms. Sullivan's trial to be fair if she continued to represent herself, Ms. Sullivan's disorganization, the fact that she had at times been argumentative with the Court and opposing counsel, her inadequate trial preparation and communication problems, and the fear that she would not effectively be able to lay out her defense. 13-ER-2926. Dr. Kennedy also cited Ms. Sullivan's desire to finish reviewing discovery before she considered plea bargaining as a "backwards consideration" supporting revocation of her right to present her own defense. 13-ER-2925.

The Court discounted most of Dr. Kennedy's concerns regarding Ms. Sullivan's competence to represent herself but was concerned about the discrepancy between what standby counsel had volunteered - that Ms. Sullivan suffered from "a significant mental illness," 13-ER-2929 line 24 - and Dr. Kennedy's conclusion that there was no evidence that Ms. Sullivan suffered from any severe and persistent mental illness, 13-ER-2924. *See,* 8-ER-1661 line 15-1662 line 4. As a result, the Court ordered production and disclosure of Ms. Sullivan's treating psychotherapist's records over her objections. 8-ER-1625, 1642 lines 13-21; 7-ER-1620.

The records were produced and did not include a diagnosis of any significant mental illness. 7-ER-1612 lines 18-20. Dr. Kennedy's opinions were thus unchanged. 13-ER-2867, 2901 line 19-20. Recognizing that Dr. Kennedy's opinions regarding competency for self-representation were not in line with *Indiana v. Edwards* or other relevant caselaw, the Court allowed Ms. Sullivan to continue representing herself. 7-ER-1596, 1603 line 22-1605 line 12.

II. Plea

On June 21, 2021, less than two months before trial was finally scheduled to commence, 7-ER-1592, Ms. Sullivan entered into a plea agreement with the government. 7-ER-1580 lines 20-22. After *eleven* hearings, totaling nearly *eight* hours, and at least *three* draft plea agreements, the Court finally accepted Ms. Sullivan's pleas. 7-ER-1590, 1569, 1565, 1530, 1495, 1490, 1475, 1471, 1447, 1442, 1354; 6-ER-1348, 1335, 1331, 1328, 1327, 1285, 1280, 1261, 1256, 1209; 10-ER-2174.[1]

Throughout these many hearings, Ms. Sullivan's degree of understanding was apparent. One example makes the point succinctly. During one colloquy, Ms.

1 On September 15, 2021, the Court ordered that all pleadings filed in Ms. Sullivan's cases be filed in both cause numbers. 5-ER-1092. To avoid unnecessary duplication in the Excerpts of Record, only the duplicate CR-17-0104 JMS transcripts, pleadings and orders are included therein and citation to the identical CR-21-0096 JMS pleadings and orders are only to the docket pages reflecting the same.

Sullivan asked if she would be a convicted felon following her pleas (to multiple felony offenses). 7-ER-1545 lines 22-23. Repeatedly during these hearings, Ms. Sullivan disputed the factual bases for the offenses. 7-ER-1396 line 12-1401 line 10, 1421 line 13-1432 line 23; 6-ER-1335 line 21-1336 line 5, 1314 lines 16-19. On July 9, 2021, after yet another attempt to lay down a colloquy establishing that Ms. Sullivan's pleas were knowing and intelligent and supported by a sufficient factual basis, Ms. Sullivan became ill and was unable to continue. 6-ER-1326 line 16-1329 line 25.

At the next hearing a few days later when Ms. Sullivan was still too ill to proceed, the Court again raised the issue of Ms. Sullivan's competency to represent herself. 6-ER-1258, 1271 line 25-1272 line 1. After Ms. Sullivan returned to court indicating she still wished to enter a plea, the Court decided no further inquiry on the issue of competency was necessary. 6-ER-1205, 1253 line 25-1254 line 17.

Pursuant to her final plea agreement, Ms. Sullivan broadly admitted to engaging in a federal and state tax fraud scheme, a credit card fraud scheme, a fraud involving financial aid for college-bound students, and aggravated identity theft. 6-ER-1177.[2] The plea agreement included the following waiver:

2 The aggravated identity count to which Ms. Sullivan pled was not charged in any indictment in the 17-104 cause number. Rather, it was charged by Information in *United States v. Leihinahina Sullivan,* United States District Court, Hawaii Cause No. 21-96. No plea agreement was filed therein. *See,* 10-ER-2167-69.

> The defendant knowingly and voluntarily waives the right to appeal, except as indicated in subparagraph "b" below, her conviction and any sentence within the Guidelines range as determined by the Court at the time of sentencing, and any lawful restitution or forfeiture order imposed, or the manner in which the sentence, restitution, or forfeiture order was determined, on any ground whatsoever, in exchange for the concessions made by the prosecution in this Agreement. The defendant understands that this waiver includes the right to assert any and all legally waivable claims.
>
> * * *
>
> b. If the Court imposes a sentence greater than specified in the guideline range determined by the Court to be applicable to the defendant, the defendant retains the right to appeal the portion of her sentence greater than specified in that guideline range and the manner in which that portion was determined and to challenge that portion of her sentence in a collateral attack.

6-ER-1193-94. By contrast, the government expressly "retain[ed] its right to appeal the sentence and the manner in which it was determined on any of the grounds stated in Title 18, United States Code, Section 3742(b)." 6-ER-1194.

III. Post-Plea

Nine days after Ms. Sullivan's 'intelligent, knowing, and voluntary' pleas were accepted, she started moving, repeatedly, to withdraw the same. 6-ER-1127; 5-ER-1100, 998; 4-ER-802; 3-ER-454; 10-ER-2169, 2172, 2192, 2199. Appointed counsel also filed a motion to withdraw the pleas, arguing Ms. Sullivan did not know or understand that the conduct underlying the 57 dismissed counts would still be considered by the Court at sentencing. 13-ER-2853-54; 10-ER-2186. While she was represented by appointed counsel, Ms. Sullivan argued pro se that

the government had breached the plea agreement. 5-ER-988. All these motions were denied or stricken. 5-ER-1125, 1112, 1093, 997, 975; 4-ER-800; 10-ER-2171-73, 2186, 2192, 2199.

On January 14, 2021, the Court issued an order to show cause why Ms. Sullivan's pro se status should not be revoked. 5-ER-1078. In response, *the government* recognized that under under *Faretta* and existing law it was not at all clear that Ms. Sullivan's pro se status could be terminated. 5-ER-1076. First, the government indicated there was no support for the claim that Ms. Sullivan's pattern of vexatious filings alone should result in a revocation of pro se status. 5-ER-1071. Recognizing there was no longer any fear about how Ms. Sullivan's conduct might undermine a trial, the government noted that the Court could take various other steps to ensure the continued orderly administration of justice. 5-ER-1074.

Unpersuaded by either the government or Ms. Sullivan, the Court revoked Ms. Sullivan's pro se status. 1-ER-143; 5-ER-1010; 10-ER-2178-79. In abrogating Ms. Sullivan's Sixth Amendment right to represent herself, the Court focused largely on her long-standing habit of filing pleadings after she was directed not to do so, seeking the same relief on multiple occasions. 5-ER-1015 line 17-1019 line 13, -1026 lines 4-7. The Court detailed:

> She files motions seeking the same relief many, many times over and over again. I've warned her to stop doing it and she continues to do it.
>
> * * *
>
> The issue is that she continuously is abusive because she doesn't listen to my orders when she continuously seeks the same relief for the same conduct over and over and over again.

5-ER-1026 lines 4-7, 1043 lines 10-13.[3] The Court reasoned in part that Ms. Sullivan's "core *Faretta* Sixth Amendment right" was not implicated since such right pertained only to "the defendant's ability to preserve actual control over the case the person wants to present to the jury" and with Ms. Sullivan's pleas there would be no jury. 5-ER-1039 lines 21-23. The Court found Ms. Sullivan's "abusive filings" forfeited her constitutional right to self-representation. 5-ER-1045 lines 15-21; 1-ER-143.

The Court appointed counsel to represent Ms. Sullivan. 1-ER-143, 145. Appointed counsel promptly and repeatedly moved to withdraw and Ms. Sullivan joined these motions. 5-ER-1005, 897, 844, 840; 4-ER-794, 792; 3-ER-454; 2-ER-428, 393, 303, 307, 289, 248, 246, 211, 156; 12-ER-2612; 10-ER-2183, 2187-93, 2199, 2203-7. For twelve months, these motions were all denied and/or stricken. 5-ER-1004, 839; 4-ER-805, 769; 2-ER-298, 288, 245, 210; 1-ER-141, 131, 129;

3 Even after Ms. Sullivan was represented by counsel, the Court continued to (repetitively) note its frustration with the motions she filed "over and over and over again," 4-ER-564 lines 5-6, 570 lines 21-22, 574 lines 9-10, 655 line 25, 698 lines 16-17. The Court complained "[w]e're at docket number 14-something in this case because of how litigious Ms. Sullivan has been, largely in a repetitive way throughout this case." 4-ER-573 lines 13-14.

10-ER-2183, 2191, 2193-94, 2203-08.

By October 25, 2022, Ms. Sullivan had repeatedly alleged appointed counsel had provided ineffective assistance. *See,* 4-ER-772 lines 10-13. Appointed counsel described these "magic words"—ineffective assistance of counsel—as drawing "a line in the sand in a relationship with a attorney and client." *Id.* He explained, "[f]rom my perspective it's kind of like a line in the sand. It's akin to threatening a malpractice lawsuit to me." 4-ER-772 lines 20-22. When the Court challenged appointed counsel, averring that such allegations were inconsequential because they were 'frivolous,' appointed counsel responded, "[m]y insurance agent doesn't care." 4-ER-773 line 2.

The following day, appointed counsel moved to withdraw again because Ms. Sullivan filed a civil suit against him. 4-ER-766; 10-ER-2194. Appointed counsel explained that he could not "continue to represent the defendant while at the same time defend[ing] himself against Defendant's malicious and false allegations." 4-ER-766; 10-ER-2194. Appointed counsel was ordered to continue representing Ms. Sullivan. 3-ER-546; 1-ER-139; 10-ER-2194-95. At this point, appointed counsel started arguing to the Court that Ms. Sullivan's allegations were "[n]ot true" and offering detailed explanations of the same. 4-ER-559 lines 12-25.

In a subsequent, fourth motion to withdraw, appointed counsel pointed to filings by Ms. Sullivan "which contain false and misleading assertions of fact against Declarant," i.e. against him. 3-ER-451; 12-ER-2602 lines 8-11; 10-ER-2201. Appointed counsel wrote: "[c]ounsel suspects and believes that Defendant is staging her court filings in an attempt to create a record to bolster a future claim of ineffective assistance of counsel against your declarant." 3-ER-452; 10-ER-2201.

Ms. Sullivan was finally sentenced in March of 2023. Probation recommended a low-end Guidelines sentence of sixteen years imprisonment. PSR, Sub. Doc. No. 1514 at 80, 10-ER-2206. The government urged the Court not to follow this recommendation and instead to impose a sentence of twenty-six years —six years above the statutory maximum sentence for any offense to which Ms. Sullivan pled guilty and significantly above all the standard sentencing ranges calculated by probation, the parties, and the Court. 2-ER-178.

In support of such an exceptional sentence, the government argued that the charges to which Ms. Sullivan pled and the guideline calculations resulting therefrom, even including all the relevant conduct relating to all the dismissed counts, did not reflect an adequate sentence in Ms. Sullivan's case. 2-ER-180-90. In particular, the government argued that Ms. Sullivan was "a one-woman criminal

enterprise," citing a plethora of uncharged and unproven offenses other than those to which she had pled, including other instances of aggravated identity theft, extensive concealment money laundering, extortion, account takeovers, thefts, uncharged bankruptcy fraud, uncharged mortgage fraud, falsified letters to state authorities, and forging of legal documents. 2-ER-178, 180, 183. The government also pointed to unproven aspects of the tax, credit, and education fraud schemes it termed "unaccounted for" frauds. 2-ER-180. Citing these alleged offenses wholly outside the scope of those in the plea agreement, the government argued the over $3 million loss amount calculated by Probation did not adequately reflect the seriousness of Ms. Sullivan's actual offense behavior because it did not include losses from these other alleged offenses. 2-ER-183 (arguing "losses related to Sullivan's *other criminal conduct* are not accounted for in the Guidelines" (emphasis added)).

In contrast to these arguments the government made at sentencing, their plea agreement included a joint stipulation "that the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior and that accepting this Agreement will not undermine the statutory purposes of sentencing." 6-ER-1190. Appointed counsel recognized the difference between the government's plea agreement stipulation and their position at sentencing, noting

in his Sentencing Statement:

> Although the government now seeks consecutive sentences on the wiretap [*sic*] offenses, the written plea agreement clearly provides that pursuant to CrimLR32.1(a) "the parties agree that the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior and that accepting this agreement will not undermine the statutory purposes of sentencing." Accordingly, the government's present complaint that the defendant's misconduct is inadequately taken into consideration by the probation office in the PSR is disingenuous. The offense conduct cited to by the government in its Sentencing Statement at paragraphs 4, 8, 12, 14, 15, and 17 is comprised of the exact same offense conduct previously established and well known to the government before entering into a plea agreement with the defendant a year and a half ago on July 20, 2021. At that time the government informed the Court that the charges to which the defendant pled guilty to adequately reflected the seriousness of the actual offense behavior and that the plea agreement did not undermine the statutory purposes of sentencing. To the opposite of its position taken in 2021, the government now seeks an upward sentence departure and consecutive terms of imprisonment arguing that what was once an adequate plea agreement to address the offense conduct and soundly within the policies of sentencing has not become wholly inadequate and undermines the purposes of sentencing.

2-ER-170-71 (internal record citations omitted); 10-ER-2207. Despite recognizing this "discrepancy" and knowing that Ms. Sullivan had already repeatedly indicated her desire to withdraw the plea agreement, appointed counsel never moved to withdraw Ms. Sullivan's plea on this basis. *See,* 11-ER-2511-82; 10-ER-2169-210.

The Court calculated an advisory Guidelines sentencing range of 168-210 months imprisonment and imposed a total term of 204 months (a mid-range

Guidelines term of 180 months for the fraud offenses plus 24 months for the aggravated identity offense). 2-ER-148; 1-ER-4, 21; 10-ER-2208-10.

SUMMARY OF ARGUMENT

(I.) An otherwise valid plea waiver does not bar consideration of an appeal where the government has breached the plea agreement, the sentence violates the Constitution, and/or enforcement of the waiver would result in a miscarriage of justice. Here, the government did plainly breach their plea agreement with Ms. Sullivan. In addition, Ms. Sullivan's sentence was entered in violation of the Sixth Amendment since the District Court improperly revoked Ms. Sullivan's right to present her own defense and then forced on her counsel with an actual conflict of interest that adversely affected his performance. Finally, enforcement of the waiver would result in a miscarriage of justice for both of these reasons. Even if otherwise valid, the waiver of the right to appeal contained in Ms. Sullivan's plea does not bar consideration of the issues herein.

(II.) The government plainly breaches a plea agreement when it makes representations at sentencing that are inconsistent with the terms of the plea agreement. Here, the government stipulated in the plea agreement that the charges to which Ms. Sullivan pled guilty adequately reflected the seriousness of her actual offense behavior then argued at sentencing that these offenses (and the relevant

conduct thereto) did *not* reflect an adequate sentence because Ms. Sullivan was "a one-woman criminal enterprise" who also committed a plethora of uncharged and unproven offenses distinct from those to which she had pled and that were unaccounted for as a result. This breach of the plea agreement affected Ms. Sullivan's substantial rights because there is a reasonable probability that the error affected the sentencing. And this breach of the plea agreement seriously affected the fairness, integrity, or public reputation of the judicial proceedings because the breach was deliberate and the integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement. Reversal and remand for further proceedings at which Ms. Sullivan may elect to withdraw her plea agreement are required.

(III.) The Sixth Amendment guarantees a criminal defendant personally the right to make her own defense unless she is incompetent to do so or has engaged in deliberate and serious obstructionist misconduct. The District Court revoked Ms. Sullivan's Sixth Amendment right to personally control her defense where she was competent to represent herself but filed continual motions that were often frivolous, abusive, vexatious, meritless, duplicative, conclusory and/or illogical. Such behavior is insufficient and denial of Ms. Sullivan's Sixth Amendment right on this basis was both structural error as well as harmful error since it contributed

to her sentence by forcing her to be represented thereat by counsel with conflicting interests that adversely affected his performance.

(IV.) The Sixth Amendment also guarantees the right to counsel's undivided loyalty. An actual conflict of interest that adversely affects counsel's performance requires reversal even absent a showing of prejudice. The District Court forced appointed counsel to simultaneously advocate on Ms. Sullivan's behalf prior to and at sentencing while actively defending himself against allegations of ineffective assistance. Trial counsel's divided loyalties caused him to simultaneously argue that Ms. Sullivan's allegations were a malicious and false attempt to stage a future malpractice lawsuit against him while handling her sentencing proceedings. Counsel also noted the government's breach of Ms. Sullivan's plea agreement but did not move to withdraw her plea. Counsel's actual conflict of interest thereby adversely affected his representation and requires reversal and remand for resentencing.

STANDARD OF REVIEW

The standards for appellate review of each issue are laid out in the argument sections below.

ARGUMENT

I. The Appeal Waiver does not Bar Consideration of the Issues Raised Herein.

A. Standard of Review

The Court reviews de novo whether an appellant has waived her right to appeal pursuant to the terms of a plea agreement.[4]

B. Argument

Representing herself, Ms. Sullivan entered into an extremely broad and completely one-sided appeal waiver. 6-ER-1193. The waiver purports to completely and prospectively abrogate Ms. Sullivan's right to appeal her conviction and sentence and the manner in which her sentence would be determined on any and every possible ground whatsoever with only one narrow exception. *Id.* The sole exception allowed Ms. Sullivan to appeal a sentence greater than that specified in the guideline range as determined by the Court. *Id.* By contrast, the government expressly retained its right to appeal the sentence. *Id.*

Examining an identical waiver, the Second Circuit has pointed out the "grave dangers" to constitutional questions and ordinary principles of fairness and justice implicated by such a broad and one-sided provision.[5] In such a

4 *United States v. Wells,* 29 F.4th 580, 583 (9th Cir. 2022); *United States v. Joyce,* 357 F.3d 921, 922 (9th Cir. 2004).

5 *United States v. Rosa,* 123 F.3d 94, 99 (2nd Cir. 1997) (Rosa's agreement "provides that 'the defendant agrees not to file an appeal in the event that the

circumstance, it is altogether appropriate for this Court to carefully examine the facts and circumstances of a given case to determine whether the issues implicated therein warrant review on the merits notwithstanding the appeal waiver.[6]

An appeal waiver is generally enforceable if it was entered knowingly and voluntarily and if the language of the waiver covers the grounds raised on appeal.[7] It is well established that an appeal waiver will not apply in several circumstances, including where: (1) the government has breached the plea agreement that includes the waiver, (2) the sentence violated the Constitution, or (3) enforcement of the waiver would result in a miscarriage of justice. Each of these circumstances exist here and are discussed in detail below.

1. Breach of Plea Agreement

As discussed in section II. infra, the government did breach their plea agreement with Ms. Sullivan. A waiver of the right to appeal is not given effect where the government has breached the plea agreement.[8] The government's breach

Court imposes a sentence within or below the applicable Sentencing Guidelines range as determined by the Court.' . . . We believe that this unorthodox agreement presents grave dangers and presents both constitutional questions and ordinary principles of fairness and justice.").

6 *See, id.* at 101 (reasoning that such a waiver "will cause us to examine carefully the facts of the case and to look at the manner in which the agreement and the sentence were entered into and applied to determine whether it merits our review.").

7 *United States v. Bibler*, 495 F.3d 621, 623-24 (9th Cir. 2007).

8 *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996); *United States v. Gonzalez*, 16 F.3d 985, 990 (9th Cir. 1993).

of the plea agreement effectively releases the defendant from her promise not to appeal her sentence.[9]

2. Unconstitutional Sentence

An otherwise valid appeal waiver will not be enforced to bar an appeal of a sentence that violates the Constitution.[10] This Court's opinions concerning the enforcement of an appeal waiver where the defendant asserts a Constitutional violation are somewhat conflicting.[11]

In *United States v. Bibler*, the Court clearly exempted challenges that a sentence is illegal from otherwise appeal waiver-barred claims.[12] Since an unconstitutional sentence is clearly an illegal sentence, the *Wells* Court recognized a sentence that violates the Constitution certainly should also fall under the general exception that an appeal waiver does not apply to an unlawful sentence as the Constitution is the supreme law of the land.[13] So, although a given defendant may have entered into a valid plea agreement promising not to appeal her sentence, the private contract principle that would normally enforce the agreement does not

9 *Gonzalez*, 16 F.3d at 990.

10 *Bibler*, 495 F.3d at 624.

11 *See, Wells*, 29 F.4th at 586 (reasoning that the scope of the Constitutional exception to application of an appeal waiver required some clarification).

12 *Wells*, 29 F.4th at 586; *citing, Bibler*, 495 F.3d at 624. *See also, Wells*, 29 F.4th at 595 (*Bibler* created a "rule that appeal waivers are never valid to bar appeals of sentences when those appeals are brought on constitutional grounds.") (Hon. Bea, J. dissenting).

13 *Wells*, 29 F.4th at 586; *citing, Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

always apply.[14] The "analogy between plea agreements and private contracts is imperfect . . . because the Constitution imposes a floor below which a defendant's plea, conviction, and sentencing may not fall."[15] Based on these authorities, the Court has previously reviewed claims of constitutional error at sentencing notwithstanding an otherwise valid appeal waiver barring the same.[16]

In *United States v. Wells,* a three-judge panel reconsidered this prior caselaw.[17] Two judges (Hon. J. Clifford Wallace and Ronald Gould) joined the majority opinion; another (Hon. Carlos T. Bea) dissented.[18] The *Wells'* two-judge majority explained the Court would review the merits of an otherwise waiver-barred appeal issue concerning a sentence that "violates the Constitution."[19] For this purpose, the majority held:[20]

> a waiver of the right to appeal a sentence does not apply if (1) the defendant raises a challenge that the sentence violates the

14 *Wells,* 29 F.4th at 586-87.

15 *Id.; citing, United States v. Torres,* 828 F.3d 1113, 1124-25 (9th Cir. 2016).

16 *United States v. Odachyan,* 749 F.3d 798, 801 (9th Cir. 2014) ("The appeal waiver in the plea agreement by its terms does not preclude an argument that the sentence is unconstitutional, and we have jurisdiction to consider a claim of constitutional error in any event. . . (an appeal waiver will not apply if the sentence violates the Constitution). Recognizing this authority, the government does not contend that Odachyan has waived his right to argue a denial of due process." (Internal citation and quotations omitted.)).

17 *Wells,* 29 F.4th at 580.

18 *Id.* at 582.

19 *Id.* at 584; *citing, Torres,* 828 F.3d at 1125.

20 *Wells,* 29 F.4th at 587.

> Constitution; (2) the constitutional claim directly challenges the sentence itself; and (3) the constitutional challenge is not based on any underlying constitutional right that was expressly and specifically waived by the appeal waiver as part of a valid plea agreement.

The majority then limited this exception, reasoning:[21]

> constitutional challenges to a sentence surviving an appeal waiver under [this] exception are limited to challenges that the terms of the sentence itself are unconstitutional. The exception does not allow any constitutional challenges *per se*, such as the Sixth Amendment rights to a speedy and public trial or right to confront witnesses, which are not challenges that the sentence is unconstitutional.

The dissent in *Wells* argued that the case was controlled by contradictory Ninth Circuit panel-decided precedents (*Joyce* and *Bibler*) and therefore should only have been decided by the court sitting en banc.[22] The *Wells* majority recognized these issues might be ripe for en banc hearing.[23] Petitions for rehearing and certiorari were both denied.[24]

A defendant who executes a general waiver of the right to appeal her sentence in a plea agreement should not thereby subject herself to being sentenced entirely at the whim of the district court. Due process and other basic rights such as the Sixth Amendment right to counsel or to control one's own defense through

21 *Id.*

22 *Id.* at 593.

23 *Id.* at 587 n.3 ("if this case is heard en banc, the en banc court can decide if *Bibler* and its progeny should be overturned and adopt a new rule. However, we as a panel are bound by our prior published decisions of our court.").

24 *Wells, rhg. denied,* 2022 U.S. App. LEXIS 13131 (9th Cir.), *cert. denied,* 143 S. Ct. 267 (2022).

self-representation should still apply. To hold otherwise would mean that once a plea agreement with a broad appellate waiver was entered, the Court could sentence the defendant without the benefit of counsel even without a valid waiver thereof, could sentence the defendant in absentia without any justification, could sentence the defendant on the basis of any alleged fact regardless of the quantum of proof thereof, and could increase a defendant's sentence because of her race, sex, religion, or political views, etc.

The *Bibler* Court got this right—even in the face of a broad appeal waiver, the Constitution must continue to impose a floor below which a defendant's sentencing proceedings may not fall.[25] As Ms. Sullivan argues infra section III., the revocation of her Sixth Amendment right to self-representation following her plea violated the Constitution and should be considered despite the appeal waiver extracted by the government. Likewise, Ms. Sullivan's subsequent representation at sentencing by counsel burdened by an actual conflict of interest that adversely affected his performance also violated the Sixth Amendment (see section IV. infra) and should be considered here under the same reasoning.

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25 *Torres,* 828 F.3d at 1124-25; *see also, Wells,* 29 F.4th at 595 (Bea, J. dissenting) *(Bibler* held "that appeal waivers are never valid to bar appeals of sentences when those appeals are brought on constitutional grounds.").

The Fourth Circuit examined a similar situation in *United States v. Attar*.[26] In *Attar*, the defendant entered into a plea agreement with a broad appeal waiver.[27] Just prior to sentencing, Attar's counsel moved to withdraw.[28] The district court told Attar he could proceed with the same counsel or represent himself but the court would not continue sentencing to retain new counsel.[29] Though Attar never waived his right to counsel, the Court allowed counsel to withdraw and sentencing proceeded.[30] Attar appealed arguing the court violated the Sixth Amendment.[31]

The Fourth Circuit considered the constitutional issue despite Attar's appeal waiver, reasoning: "a defendant who executes a general waiver of the right to appeal his sentence in a plea agreement 'does not [thereby] subject himself to being sentenced entirely at the whim of the district court. . .'"[32] As an example of such an intolerable situation, the Court cited a defendant sentenced on the basis of a constitutionally impermissible factor such as race.[33] The Court continued:[34]

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26 38 F.3d 727 (4th Cir. 1994).
27 *Id.* at 729.
28 *Id.*
29 *Id.* at 730.
30 *Id.*
31 *Id.* at 731.
32 *Id.* at 732, *quoting, United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).
33 *Id.*
34 *Id.; citing, United States v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993) (general waiver of the right to appeal sentence in plea agreement does not bar appellate review of a claim that the sentence was imposed in violation of certain 'fundamental and immutable' constitutional guarantees).

> Nor do we think such a defendant can fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations.

Ms. Sullivan cannot fairly be said to have waived her right to appeal based on a revocation of her previously long-recognized and constitutionally protected right to represent herself taking place some seven months after the government insisted on the appeal waiver. Likewise, the subsequent representation of Ms. Sullivan by counsel burdened with an actual conflict of interest that adversely affected his performance cannot fairly be said to have been waived based on the previously entered plea agreement. These constitutional issues should both be considered on their merits argued below.

3. Miscarriage of Justice

Importantly, neither the majority nor the dissenter in *Wells* disavowed another exception to the application of an otherwise valid appeal waiver—the "miscarriage of justice" exception.[35] Since 2007, the Ninth Circuit has recognized that appellate courts do generally retain subject matter jurisdiction over an appeal by a defendant who has signed an appellate waiver.[36] And even the *Wells* Court

35 *Wells,* 29 F.4th at 583.
36 *United States v. Castillo,* 496 F.3d 947, 957 (9th Cir. 2007) (en banc).

recognized the Court would continue to exercise subject matter jurisdiction to consider the merits of an otherwise waiver-barred appellate issue present "some miscarriage of justice."[37]

As to the issues raised herein—the government's breach of Ms. Sullivan's plea agreement at sentencing, the revocation of her right to self-representation, and the subsequent representation by conflicted counsel—it would be a miscarriage of justice to refuse to consider them as a result of her plea waiver. It would leave Ms. Sullivan (and other defendants in similar positions) entirely at the whim of the government and not infallible district courts at sentencing notwithstanding the many Constitutional guarantees that are supposed to continue to safeguard the basic fairness of such proceedings.

II. The Government Plainly Breached their Plea Agreement with Ms. Sullivan thereby Affecting her Substantial Rights and Seriously Affecting the Fairness, Integrity, and Public Reputation of the Judicial Proceedings Below.

A. Standard of Review

The Court generally reviews de novo whether the government breached its plea agreement.[38] If the breach of the plea agreement was not raised below, this Court reviews for plain error.[39] Reversal in such a circumstance requires a showing

37 *Wells,* 29 F.4th at 583.
38 *United States v. Whitney,* 673 F.3d 965, 970 (9th Cir. 2012).
39 *Id.*

that (1) there has been error; (2) that was plain, (3) affected substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of the judicial proceedings.[40]

B. Argument

Breaches of plea agreements implicate the constitutional guarantee of due process.[41] When a plea agreement includes promises or agreements by the government, such promises or agreements "must be fulfilled."[42] 'Must be fulfilled' is to be construed literally and strictly. Plea agreements are understood using the ordinary rules of contract law.[43] Plea agreements are contracts, and "the government is held to [their] literal terms."[44] The Court employs objective standards in which the parties' reasonable beliefs control.[45] As the drafter of the agreement, the government bears responsibility for any lack of clarity, and ambiguities are construed in the defendant's favor.[46] Strict compliance is required.[47]

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40 *Id.*
41 *United States v. De la Fuente,* 8 F.3d 1333, 1336 (9th Cir. 1993).
42 *Santobello v. New York,* 404 U.S. 257, 262 (1971).
43 *Brown v. Poole,* 337 F.3d 1155, 1159 (9th Cir. 2003).
44 *United States v. Alcala-Sanchez,* 666 F.3d 571, 575 (9th Cir. 2012).
45 *Brown,* 337 F.3d at 1159-60.
46 *United States v. Cope,* 527 F.3d 944, 950 (9th Cir. 2008); *United States v. Franco-Lopez,* 312 F.3d 984, 989 (9th Cir. 2002).
47 *United States v. Heredia,* 768 F.3d 1220, 1230, 1234 (9th Cir. 2014).

Requiring strict compliance ensures fairness in the plea bargaining process and thus protects the integrity of the criminal justice system.[48] Mandating strict compliance also "encourages plea bargaining, an essential component of the administration of justice."[49]

A plea agreement is breached when the government makes representations at sentencing that are inconsistent with the terms of the agreement or which undermine the same.[50] The stipulations in a plea agreement may be undermined explicitly or implicitly.[51]

On her own behalf, Ms. Sullivan negotiated an extremely unfavorable plea agreement whereby she broadly admitted to engaging in a federal and state tax fraud scheme, a credit card fraud scheme, a fraud involving financial aid for college-bound students, and aggravated identity theft. 6-ER-1183-90. The agreement included no concessions from the government concerning the calculation of loss amount, the identity and number of victims, or the date ranges of the federal and state tax fraud schemes. 6-ER-1192-93. But the agreement did bind the government to the following stipulation: "the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense

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48 *Id.* at 1230.
49 *Alcala-Sanchez,* 666 F.3d at 575 (internal quotation marks omitted).
50 *See, e.g., United States v. Camarillo-Tello,* 236 F.3d 1024, 1027 (9th Cir. 2001).
51 *Heredia,* 768 F.3d at 1231.

behavior. . . ." 6-ER-1190. In terms of benefit for her bargain this provision may not be much, but based thereon Ms. Sullivan was at least entitled to expect that when it came to sentencing, the government would not argue the opposite, i.e. that the charges to which she pled somehow failed to adequately reflect the seriousness of her actual offense behavior. But that is exactly what the government did, in the strongest of terms.

The government took the position at sentencing that the charges to which Ms. Sullivan had pled did not at all reflect the seriousness of her actual offense behavior. 2-ER-180-90. In particular, the government argued that Ms. Sullivan was "a one-woman criminal enterprise," citing a plethora of uncharged and unproven offenses other than those to which she had pled, including other instances of aggravated identity theft, extensive concealment money laundering, extortion, account takeovers, thefts, uncharged bankruptcy fraud, mortgage fraud, falsified letters to state authorities, and forging of legal documents. 2-ER-178, 180, 183. The government also pointed to unproven aspects of the tax, credit, and education fraud schemes it termed "unaccounted for" frauds. 2-ER-180. Citing these alleged offenses outside the scope of those in the plea agreement, the government argued the over $3 million loss amount calculated by Probation did not adequately reflect the seriousness of Ms. Sullivan's actual offense behavior because

it did not include loss amounts from these other offenses. 2-ER-183 (arguing "losses related to Sullivan's *other criminal conduct* are not accounted for in the Guidelines" (emphasis added)).

The government's breach did affect Ms. Sullivan's substantial rights. A breach of a plea agreement affects the defendant's substantial rights whenever there is a reasonable probability that the error affected the outcome.[52] Such a probability is simply one that is sufficient to undermine confidence in the outcome.[53]

The government's hyperbolic arguments specifically and intentionally called attention to matters that were not at all mentioned in Ms. Sullivan's plea agreement. The government urged the Court to reject Probation's recommendation for a low-end Guidelines sentence on this very basis and the Court did reject that recommendation, imposing a longer mid-range Guidelines term of imprisonment. Though the Court did not accept the government's invitation to impose a far longer sentence on the grounds they cited, it is very much reasonably probable that the government's recommendation did affect the outcome.

Importantly, this was not a situation where the government inadvertently breached a provision in a plea agreement, perhaps as a result of a heavy workload

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52 *Whitney,* 673 F.3d at 972; *quoting, United States v. Marcus,* 560 U.S. 258, 262 (2010).

53 *United States v. Fuentes-Galvez,* 969 F.3d 912, 916 (9th Cir. 2020); *quoting, Strickland v. Washington,* 466 U.S. 668, 694 (1984).

for government lawyers, or the result of cases getting handed from person to person at the U.S. Attorneys office (none of which would excuse the breach). Rather, this was a situation where the government deliberately took a position at sentencing they had expressly disavowed in the plea agreement. Ms. Sullivan's counsel noted as much in his sentencing memorandum. 2-ER-170-71; 10-ER-2207. As argued infra section IV., Ms. Sullivan's counsel was laboring under an actual conflict of interest. His failure to move to withdraw Ms. Sullivan's plea on this basis is evidence of the adverse affect of his conflicted interests, not on the gravity or fact of the government's breach. *See, infra* at section IV.

From this pro se defendant, the government extracted an extremely prosecution-friendly and one-sided plea agreement. Then they breached it by rejecting their stipulation therein at sentencing. Such a breach is of just the type that directly affects the integrity of the proceedings because "[t]he integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement."[54] Our current federal criminal justice system is very much a system of plea bargaining.[55] The bargaining positions of the parties in this system are often unequal and that situation was especially so here, where Ms.

54 *Whitney,* 673 F.3d at 974; *quoting, United States v. Mondragon,* 228 F.3d 978, 981 (9th Cir. 2000).

55 *United States v. Mutschler,* 152 F. Supp. 3d 1332, 1333 (W.D. Wash. 2016) (citing Department of Justice statistics indicating that roughly 97% of federal convictions result from guilty pleas).

Sullivan chose to represent herself. The government's deliberate breach of Ms. Sullivan's plea agreement in this way undermines even the most basic fairness still left in the process. It affected the very integrity of these proceedings and reversal is required as a result.

III. The District Court Erred in Revoking Ms. Sullivan's Sixth Amendment Right to Self-Representation.

A. Standard of Review

The Court has yet to definitively articulate the standard of review applicable to a claim that a defendant's Sixth Amendment right to self-representation was violated.[56] The Court has held that the validity of a *Faretta* waiver of the right to counsel precedent to self-representation is a mixed question of fact and law reviewed de novo.[57] The Sixth Amendment guarantees both the rights to representation by counsel and to control one's own defense by self-representation,[58] so waiver of the latter is likewise a mixed question of law and fact that should be reviewed de novo. *United States v. Flewitt*[59] implicitly supports this position.[60] The Second, Third, Fifth, Eighth, and Tenth Circuits have all taken this position.[61]

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56 *United States v. Engel*, 968 F.3d 1046, 1049 (9th Cir. 2020); *see also, United States v. Johnson*, 610 F.3d 1138, 1144 (9th Cir. 2010).
57 *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000).
58 *Faretta v. California*, 422 U.S. 806, 807 (1975).
59 874 F.2d 669, 676 (9th Cir. 1989).
60 *Engel*, 968 F.3d at 1050.
61 *Id.* at 1049 (collecting cases).

B. Argument

The Sixth Amendment guarantees a criminal defendant personally the right to make her defense.[62] This right derives from each defendant's fundamental "individual dignity and autonomy."[63] Respecting these rights, the Constitution "does not force a lawyer upon a defendant."[64] To do so would be contrary to the defendant's basic right to defend herself if she truly wants to do so.[65] "The right to defend is given directly to the accused; for it is [s]he who suffers the consequences if the defense fails."[66]

In 2008, the Supreme Court held that the Constitution permits limiting a defendant's self-representation right on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented even when he is competent to stand trial.[67] In other words, the constitutional guarantee of a fair trial may permit a district court to override a *Faretta* request for a given defendant based on competency but only if their "mental disorder prevented them from presenting any meaningful defense."[68]

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62 *Faretta*, 422 U.S. at 819.
63 *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).
64 *Faretta*, 422 U.S. at 807.
65 *Id.* at 817.
66 *Id.* at 819-20.
67 *Indiana v. Edwards*, 554 U.S. 164, 174 (2008).
68 *Johnson*, 610 F.3d at 1145.

Ms. Sullivan did not suffer from any documented mental disorder, much less one that would have prevented her from presenting any meaningful defense at sentencing. 7-ER-1596, 1610; 13-ER-2899. Ms. Sullivan may have had issues with organization and the specifics of criminal procedure but she was very much competent to represent herself herein. 7-ER-1596. The district court concluded as much on April 13, 2020. *Id.* Though the Court later returned to the issue of competency when it looked like Ms. Sullivan might not enter a guilty plea, 6-ER-1258, the Court was quickly willing to reverse course once Ms. Sullivan indicated she still intended to enter such a plea. 6-ER-1176. The problem was not that Ms. Sullivan seemed to be incompetent to represent herself. If that was the case, Ms. Sullivan's pro se status would have been revoked long before she entered her plea agreement. The problem was that Ms. Sullivan insisted on representing herself by the continual filing of numerous, voluminous, repetitive motions, requests to reconsider, and appeals, etc. *See,* 5-ER-1015 line 9-1019 line 25, 1026 lines 4-7, 1043 lines 10-13. So after Ms. Sullivan had pled guilty only to return to this pattern beginning with a series of motions to withdraw her pleas and to relitigate matters waived by her plea, this again became the focus of contention.

The right to self-representation may also be revoked based on a showing of deliberate and serious obstructionist misconduct.[69] But this is a high standard and

69 *Faretta,* 422 U.S. at 834 n.46.

this Court has specifically held that the right may *not* be revoked due to the defendant's numerous nonsensical pleadings.[70] The right also may *not* be revoked due to the filing of "continual motions" even where such motions are largely irrelevant.[71] Making vague and poorly formulated motions is not a valid basis for revocation of the right to represent oneself.[72] Likewise, a defendant's self-representation cannot be revoked merely because she lacks familiarity with the specifics of criminal procedure.[73]

The Court framed the issues plainly and succinctly in *United States v. Johnson.* Johnson was charged in multiple fraud-related counts and insisted on defending himself based on "an absurd legal theory wrapped up in Uniform Commercial Code gibberish."[74] In short, the record clearly showed Johnson was a "fool"[75] who engaged in a veritable "campaign of filing meaningless and nonsensical documents."[76] Johnson's defense was further characterized by the Court as sometimes wacky, eccentric, and uncooperative.[77] Despite all this, the Court held Johnson had the constitutional right to represent himself and "go down

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70 *Johnson,* 610 F.3d at 1144.
71 *Flewitt,* 874 F.2d at 674-75.
72 *Id.* at 673.
73 *Lopez-Osuna,* 242 F.3d at 1200.
74 *Johnson,* 610 F.3d at 1140.
75 *Id.*
76 *Id.* at 1143.
77 *Id.* at 1144.

in flames" if he wished."[78] The Court easily found that no aspect of Johnson's defense justified the involuntary deprivation of his constitutional right to defend himself.[79] Johnson's conduct, such that it was, simply "did not make it impossible for the court to administer fair proceedings."[80]

The *Johnson* Court summarized their holding:[81]

> the district judge conducted three *Faretta* hearings spanning several days in which he repeatedly and thoroughly advised the defendants of their right to counsel, the pitfalls of self-representation, and the right to change their minds. The defendants unequivocally demonstrated their understanding of the situation and their adamant desire to represent themselves, as was their right. They were examined by a psychiatrist and found to be fine. In the absence of any mental illness or uncontrollable behavior, they had the right to present their unorthodox defense and argue their theories to the bitter end.

Similarly here, Ms. Sullivan's campaign of voluminous and repetitive filings, however else characterized, did not warrant revocation of her Sixth Amendment right to personally defend herself. Ms. Sullivan may have filed numerous nonsensical pleadings, continual motions that were largely irrelevant, vague and poorly formulated, and repetitive motions that showed an at least near complete lack of understanding or disregard of the rules of criminal procedure. None of this was sufficient to revoke Ms. Sullivan's constitutional right to defend herself. The

78 *Id.*at 1140.
79 *Id.*at 1144.
80 *Id.*
81 *Id.* at 1146-47.

Government recognized that this pattern of vexatious filings was insufficient under *Faretta* and existing caselaw interpreting the same. 5-ER-1066. The District Court had ample authority to deal with Ms. Sullivan's poorly formulated and repetitive defense arguments to ensure the continued orderly administration of justice, 5-ER-1070, for example by striking repetitive pleadings, overruling frivolous objections, and disregarding legal arguments lacking factual support. The Court could and should have taken such steps while respecting Ms. Sullivan's constitutional rights. The Court erred and violated the Sixth Amendment by failing to do so.

The question, then, is whether remand for resentencing is required and if so on what showing. The Supreme Court and this Court have previously held that denial of a knowing, intelligent and voluntary request to proceed pro se is generally structural error and requires reversal even absent a showing of prejudice.[82] "An improper denial of a request to proceed pro se ... is not amenable to harmless error analysis. The right is either respected or denied; its deprivation cannot be harmless."[83]

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82 *Wiggins,* 465 U.S. at 177 n.8 ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis."); *United States v. Maness,* 566 F.3d 894, 896 (9th Cir. 2009).

83 *Maness,* 566 F.3d at 896.

But this Court has also held that an improper denial of a defendant's right to proceed pro se at sentencing, rather than at trial, is not a structural error and is thus subject to harmless error analysis.[84] This is inconsistent with Supreme Court precedent holdings that the Sixth Amendment applies at all critical stages of a criminal prosecution.[85] Sentencing is a critical stage of the proceedings.[86] Ms. Sullivan's case should be remanded for resentencing because the district court's improper denial of her Sixth Amendment right to represent herself at sentencing is a structural error that is not amenable to harmless error analysis.

Even under this Court's harmless error precedent, remand for resentencing is still required because the error did contribute to the sentence imposed. Under this caselaw an improper denial of a defendant's right to proceed pro se at sentencing is subject to harmless error analysis.[87] Accordingly, reversal is still required if the error contributed to the sentence imposed.[88]

Following the revocation of her right to control her own defense, counsel was forced upon Ms. Sullivan over both her and her appointed counsel's repeated

84 *Id.* at 897.

85 *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (it is beyond dispute that the Sixth Amendment safeguards apply at all critical stages of the criminal process); *United States v. Rice*, 776 F.3d 1021, 1024 (9th Cir. 2015) ("the right to counsel applies at all critical stages of prosecution . . . the right to self-representation applies to all proceedings to which the right to counsel applies").

86 *Estelle v. Smith*, 451 U.S. 454 (1981).

87 *Maness*, 566 F.3d at 897.

88 *Id.*

objections. 5-ER-1005, 897, 844, 840; 4-ER-794, 792; 3-ER-454; 2-ER-428, 393, 307, 303, 289, 248, 246, 211, 156; 12-ER-2612; 10-ER-2183, 2187-93, 2199, 2203-07. As argued infra section IV. below, appointed counsel labored under an actual conflict of interest that did adversely affect his representation. While appointed counsel was supposed to be advocating on Ms. Sullivan's behalf, he was actively doing just the opposite, advocating against her by effectively calling her a liar and undermining her credibility. To the Court, appointed counsel repeatedly alleged Ms. Sullivan's representations were "malicious and false," "not true," and included "false and misleading assertions of fact" that were staged in an attempt to set up a future presumably also malicious and false claim. 4-ER-766, 559 line 12; 3-ER-451-52; 10-ER-2194, 2214, 2201. When it came time for sentencing and the government was arguing that Ms. Sullivan was an incorrigible one-woman criminal enterprise of all-purpose fraudulent activities, appointed counsel was in no position to respond to any of these arguments. Rather, in his need to defend himself, appointed counsel had already offered up information to support such characterizations, improperly stripping Ms. Sullivan of her right to self-representation created this conundrum. It did affect her sentence and her sentence should now be reversed as a result.

IV. Appointed Counsel had an Actual Conflict of Interest that Adversely Affected his Representation and Requires Remand for Resentencing.

A. Standard of Review

"A claim that trial counsel had a conflict of interest with the defendant is a mixed question of law and fact and is reviewed de novo by the appellate court."[89]

B. Argument

The Sixth Amendment guarantee of assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence,[90] and the right to counsel's undivided loyalty.[91] A criminal defendant accordingly is entitled under the Sixth Amendment to an effective attorney who can represent her competently and without conflicting interests.[92] If counsel is prevented by a conflict of interest from asserting his client's contentions without fear or favor, the integrity of the adversary system is cast into doubt because counsel cannot play the role necessary to ensure that the proceedings are fair.[93]

An "actual conflict" is "a conflict [that] adversely affected counsel's performance" and not a "mere theoretical division of loyalties."[94] An "adverse

89 *United States v. Walter-Eze*, 869 F.3d 891, 900 (9th Cir. 2017).
90 *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).
91 *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981).
92 *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994).
93 *See, Strickland*, 466 U.S. at 685.
94 *Mickens v. Taylor*, 535 U.S. 162, 171-72 (2002).

effect" is shown if some plausible alternative defensive strategy or tactic might have been pursued but was not and the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.[95] To show the conflict had an "adverse effect," the defendant need only show that it was "likely" that the conflict had some effect on counsel's handling of particular aspects of the defense.[96] The central question in assessing a conflict's adverse effect is what the attorney was compelled to refrain from doing because of the conflict, not only at trial but also in the sentencing process.[97]

If a defendant can show that her counsel operated under an "actual conflict of interest," prejudice is generally presumed.[98] "The presumption of prejudice extends to a conflict between a client and his lawyer's personal interest."[99]

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95 *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005).

96 *Walter-Eze*, 869 F.3d at 901; *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992); *Mannhalt v. Reed*, 847 F.2d 576, 583 (9th Cir. 1988); *Lockhart v. Terhune*, 250 F.3d 1223, 1231 (9th Cir. 2001); *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994) (reviewing court "must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conduct").

97 *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978).

98 *Miskinis*, 966 F.2d at 1268; *Mannhalt*, 847 F.2d at 580; *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980).

99 *Miskinis*, 966 F.2d at 1269. *Cf. Walter-Eze*, 869 F.3d at 906 (limiting the presumption of prejudice in a distinguishable situation where counsel's actual conflict was confined to a single moment of the representation and resulted in a single identifiable decision that adversely affected the defendant).

In *Walter-Eze,* defense counsel appeared for trial indicating that he was unprepared to proceed.[100] The trial court offered Walter-Eze's counsel the choice of proceeding to trial that day or continuing the trial upon counsel's payment of the costs thereof.[101] Faced with this threat of sanctions, counsel expressed fear that he might be required to report the matter to the state bar association.[102] In the face of this sincere concern, counsel elected to proceed to trial as scheduled.[103]

Under the circumstances, the *Walter-Eze* Court had no difficulty discerning that there was an actual conflict of interest that affected counsel's performance, i.e. the choice to forego the continuance.[104] The *Walter-Eze* Court cited with approval a D.C. Circuit case, *United States v. Hurt,* finding an actual conflict where counsel was sued for defamation by a witness and feared that continued representation could lead to additional claims of this type (even though the defamation claim was "almost surely meritless").[105]

As in *Hurt,* Ms. Sullivan's counsel clearly had an actual conflict of interest. As counsel indicated to the Court, he felt a line had been crossed in Ms. Sullivan's case that led him to worry about a malpractice lawsuit and his insurance agent. 4-

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100 *Walter-Eze,* 869 F.3d at 897-98.
101 *Id.* at 898.
102 *Id.*
103 *Id.*
104 *Id.* at 904.
105 *Id.; citing, United States v. Hurt,* 543 F.2d 162, 166-67 (D.C. Cir. 1976).

ER-772 line 3-73 line 2. Ms. Sullivan did file suit against him and counsel explained candidly that there was no way he could simultaneously defend himself against Ms. Sullivan while defending her in her criminal case. 4-ER-766; 10-ER-2194. When the Court forced counsel to do so, counsel chose to assert his own interests over those of Ms. Sullivan, arguing to the Court in her case that her allegations were not true and offering detailed support for this argument. 4-ER-559 line 12-25. On another, subsequent occasion counsel argued in Ms. Sullivan's case that her continued filings contained "false and misleading assertions of fact against" him and that he "suspects and believes that Defendant is staging her court filings in an attempt to create a record to bolster a future claim of ineffective assistance of counsel against" him. 3-ER-451-2; 12-ER-2602 lines 8-11; 10-ER-2201.

Ms. Sullivan's is not a case where the conflict was relegated to a lone moment of the representation such that the affect on counsel's performance boiled down to one singular, easily identifiable choice to do or to refrain from doing something due to the conflict. Rather, Ms. Sullivan's counsel labored under an ongoing conflict of interest due to his need to defend himself while at the same time being forced to defend Ms. Sullivan. Counsel's loyalty was thus divided and this division of loyalties continued up to and through Ms. Sullivan's sentencing.

Counsel was unable to play the role necessary to ensure that Ms. Sullivan's sentencing was fair. Instead, he actively advocated against her. In his sentencing memorandum, defense counsel failed to include any sentencing recommendation. 2-ER-168; 10-ER-2207. When the government breached their plea agreement with Ms. Sullivan, counsel recognized as much but still did not move to withdraw her plea. 11-ER-2511-82; 10-ER-2169-10. Had such a motion been filed and been successful, counsel would have been forced to continue representing Ms. Sullivan through a lengthy trial, from his perspective affording additional opportunities for Ms. Sullivan to stage and bolster the future claims he suspected and believed she was planning against him.

Assigned counsel's division of loyalties did adversely effect Ms. Sullivan's defense. Under the standard, Ms. Sullivan need not show prejudice, i.e. she need not show that a motion to withdraw her plea necessarily would have been successful or that a different approach would have led to a lesser sentence. Ms. Sullivan has shown adverse effect and remand for resentencing is required as a result.

CONCLUSION

For the forgoing reasons, Ms. Sullivan's case should be remanded for further proceedings where she may elect to withdraw her pleas or proceed to resentencing

before a different judge where the government will be obligated to comply with the terms of the plea agreement.

Dated this 20th day of December, 2023.

/s/ Cassandra L. Stamm
Attorney for Appellant Leihinahina Sullivan

Appendix C

Nos. 23-573 & 23-575

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

LEIHINAHINA SULLIVAN,

Defendant-Appellant.

On Appeal From the United States District Court
for the District of Hawaii
Crim. Nos. 17-00104 JMS-KJM & 21-00096-JMS
Honorable J. Michael Seabright

BRIEF FOR APPELLEE

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JURISDICTION, TIMELINESS, AND CUSTODY STATUS

The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment on March 31, 2023 and Defendant-Appellant Leihinahina Sullivan filed a timely notice of appeal. ER-2-27.[1]

Sullivan is currently incarcerated at FCI Victorville-Medium I. Her projected release date is December 12, 2034.

STATEMENT OF THE ISSUES

(1) Whether the government breached the plea agreement when the agreement did not bind it to a particular sentencing recommendation and it advocated for an above-Guidelines sentence based on the totality of Sullivan's conduct.

(2) Whether Sullivan's claim that the district court erred when it revoked her pro se status prior to sentencing is barred by the appellate waiver of the plea agreement.

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[1] "ER" refers to Sullivan's Excerpts of Record. "SER" refers to the government's Supplemental Excerpts of Record, which are submitted herewith. "OB" refers to Sullivan's opening brief. "Dkt. #" refers to a docket entry in criminal case number 17-00104-JMS-KJM, located at ER-2217-2599.

(3) If the claim was not waived, whether the district court erred in revoking Sullivan's self-representation and, if so, whether any such alleged error was harmless.

(4) Whether Sullivan's frivolous civil lawsuit against her sentencing counsel filed after the district court denied motions to withdraw on the same claims created an actual conflict that affected counsel's performance.

PERTINENT STATUTES AND REGULATIONS

18 U.S.C. § 3553(a) and District of Hawaii Criminal Local Rule 32.1 are pertinent and reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Sullivan was a failed lawyer who orchestrated three separate fraud schemes and other crimes over the course of years, causing an economic loss that the district court conservatively calculated at over $3.5 million.

Sullivan was initially indicted in February 2017. In September 2019, she was permitted to represent herself pro se. While representing herself, Sullivan filed hundreds of abusive pleadings in direct violation of numerous court orders and was seriously disruptive in several court

proceedings. She persisted in this behavior despite repeated warnings from the court that her pro se status was in jeopardy. In July 2021, pursuant to a plea agreement that she negotiated, Sullivan pleaded guilty to four counts of wire fraud and aggravated identity theft based on a 60-count Fourth Superseding Indictment and one-count Information. The plea agreement left open various questions, including the scope of relevant conduct, the amount of the loss, and the applicability of Guidelines enhancements. It did not bind the government to any particular sentencing recommendation.

In February 2022, months after Sullivan had pleaded guilty, the court terminated her pro se status and appointed her sentencing counsel. Sullivan repeatedly tried to remove counsel based on her desire to represent herself and what the district court termed a general "unreasonableness." The court scrutinized her claims against counsel and denied the motions to withdraw. In response, Sullivan filed a frivolous civil lawsuit against counsel alleging the same claims that the district court had previously denied. Counsel again sought to withdraw and the district court denied the motion.

Sentencing was hotly contested on both sides with numerous legal and factual objections raised by Sullivan. The court held a three-day evidentiary hearing on the objections, during which Sullivan testified for one day. The court calculated the Guidelines range as 168 to 210 months with an additional 24 months in prison for aggravated identity theft. At sentencing in March 2023, Sullivan's counsel advocated for a below-Guidelines sentence of 84 months in prison. Based on the factors under 18 U.S.C. § 3553(a), the government recommended an above-Guidelines sentence. Despite finding the scope of Sullivan's criminal activity to be "unique" and "staggering," the district court sentenced Sullivan to a middle-range Guidelines sentence of 180 months for the wire fraud offenses to run consecutive to the mandatory 24 months in prison for the aggravated identity theft offense.

STATEMENT OF FACTS

A. Sullivan Engaged in Expansive Criminal Conduct That Victimized Most Everyone in Her Life

For almost a decade, Sullivan orchestrated a complex web of three interwoven fraud schemes and engaged in other criminal conduct. PSR ¶¶ 35-98. She victimized her family, friends, and other vulnerable individuals. *Id.* She stole from these victims, credit card companies,

and the government. *Id.* At the center of her fraud schemes, Sullivan used a non-profit she created and unwitting nominees, including friends and family, to open and access accounts and funnel and conceal millions in fraudulent proceeds to spend on herself. *Id.* ¶¶ 50-51, 85. Principally, in each fraud scheme, Sullivan used others' identities to file false tax returns and steal refunds, prepare and submit false educational loan and grant applications to the government and private institutions, and fraudulently open and use dozens of unauthorized credit cards that she had guaranteed by other unwitting individuals. *Id.* ¶ 41. She also used her access to other people's personal information to takeover accounts and steal from them. *Id.* ¶ 70. Sullivan obtained false refunds well exceeding $2.8 million, obtained fraudulent aid assistance of over $540,000, opened and used at least 34 credit cards in multiple people's names and credit without their knowledge charging over $1 million, and concealed and spent the proceeds by using nominee Paypal and bank accounts as well as a non-profit she created to make it look like her fraud proceeds were "donations." PSR ¶ 40, 60, 69, 84-86.

Even after Sullivan was indicted, she continued to victimize and defraud others, including grieving and elderly individuals. She

concealed these various illegal financial transactions from U.S. Pretrial Services and investigators by laundering proceeds through her family members' financial accounts. *E.g.*, *id.* ¶ 91, SER-491-92. While Sullivan was on pretrial release, she also attempted to obstruct the case. *Id.* ¶¶ 87-91. She prepared false third-party declarations of victim-witnesses that were submitted to the court. *Id.* She also tampered with grand jury proceedings by directing multiple victim-witnesses, one of whom she had previously threatened and extorted, to avoid investigators, lie to the grand jury, and destroy critical evidence. *Id.*

B. Sullivan Was Indicted Five Times for Ongoing and Extensive Criminal Conduct

Sullivan was indicted five times over the course of the case because she would not stop committing crimes. She was initially indicted on February 15, 2017. PSR ¶ 1. Thereafter, on November 8, 2017, a grand jury returned a 55-count First Superseding Indictment against her. *Id.* ¶ 3. The offenses included false tax claims, three wire fraud schemes involving false state and federal tax returns and refund theft, education fraud involving false and fraudulent scholarship and grant applications and theft from students, and credit card theft, as

well as aggravated identity theft related to all three schemes and money laundering. *Id.*

In November 2017, the government moved to revoke Sullivan's bail based on her commission of four newly charged criminal offenses after she was originally indicted. ER-2241 (Dkt. #102). U.S. Pretrial Services also filed a Petition for Action for other violations of pretrial conditions. ER-2242 (Dkt. #107). In opposition, Sullivan's counsel filed three sworn third-party declarations of individuals who were either victims or complicit in the new criminal offenses while Sullivan was on pre-trial release. Relying in large part on these declarations, the magistrate judge did not revoke Sullivan's bail. ER-2242 (Dkt. #109). Upon further investigation, the government uncovered that Sullivan falsely and fraudulently prepared these declarations. *E.g.*, PSR ¶ 87.

Thereafter, on March 28, 2018, a Second Superseding Indictment against Sullivan added four counts --- one false claim count, one wire fraud count for unauthorized use of credit cards, and one count for obstructing an official proceeding. PSR ¶ 5. Then on July 25, 2019, a grand jury returned a 60-count Third Superseding Indictment against Sullivan. PSR ¶ 9. That indictment added six new counts, all which

occurred while Sullivan was on conditions of pretrial release.[2] ER-2041-63 (Dkt. #188). Sullivan's bail was revoked based on the newly charged offenses and for other violations of pretrial conditions.[3] PSR ¶ 10; ER-2263 (Dkt. #237). Finally, on December 26, 2019, Sullivan was charged in a 60-count Fourth Superseding Indictment, which is the operative indictment in this case (hereinafter the "Indictment").[4] PSR ¶ 12.

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[2]Although the Third Superseding Indictment added six new counts, it eliminated five counts that had been included in the previous indictment. Thus, the Second Superseding Indictment included 59 counts, while the Third Superseding Indictment included 60 counts.

[3] Due to the pandemic, the district court temporarily released Sullivan twice, over the government's objections, for trial preparation purposes while she was self-represented. Sullivan was first housed at a women's YWCA pretrial program. ER-2443-44 (Dkt. #984). That program terminated her for violating the program's rules and she was arrested and detained. ER-2480 (Dkt. #1117-1121). In September 2021, she was again released to a faith-based housing program. ER-2525-26 (Dkt. #1265). In December 2021, that program also eliminated her for violating the program's rules. ER-2530-32 (Dkt. #1286, 1289, 1295). She then remained in custody during her case.

Sullivan not only got kicked out of two pretrial residential programs because of her conduct, she also racked up a lengthy disciplinary record during pretrial incarceration. Her problematic conduct at the Federal Detention Center led to loss of privileges and time in the Special Housing Unit. *See* PSR ¶ 32.

[4] The offenses included: 22 counts of preparing and submitting false claims in violation of 18 U.S.C. § 287 (false tax returns), 24 counts of wire fraud in violation of 18 U.S.C. § 1343, 2 counts of mail fraud in violation of 18 U.S.C. § 1341, 6 counts of aggravated identity theft in

C. Sullivan Represented Herself and Cycled Through Six Attorneys

Over the course of the proceedings, Sullivan had six different attorneys represent her – one retained counsel, three appointed counsel, and two appointed standby counsel. On July 2, 2018, Sullivan's original counsel was permitted to withdraw because of a conflict of interest. The government charged Sullivan with obstruction and it became apparent that counsel would have to testify at trial about his unwitting submission of false declarations given to him and fraudulently prepared by Sullivan, for use in bail hearings. ER-2065 (Dkt. #122).

Thereafter, Sullivan obtained court-appointed counsel. In December 2018, second counsel withdrew based on an irreparable breakdown in relationship with Sullivan and counsel. ER-2249 (Dkt. #151, 154). A third counsel was appointed. ER-2249 (Dkt. #155). In August 2019, soon after being charged in the Third Superseding Indictment, Sullivan was determined to proceed pro se. *E.g.*, ER-2258

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violation of 18 U.S.C. § 1028A, 4 counts of concealment money laundering in violation of 18 U.S.C. § 1956, 2 counts of obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c), and one count of Hobbs Act extortion in violation of 18 U.S.C. § 1951.

(Dkt. #209). Third appointed counsel filed a motion to withdraw and traded various accusations with Sullivan about the breakdown of their relationship. *See, e.g.*, ER-2258-59 (Dkt. #212, 216, 221). The district court then provisionally appointed a fourth counsel. ER-2260 (Dkt. #222).

After two thorough *Faretta* hearings in September 2019, the district court granted Sullivan's request to proceed pro se and appointed fourth counsel as standby counsel. ER-2261-62 (Dkt. #236). Approximately one month later, standby counsel withdrew after Sullivan accused him of not filing documents appropriately. ER-2273-74 (Dkt. #280, 286). The court then appointed new standby counsel for Sullivan. ER-2278 (Dkt. #310). That standby counsel worked with Sullivan through proceedings that culminated in her guilty plea in July 2021. Sullivan tried to have him removed based on misconduct allegations that the court determined were unfounded. *See* ER-2521-22 (Dkt. #1253).

On February 4, 2022, prior to sentencing, the district court terminated Sullivan's pro se status. ER-2545-46 (Dkt. #1349). Sullivan requested new counsel rather than using her standby counsel. ER-1047-

50. The court agreed and appointed Rustam A. Barbee as sentencing counsel. ER-2546.

D. Sullivan Initiated the Plea Process, Negotiated Her Plea, and then Unsuccessfully Tried to Unwind It

In Spring 2021, Sullivan initiated plea discussions with the government through her standby counsel. *See, e.g.*, ER-1335-36 (Dkt. #1261 at p.2-3). Sullivan negotiated her own plea, including making significant edits to the agreement's factual basis. *E.g.*, *id.* Sullivan pleaded guilty to four counts – three wire fraud counts and one aggravated identity theft count. She was able to hand-select the counts within each scheme to which she pleaded guilty. *Id.* In fact, during the plea proceedings, Sullivan chose to change the particular wire communications to which she would plead guilty. *See, e.g.*, ER-1115.

The plea agreement was not one-sided. In exchange for pleading guilty, the government agreed to several negotiated concessions. The government agreed to dismiss the remaining counts in the Indictment after sentencing, not to prosecute third-party "Person A" for "financial fraud and obstruction offenses" connected to Sullivan's conduct, to "seriously consider not opposing [a release from custody] motion," not to seek to forfeit the defendant's residence where substantial fraud

proceeds had been directed, and to recommend acceptance of responsibility under certain circumstances. ER-1177-1204 (Dkt. #1203). The plea agreement also identified disputed issues, including the amount of loss, restitution, and forfeiture, as well as the identity and total number of victims, the scope of the wire fraud offenses, and any relevant conduct. *Id.* The parties made no other agreements as to the recommended sentence or Guidelines provisions in the plea agreement. *Id.*

The plea agreement also included an appellate waiver. ER-1193-94. Sullivan agreed to waive "any and all legally waivable claims." *Id.* However, she retained her right to challenge "the portion of her sentence greater than specified in [the Guidelines range determined by the Court] and the manner in which that portion was determined," as well as assert a claim based on "ineffective assistance of counsel." *Id.*

Sullivan's plea proceedings began on June 22, 2021 and took nine hearings over approximately one month. ER-2497-2509. The district court took great care to answer all of Sullivan's questions and repeatedly explained the sentencing process, her rights, and those rights she was waiving, such as her appellate rights. *E.g.*, ER-1353-

1472. The court also afforded time for Sullivan and standby counsel to confer privately whenever requested. *E.g.*, ER-1282; ER-1497, 1505-06. Even though Sullivan chose her plea counts and had the relevant discovery for years, the court also directed the government to identify and provide specific documents related to each selected count for Sullivan to review. *E.g.*, ER-1338, 1344-45.

During the proceedings, Sullivan repeatedly affirmed her intent to plead guilty.[5] *E.g.*, ER-1507. On July 20, 2021, Sullivan pleaded guilty to Counts 1, 29, and 35 of wire fraud in the Indictment and the single-count information of aggravated identity theft. ER-2508 (Dkt. #1202). The court adjudged Sullivan guilty. *Id.*

[5] For example, Sullivan filed a document on June 24, 2021, wherein she described her desire to plead guilty in reaching an agreement with the government. SER-442 ("AUSA Perlmutter and I reached an agreement. . . . Ms. Perlmutter did a good job working with my [sic] and my standby counsel . . . ."). On June 25, 2021, after the first day of proceedings, Sullivan reaffirmed her intent to proceed with her plea. ER-1473. Further, at another hearing, Sullivan responded "yes" twice when the court asked her directly whether it was her "desire to go forward with this plea agreement." ER-1342-43, -1346.

On July 29, 2021, nine days later, Sullivan filed her first motion to withdraw her guilty plea. ER-2511[6]. The court held a hearing, heard Sullivan's argument, and denied the motion. ER-2512-13., ER-1117-24. It found that Sullivan had a "change of heart," which wasn't a valid basis to withdraw a guilty plea. *Id.* Thereafter, Sullivan filed approximately eleven more motions and supplements to withdraw her plea by citing generally the same basis. *E.g.*, ER-2515, -57-77 (Dkt. #1229, 1394, 1406, 1441, 1476, 1483, 1492, 1494, 1499, 1500).

E. As a Pro Se Litigant, Sullivan Repeatedly Violated Court Orders and Disrupted Court Proceedings

In her self-represented status, Sullivan quickly became vexatious, filing hundreds of pleadings.[7] She sought to dismiss the operative indictment approximately forty times without regard to the district court's many prior decisions. *See* ER-1080, SER-449. She became fixated on alleged wrongdoing by the case agent and prosecutor on the

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[6] "Motion for Leave to Withdraw My Plea as a Violation of My United States Constitutional Rights Amendments One, Fourth, Fifth, Sixth, Fourteenth, Breach of Contract, Prosecutorial Misconduct, Federal Rules of Criminal Procedure 11"

[7] Sullivan also filed well over 20 interlocutory and supplemental appeals with the Ninth Circuit. All were dismissed or denied.

case. She filed dozens of motions, supplements, and other pleadings lodging repetitive and unfounded accusations of misconduct. *See et seq.* ER-2259-2580.

The district court exercised extreme patience with Sullivan. At hearings, the court allowed her to talk at length about myriad irrelevant matters and make accusations without providing any good faith basis. The court also liberally interpreted her pleadings.[8] *E.g.*, ER-2519-20 And for over two years, the court painstakingly admonished and warned Sullivan repeatedly about her numerous missteps and the potential consequences regarding her pro se status but also provided her numerous opportunities to self-correct. *E.g.* SER-450. She refused to listen.

Despite such leniency, Sullivan intentionally and deliberately abused the court process. During the February 4, 2022 show cause

[8] Sullivan graduated law school but failed the bar exam. PSR ¶ 38; ER-1202. One of her prior state convictions involved falsifying documents to make it look like she passed the bar exam while seeking a bank loan. PSR ¶ 137. Furthermore, after the Third Superseding Indictment, the government uncovered that Sullivan falsely posed as a "lawyer" to gain legal-type work from unwitting individuals while she was on conditions of pretrial release, much to their financial and legal detriment. SER-491-92.

hearing for revocation of Sullivan's pro se status, the district court detailed a series of improper filings from January 2021 where it found that Sullivan purposely misdated the filings to obscure the truth and lied to the court when questioned about the circumstances. ER-1025-28. *See also, e.g.*, ER-194 (examples of Sullivan's false representations to the court). Sullivan also wielded her pro se status to do what no lawyer could do, making irrelevant and false accusations concerning arrests, drug use, statutory rape, and theft about multiple witnesses in attempts to publicly shame or retaliate against them. *E.g.*, ER-194-95; ER-97; ER-2465 (Dkt. #1065).

Even after pleading guilty on July 20, 2021, Sullivan continued to file numerous repetitive and abusive pleadings in direct violation of the court's orders. *See* ER-2510-80. For example, on August 24, 2021, the court rejected a filing that Sullivan lodged regarding the Speedy Trial Act and other claims that had been repeatedly raised and rejected. ER-2513. As it had done on previous occasions, the court "cautioned [Sullivan] that the filing of similar motions pending sentencing may result in the revocation of her pro se status." *Id.* Shortly thereafter, she filed even more motions, seeking reconsideration, a writ of mandamus,

recusal of the judge, change of venue, constitutional and discovery violations, and prosecutorial misconduct. *See, e.g.*, ER-2514-40. The district court denied each one, emphasizing that Sullivan "is simply attempting to relitigate matters previously determined by the court or to raise matters clearly known to her at the time of her plea of guilty." SER-438 (9/8/21 Order)). The court again explained that her filings: "continue to cross the line from zealous advocacy on her own behalf to vexatious and abusive behavior. Her conduct has resulted in numerous warnings since Defendant elected to represent herself in September 2019. . . . After so many warnings, the court's patience wears thin. . . . Continued abusive behavior will not be tolerated." *Id.*

Sullivan also had several outbursts during court hearings. The district court identified two such serious disruptions upon revoking her pro se status. ER-1043 (2/4/22 hearing). In one instance, at a hearing on June 17, 2020, Sullivan fought with the court so "intensely" that the district judge had to abruptly pause the proceedings and leave the bench. *Id. See also* ER-1788-1800 (6/17/20 hearing). At that same hearing, wherein the district court intended to grant her motion for temporary release, Sullivan nevertheless became so agitated that she

threatened the government attorney at a break in the proceedings. *See* ER-1799-1800 (telling the prosecutor, in front of witnesses, "that [the prosecutor] would pay for what she had done"). Then she lied to the court when questioned about her statements just a short time later. *Id.* On August 9, 2021, during a hearing about her motion to withdraw her plea, she ranted directly at the prosecutor, accusing her of lying and taking illegal actions, all of which were irrelevant to the issue of Sullivan's guilty plea. SER-21-24 (8/9/21 hearing)). In another example, in both a filing and at a hearing before a Magistrate Judge, Sullivan publicly and baselessly accused various individuals of committing serious criminal activity totally unrelated to her offenses and exploited their sexual orientation. *See, e,g.*, SER-455-57. Furthermore, in the lead up to trial, it was revealed that Sullivan's treating psychiatrist had significant concerns that Sullivan "may not be able to go through a trial without having a breakdown." ER-1080.

When the district court revoked Sullivan's pro se status, it predicted Sullivan would engage in seriously disruptive behavior during

court proceedings. ER-1046[9]. The district court was right. On October 27, 2022, during the first day of the sentencing evidentiary hearing, Sullivan could not keep her composure. SER-304-09.[10] Sullivan's interruptions were so significant that the court removed her from the courtroom. *Id.* at 308-09. The court arranged a separate courtroom where she could view the proceedings and communicate with her attorney, but she refused to participate. *Id.* at 312-13. Earlier in that same hearing, involving a motion to withdraw counsel, Sullivan became heated and repeatedly interrupted the court's oral ruling. ER-566-73.

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[9] THE COURT: "And so Ms. Sullivan's actions, in the words of *Flewitt*, afford a strong indication that she would disrupt the proceedings in the courtroom during the sentencing in this case, that she simply could not and would not follow what's required of her."

[10] Sullivan interrupted the direct examination of the IRS Special Agent to "get a new attorney and . . . ask to withdraw my plea" because "I can't handle this." SER-304. She blurted out that she was "really upset right now" and kept interrupting the district judge when directed to stop talking so that the hearing could move forward. *Id* at 305. Sullivan then got into a heated argument with the judge about his prior rulings, despite repeated warnings and directives to stop talking. *Id.* at 306. The judge then requested that the government attorney continue with questioning the witness, but Sullivan was so disruptive that it became impossible to continue the hearing. *Id.* at 305-09. Sullivan told the judge that she would not stop interrupting the proceedings because she was "upset." *Id.* at 308.

The court warned her at least three times that continued interruptions would result in her removal from the courtroom. *Id.* She did not relent and began to berate the Judge directly. *Id.* Eventually, the court removed Sullivan from the courtroom. *Id.*

F. Sullivan's Deliberate Defiance of Court Orders and Obstructionist Conduct Led To Revocation of Her Pro Se Status Prior to Sentencing

Over the course of Sullivan's self-representation, beginning with her *Faretta* hearing, the district court explicitly warned her dozens of times that her pro se status was in jeopardy by her continued defiance of court orders.[11] Finally, on January 14, 2022, the court issued an

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[11]The myriad detailed oral and written warnings the court provided to Sullivan on this topic for almost two years are too numerous to cite fully in this brief. *E.g.*, *et seq.* ER-2385-2545 (Dkt. #772 (describing nine filings on the same issue in eight days); 778 (3/19/20 hearing); 783 (notice detailing repeated violations and warning); 802 (notice of possible pro se status termination); 807 (4/2/20 hearing) (describing violations of court orders); 876 ("Discussion held regarding Defendants continued abusive filings. Court gave Defendant a last warning to stop abusive filings. If Defendant continues to violate the court's order, the court will issue an Order to Show Cause Why Defendant Should Not Be Sanctioned to Include Revocation of Defendant's Pro Se Status."); 1151 ("notice that continued abuse of court process may result in termination of self-representation"); 1160; 1312; 1321).

At Sullivan's *Faretta* hearing, the district court set forth clear requirements for self-representation. ER-2415-16 (THE COURT: "And do you promise me you will abide by my orders and the rules of

order to show cause regarding why Sullivan's pro se status should not be revoked. ER-1079, 1088-91 (Dkt. #1312[12]) (previously providing Sullivan with a "final warning" about her "abusive conduct").

At the show cause hearing on February 4, 2022, the district court revoked Sullivan's pro se status and issued a subsequent written order. ER-143-44, -1010-1054. The court's detailed factual findings demonstrated that Sullivan "deliberately engaged in serious and obstructionist misconduct" by her disruptive pattern of behavior in court proceedings, "lack of candor" to the court, "manipulation," and "knowing and intelligent" repeated violations of court orders. ER-1042-43, 46. The court described Sullivan's "absolute unwillingness or inability to follow the rules" when she "knows she's violating [the court's] orders." ER-1045-46.

Even after her pro se status was revoked and sentencing counsel was appointed, Sullivan continued to bombard the docket with pro se

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procedure and protocol here in court to the best of your ability?" SULLIVAN: "Yes, Your Honor." THE COURT: "If [the court] let[s] you represent yourself . . . you cant just ignore [the court's] orders.").

[12] The court directed the government to submit its position prior to the hearing. *See* Dkt. #1328 (gov't brief).

pleadings and interlocutory appeals. *See et seq.* ER-2546-2580. The district court repeatedly informed Sullivan that she could not file pleadings as a represented party, but she ignored the court's admonitions. *E.*g, ER-2576 (Dkt. #1497). The court struck many of these filings, but it considered and ruled on others, specifically those motions to withdraw counsel and her guilty plea. *E.g.*, ER-2546-2580 (Dkt. #1395, 1403, 1416, 1422, 1424, 1415, 1434).

G. Sullivan's Sentencing Process Was Thorough and Hotly Contested by Both Parties

The sentencing process began in 2021 and lasted over a year. The U.S. Probation Office issued the initial draft Pre-Sentence Report ("PSR") in January 2022. ER-2538 (Dkt. #1314). The government filed a response. ER-2544 (Dkt. #1343). Sullivan, representing herself, submitted at least eight filings with piecemeal objections to most paragraphs in the PSR.[13] ER- 2542-43-45, -47 (Dkt. #1331-1334, 1345-1346, 1353-1354).

Sullivan's counsel also made numerous legal and factual objections, including objections to most every specific offense

[13] After revoking Sullivan's pro se status, the district court also vacated the parties' initial filings. ER-2545-46 (Dkt. #1349).

enhancement included in the PSR, the criminal history calculation, acceptance of responsibility, and obstruction of justice. *See, e.g.*, ER-168, -2554, -80-81 (Dkt. #1381, 1522, 1527). The parties also jointly requested a sentencing evidentiary hearing on certain disputed factual matters, such as the fraud schemes' loss calculations. ER-2554, -57 (Dkt. #1383, 1396).

The evidentiary hearing took place over three days on October 27-28, and December 16, 2022. ER-2568-69, 2574-75 (Dkt. #1456, 1459, 1488). Sullivan's counsel had almost nine months to confer with her and review discovery materials in order prepare for that hearing. During the direct examination of the government's two witnesses, Sullivan's counsel lodged numerous objections, including conducting voir dire of almost every exhibit offered by the government. *E.g.*, SER-242, -52, -55-56, -95. After the government rested, at Sullivan's request, the district court paused the proceedings to provide her an additional six weeks to prepare for her own testimony. ER-2569-70 (Dkt. #1460).

On December 16, 2022, Sullivan elected to testify and submitted numerous exhibits.[14] SER-68, -70-71; SER-226-29 (Def. Exh. List – 22 exhibits). She either prepared the exhibits herself or hand selected them with counsel to use at the hearing. *E.g.*, SER-88-95. Sullivan's testimony was thorough and lasted a full day. *Id.* Counsel's examination of Sullivan gave her an open-ended opportunity to opine on a variety of topics.[15] *E.g.*, SER-132. Over the government's objections, the district court also afforded Sullivan wide latitude to give argument-type responses and testify extensively about several matters well-beyond the scope of the government's presentation. *E.g.*, *id.* at p.34, 40-41, 58, 87-98.[16]

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[14] At sentencing, the district court found that Sullivan "committed perjury even after she pled guilty," pointing to the spreadsheet she authored for sentencing and her testimony. ER-67.

[15] MR. BARBEE: "Should we move on or do you want to say anything about this?" SULLIVAN: "Well, I just want to mention that . . . ."

[16] GOVERNMENT: "Sure, I guess what I'm confused about, Your Honor, is that we have the scope of the factual objection to the PSR, and Mr. Barbee is referring to the PSR and specific information in the PSR, and these weren't objections made to the factual assertions in the PSR. And so therefore my understanding is they're admitted. So I don't understand the relevance to why Mr. Barbee is soliciting testimony related to this. He did have some legal objections, but that's a different issue."

After the evidentiary hearing, Sullivan's counsel submitted extensive briefing on various objections and evidentiary issues by incorporating documents and verbatim arguments authored by Sullivan herself. *E.g.*, SER-48-66, ER-2580 (Dkt. #1522 (def. brief)); ER-39-40[17]. *See also, e.g.*, ER-2615-21, 2715-29 (Sullivan's own submissions). Ultimately, several of the court's findings benefited Sullivan, over the government's objections. ER-2577-78, -80-81 (Dkt. #1502, 1527); ER-182 (*e.g.*, court measured credit card fraud by limited charge-off amounts rather than total unauthorized purchases). The court reduced the loss calculation for Guidelines purposes by approximately $1 million, which provided a loss between $550,000 to $1.5 million for USSG § 2B1.1 (separate from tax loss), and denied two two-level enhancements for use of a minor and unauthorized use of means of identification. ER-2580-81

THE COURT: "Well, if [the defense] had some factual objections he wants to put it out there now, I'm going to permit him to do that."

[17] MR. BARBEE: "Ms. Sullivan does disagree to that. And in fact, the Court will remember that she submitted during the evidentiary hearing on December 16th her own count – so a spreadsheet but a counter-table . . . . she stands by her numbers on her tax loss chart . . . .The second thing she objects to is regarding the credit card loss."

(Dkt. #1527); ER-28-70. Thus, the court found that the final Guidelines offense level was 33 with a criminal history category of three (sentencing range of 168 to 210 months to run consecutive to a mandatory 24 months in prison). ER-70.

Sullivan's counsel argued for a total sentence of 84 months in prison, which was well-below the Guidelines calculation. ER-73-74. In support of that recommendation, Sullivan provided a lengthy sentencing allocution. ER-75-81. The government advocated for a sentence of twenty-six years in prison based on the totality of the facts and circumstances measured against the 18 U.S.C. § 3553(a) factors. *E.g.*, ER-82, -96-98, -100-01. The Court described the extent and "boldness" of Sullivan's criminal conduct as "staggering" and "unique," but imposed a middle-range Guidelines sentence of 180 months in prison to run consecutive to the mandatory 24-month prison term for aggravated identity theft. ER-109. Sullivan also was ordered to pay $3,396,035.15 in restitution as well as a $2,012,741.92 forfeiture money judgment. ER-109, -119, -124.

H. Sullivan Tried To Remove Her Sentencing Counsel and Every Other Appointed Counsel That Represented Her

Sullivan unsuccessfully tried to manipulate the court process to get rid of her appointed sentencing counsel, Mr. Barbee. She was unhappy about the revocation of her pro se status. *E.g.* SER-3-13 (denying counsel's first motion to withdraw).[18] Besides Mr. Barbee, who had over 30 years of criminal defense experience, Sullivan had five other attorneys represent her. ER-779. The attorney-client relationship with four of those other attorneys fell apart and she had sought to remove each one. ER-782-83, 787-88.

Sullivan filed numerous pro se motions seeking to remove Mr. Barbee from her case. ER-2552-80. She also directed him to file similar motions to withdraw because of her "dissatisfaction" and view that he was "ineffective."[19] Between April and December 2022, the district court held five hearings on Mr. Barbee's motions that included ex-parte

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[18]MR. BARBEE: "[Sullivan] tells me she's not dissatisfied with the quality of my representation; she is dissatisfied with the fact that I'm representing her."
SULLIVAN: "I'm satisfied with Mr. Barbee . . . . But I just want to say, Your Honor, I really want my pro se status back."
SER-4, 10 (4/1/22 Hearing Transcript).

[19] *E.g.*, ER-772, ER-2252 (Dkt. #1376-1), ER-2566-67 (Dkt. #1446-1, #1451), ER-2574 (Dkt. #1485).

discussions with Sullivan and counsel.[20] The court denied every motion.[21]

The district court explained that Sullivan's ineffective assistance claims were "frivolous" and based on "manufactured discontent" designed to "get [Mr. Barbee] off" because of her "general unreasonableness." Er-772, -85-91. In various oral findings and written orders on this issue, the court addressed each point of dissatisfaction Sullivan raised about Mr. Barbee. *E.g.*, SER-415-29, ER-549-79, ER-770-91 (finding disagreements over "tactics" and "strategy"). For the most part, Sullivan complained Mr. Barbee did not do something that he in fact did do, such as make certain sentencing objections. *E.g.*, ER-2579 (Dkt. #1512); SER-420. She also requested that Mr. Barbee re-litigate pretrial arguments previously decided and precluded by her guilty plea and take actions that the court deemed to

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[20] ER-2552-75 (Dkt. #1378 (4/1/22), #1434 (10/12/22), #1449 (10/25/22), #1456 (10/27/22), #1493 (12/16/22)).

[21] The district court denied all of Sullivan's pro se motions and supplemental filings seeking the same relief. *E.g.*, ER-2564-80 (orders denying motions: Dkt. #1435, 1437, 1442, 1450, 1457, 1477, 1484, 1497, 1507, 1512, 1516, 1518, 1520, 1524).

be frivolous. *E.g.*, SER-420-27. The court found that even if Mr. Barbee were not representing her, Sullivan would seek to remove any counsel because it was "inevitable that the same conflicts would arise." SER-427-29[22]; ER-574-75, ER-790.

Soon after the district court denied several of Sullivan's attempts to remove Mr. Barbee, she tried a different tactic. On October 25, 2022, two days before the evidentiary hearing was scheduled, Sullivan filed a pro se civil lawsuit in federal court against Mr. Barbee.[23] ER-549-79. In response, Mr. Barbee filed a third motion to withdraw from the criminal case. ER-2567.

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[22] THE COURT: "So the present conflict in my view is based on the defendant's requests for Mr. Barbee to do things that are unreasonable, not his representation of her. I think to date everything I've seen shows Mr. Barbee has been effective and doing what he should do as a ethical officer of the court. And so I conclude with the statements again, I firmly believe that if I granted the instant motion, whether I appointed [former standby counsel] because he has some knowledge of the case or another attorney, we'd be in the same place." SER-428-29 (citing *United States v. Mendez-Sanchez*, 563 F.3d 935, 944 (9th Cir. 2009)).

[23] Sullivan v. Barbee, CV. No. 22-00464 LEK-RT (D. Haw.), was dismissed with prejudice by District Judge Leslie E. Kobayashi on November 30, 2022. SER-512.

On October 27, 2022, the district court held a hearing and denied the motion to withdraw. ER-139, ER-549-79. The allegations in the civil suit about Mr. Barbee's "lack of communication" and failure to make certain objections, were already considered and rejected by the district court. ER-556-58, 575. The court then made extensive findings about the history of Sullivan's motions to withdraw. ER-563-75. The court also found that her civil lawsuit "was absolutely frivolous and an abuse of the judicial process" meant to "delay" and "manufacture a conflict." ER-568, 576-77.[24] The court explained that the civil suit failed

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[24] THE COURT: "Why would you file this lawsuit? Well, she's doubling down. She's doubling down on her manipulation and attempts to manufacture a conflict. She knows that her claim against Mr. Barbee, for instance, on ineffective assistance of counsel because of this forfeiture language, many other things, is frivolous. But she's filed this suit in an attempt to force my hand. That's what it's about. She's trying to force my hand. And I'm not biting.

I made it clear to Ms. Sullivan that Mr. Barbee did nothing wrong, but she ignores that. She's reached deep into an obstructionist playbook in an effort to create a conflict where none exists. By this, I mean that she has filed a suit which is frivolous, that I believe she knows is frivolous, and is just an effort to force me to have Mr. Barbee leave the case.

Ms. Sullivan, before she left, before I ordered her out complained that I was -- I said she was manipulative. That's exactly what she's been in this matter. Manipulation of the highest order. Because she filed this lawsuit not because she thinks it's a legitimate lawsuit, because it's not. She abused the judicial process because she hopes by

to allege any decipherable cause of action. ER-576-77. Furthermore, the court found that Sullivan was not truthful in her claims about the number of times that she had conferred with Mr. Barbee to prepare for sentencing. ER-577.

During the various motion to withdraw hearings, the district court pressed counsel about his ability to "work with" Sullivan and provide her effective representation despite the challenges of an unreasonable defendant. On October 25, 2022, Mr. Barbee told the court that it would be difficult, but as a professional, he could continue to "try" to work with her and did not take her claims "personally." *E.g.*, ER-772-74. As described above, the court found that Sullivan's myriad claims were based on Sullivan's "unreasonableness, not on Mr. Barbee's representation of her or anything that he did." ER-574.

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filing a lawsuit the result is I say, Mr. Barbee, I'm sorry, I have to grant your motion, I'm going to grant your motion. It's the only reason.

So the filing of the lawsuit, I find, was done for an improper purpose. To attempt to have Mr. Barbee taken off the case and to get a new lawyer, who Ms. Sullivan would then try to get to file all the various things that Mr. Barbee wouldn't file, appropriately so. So she has used the judicial system as a sort of twisted tool to manufacture a conflict. I cannot allow that."

Sullivan persisted in her efforts to try to remove Mr. Barbee as her counsel. She raised the same issues that the district court had already ruled upon again and again. *See* ER-2572, -74-75 (Dkt. #1477, 1484, 1488). The district court closely examined her claims and denied all her efforts. *E.g.*, ER-298-302 (Dkt. #1507).

SUMMARY OF THE ARGUMENT

The government did not breach the plea agreement. The agreement contained a general recital that the four felonies to which Sullivan pleaded guilty adequately reflected the seriousness of her conduct and did not undermine the statutory goals of sentencing. The agreement did not bind the government to a particular sentencing recommendation or limit its sentencing advocacy. Instead, it left often significant questions for the court to resolve and allowed full advocacy on both sides.

At sentencing, the government argued that Sullivan committed serious crimes involving theft, lies, manipulation, and greed that victimized many. Based on the factors defined in 18 U.S.C. § 3553(a), the government advocated for a substantial sentence intended to serve the goals of sentencing. The government's sentencing recommendation

appropriately considered the totality of Sullivan's conduct that victimized family and friends, her almost certain likely recidivism, her lack of accountability and remorse, and her long history of similar conduct. Sullivan cannot point to any provision in the plea agreement that barred this argument.

The plea agreement contained a waiver of all appeal rights, unless the court imposed a sentence above the Guidelines range, or Sullivan alleged ineffective assistance of counsel. Given that the government did not breach the agreement, the waiver remains valid and bars any claims concerning the revocation of Sullivan's pro se status. But even if this Court reaches the issue, the record amply demonstrates that the district court did not err in appointing sentencing counsel.

During years of self-representation, Sullivan was shown extreme leniency, but she used her pro se status to manipulate, abuse, and delay the court process. She filed hundreds of vexatious pleadings in direct defiance of court orders. Over two years, the court warned her dozens of times that her abusive conduct violated the court's explicit orders and that she was in jeopardy of getting her pro se status revoked. Despite these particularized warnings, she refused to stop. Among other acts,

she lacked candor with the court, threatened the government attorney during a court hearing, and fought with the District Judge so intensely that he had to halt the proceedings and leave the bench.

After so many chances, her long pattern of intentionally obstructionist conduct justified the court's termination of her pro se status prior to sentencing. Nevertheless, Sullivan had a full opportunity to be heard in the sentencing process during her testimony and allocution, and from her submission of exhibits, written arguments attached verbatim to counsel's submissions, and several pro se filings considered by the court. And ultimately her arguments were heard, as the district court reduced the sentencing loss, rejected certain Guidelines enhancements, and imposed a sentence within the Guidelines range. As a result, any alleged error in the revocation of her self-representation, if not waived, is meritless and was at best harmless error.

Throughout her case, Sullivan repeatedly clashed with her appointed counsels because she was obstinate and unreasonable. When the court appointed sentencing counsel over her objection, she was determined to find a way to kick him off her case and delay the process.

The district court closely examined her complaints about counsel and appropriately denied the motions to withdraw. Sullivan then filed a frivolous civil lawsuit against counsel on the eve of the evidentiary hearing. It alleged that Mr. Barbee had provided ineffective assistance. The suit plainly was a hail mary attempt to manipulate the court process and circumvent the court's many prior rulings rejecting the same claims.

Sullivan's unsuccessful attempt to manufacture a conflict did not affect her counsel's advocacy on her behalf at sentencing. Contrary to her present claims, the civil lawsuit did *not* create an actual conflict; on the contrary, it was in both Sullivan and Barbee's interests for Barbee to act zealously at sentencing. Indeed, counsel vigorously defended Sullivan's sentencing interests. Sullivan's claims of ineffective assistance appear better suited for a motion under 28 U.S.C. § 2255 so that the district court can more fully develop the record involving former counsel.

LEGAL ARGUMENT

I. The Government Does Not Assert that Sullivan's Appeal Is Entirely Barred by the Plea Agreement's Appellate Waiver

Sullivan negotiated a knowing and voluntary plea agreement with the government. The plea agreement included an appellate waiver wherein Sullivan agreed to waive "all legally waivable claims." ER-1193. However, she retained limited appellate rights, including to file a claim for ineffective assistance of counsel and challenge the portion of a sentence above the Guidelines range. ER-1194

Sullivan challenges three issues in her opening brief: (1) government's alleged breach of the plea agreement, (2) the district court's post-plea revocation of her pro se status, and (3) an ineffective assistance of counsel claim based on alleged conflict of interest with her appointed counsel. The government concedes that the breach of plea agreement and ineffective assistance of counsel claims are not barred by the appeal waiver. *See, e.g.*, *United States v. Hernandez-Castro*, 814 F.3d 1044, 1045–46 (9th Cir. 2016) ("A defendant is released from [her] appeal waiver if the government breaches the plea agreement.") (citation omitted). Accordingly, the government addresses the merit of those two arguments, and asserts that the revocation of self-representation claim is waived.

II. The Government Did Not Breach the Plea Agreement

A. The Standard of Review is Plain Error

When the claim of breach of a plea agreement is not raised before the district court, the standard of review is for plain error. *United States v. Cannel*, 517 F.3d 1172,1176 (9th Cir. 2008). To be plain, the error must be "clear or obvious, rather than subject to reasonable dispute," "affect[] the appellant's substantial rights," and "seriously affect[] the fairness, integrity or public reputation of the judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135, (2009). None of the prongs are met here.

B. The Government Advocated for a Fair Sentence Within the Bounds of the Plea Agreement

The government did not breach the plea agreement by arguing for a sentence based on the statutory factors set forth in 18 U.S.C. § 3553(a). "Because a plea agreement is, at bottom, a contract between the government and a criminal defendant, for the most part 'we construe [a] plea agreement using the ordinary rules of contract interpretation.'" *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (alteration in original) (citation omitted). "If 'the terms of the plea agreement on their face have a clear and unambiguous

meaning, then this court will not look to extrinsic evidence to determine their meaning.'" *United States v. Streich*, 560 F.3d 926, 930 (9th Cir. 2009) (quoting *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000)).

As Sullivan's counsel concedes, the breach of plea claim is subject to plain error review because it was first raised on appeal. *See* OB at 38. Sullivan does not aver that the plea agreement included an explicit promise that the government would recommend a particular type of sentence. *See id.* at 35. On the contrary, the agreement identified several unresolved issues, which would be resolved by the court, and allowed both parties a broad range of advocacy at sentencing. ER-1192-93. Put another way, Sullivan was free to dispute the scope of relevant conduct, argue for a negligible loss amount, challenge enhancements, and argue for a below-guidelines sentence. And she did exactly that, succeeding in persuading the court to reduce the loss and not to impose certain enhancements. On the other hand, the agreement allowed the government to argue for an above-guidelines sentence, demonstrate any applicable losses and enhancements, and present any other aggravating circumstances.

Sullivan's breach argument relies on one sentence in the plea agreement:

> *Pursuant to CrimLR32.1(a) of the Local Rules of the District Court for the District of Hawaii, the parties agree* that the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior and accepting this Agreement will not undermine the statutory purposes of sentencing.

6-ER-1190 (emphasis added); OB at 35. The italicized language, however, was not included in Sullivan's opening brief. That portion provides context as to the reason for including the sentence in the plea agreement. It is required in all plea agreements by the District of Hawaii's local rules,[25] consistent with U.S.S.G. § 6B1.2(a). "The purpose of the 6B1.2(a) plea bargaining standard is to avoid

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[25] Rule 32.1(a) of the District of Hawaii Criminal Local Rule pertaining to "Sentencing Procedures" required a provision in a plea agreement:

> In Fed. R. Crim. P. 11(c)(1)(A) plea agreements wherein the agreement includes dismissal of charges or an agreement not to pursue potential charges, *the written plea agreement shall include a statement*, on the basis of the information then known by the parties, as to why the remaining charges adequately reflect the seriousness of the actual offense behavior and why accepting the agreement will not undermine the statutory purposes of sentencing.

District of Hawaii Criminal Local Rules (Aug. 11, 2011) (emphasis added).

inappropriate *lenience*." *United States v. Fine*, 975 F.2d 596, 601 (9th Cir. 1992) (en banc) (emphasis added). The provision was intended to "assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." *Id.* (citation omitted). The Guidelines in turn contemplate that, in fraud cases, the range be determined by loss attributable to the offenses of conviction, relevant conduct, applicable enhancements. The court then imposes a sentence using the advisory Guidelines range as a starting point and applying the statutory goals of sentencing embodied in 18 U.S.C. § 3553(a)(2).

The plea agreement here – which called for Sullivan to plead to four felony offenses from three different schemes – adequately reflected the seriousness of the actual offense behavior. But the adequacy of the charges did not in any way prevent the government from following a well-established sentencing procedure regarding loss and enhancements and recommending a sentence that took into account the need to protect the public, punish, deter and promote respect for the law. Indeed, the court warned Sullivan during plea proceedings that the loss would be calculated and "if the sentence is worse or more severe than you had

hoped or expected to receive . . . you will not be able to withdraw from your plea of guilty. . . . In other words, there's no buyer's remorse." ER-1387.

In *United States v. Streich*, 560 F.3d 926, 930 (9th Cir. 2009), the defendant wrongly claimed the government breached the plea agreement when it argued for an above-guidelines sentence by relying on photographs of child pornography that constituted additional uncharged conduct. In that plea agreement, the government agreed not to "prosecute" the defendant for additional offenses. *Id.* However, the government did not make any promises as to the sentence it would ultimately recommend. *Id.* And thus, the Ninth Circuit determined the government's sentencing advocacy did not constitute a breach. *Id.*; *Compare United States v. Mondragon*, 228 F.3d 978, 979-80 (9th Cir. 2000) (the government made an explicit promise in the plea agreement – to "make no recommendation regarding sentence" -- and then contravened that promise by advocating for a harsher sentence).

Similarly, in this case, the government made no promise about the sentence it would seek or the type of information that it would rely on at sentencing. Upon pleading guilty, Sullivan faced a potential

sentence of 62 years in prison. ER-1181. However, in consideration of the factors articulated in 18 U.S.C. § 3553(a) and the Guidelines, the government advocated for a sentence of twenty-six years in prison.[26] ER-178.

Furthermore, any aggravating or mitigating circumstances beyond the offense conduct, including information relevant to the § 3553(a) factors, are expected to be brought before the court as part of the PSR and by the parties. *See, e.g.*, FRCP 32(d)(2)(G) and (i)(1)(C) (the district court "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence"). In crafting a sentence, the court can consider any information about the defendant's background, character, and conduct without limitation, including other uncharged conduct. *See United States v. Christensen*, 732 F.3d 1094, 1104 n.2 (9th Cir. 2013). *See also* 18 U.S.C. § 3661; USSG § 6A1.3, Commentary ("Any information may be considered" by a sentencing judge so long as it has

[26] The Guidelines commentary in USSG § 2B1.1 and for obstruction directly applicable to Sullivan recommended that an "upward departure may be warranted." ER-184-85.

sufficient indicia of reliability.); *United States v. Scott*, 735 Fed. Appx. 347, 348 (9th Cir. 2018) (district court not precluded from consideration of defendant's conduct in absconding in fashioning sentence even through government agreed not to prosecute defendant). The district court explained as much to Sullivan during the plea proceedings. *See, e.g.*, ER-1550, -52.[27]

Rather than breach the agreement, the government's sentencing argument was crafted to reflect the statutory purposes of sentencing, *i.e.*, the need for just punishment, deterrence, the seriousness of the crimes, respect for the law, to protect the public, and in consideration of Sullivan's history and characteristics. *See* 18 U.S.C. § 3553(a)(1)&(2). Its arguments were grounded in relevant facts about Sullivan and

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[27] SULLIVAN: "Are they going to use bad acts before and stuff? Can they use other, like, bad things I did?"
THE COURT: "They can use any information that's sufficiently reliable, that's relevant and sufficiently reliable to sentencing."
. . . .
"Do you understand there's no limitation on the information that I may consider at the time of sentencing concerning your background, your character and conduct, provided the information is sufficiently reliable?"

supported by reliable information.[28] *See United States v. Kaila*, 366 Fed. Appx. 782 (9th Cir. 2010) (finding no government breach when "the terms of the plea agreement [] did not preclude the government from arguing that a higher sentence was warranted pursuant to 18 U.S.C. § 3553(a)" and the government based its argument "on deposits not stipulated to in the agreement"). Sullivan was a "one-woman criminal enterprise" who would not stop committing crimes. ER-100.[29] Thus, the government's recommendation reflected a sentence "in line with a just

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[28]For example, Sullivan defrauded her own college-age daughter well-after she was originally indicted. That information was supported by her daughter's police report, her voluntary interview with investigators, and other financial documentation.

[29] As described in the government's sentencing memorandum, SER-42-43:

> Sullivan's continued criminal conduct up until the point of her detention and her efforts to conceal her criminal activity are significant aggravating factors. These crimes alone demonstrate that Sullivan is a certain recidivist and has no respect for the judicial system or the administration of justice. In repeatedly victimizing others close to her and vulnerable individuals who trusted her, she appears to be devoid of a moral compass without the ability to experience genuine remorse or change. None of the escalating pretrial conditions, multiple superseding indictments, numerous admonishments by federal judges, or alienation from her family were a deterrent to stop Sullivan.

outcome in this case" that "would at least be sufficient, but not greater than necessary, to accomplish the goals of sentencing." SER-28.

Furthermore, the district court explained at sentencing that it was not considering the government's arguments regarding other uncharged conduct not in the PSR.[30] ER-104. Therefore, the other uncharged conduct "appears to have played little if any role in the district court's sentencing decision, so [Sullivan] cannot prevail under the plain error standard." *United States v. Smith*, 630 Fed. Appx. 672, 675 (9th Cir. 2015).

III. The District Court Did Not Err in Revoking Sullivan's Pro Se Status Based on Her Serious Obstructionist Conduct and Defiance of Court Orders

A. Sullivan's Claim is Barred by Her Appellate Waiver

"'[A] waiver of appellate rights 'is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made.' *U.S. v. Lo*, 839 F.3d

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[30] Sullivan incorrectly characterizes the government's arguments about the conservative calculations of unquantified loss of the wire fraud schemes as "offenses outside the scope of those in the plea agreement." OB at 36. However, at the evidentiary hearing, the Special Agent explained with particularity why and how the loss for the convicted fraud schemes extended well-beyond his calculations for sentencing purposes, *i.e.*, part of the offenses of conviction. *E.g.*, ER-98-99.

777, 783 (9th Cir. 2016) (citations omitted). This Court has 'consistently read general waivers of the right to appeal to cover all appeals, even an appeal from the denial of a motion to withdraw a guilty plea.' *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011)." *United States v. Avalos*, 822 F. App'x 601, 603 (9th Cir. 2020) (affirming appellate waiver barred direct appeal of resentencing under First Step Act).

Sullivan knowingly and voluntarily gave up her right to challenge "all legally waivable claims" in her plea agreement. ER-1193-94. She does not contend on appeal that the plea was unknowing or involuntary or that it did not comply with FRCP 11. *E.g.*, ER-1507. Thus, her claim of error in the subsequent revocation of her pro se status is subsumed in the agreement's general waiver. Such revocation at the sentencing stage is not included in the agreement's two narrow exceptions – a claim of ineffective assistance of counsel or challenge to the portion of a sentence exceeding the Guidelines range. *Id.* It also does not question the validity of the plea agreement or infect the integrity of the judicial proceedings, see *United States v. Maness*, 566 F.3d 894, 896–97 (9th Cir. 2009).

The district court went to great effort throughout the plea proceedings to explain repeatedly to Sullivan that the scope of her appellate waiver covered most all claims on direct appeal and collateral attack except in two limited circumstances and Sullivan asked the court questions. *E.g.*, ER-1528, 1532-37. Sullivan had numerous opportunities throughout the one-month plea process to inquire further or back out to preserve her appellate rights. *E.g.*, *id.*; ER-1497. She affirmatively told the court she understood the plea terms and signed the agreement such that she chose the benefits of the plea in exchange for an appellate waiver. *E.g.*, ER-1520.

B. Sullivan's Claim is Subject to Harmless Error Review

If this Court were to consider the claim's merits, the Ninth Circuit has "held [] that violating a defendant's Sixth Amendment right to counsel of his choice is subject to harmless error analysis if the violation occurred *only at sentencing* and not at the guilt phase of trial." *Maness*, 566 F.3d at 896–97 (emphasis added) (citing *United States v. Walters*, 309 F.3d 589, 592–93 (9th Cir. 2002)). *See also United States v. Spangle*, 626 F.3d 488, 494 n.2 (9th Cir. 2010). "[A]n improper denial of a defendant's motion to proceed pro se at sentencing, rather than at

trial, is not a structural error and is thus subject to harmless error analysis. The error is not intrinsically harmful to the entire proceedings." *Maness*, 566 F.3d at 897 (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)). *See also United States v. Cox*, 757 F. App'x 527, 529 (9th Cir. 2018); *United States v. Mabie*, 663 F.3d 322, 328 (8th Cir. 2011) ("Denial of all counsel v. appointment of counsel affect different rights and concerns re the 6th am. The former may indeed be structural – right to counsel embedded in 6th amendment. The latter not the same concern."). Whereas it is true that an "improper denial of a request to proceed pro se at *trial* is 'not amenable to harmless error analysis.'" *Maness*, 566 F.3d at 896–97 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)).

In *Maness*, the defendant was sentenced to 120 months in prison after a jury trial. *Maness*, 566 F.3d at 896. He moved to proceed pro se at resentencing. *Id.* The district court denied the request, appointed sentencing counsel, and resentenced Maness to the same term. *Id.* On appeal, the Ninth Circuit found that the court had failed to conduct a proper *Faretta* inquiry before denying Maness the right to self-representation. Nonetheless, the court found the error harmless

because the court considered Maness' pro se arguments at the resentencing. *Id.* at 897.

Under harmless error review, "the appellate court may review the sentencing proceedings and ascertain beyond a reasonable doubt whether the error contributed to the sentence imposed." *Id.* Put another way, "[a]n error is harmless if the court finds beyond a reasonable doubt that the result would have been the same absent the error." *Singh v. Curry*, 689 F. Supp. 2d 1250, 1261 (E.D. Cal. 2010). Thus, to prevail on such a claim, a defendant must show prejudice. *See Spangle*, 626 F.3d at 494. A district court's underlying factual findings are reviewed for clear error. *See, e.g., United States v. Mendoza*, 530 F.3d 758, 762 (9th Cir. 2008).

C. Sullivan Deliberately Ignored and Defied the District Court's Repeated Warnings That Her Abusive Conduct Jeopardized Her Pro Se Status

The Sixth Amendment right to self-representation is "not absolute." *Indiana v. Edwards*, 554 U.S. 164, 171 (2008). *See also United States v. Faretta*, 442 U.S. 806 (1975). A "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. *Faretta*, 442 at 834, n.46

(citing *Illinois v.* Allen, 397 U.S. 337 (1970)). Self-representation is limited when a defendant deliberately uses the courtroom for "disruption" because such a right is "not a license to abuse the dignity of the courtroom" or fail to "comply with relevant rules of procedural and substantive law" either because a defendant is "unable or unwilling." *Id.*; *United States v. Engel*, 968 F.3d 1046, 1050 (9th Cir. 2020). *See also United States v. Edelmann*, 458 F.3d 791, 808–09 (8th Cir. 2006) (""The right [to self-representation] does not exist . . . to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process."') (quoting *United States v. Frazier–El*, 204 F.3d 553, 560 (4th Cir. 2000)). Put simply, "[a] defendant may forfeit the right to represent himself if he 'fail[s] to obey the rulings of the court.'" *Engel*, 968 F.3d at 1051 (quoting *United States v. Flewitt*, 874 F.2d 669, 673 (9th Cir. 1989)) (alteration in original). *See also Wiggins*, 465 U.S. at 173 (noting that a self-represented defendant must be "able and willing to abide by rules of procedure and court protocol").

Whether a defendant has exhibited conduct that justifies revocation of self-representation is a question grounded in the facts of a particular case. The Ninth Circuit's decisions in *Engel* and *Flewitt*

provide a relevant framework to make such an assessment here. These cases illustrate that the district court did not error in revoking Sullivan's pro se status given the totality of her seriously disruptive pattern of conduct.

In *Engel*, the Ninth Circuit held that a district court wrongfully terminated Engel's pro se status where his conduct fell far short of "clearly defiant or obstructionist misconduct." 968 F.3d at 1052. Engel asked one objectionable question of a witness approximately three weeks into trial. When the court struck the question, Engel did not interrupt and "never challenged the judge's rulings or obstinately persisted in a line of questioning after being ordered not to do so." *Id.* at 1052. The government then argued that Engel's pro se status should be revoked and the court agreed. Even during that colloquy, Engel remained calm and apologetic.

Significantly, the *Engel* court acknowledged that self-representation may be subject to termination if a defendant disobeys court orders. *Id.* at 1051 ("Had Engel repeatedly violated the court's orders, that might be sufficiently disruptive to revoke his pro se status.") (citing *Flewitt*, 874 F.2d 673; *Wiggins*, 465 U.S. at 173). Engel,

however, did not clearly violate an unambiguous court order, nor was he ever reprimanded by the court. *Id.* Thus, when the district court revoked his status, Engel had no prior warning that his self-representation was in jeopardy. *Id.* The Ninth Circuit also explained that the single question was not part of a pattern of disruptive behavior or "open defiance"; it was no more disruptive than questions sometimes asked by opposing counsel. *Id.*

In *Flewitt*, the Ninth Circuit similarly found that defendants' pretrial actions did not constitute obstructionist behavior to justify revocation of their pro se status. 874 F.2d at 674. Defendants were in custody and repeatedly requested to be transported to a warehouse to review records they believed relevant to their case. They had no other access to those records and explained that an investigator could not "make sense out of the records" because they were in disarray after the government's seizure. *Id.* at 671. Prior to self-representation, defendants also had contended that counsel would need time to review the warehouse records to prepare for trial. The trial court denied their requests. One week before trial, defendants renewed their request explaining that "we are not asking for hundreds of hours, really. We are

asking to be taken to the records, to categorize them at last so someone can find what we are requesting[,]" such as "financial records, business records, and customer files." *Id.* at 672. The court then terminated defendants pro se status because they were not ready for trial.

The Ninth Circuit emphasized that the trial court "did not indicate that [the defendants] had been contemptuous[,] failed to obey the rulings of the court," [or] "refus[ed] to comply with court orders." *Id.* at 674-75. It was only that "they had not and would not properly prepare for trial." *Id.* The Ninth Circuit explained that revocation of self-representation cannot be abrogated when defendants fail to prepare properly for trial because "that was their choice to make." *Id.* at 673-74.

These cases provide a stark contrast to Sullivan's conduct. In *Engel*, the defendant asked a single objectionable question, but was otherwise calm and complicit with the court's instructions. Engel also received no prior warning from the court regarding the potential impact on his pro se status. And in *Flewitt*, the defendants "simply failed to prepare their defense." *Flewitt*, 874 F.2d at 676. Whereas Sullivan deliberately and repeatedly violated the district court's explicit orders, manipulated court procedures, made misrepresentations to the court,

disrupted various pretrial proceedings on multiple occasions, and was warned repeatedly that her pro se status was in jeopardy yet persisted in the same type of conduct. *See, e.g.*, ER-1046.

The district court's factual findings regarding Sullivan's conduct are not in dispute in this appeal. The court cautioned her for years that her conduct violated court rules and "may result in the revocation of her pro se status." ER-1042. In fact, at the show cause hearing, the court provided Sullivan with the opportunity to clarify several factual matters before determining that her pro se status should be revoked. In part, it was her "lack of candor" in answering the court's questions that led to its conclusions. ER-1043-44.

The district court also found that Sullivan's conduct was "deliberate" – she would keep violating court orders because she "doesn't care" and has "absolute unwillingness or inability to follow the rules, the orders and her abusive filings." ER-1042-43, -45. The court emphasized that Sullivan "well understands my rulings and my orders and makes an informed decision to ignore them. In other words, her acts are knowing and intelligent." ER-1045.

The court characterized several circumstances where Sullivan's conduct involved "[p]ure manipulation" of court process. ER-1042-43. Sullivan repeatedly abused her pro se status. She exhibited a lack of candor to the court, intentionally manipulated information in pleadings, and falsely impugned other individuals and witnesses.

Furthermore, the court described Sullivan's history of "being disruptive in court proceedings." The court specifically identified hearings where her disruptions halted the proceedings such that the judge left the bench and where she directed "heated and inappropriate" comments at the government attorney. ER-1043.

Based on the totality of circumstances here, the district court did not error in revoking Sullivan's pro se status at the show cause hearing in February 2022. Footnote 46 in *Faretta* states in pertinent part:

> [T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353. Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.
>
> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever

> else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

422 U.S. at 834 n.46 (citation omitted).

Relying on paragraph one of footnote 46, the court found that Sullivan "ha[d] deliberately engaged in serious and obstructionist misconduct." ER-1045. It also acknowledged that paragraph two would also "have a lot of force [in] . . . terminating Ms. Sullivan's pro se status." *Id.* She would not stop despite numerous admonitions and warnings from the district court. *See United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1988) (finding pro se revocation appropriate when the defendant's conduct continued after several contempt citations). She repeatedly refused to follow court orders and procedures, defied the court's authority, and manipulated the court process. *See United States v. Gougher,* 835 F. App'x 231, 237 (9th Cir. 2020) (concurrence) (a defendant's unwillingness to follow the rules of procedure and courtroom protocol based on a record of "inappropriate and disruptive behavior" provided a proper ground for denying a defendant's request to proceed pro se at trial). The court's determination to revoke her status was justified. *See Engel*, 968 F.3d at 1050-51 (citing *United States v.*

Mack, 362 F.3d 597, 599 (9th Cir. 2004) (no error in terminating pro se status "when a defendant engages in 'heated discussion[s]' with the judge," threatens a juror, and discloses something the district court specifically ordered him not to disclose)). *See also United States v. Lopez-Osuna*, 242 F.3d 1191, 1199, 1200 (9th Cir. 2000) (explaining that a defendant's "right to represent himself may be overridden," *i.e.*, "[a] trial court may refuse to permit a criminal defendant to represent himself when" he is "'not able and willing to abide by rules of procedure and courtroom protocol'") (quoting *Savage v. Estelle*, 924 F.2d 1459, 1463 (9th Cir. 1991)). Her conduct was not just a lack of familiarity "with the rules of evidence or the specifics of criminal procedure." *Engel*, 968 F.3d at 1050-51 (quotations omitted). Nor was it just confusing, nonsensical, annoying, or "uncooperative at times." *See id.* (quoting *United States v. Johnson*, 610 F.3d 1138, 1143-44 (9th Cir. 2010)). Neither of which would have been a sufficient basis for revocation.

Finally, based on its extensive dealings with Sullivan, the district court rightly predicted that her pro se behavior would lead to more serious disruptions as the sentencing phase of the case proceeded. ER-1046. *See Flewitt*, 874 F.2d at 674. Indeed, Sullivan's courtroom

behavior became so disruptive and combative that the district court had to remove her from the courtroom twice.

D. Even if the District Court's Revocation of Sullivan's Pro Se Status Was an Error, it Was Harmless

Sullivan's own arguments were presented fully during sentencing, so any error would be harmless. *See Spangle*, 626 F.3d at 495 (holding any presumed error was harmless because "at sentencing the court allowed Spangle ample opportunity to speak and interject on his own behalf"). Sullivan cannot show how she would have received a materially different sentence had she represented herself. *See Underwood v. Sullivan*, 2019 WL 926350, at *5 (C.D. Cal. Jan. 18, 2019), *R&R adopted*, 2019 WL 1505913 (C.D. Cal. Mar. 29, 2019). Thus, "it is thus clear beyond a reasonable doubt that the Sixth Amendment error did not result in prejudice." *Maness*, 566 F.3d at 896-97 (citing *United States v. Marks*, 530 F.3d 799, 812 (9th Cir. 2008)).

Her appointed counsel lodged expansive objections to the pre-sentence report, including challenging relevant conduct and amounts for loss, restitution, forfeiture. Counsel also objected to almost all of the sentencing enhancements applied to her conduct, including the objections Sullivan lodged in pro se filings (*e.g.*, related to criminal

history calculations). These objections led to substantial briefing and argument by the parties, as well as a multi-day evidentiary hearing. Sullivan even received six weeks to prepare to testify after the government's presentation. Her testimony lasted a full day. She introduced self-prepared exhibits, provided an alternative loss calculation, and submitted other documents.

In other briefing, Sullivan's counsel submitted documents that she prepared and included her own sentencing arguments verbatim. Sullivan also had the opportunity to provide a substantial allocution to the district court before she was sentenced. In considering the various motions to withdraw during the sentencing process, the district court also directly addressed Sullivan's claims that were deemed frivolous, previously denied by the court, or otherwise lodged by her counsel. In the end, the district court sustained several of Sullivan's sentencing arguments, which lowered the Guidelines range and restitution, and sentenced her only to a middle-range Guidelines sentence.

IV. The District Court's Refusal To Appoint New Counsel Did Not Violate the Sixth Amendment

A. The Standard of Review Is De Novo

"A claim that trial counsel had a conflict of interest with the defendant is a mixed question of law and fact and is reviewed de novo by the appellate court." *United States v. Nickerson*, 556 F.3d 1014, 1018 (9th Cir. 2009).[31]

B. This Court Can Resolve Sullivan's Claim on Direct Appeal

Sullivan claims that her sentencing counsel, Mr. Barbee, had a conflict of interest that violated her Sixth Amendment right to effective assistance of counsel. OB at 47. "Claims of ineffective assistance of counsel are generally inappropriate on direct appeal. Such claims normally should be raised in habeas corpus proceedings, which permit counsel to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted." *United States v. Ross,* 206 F.3d 896, 900 (9th Cir.2000) (internal citations and quotation marks omitted). *See also United States v. Robinson,* 967 F.2d 287, 290 (9th Cir.1992). The Ninth Circuit only reviews ineffective assistance claims on direct appeal where the record is sufficiently developed to review and determine the

[31] Whereas appellate review of a district court's denial of a request for new counsel is for abuse of discretion. *United States v. Plascencia-Orozco*, 852 F.3d 910, 917 (9th Cir. 2017).

issue or inadequate representation is so obvious. *United States v. Rahman*, 642 F.3d 1257, 1259-60 (9th Cir. 2011).

In this case, Sullivan alleges that an actual conflict of interest existed between Sullivan and her counsel's personal interest based on the civil lawsuit Sullivan filed against Mr. Barbee. OB at 48. She claims that conflict adversely affected counsel's performance in handling her defense. *Id.* at 48, 50-51. Without further development of the record, this Court can determine that the frivolous lawsuit did not create an actual conflict, disposing of Sullivan's claim without further analysis.

On this record, this Court can also determine that counsel's performance was *not* adversely affected. However, should this Court have any lingering questions, it can have the district court further flush out counsel's thoughts and actions. For example, the district court described Mr. Barbee's unwillingness to make "frivolous" arguments as a reasonable "tactic" and "strategy." ER-571, 786-89. On appeal, Sullivan argues that Mr. Barbee's failure to move to withdraw her plea based on a government breach of the agreement resulted from his conflict of interest. OB at 51. On this ground, the record doesn't indicate Mr. Barbee's reasons for his decision.

C. Sullivan's Frivolous Lawsuit Did Not Create an Actual Conflict of Interest Requiring New Counsel

The Sixth Amendment protects a criminal defendant's right to effective assistance of counsel. U.S. Const. Amend. VI. It is violated when an attorney has an actual conflict of interest that adversely impacts his or her performance in a criminal case. *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998). A defendant alleging an actual conflict must establish that counsel's interest and "defendant's interests diverge[d] with respect to a material factual or legal issue or to a course of action." *Culyer v. Sullivan*, 446 U.S. 356 n.3 (1980).

The Ninth Circuit has suggested that manufactured tactics by a defendant do not necessarily give rise to an actual conflict of interest. *Gougher*, 835 F. App'x at 234. In *Gougher*, an unpublished decision, the Ninth Circuit stated: "Where, as here, the defendant has been repeatedly uncooperative with successive counsel, we have declined to find that an eve-of-trial filing of a bar complaint against the defendant's latest counsel gives rise to an actual conflict of interest that would require a substitution of counsel." *Id.* (citing *Plascencia-Orozco*, 852 F.3d at 916–18). *See also Smith v. Lockhart*, 923 F.2d 1314, 1321 n.11

(8th Cir. 1991) ("A patently frivolous lawsuit brought by a defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel. Trial judges must be wary of defendants who employ complaints about counsel as dilatory tactics or for some other invidious motive.").

Sullivan's civil lawsuit against Mr. Barbee did not create an actual conflict. The district court made detailed findings that her requests to remove Mr. Barbee were disagreements over tactics and strategy and not genuine complaints about Mr. Barbee's performance. ER-571. The court emphasized that because of Sullivan's "unreasonableness," the same conflicts inevitably would arise if new counsel were appointed.[32] ER-574-75. The court rightly called her civil lawsuit against Mr. Barbee "[m]anipulation of the highest order" and an "abuse of the judicial process." ER-577. Sullivan filed the lawsuit to delay the court process on the eve of her evidentiary hearing and "to force [the court's] hand" to get Mr. Barbee off the case. ER-576-77. The

[32] The court described that Sullivan's "MO when she's unhappy" in the criminal case was to file civil lawsuits against the government attorney, the Federal Detention Center, the special agent, and a court appointed psychologist. ER-573-74. *See* PSR ¶ 35.

court highlighted that Sullivan filed the lawsuit only after her *same* complaints were denied by the district court. ER-556-67, -76-77 ("She's reached deep into an obstructionist playbook in an effort to create a conflict where none exists."). The court accurately characterized the lawsuit as "specious and frivolous." ER-575-76. And without any action on Mr. Barbee's part, the assigned district judge on Sullivan's civil case quickly disposed of her lawsuit with prejudice.

Finally, the two cases cited in Sullivan's brief are distinguishable. She relies on *United States v. Walter Eze*, 869 F.3d 891, 900 (9th Cir. 2017), where the actual conflict was due to counsel's own financial interest, which does not exist here. She also relies on a D.C. Circuit case, *United States v. Hurt*, 543 F.2d 162, 164 (D.C. Cir. 1976), where the conflict involved counsel's explicit representation to the trial court that counsel could not effectively represent the defendant in the proceedings because counsel's own self-interest would in fact diverge from the defendant's, *i.e.*, advocacy on the defendant's behalf would aggravate a pending libel suit against counsel on the same issue. Counsel in *Hurt* had expressed "an unalterable attitude towards the lawsuit" that would prevent him from actively representing the

defendant. *Id.* at 167. The record here shows that the civil lawsuit against Mr. Barbee did not create the type of directly divergent conflict suggested in *Hurt*. *See People v. Hardy*, 825 P.2d 781, 806-807 (Cal. Sup. Ct. 1992) (finding no actual conflict of interest when defendant attempted to manufacture a conflict by filing frivolous lawsuits against counsel and distinguishing *Hurt*). Mr. Barbee expressed that representing Sullivan would be difficult because she did not want to work with him,[33] *not* that his own self-interest would work against her. Rather, as discussed below, his interests aligned with hers. He had also told the district court that he did not take her claims "personally." Furthermore, unlike counsel in *Hurt*, the civil suit was dismissed with prejudice before Mr. Barbee was even served. SER-512-15.

D. Even if There Was a Conflict, Sullivan Cannot Show That Mr. Barbee's Representation Was Adversely Affected

[33] A defendant's "general unreasonableness or manufactured discontent" is not a valid ground for new counsel. *See Mendez-Sanchez*, 563 F.3d at 944 (quoting *United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002)) (explaining that defendant quarreled with and unilaterally cut off contact with his attorney). Such conduct may impair counsel's relationship with a defendant, but that stands far apart from raising any ethical conflict.

Sullivan cannot show that Mr. Barbee's representation of Sullivan was adversely affected by the conflict of interest she manufactured. To establish an "adverse effect" a defendant must show "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005) (quoting *United States v. Stantini*, 85 F.3d 9, 16 (2d Cir. 1996)); *see also McClure v. Thompson*, 323 F.3d 1233, 1248 (9th Cir. 2003) (noting that to establish an adverse effect, a defendant "must demonstrate that his attorney made a choice between possible alternative courses of action that impermissibly favored an interest in competition with those of the client").

Rather than be adversely affected, the record demonstrates that Mr. Barbee zealously advocated on Sullivan's behalf throughout the sentencing process. Sullivan was a difficult and unreasonable client, which may have impaired their relationship, but Mr. Barbee executed his duties with ethical professionalism. In fact, as an experienced

defense lawyer, Mr. Barbee told the court that he did not take Sullivan's accusations "personally."

Mr. Barbee did not pull any punches in his representation of Sullivan. Unlike a situation where counsel has divided loyalties to multiple clients or has a financial interest adverse to his client, Mr. Barbee's personal interest in avoiding defending further claims of ineffective assistance of counsel directly aligned with providing Sullivan loyal and competent representation, not some other alternate course of action. Further, their interests were aligned insofar as both benefited from favorable rulings on sentencing issues.

Mr. Barbee objected to the PSR on myriad legal and factual grounds, engaged in a contested evidentiary hearing, gave Sullivan free reign to testify and present her version of events, submitted exhibits she selected, used her own arguments verbatim in his filings, and briefed several disputed sentencing issues. In addition, at several hearings and in orders, the court addressed Sullivan's arguments directly and deemed most of them to be frivolous, previously denied by the court, precluded by her guilty plea, or otherwise raised by Mr. Barbee. Nevertheless, at the end of the contested sentencing process,

the district court made several findings to Sullivan's benefit, reducing the Guidelines offense level calculated in the draft PSR.

Sullivan argues that one of Mr. Barbee's shortcomings as a result of the "conflict," was his failure to make any sentencing recommendation. OB at 51. Her contention is wrong. Mr. Barbee advocated for a below-Guidelines sentence of 84 months, which more than halved the Guidelines calculation and U.S. Probation recommendation. ER-71.

Further, contrary to Sullivan's suggestion, Mr. Barbee did not have to simultaneously defend himself against Sullivan's civil lawsuit while defending her in the criminal case. OB at 50. Shortly after it was filed, the civil lawsuit was dismissed with prejudice by the district judge assigned to the matter.

For all these reasons, Sullivan cannot demonstrate an adverse affect on Mr. Barbee's representation of her due to her manufactured conflict of interest.

CONCLUSION

For all the foregoing reasons, the district court's judgment should be affirmed.

DATED: April 15, 2024, at Honolulu, Hawaii.

Respectfully Submitted,

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ADDENDUM

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18 U.S.C. § 3553(a) – Imposition of a Sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. 1

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

District of Hawaii Criminal Local Rule 32.1
(Aug. 11, 2011)

The following rules apply in all cases where presentence investigations and reports are ordered by a district judge or magistrate judge:

(a) To assist the court in fulfilling the standards for acceptance of plea agreements as set forth in the U.S. Sentencing Guidelines § 6B1.2, the parties shall be responsible for the following:

1. In Fed. R. Crim. P. 11(c)(1)(A), plea agreements wherein the agreement includes dismissal of charges or an agreement not to pursue potential charges, the written plea agreement shall include a statement, on the basis of the information then known by the parties, as to why the remaining charges adequately reflect the seriousness of the actual offense behavior and why accepting the agreement will not undermine the statutory purposes of sentencing;

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) Nos. 23-573 & 23-575

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Appendix D

No.s 23-573 & 23-575

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEIHINAHINA SULLIVAN,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Hawaii
No.s CR 17-00104 JMS & 21-00096 JMS
Hon. J. Michael Seabright

APPELLANT'S CONSOLIDATED REPLY BRIEF

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INTRODUCTION

On December 20, 2023, Leihinahina Sullivan filed her Opening Brief in these consolidated cases (hereinafter "OB"). The government filed their response on April 15, 2024 (Brief for Appellee, hereinafter "BFA"). Ms. Sullivan hereby submits this brief in strict reply thereto.

The government begins their response to the legal issues raised by Ms. Sullivan with a lengthy discussion of Ms. Sullivan's character. This discussion is not relevant to the issues so it is not addressed or refuted herein. This should not be taken as any sort of concession or agreement with the government's position on this matter.

Herein and in the District Court, the government took a decidedly dim view of Ms. Sullivan and her actions. But the pertinent questions in this appeal do not center around whether this view was justified. The questions presented here are whether Ms. Sullivan's actions justified revocation of her Sixth Amendment rights to advocate on her own behalf at sentencing without the interference of counsel who had an actual conflict of interest that adversely affected his performance, or the breach of the plain terms of her plea agreement by the government. As discussed below, none of Ms. Sullivan's actions nor the arguments or authorities put forward by the government justify the decisions of the District Court in these

respects. These errors require remand for further proceedings where Ms. Sullivan may elect to withdraw her pleas or proceed to resentencing before a different district court judge where the government will be obligated to stand by the terms of the plea agreement.

ARGUMENT

I. The Appeal Waiver does not Bar Consideration of the Issues Raised Herein.

The government concedes that consideration of whether the government breached their plea agreement and whether appointed counsel had an actual conflict of interest that adversely affected his representation at sentencing is not barred by Ms. Sullivan's appeal waiver. BFA at 36 ("The government concedes that the breach of plea agreement and ineffective assistance of counsel claims are not barred by the appeal waiver."). However, the government argues that the appeal waiver does bar this Court's consideration of whether the district court erred in revoking Ms. Sullivan's Sixth Amendment right to self-representation. BFA at 36 (the government "asserts that the revocation of self-representation claim is waived.").

Quoting the language of the appeal waiver in the plea agreement, the government argues that Ms. Sullivan knowingly and voluntarily gave up her right to challenge "all legally waivable claims." BFA at 46; *citing,* 6-ER-1193-94. But

the government does not analyze what claims are "legally waivable" and whether such claims include Constitutional violations at sentencing despite Ms. Sullivan's briefing regarding the same. *Compare,* OB at 27-32; *with,* BFA at 35-36, 45-47.

Reasoning that the Constitution must remain the supreme law of the land, this Court has held in *United States v. Wells* that an argument that a given sentence violates the Constitution must be heard even in the face of a broad appeal waiver.[1] Citing *United States v. Torres,* the *Wells* Court reasoned that any analogy between a plea agreement waiving certain rights and a private contract is imperfect because the Constitution continues to "impose[] a floor below which a defendant's plea, conviction, **and sentencing** may not fall."[2]

Based on these authorities, this Court has considered a claim that a defendant's constitutional rights were violated at sentencing despite a broad appeal waiver. For example, in *United States v. Odachyan* (cited in OB at 28), the defendant waived his right to appeal provided the sentence was within the statutory maximum, not unconstitutional, and within or below a designated range.[3] Odachyan argued that the district court's anti-immigrant bias unfairly influenced his sentence.[4] The Court considered this constitutional (due process and equal

1 *United States v. Wells,* 29 F.4th 580, 586 (9th Cir. 2022).
2 *Id.* at 586-87 (emphasis added); *citing, United States v. Torres,* 828 F.3d 113, 1124-25 (9th Cir. 2016).
3 *United States v. Odachyan,* 749 F.3d 798, 800 (9th Cir. 2014).
4 *Id.* at 801.

protection) argument despite Odachyan's appeal waiver.[5]

The government does not cite or address any of these arguments or authorities in their briefing. *See,* BFA at 35-36, 45-47 (failing to cite *Wells, Torres, Odachyan, Bibler,*[6] or *Attar*[7]); OB 27-32 (citing same).

A defendant's agreement to waive appellate review of her sentence is implicitly conditioned on the understanding that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations.[8] Ms. Sullivan did not knowingly and voluntarily give up all her constitutional rights subsequent to entry of her plea and plea waiver. The Constitution is the supreme law of the land and Ms. Sullivan was entitled to expect that her plea agreement would not lower this floor below which the subsequent proceedings in her case could not fall. Ms. Sullivan's appeal waiver thus does not bar consideration of her argument that the district court violated the Sixth Amendment in refusing to continue to allow her to represent herself at sentencing.

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5 *Id.*

6 *United States v. Bibler,* 495 F.3d 621, 624 (9th Cir. 2007) (reasoning that an appeal waiver will not apply if the sentence violates the law, for example if the sentence violates the Constitution).

7 *United States v. Attar,* 38 F.3d 727, 732 (4th Cir. 1994) (considering Sixth Amendment argument despite appeal waiver and reasoning "a defendant who executes a general waiver of the right to appeal his sentence in a plea agreement 'does not [thereby] subject himself to being sentenced entirely at the whim of the district court. . .").

8 *Id.*

II. The Government Plainly Breached the Plea Agreement by Arguing that the Charges to Which Ms. Sullivan Pled Guilty did not Adequately Reflect the Seriousness of her Actual Offense Behavior.

The plain language of Ms. Sullivan's plea agreement includes a stipulation by the government that the charges to which Ms. Sullivan pled guilty adequately reflected the seriousness of her actual offense behavior. 6-ER-1190 (at paragraph 9 under the heading "Factual Stipulations"). The government argued at Ms. Sullivan's sentencing that these charges and their attendant losses did not adequately reflect the seriousness of her actual offense behavior so the Court should impose consecutive sentences amounting to a total term of imprisonment significantly beyond even the statutory maximum sentence for any offense to which Ms. Sullivan pled guilty. The government now argues that they did not breach their agreement with Ms. Sullivan because the referenced provision did not really mean what it said, and that even if they did breach their agreement the error is not plain because their arguments played little if any role in the district court's sentencing decision. BFA at 37-45. Neither argument is persuasive.

First, the government argues that "in context" Ms. Sullivan's plea agreement does not mean what it says, pointing out that the language at issue is merely a "general recital" included in all plea agreements as required by Local Rule. BFA at 32, 39.[9] The government argues that this provision in Ms. Sullivan's plea

9 *Citing,* Rule 32.1(a) of the District of Hawaii Criminal Local Rules (August 11,

agreement was only included to somehow assure the district court that there had been no inappropriate leniency in the plea bargaining process. BFA at 39-40.[10] But the agreement itself says nothing of the sort. *See,* 6-ER-1177-1204.

The literal terms of Ms. Sullivan's plea agreement include various "STIPULATIONS," 6-ER-1183, including an agreement by "the parties," i.e. both Ms. Sullivan and the government, "that the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior . . ." 6-ER-1190. The fact that this stipulation and agreement was entered pursuant to a Local Rule does nothing to change the plain meaning of its guarantee. It was entirely objectively reasonable for Ms. Sullivan to understand that following her plea the government would not argue that the charges to which she pled did not adequately reflect the seriousness of her actual behavior.[11] That is what the plea agreement said. *See,* 6-ER-1190. To the extent there is any perceived lack of clarity, the government bears responsibility for the same because they drafted the agreement and any ambiguity must be construed in Ms. Sullivan's favor.[12]

2011).

10 *Citing, United States v. Fine,* 975 F.2d 596, 601 (9th Cir. 1992) (en banc).

11 *See, United States v. Alcala-Sanchez,* 666 F.3d 571, 575 (9th Cir. 2012) (the government is held to the literal terms of their plea agreements); *Brown v. Poole,* 337 F.3d 1155, 1159-60 (9th Cir. 2003) (employing objective standards in which the parties' reasonable beliefs control).

12 *See, United States v. Cope,* 527 F.3d 944, 950 (9th Cir. 2008); *United States v. Franco-Lopez,* 312 F.3d 984, 989 (9th Cir. 2002).

None of the cases cited by the government in support of the argument that "in context" Ms. Sullivan's plea agreement does not mean what it says compel a different result because none involved the plea agreement language at issue here. For example, the government cites *United States v. Streich,* BFA at 41, where the defendant argued the government breached its plea agreement not to prosecute additional offenses by basing its sentencing recommendation on those additional offenses.[13] Streich's only argument and this Court's decision were both based solely on language in his plea agreement regarding non-prosecution.[14] The decision in *Scott,* an unpublished memorandum decision relied upon by the government, BFA at 43, was substantively identical.[15] Though Ms. Sullivan's plea agreement included a similar promise, her argument regarding the government's breach is not based thereon so the analogy to *Streich* and *Scott* is inapposite.

The government also relies on *United States v. Kaila,* an unpublished memorandum disposition summarily listing four different conclusions without providing much factual background or reasoning. BFA at 44.[16] The whole of the

13 *United States v. Streich,* 560 F.3d 926, 930 (9th Cir. 2009).

14 *Id.* (focusing on the crucial term, "prosecute," in the context of Streich's plea agreement and the government's promise not to prosecute certain offenses).

15 *United States v. Scott,* 735 F. App'x 347, 348 (9th Cir. 2018) (unpublished memorandum disposition) (government's promise that it would not prosecute Scott for absconding did not preclude the district court from considering this conduct at sentencing).

16 *United States v. Kaila,* 366 Fed. App'x 782, 783 (9th Cir. 2010) (unpublished memorandum disposition).

Kaila Court's discussion of the question of breach follows:[17]

> The district court properly sentenced Kaila pursuant to the unambiguous terms of the plea agreement, which did not preclude the government from arguing that a higher sentence was warranted pursuant to 18 U.S.C. § 3553(a). *See, United States v. Streich,* 560 F.3d 926, 930 (9th Cir. 2009) ("It is irrelevant that the government advocated for a higher sentence based on uncharged conduct. It never promised to do the contrary, and we therefore conclude that it did not breach the plea agreement); *see also, United States v. Cannel,* 517 F.3d 1172, 1177 (9th Cir. 2008).

Kaila does not support the government's position herein.

Ms. Sullivan does not argue that because the government promised not to prosecute her for certain offenses or to dismiss certain counts, they breached the plea agreement by referencing the same at sentencing. *See,* OB at 34-37. Rather, Ms. Sullivan argues that because the government stipulated and agreed that the charges to which she pled adequately reflected the seriousness of the actual offense behavior, they would not argue the opposite at sentencing. *See,* OB at 34-37. In contravention of this agreement, the government expressly relied on what they termed "a plethora of criminal offenses" purportedly uncovered in their investigation but not referenced in any way in Ms. Sullivan's plea agreement. *See,* 2-ER-180-209; *see also, e.g.,* 1-ER-94 line 1-15, -99 line 6-25. In this respect the government's argument at sentencing was quite clear. The government expressly argued that none of the "ink spilled in this case," presumably including Ms.

17 *Id.*

Sullivan's plea agreement, "has ever truly reflected the full scope of Ms. Sullivan's conduct in this case." 1-ER-81 line 5-8.

Second, relying on another unpublished memorandum disposition,[18] the government argues that even if they did breach their agreement with Ms. Sullivan, the error is not plain since the district court did not consider "the government's arguments regarding other uncharged conduct not in the PSR." BFA at 45; *citing,* 1-ER-104. The District Court did state at sentencing:

> Now let me say too, I know [AUSA] Ms. Perlmutter talked about a number of things that aren't in the [Presentence] report. I'm going to sentence you based on what's in this report, not other information, as far as offense conduct. Based on information that's in the report, not other conduct that Ms. Perlmutter referred to today.

1-ER-104 line 13-18. The Court also immediately continued:

> But there's no question that this conduct was driven by this sense of entitlement and greed, and it just didn't matter who was in the way.

1-ER-104 line 19-21. So one the one hand, the Court said this conduct wouldn't be considered but then on the other hand, the Court did rely on and note the intent behind this conduct. *See,* 1-ER-104 line 13-21.

The District Court obviously heard and considered the government's arguments regarding sentencing. The District Court did not impose the twenty-six year sentence recommended by the government, but the District Court also did not

18 *United States v. Smith,* 630 Fed. App'x 672 (9th Cir. 2015) (unpublished memorandum disposition).

impose the far lower terms recommended by Probation or by Ms. Sullivan.[19] Rather, the District Court considered all the arguments and settled on a term of imprisonment nearly two and a half times the length of that requested by the defense. 2-ER-148; 1-ER-4, 21; 10-ER-2208-10. Under these circumstances, it cannot be said that the government's arguments had no discernible effect on the District Court's decision-making process.

III. Ms. Sullivan's Actions did not Justify Revocation of her Sixth Amendment Right to Represent Herself.

The government argues that the District Court's revocation of Ms. Sullivan's Sixth Amendment right to self-representation was not error because she engaged in "serious and obstructionist misconduct." BFA at 55.[20] The United States Supreme Court has recognized that "serious and obstructionist misconduct" could support revocation of a defendant's right to self-representation, but the Court has not defined such misconduct clearly.[21]

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19 The government wrote, "Sullivan argues that one of Mr. Barbee's shortcomings as a result of the 'conflict,' was his failure to make any sentencing recommendation. OB at 51. Her contention is wrong." FBA at 68. This is a misrepresentation of Ms. Sullivan's briefing in an apparent effort to claim that counsel has misstated the record. Page 51 of Ms. Sullivan's Opening Brief provides: "**In his sentencing memorandum,** defense counsel failed to include any sentencing recommendation." OB at 51 (emphasis added); *citing,* 2-ER-168; 10-ER-2207. This is absolutely correct. *See,* 2-ER-168; 10-ER-2207.

20 *Citing, Faretta v. California,* 422 U.S. 806, 834 n.46 (1975).

21 *See, id.*

In support of the proposition that Ms. Sullivan's conduct rose to this level, the government cites *United States v. Brock,* BFA at 56, a Seventh Circuit case upholding a district court's refusal to allow self-representation.[22] Consistent with the cases cited in Ms. Sullivan's Opening Brief, *see* OB at 40-47,[23] *Brock* illustrates the type of extreme conduct that rises to the level of "serious and obstructionist misconduct" sufficient to disallow self-representation. At an initial hearing to determine whether Brock's waiver of his Sixth Amendment right to counsel was knowing, intelligent, and voluntary, Brock challenged the Court's authority, refused to answer the Court's questions, refused to cooperate in any way with the proceedings, and stormed out of the courtroom.[24] Under these extreme circumstances, the *Brock* Court reached the rather unremarkable conclusion that, where the "defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel."[25] Ms. Sullivan's conduct preceding the district court's decision to revoke her self-representation never rose to this level.

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22 *United States v. Brock,* 159 F.3d 1077, 1079 (7th Cir. 1988).

23 *Citing, United States v. Johnson,* 610 F.3d 1138, 1144 (9th Cir. 2010); *United States v. Flewitt,* 874 F.2d 669, 674-75 (9th Cir. 1989); *United States v. Lopez-Osuna,* 242 F.3d 1191, 1200 (9th Cir. 2000).

24 *Brock,* 159 F.3d at 1078-79.

25 *Id.* at 1079; *see also, id.* at 1080 (reasoning, "Brock's conduct made it practically impossible to proceed").

The government similarly relies upon a concurring opinion in *United States Gougher,* an unpublished Ninth Circuit memorandum opinion.[26] BFA at 56. This case similarly illustrates the extreme type of conduct that rises to the level of "serious and obstructionist misconduct" sufficient to refuse self-representation. Gougher held sovereign citizen beliefs and apparently took the position that he was not subject to federal laws and proceedings.[27] As in *Brock*, Gougher refused to meaningfully participate even in a *Faretta* hearing to determine if he would waive his Sixth Amendment right to counsel.[28] At that hearing, Gougher repeatedly and unceasingly insisted that he did not understand the nature of the charges against him.[29] Gougher characterized the United States an an officious corporation and claimed not to understand how the United States could assert the authority to punish him at all.[30] Under these circumstances, the *Gougher* Court affirmed the district court's refusal to allow self-representation.[31] Again, Ms. Sullivan's conduct never rose to this level.

Ms. Sullivan successfully represented herself for nearly two years. *See,* 10-ER-2262-2452; 11 ER-2454-95. Before granting Ms. Sullivan's motion to proceed

26 *United States v. Gougher,* 835 F. App'x 231, 237 (9th Cir. 2020) (unpublished memorandum).
27 *Id.* at 233.
28 *Id.* at 234.
29 *Id.*
30 *Id.* at 237 (Collins, concurring).
31 *Id.* at 234.

pro se, the District Court held two very thorough hearings to ensure Ms. Sullivan's unequivocal invocation of her right to represent herself. *See,* 9-ER-1959, 1974 line 15 – 1975 line 7, 1985. Subsequently, the District Court voiced displeasure over Ms. Sullivan's prolific filings which the Court saw as frivolous, abusive, etc. 8-ER-1861, 1862-64; *see also,* 10-ER-2256-2452; 11-ER-2454-64. But throughout all this, it remained clear that Ms. Sullivan was very much competent to represent herself and there was no basis to revoke her *pro se* status. 7-ER-1596, 1603 line 22 – 1605 line 12; 8-ER-1670, 1673 lines 6-7, 1766, 1767.

Though the issues concerning Ms. Sullivan's filings were raised and re-raised on multiple occasions, the district court found that Ms. Sullivan's continued self-representation was appropriate—until she moved to withdraw her plea. *See,* 6-ER-1205, 1253 line 25 – 1254 line 17. Even then, the government recognized that Ms. Sullivan's right to self-representation could not be revoked based on her pattern of vexatious filings, there could be no fear about Ms. Sullivan undermining a trial (since there would be no trial), and the District Court could take various other steps to ensure the continued orderly administration of justice. 5-ER-1074. Though the government takes a different position now, they did not argue in the district court that Ms. Sullivan's actions were so egregious that they rose to the level of serious and obstructionist misconduct that revocation of her Sixth

Amendment right to self-representation was required. *See,* 5-ER-1071, 1073 (reasoning Ms. Sullivan's "vexatious filings alone do not appear to be a sufficient basis to terminate her *pro se* status prior to sentencing" and concluding "it is not clear that Sullivan's pro se status should be terminated at this time.").

The District Court's revocation of Ms. Sullivan's *pro se* status and appointment of counsel over her objection was expressly based on Ms. Sullivan's prolific filings. *See, e.g,* 5-ER-1043 line 10-13 ("The issue is that she continuously is abusive because she doesn't listen to my orders when she continuously seeks the same relief for the same conduct over and over and over again."); *see also,* 1-ER-143; 5-ER-1015 line 17 – 1019 line 13, 1026 lines 4-7, 1045 lines 15-21.

The government's response never addresses this crucial fact plainly forming the basis for the District Court's revocation of Ms. Sullivan's Sixth Amendment right to represent herself. *See,* BFA at 45-58. Likewise, the government does not address the authority cited in Ms. Sullivan's opening brief holding that the Sixth Amendment right to self-representation cannot be revoked based on the filing of even very numerous, continual, nonsensical pleadings. *Compare,* OB at 42-43;[32] *with,* FBA at 45-58.

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32 *Citing, United States v. Johnson,* 610 F.3d 1138, 1140-47 (9th Cir. 2010); *United States v. Flewitt,* 874 F.2d 669, 673-75 (9th Cir. 1989).

Instead, the government argues a litany of conclusory characterizations of Ms. Sullivan's conduct citing 5-ER-1046. BFA at 53-54 (Ms. "Sullivan deliberately and repeatedly violated the district court's explicit orders, manipulated court procedures, made misrepresentations to the court, disrupted various pretrial proceedings on multiple occasions, and was warned repeatedly that her pro se status was in jeopardy yet persisted in the same type of conduct. *See, e.g.,* ER-1046."). Importantly, at 5-ER-1046, the District Court was finding that the issue "especially relevant" to the decision to revoke Ms. Sullivan's *pro se* status was "her repeatedly raising issues, repeatedly, over and over, raising issues that were previously resolved by the Court and despite clear warnings to stop raising those issues." 5-ER-1046 line 6-9; *see also,* 5-ER-1046 line 14-15 (District Court continuing, "[t]he issue is, once I've ruled you have to live by that ruling."). Notwithstanding the government's characterizations thereof, the other portions of the record cited by the government in their argument on this issue similarly reveal the District Court's clear focus on Ms. Sullivan's repetitive filings as the basis for the Court's order. *See, e.g.,* BFA at 54; *citing,* ER-1042-45.

The government also argues that even if the District Court's revocation of Ms. Sullivan's *pro se* status did violate the Sixth Amendment, the error was harmless because "Sullivan's own arguments were presented fully during

sentencing." BFA at 58-59. Ms. Sullivan's arguments were never fully presented; rather, most of her filings subsequent to counsel's appointment were stricken. *See,* 1-ER-133 (minute order striking Motion to Withdraw Pleas because "Defendant is represented by counsel and cannot file a motion to withdraw from her pleas of guilty as a pro se litigant."), 134-38 (all same); 10-ER-2179-2204 (docket entry no. 47, 101, 104, 134, 135, 137, 148, 155, 168, 173 all striking pleadings filed by Ms. Sullivan); 11-ER-2546-77 (same).

The government's argument also ignores the fact that Ms. Sullivan's other arguments were substantially muted by her inability to make them directly and by the necessity of simultaneously trying to present these arguments while her own counsel was advocating against her. The government's argument in this respect is essentially that hybrid representation is equivalent to self-representation. But the government cites no authority to support this proposition.

Finally, contrary to the government's assertion, *see* BFA at 67, counsel did pull punches in representing Ms. Sullivan. The most obvious example is counsel's arguing in a sentencing memorandum that the government had breached Ms. Sullivan's plea agreement but never moving to withdraw Ms. Sullivan's plea despite knowing that she had vehemently desired to do so. *See,* 2-ER-170-71 (defense sentencing memorandum discussing the government's breach); 10-ER-

2169-2210 (docket entries showing no motion to withdraw Ms. Sullivan's plea on this basis); 11-ER-2511-82 (same). In addition to pulling this punch, counsel threw (metaphorical) punches directly at Ms. Sullivan effectively calling her a malicious liar in more than one pleading and oral presentation. 4-ER-766 (declaration of counsel referencing Ms. Sullivan's "malicious and false allegations"); 3-ER-451-52 (declaration of counsel pointing out Ms. Sullivan's "false and misleading assertions of fact" and 'staged' court filings); 4-ER-559 lines 12-25 (counsel going on to declare that Ms. Sullivan's allegations were not true and offering detailed explanations to prove the same).

The District Court's violation of Ms. Sullivan's Sixth Amendment right to represent herself following her guilty plea was constitutional error and it was not harmless. This error did affect her sentence and remand for re-sentencing is required as a result.

IV. Appointed Counsel did have an Actual Conflict of Interest and this Conflict did Adversely Affect his Representation.

Following the District Court's revocation of Ms. Sullivan's *pro se* status, court-appointed counsel alleged that Ms. Sullivan drew a line in the sand, threatening him with a malpractice lawsuit which counsel deemed would be of concern to his "insurance agent." 4-ER-772 lines 10 – 773 line 2. Counsel explained quite clearly that he felt he could not continue to represent Ms. Sullivan

while simultaneously defending himself against her "malicious and false allegations." 4-ER-766; 10-ER-2194; *see also,* 3-ER-451-52 (declaration of counsel pointing out Ms. Sullivan's "false and misleading assertions of fact" and staged court filings meant to bolster a future claim of ineffective assistance of counsel); 4-ER-559 lines 12-25 (counsel going on to declare that Ms. Sullivan's allegations were not true and offering detailed explanations to prove the same).

The government argues none of this establishes that counsel's personal interests conflicted with those of Ms. Sullivan. BFA at 62-65. For this proposition, the government relies heavily on the previously discussed *Gougher* decision,[33] a footnote in the Eighth Circuit decision in *Smith v. Lockhart,*[34] and a California Superior Court decision in *People v. Hardy.*[35] BFA at 62-65. Each of these decisions is distinguishable and actually supports Ms. Sullivan's argument.

Gougher made one claim and one claim only concerning his counsel's purported conflict—that Gougher had filed a bar complaint against him.[36] The *Gougher* Court held that *standing alone* this singular assertion did not establish any conflict.[37] While the Eighth Circuit did drop a footnote in *Smith* recognizing the danger in allowing defendants to manufacture conflicts of interest by initiating

33 *Gougher,* 835 F. App'x at 234.
34 *Smith v. Lockhart,* 923 F.2d 1314, 1321 n.11 (8th Cir. 1991).
35 *People v. Hardy,* 825 P.2d 781, 806-07 (Cal. Sup. Ct. 1992).
36 *Gougher,* 835 F. App'x at 234.
37 *Id.*

lawsuits against their attorneys,[38] in the body of their opinion the Court emphasized:[39]

> A federal lawsuit pitting the defendant against his attorney certainly suggests divided loyalties and gives the attorney a personal interest in the way he conducted Smith's defense – an interest independent of, and in some respects in conflict with, Smith's interest in obtaining a judgment of acquittal.

And the *Hardy* Court similarly reasoned "that being named as a defendant in a lawsuit by one's client can place an attorney in a situation where his or her loyalties are divided."[40] To determine whether counsel's loyalties were in fact divided, the *Hardy* Court looked to counsel's perception of the situation, reasoning that even if counsel objectively had little to fear, counsel's sincere subjective belief that he was at risk and that he would thereby be prevented from actively representing his client controlled.[41] In this vein, the *Hardy* Court examined whether counsel desired to continue the representation and believed his advocacy would not be inhibited.[42] Citing the Supreme Court, the Hardy Court reasoned:[43]

> The United States Supreme Court has addressed this point, noting that trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. A criminal defense attorney is in

38 *Smith,* 923 F.2d at 1321 n.11.
39 *Id.* at 1321 (internal quotations omitted).
40 *Hardy,* 825 P.2d at 806.
41 *Id.* at 807.
42 *Id.*
43 *Id.* (internal quotations and citations omitted); *quoting,Cuyler v. Sullivan,* 446 U.S. 335, 347 (1980); *Holloway v. Arkansas,* 435 U.S. 475, 485 (1978).

> the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. [Counsel's] considered opinion that the lawsuit would not prevent his full and active representation of Hardy is thus a significant factor when determining whether an actual conflict existed.

In contrast to these facts underlying the cases cited by the government, Ms. Sullivan's appointed counsel did not want to continue to represent her and did not believe his representation would be unaffected as a result of her allegations against him. *See,* 4-ER-766, 772 line 10 – 773 line 2. To the contrary, counsel explained quite clearly that he felt he could not continue to represent Ms. Sullivan while simultaneously defending himself against what he termed her "malicious and false allegations." 4-ER-776; 10-ER-2194. When the District Court averred that counsel had nothing to fear because Ms. Sullivan's allegations were not well-founded, counsel candidly explained "[m]y insurance agent doesn't care." 4-ER-773 line 2. Counsel then went on to prove his point by actively advocating against Ms. Sullivan, i.e. dividing his loyalty and putting his own personal interests above his duties to Ms. Sullivan. *See,* 3-ER-451-52; 4-ER-559 lines 12-25; 12-ER-2602 lines 8-11; 10-ER-2201.

The government also argues that even if Ms. Sullivan's counsel had a conflict of interest, she cannot show any adverse affect. BFA at 65-68. This is incorrect; Ms. Sullivan's counsel's advocacy was very much adversely affected by

his personal self-interest. Ms. Sullivan's counsel repeatedly swore to the Court that she had made malicious and false allegations and assertions of fact in an effort to commit a fraud against him. *See,* 3-ER-451-52; 4-ER-559 lines 12-25; 12-ER-2602 lines 8-11; 10-ER-2201. Counsel knew Ms. Sullivan wanted to withdraw her plea because she had filed numerous motions to do so. *See,* 6-ER-1127; 5-ER-998, 1100; 4-ER-802; 3-ER-454; 10-ER-2169; 2172, 2192, 2199. Counsel recognized in his sentencing memorandum that the government had breached the plea agreement, 2-ER-170-71; 10-ER-2207, but never moved to withdraw the plea on this basis, see 11-ER-2511-82; 10-ER-2169-210, resulting in the application of a plain error standard of review on appeal. Though counsel set forth some arguments regarding certain guidelines computations drafted by Ms. Sullivan, he made no sentencing recommendation in his sentencing statement. *See,* 2-ER-168-75. At sentencing, counsel did make an oral recommendation but having already personally joined the government in maligning Ms. Sullivan, he was in no real position to zealously advocate for the same.

Ms. Sullivan's counsel's divided loyalties did adversely affect the representation Ms. Sullivan received following her plea. Ms. Sullivan need not establish prejudice (i.e. that a motion to withdraw her plea necessarily would have been successful or that a different approach or attorney would have led to a lesser

sentence). Under these circumstances, counsel's actual conflict of interest and the resulting adverse affect on his representation requires remand for resentencing.

CONCLUSION

Ms. Sullivan's case should be remanded for further proceedings where she may elect to withdraw her pleas or proceed to re-sentencing before a different judge where the government will be obligated to comply with the terms of the agreements.

Dated this 27th day of April, 2024.

/s/ Cassandra L. Stamm
Attorney for Appellant Leihinahina Sullivan

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-573 & 23-575

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Appendix E

No.s 23-573 & 23-575

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEIHINAHINA SULLIVAN,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Hawaii
No.s CR 17-00104 JMS & 21-00096 JMS
Hon. J. Michael Seabright

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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I. INTRODUCTORY STATEMENT OF COUNSEL

Appellant Leihinahina Sullivan seeks panel rehearing or en banc review of the Memorandum decision filed October 30, 2024. A copy of this decision is attached as Exhibit 1 to this petition. As explained below, the panel's memorandum decision overlooks or misapprehends several points of fact warranting panel rehearing pursuant to Federal Rule of Appellate Procedure 40(a). (2). Moreover, the breach of plea agreement issue involves a question of exceptional importance warranting en banc review pursuant to Federal Rule of Appellate Procedure 35(a)(2).

The panel's memorandum decision overlooks or misapprehends several points of fact concerning the government's breach of their plea agreement with Ms. Sullivan. The panel decision fails to measure the government's alleged breach against the literal terms of their plea agreement herein, instead analogizing to a nonprosecution agreement. The panel's decision additionally either overlooks or misapprehends the nature of the alleged breach which went well beyond a mere reference to relevant conduct at sentencing. Finally, this is an issue of exceptional importance touching on the fundamental fairness of the plea bargaining system in the District of Hawaii and elsewhere.

The panel's memorandum decision also overlooks several critical facts concerning Ms. Sullivan's appointed counsel's conflict of interest. The panel concluded counsel's divided interests did not affect his performance in any way. This conclusion effectively ignores the undisputed fact that counsel openly advocated against Ms. Sullivan, calling her a malicious liar, arguing that her allegations were untrue, false, and misleading, and elaborating on his suspicions and beliefs that Ms. Sullivan was intentionally staging a future claim of ineffective assistance of counsel.

II. STATEMENT OF THE CASE

Leihinahina Sullivan is a fifty-two year old mother of two currently serving a term of 204 months imprisonment. 1-ER-2-27; PSR, Sub. Doc. 1514 at 3, 52. Ms. Sullivan appealed her conviction and sentence raising several issues, including whether the government plainly breached their plea agreement and whether appointed counsel had an actual conflict of interest that adversely affected his representation at sentencing. The Court rejected her arguments in an unpublished memorandum decision filed October 30, 2024. Exh. 1.

A. Breach of Plea Agreement

Pro se, Ms. Sullivan entered into a plea agreement admitting three fraudulent schemes involving tax, credit card, and financial aid-related fraud. 6-ER-1183-

1190. In the plea agreement, the government included a "factual stipulation" "that the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior and that accepting this Agreement will not undermine the statutory purposes of sentencing." 6-ER-1190.

At sentencing, the government argued that the charges to which Ms. Sullivan pled guilty, including all the relevant conduct thereto, *did not* fully reflect the seriousness of her actual offense behavior. Exh. 1 at 2-3 ("At sentencing, the government referred to Sullivan as a 'one-woman criminal enterprise' and asserted that '[t]he truly staggering amount of criminal activity that Sullivan engaged in for over a decade is not reflected fully in the Guidelines calculation in this case."); 2-ER-180-191. In particular, the government argued that Ms. Sullivan was responsible for a plethora of uncharged and unproven offenses unrelated in any respect to those to which she had pled, including bankruptcy and mortgage fraud. 2-ER-178, 180, 183. Citing this additional alleged offense behavior, the government argued the over $3 million relevant conduct-based loss amount calculated by Probation, the Court, and the parties did not adequately reflect the seriousness of Ms. Sullivan's actual offense behavior. 2-ER-183. The government urged the Court to impose a sentence of twenty-six years—six years above the statutory maximum sentence for any offense to which Ms. Sullivan pled guilty and

significantly above all the standard sentencing ranges calculated by probation, the parties (the defense *and* the government), and the Court based on the offenses admitted in the plea agreement and the relevant conduct thereto. *See,* 2-ER-178.

The panel reasoned that the government's stipulation that the charges to which Ms. Sullivan pled adequately reflected the seriousness of her actual offense behavior was not a promise to avoid discussion of any uncharged and unproven offenses. Exh. 1 at 3.[1] The panel further reasoned that the sentencing Court's consideration of the uncharged and unproven offenses introduced and relied upon by the government in support of their sentencing recommendation was proper. Exh. 1 at 3-4.[2] The panel concluded that the government did not breach the plea agreement with statements made at sentencing. Exh. 1 at 2.

B. Appointed Counsel's Conflict

Shortly after her plea agreement was accepted by the Court, Ms. Sullivan moved to withdraw therefrom, 6-ER-1127 & 10-ER-2169, and the Court revoked her pro se status. 1-ER-143; 5-ER-1010, 1015 line 17 – 1045 line 21; 10-ER-2178-2179. Counsel was appointed over Ms. Sullivan's objection then subsequently moved to withdraw. 5-ER-1005; 4-ER-794, 765; 3-ER-450; 12-ER-2602 lines 8-11; 10-ER-2183, 2193-2194, 2201.

1 *Citing, United States v. Streich,* 560 F.3d 926, 930 (9th Cir. 2009).
2 *Citing,* 18 U.S.C. § 3661; *United States v. Christensen,* 732 F.3d 1094, 1104 n.2 (9th Cir. 2013).

Initially, appointed counsel worried that Ms. Sullivan's allegations of ineffective assistance of counsel had drawn a line in the sand that concerned him as well as his "insurance agent." 4-ER-772 line 10 – 773 line 2. Appointed counsel explained he could not represent Ms. Sullivan "while at the same time defend[ing] himself against Defendant's *malicious and false allegations*." 4-ER-766 (emphasis added); 10-ER-2194 (same). Then, in Ms. Sullivan's criminal case, counsel did defend himself arguing to the Court that her allegations about his representation were "[n]ot true" and offering detailed explanations of the same. 4-ER-559 lines 12-25. Counsel further volunteered to the Court his suspicion and belief that Ms. Sullivan was "staging her court filings in an attempt to create a record to bolster a future claim of ineffective assistance of counsel against [him]." 3-ER-452; 10-ER-2201.

While openly advocating against Ms. Sullivan as described above, counsel also recognized the government's breach of their plea agreement described above. *See,* 2-ER-170-171. Counsel wrote:

> the government informed the Court that the charges to which the defendant pled guilty to adequately reflected the seriousness of the actual offense behavior and that the plea agreement did not undermine the statutory purposes of sentencing. To the opposite of its position taken in 2021, the government now seeks an upward sentence departure and consecutive terms of imprisonment arguing that what was once an adequate plea agreement to address the offense conduct and soundly within the policies of sentencing has not become wholly

inadequate and undermines the purposes of sentencing.

2-ER-171 (emphasis in original). Despite recognizing the above and knowing full well that Ms. Sullivan had already repeatedly indicated her desire to withdraw the plea agreement, counsel failed to move to withdraw Ms. Sullivan's plea on this basis. *See,* 11-ER-2511-2582; 10-ER-2169-2210.

The panel concluded that "counsel's performance was not affected" in any way by any conflict between his own interests and those of Ms. Sullivan. Exh. 1 at 6. As proof of this proposition, the panel cited the fact that counsel "advocated for a sentence of 84 months, which was well below the Guidelines calculation and the probation department's recommendation." Exh. 1 at 6.

III. ARGUMENT

A. The Panel's Decision Concluding the Government did not Plainly Breach the Plea Agreement Overlooks or Misapprehends Several Points of Fact and Involves a Question of Exceptional Importance.

The panel recognized Ms. Sullivan's plea agreement contained a stipulation by the parties that "the charges to which the defendant is pleading guilty adequately reflect the seriousness of the actual offense behavior." Exh. 1 at 3. The panel also noted the government's reliance at sentencing on unproven and uncharged offenses well outside the scope of the plea agreement to justify an exceptionally long sentence of imprisonment. Exh. 1 at 2-3. But the panel

nonetheless concluded "[t]he government did not breach the plea agreement with statements made at sentencing." Exh. 1 at 2. To reach this conclusion, the panel either overlooked or misapprehended several important points of fact.

Had the government simply introduced and relied upon conduct relevant to the schemes to which Ms. Sullivan pled guilty, the panel conclusion could at least arguably follow. But that is not what actually happened. The government was not pointing only to relevant conduct at Ms. Sullivan's sentencing; such conduct was taken into account to great effect in the parties,' Probation's, and the sentencing Court's Guidelines calculations. Rather, the government's argument was that the Court should sentence Ms. Sullivan on the basis of "*other* criminal conduct . . . *not* accounted for in the Guidelines." 2-ER-183 (emphasis added) (government sentencing memorandum arguing "The Guidelines Do Not Reflect an Adequate Sentence in This Case," summing up the argument, "[f]inally, losses related to Sullivan's other criminal conduct are not accounted for in the Guidelines," and referencing alleged losses having nothing to do with the tax, credit card, and financial aid-related frauds included in Ms. Sullivan's plea agreement, including an alleged theft of unspecified funds donated to a widow, a suspected 2012 bankruptcy fraud, and a 2015 alleged mortgage fraud). The government's hyperbolic arguments specifically and intentionally relied upon matters that were

outside the scope of the plea agreement or any conduct relevant thereto—a position expressly disavowed in their plea agreement.

The panel reached its conclusion arguing that the quoted provision in the plea agreement (i.e. that the charges to which Ms. Sullivan pled adequately reflected the seriousness of her actual offense behavior) "was not a promise to avoid discussion of uncharged and unproven offenses" citing one case, *United States v. Streich*.[3] Exh. 1 at 3. But *Streich* involved a completely different promise in a plea agreement guaranteeing nonprosecution of additional offenses.[4] The terms of the *Streich* plea agreement specifically provided that although the government agreed "not to prosecute" additional offenses, the government would still provide "evidence of all relevant conduct committed by Defendant."[5] Not surprisingly, the *Streich* panel held the government did not breach this plea agreement since the crucial promise was not "to prosecute" Streich for any additional offenses and the government's reliance on uncharged relevant conduct at sentencing did not contravene this specific language and was in fact expressly allowed by the terms of the plea agreement.[6]

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3 *United States v. Streich,* 560 F.3d 926, 930 (9th Cir. 2009).
4 *Id.* at 928-29.
5 *Id.*
6 *Id.* at 930.

The panel does not cite any case regarding the plea provision at issue here, a government agreement that the charges to which the defendant pled adequately reflected the seriousness of the actual offense behavior. *See generally,* Exh. 1 at 2-4. This fact is critical to the analysis because these are the literal terms by which the government's alleged breach must be measured.[7] Plea agreements are contracts and the government is to be held to their literal terms.[8] Ms. Sullivan's argument is not that the government violated any nonprosecution agreement. Rather, Ms. Sullivan's argument is that the government stipulated that the charges to which she pled guilty "adequately reflect[ed] the seriousness of [her] actual offense behavior," Exh. 1 at 3, and then they turned around at sentencing and said just the opposite, arguing that the offenses and all the relevant conduct thereto referenced in the plea agreement were insufficient indicators of the seriousness of her offense behavior and the sentence she should receive as a result. 2-ER-178, 180, 183.

The panel also relied on the fact that "other portions of the plea agreement explained that several issues were unresolved and would be discussed at sentencing" and that since there is no limitation on the information concerning the background, character and conduct of the defendant at sentencing this somehow authorized the government's reliance on uncharged and unproven offenses well

7 *United States v. Alcala-Sanchez,* 666 F.3d 571, 575 (9th Cir. 2012).
8 *Id.*

outside the scope of the plea agreement. Exh. 1 at 3-4.[9] But the government did not simply introduce and rely on relevant conduct or information concerning Ms. Sullivan's background or character. The government introduced and relied upon other alleged offenses that were beyond the scope of any offense mentioned in the plea agreement or the relevant conduct thereto. 2-ER-178-190.

Our current federal criminal justice system is very much a system of plea bargaining with some ninety-seven percent of all criminal cases resulting in a plea.[10] Federal Rule of Criminal Procedure 11 governs these pleas and provides that when a plea agreement specifies the government will not bring or will move to dismiss charges, the district court may reject the agreement and advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.[11] The purpose of this rule is to highlight both the Court's authority to reject such an agreement and to safeguard the defendant's interests and the interests of fairness at the time of the rejection of such a plea by informing the defendant upon rejection of the agreement that she shall not receive the bargained-for concessions if she

9 *Citing,* 18 U.S.C. § 3661; *United States v. Christensen,* 732 F.3d 1094, 1104 n.2 (9th Cir. 2013).

10 *United States v. Mutschler,* 152 F. Supp. 3D 1332, 1333 (W.D. Wash. 2016) (citing Department of Justice statistics indicating that roughly 97% of federal convictions result from guilty pleas).

11 Fed. R. Crim. P. 11(c)(5).

does not withdraw her plea.[12]

Rule 11 does not attempt to define the criteria for rejection of such a plea agreement[13] but the District of Hawaii has put additional safeguards in place.[14] In the District of Hawaii, when a plea agreement resulted in the dismissal of charges or an agreement not to pursue potential charges, the parties were obligated by local rule to "include a statement, on the basis of the information then known by the parties, as to why the remaining charges adequately reflect the seriousness of the actual offense behavior and why accepting the agreement will not undermine the statutory purposes of sentencing."[15]

So in this case, the government entered into a stipulation assuring not just Ms. Sullivan but also the District Court that the offenses to which Ms. Sullivan pled guilty adequately reflected the seriousness of her actual criminal behavior. It was only after Ms. Sullivan had signed off on the plea agreement (without the assistance of counsel) and after the Court had accepted the agreement that the

12 Fed. R. Crim. P. 11(c)(5), advisory committee note—1979 Amendment ("there must ultimately be an acceptance or rejection by the court of a type (A) [including an agreement to not bring or dismiss other charges] or (C) agreement so that it may be determined whether the defendant shall receive the bargained for concessions or shall instead be afforded an opportunity to withdraw his plea.").

13 Fed. R. Crim. P. 11(c)(5), advisory committee note—1974 Amendment ("The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement.").

14 *See,* Local Crim. R. 32.1 (D. Haw.) (Aug. 11, 2011).

15 *Id.*

government changed their tune, arguing that in fact the offenses to which Ms. Sullivan had pled and all the relevant conduct thereto did not adequately reflect the seriousness of her criminal behavior and additional offenses warranted a sentence far outside even the guideline range calculated by the government and beyond the statutory maximum for any of these offenses. Given the importance of plea agreements throughout the federal criminal system, this is very much an issue of exceptional importance.

Breaches of plea agreements implicate the constitutional guarantee of due process, i.e. basic fairness.[16] Plea agreements are contracts and the government is supposed to be held to the literal terms therein,[17] i.e. strict compliance is required.[18] Requiring strict compliance is meant to ensure both fairness in the plea bargaining process as well as to protect the integrity of the criminal justice system.[19]

In multiple instances, the panel's memorandum decision overlooks or misapprehends several points of fact concerning the government's breach of their plea agreement with Ms. Sullivan. This is an issue of exceptional importance touching on the fundamental fairness of the plea bargaining system in the District

16 *United States v. De la Fuente,* 8 F.3d 1333, 1336 (9th Cir. 1993).
17 *Alcala-Sanchez,* 666 F.3d at 575.
18 *United States v. Morales Heredia,* 768 F.3d 1220, 1230, 1234 (9th Cir. 2014).
19 *Id.* at 1230.

of Hawaii and elsewhere. Panel rehearing or en banc rehearing are warranted as a result.

B. The Panel's Decision Concluding Appointed Counsel did not have an Actual Conflict of Interest that Adversely Affected his Representation Overlooks or Misapprehends Several Points of Fact.

When an actual conflict of interest exists between a defendant and her lawyer, the Sixth Amendment protects the defendant from forced representation by that lawyer. Exh. 1 at 6.[20] The central question in such a case is whether such a conflict actually affected counsel's performance or merely posed a theoretical division of loyalties. Exh. 1 at 6.[21] Recognizing this law, the panel concluded that Ms. Sullivan's counsel's performance was not affected. Exh. 1 at 6. This conclusion either overlooks or misunderstands the facts herein.

Ms. Sullivan's counsel explained that his loyalty was divided between his own self-interest and the interests of Ms. Sullivan. Counsel candidly admitted that in his mind, Ms. Sullivan had drawn a line in the sand in the attorney-client relationship by accusing him of ineffective assistance of counsel and threatening a malpractice lawsuit against him. 4-ER-772 lines 10-22. According to counsel he and his "insurance agent" both cared about Ms. Sullivan's allegations, frivolous or not. 4-ER-772 line 20 – 773 line 2. Counsel forthrightly explained that he felt he

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20 *Citing, Garcia v. Bunnell,* 33 F.3d 1193, 1195 (9th Cir. 1994).
21 *Citing, Mickens v. Taylor,* 535 U.S. 162, 171 (2002).

could not continue representing Ms. Sullivan while at the same time defending himself against her allegations. 4-ER-766; 10-ER-2194.

After Ms. Sullivan's counsel candidly admitted there was no way he could simultaneously defend himself against Ms. Sullivan while defending her in her criminal case, the Court ordered him to do so. 5-ER-1004, 839; 4-ER-805, 769; 2-ER-298, 288, 245, 210; 1-ER-141, 131, 129; 10-ER-2183, 2191, 2193-2194, 2203-08. So counsel did what he felt he had to do; he simultaneously asserted his own interests while purportedly advocating on Ms. Sullivan's behalf. Counsel openly and plainly characterized Ms. Sullivan's allegations against him as malicious and false. 4-ER-766; 10-ER-2194. Counsel effectively called Ms. Sullivan a liar, bluntly asserting as a matter of fact that Ms. Sullivan's allegations were "not true," "false and misleading." 4-ER-559 line 12; 3-ER-451; 12-ER-2602 lines 8-11; 10-ER-2201. And counsel offered up his suspicions and beliefs that Ms. Sullivan was "staging her court filings in an attempt to create a record to bolster a future claim of ineffective assistance of counsel against your declarant." 3-ER-452; 10-ER-2201.

Counsel's performance was very much affected by his divided loyalty and self-interest in each of these instances. Absent some significant oversight or misunderstanding of the facts, it cannot be said that counsel was unaffected. He

advocated to the Court in support of his own interests to the detriment of Ms. Sullivan accusing her of making malicious and false allegations that were not true, false, and misleading, as well as staging a fraudulent claim of ineffective assistance of counsel. 4-ER-766, 559 line 12; 3-ER-451-452; 12-ER-2602 lines 8-11; 10-ER-2194, 2201. The panel's opinion fails to recognize or account for these critical facts.

Instead, the panel cites the fact that "counsel advocated for a sentence of 84 months, which was well below the Guidelines calculation and the probation department's recommendation" as proof that counsel was not at all affected by his divided loyalties. Exh. 1 at 6. This misses the point. Ms. Sullivan does not allege and the law does not require any showing that counsel wholly abrogated his duties to her in service to his own self-interest. Instead, Ms. Sullivan alleges that counsel's loyalty to her was divided (but not necessarily wholly eviscerated) and that his active advocacy against her demonstrates as much. The fact that counsel requested a below-Guidelines range sentence does not undermine this argument.

Moreover, while counsel ultimately made a defense-oriented recommendation concerning sentencing, he also inexplicably failed to move to withdraw Ms. Sullivan's plea even though he recognized the government had arguably breached the same and he was very well aware that Ms. Sullivan desired

to withdraw her plea. *See,* 2-ER-170-171; 10-ER-2169-2210; 11-ER-2511-2582. Of course, had Ms. Sullivan been allowed to withdraw her plea, counsel would have been forced to continue representing her through a lengthy trial, from counsel's perspective no doubt affording additional opportunities for Ms. Sullivan to stage and bolster the future claims he suspected and believed she was planning against him.

The panel's memorandum decision overlooks several critical facts concerning Ms. Sullivan's appointed counsel's conflict of interest. Counsel's performance was affected as detailed above. Panel rehearing is warranted as a result.

IV. CONCLUSION

For all these reasons, this Court should grant Ms. Sullivan's petition for panel rehearing or rehearing en banc.

Respectfully submitted this 11th day of November, 2024.

/s/ Cassandra L. Stamm
Attorney for Appellant Leihinahina Sullivan

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 23-573 & 23-575

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 3,477.

(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Cassandra Stamm **Date** Nov 11, 2024

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