**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

---

CLARE E. CONNORS
*United States Attorney*
*District of Hawaii*

REBECCA A. PERLMUTTER
*Assistant U.S. Attorney*
*Room 6-100*
*PJKK Federal Building*
*300 Ala Moana Blvd.*
*Honolulu, Hawaii 96850*
*Telephone: (808) 541-2850*

---

## TABLE OF CONTENTS

**Page**


JURISDICTION, TIMELINESS, AND BAIL STATUS ..... 1

STATEMENT OF THE ISSUES ..... 1

PERTINENT STATUTES AND REGULATIONS ..... 2

STATEMENT OF THE CASE ..... 2

STATEMENT OF FACTS ..... 4

A. Sullivan Engaged in Expansive Criminal Conduct That Victimized Most Everyone in Her Life ..... 4

B. Sullivan Was Indicted Five Times for Ongoing and Extensive Criminal Conduct ..... 6

C. Sullivan Represented Herself and Cycled Through Six Attorneys ..... 9

D. Sullivan Initiated the Plea Process, Negotiated Her Plea, and then Unsuccessfully Tried to Unwind It ..... 11

E. As a Pro Se Litigant, Sullivan Repeatedly Violated Court Orders and Disrupted Court Proceedings ..... 14

F. Sullivan's Deliberate Defiance of Court Orders and Obstructionist Conduct Led to Revocation of Her Pro Se Status Prior to Sentencing ..... 20

G. Sullivan's Sentencing Process Was Thorough and Hotly Contested by Both Parties ..... 22

H. Sullivan Tried to Remove Her Sentencing Counsel and Every Other Appointed Counsel That Represented Her ..... 26

SUMMARY OF ARGUMENT ..... 32

LEGAL ARGUMENT ..... 35

I. The Government Does Not Assert that Sullivan's Appeal Is Entirely Barred by the Plea Agreement's Appellate Waiver ..... 35

II. The Government Did Not Breach the Plea Agreement ..... 37

A. The Standard of Review is Plain Error ..... 37

B. The Government Advocated for a Fair Sentence Within the Bounds of the Plea Agreement ..... 37

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 ..... 45

A. Sullivan's Claim Is Barred by Her Appellate Waiver ..... 45

B Sullivan's Claim Is Subject to Harmless Error Review ..... 47

C. Sullivan's Deliberately Ignored and Defied the District Court's Repeated Warnings That Her Abusive Conduct Jeopardized her Pro Se Status ..... 49

D. Even if the District Court's Revocation of Sullivan's Pro Se Status Was an Error it Was Harmless ..... 58

IV. The District Court's Refusal to Appoint New Counsel Did Not Violate the Sixth Amendment ..... 59

A. The Standard of Review Is De Novo ..... 59

B. This Court Can Resolve Sullivan's Claim on Direct Appeal ..... 60

C. Sullivan's Frivolous Lawsuit Did Not Create an Actual Conflict of Interest Requiring New Counsel ..... 62

D. Even if There Was a Conflict, Sullivan Cannot Show That Mr. Barbee's Representation Was Adversely Affected ..... 65

CONCLUSION ..... 69

ADDENDUM

## TABLE OF AUTHORITIES

**Federal Cases** **Page(s)**


Culyer v. Sullivan,
446 U.S. 356 (1980) ..... 62

Faretta v. California,
422 U.S. 806 (1975) ..... 49, 55-56

Illinois v. Allen,
397 U.S. 337 (1970) ..... 50

Indiana v. Edwards,
554 U.S. 164 (2008) ..... 49

McKaskle v. Wiggins,
465 U.S. 168 (1984) ..... 48, 50, 51

Singh v. Curry,
689 F. Supp. 2d 1250 (E.D. Cal. 2010) ..... 49

Smith v. Lockhart,
923 F.2d 1314 (8th Cir. 1991) ..... 62-63

Underwood v. Sullivan,
2019 WL 926350 (C.D. Cal. Jan. 18, 2019), R&R adopted, 2019 WL 1505913 (C.D. Cal. Mar. 29, 2019) ..... 58

United States v. Avalos,
822 F. App'x 601 (9th Cir. 2020) ..... 46

United States v. Brock,
159 F.3d 1077 (7th Cir. 1998) ..... 56

United States v. Cannel,
517 F.3d 1172 (9th Cir. 2008) ..... 37

United States v. Clark,
218 F.3d 1092 (9th Cir. 2000) ..... 38

United States v. Cox,
757 F. App'x 527 (9th Cir. 2018) ..... 48

United States v. Edelmann,
458 F.3d 791 (8th Cir. 2006) ..... 50

United States v. Engel,
968 F.3d 1046 (9th Cir. 2020) ..... passim

United States v. Fine,
975 F.2d 596 (9th Cir. 1992) ..... 40

United States v. Flewitt,
874 F.2d 669 (9th Cir. 1989) ..... 19, 50-53, 57

United States v. Gougher,
835 F. App'x 231 (9th Cir. 2020) ..... 56, 62

United States v. Hernandez-Castro,
814 F.3d 1044 (9th Cir. 2016) ..... 36

United States v. Hurt,
543 F.2d 162 (D.C. Cir. 1976) ..... 64-65

United States v. Kaila,
366 F. App'x 782 (9th Cir. 2010) ..... 44

United States v. Lo,
839 F.3d 777 (9th Cir. 2016) ..... 45-46

United States v. Lopez-Osuna,
242 F.3d 1191 (9th Cir. 2000) ..... 57

United States v. Mabie,
663 F.3d 322 (8th Cir. 2011) ..... 48

United States v. Maness,
566 F.3d 894 (9th Cir. 2009) ..... passim

United States v. Mendez-Sanchez,
563 F.3d 935 (9th Cir. 2009) ..... 29, 65

United States v. Mendoza,
530 F.3d 758 (9th Cir. 2008) ..... 49

United States v. Mondragon,
228 F.3d 978 (9th Cir. 2000) ..... 41

United States v. Moore,
159 F.3d 1154 (9th Cir. 1998) ..... 62

United States v. Nickerson,
556 F.3d 1014 (9th Cir. 2009) ..... 60

United States v. Plascencia-Orozco,
852 F.3d 910 (9th Cir. 2017) ..... 60

United States v. Rahman,
642 F.3d 1257 (9th Cir. 2011) ..... 46, 61

United States v. Robinson,
967 F.2d 287 (9th Cir. 1992) ..... 60

United States v. Scott,
735 F. App'x 347 (9th Cir. 2018) ..... 43

United States v. Smith,
630 F. App'x 672 (9th Cir. 2015) ..... 45

United States v. Smith,
282 F.3d 758 (9th Cir. 2002) ..... 65

United States v. Spangle,
626 F.3d 488 (9th Cir. 2010) ..... 47, 49, 58

United States v. Streich,
560 F.3d 926 (9th Cir. 2009) ..... 38, 41

United States v. Transfiguracion,
442 F.3d 1222 (9th Cir. 2006) ..... 37

United States v. Walter-Eze,
869 F.3d 891 (9th Cir. 2017) ..... 64

United States v. Walters,
309 F.3d 589 (9th Cir. 2002) ..... 47

**Federal Statutes**

18 U.S.C. § 287 ..... 8
18 U.S.C. § 1512 ..... 9
18 U.S.C. § 1951 ..... 9
18 U.S.C. § 3231 ..... 1
18 U.S.C. § 3553 ..... passim
18 U.S.C. § 3661 ..... 42
18 U.S.C. § 1028A ..... 9
18 U.S.C. § 1341 ..... 8
18 U.S.C. § 1343 ..... 8
18 U.S.C. § 1956 ..... 9
28 U.S.C. § 1291 ..... 1
28 U.S.C. § 2255 ..... 35

**State Cases**

People v. Hardy,
825 P.2d 781 (Cal. Sup. Ct. 1992) ..... 65

**Rules**

Fed. R. Crim. P. 11 ..... 39, 46
Fed. R. Crim. P. 32 ..... 42

**Other**

U.S. Const. Amend. VI ..... 62
USSG § 2B1.1 ..... 25, 42
USSG § 6A1.3 cmt. ..... 42
USSG § 6B1.2 ..... 39
Local Crim. R. 32.1 (D. Haw.) ..... 2, 39

## 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.

---

[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.

---

[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

---

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

---

[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.

---

[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

---

[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

---

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]

---

[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

---

[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

---

[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.

---

[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

[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.

---

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

---

[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

---

[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

---

[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

[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,

CLARE E. CONNORS
United States Attorney

*/s/ Rebecca A. Perlmutter*
REBECCA A. PERLMUTTER
Assistant U.S. Attorney
PJKK Federal Building, Rm. 6100
300 Ala Moana Blvd.
Honolulu, Hawaii 96850
Telephone: (808) 541-2850
rebecca.perlmutter@usdoj.gov

# ADDENDUM

## TABLE OF CONTENTS

18 U.S.C. § 3553(a) ..... A1

District of Hawaii Criminal Local Rule 32.1 ..... A3

## 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**

## Form 8. Certificate of Compliance for Briefs

*Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf*

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

I am the attorney or self-represented party.

**This brief contains** 13,674 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** s/ *Rebecca A. Perlmutter* **Date** Apr 15, 2024

*(use "*s/[typed name]*" to sign electronically-filed documents)*

*Feedback or questions about this form? Email us at forms@ca9.uscourts.gov*