No.s 23-573 & 23-575

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEIHINAHINA SULLIVAN,

Defendant-Appellant.

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

APPELLANT'S CONSOLIDATED OPENING BRIEF

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INTRODUCTION

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

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

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

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

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

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

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

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

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

JURISDICTIONAL STATEMENT

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

BAIL STATUS STATEMENT

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

STATUTORY AND REGULATORY AUTHORITIES

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

ISSUES PRESENTED

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

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

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

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

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

STATEMENT OF THE CASE

I. Pre-plea

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Plea

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

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

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

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

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

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

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

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

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

III. Post-Plea

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in his Sentencing Statement:

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

A. Standard of Review

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

B. Argument

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

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

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

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

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

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

1. Breach of Plea Agreement

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

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

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

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

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

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

2. Unconstitutional Sentence

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

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

9 *Gonzalez,* 16 F.3d at 990.
10 *Bibler*, 495 F.3d at 624.
11 *See, Wells,* 29 F.4th at 586 (reasoning that the scope of the Constitutional exception to application of an appeal waiver required some clarification).
12 *Wells,* 29 F.4th at 586; *citing, Bibler,* 495 F.3d at 624. *See also, Wells,* 29 F.4th at 595 (*Bibler* created a "rule that appeal waivers are never valid to bar appeals of sentences when those appeals are brought on constitutional grounds.") (Hon. Bea, J. dissenting).
13 *Wells,* 29 F.4th at 586; *citing, Cooper v. Aaron,* 358 U.S. 1, 18 (1958).

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

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

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

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

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

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

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

18 *Id.* at 582.

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

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

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

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

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

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

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

21 *Id*.
22 *Id.* at 593.
23 *Id.* at 587 n.3 ("if this case is heard en banc, the en banc court can decide if *Bibler* and its progeny should be overturned and adopt a new rule. However, we as a panel are bound by our prior published decisions of our court.").
24 *Wells, rhg. denied,* 2022 U.S. App. LEXIS 13131 (9th Cir.), *cert. denied,* 143 S. Ct. 267 (2022).

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

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

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

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

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

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

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

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

3. Miscarriage of Justice

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

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

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

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

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

A. Standard of Review

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

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

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

B. Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

B. Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

84 *Id.* at 897.

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

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

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

88 *Id.*

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

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

A. Standard of Review

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

B. Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Dated this 20th day of December, 2023.

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

STATEMENT OF RELATED CASES

I am unaware of any related cases currently pending in this court.

Signature: /s/ Cassandra Stamm Date: December 20, 2023

CERTIFICATE OF COMPLIANCE

I am the attorney for Appellant Leihinahina Sullivan in these Cause No.s 23-573 and 23-575. This brief contains 11,387 words. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature: /s/ Cassandra Stamm Date: December 20, 2023

ADDENDUM

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Statutes

18 U.S.C. § 3231

District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. § 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

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