No.s 23-573 & 23-575

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEIHINAHINA SULLIVAN,

Defendant-Appellant.

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

APPELLANT'S CONSOLIDATED REPLY BRIEF

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INTRODUCTION

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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5 *Id.*

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

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

8 *Id.*

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

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

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

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

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

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

2011).

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

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

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

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

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

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

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

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

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

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

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

Kaila does not support the government's position herein.

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

17 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

21 *See, id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 27th day of April, 2024.

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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