No. 18-6871

IN THE SUPREME COURT

OF THE UNITED STATES

ARCHIE CABELLO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respodent

Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1) Does a Trial Judge have any duty to ensure that a defendants right to counsel of choice is protected?

2) When a defendant asserts his right to self-representation, does the Trial Judge have any duty to see that the self-representation is maningful?

3) Does the Trial Judge have any duty to ensure that all papers and representations presented to the Court are properly signed, before the Court and are not presented for any improper purpose pursuant to Rule 11(a) of pleadings, motions, and other papers, or representations to the Court, 11(b), 11(b)(1), 11(b)(2), 11(b)(3), and 11(b)(4) ?

4) Does the Trial Judge have discretion to disregard established Case Law?.....Can the Trial Judge disregard or alter the Rules of Criminal Procedure and Rule 11 Procedures on an ad hoc basis, to fit a paticular case or circumstances?

QUESTIONS PRESENTED1

1) Does a trial judge have any duty to ensure that a defendant's right to counsel of choice is protected?

2) When a defendant asserts his right to self-representation, does the trial judge have any duty to see that the self-representation is meaningful?

3) Does the trial judge have any duty to ensure that all papers and representations presented to the court are properly signed, properly before the court and are not presented for any improper purpose pursuant to Rule 11(a) of pleadings, motions, and other papers; representations to the court, 11(b), 11(b)(1), 11(b)(2), 11(b)(3), and 11(b)(4)?

4) Does the trial judge have discretion to disregard established case law? Can the trial judge disregard or alter the rules of Criminal procedure and Rule 11 procedures on an ad hoc basis, to fit a particular case or circumstance.

OPINIONS BELOW AND JURISDICTION

There was no written opinion in the Appeals Court addressing the issues relevant in this proceeding. On June 25, 2018 the Ninth Circuit filed its order denying the petition for a Writ of Mandamus to the District Court of Oregon.

This Court has Jurisdiction under 28 U.SC. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right... to have assistance of counsel for his defense". U.S. CONST., Amend. VI.

"No person shall be... deprived of life, liberty, or property, without due process of law..." U.S. CONST., Amend., V, XIV.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

COURT RULES

CANON

APPENDIXES

STATEMENT OF THE CASE

On December 2, 2010, the grand jury handed down a fifty-one count sealed indictment accusing Cabello, his wife Marian and his adult son Vincent.

Cabello was charged with conspiracy(18 U.S.C. §371) to commit bank larceny (18 U.S.C. §2113(b)), and making false statements on credit card applications (18 U.S.C. §2014) in the first count. Count 2 charged Cabello with a 2005 bank larceny. Count 3 charged Cabello with possession of stolen bank funds 18 U.S.C. §2133(c). Counts 4,9,10,11, and 12 each charged Cabello with making a false statement on a Credit card application. Count 15 with filing a false tax return for 2005 (26 U.S.C. §7206(i) and 18U.S.C. §2). Counts 16-50 accused Cabello of money laundering. (18 U.S.C. §1956(a). Finally Count 51 charged Cabello with conspiracy to commit money laundering.

In due course Cabello's co-defendants entered into plea and co-operation agreements with the government.

Cabello's attorney, Mr. Gerald Boyle was set to represent Cabello. Mr. Boyle of Milwaukee, Wi., had represented Cabello for 15 years. Mr. Boyle was threatened with prosecution and forfeiture if he represented Cabello.

The government claimed that he had a conflict. Although Mr. Boyle stated in a letter that it was absurd to think he had a conflict. Mr. Boyle was nevertheless threatened off the case and never appeared in court. As Cabello's attorney for 15 years he was familiar with all aspects of the case. the court then appointed Mr. Michael Smith to represent Cabello. Mr. Smith and the government proceeded to stipulate to a 14 month extension.

On Sept. 13, 2012 which was 4 days before trial, Cabello asked

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1) Defendant's exhibits are in App.3 and are serially paginated. They are referred herein as App.3 and page number.

for a representation hearing. Mr. Smith who had spent the previous month in London watching the Olympics informed Cabello that he had no experts, no exhibits, no witnesses, in short no defense plan other than concede the charges. See App.3 pg.1. Cabello however thought that he had been charged under the wrong statute and had committed no money laundering. The court set the matter for the morning of the trial.

Cabello then requested to go pro se. The court advised in general terms against this course of action but granted the motion. Cabello then requested a continuance in order to have time to prepare. the court denied the request. Rather than continue the trial and address the matter at leisure, the trial court set the matter for the morning of trial. First it can be inferred from this timing coupled with the court's resistance to a continuance so that Cabello could prepare, the trial judge had prejudged the request for continuance necessarily implicit in any request for a change of counsel when it calendared the hearing for the morning of trial. It cannot be seriously maintained that a lay person like Cabello could have tried his complex 51 count case without some time to prepare. Instead the court coupled his request to represent himself at trial with a denial of time to prepare. Cabello's request was timely.

During a brief recess Mr. Smith presented Cabello with a plea petition which was for Counts 1 and 51 only! No waiver of appeal. A mandatory minimum of 0 years imprisonment. Supervised release of 2-3 years. It presented Cabello with a Hobsens Choice. On the one hand Cabello could proceed that same morning with no time to prepare. On the other hand he could simply enter a plea of guilty to two counts of conspiracy and appeal. Thinking that

49 counts had been dismissed and conspiracy being wholly distinct from actual consummation of the offense conspired to.

Cabello believing that he would prevail on appeal signed the petition as did the Court and Mr. Smith. The Court proceeded to read a colloquy that had no connection or association with the petition we had just signed. Why this was so Cabello never was able to discover. Later however in a finding the court acknowledged that the original plea colloquy was inadequate and took full responsibility for it. See App.3 pg.2.

Three days late Mr. Smith came to see Cabello with a copy of the petition which had added counts 3,4,9,11,12 and 15. These interlineations were made after Cabello had signed without his knowledge or input. The government was still not satisfied and proposed amendments which Mr. Smith demanded that Cabello sign. This Cabello refused to do. The government then calendared a hearing for Sept. 27, 2012. A scant 10 days after the Sept. 17 hearing.

The government sought to "amend" the plea petition to "correct" the record, but Cabello refused to do that necessitating the hearings. Over the next ten pages of transcript, the court read at length the governments proposed "amendments". The actual written proposed amendments - unsigned as they were by either Cabello or Mr. Smith - were not filed and do not appear in the record. The "amendments" are not in the record anywhere, i.e. they <u>do not exist!</u> The plea had been tampered with and otherwise altered. that not withstanding the court defended its plea and the government also defended it although they were not signatory to it. Cabello filed numerous motions to withdraw his plea. The Court denied or ignored all motions to withdraw the plea.

On March 20, 2013 the court sentenced Cabello to 240 months on Count 51, concurrent with 240 months on the forged counts 4,9,11, and 12. On forged count 3 120 months also concurrent. 36 months on forged count 15, and finally 60 months on count 1, all concurrent. Imprisonment was to be followed by 5 years supervised release. The court imposed other conditions as well, including restitution in the amount of $3,755,000. Counts 2,10 and 16-50 were dismissed on motion of government. It is noteworthy that all the actual money laundering counts were dropped.

Cabello is presently detained at FCI La Tuna, in Anthony, TX/NM.

WRIT OF MANDAMUS

On petition for Writ of Mandamus to modify final decision of district court, the court will consider whether (1) party seeking relief has no other adequate means, such as district appeal to attain desired relief, (2) petitioner will be damaged or prejudiced in a way not correctable on appeal, (3) District Court's order is clearly erroneous as a matter of law, (4) District Court order is oft-repeated error or manifests persistent disregard of federal rules and, (5) District Court's order raises new and important problems or issues of law of first impression. See Baumen v. Dist.Ct. 557 F.2d 650(9th Cir. 1977)

DENIAL OF COUNSEL OF CHOICE

The proceeding involves one or more questions of exceptional importance.

Mr. Gerald Boyle of Milwaukee Wisconsin, had been Cabello's lawyer for 15 years and Mr. Boyle indicated that he would be representing Cabello in this case. the government responded by threatening Mr. Boyle with prosecution should he attempt to do

so. See App.3 pg.4-5 This was a threat that any lawyer would take seriously. Mr. Boyle is an elderly gentleman whose health is not good.

The court did not make inquiries into whether the government allegations regarding Mr. Boyle's "conflict of interest" had any basis in fact. In Cuyler v. Sullivan, The Supreme Court held that mere possibility of conflict is not sufficient proof. Mr. Boyle was Summarily disqualified by the government by threat and the court quietly acquiesced. The Supreme Court also held that therefore, if the trial court knows or reasonably should know that a conflict exists, it is the duty of the trial court to investigate. The Supreme Court held that a hearing involving the disqualified attorney to determine what the facts are must be held. See Cuyler v. Sullivan, 446 US 335, 64 L.Ed 353, 100 S ct. 1708. Cabello raised this in open court. At a Dec. 5, 2012 hearing. Cabello's right to represent himself had been unilaterally suspended by the court for the 3rd time and Mr. Michael Levine had been appointed counsel, much to Cabello's surprise. Mr. Levine upon learning of the threats to counsel of choice Mr. Boyle proposed to the court that a hearing be held to find out what the facts are. Mr. Levine expressed to the court that "clearly this is something that needs to be seriously investigated and looked into." The court seemed to agree.

The Court: "Well, in respect to this matter, it can be resolved by having a hearing. Mr. Boyle can testify by oath. He can do this with our electronics so he doesn't have to travel. We will find out what the facts are that are disputed."

Mr. Levine: "I think we can definitely do that". See App.3 pg.6-7

The court through the hearings displayed a pattern of saying one thing and then doing another. Say one thing and then retracting it. this hearing was never held. The government claims that Mr. Boyle was to travel to Portland and testify for the government.

This was factually incorrect and the government and the court knew it. Apparently forgetting that at a Sept. 6, 2012 hearing the parties had agreed to a stipulation.

The Court:Well, instead of flying him clear out here to say that, why don't you write out precisely what you'd have him say."
(AUSA)Ms. Fay:"All right"
The Court:"See if Counsel can stipulate to it."
Ms. Fay:"All right"
The Court:"I just don't want to get into collateral issues that he was charged with this and we talked about this and that and so forth."
Ms. Fay:"That's not our intent." See App.3 pg.8

The gist of Mr. Boyle's testimony was that he received cash from Cabello and duly filed the Form 8300. Mr. Boyle had already agreed to stipulate to that and was prepared to proceed as Cabello's counsel. Moreover in a letter he stated that it was absurd to think there was a conflict did not think that any Federal Judge would see it as a conflict but clearly an administrative matter and not anything relative to the case charged. See App.3 pg.9 The lawyer, "necessary witness" standard is, (1) Testimony relates to an uncontested issue; which it is, (2) The testimony relates to the nature and value of legal services rendered in the case; which it does, (3) Disqualification of the lawyer would work substantial hardship on client; Which it did.

Denial of Counsel of choice is structural error, requiring that the conviction even without showing of prejudice. Once counsel of choice is violated the violation is complete. See Gonzalez-Lopez 548 U.S. 140 126 S ct. 2557,165 L.Ed 2d 409. The error is clear, obvious, and structural and the Supreme Court has held that it is not amenable to harmless error analysis. In light of Cuyler v. Sullivan, supra, the trial court erred in denying Cabello counsel of choice without cause. The circuit court equally erred by putting its impramatur on this 6th Amendment violation. Right

to counsel of choice is the very root of the guarantee under the 6th Amendment. The trial courts discretion must be exercised within the limitations of the 6th Amendment.

DENIAL OF SELF-REPRESENTATION

After Cabello's counsel of choice had been stripped away, a Mr. Michael Smith was appointed to represent Cabello. The defendant had asked for a representation hearing 4 days prior to trial. Mr. Smith was prepared for trial, he had no witnesses, no experts, in short no defense plan, other than to concede the charges. Cabello asked Mr. Smith to file a motion defending Cabello on being charged under the wrong statute and the fact that there had been no money laundering.

This was based on case law. See RE:Grin 112 F.790:(9th Cir. 1901) and Gillet 249 F.3d 1200,(9th Cir. 2001)

This Mr. Smith refused to do. Any lawyer that would refuse a clients reasonable request can hardly be said to be providing effective counsel. At this point in time Cabello asked to go pro se but that he would need time to prepare. the court quickly responded. "NO, thats not going to happen. We are going ahead with the trial as scheduled."

The Supreme Court has held that self-representation requires time to prepare. The court denied the request. Rather than continue the trial and address the matter at leisure, the trial court set the matter for the morning of trial. First it can be inferred from this timing coupled with the courts resistance to the request for continuance so that Cabello could prepare, the trial judge prejudged the request for continuance implicit in any change of counsel when it calendared the hearing for the morning of trial. No attorney would have taken the case conditioned on trying immediately. Cabello could not try a complex 51 count case with

zero time to prepare. During a brief recess, Mr. Smith presented with a plea petition which was for Counts 1 and 51 only! The denial of the request for a continuance constitute[s] an abuse of discretion that amounts to outright denial of [the] request to proceed pro se.

On one hand Cabello could undertake to defend himself that same morning at the trial of a 51 count prosecution or on the other hand Cabello could abandon his right to self-representation and simply enter pleas of guilty to what he was led to believe were 2 counts, 1 and 51. It presented Cabello who had made a timely, unequivocal, voluntary, and intelligent request to proceed pro se, with a true Hobsen's Choice. That Cabello did the latter does not bespeak of a free exercise of meaningful choice.

Circuit Judge Richard A. Paez of the Ninth Circuit writing for a unanimous panel in Farias, 618 F.3d 1099,1052,1053(9th Cir. 2011) case, Wrote "A criminal defendant does not simply have the right to represent himself, but rather has the right to defend himself meanfully. Meanful representation requires time to prepare." Milton v. Morris 767 v.2d 1443,1446(9th Cir. 1985) ("[T]ime to prepare... [is] fundamental to a meaningful right of representation.")) See also Powell v. Alabama, 287 US 45,59,53 S.ct 55,77 LEd 158(1932)("It is vain to give the accused a day in court with no opportunity to prepare for it..."(internal quotation marks omitted)); Armant v. Marquez, 772 F.2d 552,557-58[618 F.3d 1054](9th Cir. 1985)("Holding that where a defendant had unequivocally invoked his right to proceed pro se the day before trial, the district courts denial of his request for a continuance constituted an abuse of discretion and ("effectively rendered his right to self-representation meaningless"); Barhum v. Powell, 895 F.2d 19,22(1st Cir. 1990)("If

[the defendant] needed that extra time to exercise his right to self-representation in a meaningful way, then denying him the time effectively deprived him of the right and may have been a constitutional error".) Although the district never expressly denied Faria's request to proceed pro se, it denied him the right to meaningful self-representation". In addition Judge Paez writes; Here Farias timely requested to proceed pro se before the jury was empaneled, and the district court made no findings -- nor -- that Farias sought to delay the impending trial by invoking his right to self-representation.

On-point Ninth Circuit cases have held that at least absent any contemporaneous showing to the trial court that the request is to cause delay, the denial of such a request amounts to outright denial of the request to go pro se. Cabello's case is more egregious in that he requested a representational hearing 4 days before trial.

The district court's improper denial of Cabello's request to go pro se is structural error and therefore requires reversal. See McKasle v. Wiggins, 465 U.S. 168, 177 n.8 104 S.ct 944, 79 LEd.2d 122(1984)

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. The district court erred in denying Cabello's right to proceed pro se by denying him time to prepare. The trial courts summarily disregard of Cabello's rights under Faretta v. California, 422 U.S. 806(1975) to represent himself is clear and obvious error, moreover it is structural error. Again 9th Circuit Judge Paez writing for a unanimous panel declared that the trial courts understanding of

Faria's Faretta right was too limited. meaningful representation requires time to prepare. Id., at 1053

The circuit courts erred by overlooking the district courts abuse of discretion, in contravention of established Supreme Court case law and in contravention of established 9th Circuit case law.

PLEA PETITION

A forensic examination of the plea is enlightening as in the light of day the court can see how this jerrybuilt production was constructed and appreciate in full the Rube Goldberg nature of it. See App.1 pg.1-9. On page 2 of the plea the first interlineations appear. An unknown hand crudely interlineated 6 additional counts. 3,4,9,11,12 and 15. Count 15 shows an arrow pointed to false income tax. Another line points to false statements on credit cards. Then count 3 is sectioned off with, is possession of stolen funds. On page 4 of the plea, on line 8, the only mention of waiver of appeal is that Cabello will not be able to appeal from judges denial of any pretrial motions he may have filed concerning matters or issues not related to the courts jurisdiction.

This is in nowise a waiver of appeal. Continuing down page 4 on line 10 are more interlineations. Scrawled in: $1,000,000 credit card charges[;] credit cards 30yr. False tax 3yr. felony and $250,000 fine. On that same line 10, I also know there is a mandatory minimum of -0- years imprisonment. Cabello was lead to believe he could expect some measure of leniency.

This was highly misleading as Cabello was sentenced at level 37 which calls for 210-262 months. This is a violation of Rule 11(b)(I). Courts have held that failure to inform defendant of direct consequences is not harmless error. The courts failure to inform Cabello that the mandatory minimum of 0 years imprisonment had no meaning was

a substantial violation of Cabello's rights. See U.S. v. Goodall 236 F.3d(DC 2001) U.S. v. Watetly 987 F.2d 841; 300 U.S.(DC 1993) On page 5 of the plea on line 15, the plea states that Cabello will be given a supervised release term of 2-3 years. Another misleading provision as Cabello was given 5 years of supervised release. See App.1 pg.4. On line 10 the printed portion shows a fine of $250,000 on count 1 and $500,000 on count 51. Again misleading as Cabello was fined $3,000,000 over that. Whoever tampered with the plea did so in haste. Quickly forging 3,4,9,11,12 and 15 on line 3. See App.1 pg.2. He or she neglected to alter line 23 which states unambiguously that the plea is for 1 and 51 only! See App.1 pg.6-7. These interlineations were done without Cabello's knowledge, consent, or input, SUB ROSA.

The court will note that none of these interlineations are initialed by the signatories of the plea. Attorney Mr. Smith did not initial the interlineations, since this occurred without Cabello's consent, he didn't initial the new terms, and the court did not initial the new terms or ever attempt to find out who altered the plea. The government was not signatory to the plea. It was the Court's Plea.

While it is not known who tampered with the plea it could only have been someone with access and an interest in doing so. Who had access? Attorney Mr. Smith, AUSA's Mr. Edmonds, Ms. Faye and the Court.

At a Nov. 15, 2012 hearing Cabello complained about these interlineations, that the plea was defective, illegal, and void.

The Defendant: Your Honor, also on pg.2 of this plea agreement -- its been penciled in. You won't find my initials next to any of this, as you would on any contract.

The Court: Anything further sir? See App.3 pg.10

At this hearing all of the persons who had access to the plea were present. Neither Mr. Smith, the government, or the court endeavored to contradict Cabello or otherwise gainsay that the plea had been tampered with and altered. Moreover the court made zero attempt then or ever to find out who had taken it upon themselves to alter the pleas integrity, especially as this document was being used in an official proceeding. Cabello was not permitted to enforce the plea he signed which was for count 1 and 51 only. In clear contravention of the controlling and unambiguous holding of the Supreme Court in Santobello, 404 US 257, 30 L.Ed 2d 427,92 S.ct 495 by permitting the illegal plea to stand. This bait and switch "trick" is something that the Supreme Court has held or recognized that where a defendant is deceived, misled, or tricked into pleading guilty, such a plea is invalid. See Hawk v. Olson(1945) 326 US 271, 90 LEd 61,66 S.ct 116. Smith v. O'Grady(1941) 312 US 329, 85 LEd 859,61 S.ct 572 Parker v. North Carolina(1971) 397 US 790,25 LEd 2d 785,90 S.ct 1458.

The government of course knew that this crude mishmash of interlineations, misleading provisions, and chaos was fatally flawed.

So after the Sept. 17, 2012 plea hearing, the government hastened to calendar a hearing on Sept. 27, a scant 10 days later. The governments purpose was to "amend" the plea, notwithstanding the fact that there is no Rule 11 procedure to "amend" a plea. The government was in effect asking the court to preside over a procedure that does not exist. The court complied. AUSA Mr. Edmonds in a moment of candor told the court some inconvenient truths: (1)"It's undoubted in looking at the petition that Mr. Smith completed, that it has errors in it." (2)"Secondly, it doesn't have any factual

basis included in it for the false statement counts or the tax count." (3)"It also didn't include anything about the waiver of appeal." See App.3 pg.11-12. It is not a coincidence that the false statement counts and the tax count are precisely the very counts that are forged onto the plea. The government concedes that the plea is riddled with errors and inadequacies. The government agrees with Cabello that Mr. Smith is ineffective and incompetent in equal measure. The government then proceeded to introduce amendments which the court accepted and read out loud. Cabello refused to sign them and objected to them. See App.3 pg.13 line 154. Unsigned as they were by Cabello or Mr. Smith they were not filed and are NOT part of the record, i.e., they do-not legally exist. Undaunted, the court declared that they were "incorporated" into the original plea. There is no provision in the Federal Rules of Criminal Procedure for the district court to amend or modify a plea. See United States v. Goodall 236 F3d(DC 2001) This is a violation of Rule 11(a) signing pleadings, motions and representations to the court. The court must strike unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention, and 11(b)(1) It is not being presented for any improper purpose. At the very least it is improper to use an unsigned document that does not legally exist to support or buttress an illegal document that does. This freed the government to misrepresent to the Ninth Circuit on direct appeal that the Sept. 27 hearing "cured" the flawed original plea. See App.3 pg.14. The government misrepresents that Cabello acknowledged that the court would be incorporating the amendments despite Cabello's objection to the amendments. See App.3 pg.13.

Cabello filed numerous motions to withdraw the plea on the grounds that he had 'fair and just reasons." One of the primary reasons is inadequate plea colloquies. See Ortega-Ascanio 376, F.3d 878,833(9th Cir. 2008) At a Feb. 19, 2013 hearing the court in a finding agreed with the defendant and conceded on pg. 18 of the finding, "The court regrets that a better record was not initially made and takes full responsibility for inadequacies apparent in the original plea colloquy." The court concedes that the plea colloquy was fatally flawed and that the inadequacies were APPARENT! See App.3 pg.2

The Court: The purpose is for you to tell me what is the basis for your -- not the law, but what is the factual basis as to what happened at the time of your plea that you feel was improper."

The Defendant: Well, I mean inadequate -- inadequate plea colloquies."

The Court: "In what respect."

The Defendant: "Well, there was no relationship between the plea colloquy and the plea agreement that I had in my head that day. And from this draft disposition that you sent me, Your Honor, on page 18, lines 10 and 11, the court regrets that a better record was not initially made and takes full responsibility for inadequacies apparent in the original plea colloquy."
Your Honor, the government has to take responsibility for inadequacies or ambiguities in the plea colloquies."

The Court: "Well the plea colloquy was prepared by you and Mr. Smith."

The Defendant: "I didn't -- I had nothing to do with it, the plea colloquy, Your Honor."

The Court: "Well, you read your confession from it."

The Defendant: "Well, I -- as Your Honor --

The Court: "Don't tell me you had nothing to do with it. I'm talking about, when I say the colloquy, We're talking about me discussing giving you your rights and so forth. We were -- We did not in that colloquy address certain aspects which were supplemented later which you already know.
I'm asking you as to as to that you say you didn't about or was not addressed."

Since this was the courts plea and the court had signed it, the court had a vested interest in making it stand. The supplement the court refers to are the non record and non existent "amendments". The courts strained conceit needs no further construction. There

are no jurisdictions in which the defendant prepares the plea colloquy. See App.3 pg.15-16

The court was being accurate when the court stated that the original plea colloquy was inadequate, it was. However, the court had taken an adversarial stance against Cabello and had taken the lead in arguing for the plea, thus removing the court as a neutral arbiter between the government and the defendant. The court apparently realizing that it had given Cabello confirmation that he had "fair and just reasons" as well as a legal right to withdraw his plea now hastened to "cure" the confirmation. The hearing was on Feb. 19, 2013, by the time the finding was filed the concession had been expunged. See App.3 pg.2-3. This altering of the finding is instructive. Because the court had denied attempts to withdraw the plea and had argued vigorously for the plea and in fact it was the court's plea, the court could not or would not be a neutral arbiter. Judicial action taken without any arguable legal basis -- and without giving notice and an opportunity to be heard to the party adversely affected is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts". Cabello did not discover this expungement for many months. The government conceded that the colloquy was inadequate, the court conceded that it was inadequate. It was incontrovertibly true that the plea colloquy was inadequate and one of the primary reason for withdrawal of plea. See Ortega-Ascanio supra.

The court had no legal basis to alter the finding. All Cabello's attempts to recuse the judge were denied.

Seemingly immune to verity and not one to let caution fetter his misrepresentations AUSA Mr. Edmonds feels free to state to the 9th Circuit on direct appeal that "At no point did defendant argue that there was a defect in the district court's Rule 11 colloquy". Mr. Edmonds was present at the Feb. 19, 2013 hearing and knows that this is factually incorrect. See App.3 pg.17. The back story to the very occurrence of the 9/27/12 hearing undercuts any notion that this plea is valid. It was the government that calendared that hearing, for the express purpose of shoring up the factual and legal record made at the defective plea hearing. The prosecution itself raised many of the shortcomings in the plea record.

So we can dispense with the fiction that the 9/27/12 hearing "cured" the original plea. It cured nothing. How could the "amendments" cure anything, they don't exist? If the government were ordered to respond to this writ, it is very doubtful they will rely on the "amendments".

Cabello, however still wanted to find out who made the interlineations Attorney Mr. Smith was the 'Author" of the disordered and error plagued plea. This plea caused a jumble in the court. The government hastened to amend what it could not amend. Any attorney who presents a plea such as this, that caused disorder and confusion in the court is by definition ineffective. This impelled the government and the court to pull out all the stops to defend the defective, illegal, and fraudulent plea. The disorder is taken to a new level as Mr. Smith who had been appointed Cabello's advocate was relieved between a Nov. 15, 2012 hearing and a Dec. 5, 2012 hearing. At the Nov. 15 hearing, Mr. Smith indicated he would be at the Dec. 5 hearing. See App.3 pg.18. In a scant 20 days Mr. Smith abandons

Oregon and hightailed out of town. This departure was hasty. Mr. Smith had practiced in Oregon and Alaska for years, but then suddenly he folds his tent and heads for Alaska. Mr Smith who had indicated to Cabello that he was fully booked, suddenly abandons all the cases he had pending and heads out to The Last Frontier. Thereafter he was "unavailable". Cabello's attempts to call Mr. Smith in for a hearing were futile. The court went through the motions of pretending there would be such a hearing. Mr. Smith was the fulcrum from which much heavy lifting could have been done. As the "Author" of the plea he either made the interlineations or knew who did.

Cabello never tired of trying to find out who forged the plea and at that same Feb. 19, 2013 stated to the court:

The Defendant: I do not see how -- I hesitate to say this, but a forged document that is committing fraud upon the court can be allowed to stand. I don't understand that, your honor. And I have other case law here. The Ninth Circuit has held over and over again that the fair and just standard must be met --"
The Court: "You sent me --"
The Defendant: "And I --"
The Court: "You sent me 80 some pages of your position and cases. Which I've read. Anything further? See App.3 pg. 19

Again, zero attempt by the court to discover who altered and tampered with a document that was being used in an official Federal Court Proceeding. All of Cabello's attempts to find out who made the interlineations were futile. Whoever did it, not wanting to leave fingerprints did not initial and never stated in open court that he or she made the interlineations. The court and the government, not wanting to know the answer, never posed the question. The Supreme Court and the Ninth Circuit have construed pleas as a contract and are judged under the General Principles of contract law. The plea once accepted cannot be altered without consent

of the parties, nor may the court modify a plea on its own simply because of an uninduced mistake, unilaterally, neither side should be able, anymore than would private contracting parties to renege or seek modification because of a change of mind. Both constitutional and supervisory concerns require holding the government and in this case the court to a greater degree of responsibility than the defendant. The judicial branch and the executive branch are separate but in this case they must be conflated. The government has made every effort to enforce a defective plea that it was not signatory to. The court has had to rule on its plea.

Rule 11(c)(1) has a stern command. The court must not participate in any plea agreement(petition). The court did more than merely participate, it was the court's plea and the court argued vigorously for it. Despite all the negative indications the court would not consider any argument against its plea.

And finally, allowing a district court to engage in appellate-waiver negotiations and other provisions of the plea compromises the judge's decision making because it makes it difficult for a judge to objectively assess the voluntariness of the plea entered by the defendant. And if problems arose with the plea, the judge may view unfavorably the defendant's rejection of the plea. See Bruce 976 F.2d at 557-58. The court argued for the waiver of appeal throughout the hearings. This despite the fact that the prosecution itself conceded that there was no appeal waiver. See App.3 pg.12.

The court is a neutral arbiter between the prosecution and the defendant. In this case the court took the lead in arguing for the defective plea, so the prosecution did not have to. The reason is clear, it was the court's plea petition and the court defended it zealously. The government negotiates it's plea agreements

through the agency of specific U.S. Attorney's as necessarily it must, the agreements reached are those of the government. See U.S. v. Harvey 791 F.2d(4th Cir. 1986) U.S. v. Goodall 236 F.3d, 700(DC 2001)

Ambiguities and imprecisions in plea agreements may not be allowed to relieve the government of its primary responsibility of insuring precisions in the plea. No argument can be made that the chaotic plea has any resemblance to precision. And, yet the court did, as the government was not signatory to the plea, it fell to the court Who was signatory to defend it, as if you will an "alter ego". It is not clear if the two separate branches can meld into one, it is highly probable that they cannot, but the government is responsible for the forged, defective, confusing, illegal, and imprecise plea, and it was the government that conceded that the plea was error ridden and inadequate. See App.3 pg.12

Going by the specific language of the plea there are no provisions for non-signatories. The only course of action available for the district court upon rejecting the plea, which it clearly did entertaining the governments amendments, is to advise the defendant personally and give the defendant an opportunity to withdraw the guilty plea. Fed. R. Crim. P. 11(c)(5)(C).

This was not done. In a complete usurpation of judicial power, the court is inventing its own rules.

Mandamus is a drastic remedy and is granted in extraordinary circumstances. Exercise of judicial power in the absence of any arguably legitimate basis is just such a circumstance. The orderly procedures of Rule 11 are not designed merely to ensure fairness to the litigants and the correct application of the law, though they surely serve those purposes as well. More fundamentally, they lend legitimacy

to the judicial process by ensuring that judicial action is --- and is seen to be --- based on lw, not the judge's caprice. The actions taken to defend the defective plea are far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial" to the effective and expeditious administration of the business of the courts.

This is a serious legal error and an egregious one in that the court denied Cabello fundamental procedural rights. See 28 U.S.C. §351(a); Shaman, lubet & Alfini. §2.02 at 37. Can a judge abuse judicial power, disregard fundamental rights, intentionally disregard rules and established procedures? Cabello avers that this is an extraordinary circumstance.

This contract(plea) would not be legal in any state and it is not legal under Oregon Contract Law. In interpreting the plea the court is bound by the principals of Oregon Contract Law Botefur, 7 F.3d, under Oregon Law, "first, the court examines the test of the disputed provisions, in the context of the document as a whole. If the provisions are clear, the analysis ends". Yogman v. Parrot, 325 Ore. 358,937, P.2d 1019,1021(Or. 1997) To determine hat the contract says, "the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provisions in question." Eagle Industries, Inc. v. Thompson, 321 Ore. 398,900 P.2d 475,479(Or. 1995) If there is no ambiguity in the text of the contract, "the court construes the words of a contract as a matter of law. Id.

The doctrine of Federal "borrowing" of the local state law is well established. See Brown v. United States, 239 U.S. D.C. 345 742 F.2d 1498,1503(D.C. Cir. 1984) Under Oregon law ambiguity is a question of law.

Just a cursory inspection reveals a hodgepodge of ambiguity, which have been delineated in this Writ. The plea(contract) contradicts itself. On line 3 the printed portion clearly and unambiguously states that the plea is for 1 and 51 only! That is, until an unknown hand crudely interlineates a raft of counts and cryptic statements. This was done in such haste that whoever did it neglected to also alter line 23. Which clearly and unambiguously states that the plea is for 1 and 51 only! Which portion of the contract is enforceable? Unlike the breaches in the pleas of Santobello Supra and Rickets v. Adamson 483 US 1, 97 LED 2, 107 S.ct 2860, this case is even more egregious in that whoever interlineated the extra counts and provisions engaged in wholesale alteration of the plea. Unwilling to leave fingerprints, this unknown person took care not to initial the new terms.

A defendant has a due process right to enforce the terms of his plea as anyone has the right to enforce a contract See Buckley v. Therhune 441 .3d 688(9th Cir.) citing Santobello, Supra.

The district court stated that it would not appoint an attorney for any appeal. Cabello filed a motion in the 9th Circuit for an appellate attorney. The circuit court granted the motion and the district court having been ordered to appoint an attorney appointed a Mr. Robert Weppner.

Mr. Weppner's bedside manner was strange, he would not accept phone calls from his client. Cabello offered to pay for the calls but Mr. Weppner's practice was to "discourage" phone calls. He would not brook any input into arguments to be made. Cabello asked Mr. Weppner not to waive the arguments he made in the district court. Mr. Weppner takes great care to avoid all of Cabello's arguments and argues narrowly on Faretta. I was not given a Faretta

hearing but that was not my main argument.

Not only will Mr. Weppner not take phone calls but was very difficult to communicate with, even by e-mail.

In a series of handwritten letters and e-mails, I ask Mr. Weppner to not waive my arguments and to send me a draft of his brief before he files it. See App.3 pg.20. After not responding for 3 weeks, Cabello sent another e-mail asking to please respond as he has not had any contact with Mr. Weppner in months. Mr. Weppner responds finally to say that he thinks that "it is unlikely in the extreme" that he will raise my arguments. And that it is unlikely that he will be able to send a draft of his brief. See App.3 pg.21.

Lawyers advise but clients decide. This ignoring his client's wishes is not only deplorable but textbook ineffectiveness. His stumbling performance at the 10 minute oral argument is even more deplorable. The court can view his "performance" on YouTube. Case #13-30080 3/2/15 location: Portland, Oregon

Cabello's arguments of course should have been raised on direct appeal A lawyer refusing a clients reasonable request can hardly be said to be providing effective assistance.

Since removing Mr. Weppner, Cabello has been trying ever since, pro se to have these issues reviewed. The trial attorney Mr. Smith's error ridden plea, deplorable performance and subsequent disappearance greatly prejudiced his client. The appellate attorney, Mr. Weppner does not find Mr. Smith's proffering this defective plea and then vamoosing to Alaska at all unusual and never deviates from his course of arguing narrowly on Faretta. Mr. Weppner's "representation" of Cabello greatly prejudiced his client. Messrs. Smith & Weppner both surpass the Strickland bar. See Strickland v. Washington 466,

US 668,689,80 Led 674(1984)

In the United States v. Cronic 466, US 648,80 Led 2d 657, 104 S.ct 2039(1984) The Supreme Court noted that there are circumstances that are so likely to prejudice the accused that it is not worth litigating their effect in a particular case. Cabello avers that this case is just such a case and clears the Cronic bar.

We are living in a post-truth world. A time when truth is unimportant or irrelevant. If untruths are tolerated, how can justice be administered.

John Adams said famously, "Facts are stubborn things, and whatever our wishes, our inclinations, or the dictates of our passions they cannot ALTER the state of facts and evidence". The defendant can understand why these facts may be difficult to believe. Having spent many hours trying to find a case even slightly analogous to Cabello's has not born fruit. This case is sui generis, if there is another case similar to Cabello's, he can't find it. This may be the only case in the history of American Jurisprudence where such "Legerdemain" is conducted right out in the open. Just on the surface the evidence is clear and obvious. The shenanigans begin on trial day Sept. 17, 2012, continue 10 days later during a hearing which procedurally does not exist on Sept. 27, 2012. Knowing that courts take a dim view of being mislead does not stop AUSA Mr. Edmonds from carefully shepherding it past the 9th Circuit on direct appeal with misrepresentations and the non-objecting acquiescence of Appellate attorney Mr. Weppner. Since no attorney was appointed for the 2255 process and no evidentiary hearing was held, the government and the court carried the day. Oft times the Supreme Court is the last stop for defendants seeking justice.

I pray that this honorable court will undo this unfair and manifest injustice. The district court erred in permitting a court document that had been altered in a wholesale fashion to stand as legitimate. The Circuit Court erred by putting its imprimitur on the district courts clear errors.

REASONS FOR GRANTING

All 5 Baumen factors and clear error are satisfied. See Baumen v. dist. Ct. 557 F.2d 650(9th Cir. 1977)

1) Cabello has no other adequate means to attain desired relief. Ninth Circuit denied Writ of Mandamus on June 25, 2018. See App.2
2) Cabello was prejudiced at the district court and on all subsequent appeals by denial of due process, 6th amendment violations, and ineffective attorney[s]
3) As demonstrated throughout this writ, the court having begun in a wrong measure persisted in it rather than rectify the errors. As a matter of law Cabello's 5th and 6th amendment rights were violated. Disregarding established Supreme Court case law as well as well as 9th Circuit established case law. The Ninth Circuit has unequivocally stated that a published decision constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so. The errors were clear and obvious, moreover they were structural.

4) The errors were repeated and extensive. Wholesale violations of Rule 11 and controlling authorities were disregarded. The errors were taken to a new level by inventing a procedure to evade Rule 11(c)(5)(C). Then taking it to a new dimension by not correcting the record and continuing to advocate for it

throughout the hearings and on direct appeal and the habeas court in violation of 11(b) of Signing, pleadings, Motions, and other papers; Representations to the court.

Along those same lines; 11(a) signature, the court must strike unsigned paper; 11(b)(C) it is not being presented for any improper purpose; 11(b)(2) the claims, defenses and other legal contentions are warranted by existing law. 11(b)(3) The factual contentions have evidentiary support; 11(b)(4) the denials of actual contentions are warranted on the evidence. Hearings to determine facts were not held.

Nowhere did the court, "address the defendant personally in open court" and "determine that the defendant understands... the terms of any plea agreement provision waiving the right to appeal..." in clear violation of Fed.R.Crim. 11(b)(1)(N). In United States v. Arellano-Gallegos, 387 F.3d 794(9th Cir. 2004), the 9th Circuit on appeal characterized the failure by the magistrate judge to inquire on the record as no "technical violation" but rather a "wholesale omission" affecting defendants substantial rights, and plain error. ID at 797.

The courts failure to inform Cabello that the mandatory minimum of 0 years imprisonment had no meaning was clear violation of Fed.R.Crim. 11(b)(I). Courts have held that failure to inform defendants of direct consequences is not harmless error, but a violation of Cabello's substantial rights. See U.S. v. Goodall supra, U.S. v. Wately supra.

The court not only participated in the plea[petition] but signed it and argued vigorously for it in violation of Fed.R.Crim. 11(c)(1).

Such complaints are usually dismissed because the judge followed normal procedures and there is no evidence whatsoever to support the allegations. This case is quite different because the district judge did not follow normal procedures and thus forfeited the presumption of regularity that normally attaches to judicial actions. The transgressions here, however were particularly egregious and protracted. The courts formula for correcting the errors was to invent procedures that do not exist and to ensure that all subsequent court activity was an effort to justify the clear violations of Cabello's substantial rights and Federal Rules of Criminal Procedure. The formula was more complicated than the problem itself. The court could have simply followed established Rule 11 procedures. Despite numerous opportunities to do so. In a total usurpation of judicial power, the court steadfastly refused to do so. The evidence is clear, obvious and in the open.

The district court erred in permitting these violations. The circuit court erred in not correcting them and instead put its imprimiture on them.

5) The District Court's order raises new and important problems and issues of law of first impression. Can the district court allow the government to disqualify the defendant's counsel of choice without a hearing? Can the district court deny the right of self-representation by denying the defendant time to prepare? The Supreme Court has held that for purposes of appellate review in Criminal cases, the federal constitutional errors sometimes called structural defects, that defy analysis by harmless-error standard include (1) the denial of counsel, (2) the denial of self-representation, (3) the denial of right

to public trial, and (4) the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction. (Scalia, J. , joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)pg. 414

Along the same lines the Ninth Circuit held in United States v. Pena, 314 F.3d 1152,1158(9th Cir. 2003), the district courts wholesale failure to comply with the requirements of Rule 11 requires that we reverse[the] conviction. Does the district court have discretion to modify Rule 11 on an ad hoc basis to conform with the arguments in a particular case?

Does the district court have discretion to disregard established case law? Does the district court have discretion to permit alteration of a court document without the party adversely affected being informed and given the opportunity to be heard? Intuitively, this would seem to be against all legal principals. The court despite Cabello's attempts to have this matter investigated made zero effort to discover who altered the plea or why. Cabello would not have signed the altered plea and said so throughout the hearings.

Under U.S.C. 18 1512(c), it is prohibited for anyone to alter, destroy, mutilate, conceal a record, or other object, or attempts to do so, with the intent to impair the objects integrity or availability for use in an official proceeding. This is a serious matter that needs to be seriously looked into. the district court made no attempt to investigate the who, when, how, or why of these SUB ROSA alterations.

Cabello has raised this matter in open court, in motions, in briefs, in Writs, in recall the mandate petition, and in letters to the office of professional responsibility. All under pain

of perjury. Cabello raises it again in this writ, again under pain of perjury. All attempts to investigate this matter have been in vain. the district court erred by not investigating this matter or having a hearing to determine what the facts are. The Circuit court also erred by not at least looking into the matter.

The Ninth Circuit Court of Appeals did not explicitly address any of these violations and issues when it denied relief. It thereby implicitly found that the trial court had no such duty to extend the safeguards that should attend the in-court constitutional rights of defendants. To have found that standard met by the trial court, violates established Supreme Court Case law, Ninth Circuit Case law, Rules of Fed.R.Crim., and the Constitution itself.

This is classically the sort of important question of Federal Law that should be settled by this court. By any metric this case is an extraordinary circumstance and a misfit in a country dedicated to affording equal justice for all.

CONCLUSION

As is demonstrated throughout this Writ, the violations were egregious, extensive and protracted. All statements in this Writ are true to the best of my ability, moreover they are demonstrably true. All statements in this writ, are made under pain of perjury. the Supreme Court holds briefs filed by pro se defendants to less stringent standards than formal pleadings drafter by lawyers. Haines v. Kerner U.S. 519,520,521 92 S.ct 594(1972)

This court should grant the petition for

Writ of Certiorari

to the Ninth Circuit Court of Appeals.