No. 18-7754

IN THE SUPREME COURT

OF THE UNITED STATES

FILED
JAN 28 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN RE: ARCHIE CABELLO,

Petitioner,

vs.

USDC-ORP,

Respondent.

ON WRIT OF MANDAMUS TO
THE UNITED STATES DISTRICT
COURT for THE DISTRICT
OF OREGON

## QUESTIONS PRESENTED

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-representations 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 and 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?

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## 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. See Appendix B.

This Court has jurisdiction pursuant to 28 U.S.C. §1651(a), the Supreme Court and all courts established by Act of Congress, may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

## 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 charge 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). 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 18 U.S.C. §2). Counts 16-50 acused Cabello of money laundering (18 U.S.C. §1956(a)).

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1)Defendant's exhibits are in Appendix D and are serially paginated. The are referred herein as App.D and page number.

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 gonvernment.

Cabello's attorney, Mr. Gerald 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.

Whenever we met, Mr. Smith would try to convince, cajole or arm-twist me into pleading guilty. Cabello however thought that he had been charged under the wrong statute and had committed no money laundering. Cabello wanted to put on a vigorous defense. The court set the matter for the morning of trial. Cabello the requested to go pro se. The court advised in general terms against this course of action but granted the motion. Cabello the requested a continuance in order to have time to prepare. The court denied the request. Instead the court coupled his request to represent himself with a denial of time to prepare. Cabello's request to self represent was timely. During a brief recess Mr. Smith presented Cabello with a plea petition with 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 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 then proceeded to read a colloquy that had no connection or association with the petition we had just signed. Why this was so Cabello was never able to discover. Later in a filing the court acknowledged that the plea colloquy was inadequate and took full responsibility for it. See App.D pg.2.

Three days later Smith came to see Cabello with a copy which had added counts [illegible] and 15. These interlineations were made after Cabello [illegible] knowledge or input. This was the first time Cabello had seen the plea after he signed numerous copies in court. Mr. Smith did not give Cabello any of those copies. Mr. Smith did give Cabello a copy of the altered plea but it was not an original and had been copied on a machine. The government was still not satisfied and proposed amendments which Mr. Smith demanded that Cabello sign. This Cabello refused to do. The government sought to "amend" the plea petition to "correct" the record, but Cabello refused to do that necessitating the hearings. The Court read the "amendments" aloud in court. This time there was no colloquy

as the Court "incorporated" the amendments into the original plea petition.

On March 20, 2013 the Court sentenced Cabello to 240 months on count 51, concurrent with 240 months on forged counts 4, 9, 11, and 12. On forged count 3, 120 months also concurrent. On forged count 15, 36 months 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 and 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 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 persistant disregard of federal rules, (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).

A petition for an extraordinary writ may not be joined with a petition for Writ of Certiorari, Rule 12.4. Petitioner

did so in error and now presents to the Court as an original Writ of Mandamus (see App.C).

## 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.

## DENIAL OF COUNSEL OF CHOICE

The proceeding involves one or more questions of exceptional importance.

Mr. Gerald Boyle of Milwaukee, Wi., 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.D pg. 4-5. The Court will note that at that point in time these were mere allegations. 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 any 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 and the Court 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 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 unilaterly suspended by the court for the third time and a 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: Your Honor, as an officer at this point, or perhaps as Mr. Cabello's counsel, although I'm appointed--I am his counsel. This is a serious issue, just from what I know and just listening to his colloquy, and that's all I know at the moment. Clearly if Mr. Cabello--if there is evidence that the government in someway interfered with Mr. Cabello's right to retain his own counsel--I'm not suggesting there was--but if there was some sort of improper conduct with respect to interfereing with his right to counsel, that raises a very serious constitutional issue, which also effects the entry of the guilty plea. But even beyond that, it could affect the status of the indictment. These are all materials--I have never spoken to this Mr. Boyle. I don't know any of the underlying facts. I have heard assertions on both sides. Clearly this is something that needs to be seriously investigated and looked into. That's all I want to say, Your Honor.
>
> The Court: Well, in respect to this matter, it can be resolved by having a hearing. Mr. Boyle can testify under 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 definately do that. See App.D pg. 6-7.

This hearing was never held. Throughout the hearings the court displayed a pattern of saying one thing and then retracting or ignoring it. The government claims that Mr. Boyle was to travel to Portland and testify for the government. The Court did nothing to stop AUSA's Mr Edmonds and Ms. Faye from

repeatedly stating this misrepresentation. This was factually incorrect and the government and the Court in the person of the Honorable Judge Robert E. Jones 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. Faye: "All right."
>
> The Court: "See if counself can stipulate to it."
>
> Ms. Faye: "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. Faye: "That's not our intent." See App.D pg. 8.

The gist of Mr. Boyle's testimony was that he received cash from Cabello and duly filed a 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 and 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.D 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 the client; which it did. Cabello was denied counsel of choice because Mr. Boyle followed the law and filed a form 8300.

Denial of counsel of choice is structural error, requiring that the conviction be reversed even without showing of prejudice. Once counsel of choice is violated the violation is complete. See Gonzalez-Lopez 548 US 140, 126 S ct. 2557, 165 L.Ed 2d 409. The error is plain 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 impramature 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 had been denied counsel of choice, a Mr. Michael Smith was appointed to represent Cabello. The defendant asked for a representation hearing 4 days prior to trial on Spet. 13, 2012. Cabello had not seen nor spoken to Mr. Smith in some time, as he had spent the previous month in London, England watching the Olympics. Upon his return Mr. Smith was unprepared for trial, he had no witnesses, no experts, no exhibits, in short no defense plan, other than to concede the charges. See App.D pg.1. Cabello asked Mr. Smith to file a motion stating that Cabello had been charged under the wrong statute and the fact that there had been no money laundering. This was based on Case Law, regarding a third party, 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, that's 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 calendered the hearing for the morning of trial. No attorney would have taken the case conditioned on trying it immediately. Cabello could not try a complex 51 count case with zero time to prepare. During a brief recess, Mr. Smith presented Cabello with a plea petition which was for counts <u>1 and 51 only</u>! 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 believed 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. 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.

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 defend 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, ("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. Pawell, 895 F.2d 19, 22 (1st Cir. 1990) ("If [the defendant] needed extra time to exercise his right to self-representation in a meaningful way, then denying him time effectively deprived him of the right and may have been a constitutional error.") "Although the district never expressly denied Farias 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 McKaskle v. Wiggins, 465 US 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 summary disregard of Cabello's rights under Faretta v. California, 422 US 806 (1975) to represent himself is plain error, moreover it is structural error. Again 9th Circuit Judge Paez writing for a unanimous panel declared tha the trial courts understanding of Farias' Faretta right was too limited, meaningful representation requires time to prepare. Id., at 1053 The district courts abuse of discrection was plain error. The Circuit Court erred by putting its impramature on the district courts order, 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 jerry built production

was constructed and appreciate in full the Rube Goldberg nature of it. See App.A 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 potions 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 30 yr 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. Wately 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.A pg. 4. On line 10 of 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 counts 3, 4, 9, 11, 12 and 15 on line 3. See App.A pg. 2. He or she in their haste neglected to alter line 23 which states unambiguously that the plea is for 1 and 51 only! See App.A 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 initiated by the signatories of the plea. Attorney Mr. Smith did not initial the interlineations, since this occurred without Cabello's consent, he did not 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 Courts plea.

While it is not known who tampered with the plea it could only have been someone with access to the document and an interest in doing so. Who had access? Attorney Mr. Smith, AUSA's Mr. Edmons and Ms. Faye, as well as the Court in the person of the Honorable Judge Robert E. Jones.

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.D pg. 10)

At this hearing all the persons who had access to the plea were present. Neither Mr. Smith, the government, or the Court

endevored 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 since it was being used in an official Federal proceeding. Interestingly none of the other officers of the court stepped up to say that they were the author of the interlineations. 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 unambigous 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 tha the Supreme Court has held or recognized that where a defendant is deceived, mislead, or tricked into pleading guilty, such a plea is invalid. See Hawk v. Olsen (1945) 326 US 271, 90 L.Ed 61, 66 S.ct 116. Smith v. O'Grady (1941) 312 US 329, 85 L.Ed 859, 61 S.ct 572. Parker v. North Carolina (1971) 387 US 790, 25 L.Ed 2d 785, 90 S.ct 1458.

The government of course knew that this crude mish-mash 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 with the request. AUSA Mr. Edmonds in a moment of candor told the government 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 th waiver of appeal." See App.D pg. 11-12. It is not a coincedence that the false statement counts and the tax count are 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 incompetant 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.D 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 to amend or modify a plea. See United STates v. Goodall, 236 F.3d (DC 2001). This is a violation of Rule 11(a) signings pleadings, motions and representations to the court. The Court must trike 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 one that does. This freed the government to misrepresent to the 9th Circuit on direct appeal that the Sept. 27, 2012 hearing "cured" the flawed original plea. See App.D 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.D pg. 13. Criminal Law §59, 112 -Federal Rules-guilty plea-record 6. Under rule 11 of the F.R.C.P. governing pleas in Federal Courts, the sentencing judge must develop, on the record, the factual basis for a guilty plea, as, for example, by having the accused describe the conduct that gave rise to the charge. This was not done for the 6 forged counts. The government admitted it in open court and the Court knew it as well. See App.D pg. 11-12. In this instance and throughout the hearings the Honorable Judge Robert E. Jones disregarded Rule 11 procedures and took great care that the Courts plea petition would stand. Before a Writ of Mandamus may issue, a party must astablish that (1)"no other adequate means [exist] to attain the relief he desires", (2) the party's "right to issuance of the writ is "clear and indisputable"", and (3) "the writ is appropriate under the circumstances. Cheny v. United States Dist. Court of D.C. 542 U.S. 367, 380-381, 124 S.ct 2576, 159 L.Ed 2d 459 (2004). The Supreme Court will issue a Writ of Mandamus directly to a Federal District Court "only where a question of public importance is involved, or where the question is of such a nature that it is peculiaryly appropriate that such an action by this court be taken." Ex parte United States

287 U.S. 241, 248-249, 53 S.ct. 129, 77 L.Ed. 283 (1932). These familiar standards apply here where Cabello claims that the District Courts order did not have a legal basis and was in violation of 18 U.S.C. 1512(c)(1). This statute explicitly proscribes that under 1512(c)(1), whoever corruptly--alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the objects integrity or availability for use in an official proceeding is in violation of Federal Law. The Court never asked any officers of the court if they had added the extra counts, rather Judge Jones asked Cabello.

> The Court: Why don't you--just a minute. In respect to adding the counts other than 1 and--51 or 2?
>
> AUSA Mr. Edmonds: 51, Your Honor.
>
> The Court: There were additional counts added. When was that done?
>
> The Defendant: I wish I knew your Honor. I don't know. I was under the impression when I--one of the reasons I was reasonable content with Mr. Smith that day is because I thought I was pleading to counts 1 and 51. See App.D pg. 15-16

The question was a bit disingenuous in that Cabello had been attempting all along to discover who had tampered with the plea. It was after all the Court who signed the plea. However no other inquiries were made. Again at this hearing Cabello is never gainsaid, opposed or contradicted, that the plea had been surreptitiously falsified. Under 18 U.S.C., 1519, it qualifies as falsified if it misrepresents what the parties agreed to. Contracts §54 - Construction 12. The purpose of the common-law rule that a court should construe ambiguous contract language

against the interest of the party that drafted such language is to protect the party who did not choose such language from an unintended or unfair result. This is a material misrepresentation. In contract law a misrepresentation is material only if it would induce a reasonable person to manifest his assent. Since Cabello's attorney had no defense and Cabello had been denied time to prepare to self-represent, he had a strong incentive to manifest his assent to a plea petition that was removing 49 of the 51 counts.

Cabello filed numerous motions to withdraw his plea on the grounds that he had "fair and just reasons." 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 original plea colloquy was the only plea colloquy. The non-record "amendments" were merely read aloud and Cabello did not acknowledge them, but on the contrary objected to them. See App.D pg. 2 and App.D pg. 13 line 154.

> 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 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 resonsibility 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 colloquy, we're talking about me discussing giving you your rights and so forth. We were --We did not in that colloquy address certain apsects which were supplemented later, which you already know. I'm asking you as to what you say you dind't know about or was not addressed."

Since this was teh 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-existant amendments. The courts strained conceit needs no further construction. There are NO jurisdictions in which the defendant prepares the plea colloquy. See App.D pg. 17-18.

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 nuetral 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 Feb. 19, 2013, by the time the finding was filed the concession had been expunged. See App.D

pg. 2-3. Because the court had denied attempts to withdraw the plea and had argued vigorously for the plea and because it was the courts plea, the court could not or would not be a neutral arbiter. This alteration of the finding is instructive. There cannot be an atom or reservation or doubt that there is a nexus between altering yet another court document and Judge Jones' steadfast refusal to entertain Cabello's motions to withdraw his plea. Seemingly forgetting that it is in the transcripts. See App.D pg. 17-18. Judical action is taken, without any arguable legal basis--and without giving notice and an opportunity to be heard to the party adversly affected is far worse that simple error or abuse of discretion; it is an abouse 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 reasons for withdrawing a 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.

AUSA Mr. Edmonds took the expungement to mean that he could now misrepresent to the 9th Circuit on direct appeal that "At no point did the defendant argue that there was a defect in the district courts Rule 11 colloquy." Mr. Edmonds was present at the Feb. 19, 2013 hearing and knows that this is factually incorrect. See App.D pg. 19. Mr. Edmonds also apparently forgot

that Cabello's complaint to the court about the inadequate plea colloquy was in the transcripts. See App.D pg. 17-18. The back story to the very occurance of the Sept. 27, 2012 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 "amdendments" 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. The government may resort to some in limine violations but the Petitioner will bring this very quickly to this courts attention.

Cabello, however still wanted to discover who had tampered with the plea. Attorney Mr. Smith was the "Author" of the disordered and error plagued plea. This plea caused a jumple 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, suddenly decamped for Alaska. The Court granted Mr. Smith's request to be relieved sometime between a Nov. 15, 2012 hearing and a Dec. 5, 2012 hearing. At the Nov. 15 hearing, Mr. Smith indicated that he would be

at the Dec 5 hearing. See App.D pg. 20. 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 skedaddles 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 of <u>knew who did</u>. Cabello never tired of trying to find out who forged the plea and at that same Feb. 19, 2013 hearing 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 some 80 pages of your position and cases. Which I've read. Anything further? See App. D pg. 21.

Again, zero attempt by the court to discover <u>who altered and tampered with</u> a document that was being used in an official Federal Court Proceeding. The court will note that Cabello <u>is not</u> contradicted by the government or the court. There can be only one reason why, and that is because the plea had been corruptly tampered with in direct violation of U.S.C. 18 1512(c)(1)

and everyone in the court knew it. 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 the interlineations 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. A contract term is ambiguous only if "multple reasonable interpretations exist." See IBEW-NECA Pension Tr.Fund V. Flores, 519 F.3d 1045, 1047 (9th Cir. 2008). Under these principles the contract (plea petition) is a legal document and must be applied in accordance with [their] terms. In this plea petition we not only have ambiguity but a flat out, 180 degree contradiction. Line 3 of the plea shows in the printed portion what the Defendant agreed to but then additional counts were forged. See App.A pg. 1-2. Line 23 shows what the Defendant agreed to, that is count 1 and 51. See App.A pg. 6-7. These peculiar and extraordinary facts are indisputably true. One simply could not invent these events. Cabello says that line 23 is what he agreed to. The government and the court cleave to the forgeries on Line 3. Having decided early on that they would stick-fast to the forged plea, the government did so through direct appeal and the 2255 and continue to adhere to it to this day. The Court has as well. Judge Jones has been steadfast in his defense of the plea. The Supreme Court has held that Pleas are a legal document that must be construed and in accordance with [their] terms. See Texas v. New Mexico,

482, U.S. 124, 128, 107 S.ct. 2279, 96 L.Ed. 2d 105 (1987). 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 this case, the court as well, to a greater degree of responsibility than the defendant. The government has made every effort to enforce a defective plea that it is not signatory to. The court has ruled that its plea (the courts) will stand. Fule 11(c)(1) has a stern command. The court must not participate in any plea agreemtn (petition). The court did more than merely participate, it was teh courts plea. And finally, allowing a district judge 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 asses the voluntariness of the plea entered by the defendant. And if problems arose with the plea, the judge may view unfavorably the defendants rejection of the plea. See Bruce, 976 F.2d at 557-58. The court argued for waiver of appeal throughout the hearings. This despite the fact that the prosecution itself conceded that there was no appeal waiver. See App.D 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.

The government negotiates its plea agreements through the agency of specific U.S. Attorney's as necessarily it must, the agreements reached are those of th government. See U.S. v. Harvey, 791 F.2d (4th Cir. 1986); U.S. v. Goodall, 236 F.3d. 700 (DC 2001). Ambiguities may not be allowed to relieve the government of its primary responsibility of insuring presisions in th 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. However the government is responsible for the illegal and defective plea. The government itself conceded that the plea was error ridden and inadequate. See App.D 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 teh 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 teh absence of any arguably legitimate basis is just such a circumstance. The orderly procedures of Rule 11 are not designed merely to insure 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 law, not the judges caprice. The actions taken by the court to defend the forged plea petition are far worse than simple error or abuse of discretion; it's an abuse of judicial power. 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, and 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 extra-ordinary circumstance. Cabello makes a plain and clear case for consideration to a Writ of Mandamus.

This contract (plea petition) 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. See 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." See Yogman v. Parrot, 325 Ore. 358, 937, P.2d 1019, 1021 (Ore 1997). To determine what the contract say, 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 (Ore. 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 and contradiction, 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 draft of counts and cryptic statements. This was 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. 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.

Judge Robert E. Jones having denied Cabello his counsel of choice, denied his right to self-represent by not granting time to prepare, completes the trilogy by stating tha the court would not appoint an attorney for any appeal. Cabello filed a motion in the Ninth Circuit for an appellate attorney. The circuit court granted the motion. See App.D pg. 22 line 5. The Circuit Court having ordered the District Court to appoint an appellate attorney forced the judge to do what he did not want to do. The court 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 teh district court. Mr. Weppner takes great care to avoid all of Cabello's arguments and argues narrowly on a Faretta Hearing. I was not given a Faretta hearing but that was the least of my arguments. Not only will Mr. Weppner not take phone calls but was also difficult to communicate with, even by e-mail.

In a series of handwritten letters, I ask Mr. Weppner to not waive my arguments and to send me a draft of his brief before he files it. See App.D pg. 23. 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 he will be able to send a draft of the plea. See App.D pg. 24.

Lawyers advise, but clients decide. This ignoring his clients wishes is not only deplorable but textbook ineffectiveness. His stumbling performance at the direct appeal 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 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 forged plea and then vamoosing to Alaska at all unusual and never deviates from his course of arguing narrowly on Faretta. Mr. Weppner's representation greatly prejudiced his client. Messrs. Smith and Weppner both clear the Strickland bar. See Strickland v. Washington, 466, US 668, 689, 80 L.ed 674 (1984). In the United States v. Cronic, 466, US 648, 80 L.ed 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. 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 peculiar facts of this case is that such "Legerdemain" is conducted right out in the open with no effort to conceal it. The power differentials between a pro se defendant and a Federal Judge is vast. All of Cabello's objections to the forged plea, denial of counsel of choice, and denial of right to self-represent, fell on deaf ears. Cabello's protests that his rights were being flouted were disregarded or ignored. Just on the surface the evidence is plain and obvious. The tricks begin on trial day Sept. 17,

2012, continue 10 days later during a hearing that procedurally does not exist on Sept. 27, 2012. Knowing that the courts take a dim view of being mislead does not stop AUSA Mr. Edmonds from carefully shepherding it passed the 9th circuit on direct appeal with misrepresentations and the non-objecting acquiescence of Appellate Attorney Mr. Weppner. Since no attorney was appointed for Cabello's 2255 petition, the court denied his pro se brief out of hand. There was no evidentiary hearing. The decision to deny Cabello his substantial rights and due process rights was by this point in time "baked into the cake". Petitioners "right to issuance of the writ is clear and indisputable". The district court erred in presiding and permitting 5th and 6th amendment violations that constitutes structural error. The district court erred in not investigating or trying to discover which of the officers of the court altered and falsified the plea in violation of 18 1512(c)(1) and 1519. The circuit court erred in not investigating or trying to determine the facts of this serious matter, and points of law, were over looked by 9th Circuit judges: Canby, Wardlaw, and Rawlinson.

## REASONS FOR GRANTING

All 5 Baumen factors and plain error are satisfied. See Baumen v. dist.ct., supra.

Under Supreme Court Rule 20, before a Writ of Mandamus may issue, a party must establish that (1)"no other adequate means [exist] to attain the relief he desires", (2) the party's right issuance of the writ is "clear and indisputable", and (3) "the writ is appropriate under the circumstances", (4) the petition must show that the writ will be in aid of the court's

appellate jurisdiction, that exceptional circumstances warrant the exercise of the court's discretionary powers.

The uncommon facts presented here establish cause adequate for the court to exercise its discretionary powers. Cabello has exhausted all other means to attain desired relief. On direct appeal attorney Robert Weppner, contrary to Cabello's instructions would not raise these issues. After direct appeal was denied Cabello attempted to recall the mandate and it was denied. Cabello's 2255 was denied by the district court with prejudice. Petition for COA was denied by the 9th circuit. See App.B.

A Writ of Mandamus may not be attached to a writ for Certiorari and Cabello did so in error. See Rule 12.4. Cabello now asks that the court reconsider these papers as an original Writ of Mandamus to the District Court of Oregon. See App.C.

Cabello's efforts to have these matters reviewed have foundered on the shoals of ineffective attorney[s] and layman mistakes by the petitioner who is not an attorney.

As demonstrated throughout this writ, the district 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. Non-compliance with standard procedures was extensive. Disregarding established Supreme Court case law as well as 9th Circuit established case law. It is well established 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 district court made no effort to determine the apparent U.S.C. 18 1512(c)(1) violation by one of the officers of the court and to this day Cabello does

not know who did it or when.

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 hearing 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 trike unsigned paper; 11(b) by presenting to the court a pleading, written motion, or other paper -whether by signing, filing, submitting, or later advocating for it,- an attorney or unrepresented party certifies that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstance: 11(b)(1) itis 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 factual contentions are warranted on the evidence. Rule 11(c)(1): The court may impose an appropriate sanction on a party who violated rule 11(b) or is responsible for the violation. No other circuit or district court under the Supreme Courts appellate jurisdiction would permit such wholesale violation of rule 11(b), save the Ninth Circuit and in particular the District Court for the District of Oregon. The peculiar facts of this case makes it appropriate that this court invoke the writ. See Exparte supra. The

government in the person of AUSA's Mr. Edmonds and Ms. Faye presented to the court "amendments" that they knew were not legal and then used them to buttress the illegal plea. The court in the person of the Honorable Judge Robert E. Jones not only countenanced this illegal play but ruled that they were "incorporated" into the original plea despite the fact that they were unsigned, never filed, and not part of the record. These non-existant amendments were then used by the government to "cure" the chaotic, forged, and illegal original plea. See App.D pg. 14. All this was a wholesale violation of Rule 11(b). The court not only participated in the plea [petition] but signed it and argued vigorously for it.

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, all the more so because these transgressions happened to an unknowing and uncounseled defendant. The courts formula for correcting the errors was to invent procedures that do not exist and to ensure that all subsequent court activity justified the clear violations of Cabello's substantial rights. 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 district courts' order raises new and important issues of law of first impression. This is an opportunity for this court to put the Ninth Circuit and particularly th District Court of Oregon in line with the other Circuits and District Courts under the Supreme Courts jurisdiction. The judicial actions in this case would not pass muster in any other circuit as they are clearly and obviously against all legal principles. Under U.S.C. 18 1512(c)(1), it is prohibited for anyone to alter, destroy, mutilate, conceal a record, or other object, ar 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, and why of these SUB ROSA alterations. Cabello would not have signed the altered plea and said so through out the hearings. Cabello has raised this matter in open court, in motions, in briefs, in writs, in recall the mandate petition. All under pain of perjury. There was no written opinion and the Ninth Circuit did not explicity 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 case is an outlier among the other circuits and this writ provides

this court an opportunity to bring the Ninth Circuit Court of Appeals and the Federal Court for the District of Oregon in line with the other circuits. 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 and peculiar 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 knowledge, ability, information and belief. Moreover they are demonstratably 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 then formal pleadings drafted by lawyers, Haines v. Kerner, U.S 519, 520, 521 92 S.Ct. 594 (1972).

This court should grant the petition for a Writ of Mandamus to the Federal Court for the District of Oregon.

## RELIEF SOUGHT

Defendants convictions should be vacated, his pleas of guilty and the plea petition set aside, and the matter remanded to the district court with instructions

Respectfully submitted,

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