20-5475

No._____

ORIGINAL

IN THE SUPREME COURT

OF THE UNITED STATES

ARCHIE CABELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

DC No. 3:10-cr-482-MO

USCA 19-35901

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORI

QUESTIONS PRESENTED

1) When the government moves to strip a defendant of his counsel of choice, does the court have any obligation to hold a hearing to inquire and determine what the facts are vis-a-vis Cuyler v. Sullivan? If not, does this meet the constitutional minimum for right to counsel of choice under the sixth amendment?

2) Whether a forged, fraudulent, altered plea petition in apparent violation of federal law under 18 USC §1512(c)(1) rises to the level of 'extraordinary circumstances' sufficient to satisfy the standards of 60(b)(6)?

3) Whether a judgement based on a plea that was tampered with is from its inception, a null and void judgement, and sufficient to satisfy the standards of 60(b)(4)?

4) Whether when a court disregards or ignores all of the defendants motions, pleas, complaints, i.e., refuses to let the defendant be heard does this meet the constitutional minimum for due process under the Fifth Amendment?

5) Does an appointed defense panel attorney who is the putative 'author' of a document have any obligation to inform the court who tampered with the document, i.e., the plea petition?

6) Whether the panel of circuit Judges M. Smith and Lee Introverted the statutory order of operations, by applying the wrong standard in denying Cabello's petition for Certificate of Appealability, in contravention of the controlling and unambiguous hold of the Supreme Court in Buck v Davis that clarifies the standard for COA.

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COMES NOW, Archie Cabello respectfully seeking leave of this honorable court to entertain the above referenced case in which he invokes Rule 60(b)(6) and by extension implicates Rule 60(b)(4) for the proposition, this rule is not only consistent with case law, but it also comports with the fair and equitable administration of justice.

It is settled that equitable relief is relief that is available pursuant to an independent action in cases of unusual and extraordinary circumstances. As in this case they are reserved for cases of injustices.

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.

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.

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

Cabello was charged consipiracy to commit bank larceny, making false statements on Credit Cards, Count 2 charged Cabello with a 2005 bank larceny, Count 3 possession of stolen bank funds, Counts 4, 9, 10, 11, and 12 each charged Cabello with making false statements on credit card applications. Count 15 with filing false tax returns. Counts 16-50 accused Cabello

of money laundering. Finally count 51 charged Cabello with conspiracy to commit money laundering.

Cabello then agreed to plead to count 1 and count 51 of the indictment. Both are conspiracy counts.

Three days later panel attorney Mr. Smith came to see Cabello with a copy of the plea that had added counts 3, 4, 9, 11, 12, and 15. This wholesale alteration of the plea is the crux of the argument. The plea was altered without Cabello's knowledge or input.

On March 20, 2013 Cabello was sentenced to 240 months on Count 51, concurrent with 240 months on forged counts 4, 9, 11, and 12. On forged count 15, 36 months and finally 60 months on cont 1, all concurrent.

Also 5 years supervised release and restitution in the amount of $3,755,000. Counts 2 and 10 and 16 50 were dismissed on motion of the government. Since the money laundering counts were mere window dressing and no money had been laundered, the money laundering counts were dropped.

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

JURISDICTION

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 apporpriate in aid of their respective jurisdictions and agreeable to the usages and priciples of law.

LEGAL ANALYSIS

In Buck v. Davis, 580 US__, 137 S.ct__, 197 L.Ed. 1, 2017 US Lexis 1429, the defendant Buck sought in 2014 to reopen a 2006 judgement by filing a motion under Federal Rule of Procedure 60(b)(6). He argued that the Supreme Courts decisions in Martinez v. Ryan, 566 US 1, 132 s.ct. 1309, 182 L.Ed 272 (2012), and Trevino v. Thaler, 569 US__, 133 s.ct. 1911, 185 L.Ed. <*pg. 10> 2d 1044 (2013) had changed the law in a way that provided an excuse for his procedural default, permitting him to litigate his claim on the merits. In addition to this change in law, Bucks motion identified ten other factors he said constituted "extraordinary circumstances" required to justify reopening the 2006 judgement under the rule. See Gonzalez v. Crosby, 545 US 524, 535, 125 s.ct. 2641, 162 L.Ed.2d 480(2005).

The District Court denied the motion, and the Fifth Circuit declined to issue the certificate of appealability (COA) request by Buck to appeal that decision. The Supreme Court granted certiorari and in a 6-2 decision reversed.

DENIAL OF COUNSEL OF CHOICE

The following 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.1-2. 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 unilateraly 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. 3-4.

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. See App.D pg.24 Line 129 #128.

> 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 counsel 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.5.

The gist of Mr. Boyle's testimony was that he received cash from Cabello and duly filed 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.6. 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 his 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 Ammendment 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 Sept. 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.7. 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 1 and 51 only! 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 present-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 to 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 enequivocally invoked his right to proceed pro se the day before the 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),).

PLEA PETITION

A forensic examination of the plea is enlightening as in the light of day, the Court can see how this jury built production was constructed and appreciate in full the Rube Goldberg nature of it. See App.B pg. 1-9. On page 2 of the plea, the first inter-

lineations 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 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.B 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.B pg. 6-7. These interlineations are not initialed 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. Edmonds 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.8)

At this hearing all 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 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 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, 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 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.D pg.9-10. It is not a coincedence that the false state-

ment 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.11 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 the 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 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 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.12. 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.11, line 154. 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.9-10. 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. 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 reasonably content with Mr. Smith that day is because I thought I was pleading to counts 1 and 51. See App.D pg.13-14

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 nonrecord "amendments" were merely read aloud and Cabello did not acknowledge them, but on the contrary objected to them. See App.D pg.15 and App.D pg.11 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 responsibility for inadequacies apparent in the original plea colloquy." Your Honor, the government has to take responsibility for inadequacies or ambiguitites 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 Defenant: "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 aspects which were supplemented later, which you already know. I'm asking you as to what you say you didn't know 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-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 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 Feb. 19, 2013, by the time the finding was filed the concession had been expunged. See App.D pg.15-16. 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 of 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. Judicial action taken, without any arguable legal basis--and without giving notice and an opportunity to be heard to the party adversly affected is far worse than simple error or abuse of discretion; is is 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 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 "amendments" cure anything, they don't exist. If the government were ordered to respond to this motion, 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.

Cabbello, 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 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 th 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. Mr. Smith apparently filed no motion but was "excused" by Judge Jones. Cabello's pro se status was suspended for the third time

and Mr. Levin was appointed counsel to Cabello's surprise. 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 20days 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 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 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 who altered and tampered with a document that was being used in an official Federal Court Proceeding. The court will note that Cabello is not 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 "multiple 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.B pg.1-2. Line 23 shows what the Defendant agreed to, that is count 1 and 51. See App.B 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 stadfast 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 that 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. 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 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.10.

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 the 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 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. 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.10. 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 adivse 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. A 60(b) motion 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 proceduers 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 fundamentamentally, they lend legitamacy 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.

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 that 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 the district court. Mr. Weppner takes great care to avoid all of Cabello's arguments and argues narrowly on Faretta. 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 arguemtns and to send me a draft of his brief before

he files it. A reasonable request. 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" tha the will raise my arguments. And that it is unlikely he will be able to send a draft of the plea.

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 views his "performance" on YouTube. Case# 13-30080 3/2/15 location: Portland, Oregon. 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 protest that his rights were being flouted were disregarded

or ignored. Circuit Court Judges M.Smith and Lee erred in overlooking these plain and clear constitutional violations. See App.A pg.3.

GOVERNMENTS RESPONSE TO 60(b) MOTION

Honorable Judge Michael W. Mosman to whom the case has been reassigned after Cabello filed motion to recuse Honorable Judge Robert E. Jones,ordered the government to respond to defendant's 60(b) motion. See App.D. pg.23 line 326. The court ordered the government to reply by October 15, 2019. The petition was denied on October 18, 2019, thereby not permitting the defendant to reply to government response. See App.D pg.23 Line 330. That is rather irregular and does not seem quite proper. Cabello received the governments response in the mail on Oct. 21, 2019, by which time the 60(b) petition had been denied. See App.A pg.1-2.

In the government response Ms. Zusman misses the mark on Buck v. Davis supra by a wide margin , she ignores the fact that the Supreme Court had changed the law that provided an excuse for his procedural default, permitting him to litigate his claim on the merits.

The court will note that the government attorney makes no mention of 18 §1512(c)(1) save sparse mention of some interlineations and that's Cabello's "beef". There is no attempt to deny that a court document had been illegally altered. Neither the government or the court have ever denied that the plea had been tampered with. Ms. Zusman is also incorrect to say that I have fully vetted the accuracy of my guilty plea. All of my arguments were procedurally defaulted, courtesy of Appellate

Attorney Mr. Wepner, as Ms. Zusman noted in her response. See App.C. pg.2. This case has long since been ready for a wide-angled lense put to it. The interlineations are more than Cabello's "beef" and graver than violation of a mere statute. It undermines the entire structure of the judicial system if the government or the court is allowed to alter documents to fit their narrative and "poisons the public confidence in the judicial process."

If a response is required and the allegations are not denied they are admitted as true. See Rule 8(b)(6). A response was required. See App.D pg.23 line 326. The government attorney does not deny the allegations because she knows that they are not only true, but demonstrably true.

The Government admits that the amendments that "cured" the forged plea were phantasms, that Mr. Edmonds made crucial and material misrepresentations, and that there were wholesale violations of Rule 11 procedures. The government in not denying the allegation, tacitly agrees that the plea had been tampered with, altered, and forged, admitting the violation of 18 USC §1512(c)(1). Admits nullification of important Rule 11 procedures. See Fed.R.P. 1. Fed.R.Civ.P. 8 governs the pleading standards in all civil actions and proceedings in United States district courts. (Kennedy, J joined by Roberts, ch.J. and Scalia, Thomas, and Alito, JJ). See Rule 8(b)(6).

The phone call that the government refers to is an in limine violation. The fact that it is taken out of context and twisted to mean something other than what Cabello meant is beside the point. It is an IN LIMINE VIOLATION. The fact that it was an in limine violation was lost on AUSA Mr. Edmonds who introduced

it in the district court and astonishingly that fact was also lost on the court that favored the government by allowing it. Thereby not only allowing the in limine violation but violating his own court order. See App.D.pg.24 Line 129 #119. The fact was also lost on the blithe appellate attorney Mr. Weppner and now Ms. Zusman closes the loop by also referencing the in limine violation. The court had ruled definitively that the motion in limine to bar jailhouse calls was moot; the government does not intend to present such evidence at trial, thus mooting the need to suppress with respect to jailhouse calls. See also App.D. pg.25. Suffiency in Federal Court of motion in limine to preserve for appeal absent contemporary objection at trial. 76 ALR Fed 619. Evid. Rule 103 - Once the court rules definitively on the record either before or at trial - a party need not renew or offer of proof to preserve a claim of error for appeal. It is important for the court to note that this occurred on Sept. 6, 2012 - eleven days before the trial date of Sept. 17. Circuit Court Judges M.Smith and Lee erred in overlooking these due process and fifth amendment violations, compounded by sanctioning these vast departures from the accepted and usual course of judicial proceedings. See Supreme Court Rule 10(a)

FRAUD ON THE COURT

Rule 60(d) authorizes the court to set aside a judgement for fraud on the court. In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct prejudiced the opposing part, but whether it harmed the integrity of the judicial process.

The plea petition, standing alone is proof of fraud on

the court, only more so because it is fraud in the presence of the court. The government covered these violatoins in a cloak of legal procedures. After the Sept. 27 2012 hearing where the "Potemkin Amendments" were taken out for a trial run and the illusion of having "cured" the fraudulent plea was promulgated, all subsequent hearings were held to justify that same plea. The defendants attempts to have panel attorney Mr. Smith testify as to who forged the plea were ignored. See App.D pg.26. These hearings then made it possible for Cabello's case on direct appeal to narrowly focus on Faretta, as Appellate attorney Mr. Weppner disregarded Cabello's district court arguments. Another example of just how chaotic and jumbled these proceedings were was the amendments Mr. Smith insisted I sign. See App.D. pg.27 On App.D pg. 27, the court can clearly see where the government has signed but the defendant and Mr. Smith have not. The court will note that the plea offer expires on Dec. 16, 2011, this at a Sept. 27 2012 hearing. The plea's shelf life had expired some nine months earlier. The affirmative act[s] of continuing to defend the plainly illegal petition were in furtherance of the continuing fraud on the court. This fraud on the court has not ceased to operate. Not only fraud on the court, this is several orders of magnitude beyond fraud in that it involves violation of statutory law in the "presence" of the court. This kind of fraud is far more damaging to the courts good name and the integrity of the court and its ability to function is directly impinged. To call these errors would be incorrect. Everyone present knew that the plea had been forged. The action was a

deliberate and wilfull disregarding of the rule of law. This setting aside of legal principles in order to promulgate the illegal plea and complete what the government viewed as legal necessities, i.e., to win. This can only be called irrational perserverance. The solution to all of this chaos was achingly simple; follow the rule of law and have the social intelligence to keep your word.

At the Sept. 27, 2012 hearing, Mr. Edmonds was aware that the court merely reading the "amendments" was not even close to following Rule 11 procedures. That the whole proceeding to implement untethered procedures not based on established rules or law was inadequate. AUSA Mr. Edmonds persisted;

> AUSA: Mr. Edmonds: Well, we want acknowledgement from the defendant that he has entered pleas of guilty to the charges that are in this amended plea petition. Its clear to the government that he's going to be contesting these matters.
>
> The Court: Well, Counsel, you're--all you're doing is muddling up the record at this point...

See App.D pg.28. Although the government practically begs the court to follow established rule 11 procedures, to follow the rule of law, the courts answer is a resounding no. The court considered following Rule 11 procedures as "muddling up the record". The court's outlook was narrow and restricted in scope, i.e., the promulgation of the illegal plea. A district court abuses its discretion if it does not apply the correct law, or if it rests its decision on a clearly erroneous finding of material fact. By any metric an extraordinary circumstance. Due Process Clause of the Fifth Amendment is repeatedly violated throughout the entire process. Circuit Court judges M. Smith and Lee erred in overlooking these repeated Fifth Amendment

violations and peculiar and extraordinary circumstances. See App.A pg.3

STANDARD OF REVIEW

Federal Rule 60(b) authorizes courts to relieve a party to a civil action. The two grounds that are relevant here are: 60(b)(4) the judgement is void; 60(b)(6) any other reason justifying relief. It does not take a microscope to see that the plea petition (contract) is void. It is visible to the naked eye. To present Cabello with a petition that has been altered beyond recognition as a "fait accompli" is a gross violation of Cabello's due process rights under the fifth amendment. The repeated violations of all rules and procedures fit 60(b)(6) as a reason[s] justifying relief. The violation of 18§USC 1512 (c)(1) is plain and clear, moreover never denied. Because this action occurred during a criminal trial 18 §1512(j) is implicated. Rule 60(d)(1)(3) this rule does not limit a courts power to; 60(d)(1) - entertain an independent action to relieve a party from judgement, order, or proceeding; 60(d)(3) - set aside judgement for fraud on the court.

Further, in determining jurisdiction, the Supreme Court has been very clear on this matter. In determining whether extraordinary circumstances exist or are present a court may consider a wide range of factors. These may include in an appropriate case, where the risk of injustice is present to the parties and the risk of undermining the publics confidence in the judicial process. (Roberts C.J. joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan JJ). L.Ed. Digest §289, "The whole purpose of Fed. R.Civ.P 60(b) is to make an exception to finality." (Roberts C.J. joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ) L.Ed Digest §289.

REASONS FOR GRANTING

1) First and foremost the plea petition itself. We can stipulate that in most Federal Court proceedings, court documents are not forged, altered, riddled with errors, misrepresentations, and misleading terms. Just on the surface even a cursory examination of this forged document exposes the inadequate, defective, and illegal nature of it. This is taken to a new dimension by the government and the courts extraordinary exertions to promulgate this illegal plea that is in plain and clear violation of Federal Law. The defendant is 72 years old and would be foolhardy to invite a charge of perjury by inventing these events. The court will note that at no time throughout the process does the government deny that the plea was altered and does not deny it even when ordered to respond to Cabello's 60(b) motion. See App.C. One would think that a defendant making such a serious allegation(s) would trigger a strenuous reaction by the government. That never happens. Any defendant that altered court documents in that manner, would soon find himself holding the short end of the stick.

Appellate courts review interpretations of plea agreements de novo and in accordance with principles of contract law. But plea agreements are unique contracts and courts temper the application of ordinary contracts with special due process concerns for fairness and the adequacy of procedural safeguards. Accordingly, courts construe plea agreements strictly against the government and do not hesitate to scrutinize the governments conduct to ensure that it comports with the highest standards of fairness. This document in nowise clears that bar. While

the defendant is not a lawyer, what little law he knows he learned by briars and thorns in the prison law library, he cannot see that there is another side to this issue. See App.B.

During oral argument in Dec. 2019 in a case involving Insurance Companies cheated by congress renegging on a promise of $12 billion. Justice Sotomayor wrote the 8-1 opinion on the basis of "a principle as old as the nation itself"; the government should honor its obligations. That is, have the social intelligence to keep its word. Chief Justice Roberts agreed saying insurers "would not have participated in the risk corridor program but for the governments promise to pay." Along the same lines the defendant would not have signed the plea, but for the fact that he thought it was for 2 counts with 49 counts dismissed. All of the officers of the court knew this, and it is easily proved by the fact that none of them ever deny it or step up and say that they were the one that altered the plea. And if the court rejects the plea, which it clearly did by permitting a procedure that does not exist to amend the illegal plea, the court must follow Rule 11(c)(5)(A)(B)(C). This was not done. The rule 11 violations were flagrant and extensive. The court must address the defendant personally. See McCarthy v. United States, 349 US 459, 22L.Ed.2d 418, 89 S.ct. 1166(1969). The court concluded that "prejudice inheres in a failure to comply with Rule 11." Rule 11 procedures must be followed, any other approach deprives the defendant of Rule 11 procedural safeguards, and is a violation of his substantial rights and eviscerates his due process rights. Once is happenstance, twice is coincedence, repeated violations is deliberate and wilfull.

This is not harmless error.

2) Prosecutorial misconduct. Prosecutorial misconduct is a hidden problem. The system does not have a self-correct mechanism. It has to be discovered. This does not happen often as 97% of Federal prosecutions end in guilty pleas. In the instant case, this Honorable Court does not have to wander very far off into the weeds to discover it. The evidence is in plain sight. The record clearly reflects instance after instance of misconduct and the documentation in this 60(b) motion is overwhelming. The extraordinary lengths that AUSA Mr. Edmonds goes to promulgate a plea that he himself stated in open court was inadequate and riddled with errors. See App.D pg. 9-10. It takes a lawyer of rare perspicacity and breadth to present a document that does not exist (amendments) to buttress an illegal document that does (plea petition). He presented this in the district court and since it was sanctioned there, he felt free to present these non-existant and non-record amendments to the circuit court and claimed that they "cured"(sic) the defective and illegal plea. See App.D pg.12. The fact that this was a blatant falsehood was of no moment to Mr. Edmond, nor the fact that this was also a direct violation of Circuit Rule 10-2 defining the scope of the "record on appeal." The circuit court relied on these falsehoods as truth. Mr. Edmonds as an experienced prosecutor knows that Appellate Courts take a dim view of being mislead. However Mr. Edmond having freely violated 18 §1512(c)(1) in the distric court now proceeds to mislead the circuit court in violation of 18 USC §1515(a)(3)(A)(B)(C)(E). The statute defines misleading as:

(A) Knowingly making a false statement.

(B) Intentionally omitting information from a statement thereby causing a portion of such a statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such a statement.

(C) With intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered or otherwise lacking in authenticity.

(E) Knowingly using a trick, scheme, or device with intent to mislead.

In for a penny, in for a pound, having violated federal law in the district court, Mr. Edmonds must needs play it through, and he does. Attorneys, especially government attorneys hvae a duty to the courts in which they practice. They have to serve truth and the ends of justice. In these times they say that we are living in a post-truth world. However there are still cries from the wilderness. In the Roger Stone case, Judge Amy Berman Jackson states: "The truth still exists, the truth still matters." In the Sen. Stevens of Alaska case, the truth about prosecutorial misconduct was not discovered until it was too late for Senator Stevens. If prosecutors can do that to a sitting United States Senator, it is not too difficult to imagine what they can do to those of us on the lower frequencies. Mr. Edmonds caused substantial prejudice to the defendant and was flagrant in his disregard for the limits of appropriate professional conduct. His lack of professional responsibility in both the district court and the circuit court is appalling. Courts have authority to police a prosecutor's ethical mis-

conduct, and can dismiss actions where government attorneys have wilfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice. A defendant has a due process right to enforce the plea he signed. A prosecutor shall not make a false statement of fact or law or fail to correct a false statement or material fact, made to the tribunal. Lawyers have a duty to the courts before which they practice. See Pumphrey v. K.W. Thompson Tool Company, 62 F.3d 1128, 1130 (9th Cir. 1995). Cabello's objections, pleas, motions, and complaints had no agency. None at all. The defendant was just never heard.

Justice Ginsburg wrote in a 2008 case, in our system "courts follow the principle of party presentation, i.e., the parties form the issues for decision and the courts generally serve as nuetral arbiters of matters the parties present." In U.S. v. Sineng-Smith Justice Ginsburg wrote, "The Ninth Circuit Appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion." In the instant case, the only party making a presentation was the government. Cabello's presentations were summarily denied or ignored. Moreover the court argued vigoursely for the governments position. Passim. To permit a forged and fraudulent plea to stand, Judge Jones was acting like Justice Ginsburg said the Ninth Circuit Judges did:"beyone the pale." This is not harmless error.

3) Biased Court. The court in signing the plea was now in an adversarial position vis-a-vis the defendant. The court steadfastly would not entertain any motions to withdraw the plea despite the government stating that the plea was inadequate

and the court stating that the original plea colloquy was inadequate before surreptitiously expunging the admission. The admission was somewhat artful in tha it implies that there was another colloquy, the record shows there was only one plea colloquy. See Ap.D pg. 9-10. Also see App.D pg.15 and compare to App.D pg.16. Judge Jones also takes care to remove the false assertion that Cabello did not object to incorporation of the phantom amendments. See line 3 of App.D pg.15. Why the court kept insisting on something that was so easily disproved is puzzling. After the defendant filed to rescuse Judge Jones, he granted motion saying that he could no longer rule objectively because as signatory to the plea he would in effect have to rule against himself. An impartial judge is at the very root of constitutional rights, i.e., the right to a judge who follows the constitution and Supreme Court precedent as well as Appeals court precedent and upholds their oath of office. See, e.g. Neder v. United States, at 527 US 8. Also see Tumey v. Ohio, 273 US 510, 523 (1927). Biased trial judge is structural error and is thus subject to automatic reversal. The courts general disposition towards the defendant is illustrated at a March 13, 2013 hearing, about a Writ of Mandamus.

> The Defendant: And, in fact, your honor, I would like to ask the court to grant me leave to appeal to the Ninth Circuit.
>
> The Court: I'm not granting you anything.
>
> See App.D pg.29

Regardless of legal merit, rule of law, the constitution, court rules, normal procedures, the court's disposition was: "I'm not granting you anything." All of Cabello's attempts to

be heard fell upon unwilling ears. This is bias 101.

4) Sixth Amendment Violations.

Mr. Gerarld Boyle had been Cabello's lawyer for 15 years and was familiar with all the facets of the case and had signaled that he would seek a speedy trial. Mr. Boyle actually had a strategy of defense for his client. Threats of prosecution coerced him off the case. Right to counsel of choice is the very root of the guarantee under the Sixth Amendment. The government was able to disqualify Mr. Boyle by merely asserting that he had a "conflict of interest" (sic). Which Mr. Boyle said was absurd. The court pretended that it would have a hearing "to find out what the facts are that are disputed." That hearing never happened, dispite the Supreme Court holding that a hearing involving the disqualified attorney must be held. Cuyler v. Sullivan, Supra. Also see App.D pg. 1-4. This is an open denial of due process and a denial of counsel of choice. A violation of Cabello's Fifth and Sixth Amendment rights in one fell swoop.

Panel attorney Mr. Michael Smith having placed a null, void, and illegal plea that caused a jumble in the court, did not ever state who forged the petition, completes the hat trick by vanishing and apparently fell off the Earth because he was everafter unavailable. Mr. Smith had to know that a plea cannot be amended. Yet he would not, or could not object, on the contrary, he did all he could to support the government and court position except sign. This plea petition compelled the government to violate federal law and the only thing that it did for his client was leave him with open sentencing. This is ineffective lawyering made manifest. Appellate attorney Mr. Weppner having many

issues that the defendant argued in court disregards Cabello's pleas and makes an argument that Cabello never made. A narrow and esoteric argument that one of the judges at the oral argument asked Mr. Weppner, "That's a tough standard of review, isn't it?" See YouTube Case #13-30080 3/2/15 location: Portland, OR. Mr. Smith and Mr. Weppner are ineffective attorneys personified.

5) Fraud on the court. The facts are out in the open. This Honorable Court will not find it difficult to "suss" them out. The constitution does not conjecture a legal system that would permit this type of open "legerdemain". The district court and the circuit court however do, and with great vigor. The District Court would only let the government present hearings to incriminate Cabello further. These hearings were superfluous in that Cabello had already pleaded to two counts. The defendants efforts to have hearings to determine who forged the plea were ignored as were his pleas to have a hearing about counsel of choice. The defendant was not heard. All defendants have due process rights regardless of the evidence against them. All of the above are not harmless error. See App.D pg.21. The court is expected to avoid using the wisdom of hindsight and should test the signers conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Rule 11 applies to anyone who signs a pleading, motion, or other paper. This court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. See Haines v. Kerner, 404 U.S. 519 [30 L.Ed.2d 652] (1972). There is no ambiguity in the statutory text of 1512(c)(1), it

is quite clear. There is nothing to infer. When the statutory text is clear, courts need not, consider extra-textual evidence. (Roberts, Ch.j. joined by Kennedy, Thomas, Alito, and Gorsuch, JJ.) L.Ed.Digest:Statutes §164.

CONCLUSION

The indispensable elements of this motion are: (1) a judge-emnt which ought not, in equity and good conscience be enforced; (2) This is a true 60(b) motion in that it attacks not the substance of the courts action but impugns the integrity of the proceedings themselves. See Gonzalez v. Crosby, 545 US 524, 535, 125 s.ct. 2641 163 L.Ed 480 (2005). The actions of the court and government were as far a departure from the usual course of judicial proceedings as this honorable court is likely to see. See Supreme Court rule 10(a). The COA inquiry asks only if the district courts decision is debatable. See Miller-el v. Cocrell, 537, US 322, 123, s.ct. 1029 (2003). The government tacitly agrees by conceding that they are true by not denying them. To AUSA Ms. Zusmans credit she does not repeat AUSA Mr. Edmonds falsehoods and misrepresentations, save for the in limine violation. The violations of federal law are a continuing violation as the government continues to defend these violations and has never moved to correct the record. These acts pass the facial plausability standard and the "shock the conscience" standard.

The repeated violations of federal law and repeated violations of defendants 5th and 6th Amendment rights rise to the level of extraordinary circumstances to satisfy the standards of 60(b)(6). The plea petition is clearly null, and void, and rises to the level of extraordinary circumstances to satisfy the

standards of 60(b)(4). Moreover there was only one presenter in the court, the defendant was never heard. All of the acts in this petition are a misfit in a country professing equal justice for all. It was by thunder-dint of forgeries, misrepresentations, that the government obtained the judgement. The government response does not deny this. See App.C. Also Rule 8(b)(6). Honorable circuit Court Judges M.Lee and Smith erred in overlooking these blantant constitutional violations and violations of Federal Law by declining to grant a COA. See App. A pg.3. Although district judge ordinarily has broad discretion in application of FRCP 60(b) such is not true with respect to motions brought under 60(b)(4). See U.S. v. Indoor Cultivation Equip, from High Tech Indoor Supply, 55 F.3d 1311, 31 Fed.R. Serv.3d (callaghan) 832 (7th Cir. 1995). After all null and void is null and void. There is no wiggle room.

The district court did not issue or decline to issue a COA in its original opinion on Oct. 18, 2019. See App.A pg.1. Ordered to grant or deny a COA by Peter L. Shaw, Appellate Commisioner, Judge Mosman declined to issue a COA because defendant failed to make a substantial showing of the denial of a constitutional right on Nov. 19, 2019. See App.A pg.2. For the appellate commissioner to have to remind an experienced Federal Judge that he has to grant or deny a COA and to have to cite case law to the Chief Judge of the Oregon District Court to grant or deny a COA seems awkward and passing strange. See App.A pg. 4-5. This kind of offhand treatment of the instant case seemingly without any forethought is emblematic of how this case

has been treated all along.

As Justice Ginsburg wrote in another 9th Cir. case U.S. v. Sineny-Smith, supra the sanctioning of this vast departure from the accepted and usual course of judicial proceedings, is beyond the pale. In no other circuit would the governments open violation of Federal Law be tolerated. At no time were the proceedings in conformance with either the constitution of the United States or Fed.R.Crim.P.11. See Rule 10(a). The question still remains, who altered the plea petition? Who forged the extra counts? There is much here that merits further review. However discomfitting, things are exactly what they seem to be. This court should grant a Writ of Certiorari.

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Respectfully Submitted,

Archie Cabello Pro Se

Archie Cabello
Reg. No. 73097-065
Federal Correctional Institution
La Tuna P.O. Box 3000
Anthony, TX/NM 88021