

APPENDIX A

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 10/18/2019 at 10:55 AM PDT and filed on 10/18/2019

Case Name: USA v. Cabello et al

Case Number: 3:10-cr-00482-MO

Filer:

Document Number: 330(No document attached)

Docket Text:

ORDER: Motion [325] Petition for Independent Action Under 60(B)(4) and 60(b)(6) to Cure Fundamental Defects That Impugn the Integrity of the District Courts Judgement, and That the Government Obtained by Prosecutorial Ethical Misconduct is Denied. Ordered by Judge Michael W. Mosman. (kms)

3:10-cr-00482-MO-1 Notice has been electronically mailed to:

Claire M. Fay claire.fay@usdoj.gov, CaseView.ECF@usdoj.gov, judi.burton@usdoj.gov, tom.edmonds@usdoj.gov

Kathleen Louise Bickers kathleen.bickers@usdoj.gov, CaseView.ECF@usdoj.gov, deryl.looney@usdoj.gov, jeannie.berg@usdoj.gov, melissa.stewart@usdoj.gov, michelle.goodrow@usdoj.gov

Kelly Alexandre Zusman Kelly.zusman@usdoj.gov, beth.gunderson@usdoj.gov, CaseView.ECF@usdoj.gov

Lynne B. Morgan lbmorgan@att.net, pdxcduncan@gmail.com

Thomas H. Edmonds tom.edmonds@usdoj.gov, amy.kuntz@usdoj.gov, CaseView.ECF@usdoj.gov, kelly.borroz@usdoj.gov

Whitney Patrick Boise whitney@boisematthews.com, pat@boisematthews.com

3:10-cr-00482-MO-1 Notice will not be electronically mailed to:

Archie Cabello(Terminated)
73097-065
LA TUNA
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 3000
ANTHONY, NM 88021

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 11/19/2019 at 4:18:30 PM PST and filed on 11/19/2019

Case Name: USA v. Cabello et al

Case Number: 3:10-cr-00482-MO

Filer:

WARNING: CASE CLOSED on 03/26/2013

Document Number: 333 (No document attached)

Docket Text:

ORDER: With respect to this Court's 10/18/2019 Order [330] denying Defendant's Motion [325], this Court **DECLINES** to issue a certificate of appealability because the defendant has failed to make a substantial showing of the denial of a constitutional right. Ordered by Judge Michael W. Mosman. (dls)

3:10-cr-00482-MO- 1 Notice has been electronically mailed to:

3:10-cr-00482-MO- 1 Notice will not be electronically mailed to:

Archie Cabello(Terminated)
73097-065
LA TUNA
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 3000
ANTHONY, NM 88021

Claire M. Fay
United States Attorney's Office
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204

Kathleen Louise Bickers
United States Attorney's Office
1000 SW Third Avenue

Suite 600
Portland, OR 97204

Kelly Alexandre Zusman
United States Attorney's Office
1000 SW Third Avenue
Suite 600
Portland, OR 97204

Lynne B. Morgan
Lynne B. Morgan
Attorney at Law
6312 SW Capitol Hwy, #443
Portland, OR 97239

Thomas H. Edmonds
United States Attorney's Office
1000 S.W. Third Ave.
Suite 600
Portland, OR 97204

Whitney Patrick Boise
Boise Matthews LLP
Sixth+Main
1050 SW Sixth Avenue
Suite 1400
Portland, OR 97204-1174

The following document(s) are associated with this transaction:

This is a re-generated NEF. Created on 11/21/2019 at 12:54 PM PST

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAY 7 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARCHIE CABELLO, AKA Archibaldo
Cabello, AKA Archie Cabello, Jr., AKA
Archie P. Cabello, AKA Arquimedes
Cabello, AKA Archie Palumbo,

Defendant-Appellant.

No. 19-35901

D.C. Nos. 3:16-cv-01780-JO
3:10-cr-00482-MO-1

District of Oregon,
Portland

ORDER

Before: M. SMITH and LEE, Circuit Judges.

This appeal is from the denial of appellant's Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry No. 8) is denied because appellant has not shown "that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

NOV 12 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARCHIE CABELLO, AKA Archibaldo
Cabello, AKA Archie Cabello, Jr., AKA
Archie P. Cabello, AKA Arquimedes
Cabello, AKA Archie Palumbo,

Defendant-Appellant.

No. 19-35901

D.C. Nos. 3:16-cv-01780-JO
3:10-cr-00482-MO-1

District of Oregon,
Portland

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise from the denial of petitioner's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) in section 2255 proceedings. *See Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (certificate of probable cause to appeal necessary to appeal denial of post-judgment motion for relief under Rule 60(b)); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016). Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. §

2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. Under *Asrar*, if the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the clerk of the district court shall forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

The Clerk shall send a copy of this order to the district court.

10/15/2019	<u>329</u>	Certificate of Service by USA as to Archie Cabello regarding Response to Motion <u>328</u> , Notice of Attorney Appearance - USA <u>327</u> (Zusman, Kelly) (Entered: 10/15/2019)
10/18/2019	330	ORDER: Motion <u>325</u> Petition for Independent Action Under 60(B)(4) and 60(b)(6) to Cure Fundamental Defects That Impugn the Integrity of the District Courts Judgement, and That the Government Obtained by Prosecutorial Ethical Misconduct is Denied. Ordered by Judge Michael W. Mosman. (kms) (Entered: 10/18/2019)
10/28/2019	<u>331</u>	Notice of Appeal to the USCA for the 9th Circuit by Archie Cabello regarding Order on Motion for Order, 330 Receipt number no fee paid (schm) (Entered: 10/28/2019)
10/29/2019		USCA-9th Circuit Case Number as to Archie Cabello 19-35901 for Notice of Appeal <u>331</u> filed by Archie Cabello, Archie Cabello, Jr.. (jtj) (Entered: 10/29/2019)
11/12/2019	<u>332</u>	Order of USCA-9th Circuit as to Archie Cabello regarding Notice of Appeal <u>331</u> USCA # 19-35901. The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise from the denial of petitioner's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) in section 2255 proceedings. See Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993) (certificate of probable cause to appeal necessary to appeal denial of post-judgment motion for relief under Rule 60(b)); United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015), cert. denied, 136 S. Ct. 2462 (2016). Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the courts earliest convenience. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); United States v. Asrar, 116 F.3d 1268, 1270 (9th Cir. 1997). If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. See 28 U.S.C. § 2253(c)(3); Asrar, 116 F.3d at 1270. Under Asrar, if the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the clerk of the district court shall forward to this court the record with the order denying the certificate. See Asrar, 116 F.3d at 1270. The Clerk shall send a copy of this order to the district court. (jtj) (Entered: 11/12/2019)
11/19/2019	333	ORDER: With respect to this Court's 10/18/2019 Order 330 denying Defendant's Motion <u>325</u> , this Court DECLINES to issue a certificate of appealability because the defendant has failed to make a substantial showing of the denial of a constitutional right. Ordered by Judge Michael W. Mosman. (dls) (Entered: 11/19/2019)
11/19/2019	334	Clerk's Notice of Mailing as to Archie Cabello regarding Order 333 . (dls) (Entered: 11/19/2019)
11/25/2019	<u>335</u>	Notice of Change of Address entered as to Archie Cabello. (sb) (Entered: 11/25/2019)
11/25/2019	336	Clerk's Notice of Mailing as to Archie Cabello Regarding Order 333 Certificate of Appealability Denied. (sb) (Entered: 11/25/2019)

12/02/2019	<u>337</u>	Notice of Change of Address entered as to Archie Cabello (schm) (Entered: 12/03/2019)
12/06/2019	<u>338</u>	Notice of Appeal to the USCA for the 9th Circuit by Archie Cabello regarding Certificate of Appealability Denied, 333 . (schm) (Entered: 12/06/2019)
01/16/2020	<u>339</u>	Notice of Change of Address entered as to Archie Cabello. (sss) (Entered: 01/18/2020)
05/08/2020	<u>340</u>	Order of USCA-9th Circuit as to Archie Cabello regarding Notice of Appeal <u>331</u> USCA # 19-35901. This appeal is from the denial of appellants Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry No. <u>8</u>) is denied because appellant has not shown that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right. United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015); see also 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Any pending motions are denied as moot. DENIED (ecp) (Entered: 05/08/2020)

PACER Service Center			
Transaction Receipt			
08/24/2020 12:00:17			
PACER Login:	US4856	Client Code:	
Description:	Docket Report	Search Criteria:	3:10-cr-00482-MO Start date: 1/1/1971 End date: 8/24/2020
Billable Pages:	30	Cost:	3.00
Exempt flag:	Exempt	Exempt reason:	Always

APPENDIX B

Law Office of Michael R. Smith
Michael R. Smith
806 SW Broadway, Suite 300
Portland, Oregon 97205
(503)972-9407
MSmith@AlaskaOregonLawyer.com
Attorney for Defendant Archie Cabello

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

United States of America,)	
)	Case No.: 3:10-cr-482 JO
Plaintiff,)	
v.)	PETITION TO ENTER PLEA
)	OF GUILTY, CERTIFICATE
Archie Cabello)	OF COUNSEL, AND ORDER
)	ENTERING PLEA.
Defendant.)	

The defendant represents to the court

1. My name is Archie Cabello. I am 64 years old. I have gone to school up to
and including the 12th Grade.

2. My attorney is Michael R. Smith.

3. My attorney and I have discussed my case fully. I have received a copy of the
Indictment or information. I have read the Indictment or Information, or it has been read
to me, and I have discussed it with my attorney. My attorney has counseled and advised
me concerning the nature of each charge, any lesser-included offense(s) and the possible
defense that I might have in this case. I have been advised and understood that the
elements of the charge(s) alleged against me to which I am pleading "GUILTY" are as
follows: Conspiracy to Commit Bank Larceny; Possession of Stolen Bank Funds; and
Making False Statements on Credit Applications (Count 1 of the Indictment); (1) an

000058

False Statements Ct. 3 is possession
on credit cards of stolen funds

agreement between defendant and at least one other person to commit either Bank

Larceny, Possession of Stolen Bank Funds or Making False Statements on Credit Card

Applications; (2) that defendant became a member of the conspiracy knowing at least one of its objects and intending to help accomplish it; (3) an overt act performed by one of the conspirators for the purpose of carrying out the conspiracy; and (4) that some part of the conspiracy took place within the District of Oregon.

Also Counts 3, 4, 9, 11, 12, 15 → False income tax

For the charge of Money Laundering Conspiracy (Count 51 of the Indictment),

that (1) an agreement between defendant and at least one other person to commit Money Laundering; (2) that defendant became a member of the conspiracy knowing at least one of its objects and intending to help accomplish it; (3) an overt act performed by one of the conspirators for the purpose of carrying out the conspiracy; and (4) that some part of the conspiracy took place within the District of Oregon.

I have had a full and adequate opportunity to disclose to my attorney all facts known to me that relate to my case. I understand that the Court may ask whether I am satisfied with the advice I have received from my attorney.

4. I know that if I plead "GUILTY," I will have to answer any questions that the judge asks me about the offense(s) to which I am pleading guilty. I also know that if I answer falsely, under oath, and in the presence of my attorney, my answers could be used

against me in a prosecution for perjury or false statement.

5. I am not under the influence of alcohol or drugs. I am not suffering from any injury, illness or disability affecting my thinking or my ability to reason except as follows: *none*. I have not taken any drugs or medications within the past seven (7) days except as follows: *none*.

6. I understand the conviction of a crime can result in consequences in addition to imprisonment. Such consequences include deportation, or removal from the United States, or denial of naturalization, if I am not a United States citizen, loss of eligibility to receive federal benefits, loss of certain civil rights (which may be temporary or permanent depending on applicable state or federal law), such as the right to vote, to hold public office, and to possess a firearm, and loss of the privilege to engage in certain occupations licensed by the state or federal government.

7. I know that I may plead "NOT GUILTY" to any crime charged against me and that I may persist in that plea if it has already been made. I know that if I plead "NOT GUILTY" the Constitution guarantees me:

a. The right to a speedy and public trial by jury, during which I will be presumed to be innocent unless and until I am proven guilty by the government beyond a reasonable doubt and by the unanimous vote of twelve jurors:

b. The right to have the assistance of an attorney at all stages of the proceedings;

c. The right to use the power and process of the court to compel the production of evidence including the attendance of witnesses in my favor;

d. The right to see hear, confront, and cross-examine all witnesses called to testify against me;

e. The right to decide for myself whether to take the witness stand and testify, and if I decide not to take the witness stand, I understand that no inference of guilt may be drawn from this decision, and

f. The right not to be compelled to incriminate myself.

8. I know that if I plead "GUILTY" there will be no trial before either a judge or a jury, and that I will not be able to appeal from the judge's denial of any pretrial motions I may have filed concerning matters or issues not related to the court's jurisdiction [see instructions].

9. In this case I am pleading "GUILTY" under Criminal Rule 11. My attorney has explained the effect of my plea under Rule 11 to be as follows:

My plea of guilty is under Rule 11(a) and (b), although the judge will consider the recommendations and agreements of both the prosecution and defense attorneys concerning sentencing, the judge is not obligated to follow those recommendations or agreements. If the judge imposes a sentence different from what I expected to receive I do not have a right to withdraw my plea.

10. I know the maximum sentence which can be imposed upon me for the crimes(s) to which I am pleading guilty is 5 years imprisonment on Count 1 and 20 years imprisonment on Count 51 and a fine of \$250,000 on Count 1 and \$500,000 on Count

\$1,000,000 credit card charges
51. I also know there is a mandatory minimum sentence of -0- years imprisonment.

credit cards 30yr; false tax 3yr felony ~ \$250,000 fine.

11. I know that the judge, in addition to any other penalty, will order a special assessment as provided by law in the amount of \$100 per count of conviction.

12. I know that if I am ordered to pay a fine, and I willfully refuse to pay that fine, I can be returned to court, where the judge can substantially increase the amount of the unpaid balance owed on the fine and I can be imprisoned for up to one year.

13. My attorney has discussed with me the Federal Sentencing Guidelines. I know that the Guidelines are advisory, not mandatory. I also know the sentencing judge, in determining the particular sentence to be imposed, must consider those factors set forth

in Title 18, United States Code, Section 3553(a), including but not limited to: the nature and circumstances of the offense, my own history and characteristics, the goals of sentencing (punishment, deterrence, protection and rehabilitation) and the sentencing range established by the advisory Guidelines. If my attorney or any other person has calculated a guideline range for me, I know that is only a prediction and advisory and that it is the judge who makes the final decision as to what the guideline range is and what sentence will be imposed. I also know that a judge may not impose a sentence greater than the maximum sentence referred to in paragraph (10) above.

14. I know from discussion with my attorney that, under the Federal Sentencing Guidelines, if I am sentenced to prison I am not entitled to parole. I will have to serve the full sentence imposed except for any credit for good behavior that I earn. I can earn credit for good behavior in prison at a rate of up to 54 days for each year of imprisonment served. Credit for good behavior does not apply to a sentence of one year or less.

15. I know that if I am sentenced to prison, the judge will impose a term of supervised release to follow the prison sentence. During my supervised release term I will be supervised by a probation officer according to terms and conditions set by the judge. In my case, a term of supervised release can be 2 to 3 years. If I violate the conditions of supervised release, I may be sent back to prison for up to 3 year(s) [see instructions].

16. I know that in addition to or in lieu of any other penalty, the judge can order restitution payments to any victim of any offense to which I plead guilty. I am also informed that, for certain crimes of violence and crimes involving fraud or deceit, it is mandatory that the judge impose restitution in the full amount of any financial loss or

harm caused by an offense. If imposed, the victim can use the order of restitution to obtain a civil judgment lien. A restitution order can be enforced by the United States for up to twenty (20) years from the date of my release from imprisonment, or, if I am not imprisoned, twenty (20) years from the date of the entry of judgment. If I willfully refuse to pay restitution as ordered, a judge may resentence me to any sentence which could originally have been imposed.

17. On any fine or restitution in an amount of \$2,500 or more, I know that I will be required to pay interest unless that fine or restitution is paid within fifteen (15) days from the date of the entry of judgment.


18. If I am on probation, parole, or supervised release in any other state or federal case, I know that by pleading guilty in this court my probation, parole or supervised release may be revoked and I may be required to serve time in that case, which may be consecutive, that is, in addition to any sentence imposed on me in this court.

19. If I have another case pending in any state or federal court, I know that my Petition and Plea Agreement in this case do not, in the absence of an express and written agreement, apply to my other case(s), and that I can be faced with consecutive sentences of imprisonment.

~~20. My plea of "GUILTY" is NOT based on a Plea Agreement.~~

21. N/A.

22. My plea of "GUILTY" is not the result of force, threat, or intimidation.


 23. I hereby request that the judge accept my plea of "GUILTY" to the following counts Count 1: Conspiracy to Commit Bank Larceny (18 U.S.C. § 2113(b)). Possession of Stolen Bank Funds (18 U.S.C. § 2113(c) and Making False Statements on Credit

Applications (18 U.S.C § 1014). all in violation of 18 U.S.C. § 371; and Count 51:
Money Laundering Conspiracy (18 U.S.C. § 1956(h).

24. I know that the judge must be satisfied that a crime occurred and that I committed that crime before my plea of "GUILTY" can be accepted. With respect to the charge(s) to which I am pleading guilty, I represent that I did the following acts and that following facts are true: Beginning in or about August 1995 and continuing until 2012, in the District of Oregon, along with my co-defendants Marian Cabello and Vincent Cabello, I knowingly and intentionally conspired to commit Bank Larceny, Possession of Stolen Bank Funds, and Making False Statements on Credit Applications, and knowingly and intentionally conspired to commit Money Laundering,

25. I offer my plea of "GUILTY" freely and voluntarily and of my own accord and with a full understanding of the allegations as forth in the Indictment or Information, and with a full understanding of the statements set forth in the Petition and in the certificate of my attorney that is attached to this Petition.

SIGNED by me in the presence of my attorney, after reading (or having had read to me) all of the foregoing pages and paragraphs of this Petition on this Sept 17 day of 2012.


Archie Cabello

CERTIFICATE OF COUNSEL

The undersigned, as attorney for defendant Archie Cabello, hereby certifies:

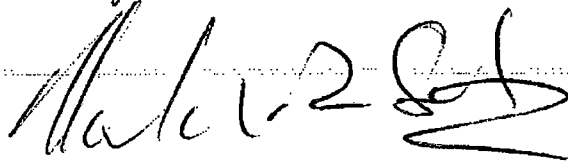
1. I have fully explained to the defendant the allegations contained in the Indictment or Information in this case, any lesser-included offense(s), and the possible defenses which may apply in this case.

2. I have personally examined the attached Petition To Enter Plea of Guilty And Order Entering Plea, explained all its provisions to the defendant, and discussed fully with the defendant all matters described an referred to in the Petition.

3. I have explained to the defendant the maximum penalty and other consequences of entering a plea of guilty described in paragraphs (6)-(20) of the Petition, and I have also explained to the defendant the applicable Federal Sentencing Guidelines.

4. I recommend that the Court accept the defendant's plea of "GUILTY."

SIGNED by me in the presence of the above named defendant, and after full discussion with the defendant of the contents of the Petition To Enter Plea of Guilty, and any Plea Agreement, on this 17 day of September, 2012.



APPENDIX C

BILLY J. WILLIAMS, OSB #901366
United States Attorney
District of Oregon
KELLY ZUSMAN
Assistant United States Attorney
Kelly.Zusman@usdoj.gov
1000 SW Third Avenue, Suite 600
Portland, OR 97204
Telephone: (503) 727-1009
Attorneys for United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

3:10-CR-00482-MO

v.

ARCHIE CABELLO,

Defendant.

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S PETITION FOR
INDEPENDENT ACTION (#325)**

Introduction

After unsuccessfully attempting to undo his guilty plea through a direct appeal and a habeas motion, Defendant Archie Cabello now seeks to circumvent the statutory successive petition rule by styling his latest effort a motion for relief from judgment. Because this motion is a disguised successive 2255, this Court lacks jurisdiction to entertain it and the motion must be denied.

Background & Argument

Cabello stole millions of dollars from armored car companies over the course of a decade. He roped his wife and son into his elaborate scheme and stole millions that they trio used to fund their living expenses for years. Cabello was caught in Oregon and charged in a 51-count

Four months later, Cabello filed a writ of mandamus in the Ninth Circuit. The court summarily denied the writ in June of 2018. (ECF No. 318). The court also told Cabello that it would no longer accept his filings. (*Id.*).

Now, over two years after this Court denied his first 2255 motion, Cabello seeks to reopen his judgment citing Fed. R. Crim. P. 60(b). (ECF No. 325). He alleges malfeasance by one of the AUSAs and the original trial judge, but offers no evidentiary support for any of his attacks. He raises nothing new. His motion simply recycles the same arguments he advanced in his original motion to withdraw his guilty plea.

This Court lacks jurisdiction over Rule 60(b) motions that are in fact disguised successive petitions. Inmates are generally limited to bringing only one 2255 motion and may not bring a successive motion “unless it meets the exacting standards of 28 U.S.C. 2255(h).” *United States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011). Unless and until the Ninth Circuit certifies a successive motion based on newly discovered evidence or a new rule of constitutional law made retroactive by the Supreme Court, this Court may not consider his motion. *Id.* Artful pleading cannot circumvent this rule when the inmate seeks to present a “claim” for relief from judgment. *Id.* at 1063, *citing Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005), *see also United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011).

Cabello asserts that his conviction was procured by fraud because his plea petition listed more than two counts. This is a “claim” that his conviction is invalid because it is unconstitutional. Therefore, his motion falls within 2255(h). Cabello cannot invoke other procedural mechanisms to avoid 2255(h). *Washington*, 653 F.3d at 1063.

And *Buck v. Davis*, 137 S. Ct. 759 (2017) is neither analogous nor helpful to Cabello. In that case, the defendant was convicted and sentenced to death, in part, because his own lawyer presented “expert” testimony that black people are statistically more likely to commit future

violent acts. State habeas counsel failed to raise the issue at all, despite unequivocal law condemning the practice. *Id.* at 775. The Court held that the defendant presented precisely the type of extraordinary circumstance that merited relief under Rule 60(b)(6) because he “may have been sentenced to death because of his race,” and such a result “poisons public confidence in the judicial process.” *Id.* at 778.

Much of the Court’s analysis is grounded in concerns about race and the death penalty, two concerns that are not present in this case. Moreover, Cabello has fully vetted his claims regarding the accuracy of his guilty plea and his efforts have failed because he lacks any evidentiary support for the notion that anyone hoodwinked him. Indeed, as Cabello acknowledged in his direct appeal, he can be heard in a jail call recording with his son describing his plea deal to “7 or 8 counts.” D. Reply at 2014 WL 3909328, *10 (2014).

Because Cabello has not obtained authorization from the Ninth Circuit to pursue this claim, this Court lacks jurisdiction to consider it. His latest motion should be denied.

Conclusion

This Court should deny Cabello’s motion for relief from judgment (ECF No. 325).

Dated: October 15, 2019.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

s/ Kelly Zusman
KELLY ZUSMAN
Assistant United States Attorney

**Additional material
from this filing is
available in the
Clerk's Office.**