

No. 20-5475

IN THE SUPREME COURT  
OF THE UNITED STATES

ARCHIE CABELLO,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

PETITION FOR RECONSIDERATION  
ON WRIT OF CERTIORARI  
TO THE NINTH CIRCUIT  
COURT OF APPEALS

# CERTIFICATE

This petition for reconsideration is presented in good faith and not for delay.

The grounds are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Respectfully Submitted,

Dated October 22 2020

Archie Cabello

Archie Cabello pro se

## Questions Presented

- (1) In light of the fact that the Supreme Court can take only 1% of cases submitted, does this give defendants and in particular pro se inmates, limited access to review by the Supreme Court despite serious violation of their constitutional rights?
- (2) Does the circuit court have any obligation to not permit or sanction a departure from the accepted and usual course of proceedings vis-a-vis rule 10(a)?

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## 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 appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

## ARGUMENT

In denying the defendant's petition for writ of certiorari the court cited rule 39.8. It was not the intent of the petitioner to be malicious or frivolous. see App. A. The intent was to present the facts and the unvarnished truth to the court. Because so few pro se defendants actually get a Supreme Court review of their case, it was the defendants intent to pique the court's interest by presenting serious persuasive proofs to back these serious allegations. If it came across as malicious, the petitioner apologizes to the court. There is certainly nothing frivolous about these serious allegations. Serious allegations require serious evidence and the defendant in the 40-page original petition provided an abundance of documented evidence.

In U.S. v. Collins 684 F.3d 873 (9<sup>th</sup> cir. 2012), defendant was initially charged by indictment, and then by First Superseding Indictment. Count 1 of each indictment was identical. The parties entered an agreement whereby defendant would plead to just the first count of the superseding indictment.

After full Rule 11 advisement the court asked the defendant, "How do you plead to count 1 of the indictment [sic]?" The defendant replied, "guilty." Later the judge realized he had taken defendant's plea to the original, now superseded indictment. He reconvened the attorneys and explained the problem.

He asked the defendant if there was anything from their prior colloquy he wanted to change, and the defendant said no. He then asked the defendant how he wished to plead to count 1 of the "First Superseding Indictment?", and the defendant again responded "guilty."

*Id.* at 880. The difference between Collins' trial court and this case is stark. If the Collins trial court were to have acted as did the court below, he would have simply announced to the defendant that he was going to "incorporate" the word "superseding" into what he had said at the original plea hearing and called it good, inviting no participation by the defendant. In fact, once the court made plain its intent to ascribe to Cabello a sort of *nunc pro tunc* mental state at

the time of his change of plea hearing-Cabello objected. Instead, the court in Collins ensured that the defendant recalled and affirmed the content of their earlier colloquy and understood what the purpose of the second hearing was. He addressed the defendant directly and asked if there was anything he wanted to change. He then re-asked him to submit a plea under the new and revised circumstances, and defendant willingly did so anew. That was not done in this case.

Law of the circuit is stare decisis by another name. Published decisions of the 9<sup>th</sup> cir. become law of the circuit, which is binding authority, that the 9<sup>th</sup> circuit must follow until overruled. See Gonzalez v. Arizona 677 F.3d 383 (9<sup>th</sup> cir. 2012) (en banc). Controlling, overruling authority includes only intervening statutes or Supreme Court opinions that create "clearly irreconcilable" conflicts with 9<sup>th</sup> cir. case law. See Miller v. Gammie 335 F.3d (9<sup>th</sup> cir. 2003) (en banc). That threshold is not reached here. As a general rule, the principle of stare decisis directs the court to adhere not only to the holdings of the circuit courts prior cases, but to their explications of the governing rules of law. Under law-of-the-case doctrine, the holding of the circuit court is binding until it is overruled by a body competent to do so.

A circuit panel may not overturn a prior circuit authority, still less Supreme Court case law.

Of course nothing supercedes statutory text. Statute § 109 - It is a cardinal rule of statutory construction that a statute is to be read as a whole. 5(a) 5(b). Congress intended 18 § 1512 as a broad ban on evidence-spoilation. At the very least we can conservatively say that 18 § 1512 (c) (1) was overlooked.

Because the Supreme Court takes 1% of cases submitted and even less from uncounseled pro se defendants, to perform the Augean task of receiving a full review in this Honorable Court is very much against the odds. However, this is a classic example of just the type of criminal case that calls for an exercise of this court's supervisory power. See rule 10(a).

What would induce experienced U.S. Attorneys to so far depart from the accepted and usual course of judicial proceedings and what would induce the court to sanction this gambit? As everything in this case it begins with the plea petition. As everything had been done in a hurry the day of trial, the author of the plea, panel attorney Mr. Smith had merely copied the plea that had served my co-defendants, who had

co-operated with the government. See App. B pg. 1-10. If the court will view the plea that the defendant in the instant case signed. See App. B original petition. The court will notice the similarity. However the co-defendants plea is not defaced by interlineations on line 3. Line 23 is identical, neither is spoiled by alterations. The defendant requests that the court view line 21 on the co-defendants plea and note that this line contains a disclaimer saying that she has no claim or expectation of leniency. Line 21 on the defendants plea is marked N/A. Panel Attorney Mr. Smith deleted line 21, knowing full well that the disclaimer would have been a deal breaker. Moreover Mr. Smith pointed out that my co-defendants were to receive a sentence of 18 months on this exact [sic] plea. He assured me that by sparing court resources, the court would look upon this change of plea favorably. A little cutting and pasting and the job's done. The problem was that Cabello had now pleaded to only 2 counts, which were conspiracy counts, which are of course wholly distinct from the crime conspired to. To "cure" that problem one or more officers of the court added six counts. After several days to reflect, they seemed to have concluded that the

forged plea did not pass legally. They then determined to "cure" the "cure" by amending it. The fact that there is no rule 11 procedure to amend a plea was not a consideration. Mr. Smith was dispatched to the county jail to cajole Cabello into signing them. This was when the defendant first saw the additional counts. The amendments had the additional counts in the printed portion and also included a waiver of appeal which the original plea did not. Cabello informed Mr. Smith that he would not sign these amendments. Mr. Smith stated that nothing had changed, that the government merely wanted the defendant to plead with more specificity. This Cabello assured Mr. Smith could not be done. As the amendments went unsigned, they do not exist and the court ruled that the altered plea petition, would stand. The highly unusual and peculiar circumstances of this case caused a transmutation of the court and the court found itself defending the plea. It was the court that signed the plea and therefore would have to rule against itself. This intrusion into the executive branch is a breach of the separation of powers. While the government was not signatory to the plea, they are nevertheless responsible for it.

Long ago in a case called Berger, the

Supreme Court set the standard for the conduct of U.S. Attorneys: "the United States Attorney is not the representative of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, there, in a criminal prosecution is not that it shall win the case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, he may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Clear and unambiguous, yet oft times not heeded. See *Berger v. United States* 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed 1314 (1935).

Federal judges at all levels rely rightly or wrongly on federal prosecutors to do the right thing. The touchstone for prosecutorial misconduct is not the culpability of the prosecutor but the fairness of the proceedings. No argument can be made that the proceedings, I.e., the trial phase and after were fair. The defendant is aware that it is difficult in the extreme to uncover

prosecutorial misconduct.

In the case of Senator Stevens prosecutorial misconduct was discovered, albeit too late for Senator Stevens. It cost him the election which was a week after his conviction and it changed the balance of power in the Senate. In Senator Stevens case he was doubly lucky: first an honest FBI agent broke ranks with his colleagues and prosecutors in the DOJ and disclosed the governments willfull Brady violations and misrepresentations to the district court and the judge presiding over the case took his obligations and his duties as a Federal Judge seriously. No officer of the court is going to step up and disclose the manner in which the plea petition was altered as Agent Joy did in the Senator Stevens case. See United States v. Stevens Criminal Case No. 08-23 (D.D.C.). The theme seemed to be in the Senator Stevens case and in this case as well, get the conviction and we'll deal with the appeals later.

Submitting altered documents as evidence is void and must be vacated and set aside pursuant to FRCP 60(b). The defendant was certainly injured and there is no question that it affected his substantial rights. Of course this interfered with Cabello's ability to fully and fairly proceed at trial.

The district court declined to issue a COA because the defendant had failed to make a substantial showing of a denial of a constitutional right. The circuit court followed suit. How they reached that conclusion is mystifying.

In McGee v. McFadden [204 L. Ed 2 1160] 139 S. Ct. 2608 US Lexis 4445 (2019). Justice Sotomayor wrote: "The large volume of COA requests, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a rubber stamp, especially for pro se litigants. We have periodically had to remind lower courts not to unduly restrict this path to appellate review.

In 2007, a former employee of Louisiana's Fifth Circuit Court of Appeals shot himself in his courthouse office. The employee left a suicide note claiming that he had been tormented by his involvement in the court of appeals 13-year policy of summarily denying pro se appeals. The Fifth Circuit ordered to review appeals; due process denied, Supreme Court says. New Orleans, La., Times Picayune, Oct. 7, 2008 pg. 1. The note reported that no judge had reviewed a habeas application during that time; instead courthouse staff prepared rulings that judges signed "without so much as a glance" at

the underlying petitions or any review of the applications' merits. Johnson v. Parish of Jefferson 2009 U.S. Dist. Lexis 5183, 2009 WL 1808718\*4 Ed. La (June 19<sup>th</sup> 2009). This is but one example of the difficulty pro se litigants are up against trying to have wrongs remedied.

The government did not misperceive the Fifth Amendment's compass but deliberately disregarded Cabello's due process rights.

Brady along with recent trends in legal ethics recognize that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction, including forged documents. See e.g. ABA Model Rules of Professional Conduct 3.8(g)-(h) (2008). See also Imbler v. Pachtman, 424 U.S. 409, 427, n 25 96 S. C. T. 984, 47 L. Ed 2d 128 (1976). [A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correction of the conviction. Had the government been forthcoming about the illegal plea, it would have impeached everything that occurred during the hearings and the plea declared null and void.

In the context of a Brady / Giglio claim,

outrageous government conduct that amounts to due process violation, warrants dismissal of the indictment. The defendant makes an unequivocal Brady/Giglio claim. See Brady v. Maryland 373 U.S. 83, s. ct. 1194 10 L. Ed 2d 40 (1963). Also see Giglio v. United States 405 U.S. 150 92 s. ct. 763 31 L. Ed 2d 104 (1972).

In the governments reply on direct appeal Mr. Edmonds claims that Cabello did not raise a factual basis claim. But the defendant did raise the claim in the district court in a motion submitted on the 28<sup>th</sup> of January, 2013. See App. C pg. 1. Mr. Edmonds also cites Collins, *supra*. But, Collins actually undermines the governments argument and shows the weakness of it. See App. C pg. 2. There was no appellate waiver, yet in the governments reply to the direct appeal opening brief, Mr. Edmonds states: "the government is not seeking to enforce that waiver with this appeal." Since the waiver did not exist it was a small matter not to enforce it. Moreover, who has ever heard of the government not enforcing an appeal waiver. Repeated misrepresentations impeded Cabello's ability to receive due process in the district court and his ability to have his case reviewed on the merits, in the circuit court. See App C pg. 3

This is that rare case in which the facts and the law are on the defendants side. All of Cabello's allegations are fully documented.

Marbury v. Madison (1803) officially established the Supreme Court as the final arbiter of the constitutionality of any law passed by congress. In doing so Chief Justice Marshall made the court the effective equal-in a checks-and balance sort of way-of both the legislative and executive branches. This court is the final check on the executive branch.

The defendant was never heard throughout the hearings. His questions were never answered, rather he was given answers that could not be questioned.

## REASONS FOR GRANTING

Cabello understands the courts denial and dismissal of his Writ of Certiorari. If one can be too zealous in his own defense and in attacking his case, then perhaps I was. I stand rectified, and pray that this petition conforms to the standards of this court. See App. A. The truth is hard but clean. There just is not an easy or adroit and diplomatic way to essay that an officer or officers of the law violated legal norms to preserve a conviction. The defendant asks the court to look past his inexpert

petition for a writ of certiorari and reconsider on the underlying merits of the case. All allegations are fully documented and laid out for the court to examine.

In Haines v. Kerner 404 US 519 50 L. Ed. 2d] 1972. The United States Supreme Court holds allegations of a pro se complaint to less stringent standards than formal pleadings drafted by lawyers. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Pleading S 130. That is certainly not the case here as the facts are laid out plainly and clearly.

As Justice Sotomayor wrote in McGee v. McFadden, *supra*. This court has had to periodically remind lower courts not to impede or restrict pro se defendants rights to appellate review. The Fifth Circuit is of course an egregious example but there may be more. See Johnson v. Parish of Jefferson, *supra*. This case would provide an opportunity for this court to codify or circumscribe how the lower courts perceive pro se petitions in all circuits, so that pro se petitions are reviewed on a par with counseled defendants.

In Haines v. Kerner, *supra*, the United States Supreme Court reversed. In a per curiam opinion

expressing the unanimous views of the court, it was held that since it did not appear beyond doubt that the inmate could prove no set of facts in support of his claim which would entitle him to relief, he was entitled to an opportunity to present proof.

The district and the circuit courts both denied Cabello's petition, failing to state a claim despite the fact that it did not appear beyond doubt that the inmate could prove no set of facts. Cabello's allegations enjoy the unusual advantage of being true. The circuit court did not give an opportunity to present proof.

It is almost a half-century since Haines v. Kerner. It is perhaps time for this court to update the constitutional rights of pro se defendants to be heard and not be denied due process and equal protection rights.

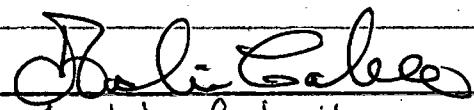
The defendant requests that the court disregard any improper statements or phrasing in the original petition and reconsider on the underlying merits of the case.

## CONCLUSION

This court should reconsider and grant a Writ of Certiorari.

Dated: October 22, 2020

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

**APPENDIX A**

**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**Scott S. Harris  
Clerk of the Court  
(202) 479-3011**

October 5, 2020

Mr. Archie Cabello  
Prisoner ID #73097-065  
F.C.I. - La Tuna  
P.O. Box 3000  
Anthony, TX 88021

Re: Archie Cabello, aka Archibaldo Cabello, aka Archie Cabello, Jr.,  
aka Archie P. Cabello, aka Arquimedes Cabello, aka Archie  
Palumbo  
v. United States  
No. 20-5475

Dear Mr. Cabello:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

Sincerely,



**Scott S. Harris, Clerk**

## **APPENDIX B**

Whitney P. Boise, OSB #851570  
HOEVET, BOISE & OLSON, P.C.  
1000 SW Broadway, Suite 1500  
Portland, OR 97205  
Telephone: (503) 228-0497  
Facsimile: (503) 228-7112  
E-mail: wboise@hoevet-boise.com

Of Attorneys for Defendant Marian Cabello

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, ) Case No. 3:10-CR-00482-02-JO  
Plaintiff, )  
vs. ) PETITION TO ENTER PLEA  
MARIAN P. CABELLO, ) OF GUILTY, CERTIFICATE  
Defendant. ) OF COUNSEL, AND ORDER  
ENTERING PLEA.

The defendant represents to the court:

1. My name is Marian P. Cabello. I am 60 years old. I have gone to school up to and including the 8<sup>th</sup> grade.
2. My attorney is Whitney P. Boise.
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 defenses that I might have in this case. I have been advised and understand that the elements of the charges alleged against me to which I am pleading "GUILTY" are as

follows: Count 1: (1) an 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 objets 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. Count 51: (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: \_\_\_\_\_.

6. I understand that 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.

9. In this case I am pleading "GUILTY" under Rule 11(c)(1)(C). My attorney has explained the effect of my plea under Rule 11(c)(1)(C) to be as follows:

My plea of guilty is under Rule 11(c)(1)(C); therefore, at the time of sentencing, the judge must either impose the specific sentence agreed upon by the prosecutor and me, or allow me to withdraw my plea.

10. I know the maximum sentence which can be imposed upon me for the crimes 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 51. I also know there is a mandatory minimum sentence of -0- years imprisonment.

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 amount of the unpaid balance owed on the fine can be substantially increased by the judge 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

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 based on a Plea Agreement that I have made with the prosecutor. That Plea Agreement is attached hereto and incorporated herein. I have read or had read to me the Plea Agreement, and I understand the Plea Agreement.

21. The Plea Agreement contains the only agreement between the United States government and me. No officer or agent of any branch of government (federal, state or local) or anyone else has promised or suggested that I will receive a lesser term of imprisonment, or probation, or any other form of leniency if I plead "GUILTY" except as stated in the Plea Agreement. I understand that I cannot rely on any promise or suggestion made to me by a government agent or officer which is not stated in writing in the Plea

Agreement, or which is not presented to the judge in my presence in open court at the time of the entry of my plea of guilty.

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 charges to which I am pleading guilty, I represent that I did the following acts and that the following facts are true:

Beginning in or about August 1995 and continuing until the date of the plea agreement, in the District of Oregon, along with my co-defendants Archie 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, as more specifically set out in the Factual Statement on pages 3-7 of the attached plea agreement.

25. I offer my plea of "GUILTY" freely and voluntarily and of my own accord and with a full understanding of the allegations set forth in the Indictment or Information, and with a full understanding of the statements set forth in this 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 10 day of July, 2012.

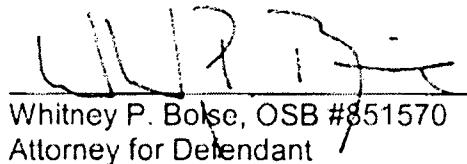
Maria P. Cabello 7/10/12  
Maria P. Cabello, Defendant

**CERTIFICATE OF COUNSEL**

The undersigned, as attorney for defendant Marian P. 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 and 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 6<sup>th</sup> day of July, 2012.



Whitney P. Bolse, OSB #851570  
Attorney for Defendant

## **APPENDIX C**

7. There is, in fact, no factual basis for the plea as required by Rule 11 (b)(3), because defendant alleges that he is not guilty and indicated guilt only because he was informed that this would be the only way to avoid life in prison.

The Ninth Circuit has held in United States v. Bonilla, 637 F.3d 980 (9th Cir. 2011) that "the 'fair and just reason' standard for withdrawal of a guilty plea prior to sentencing is generous and must be applied liberally."

In United States v. Davis, 428 F.3d 802, (9th Cir 2005) the court held that "Although defendant has burden of demonstrating fair and just reason for withdrawal of guilty plea, such standard is applied liberally."

For these reasons defendant believes he is entitled to withdraw his plea of guilty in this matter.

Dated this 28<sup>th</sup> day of January, 2013.

Respectfully Submitted,  
Archie Cabello  
Defendant Pro-Se  
000152

MEMORANDUM IN SUPPORT . . .

1

that claim with this appeal. Instead, defendant relies exclusively on a theory that the district court failed to comply with Fed. R. Crim. P. 11 because it failed to ensure that there was a sufficient factual basis for defendant's guilty pleas. D. Br. at 46-49. ~~Because defendant failed to~~ ~~raise this claim before the district court~~ to establish plain error, he must prove that he would not have entered a guilty plea but for the court's error. United States v. Collins, 684 F.3d 873, 884-85 (9th Cir. 2012). In his opening brief, defendant never makes this claim. At most, the trial court record reveals defendant's desire to avoid pleading guilty to all but counts 1 and 51, but he offers no explanation for how the court's alleged failure to provide greater detail about the other counts somehow renders his plea infirm.

Even if defendant could satisfy the plain error requirement, he could not overcome Rule 11(h)'s harmless error rule.<sup>10</sup> An error is harmless if the defendant was aware of the necessary information when

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<sup>10</sup> In fact, the Supreme Court has held that a Rule 11 error is harmless unless a defendant can show "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004). And a harmless Rule 11 error cannot constitute a fair and just reason to withdraw a plea. *Vonn*, 535 U.S. at 72, n.9.

a further change of plea hearing. Later, defendant moved to withdraw his plea claiming that he had been coerced by his trial attorney to plead guilty, pleaded guilty under duress, and contending that he was not guilty of the charges. The district court denied his motion, and further found that defendant was simply attempting to manipulate the system and stall his criminal case.

This appeal followed. While the informal plea agreement between the parties included an appellate waiver, the government is not seeking to enforce that waiver with this appeal. Moreover, while defendant assigns as error the district court's failure to conduct a complete *Farett*a hearing on the day he opted to plead guilty, this claim is either moot or harmless because defendant dropped his bid for a new lawyer and proceeded to enter his guilty plea with the assistance of that same attorney. As a consequence, the only issue raised on appeal that this Court must resolve is whether the district court abused its discretion when it denied defendant's motion to withdraw his guilty plea.

#### **JURISDICTION, TIMELINESS & CUSTODY STATUS**

The district court had jurisdiction over this criminal proceeding pursuant to 18 U.S.C. § 3231. The district court entered its judgment

No. 20-5475

IN THE  
SUPREME COURT OF THE UNITED STATES

Anchie Cabello — PETITIONER  
(Your Name)

VS.  
United States of America — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Federal District Court of Oregon

Ninth Circuit Court of Appeals

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: \_\_\_\_\_

, or

a copy of the order of appointment is appended.

Anchie Cabello  
(Signature)

RECEIVED

NOV - 3 2020

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

**AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Archie Cabello, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

<b>Income source</b>	<b>Average monthly amount during the past 12 months</b>		<b>Amount expected next month</b>	
	<b>You</b>	<b>Spouse</b>	<b>You</b>	<b>Spouse</b>
Employment	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Self-employment	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Income from real property (such as rental income)	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Interest and dividends	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Gifts	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Alimony	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Child Support	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>N/A</u>	\$ <u>850</u>	\$ <u>N/A</u>	\$ <u>850</u>
Disability (such as social security, insurance payments)	\$ <u>N/A</u>	\$ <u>SS-SSI</u>	\$ <u>N/A</u>	\$ <u>SS-SSI</u>
Unemployment payments	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Public-assistance (such as welfare)	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Other (specify): _____	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
<b>Total monthly income:</b>	\$ <u>N/A</u>	\$ <u>850</u>	\$ <u>N/A</u>	\$ <u>850</u>

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>\$ N/A</u>
			<u>\$</u>
			<u>\$</u>

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>\$ N/A</u>
			<u>\$</u>
			<u>\$</u>

4. How much cash do you and your spouse have? \$398 in prison account

Below, state any money you or your spouse have in bank accounts or in any other financial institution. Spouse 850 per month

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
<u>Prison account</u>	<u>\$ 398</u>	<u>\$</u>
<u>Checking SS-SSI</u>	<u>\$</u>	<u>\$ 850 per month</u>
	<u>\$</u>	<u>\$</u>

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home  
Value N/A

Other real estate  
Value N/A

Motor Vehicle #1  
Year, make & model 2000 Buick  
Value \$500

Motor Vehicle #2  
Year, make & model N/A  
Value \_\_\_\_\_

Other assets  
Description N/A  
Value \_\_\_\_\_

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
<u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>N/A</u>	\$ <u>158</u>
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		<u>Rent Assisted</u>
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>N/A</u>	<u>Power Assisted</u>
Home maintenance (repairs and upkeep)	\$ <u>N/A</u>	\$ <u>N/A</u>
Food	\$ <u>N/A</u>	<u>Food Stamps</u>
Clothing	\$ <u>N/A</u>	\$ <u>N/A</u>
Laundry and dry-cleaning	\$ <u>N/A</u>	\$ <u>N/A</u>
Medical and dental expenses	\$ <u>N/A</u>	\$ <u>N/A</u>

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>N/A</u>	\$ <u>N/A</u>
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>N/A</u>	\$ <u>N/A</u>
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>N/A</u>	\$ <u>N/A</u>
Life	\$ <u>N/A</u>	\$ <u>N/A</u>
Health	\$ <u>N/A</u>	\$ <u>N/A</u>
Motor Vehicle	\$ <u>N/A</u>	\$ <u>N/A</u>
Other: _____	\$ <u>N/A</u>	\$ <u>N/A</u>
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ <u>N/A</u>	\$ <u>N/A</u>
Installment payments		
Motor Vehicle	\$ <u>N/A</u>	\$ <u>N/A</u>
Credit card(s)	\$ <u>N/A</u>	\$ <u>N/A</u>
Department store(s)	\$ <u>N/A</u>	\$ <u>N/A</u>
Other: _____	\$ <u>N/A</u>	\$ <u>N/A</u>
Alimony, maintenance, and support paid to others	\$ <u>N/A</u>	\$ <u>N/A</u>
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>N/A</u>	\$ <u>N/A</u>
Other (specify): _____	\$ <u>N/A</u>	\$ <u>N/A</u>
<b>Total monthly expenses:</b>	\$ <u>N/A</u>	\$ <u>N/A</u>

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes  No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?  Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Petitioner is incarcerated

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 22, 2020

  
(Signature)