

No. _____

In the
Supreme Court of the United States of America

FRANCISCO CUBERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Appendix to
Petition for Writ of Certiorari

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Provisions of Law Involved

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13736-G

FRANCISCO CUBERO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT and MARCUS, Circuit Judges.

BY THE COURT:

Francisco Cubero has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's January 5, 2018, order denying his motion for a certificate of appealability. Upon review, Cubero's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13736-G

FRANCISCO CUBERO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Francisco Cubero is a federal prisoner serving a total sentence of 151 months' imprisonment,¹ followed by a life term of supervised release, after pleading guilty to 1 count of distribution of child pornography ("Count 1"), and 2 counts of possession of child pornography ("Counts 2 and 3"). Cubero filed the instant counseled 28 U.S.C. § 2255 motion to vacate his convictions and sentence, raising three claims for relief:

- (1) his guilty plea was not knowing or voluntary because the magistrate judge, the prosecutor, and trial counsel misadvised him as to the maximum term of supervised release for his offenses;
- (2) trial counsel was ineffective for failing to discover or communicate that he was subject to a life term of supervised release and for failing to object to the government's request for a life term of supervised release; and

¹ Specifically, Cubero was sentenced to 151 months' imprisonment on Count 1 and 120 months' imprisonment on Counts 2 and 3, to run concurrently.

- (3) appellate counsel was ineffective for failing to challenge his guilty plea on the ground that he was affirmatively misled about the maximum term of supervised release.

As to each of his claims, Cubero alleged that he would not have pleaded guilty had he been accurately informed of the maximum term of supervised release to which he was subject. Cubero also argued that he was not required to show prejudice to prevail on his claims because the district court and the prosecution were involved in the error at issue. In any event, he argued that he was prejudiced because he pleaded guilty on the basis of misinformation from the magistrate judge and the prosecutor.

District Court's Denial of the § 2255 Motion

After the government responded, the district court denied Cubero's § 2255 motion. The district court first noted that Cubero's claim that his plea was not knowing and voluntary was procedurally defaulted because he failed to raise it on direct appeal. Further, the district court determined that Cubero could not overcome the procedural default through his claims of ineffective assistance of counsel because, given the deferential standard for claims of ineffective assistance, neither trial nor appellate counsel performed deficiently. The district court stated that the record at sentencing showed that Cubero read and understood the presentence investigation report ("PSI"), which stated the correct term of supervised release to which he was subject. The district court noted that Cubero argued that his affirmative response to the sentencing court's question of whether he had read "it" was ambiguous as to whether Cubero was referring to his PSI. Nevertheless, the district court stated that Cubero did not actually argue that he did not review the PSI before sentencing, and that a better reading of the dialogue between Cubero and the sentencing court was that he had read each of the documents the sentencing court discussed.

Next, the district court noted that Cubero argued that he did not need to show prejudice to prevail on his claims. However, the district court stated that the Supreme Court had only recognized three exceptions to the requirement that a petitioner show prejudice, and Cubero's case did not fall within any of the exceptions. The district court further concluded that Cubero could not show that trial counsel's or appellate counsel's performance prejudiced him because he received a copy of the PSI, and the sentencing transcript showed that he reviewed the PSI, along with other sentencing documents. In any event, the district court determined that he still could not show prejudice because the sentencing court imposed a sentence at the low-end of his guidelines range. Cubero then moved the district court for a COA, which the district court denied.

Background of Plea and Sentencing Hearing

Cubero now moves this Court for a COA. He argues that the district court did not address his claim that his plea was not knowing or voluntary and only addressed ineffective-assistance claims. He also argues that the district court did not address his argument as to why he did not have to show counsel's performance prejudiced him. These arguments warrant a review of the plea and sentencing transcripts.

Briefly, as background, Cubero was indicted on one count of distribution of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1) (Count 1); and two counts of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2) (Counts 2 and 3), in 2012. Cubero retained counsel and pleaded guilty to all counts charged in the indictment without a written plea agreement.

A magistrate judge then held a change-of-plea hearing. At the hearing, Cubero was placed under oath, and he and the government agreed that they had elected to proceed with the

change-of-plea hearing before the magistrate judge. He stated that he was not under the influence of any drugs, medications, or alcoholic beverages. He noted that he had reviewed the indictment and discussed it with trial counsel and that he was fully satisfied with trial counsel's services. Cubero stated that he was pleading guilty of his own volition and that he had not been made any promises or assurances in exchange for doing so. He also stated that he discussed that he would be losing certain rights, such as the right to vote, by pleading guilty to a felony with his counsel.

The magistrate judge then explained the penalties for Cubero's offenses. Specifically, the magistrate judge explained that Count 1 had a statutory maximum sentence of 20 years' imprisonment and a supervised release term of up to 3 years. The magistrate judge stated that Count 2 had a corresponding statutory maximum sentence of 20 years' of imprisonment and a supervised release term of up to 3 years. The magistrate judge also stated that Count 3 carried a maximum term of imprisonment of ten years and a term of supervised release of three years. Cubero's trial counsel then stated that he believed Count 2 had a ten-year maximum sentence. Both defense counsel and the prosecutor stated that the maximum supervised release term for Count 2 was five years. The prosecutor also noted that the supervised release term was five years for all counts. The magistrate judge then stated that those changes had been "noted and made part of the record." The magistrate judge asked Cubero if he had any questions about the sentences, and he responded that he did not. The prosecutor clarified that Count 1 carried a mandatory-minimum sentence of five years' imprisonment. Cubero's trial counsel concurred and also stated that the maximum sentence was 40 years' imprisonment. The magistrate judge again asked Cubero if he had any questions about the "potential sentences," and he again replied that he did not.

The magistrate judge then discussed the sentencing process and asked Cubero and his trial counsel if they had reviewed the advisory Sentencing Guidelines, to which they responded that they had. The magistrate judge explained that a PSI would be issued, to which the parties could object, and that the district court would rule on those objections. The magistrate judge further explained that the imposed sentences could be different from any estimates that Cubero had been given. Cubero responded that he understood. The magistrate judge then explained that both Cubero and the government had the right to appeal the sentence under certain circumstances. Next, the magistrate judge explained the requirements of supervised release. The magistrate judge stated that supervised release would require Cubero to meet with his supervisor regularly and refrain from any further violations of the law. The magistrate judge also stated that, if he violated the conditions of his supervised release, Cubero could be brought back before the district court and could face additional penalties. Cubero stated that he understood. The magistrate judge asked if Cubero understood all the consequences of pleading guilty, and he replied that he did and that he did not have any questions.

The magistrate judge then reviewed the rights Cubero was forfeiting by pleading guilty, such as the right to a jury trial at which it would be presumed that he was innocent of the offenses charged until the government proved his guilt beyond a reasonable doubt. Cubero stated that he understood the rights he was waiving and did not have any questions. The magistrate judge explained the charges to which Cubero was pleading guilty, and he stated that he understood the charges and had no questions. The magistrate judge then asked Cubero whether he chose to plead guilty or not guilty, and Cubero responded "guilty." Finally, the magistrate judge found that Cubero was fully competent and capable of entering into an

informed plea, he was sufficiently aware of the charges and the consequences of his guilty plea, and his plea was knowing and voluntary.

The same day as the change-of-plea hearing, the magistrate judge issued a report and recommendation (“R&R”), recommending that the district court accept Cubero’s guilty plea. The magistrate judge stated that Cubero was advised that: (1) Count 1 carried a statutory mandatory-minimum term of 5 years’ imprisonment, a maximum of 20 years’ imprisonment, and a maximum 5-year term of supervised release; (2) Count 2 carried a statutory maximum term of 10 years’ imprisonment and a maximum 3-year term of supervised release; and (3) Count 3 carried a statutory maximum of 10 years’ imprisonment and a maximum 3-year term of supervised release. The district court adopted the R&R and adjudicated Cubero guilty on all counts.

Prior to sentencing, a probation officer prepared a PSI, calculating Cubero’s advisory guidelines range to be 151 to 188 months’ imprisonment. The PSI stated that Cubero’s offenses carried statutory terms of supervised release of “at least five years but may be up to life.” Cubero objected to a two-level enhancement for distribution of child pornography and requested a two-level reduction and a downward variance, but did not object to the PSI’s statement that he was subject to a maximum life term of supervised release.

At the sentencing hearing, the district court stated that it had reviewed the PSI and the parties’ filings, and asked Cubero whether he had read “it.” Cubero responded that he had. After hearing the parties’ arguments and considering the 18 U.S.C. § 3553(a) factors, the district court sentenced Cubero to 151 months’ imprisonment on Count 1, and 2 concurrent 10-year terms of imprisonment on Counts 2 and 3. The district court also imposed a life term of supervised release.

Cubero's Direct Appeal

Cubero filed a notice of appeal of the district court's judgment. Trial counsel then moved the district court to withdraw as counsel. The district court granted trial counsel's motion to withdraw and appointed Cubero counsel for purposes of his direct appeal. On appeal, Cubero argued that his sentence was procedurally and substantively unreasonable. This Court affirmed his sentence.² He then petitioned the United States Supreme Court for a writ of *certiorari*, which the Supreme Court denied.³

Motion for COA to Appeal Denial of § 2255 Motion:

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). However, when the district court denied the movant's claims in part on procedural grounds, the movant must demonstrate that reasonable jurists would find debatable (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Id.* (quotation omitted).

When reviewing a district court's denial of a § 2255 motion, this Court reviews "findings of fact for clear error and questions of law *de novo*." *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). A § 2255 movant bears the burden of establishing each of his claims by a preponderance of the evidence. *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980); *see*

² *United States v. Cubero*, 754 F.3d 888 (11th Cir. 2014).

³ *Cubero v. United States*, 135 S. Ct. 764 (2014).

also Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982) (explaining, in a habeas appeal brought by a state prisoner, that “[t]he burden of proof for showing ineffective assistance of counsel is . . . on petitioner throughout a habeas corpus proceeding”).

The Supreme Court decision applicable in an ineffective-assistance case is *Strickland v. Washington*, 466 U.S. 668 (1984). *See Premo v. Moore*, 562 U.S. 115, 121 (2011). To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel’s performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687; *see also Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) (holding that, if the defendant makes an insufficient showing on the prejudice prong, the court need not address the performance prong, and *vice versa*). Counsel’s performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *See Strickland*, 466 U.S. at 687–88. Prejudice occurs when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

As a preliminary matter, Cubero’s claim that the district court failed to address either Claim 1 or his argument that he was not required to show prejudice is belied by the record. The district court specifically addressed that Claim 1 was procedurally defaulted, and determined that Cubero could not overcome the procedural default based on his claims of ineffective assistance of counsel because he could not show prejudice. In analyzing whether Cubero could show prejudice, both to overcome the procedural default on Claim 1 and to prove Claims 2 and 3, the district court also stated that Cubero had claimed that he was not required to show prejudice, but determined that this argument failed.

Furthermore, his argument that he was not required to show prejudice, both to overcome the procedural default on Claim 1 and to show trial and appellate counsel were ineffective in Claims 2 and 3, is unpersuasive. The Supreme Court has recognized only three exceptions to the requirement that a petitioner raising an ineffective-assistance-of-counsel claim show prejudice: “[a]ctual or constructive denial of counsel altogether,” “various types of state interference with counsel’s assistance,” and where counsel is burdened by conflicting interests due to representing multiple clients. *Id.* at 692–93; *United States v. Cronic*, 466 U.S. 648, 658–60 & n.25 (1984). None of these circumstances were present in Cubero’s case. Thus, he was required to show prejudice in order to overcome the procedural default on Claim 1 and to prove Claims 2 and 3. Additionally, Cubero failed to cite any cases supporting his argument that the magistrate judge’s and the prosecutor’s misstatements during the change-of-plea hearing relieved him of the requirement to show prejudice.

Claim 1:

In Claim 1, Cubero alleged that his guilty plea was not knowing and voluntary because the magistrate judge who conducted his change-of-plea hearing, the prosecutor, and his trial counsel all incorrectly informed him that he was subject to a maximum five-year term of supervised release if he pleaded guilty. He claimed that the record was unclear as to whether he reviewed the PSI before the sentencing hearing because, at sentencing, the district court stated that it reviewed the PSI and other filings and asked only if Cubero had read “it,” to which Cubero responded that he had. He further claimed that he would not have pleaded guilty if he had known he was subject to a maximum life term of supervised release. The district court denied this claim as procedurally defaulted.

Under the procedural-default rule, a § 2255 movant is procedurally barred from raising a previously available claim that was not raised on direct appeal unless he can show either (1) cause for not raising the claim on direct appeal and prejudice from the alleged error, or (2) that a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). Ineffective assistance of counsel may satisfy the cause exception to a procedural bar. *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000).

In order for a plea to be knowing and voluntary, the district court accepting the plea must comply with Fed. R. Crim. P. 11, and, in particular, address three “core concerns” by ensuring that: (1) the guilty plea is voluntary and free from coercion; (2) the defendant understands the nature of the charges; and (3) the defendant knows and understands the consequences of his plea. *United States v. Bell*, 776 F.2d 965, 968 (11th Cir. 1985). Specifically, Rule 11 requires that a defendant must understand, among other things, “any maximum possible penalty, including imprisonment, fine, and term of supervised release.” Fed. R. Crim. P. 11(b)(1)(H). This Court applies a “strong presumption” that statements made by a defendant during his plea colloquy are true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). Therefore, “when a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.” *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988).

In *United States v. Brown*, this Court rejected a prisoner’s argument, raised on appeal for the first time, that his guilty plea was not knowing or voluntary because the district court stated an erroneous maximum term of supervised release during his Rule 11 colloquy. 586 F.3d 1342, 1344–47 (11th Cir. 2009). Under plain-error review, this Court determined that the district court’s incorrect advice during the plea colloquy constituted plain error. *Id.* at 1346.

Nevertheless, this Court held that Brown could not show that the district court's erroneous statement prejudiced him because (1) his PSI correctly stated the maximum life term of supervised release to which he was subject, (2) Brown did not object to the PSI, and (3) Brown stated at sentencing that he discussed the PSI with his counsel and understood its contents. *Id.* at 1346. Consequently, this Court determined that Brown's own conduct indicated that his substantial rights were not harmed by the district court's error during the plea colloquy. *Id.*

Reasonable jurists would not debate the district court's denial of this claim. First, this claim was available on direct appeal, but Cubero failed to raise it. Thus, this claim is procedurally defaulted. *Lynn*, 365 F.3d at 1234. Second, Cubero cannot overcome the procedural default based on his claim of ineffective assistance of counsel. It is undisputed that the magistrate judge, the prosecutor, and trial counsel incorrectly advised Cubero during the change-of-plea hearing that he was only subject to a five-year term of supervised release, when he was actually subject to a life term. 18 U.S.C. § 3583(k). However, Cubero's PSI correctly stated that he was subject to a maximum life term of supervised release, and he did not object to the PSI on that basis before or at sentencing.

Cubero's claim that the record is unclear as to whether he read the PSI is unavailing. Here, the district court determined that, under the best reading of the sentencing transcript, Cubero read all of the documents the sentencing court mentioned, including the PSI. Cubero has not alleged that he, in fact, did not review the PSI or discuss it with his counsel before the sentencing hearing. As such, he has failed to show that the district court's determination that he reviewed the PSI was clearly erroneous. *Rhode*, 583 F.3d at 1290; *Wright*, 624 F.2d at 558. Thus, the district court correctly concluded that Cubero failed to show that trial counsel's actions prejudiced him, and he was unable to overcome the procedural default on his claim that his plea

was not knowing and voluntary. *Brown*, 586 F.3d at 1346; *Strickland*, 466 U.S. at 694; *Lynn*, 365 F.3d at 1234.

Claims 2 and 3:

In Claim 2, Cubero alleged that his trial counsel was ineffective for failing to discover that he was subject to a maximum life term of supervised release and for failing to object to the imposition of a life term of supervised release. In Claim 3, he alleged that appellate counsel was ineffective for failing to challenge his guilty plea on appeal. He argued that, had he been correctly informed about the maximum term of supervised release for his offenses, he would not have pleaded guilty. The district court denied these claims on the merits.

Reasonable jurists also would not debate the district court's denial of Claims 2 and 3. For the same reason stated above, Cubero failed to show that he was prejudiced by trial counsel's failure to challenge his guilty plea on the basis of the district court's incorrect advice as to the maximum term of supervised release. *Brown*, 586 F.3d at 1346; *Strickland*, 466 U.S. at 694. Furthermore, he cannot show that appellate counsel was ineffective. Because (1) this claim would have been subject to plain-error review, and (2) he could not show that the magistrate judge's error during his change-of-plea hearing prejudiced him, there is not a reasonable probability that, had appellate counsel raised this issue, the outcome of his appeal would have been different. *Brown*, 586 F.3d at 1344–47 (stating that plain error occurs where: (1) there is an error; (2) that is plain; (3) that affects the defendant's substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings); *Strickland*, 466 U.S. at 694.

Accordingly, because reasonable jurists would not debate the district court's denial of Cubero's § 2255 motion, his motion for a COA is DENIED. 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484.

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

**Case Number: 15-24492-CIV-MORENO
12-20071-CR-SEITZ**

FRANCISCO CUBERO,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE came before the Court upon Motion for Certificate of Appealability (D.E. 21), filed on July 21, 2017.

Movant's motion for a certificate of appealability is **DENIED** because Movant has failed to make a substantial showing of the denial of a constitutional right. *See 28 U.S.C. § 2253(c)(2).*

DONE AND ORDERED in Chambers at Miami, Florida, this 27 of September, 2017.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

**Case Number: 15-24492-CIV-MORENO
12-20071-CR-SEITZ**

FRANCISCO CUBERO,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING MOTION TO VACATE JUDGMENT

Francisco Cubero is moving to vacate his criminal conviction for child pornography claiming that Magistrate Judge Barry Garber, to whom Judge Patricia Seitz had referred the case for a guilty plea, misinformed him at his plea colloquy that the maximum supervised release term was five years, not life. The undersigned was asked by Judge Seitz to handle this and numerous other cases while she underwent treatment for cancer. No objection was made by Defendant or his counsel. The undersigned sentenced Cubero to the bottom of the guidelines, totaling 151 months, in prison, to be followed by supervised release for the remainder of Cubero's life. Cubero filed a direct appeal and the Eleventh Circuit affirmed his sentence in all respects. *Cubero v. United States*, 754 F.3d 888, 896 (11th Cir. 2014).

In this 28 U.S.C. § 2255 case, Cubero argues that both his trial and appellate counsel were ineffective for not challenging the knowing and voluntary nature of his guilty plea, because he was misinformed at his plea colloquy as to the maximum term of supervised release. Cubero's argument is unavailing. The Presentence Investigation Report, at pages 14 and 15,

corrected the error to reflect the maximum life term and the special conditions of supervised release. Cubero acknowledged that he had read the Presentence Investigation Report before sentence was imposed. Cubero did not object to the Presentence Investigation Report at sentencing, nor did he move to withdraw his guilty plea. He also failed to raise the issue on direct appeal. Given the high hurdle Cubero faces in a § 2255 collateral proceeding, the Court does not find the erroneous advice provided by the Magistrate Judge at the plea colloquy implicated Cubero's rights. This is especially true in this case where the Court sentenced him to a low-end of the guidelines prison term for child pornography, which he is still serving, but gave him a higher term of supervised release, which has not yet commenced.

THIS CAUSE came before the Court upon the Petitioner's Motion pursuant to 28 U.S.C. § 2255 to Vacate Judgment (D.E. 1).

THE COURT has considered the motion, the response, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is DENIED.

I. Factual Background

A. The Criminal Offense

The Government filed a child pornography case against the Movant Francisco Cubero on January 19, 2012. On December 16, 2011, law enforcement officers identified an online user, who had made images of child pornography available for distribution at an IP address registered to Cubero. The user was on Frostwire, a peer-to-peer online file sharing network. Using that same network, law enforcement officers connected to Cubero's computer and downloaded 18 files. Seventeen of those files from Cubero's IP address were child pornography. After an authorized search, agents discovered that Cubero's laptop computer contained peer-to-peer

software containing a folder with child pornography. Agents also found a CD-Rom containing child pornography images, which Cubero admitted belonged to him. The pornography on Cubero's computer contained files of a depraved nature involving infants, toddlers, and children (including preteens). Cubero admitted the pornography belonged to him.

B. The Plea Proceedings

Cubero pled guilty to all charges on May 10, 2012. The Government and Cubero elected to proceed to a plea on all charges before a Magistrate Judge without a plea agreement. At the plea colloquy, Cubero indicated he had reviewed the indictment and discussed it with counsel. He was fully satisfied with his counsel at the time. Cubero indicated he was entering the plea freely of his own volition.

The Magistrate Judge explained the attendant penalties to Cubero. Specifically, the Magistrate Judge told Cubero that Count 1 had a statutory maximum prison sentence of 20 years, a fine of up to \$250,000, and a 3-year maximum term of supervised release. Count 2 had a corresponding statutory maximum prison sentence of 20 years, a fine of up to \$250,000, and a 3-year maximum term of supervised release. The Magistrate Judge also told Cubero that Count 3 carried a maximum prison sentence of 10 years, a fine of up to \$250,000 and a 3-year maximum term of supervised release.

The Magistrate Judge's explanation of the potential sentence contained a couple of errors that counsel and the judge corrected on the record at the plea colloquy. First, Cubero's counsel informed the Magistrate Judge that Count 2 carried a 10-year maximum sentence, not 20 as the Magistrate Judge had stated. Counsel for both sides also corrected the maximum term of

supervised release to state it was 5 years on all counts.¹ At the plea colloquy, the Government also corrected that Count 1 carried a mandatory minimum prison sentence of 5 years, and defense counsel added that it was a 40-year maximum² sentence. The Magistrate Judge corrected the record and stated the terms as advised by counsel at the plea colloquy. The Magistrate Judge proceeded to ask Cubero if he had any questions regarding the potential sentence and he did not.

The Magistrate Judge also advised Cubero that he would receive a Presentence Investigation Report, to which he could file objections. Cubero stated he understood that the imposed sentences could be different from the estimates that his counsel provided. Cubero also acknowledged that the Court could depart upward or downward from the guidelines range and that the statutory sentencing factors would be considered in that regard. The Magistrate Judge advised Cubero that there is no parole in the federal system and that he would have the right to appeal the sentence in certain circumstances. Cubero stated he understood what supervised release meant after receiving an explanation from the Magistrate Judge. He acknowledged that should he violate the conditions of supervised release, “[he] would be brought back before the Court and could face additional penalties.”³ Plea Tr. at 10.

At the end of the plea colloquy, Cubero stated he understood the consequences of his plea and indicated he had no questions. Then, Cubero formally entered a guilty plea on the record, and the Magistrate Judge found Cubero was “fully competent and capable of entering into an informed plea,” that he was aware of the “consequences of his pleas of guilty, that the pleas of

¹ The maximum term of supervised release was actually life. *See* 18 U.S.C. § 3583(k); United States Sentencing Guidelines § 5D1.2(b)(2).

² Indeed, the mandatory minimum prison sentence was indeed 5 years, the maximum prison term was 20 years. *See* 18 U.S.C. § 2252(b)(1).

³ Despite this acknowledgment, Movant argues that he was only told in Open Court that supervised release was akin to treatment. The transcript shows Movant acknowledged that if he violated the conditions of supervised release, he would return to Court and possibly face additional penalties.

guilty are knowing and voluntary.” The Magistrate Judge then accepted the plea and adjudicated Cubero guilty of Counts 1, 2, and 3 of the indictment. Cubero signed the Government’s Factual Proffer.

The Magistrate Judge issued a Report and Recommendation on the Change of Plea, summarizing what had transpired in Open Court. As to Count 1, the Magistrate Judge indicated the maximum term of supervised release was 5 years. On Counts 2 and 3, the Magistrate Judge noted the maximum term of supervised release was 3 years. Cubero did not object to the Report and Recommendation and District Judge Patricia A. Seitz adopted it, adjudicating Cubero guilty of all counts in the indictment.

C. Presentence Investigation Report

The Presentence Investigation Report determined the base offense level was 22, pursuant to the United States Sentencing Guidelines § 2G2.2(a)(2) for an offense involving the distribution of child pornography. The base offense level was increased because the material involved a prepubescent minor or a minor, who had not attained the age of 12 years, the offense involved distribution of child pornography, the images he possessed and distributed portrayed sadistic or masochistic conduct, or other depictions of violence, he used a computer in the commission of the crime, and the offense involved 600 or more images. The Presentence Investigation Report also contained a reduction for acceptance of responsibility. Cubero’s total offense level was 34, with a criminal history category I, which resulted in a sentencing guideline range of 151 to 188 months of imprisonment. The Presentence Investigation Report explicitly stated that the statutory term of supervised release was “any term of years not less than five.” Separately, the Presentence Investigation Report said that under the guidelines the applicable term of supervised release was “at least five years, but may be up to life.”

At the time of his sentencing, Cubero raised a few objections, none relating to the inconsistency between what was said at the plea colloquy and the contents of the Presentence Investigation Report vis-à-vis the term of supervised release. Cubero objected to a sentencing enhancement under § 2G2.2(b)(3) claiming peer-to-peer sharing did not constitute distribution. He also claimed that he was entitled to a two-level decrease because he received the material for personal use and he did not intend to traffic or distribute child pornography.

In response, the United States filed case law to support the sentencing enhancements and urging the district court not to vary downward given the heinous nature of the images.⁴ In addition to the images and videos on Cubero's computer, the United States seized a small amount of cocaine while executing the search warrant. Cubero admitted that he had a cocaine addiction and his use was related to his need for child pornography. In addition to the images on Cubero's computer, the Government also discovered pictures in Cubero's possession of a disturbing nature involving Cubero and women. Disputing Cubero's request for a downward variance, the United States also cited the need for deterrence as a reason for sentencing within the guideline range.

The Court sentenced Cubero at the bottom of the guidelines to 151 months followed by a life term of supervised release. On direct appeal, the Eleventh Circuit Court of Appeals upheld the sentence. *Cubero*, 754 F.3d at 896.

II. Legal Analysis

A. Procedural Default

⁴ Some images found in Cubero's possession include images depicting: (1) a preteen female performing oral sex on an adult male; (2) a preteen male engaging in anal sex with an adult male; (3) a naked adult male sitting with a naked toddler, who is touching the male's erect penis; (4) a naked preteen female straddling a naked adult male, who appears to have ejaculated on his leg; (5) a naked preteen female with her arms and legs spread open, tied to a bed, with a gag-ball in her mouth and the words "lick me please" written on her stomach with an arrow pointing to her vagina; and (6) a prepubescent girl being raped by a dog.

Generally, a movant must file a direct appeal, or else be barred from presenting such claims in a 28 U.S.C. § 2255 proceeding. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). A defendant can avoid a procedural bar only by establishing one of the two exceptions to the procedural default rule. Under the first exception, a defendant must show cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error. *Bousley v. United States*, 523 U.S. 614, 622 (1998); *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“Claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice.”). As the Supreme Court explained in *United States v. Frady*, 456 U.S. 152, 166 (1982), the cause and prejudice standard imposes “a significantly higher hurdle” than would exist on direct appeal and thus, the plain-error standard of Fed. R. Crim. P. 52 does not apply on collateral review of a criminal conviction.

In *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986), the Supreme Court held that ineffective assistance of counsel can provide “cause” for the failure to raise an underlying claim. Cubero alleges that his attorneys provided ineffective assistance of counsel in the district court and on appeal when they failed to challenge the knowing and voluntary nature of his plea. The basis for the argument is that at the plea colloquy there was misinformation regarding the maximum term of supervised release that could be imposed upon conviction. Put another way, Cubero argues his counsel was ineffective for allowing him to believe that he faced a maximum supervised release period of 5 years. Cubero makes this argument even though the Presentence Investigation Report contained the correct life term of supervised release.

1. *Legal Standard for Ineffective Assistance of Counsel*

Strickland v. Washington, 466 U.S. 668 (1984) sets forth the legal standard to determine whether there was ineffective assistance of counsel. A movant must first show that “counsel

made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed. . . by the Sixth Amendment.” *Id.*, 466 U.S. at 687. If this showing can be made, the movant must then demonstrate that the “deficient performance prejudiced the defense,” which “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* Unless a movant can make both showings – performance and prejudice – he cannot prevail. The Eleventh Circuit has cautioned this standard is difficult to meet. *Brownlee v. Haley*, 306 F.3d 1043, 1059 (11th Cir. 2002); *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (stating that cases where a criminal defendant can prove ineffectiveness are “few and far between.”). Under the familiar two-prong test, Cubero must show that the performance of his attorney at trial and on appeal was deficient, meaning that it “fell below an objective standard of reasonableness,” and that the “deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687-88.

a. Strickland’s First Prong

When a court evaluates the first prong, “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and a “court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that . . . the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689. The presumption is stronger in cases where counsel is experienced. *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc). To prove incompetence, “[a] petitioner must identify specific acts or omissions that were not the result of reasonable professional judgment, and a court should deem these acts or omissions deficient only if they ‘were outside the wide range of professionally competent assistance.’” *Brownlee*, 306 F.3d at 1059 (quoting *Strickland*, 466 U.S. at 690).

Cubero argues that his counsel⁵, both experienced criminal attorneys, were ineffective for not challenging the knowing and voluntary nature of his guilty pleas. Given the high deference afforded and the record in this case, the Court does not find counsel's actions "fell below an objective standard of reasonableness." The record at the sentencing shows that Cubero read and understood the Presentence Investigation Report, which corrected the term of supervised release. In his motion, Cubero relies on the colloquy between the parties at sentencing where the District Court noted it reviewed the "Presentence Investigation Report, the letters, the objections, the sentencing memoranda, the first supplement, the second supplement, . . . the government's response" and then asked whether Cubero had "read it as well." (emphasis added). Cubero responded in the affirmative and now argues "it" could have stood for any one of the documents and not necessarily the Presentence Investigation Report. Cubero does not actually come out and say that he did not review the Presentence Investigation Report, which clarified the life term of supervised release. A better reading of the dialogue at sentencing is that Cubero affirmatively stated he read each and all of those documents. Certainly, given this dialogue it was reasonable for Cubero's counsel not to object given Cubero's admission and the clarification provided in the Presentence Investigation Report that he faced a life term of supervised release.

The Defendant's counsel also did not object presumably because Cubero faced a lower prison term, albeit a higher term of supervised release. Cubero pled guilty to the indictment without the benefit of a plea agreement. His main advantage, in doing so, was a 3-point reduction for acceptance of responsibility. Thus, instead of a total offense level 34, with a criminal history category of 1 and an advisory guideline range of 151 to 188 months of

⁵ Cubero's counsel was Mr. Manuel Gonzalez, who was admitted to the Florida Bar in 1984 and to this Court's Bar in January 1985. He is a member in good standing of both bars. He is also a member of the Criminal Law Section of the Florida Bar. In addition, Cubero was represented on appeal by Brenda Bryn, who is an Assistant Federal Public Defender in the Southern District of Florida. She has been a member of the Bar of the Eleventh Circuit Court of Appeals since 1989 and the Bar of the United States Supreme Court since 1992.

imprisonment, he would have been a level 37, which would have exposed him to an advisory guideline range of 210 to 262 months imprisonment. Cubero has not shown that he would have exposed himself to such a greater sentence to avoid the life term of supervised release with a lesser prison sentence. Given the posture of this case, it certainly cannot be said that counsel's failure to object was outside the wide range of professionally competent assistance. More likely, Defendant's counsel acted reasonably competent in failing to object at the sentencing and on appeal to the life term of supervised release.

2. *Strickland*'s Second Prong

Cubero argues he need not satisfy *Strickland*'s prejudice prong because *Strickland* only applies in cases where the Court and the prosecution are uninvolved in the error and have no responsibility for it. The Supreme Court, however, has recognized three exceptions to the requirement that a petitioner show prejudice: “[a]ctual or constructive denial of counsel altogether,” “various kinds of state interference with counsel’s assistance,” and where counsel is burdened by conflicting interests due to representing multiple clients. *Strickland*, 466 U.S. at 692, 93. Cubero’s case does not fall within these limited exceptions to the prejudice requirement.

Unable to escape the prejudice requirement, Cubero relies on *United States v. Brown*, 586 F.3d 1342, 1346 (11th Cir. 2009) to support his claim that he never would have pled guilty had he known the correct term of supervised release. Cubero’s reliance on *Brown* is misplaced. Like the defendant in *Brown*, Cubero was misinformed about the correct term of supervised release, which was corrected in the Presentence Investigation Report. *Brown*, like Cubero, did not raise any objection to the Presentence Investigation Report or move to withdraw his guilty plea even after the district court imposed a life term of supervised release, which was in excess of the time

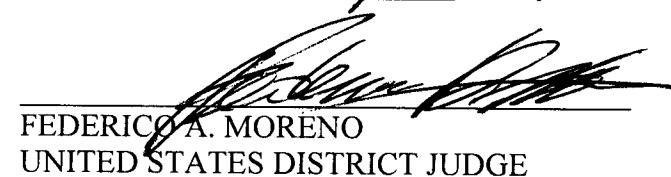
stated in the plea colloquy. *Id.* at 1345-46. On direct appeal, Brown argued for the first time that his plea was unknowing and involuntary because he was misinformed as to the maximum term of supervised release for the offense to which he pled guilty. The Eleventh Circuit held that Brown had not demonstrated prejudice as required to establish plain error, because the Presentence Investigation Report corrected the error from the plea colloquy. *Id.* Unlike Brown, Cubero faces an even “higher hurdle” because he did not raise the issue on direct appeal, and is raising it in a collateral proceeding. *Frady*, 456 U.S. at 166.

United States v. Nelson, 370 F. App’x 15 (11th Cir. 2010) also informs the Court’s decision. The defendant Nelson was mistakenly told the maximum applicable supervised release term was 5 years. Like in this case, the Presentence Investigation Report corrected the term to reflect the correct maximum term of life. Nelson, like Cubero, never objected to the Presentence Investigation Report. Also like Cubero, Nelson pled guilty without a written plea agreement. Unlike this case, Nelson argued that his rights were impacted because he requested a bottom of the guidelines sentence and was sentenced mid-range. *Id.*, 370 F. App’x at 17. In this case, the Court followed the United States’ recommendation and gave Cubero a low-end prison term. Applying *Brown* to the *Nelson* case, the Eleventh Circuit concluded that while the district court had plainly erred in advising Nelson that his maximum supervised release term was 5 years, the error did not impact Nelson’s rights. *Id.*, 370 F. App’x at 18. The Eleventh Circuit explained the holding is particularly appropriate where the Presentence Investigation Report contained the correct supervised release term, the record showed the defendant received a copy of it, the defendant reviewed the document, and did not object to the Presentence Investigation Report. *Id.*

To reiterate, Cubero faces the significant hurdle of requesting collateral relief, which is a

higher standard than the Eleventh Circuit applied in *Brown* and *Nelson* to find there was no prejudice to the defendants due to misinformation at the plea colloquy. On a § 2255, the Court must view the evidence in the light most favorable to the United States. *Messinger v. United States*, 872 F.2d 217, 219 (7th Cir. 1989). The record reflects that Cubero received the Presentence Investigation Report. The sentencing transcript shows the Court asked Mr. Cubero if he had read the documents the Court reviewed, which the Court listed as the Presentence Investigation Report, the letters, objections, the sentencing memoranda, the first supplement, the second supplement, . and the government's response. Given the standard of deference in a § 2255 and the record in this case, the Court finds that like *Nelson* and *Brown*, the Movant cannot clear the high hurdle of showing that the error at the plea colloquy impacted his rights.⁶ This Court unequivocally finds a reading of the entire sentencing colloquy shows Cubero received and read the Presentence Investigation Report. Even if the Court found that Cubero had not received it, he still would be unable to meet the prejudice prong because his sentence was at the low-end of the guidelines. *United States v. Bru*, 482 F. App'x. 509, 515 (11th Cir. 2012) (concluding that even if the district court had committed plain error by not assuring that Bru had reviewed the Presentence Investigation Report with counsel, Bru failed to make showing that it had impacted his rights where the sentence was in the low end of the applicable guidelines range).

DONE AND ORDERED in Chambers at Miami, Florida, this 17 of July 2017.


FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

⁶ Even if the Court were to find that Cubero's rights were impacted by the misinformation at the plea colloquy, the proper remedy is to re-sentence him or simply reduce the period of supervised release to 5 years and not vacate a clearly voluntary and knowing guilty plea.

Copies furnished to:
Counsel of Record

CONFIDENTIAL
PROPERTY OF U.S. COURTS.

This document is not to be disclosed to any party not officially involved in the pre and post sentencing aspects of this case without approval of the Court, Rule 32(e)

SD/FL PACTS #110793

Pursuant to the U.S. Supreme Court decision in U.S. v Booker, 125 S.Ct. 738(2005), the sentencing guidelines presented herein are advisory and not binding on the Court.

**UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA**

Prepared for: The Honorable Patricia A. Seitz
U.S. District Judge

Prepared by: Wendy E. Squitero
U.S. Probation Officer
400 North Miami Avenue, Ninth Floor South
Miami, FL 33128
305.523.5472

Assistant U.S. Attorney
Vanessa S. Johannes
99 NE 4th Street
Miami, FL 33132
305.961.9023
305.536.7599 Fax

Defense Counsel
Manuel Gonzalez
2000 Ponce de Leon Boulevard
Suite 614
Coral Gables, FL 33134
305.444.1400
305.938.5009 Fax

Sentence Date: August 2, 2012, Miami, FL

60. **Guideline Provisions:** Supervised release shall be ordered when required by statute, § 5D1.1(a)(1); except as provided in subsection (c), when the Court imposes a term of imprisonment of more than one year, § 5D1.1(a)(2); or to follow imprisonment in any other case, § 5D1.1(b). The guideline range for a term of supervised release is at least five years but may be up to life, § 5D1.2(b)(2).

Probation

61. **Statutory Provisions:** A sentence of probation may not be imposed because the defendant is being sentenced at the same time to a term of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).
62. **Guideline Provisions:** A sentence of probation may not be imposed because the defendant is being sentenced at the same time to a term of imprisonment for the same or a different offense, § 5B1.1(b)(2).

Fines

63. **Statutory Provisions:** As to each of Counts One, Two and Three, the maximum fine is \$250,000, 18 U.S.C. § 3571(b)(3). A special assessment of \$100 is mandatory as to each count of conviction, 18 U.S.C. § 3013.
64. **Guideline Provisions:** The instant offense is from \$17,500 to \$175,000, § 5E1.2(c)(3).

Restitution

65. **Statutory Provisions:** The Court shall order the defendant to make restitution to the victims of the offense, 18 U.S.C. § 3663A(a)(1). However, since the victims' losses are not yet ascertainable, the Court shall set a date for the final determination of the victims' losses, not to exceed 90 days after sentencing, pursuant to 18 U.S.C. § 3664(d)(5).
66. **Guideline Provisions:** Restitution shall be ordered, § 5E1.1.

PART E. FACTORS THAT MAY WARRANT A DEPARTURE

67. None

PART F. IMPACT OF THE PLEA AGREEMENT

68. There is no plea agreement in this case.

PART G. RECOMMENDED SPECIAL CONDITIONS OF SUPERVISION

69. **Computer Modem Restriction:** The defendant shall not possess or use a computer that contains an internal, external or wireless modem without the prior approval of the Court.
70. **Computer Possession Restriction:** The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.
71. **Mental Health Treatment:** The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.
72. **Substance Abuse Treatment:** The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.
73. **Permissible Search:** The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.
74. **No Contact with Minors:** The defendant shall have no personal, mail, telephone, or computer contact with children/minors.
75. **No Contact with Minors in Employment:** The defendant shall not be employed in a job requiring contact with children.
76. **No Involvement in Youth Organizations:** The defendant shall not be involved in any children's or youth organization.
77. **Sex Offender Treatment:** The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.
78. **Restricted from Possession of Sexual Materials:** The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or

companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

79. **Adam Walsh Act Search Condition:** The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Respectfully submitted,

by: **CEO1CFED-7A5D-4F90-9044-58AA13FC2FF0**

A handwritten signature in cursive ink that appears to read "Wendy E. Squitero".

Wendy E. Squitero
U.S. Probation Officer

Reviewed and approved:

B4262C09-6048-4D02-BABA-123FE984B14F

A handwritten signature in cursive ink that appears to read "Theresa D. Bradman".

Theresa D. Bradman, Supervising
U.S. Probation Officer

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

*** ***AMENDED JUDGMENT IN A CRIMINAL CASE**

v.

Case Number - 1:12-20071-CR-SEITZ-1**FRANCISCO CUBERO**

USM Number: 97879-004

Counsel For Defendant: Manuel Gonzalez
 Counsel For The United States: Vanessa Johannes
 Court Reporter: Gilda Pastor-Hernandez

Date of Original Judgment: November 21, 2012
 (Or Date of Last Amended Judgment)

Reason for Amendment:

- Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
 Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
 Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
 Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- Modification of Supervision Conditions (18 U.S.C. §§ 3563C or 3583(e))
 Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
 Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
 Direct Motion to District Court 28 U.S.C. § 2255 or
 18 U.S.C. § 3559(c)(7)
 Modification of Restitution Order (18 U.S.C. § 3664)

The defendant pleaded guilty to Counts 1,2,3 of the Indictment.
 The defendant is adjudicated guilty of the following offenses:

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. § 2252(a)(2)	Distribution of child pornography	December 17, 2011	ONE
18 U.S.C. § 2252(a)(4)(B)	Possession of child pornography	January 29, 2012	2 and 3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Original Sentence:
 November 21, 2012


 FEDERICO A. MORENO
 Chief United States District Judge

December 12 2012 

DEFENDANT: FRANCISCO CUBERO
CASE NUMBER: 1:12-20071-CR-SEITZ-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TOTAL SENTENCE: 151 MONTHS. [Count 1- 151 months; Counts 2 and 3 - 120 months, to run CONCURRENT to Count 1.]**

The Court makes the following recommendations to the Bureau of Prisons:

500-hour Drug Treatment Program

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal



DEFENDANT: FRANCISCO CUBERO
CASE NUMBER: 1:12-20071-CR-SEITZ-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **LIFE**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.



DEFENDANT: FRANCISCO CUBERO
CASE NUMBER: 1:12-20071-CR-SEITZ-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Adam Walsh Act Search Condition - The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Modem Restriction - The defendant shall not possess or use a computer that contains an internal, external or wireless modem without the prior approval of the Court.

Computer Possession Restriction - The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No Contact with Minors - The defendant shall have no personal, mail, telephone, or computer contact with children/minors or with the victim.

No Contact with Minors in Employment - The defendant shall not be employed in a job requiring contact with children or with the victim.

No Involvement in Youth Organizations - The defendant shall not be involved in any children's or youth organization.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Restricted from Possession of Sexual Materials - The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Sex Offender Treatment - The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: FRANCISCO CUBERO
CASE NUMBER: 1:12-20071-CR-SEITZ-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$300.00	\$	\$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.



DEFENDANT: FRANCISCO CUBERO
CASE NUMBER: 1:12-20071-CR-SEITZ-1

*****SCHEDULE OF PAYMENTS*****

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A. Lump sum payment of **\$300.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

- A. **One (1) Hewlett Packard laptop computer, S/N CNF5432CX8; and**
B. **One (1) Compact disk (CD)**

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-20071-CR-Seitz/Garber

UNITED STATES OF AMERICA,

v.

FRANCISCO CUBERO,

Defendant.

/

REPORT AND RECOMMENDATION ON CHANGE OF PLEA

THIS CAUSE was before the Court by Order of Reference from United States District Judge Patricia A. Seitz and the consent of the parties for the acceptance by a United States Magistrate Judge of guilty pleas by the defendant in this cause. Pursuant to such reference, the Court has conducted a change of plea hearing on May 10, 2012 which was attended by the defendant Cubero, his attorney, Manuel Gonzalez, Esquire, and Assistant United States Attorney Vanessa S. Johannes. The Court hereby advises as follows:

1. At the commencement of the change of plea proceedings, the Court advised the defendant that he had a right to have these proceedings conducted by the United States District Judge assigned to this case. The defendant was advised that a Magistrate Judge was conducting these proceedings by Order of Reference from the District Judge, based upon the consent of the defendant, his attorney, and the Assistant United States Attorney to whom this cause is assigned, as evidenced by the filing of a Waiver executed by the defendant, his counsel, and government counsel. The Court advised the defendant that the sentence would be imposed by the District Judge, who would make all findings

and rulings regarding such sentence and would conduct a sentencing hearing at a time scheduled by the District Judge.

2. The defendant was advised that he did not have to permit the undersigned United States Magistrate Judge to conduct the change of plea hearing and could request that it be conducted only by a United States District Judge. All parties and counsel agreed and consented to these proceedings being conducted by the undersigned.

3. The Court then conducted a plea colloquy with the defendant consistent with the outline set forth in the Bench Book for U. S. District Court Judges and in conformity with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

4. The Court advised the defendant of the sentence possibilities as to the charges set forth in Counts 1, 2, and 3 of the Indictment to which he was tendering guilty pleas, as well as the possible fines and terms of supervised release. The Court also advised the defendant of the mandatory special assessment of \$100.00 per count which must be paid at the time of sentencing. The defendant was advised that the charges in Count 1 carried a statutory mandatory term of imprisonment of five (5) years and up to twenty (20) years, a fine of up to \$250,000.00, and a term of supervised release of up to five (5) years; Count 2 carries a statutory maximum term of ten (10) years imprisonment, supervised release of up to three (3) years, and a fine of up to \$250,000.00; and Count 3 carries a maximum term of imprisonment of ten (10) years, supervised release of three (3) years, and a fine of up to \$250,000.00. The Indictment sets forth a forfeiture requirement and by his plea of guilty, the defendant waives his right to contest such forfeiture.

5. The defendant acknowledged that he was satisfied with the services of his attorney and that he had full opportunity to discuss all facets of his case with his attorney, which he acknowledged that he understood.

6. The defendant pled guilty to the charges set forth in Counts 1, 2, and 3 of the Indictment, Count 1 charging that the defendant, on the date alleged in the Indictment and in the Southern District of Florida, did knowingly distribute visual depictions by use of interstate and foreign commerce including by computer, and production of such visual depictions involving the use of a minor engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2), and such visual depiction was of such conduct, in violation of Title 18, United States Code, Sections 2252 (a)(2) and (B)(1). Counts 2 and 3 charge the defendant with Possession of Child Pornography on a laptop (Count 2) and on a compact disk (Count 3), both counts in violation of Title 18, United States Code, Sections 2252(a)(4)(B) and (b)(2).

7. The government filed a factual basis, made part of the record and executed by the government, the defendant and his counsel, for the guilty pleas, which consisted of all of the essential elements of the offenses to which the defendant is pleading guilty.

8. The defendant was referred to the United States Probation Office for the preparation of a Pre-sentence Report. The defendant was permitted to remain at liberty on the bond and all conditions previously imposed.

Accordingly, and based upon the foregoing and the plea colloquy conducted in this cause, the undersigned hereby

RECOMMENDS that the defendant be found to have freely and voluntarily entered his guilty pleas to Counts 1, 2, and 3 of the Indictment, that his guilty pleas be accepted, that he be adjudicated

guilty of such offenses, and that a sentencing hearing be scheduled for a final disposition of this cause.

The parties have fourteen (14) days from the date of this Report and Recommendation within which to file written objections, if any, with United States District Judge Patricia A. Seitz. See 28 U.S.C. §636. Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745, 750 (11th Cir.), cert. denied, 488 U.S. 958 (1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 10th day of May, 2012.



BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE
