

No. _____

**In the
Supreme Court of the United States**

BRIAN ANTHONY CAPUTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a defendant knowingly, voluntarily, and intelligently enter into a plea agreement where he is neurologically incapable of understanding the future consequences of that agreement? Correspondingly, is a court's determination of "knowing" and "intelligent" dependent on what the defendant was told or what the defendant had the ability to understand?

PARTIES TO THE PROCEEDINGS

The parties are petitioner, Brian Anthony Caputo, and respondent, United States of America. All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Anthony Caputo, respectfully prays that a writ of certiorari issue to review the memorandum of the Ninth Circuit Court of Appeals, entered in the instant proceeding on May 20, 2019, Ninth Circuit Court of Appeal № 16-10497.

OPINIONS BELOW

On May 20, 2019, the Ninth Circuit Court of Appeals issued an unpublished Memorandum decision in this matter. App. 1a. See *United States v. Caputo*, 770 Fed.Appx. 400 (9th Cir. 2019)(unpublished). In that Memorandum, the Court of Appeals affirmed Mr. Caputo's conviction. App.5a The district court order from which Mr. Caputo appealed is unpublished and was entered on November 7, 2016. App. 6a. See *United States v. Caputo*, U.S. District Court, Eastern District of California, No. 1:14-cr-00041-LJO-1.

STATEMENT OF JURISDICTION

The date on which the Ninth Circuit Court of Appeals filed its order in the instant matter was May 20, 2019. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE AND FACTS

A. Brian Was Born with a Spectrum of Congenital Brain Deformities.

The petitioner, Brian Caputo was born in 1988 with “a spectrum of congenital brain abnormalities.” PSR 1, 12-14, 38. Each of Brian’s abnormalities are structural defects in the brain readily observable by MRI. PSR 38-39. The spectrum includes the following conditions:

- Colpocephaly;
- Agenesis of the Corpus Callosum; and,
- Cerebral Autosomal Dominant Arteriopathy with Subcortical Infarcts and Leukoencephalopathy, also known as “CADASIL.”

PSR 38.

1. Colpocephaly

One of Brian’s structural brain defects is “Colpocephaly” where certain portions of his brain are physically enlarged. PSR 38. Individuals with colpocephaly suffer from moderate to severe intellectual disability. Colpocephaly, Wikipedia (January 13, 2018)

<https://en.wikipedia.org/wiki/Colpocephaly>.

2. Agenesis of the Corpus Callosum

Colpocephaly often occurs in conjunction with other neurological abnormalities such as Agenesis of the Corpus Callosum (ACC). It is thus, not surprising that in addition to Colpocephaly, Brian suffers from this type of agenesis. PSR 38. Agenesis means an absence of or failed development of a body part.” See Agenesis, Dictionary.com (January 13, 2018) <http://www.dictionary.com/browse/agenesis?s=t>. See also PSR 43. The corpus callosum is the band of white matter connecting the right and left sides of the brain. PSR 43. Thus, a complete agenesis of the corpus callosum is a congenital condition in which the corpus callosum of the brain is absent from birth. Mental and Social Disabilities in Agenesis of the Corpus Callosum, Travis Research Institute, (January 13, 2018) <http://fuller.edu/microsites/travis-research-institute/research/mental-and-social-disabilities-in-agenesis-of-the-corpus-callosum/>. See also PSR 38, 43; Agenesis of the Corpus Callosum Page, National Institute of Neurological Disorders and Strokes (January 13, 2018) <https://www.ninds.nih.gov/Disorders/All-Disorders/Agenesis->

Corpus-Callosum-Information-Page.

Agenesis of the corpus callosum causes cognitive disabilities even when the individual's IQ is apparently normal. PSR 38, 44-45. See also Mental and Social Disabilities in Agenesis of the Coropus Callosum, Travis Research Institute, (January 13, 2018) <http://fuller.edu/microsites/travis-research-institute/research/mental-and-social-disabilities-in-agenesis-of-the-corpus-callosum/>; Aegenesis of the Corpus Callosum, https://en.wikipedia.org/wiki/Agenesis_of_the_corpus_callosum#Signs_and_symptoms. Persons with ACC have deficiencies on tasks that demand complex novel mental processing and problem solving. Mental and Social Disabilities in Agenesis of the Corpus Callosum, Travis Research Institute, (January 13, 2018) <http://fuller.edu/microsites/travis-research-institute/research/mental-and-social-disabilities-in-agenesis-of-the-corpus-callosum/>; PSR 44-45.. Other issues that accompany ACC are:

- difficulty imaging and anticipating the consequences of actions in complex social situations;
- reduced ability for reasoning, and concept formation;

- difficulty comprehending second-order meaning in language;
- difficulty in processing and interpreting social cues; and,
- a reduced ability to infer the intentions and states of mind of other people, particularly when the inference demands integrating information from previous social contexts.

See PSR 40; Mental and Social Disabilities in Agenesis of the Corpus Callosum, Travis Research Institute, (January 13, 2018) <http://fuller.edu/microsites/travis-research-institute/research/mental-and-social-disabilities-in-agenesis-of-the-corpus-callosum/>; Brown WS, Paul Lk., Cognitive and Psychosocial Deficits in Agenesis of the Corpus Callosum, Cognitive Neuropsychiatry. 2000; 5:135, p. 154, available at https://www.researchgate.net/profile/Lynn_Paul2/publication/261686094_Cognitive_and_psychosocial_deficits_in_agenesis_of_the_corpus_callosum_with_normal_intelligence/links/569577a408ae3ad8e33d6e88/Cognitive-and-psychosocial-deficits-in-agenesis-of-the-corpus-callosum-with-normal-intelligence.pdf (last visited January 13, 2018).

3. Cerebral Autosomal Dominant Arteriopathy with

Subcortical Infarcts and Leukoencephalopathy (CADASIL)

The third brain deformity from which Brian suffers is cerebral autosomal dominant arteriopathy with subcortical infarcts and leukoencephalopathy, also known as “CADASIL.” PSR 39. CADASIL is a genetic condition affecting certain small blood vessels, resulting in the blockage of blood flow to the brain. PSR 40. This condition causes, inter alia, migraine headaches and strokes progressing to dementia. PSR 39, 47-48.

4. Brian’s white-matter brain abnormalities render him incapable of inferring possible future outcomes from abstract facts.

Brian's deformities and several of his corresponding deficits were presented to the district court before sentencing by neurologist, Dr. John Sabow. PSR 38. Dr. Sabow explained that Brian's brain deformities were discovered in 2013 through an MRI. PSR 38, 40. Dr. Sabow further explained that Brian’s conditions caused, inter alia, moderate to severe intellectual disability, difficulty in complex problem

solving, and social difficulties (which includes missing subtle social cues.) PSR 38-40, 47-48.

Individuals with the type of brain anomalies that Brian has cannot take a set of abstract facts and infer possible future outcomes. This is because in order to infer potential outcomes from abstract facts, an individual must first form a concept from the concrete words used to convey the concept. Individuals with Brian's anomalies cannot form such concepts, and thus, they cannot understand how the words spoken to them will apply in the future. Individuals with these anomalies, for obvious reasons, do not understand that they cannot form concepts and understand future consequences. Paul, L. K., Schieffer, B., and Brown, W. S. (2004), Social processing deficits in agenesis of from the Thematic Apperception Test. *Archives of Clinical Neuropsychology*, 19, 215-225. https://ac.els-cdn.com/S0887617703000246/1-s2.0-S0887617703000246-main.pdf?_tid=5d315f7a-ad21-4e54-be73-7c9bef3b5663&acdnat=1522969546_4b03779a935c3e47c49d1e5d635ecaf0 (last visited, April 5, 2018.)

B. Despite Brian's Congenital Brain Conditions, the District Court Entered Judgment Against Brian Based on a Guilty Plea and the Ninth Circuit Court of Appeals Affirmed That Judgment.

On March 6, 2014, the government filed an indictment against Brian charging Sexual Exploitation of a Minor and Attempt under 18 U.S.C. §§ 2251 (a) and (e); Receipt of a Visual Depiction of a Minor Engaged in Sexually Explicit Conduct under 18 U.S.C. § 2252(a)(2) ; and Criminal Forfeiture under 18 U.S.C. § 2253. ER 441. At his March 10, 2014 arraignment/detention hearing, Brian pleaded not guilty. ER 417.

On May 10, 2016, Brian and the government entered into a plea agreement. ER 94, 104. Based on that plea agreement. The district sentenced Brian to 180 months of incarceration to be followed by 180 months of supervised release. ER 9-10, 63.

On November 28, 2016, the district court filed Brian's notice of appeal which challenged his conviction and sentence. ER 69. On June 18, 2018, Mr.

Caputo filed under seal and in camera a motion in the Ninth Circuit Court of Appeals. The Ninth Circuit denied that motion. On July 29, 2019, Mr. Caputo filed a petition for certiorari challenging the denial of the motion. That petition for certiorari is currently pending before this Court under case number 19M40. On May 20, 2019, the Ninth Circuit Court of Appeals issued the Memorandum affirming Mr. Caputo's conviction. App 1a.

REASONS FOR GRANTING THE WRIT

I. WHETHER A FINDING OF A "KNOWING" AND "INTELLIGENT" WAIVER IS BASED ON WHAT THE DEFENDANT WAS TOLD OR WHAT THE DEFENDANT HAD THE ABILITY TO UNDERSTAND IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Because of his severe brain deformities, Brian did not have the ability to form the abstract concepts necessary to understand the future consequences of the plea agreement on which his conviction was based. Based on this lack of ability, Brian challenged his conviction explaining, *inter alia*, that his plea agreement was not knowing, voluntary, and intelligent, and it was therefore invalid.

The Ninth Circuit Court of Appeals affirmed Brian's conviction, concluding that Brian entered into a plea agreement knowingly and intelligently. App. 3a. In so doing, the Court of Appeals relied on the information that was assertedly imparted to Brian and Brian's

responses to questions by the district court. App. 2a-3a. This, however, did not take into consideration the fact that Brian could not understand how the words spoken to him would apply in the future. No matter whether Brian was provided certain information regarding his plea agreement, he did not have the ability to understand the future consequences of the agreement. Thus, in affirming Brian's conviction, the Ninth Circuit Court of Appeals relied on the information provided to Brian as opposed to the information indicating his inability to understand the information. App. 2a-3a.

Given that the Court of Appeals affirmed Brian's conviction, the question becomes: Does a determination of the knowing and intelligent nature of a waiver rest on the information provided to the defendant or does it rest on his ability to understand it? Although this is an important point of federal law, case law on this issue is ambiguous and should be clarified by this Court.

A number of cases discuss the determination of whether a waiver was voluntary, knowing and intelligent. In so doing, these cases often state that valid waivers must be knowing, intelligent acts done with

sufficient awareness of the relevant circumstances and likely consequences. See *Iowa v. Tovar*, 541 U.S. 77, 81 (2004); *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Isom*, 85 F.3d 831, 835 (1st Cir. 1996); *United States v. Campusano*, 947 F.2d 1, 4 (1st Cir. 1991) *United States v. Morgan*, 51 F.3d 1105, 1110 (2nd Cir. 1995); *Taylor v. Horn*, 504 F.3d 416, 446 (3rd Cir. 2007); *United States v. Garcia*, 517 F.2d 272, 276 (5th Cir. 1975); *United States v. Escandar*, 465 F.2d 438, 441 (5th Cir. 1972); *Jean-Paul v. Douma*, 809 F.3d 354, 358 (7th Cir. 2015).

These cases require a level of awareness that is most often based on the information provided to the defendant and the defendant's responses to questions about understanding that information. See *Bousley v. United States*, 523 U.S. 614, 618 (1998) discussing notice given; *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 69 (1st 2009) wherein the judgment was affirmed based on the information provided to the defendant; *United States v. Lloyd*, 901 F.3d 111, 118 (2nd Cir. 2018) discussing the Rule 11 colloquy; *United States v. Booker*, 684 F.3d 421, 426 (3rd Cir. 2012) addressing whether the defendant was adequately

informed; *United States v. Moussaoui*, 591 F.3d 263, 286-287 (4th Cir. 2010) holding that the defendant had been informed of certain information and thus his waiver was knowing and voluntary; *United States v. Hernandez*, 234 F.3d 252, 256 (5th Cir. 2000) addressing what matters a defendant must be informed of for a waiver to be knowing and voluntary; *United States v. Nururdin*, 8 F.3d 1187, 1195 (7th Cir. 1993) holding that a guilty plea is knowing and voluntary if the defendant was first made aware of the direct consequences of his plea; *Torrey v. Estelle*, 842 F.2d 234, 237 (9th Cir. 1988) discussing whether the advice given to a defendant was sufficient to conclude his waiver was knowing and voluntary; *United States v. Muhammad*, 747 F.3d 1234, 1240 (10th Cir. 2014); *Jones v. White*, 992 F.2d 1548, 1557 (11th Cir. 1993). In so doing, cases often rely on responses from the defendant as to whether s/he understood the information provided. See *McCarthy v. United States*, 394 U.S. 459, 471 (1969) wherein the defendant acknowledged understanding the information provided; *United States v. Santiago Miranda*, 654 F.3d 130, 138 (1st Cir. 2011) wherein the Court of Appeals relied on statements made during the Rule 11

colloquy; *United States v. Sosa*, 782 F.3d 630, 636 (11th Cir. 2015) concluding that the waivers were knowing and voluntary because the defendants had been informed of the information in question; *Jones v. White*, 992 F.2d 1548, 1557 (11th Cir. 1993) where the defendant's waiver was found to be knowing and voluntary because he acknowledged understanding the information provided.

A supplement to the law regarding waiver is the law regarding competency. This Court directs that a defendant must be competent in order to waive constitutional rights. See *Brady v. United States*, 397 U.S. 742, 755-756 (1970). To similar effect, See *United States v. Jordan*, 870 F.2d 1310, 1316 (7th Cir.1989); *Torrey*, 842 F.2d at 237; *Jean-Paul*, 809 F.3d at 358; *Campusano*, 947 F.2d at 4; *Taylor*, 504 F.3d 416, 446. Yet the meaning of competency in the context of cases such as the instant one simply has not been addressed.

This Court has described incompetency as being not in control of one's mental faculties. See *Brady*, 397 U.S. at 755-756. Thus, to make a competency determination, courts have relied on such things as the defendant's irrational behavior and his or her courtroom behavior.

Walton v. Angelone, 321 F.3d 442, 459 (4th Cir. 2003); Austin v. Davis, 876 F.3d 757, 781 (5th Cir. 2017); Mata v. Johnson, 210 F.3d 324, 329 (5th Cir. 2000). Case law also directs courts to look for signs of low intelligence when determining competency. Walton, 321 F.3d at 459 (4th Cir. 2003); Hill v. Anderson, 881 F.3d 483, 505 (6th Cir. 2018) In other words, case law essentially directs courts to look for profound mental illness or low IQ.

The Court of Appeals in this matter clearly reviewed the record to determine whether Brian was “in control of his mental faculties” in the larger sense, and it did so by reviewing his demeanor in court and by reviewing his responses to the information assertedly provided to him. App. 2a-3a. The Court of Appeals also reviewed the record for signs of low intelligence. App. 2a-3a. Yet, the Court of Appeals did not address whether Brian was able to understand the future consequences of his actions given the specifics of his undisputed neurological conditions, none of which caused mental illness or low IQ in the traditional sense. The case law on which the Court of Appeals relied clearly fails to provide an adequate context for analyzing the “knowing and intelligent”

requirement under the circumstances presented in this case.

Case law on the determination of competency is equally inadequate for use in determining whether Brian's waiver/plea agreement in the instant matter was knowing and intelligent. The test for competency with respect to standing trial is often stated as whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. *Figueroa-Vazquez v. United States*, 718 F.2d 511, 513 (1st Cir. 1983). See also *Jean-Paul* 809 F.3d at 358; *United States v. Dreyer*, 705 F.3d 951, 971 (9th Cir. 2013). The degree of competence required to plead guilty has been asserted as the same as that required to stand trial. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). See also *Allard v. Helgemoe*, 572 F.2d 1 (1st Cir. 1978); *United States ex rel. McGough v. Hewitt*, 528 F.2d 339 (3d Cir. 1975); *Malinauskas v. United States*, 505 F.2d 649 (5th Cir. 1974); *United States v. Harlan*, 480 F.2d 515 (6th Cir.); *Wolf v. United States*, 430 F.2d 443 (10th Cir. 1970); *United States v. Valentino*, 283 F.2d 634 (2d Cir. 1960); *U. S. ex rel. Heral v. Franzen*,

667 F.2d 633, 638 (7th Cir. 1981). This test relies quite heavily on rationality, which, for the most part is an objective standard.

Rationality is not the basis for Brian's assertion that he did not knowingly and intelligently enter into his plea agreement. Thanks to the advances of medical science, it is possible for Brian's counsel to articulate with precision that Brian's physical limitations do now allow him to sufficiently understand the future consequences of his plea agreement, even though he is not mentally ill nor does he have a low IQ in the traditional sense. The law regarding waiver and competency must catch up to the medical science that is now available.

Brian does not suffer from a mental illness nor does he have a low IQ in the traditional sense. Yet, Brian cannot sufficiently understand the future consequences of the plea agreement that is the basis for his conviction. The case law regarding waiver and competency fails to address circumstances such as the one here, where the defendant cannot understand the consequences of the waiver and cannot understand that s/he cannot understand, even though s/he does not suffer from mental illness or a low IQ in the more common sense. The

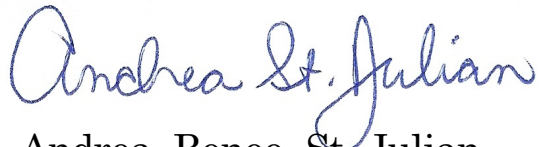
inadequacy of the law regarding waiver and competency must be corrected through the grant of the instant petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: August 16, 2019

Respectfully submitted,



Andrea Renee St. Julian
Counsel of Record for Petitioner,
BRIAN ANTHONY CAPUTO

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 20 2019

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 16-10497

Plaintiff-Appellee,

D.C. No.

1:14-cr-00041-LJO-SKO-1

v.

BRIAN CAPUTO,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Submitted May 15, 2019**
San Francisco, California

Before: WALLACE, IKUTA, and CHRISTEN, Circuit Judges.

Brian Caputo pleaded guilty to receiving or distributing child pornography, in violation of 18 U.S.C. § 2252(a)(2). The district court sentenced him to 15 years imprisonment, to be followed by 15 years of supervised release. He appeals from the judgment and sentence. We have jurisdiction under 28 U.S.C. § 1291, and we

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

affirm.

1. On de novo review, we conclude that Caputo knowingly and voluntarily entered into the plea agreement. *See United States v. Timbana*, 222 F.3d 688, 701 (9th Cir. 2000). During the plea colloquy, Caputo responded that he understood the terms of the agreement and the consequences of pleading guilty. *See United States v. Briggs*, 623 F.3d 724, 728 (9th Cir. 2010) (“We take the district court’s detailed colloquy with [the defendant] as strong evidence that [he] understood the meaning of his actions”). Caputo’s courtroom demeanor and actions also indicate sufficient mental comprehension. He was able to remember events from prior hearings, demonstrating awareness of the general proceedings. He testified clearly and articulately, from which the district court made credibility determinations. He understood and was able to respond rationally to questions. Caputo submitted several articulate letters. In fact, the district court described Caputo’s testimony at the suppression hearing as “very precise [and] detailed” as to “what happened, what was said, who said it, who did what, who didn’t do what.” Nowhere is it suggested that Caputo displayed unusual conduct or mannerisms during any part of the trial proceedings.

Furthermore, defense counsel stated multiple times that Caputo understood the nature of the trial proceedings. At the detention hearing, counsel stated, “having talked to Mr. Caputo and his mother and some of his family members, he

knows what is going on . . . he knows, he understands what is going on.” At the sentencing, counsel stated that, “in terms of [Caputo’s] ability to understand the proceedings, he was able to go through the Presentence Report with [counsel], he asked appropriate questions, and appeared to understand [counsel’s] answers.”

This is telling because “a defendant’s counsel is in the best position to evaluate a client’s comprehension of the proceedings.” *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991).

There is no question that Caputo suffers from neurological conditions, of which the district court was well aware. However, the evidence indicates that Caputo knowingly and voluntarily entered into the plea agreement.

2. Because Caputo knowingly and voluntarily entered into the plea agreement, the appeal waiver included therein is valid. He has waived his right to challenge the police officers’ search and seizure. *See United States v. Medina-Carrasco*, 815 F.3d 457, 462 (9th Cir. 2016) (enforcing “a valid waiver even if the claims that could have been made on appeal absent that waiver appear meritorious, because ‘[t]he whole point of a waiver . . . is the relinquishment of claims regardless of their merit’” (quoting *United States v. Nguyen*, 235 F.3d 1179, 1184 (9th Cir. 2000))).

3. For the first time, Caputo challenges on appeal the district court’s failure to order a competency hearing sua sponte, so we review for plain error. *United*

States v. Marks, 530 F.3d 799, 814 (9th Cir. 2008).¹ We may exercise our discretion to correct a district court on plain error review if: (1) the district court erred; (2) the error was plain; (3) the error affects substantial rights; and (4) the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc). “Due process requires a trial court to hold a competency hearing sua sponte whenever the evidence before it raises a reasonable doubt whether a defendant is mentally competent.” *Id.* (quoting *United States v. Mitchell*, 502 F.3d 931, 986 (9th Cir. 2007)). We review “to see if the evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant’s competence.” *Id.* (quoting *Mitchell*, 502 F.3d at 986). As discussed, evidence indicates that Caputo understood the nature of the proceedings and intelligently participated. *See United States v. Garza*, 751 F.3d 1130, 1136 (9th Cir. 2014) (concluding that “[e]ven a mentally deranged defendant is out of luck if there is no indication that he failed to understand or assist in his criminal proceedings”). “And [Caputo] was, in fact, able to assist in his defense. He testified. He allocuted. And his counsel had no complaints.” *Id.* at 1137; *see also*

¹ The government does not argue, so we do not consider, whether the appellate waiver in Caputo’s plea agreement, once determined to be valid and enforceable, precludes a challenge to the district court’s decision not to order a competency hearing sua sponte.

id. (affirming a decision not to hold a sua sponte competency hearing and stating that the judgment of “an experienced trial judge with a far better vantage point than ours . . . give[s] us confidence in our conclusion”). Accordingly, the district court did not plainly err in failing to order a competency hearing sua sponte.

AFFIRMED.

UNITED STATES DISTRICT COURT

Eastern District of California

UNITED STATES OF AMERICA

v.

BRIAN CAPUTO

AKA: Brian Anthony Caputo, Brian A. Caputo

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: **1:14CR00041-001**

Defendant's Attorney: Eric A. Chase, Retained

THE DEFENDANT:

- ☒ pleaded guilty to count 2 of the Indictment.
- ☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.
- ☐ was found guilty on count(s) ____ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense (s):

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number
18 U.S.C. § 2252(a)(2)	Receipt of a Visual Depiction of a Minor Engaged in Sexually Explicit Conduct (Class C Felony)	February 28, 2014	TWO

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).
- ☒ Count 1 is dismissed on the motion of the United States.
- ☐ Indictment is to be dismissed by District Court on motion of the United States.
- ☐ Appeal rights given. ☒ Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall 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 or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

11/7/2016

Date of Imposition of Judgment

/s/ Lawrence J. O'Neill

Signature of Judicial Officer

Lawrence J. O'Neill, United States District Judge

Name & Title of Judicial Officer

11/16/2016

Date

DEFENDANT: **BRIAN CAPUTO**
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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 180 Months.

- ☐ No TSR: Defendant shall cooperate in the collection of DNA.
- ☒ The court makes the following recommendations to the Bureau of Prisons:
FIRST PRIORITY: The Court recommends that the defendant be incarcerated in a facility in which he can receive the proper medical treatment for his condition. SECOND PRIORITY: The Court recommends that the defendant be incarcerated in a California facility near Los Angeles, CA, but only insofar as this accords with security classification and space availability. THIRD PRIORITY: The Court recommends the defendant participate in the 500-Hour Bureau of Prisons Substance Abuse Treatment Program.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district
- ☐ at ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.
- If no such institution has been designated, to the United States Marshal for this district.

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 United States Marshal

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DEFENDANT: **BRIAN CAPUTO**
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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
180 Months.

MANDATORY CONDITIONS

You must not commit another federal, state or local crime.

You must not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- ☒ You must cooperate in the collection of DNA as directed by the probation officer.
- ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.
- ☐ You must participate in an approved program for domestic violence.

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

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant, by any law enforcement or probation officer in the lawful discharge of the officer's supervision functions with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.
3. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
4. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
5. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
6. The defendant shall not possess or use a computer or any device that has access to any "on-line computer service" unless approved by the probation officer. This includes any Internet service provider, bulletin board system, or any other public or private computer network.
7. The defendant shall have no contact with known children under the age of 18, unless approved by the probation officer in advance. The defendant is not to loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18. This shall include that the defendant is not to engage in any occupation, either paid or volunteer, that causes him to regularly contact known persons under the age of 18.
8. The defendant shall consent to the probation officer and/or probation service representative conducting periodic unannounced examinations of (a) any computer, or (b) computer-related device, or (c) equipment that has an internal or external modem which is in the possession or control of the defendant. The defendant consents to retrieval and copying of all data from any such computer, computer-related device, or equipment as well as any internal or external peripherals to ensure compliance with conditions. The defendant consents to removal of such computer, computer-related device, and equipment for purposes of conducting a more thorough inspection and analysis.

The defendant consents to having installed on any computer, computer-related device, and equipment, at the defendant's expense, any hardware or software systems to monitor the use of such computer, computer-related device, and equipment at the direction of the probation officer, and agrees not to tamper with such hardware or software and not install or use any software programs designated to hide, alter, or delete his computer activities. The defendant consents to not installing new hardware without the prior approval of the probation officer.

9. The defendant shall not possess, own, use, view, or read any material depicting and/or describing sexually explicit conduct involving children, including computer images, pictures, photographs, books, writings, drawings, videos, or video games. "Sexually explicit conduct" as defined in 18 U.S.C. § 2256(2) means actual or simulated (a) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person.

In addition, the defendant shall not possess, own, use, view, or read any material depicting and/or describing sexually explicit conduct involving adults, defined as sexually stimulating depictions of adult sexual conduct that are deemed inappropriate by the defendant's probation officer, including computer images, pictures, photographs, books, writings, drawings, videos, or video games depicting such conduct. Furthermore, the defendant shall not frequent any place whose primary purpose is to sell, rent, show, display, or give other forms of access to, material depicting and/or describing sexually explicit conduct.

10. The defendant shall provide all requested business/personal phone records to the probation officer. The defendant shall disclose to the probation officer any existing contracts with telephone line/cable service providers. The defendant shall provide the probation officer with written authorization to request a record of all outgoing or incoming phone calls from any service provider.
11. The defendant shall consent to third-party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon him. This includes any activities in which you are acting as a technician, advisor, or consultant with or without any monetary gain or other compensation.

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AO 245B-CAED(Rev. 09/2011) Sheet 3 - Supervised Release

DEFENDANT: **BRIAN CAPUTO**

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12. The defendant shall attend, cooperate with, and actively participate in a sex offender treatment and therapy program [which may include, but is not limited to, risk assessment, polygraph examination, and/or Visual Reaction Treatment] as approved and directed by the probation officer and as recommended by the assigned treatment provider.
13. The defendant's residence shall be pre-approved by the probation officer. The defendant shall not reside in direct view of places such as school yards, parks, public swimming pools, or recreational centers, playgrounds, youth centers, video arcade facilities, or other places primarily used by children under the age of 18.

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DEFENDANT: **BRIAN CAPUTO**
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$Waived	

- ☐ The determination of restitution is deferred until ____ . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals	\$ ____	\$ ____	

- ☐ Restitution amount ordered pursuant to plea agreement \$ ____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ The interest requirement is waived for the ☐ fine ☐ restitution
- ☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:
- ☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.
- ☐ If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

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

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SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A. ☒ Lump sum payment of \$ 100.00 due immediately, balance due
☐ Not later than ____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after the date of this judgment; or
- D. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or
- E. ☐ Payment during the term of supervised release/probation will commence within ____ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendants ability to pay at that time; or
- F. ☐ Special instructions regarding the payment of criminal monetary penalties:

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.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

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

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.