No. 19-8366

IN THE

SUPREME COURT OF THE UNITED STATES

Andres Cabezas,

petitioner,

v.

United States,

respondent.

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

PETITION FOR RECONSIDERATION

Andres Cabezas
Reg. No. 68854-018 Unit B-3
Federal Correctional Complex
P.O. Box 1031 (Low Custody)
Coleman, Florida 33521-1031

QUESTION PRESENTED

Andres Cabezas filed verified-under-penalty-of-perjury non-frivolous pleadings that raised the specter of prosecutorial misconduct and pointed directly to Mr. Cabezas's actual innocence. The courts refused to hold or authorize a hearing on the merits of any of Mr. Cabezas's claims.

> Do courts have an affirmative duty to hold a hearing in a non-frivolous proceeding when a miscarriage of justice is implicated?

STATEMENT OF FACTS

The Statement of the Case in the previously filed certiorari petition is incorporated into this Statement of Facts.

When Andres Cabezas had pleaded guilty to receipt of child pornography, it was a lie. The sham charge was concocted by the United States's officers and Mr. Cabezas's attorney in order to induce a guilty plea. Mr. Cabezas later attempted to withdraw the plea, and among his actions claimed he was innocent of the charges. (Doc. 90-1). His guilty plea was kept intact, however, (Doc. 91), and he was sentenced to 151 months.

Mr. Cabezas——and the government——know that the forfeited iPhone never contained any child pornography or was ever used to search for child pornography. Mr. Cabezas also knew that any forensic analysis conducted by the government as to the iPhone's contents would be conclusive proof as to this. Thus, in order to compel the government to produce this exculpatory evidence, Mr. Cabezas raised a valid claim that the government should return his unforfeited digital property under Fed.R.Crim.P. 41(g). (Doc. 115).

The district court denied this motion. (Doc. 122). Mr. Cabezas appealed. **United States v. Cabezas**, No. 18-14660 (11th Cir.).

On January 7, 2019, the prison's Special Investigative Services summoned Mr. Cabezas to their office. The SIS officers informed Mr. Cabezas that the FBI wanted to return Mr. Cabezas's phone to him, the same phone that he purportedly had used to received child pornography.

The SIS officers told Mr. Cabezas that in order to release his iPhone from FBI custody, he only needed to sign some forms (detailing the identifying characteristics of the phone, e.g., model, IMEI, serial numbers) authorizing the FBI to return the phone and verifying the address of where the iPhone should be

sent (the form listed his home address as the default). Mr. Cabezas asked to be allowed to take the forms to his housing unit in order to review them. The SIS officers did not permit him to do so; they told him to just sign the forms.

Mr. Cabezas did not want to taint his exculpatory evidence that was in the FBI's possession, and he asked to be allowed to leave without signing the forms on the pretense that he needed to speak with his attorney. On returning back to the housing unit, Mr. Cabezas informed both the prison law clerk of what had occurred and called his family to let them know that if they were contacted to not accept the iPhone under any condition.

On the morning of January 8, 2019, SIS tracked Mr. Cabezas down to the recreation yard. Through the recreation officers, SIS asked Mr. Cabezas if he still wanted his iPhone back. Mr. Cabezas refused, and informed the officers that the FBI should talk to his attorney.

Several months later, after the initial 41(g) appeal was remanded to the district court, Mr. Cabezas sent the district court a verified-under-penalty-of-perjury notice that his 41(g) motion was ready for disposition. Mr. Cabezas also informed the court of the events described above, renewed his claims of actual innocence, and requested an evidentiary hearing. (Doc. 131). The government was silent as to Mr. Cabezas's allegations. Despite this, the district court denied Mr. Cabezas's motion. (Doc. 134). Mr. Cabezas appealed, and in his initial brief, also recounted the odd events and the circumstances of Mr. Cabezas's actual innocence. **United States v. Cabezas**, No. 19-12117, Ini. Br. (11th Cir. Aug. 22, 2019). The government——again——never responded to Mr. Cabezas's allegations, instead requesting summary dismissal based on the appellate court's lack of jurisdiction because of the pending criminal appeal.

Not one to let his actual innocence slide by because of a technicality, Mr. Cabezas then filed an original 41(g) in the appellate court, arguing that since the court had jurisdiction over the property and that the court was controlled by the Federal Rules of Criminal Procedure, they should be able to rule on the motion now. Again, he alluded to the goverment's bizarre actions and his actual innocence. The court denied the motion. **United States v. Cabezas**, No. 18-10258 (11th Cir. Jan. 28, 2020).

On April 28, 2020, before Mr. Cabezas's criminal appeal was resolved, or this certiorari petition was resolved, the district court——without jurisdiction——denied Mr. Cabezas's 41(g) motion to return the digital property and his request for an evidentiary hearing. (Doc. 156).

On June 1, 2020, this Court denied the petition for certiorari. This petition for reconsideration followed.

PETITION FOR RECONSIDERATION

Andres Cabezas seeks reconsideration of the denial of his petition for certiorari. He raises a ground previously not presented to this court that relate to his actual innocence of the crime of conviction, and provided he is granted relief (here, ordering a hearing or return of the contents of his forfeited iPhone), the results would produce exonerating evidence.

Under this miscarriage of justice consideration and review of Mr. Cabezas additional ground, Mr. Cabezas requests this Court to reconsider its previous denial of certiorari, and order the solicitor general to respond.

ADDITIONAL GROUND

Do courts have an affirmative duty to hold a hearing in a non-frivolous proceeding when a miscarriage of justice is implicated?

The merits of Andres Cabezas's argument to return his digital property are discussed elsewhere in the previous petition for certiorari, but in summary the government refuses to return Mr. Cabezas's non-forfeited, non-contraband, and non-evidentiary electronic property. Given that all courts of appeals other than the Eleventh Circuit appear to recognize the distinction between a container and its contents, the issue is non-frivolous. But embedded within these arguments was a direct challenge to Mr. Cabezas's conviction. Simply, if the contents of the forfeited device were disclosed, it would reveal that no child pornography was ever searched for, downloaded, or viewed on Mr. Cabezas's forfeited device. The evidence would be completely exonerating.

The courts, both appellate and district, have balked at Mr. Cabezas's assertions, ignoring the actual innocence claims and summarily denying on a procedural pretense to shield the (false) conviction in addition to allowing the government to retain Mr. Cabezas's electronic property. But do so is to perpetuate the miscarriage of justice, something this Court and society abhors.

Indeed, a miscarriage of justice is so odious to this Court that it may even overcome procedure when it is in the interests of justice. See, e.g., **McQuiggin v. Perkins**, 569 U.S. 383 (2013)(an actual innocence claim can overcome AEDPA's one year statute of limitations); **Murray v. Carrier**, 477 U.S. 478, 485 (1986)(procedural default may be overcome because failure to consider the claim would result in a "fundamental miscarriage of justice"); **United States v. Addonizio**, 442 U.S. 178, 185-87 (1979)(noting that a complete miscarriage of justice would occur if a court refused to vacate a sentence where the conduct for which a defendant was convicted was subsequently made legal).

Granted, it is [was] the government's duty to provide the exculpatory evidence. See **Banks v. Dretke**, 540 U.S. 668, 691 (2004)(discussing **Brady v. Maryland**, 373 U.S. 83 (1963); **Napue v. Illinois**, 360 U.S. 264, 269 (1959). But the government refuses to provide the exculpatory evidence, or even challenge Mr. Cabezas's verified pleadings directly. Essentially undermining the court's truth finding function.

The government's silence as to Mr. Cabezas's claims of innocence and prosecutorial misconduct allegations notwithstanding, the district and appeals court have denied Mr. Cabezas's 41(g) claims and implicitly deisregard his——much more concerning——verified-under-penalty-perjury pleadings. Essentially, dismissing Mr. Cabezas as incredible without ever holding a hearing.

There are two problems with this. First, the courts have found that, particularly in the habeas context, credibility determinations must be made during a hearing. **Garces-Hurtado v. United States**, 2020 U.S. App. LEXIS 10179 (11th Cir. 2020)(finding the district court abused its discretion by not granting an evidentiary hearing as to the § 2255 allegations); **Prakash v. Am. Univ.**, 727 F.2d 1174, 1180 (D.C. Cir. 1984)(district court must hold a hearing

to assess credibility). Mr. Cabezas is not at the habeas stage, but his allegations are significant: actual innocence and officer misconduct.

Second, Mr. Cabezas's verified allegations are not made willy-nilly. If he is lying, he could——and should be——charged with perjury. A disastrous cap to a 151 month sentence. Whichever way, the district court and appeals court has ignored someone's bad conduct, the government's or Mr. Cabezas's, and the miscreant should be duly sanctioned.

This is not to say that Mr. Cabezas suggests that by saying the magic words, "miscarriage of justice" or "manifest injustice" anyone can provoke a court into action. But in Mr. Cabezas's pleading, he provided a detailed account of potential misconduct of officers of the United States. More than that, the government has provided no evidence as to the child pornography ever being present or searched for on the iPhone. Nor will they ever, because the crime did not happen. The only evidence that anything is on the forfeited device is from Mr. Cabezas's own statements at his guilty plea. The courts should have given Mr. Cabezas an opportunity to be heard in an adversarial setting.

Of course, the appropriateness of raising a miscarriage of justice in a return of property proceeding comes into question. But Mr. Cabezas had limited avenues to raise claims other than in 28 U.S.C. § 2255, which does not recognize a freestanding claim of actual innocence. **Herrera v. Collins**, 506 U.S. 390, 400 (1999). Further, § 2255 takes up to a year, or more. Mr. Cabezas will remained imprisoned for a crime he did not commit, preparing a claim that is important, but tangential to his real issue. And direct appeal of the criminal case was not suitable as the record has not been developed yet.

The courts should have avoided this unnecessary waste of time, resources, or of Mr. Cabezas's life and should have simply conducted a hearing to find the truth.

CONCLUSION

Mr. Cabezas's electronic property has been seized by the government and has not been returned. But more than that, the miscoduct of the government's agents has resulted in his conviction of a crime he is factually innocent of.

Mr. Cabezas requests that this court reverse its previous order denying certiorari, and ask the government to respond to Mr. Cabezas's petition.

Respectfully submitted by Andres F. Cabezas on June 26, 2020.

Andres F. Cabezas
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CERTIFICATION OF PRO SE PARTY

I certify that the grounds presented in this document were limited to those of an intervening circumstance of a substantial and controlling effect or to substantial grounds not previously presented and that this document is presented in good faith and not for delay.

Andres Cabezas

VERIFICATION

Under penalty of perjury as authorized in 28 U.S.C. § 1746, I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

Andres Cabezas

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PROOF OF SERVICE

I, Andres Cabezas, do swear and declare that on this date, June 26, 2020, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR RECONSIDERATION on each party to the above proceeding and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and address of those served are as followed:

Supreme Court of the United States, Office of the Clerk, 1 First Street, N.E., Washington, D.C. 20543;

Solicitor General of the United States, Room 5616, Department of Justice, 905 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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

Executed on June 26, 2020.

Andres Cabezas