20-6363

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Andres F. Cabezas,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to
The Eleventh Circuit Court of Appeals
(Appeal No. 18-10258)

PETITION FOR WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

Whether a district court commits plain error by not waiting the fourteen days allotted by 28 U.S.C. § 636 prior to adopting a magistrate's Report and Recommendation.

Did the appellate court err in relying on unsworn attorney statements to affirm the conviction and defeat claims of actual innocence?

Is there a miscarriage of justice exemption to plea agreement appellate review waivers?

LIST OF PARTIES

The caption of the case names all the parties to the proceedings in the court below.

RELATED CASES

United States v. Cabezas, No. 6:17-cr-148, U.S. District Court for the Middle District of Florida. Judgment entered January 18, 2018.

United States v. Cabezas, No. 18-10258, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered June 9, 2020.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Rules, and Other Authorities

PETITION FOR WRIT OF CERTIORARI

Andres F. Cabezas asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Eleventh Circuit on June 9, 2020.

OPINIONS BELOW

The opinion of the Eleventh Circuit appears at Appendix A. The motion for reconsideration of the Eleventh Circuit's opinion appears at Appendix C. The judgment of the United States District Court appears at Appendix B.

JURISDICTION

The opinion and judgment of the Eleventh Circuit were issued on June 9, 2020. On March 19, 2020, this Court issued an Omnibus order. In re Order, 2020 U.S. LEXIS 1643 (U.S., March 19, 2020). Thus, the filing of this writ is within 150 days from the motion for reconsideration of the opinion and judgment of the Eleventh Circuit. See SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 636 in pertinent part provides:

> (b)(1) Notwithstanding any provision of law to the contrary——
>
> > (A) A judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this

> subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [post-trial] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions.

STATEMENT OF THE CASE

On October 18, 2017, Andres Cabezas pleaded guilty before a magistrate judge. Dkt. 67. Minutes prior to the commencement of the change of plea hearing, and (obviously) before to the issuance of the Magistrate's Report and Recommendation, retained defense counsel[1] instructed Cabezas to sign a notice of non-objection[2] to a forthcoming Report and Recommendation. Non-attorney Cabezas signed a notice of non-objection to a non-existent Report and Recommendation. Dkt. 75.; (Appx. E)

Towards the end of the change of plea hearing, a brief, albeit bizarre, exchange between defense counsel and the magistrate illustrates the defect in

/1 Cabezas's family initially retained Todd Foster, Esq., but subsequently retained different counsel after Foster's misrepresentations.

/2 This was a complete misrepresentation by defense counsel because nowhere in the federal rules or statutes does it require the filing of a notice of non-objections if a litigant does not intend to file objections to a magistrate's report and recommendation.

the proceedings. Defense counsel informed the magistrate that he was in possession of an executed notice of non-objection to the yet-to-be-issued magistrate's report and recommendation. Dkt. 84 at 22. The magistrate's report was issued later that day, Dkt. 73; (Appx. F), long after Cabezas signed the non-objection notice. Dkt. 75.

The Report and Recommendation discussed, inter alia, topics that were not mentioned at Cabezas's change of plea hearing. Compare Dkt. 84 with Dkt. 73.[3] Immediately after the hearing, Cabezas began to seek new counsel to withdraw his guilty plea on the basis of his actual innocence. Within the 14 day period of the colloquy, on October 31, 2017, Cabezas hired new counsel. But it was already too late; previous counsel's premature notice of non-objection to the Report and Recommendation prompted the district court to adopt the magistrate's report and recommendation, two days after the colloquy. Dkt. 77; (Appx. G). Seeing no need to rush, newly appointed counsel ultimately was substituted. Dkt. 81. Months later, new counsel filed a motion to withdraw the guilty plea. Dkt. 90. The motion was denied. Dkt. 91.

At sentencing, Cabezas asserted his innocence, objected to all of the criminal conduct in the PSR, and renewed his request to withdraw his plea. Dkt. 97. The district court overruled the objections with a general proclamation, and sentenced Cabezas to 151 months. Dkt. 110.

[3] The Report and Recommendation discusses 18 U.S.C. § 3142(f)(1)(A), (B), and (C) and also 18 U.S.C. § 3143(a)(2), none of which were discussed at the change of plea hearing. Dkt. 84.

REASONS FOR GRANTING THE WRIT

1. Whether a district court commits plain error when it refuses to wait the fourteen days allowed by 28 U.S.C. § 636 prior to adopting a magistrate's report.

The Eleventh Circuit explained that neither it "nor the Supreme Court has ever required that a district court wait the full 14 days to adopt a Report and Recommendation when both sides have given non-objection notices, so the district court did not plainly err by failing to wait." United States v. Cabezas, 797 Fed. Appx. 415, 418 (11th Cir. 2019); (Appx. A at 3). But this sophist reasoning does not take into consideration the actual text of 28 U.S.C. § 636 nor the situation here.

Section 636 states, "[w]ithin fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court." 28 U.S.C. § 636 (2020). The statute specifically allots an amount of time when a party may file written objections. Id. Section 636 does not state that a court may adopt a Report and Recommendation before the allotted fourteen days under any circumstance. In other words, Section 636 allows a party an allotted time to act, not the district court.

Moreover, Cabezas's notice of non-objection is void and was obviously not ripe for review as "it rest[ed] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998). Cabezas could not have possibly intelligently or knowing filed a notice of non-objection to a non-existent Report and Recommendation. Dkt. 75. Even if Cabezas had no intention to withdraw his plea, the Report and Recommendation was not "as anticipated" by Cabezas. See Fn. 3, ante.

In essence, because Cabezas's notice of non-objection is void, the district court acted prematurely by adopting that Report and Recommendation before the expiration of the 14 day statutory limitation. 28 U.S.C. § 636. 28 U.S.C. § 636. Admittedly, the district court must have been unaware of the unorthdox and unethical practices by defense counsel and the government and employed and condoned by the magistrate. Dkts. 84 at 22.[4] But defense counsel and the government cannot be blamed for the docket manipulation that was done by the magistrate. Dkts. 84 at 21-22 (transcripts illustrating defense counsel's notice of non-objections being handed over to the court before the issuance of the Report and Recommendation, the document being docketed out of the order received). Besides, the statute and the rules do not forbid a party from filing more than one objection to the magistrate's report. Notably, the Eleventh Circuit explained that the district court's premature "adoption became effective at the end of 14 days ..." Cabezas, 797 Fed. Appx. at 418.

In any event, with no direction from this Court on the Question Presented, the Eleventh Circuit, left to its own devices, simply speculates:

> "Neither this court nor the Supreme Court has ever required that a district court wait the full 14 days to adopt a Report and Recommendation ...." Id.
>
> "[E]ven assuming that the district court's adoption of the Report and Recommendation was legally ineffective at first ... the adoption became effective at the end of 14 days ...." Id.

But the lack of clarity to the Question Presented caused Cabezas to lose a favorable review standard. "[T]here can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving an issue." United States v. Cavallo, 790 F.3d 1202, 1234 (11th Cir. 2015)(alteration omitted).

/4 This Court held in Thomas v. Arn, 474 U.S. 140 (1985), that "[i]t seems clear that Congress would not have wanted district judges to elevate time to reviewing magistrate's reports except to the extent that such review is requested by the parties or otherwise necessitated by Article III of the Constiution. Id. at 153.

There is no reason for a district court to adopt a magistrate's Report and Recommendation before the 14 days allotted by § 636. Especially, given the circumstances presented here, where there were effectively objections made to the Report and Recommendations.

Wherefore, Cabezas respectfully requests this Court grant review.

2. Did the appellate court err in relying on unsworn attorney statements to affirm the conviction and defeat claims of actual innocence?

Every circuit has found that unsworn statements of counsel are not evidence, in addition to this Court. INS v. Phipathya, 464 U.S. 183, 188 n.6 (1984). The Eleventh Circuit, however, relied upon Cabezas's former counsel's statements in affirming Cabezas's conviction, finding it as evidence overriding his claims of actual innocence. Specifically, the circuit court found that "[t]he record already contains an admission by Cabezas's lawyer that Cabezas deleted the video after viewing it. The absence of pornography from the phone is thus entirely consistent with his guilt." (App. A at 4). Notably, this statement was not authorized by Cabezas, and known by counsel to be untrue.

The Eleventh Circuit's improper use of counsel's statement runs contrary no only to its law regarding attorney statements, United States v. Washington, 714 F.3d 1358, 1361 (11th Cir. 2013), but also to the circuit's finding with respect to forensic examination of computer files: deleted files are recoverable. United States v. Woods, 684 F.3d 1045, 1061 (11th Cir. 2012). In the record below, there is no electronic evidence or expert testimony that Cabezas downloaded, viewed, or controlled any child pornography.[5]

Cabezas respectfully requests that this Court grant certiorari, vacate the circuit court's order, and remand the case to the appellate court with instructions to not consider the attorney's statements in their opinion.

[5] It is worth noting that the Government has also not explained how Cabezas accessed the "dark web" to purportedly download the child pornography video, particularly when considering that the iPhone's Safari internet browser does not boast this capability.

3. Is there a miscarriage of justice exception to plea agreement appellate review waivers?

At Cabezas's sentencing, he objected to all of the PSR's findings discussing the alleged criminal conduct on the basis of his actual innocence. The district court, however, proceeded to not follow its prescribed sentencing procedure by not 1) ruling on each objection specifically; 2) not placing the burden on the government to demonstrate preponderance of the evidence that each act occurred; and 3) not indicating that any conduct would definitively not be factored into sentencing. See Fed. R. Crim. P. 32(i)(3)(B). As a result, the district court found that Cabezas has engaged in both receipt of child pornography and enticement of a minor. The government had provided no new evidence or testimony at sentencing.

Cabezas's contentions of innocence at sentencing invoke 2 forms of a miscarriage of justice:

- A "fundamental miscarriage" of justice, as in a constitution violation probably caused the conviction of an innocent person. McClesky v. Zant, 499 U.S. 467, 502 (1991)(emphasis added).

- The sentencing court's obligation to "satisfy applicable constitutional requirements." United States v. Guillen, 561 F.3d 527, 530 (D.C. Cir. 2009). Here, the district court's accepting of the enticement conduct as true without putting the government to its burden denied Cabezas due process.

To illustrate part of the district court's error, the district court accepted objected-to facts in the PSR that contradict each other. Compare PSR ¶ 32 ("Cabezas is a middle school teacher [] and teaching technology") with Id. ¶ 71 ("[Cabezas] advised he worked as a teacher ... he was scheduled to begin part time employment [] as a [university-level] lab coordinator."). Notably, the district court did not indicate if it had considered Cabezas's former employment in sentencing.

Additionally, the district court propagate the error by reciting facts that did not exist on the record:

- "Between May 25th and May 30th, Mr. Cabezas spoke with an undercover female officer." Dkt. 110 at 86. The criminal complaint discusses that the electronic communication was conducted by a male officer. Dkt. 1.

- "[Cabezas] is walking her through the process of grooming her to have sex." Dkt. 110 at 86. Grooming was not offered as evidence by the government, and was only a statement made by the prosecutor.

- "[B]y the fact that you were willing to meet with a mother to engage in sex with a child ..." Dkt. 110 at 118. The record does not demonstrate that Cabezas had planned to meet an intermediary.

- "Taboo means there's going to be incest in the scenario." Dkt. 110 at 81. The meaning of "taboo" was never offered as evidence.

The court, in its disgust for what it believed Cabezas had done, took a shortcut at sentencing, and did not allow the allegations to be tested, thereby depriving Cabezas of due process.

The Eleventh Circuit found that Cabezas's appellate waiver barred Cabezas's sentencing appeal claims "because we have not adopted a miscarriage of justice exception." (App. A at 5). The Eleventh Circuit is in a minority; 8 circuits acknowledge a miscarriage of justice exception to appellate waivers. (App. H). Specifically, the circuit courts have found that appellate waivers may not be enforced if the waiver would work a miscarriage of justice. Essentially, the interests of justice overcome even a knowing and voluntary waiver.

Cabezas requests that this court grant certiorari, vacate the Eleventh Circuit's order, bring the circuit's into alignment as to the applicability with respect to appellate waivers, and remand the case to the Eleventh Circuit to determine that enforcing the waiver would not work a miscarriage of justice.

Cabezas respectfully requests that this honorable Court grant certiorari.

Respectfully submitted by Andres F. Cabezas on November 4, 2020.

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

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

Document Cover Sheet

Cabezas, Andres Fernando v. United States

Appendix
SCUS|161015|42

APPENDIX "A"
Eleventh Circuit Opinion

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ANDRES FERNANDO CABEZAS, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
797 Fed. Appx. 415; 2019 U.S. App. LEXIS 36081
No. 18-10258 Non-Argument Calendar
December 5, 2019, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 6:17-cr-00148-PGB-TBS-1.United States v. Cabezas, 2017 U.S. Dist. LEXIS 208839 (M.D. Fla., Dec. 19, 2017)

Disposition:

AFFIRMED IN PART; DISMISSED IN PART.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Holly Lynn Gershow, Linda Julin McNamara, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, TAMPA, FL.

ANDRES FERNANDO CABEZAS, Defendant - Appellant, Pro se, COLEMAN, FL.

Judges: Before MARCUS, NEWSOM, and HULL, Circuit Judges.

Opinion

{797 Fed. Appx. 416} PER CURIAM:

Andres Fernando Cabezas, proceeding *pro se*, appeals his conviction, the denial of his motion to withdraw his guilty plea, and his 151-month prison sentence imposed for receiving child pornography. On appeal, Cabezas first argues that the district court abused its discretion in denying his motion to withdraw his guilty plea because (1) his plea was not knowing and voluntary; (2) the factual proffer supporting his plea was false and insufficient; (3) the district court erred in failing to wait 14 days to adopt the magistrate judge's Report and Recommendation; and (4) he asserted a verifiable actual-innocence claim, and the district court failed to grant him an evidentiary hearing to prove it. Second, Cabezas argues that his conviction**{2019 U.S. App. LEXIS 2}** is void because either (1) his guilty plea lacked a factual basis or (2) the district court plainly erred in failing to *sua sponte* find that 18 U.S.C. § 2252A is void for vagueness. Third, Cabezas argues that his sentence should be vacated because the district court left several disputed facts unaddressed at sentencing.

I

We review for abuse of discretion a district court's denial of a defendant's motion to withdraw his guilty plea. *United States v. Freixas*, 332 F.3d 1314, 1316 (11th Cir. 2003). A district court may

APPENDIX "A"

permit a defendant to withdraw his guilty plea before sentencing for "a fair and just reason." Fed. R. Crim. P. 11(d)(2)(B). In determining whether a defendant has shown a fair and just reason, a court should "evaluate[] the totality of the circumstances, including '(1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea.'" *Freixas*, 332 F.3d at 1318 (quoting *United States v. Najjar*, 283 F.3d 1306, 1309 (11th Cir. 2002)). Once the district court determines that the defendant received close assistance of counsel and entered a knowing and voluntary plea, the third and fourth factors are not given considerable weight. *United States v. Gonzalez-Mercado*, 808 F.2d 796, 801 (11th Cir. 1987).

A

Under Federal Rule of Criminal Procedure 11, the district court must "address the defendant**{2019 U.S. App. LEXIS 3}** personally in open court and inform the defendant of, and determine that the defendant understands . . . the nature of the charge to which the plea is offered and the potential consequences of that plea." *United States v. Lewis*, 115 F.3d 1531, 1535 (11th Cir. 1997) (internal quotation marks and citation omitted). To determine whether a guilty plea is knowing and voluntary, a court must comply with the "three core principles" of Rule 11 by ensuring that "(1) the guilty plea [is] free from coercion; (2) the defendant . . . understand[s] the nature of the charges; and (3) the defendant . . . know[s] and understand[s] the consequences of his guilty plea." *United States v. Jones*, 143 F.3d 1417, 1418-19 (11th Cir. 1998) (quotation omitted). On direct appeal, we strongly presume that the defendant's statements at the plea colloquy were truthful, including his admission of guilt and his representation that he understood the consequences of his plea. *See United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994).

{797 Fed. Appx. 417} Here, the district court did not abuse its discretion in denying Cabezas's motion to withdraw. The first *Freixas* factor did not favor allowing Cabezas to withdraw his plea because he enjoyed the close assistance of counsel before and during his plea colloquy. *Freixas*, 332 F.3d at 1318. As to the second *Freixas* factor, Cabezas's guilty plea was knowing and voluntary based on his sworn statements**{2019 U.S. App. LEXIS 4}** at the Rule 11 hearing, which we strongly presume were truthful. *See id.; Medlock*, 12 F.3d at 187. As a result, we need not "give particular attention" to the other two *Freixas* factors. *See Gonzalez-Mercado*, 808 F.2d at 801.

B

"Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). Rule 11 requires a showing of "a factual basis for each essential element of the crime." *United States v. Montoya-Camacho*, 644 F.2d 480, 485 (5th Cir. Unit A May 1981). Normally, in reviewing whether the plea agreement has a sufficient factual basis, we will determine "whether the district court was presented with evidence from which it could reasonably find that the defendant was guilty." *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1287 (11th Cir. 2015) (alteration omitted) (quotation omitted). But, as explained below, we review this issue only for plain error here.

When the district court refers a dispositive matter to a magistrate judge, a party has 14 days to submit written objections after being served with a copy of the Report and Recommendation. Fed. R. Crim. P. 59(b)(2). "Failure to object in accordance with this rule waives a party's right to review." *Id.* If a defendant pleads guilty before a magistrate judge and fails to object to his recommendation that the plea be accepted, the defendant waives any "argument that the district court should not have accepted his guilty plea."**{2019 U.S. App. LEXIS 5}** *See United States v. Garcia-Sandobal*, 703 F.3d 1278, 1282 (11th Cir. 2013); *see also* Fed. R. Crim. P. 59(b)(2). Still, we "may review on appeal for plain error if necessary in the interests of justice." 11th Cir. R. 3-1. Because Cabezas made no

objection to the factual basis of his guilty plea before either the magistrate judge or district court, his challenge to the factual basis of his guilty plea merits at most plain error review. *See United States v. Evans*, 478 F.3d 1332, 1338 (11th Cir. 2007).

Here, the factual basis for the plea of guilty was more than sufficient. Cabezas admitted in open court that the stipulated statement of facts detailing his receipt and viewing of child pornography was correct. By itself, this admission provides a sufficient factual basis because the stipulated facts satisfy all the elements of the charged offense. *See Puentes-Hurtado*, 794 F.3d at 1287. Refusing to allow Cabezas to withdraw his plea on grounds that its factual basis was deficient was therefore not an error, much less plain error. *See Garcia-Sandobal*, 703 F.3d at 1282; 11th Cir. R. 3-1.

C

In criminal proceedings, objections or arguments that are not raised before the district court are also reviewed for plain error. *See, e.g., Evans*, 478 F.3d at 1338. "[T]here can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving an issue." *United States v. Cavallo*, 790 F.3d 1202, 1234 (11th Cir. 2015) (alteration omitted). Furthermore, if a party affirmatively "induces or invites the district**{2019 U.S. App. LEXIS 6}** court into making an error," we are entirely "precluded from reviewing that error on appeal." *United States v. Brannan*, 562 F.3d 1300, 1306 **{797 Fed. Appx. 418}** (11th Cir. 2009) (quotations omitted). "[F]ailing to object"-in and of itself-"does not trigger the doctrine of invited error," but unambiguously agreeing with a course of action proposed by the court does. *See United States v. Dortch*, 696 F.3d 1104, 1112 (11th Cir. 2012).

Here, any possible error that the district court made in failing to wait the full 14 days to accept the Report and Recommendation was likely invited by Cabezas when he filed a notice of non-objection. *See Brannan*, 562 F.3d at 1306; *Dortch*, 696 F.3d at 1112. Even if reviewed for plain error, however, Cabezas's argument fails. Neither this Court nor the Supreme Court has ever required that a district court wait the full 14 days to adopt a Report and Recommendation when both sides have given non-objection notices, so the district court did not plainly err by failing to wait. *See Cavallo*, 790 F.3d at 1234 (holding that because there was "no controlling precedent resolving [the defendant's] present claim," any error with respect to that issue would not be plain).

Cabezas's argument here, however, suffers from an even more profound defect. Even were this Court inclined to hold that the 14-day period for objections cannot be waived and that a Report and Recommendation cannot be**{2019 U.S. App. LEXIS 7}** effectively adopted until that time elapses, Cabezas did not even attempt to withdraw his plea within the 14 days. He first moved to withdraw his plea nearly two *months* after the magistrate judge issued the Report and Recommendation. As a result, even assuming that the district court's adoption of the Report and Recommendation was legally ineffective at first because the time for objections had not yet elapsed, the adoption became effective at the end of 14 days-long before Cabezas attempted to withdraw his plea. Consequently, Cabezas lost the right to withdraw his plea "for any reason or no reason" and was required to "show a fair and just reason" for withdrawal. Fed. R. Crim. P. 11(d)(1), (d)(2)(B). As already noted, he failed to make that showing.

D

"A mere declaration of innocence does not entitle a defendant to withdraw his guilty plea." *United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1988). Further, where a magistrate judge conducts an extensive plea colloquy, the district court does not abuse its discretion in refusing to hold an evidentiary hearing on a defendant's motion to withdraw his guilty plea. *See United States v. Brehm*, 442 F.3d 1291, 1298 (11th Cir. 2006).

Cabezas has failed to demonstrate that he was entitled to withdraw his guilty plea based on his actual innocence. He does little more than assert his innocence,{2019 U.S. App. LEXIS 8} which is insufficient by itself. *See Buckles*, 843 F.2d at 472. To his bald assertions, Cabezas adds only the claim that his confiscated phone contains no child pornography. But that fact, even if proved, is not meaningfully exculpatory at this point. The record already contains an admission by Cabezas's lawyer that Cabezas deleted the video after viewing it. The absence of pornography from the phone is thus entirely consistent with his guilt. Cabezas, then, has not offered any evidence of his actual innocence. And because the magistrate judge conducted an extensive Rule 11 hearing, the district court did not abuse its discretion in denying Cabezas an evidentiary hearing to shore up his flimsy argument. *See Brehm*, 442 F.3d at 1298.

II

We review *de novo* "whether a criminal statute is unconstitutionally vague." *United States v. Wayerski*, 624 F.3d 1342, 1347 (11th Cir. 2010). A criminal statute is void for vagueness if it either (1) "fails to provide {797 Fed. Appx. 419} people of ordinary intelligence a reasonable opportunity to understand what conduct" is prohibited, or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* (quotation omitted).

We have held that 18 U.S.C. § 2252A is not unconstitutionally vague. *United States v. Woods*, 684 F.3d 1045, 1059 (11th Cir. 2012). In *Woods*, we also held that the words "knowingly" and "receive" clearly conveyed that a person who{2019 U.S. App. LEXIS 9} intentionally viewed, acquired, or accepted child pornography from an outside source violated § 2252A. *Id.* at 1058. Under the well-established prior panel precedent rule, we are bound by a prior panel's holding "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

As previously explained, the factual basis of Cabezas's plea was sufficient. To the extent that Cabezas argues that his plea is void for factual insufficiency, that argument fails for the reasons already given. Cabezas's contention that his plea is void because the statute under which he plead guilty is unconstitutionally vague also fails. We review Cabezas's vagueness challenge for plain error, as he failed to raise it before the district court. *See, e.g., Evans*, 478 F.3d at 1338. Moreover, we have explicitly held that 18 U.S.C. § 2252A is not unconstitutionally vague. *See Woods*, 684 F.3d at 1059. We are bound by our holding in *Woods*. *See Archer*, 531 F.3d at 1352. Accordingly, the district court did not err, much less plainly err, in failing to *sua sponte* find that § 2252A was unconstitutionally vague.

III

"We review the validity of a sentence appeal waiver *de novo*." *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008). A sentence-appeal waiver will be enforced if it was made knowingly and voluntarily. *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993). To{2019 U.S. App. LEXIS 10} establish that the waiver was made knowingly and voluntarily, the government must show either that "(1) the district court specifically questioned the defendant" about the waiver during the plea colloquy or (2) the record makes clear "that the defendant otherwise understood the full significance of the waiver." *Id.*

A valid appeal waiver waives "the right to appeal difficult or debatable legal issues [and] blatant error." *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005). In *Johnson*, we discussed the Eighth Circuit's application of a "miscarriage of justice" exception to sentence-appeal waivers, but we did not purport to adopt this exception. 541 F.3d at 1069 n.5.

Here, Cabezas's sentence-appeal waiver bars his argument regarding his sentence because the government has shown that the waiver was made knowingly and voluntarily. At the plea colloquy, the district court specifically questioned Cabezas about the waiver, and he acknowledged that he understood that his rights to appeal were limited to a few exceptions inapplicable here. *See Bushert*, 997 F.2d at 1351. To the extent that Cabezas argues that a miscarriage of justice would result from enforcement of his sentence appeal waiver, we have not adopted a "miscarriage of justice" exception. *See Johnson*, 541 F.3d at 1069 n.5. Cabezas's sentence-appeal waiver**{2019 U.S. App. LEXIS 11}** is therefore enforceable, and thus, we will not consider his arguments regarding his sentence. Accordingly, we dismiss his challenge to his sentence.

AFFIRMED IN PART; DISMISSED IN PART.

APPENDIX "B"
District Court Judgment

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v

ANDRES FERNANDO CABEZAS

Case Number: 6:17-cr-148-Orl-40TBS

USM Number: 68854-018

James Wesley Smith, III, Retained
Suite 445
201 E Pine St
Orlando, FL 32801

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Superseding Information. The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 U.S.C. §§ 2252A(a)(2) and (b)(1)	Receipt of Child Pornography	May 8, 2017	One

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.

The underlying indictment is dismissed.

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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

January 17, 2018

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

January 18, 2018

APPENDIX "B"

Andres Fernando Cabezas
6:17-cr-148-Orl-40TBS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED FIFTY-ONE (151) MONTHS** as to Count One of the Superseding Information.

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

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **TWENTY (20) YEARS** as to Count One of the Superseding Information.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. The mandatory requirements of the Violent Crime Control Act are imposed. The Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions as follows.

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 your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
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 your 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:_____

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, the defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.

2. The defendant shall participate in a mental health program specializing in sex offender treatment and submit to polygraph testing for treatment and monitoring purposes. The defendant shall follow the probation officer's instructions regarding the implementation of this court directive. Further, the defendant shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the probation officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

3. The defendant shall register with the state sexual offender registration agency(s) in any state where he or she resides, visits, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S.943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct the defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

4. The defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate, including: schools, daycare centers, theme parks, playgrounds, etc.

5. The defendant is prohibited from possessing, subscribing to, or viewing, any video, magazine, or literature depicting children in the nude and/or in sexually explicit positions.

6. Without prior written approval of the probation officer, you are prohibited from either possessing or using a computer (including a smart phone, a hand-held computer device, a gaming console, or an electronic device) capable of connecting to an online service or an internet service provider. This prohibition includes a computer at a public library, an internet cafe, your place of employment, or an educational facility. Also, you are prohibited from possessing an electronic data storage medium (including a flash drive, a compact disk, and a floppy disk) or using any data encryption technique or program. If approved to possess or use a device, you must permit routine inspection of the device, including the hard drive and any other electronic data storage medium, to confirm adherence to this condition. The United States Probation Office must conduct the inspection in a manner no more intrusive than necessary to ensure compliance with this condition. If this condition might affect a third party, including your employer, you must inform the third party of this restriction, including the computer inspection provision.

7. The defendant shall submit to a search of his or her person, residence, place of business, any storage units under the defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

8. The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or making an obligation for any major purchases without approval of the probation officer. The defendant shall provide the probation officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	Assessment	JVTA Assessment [1]	Fine	Restitution
TOTALS	$100.00	$5,000.00	Waived	N/A

SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk, U.S. District Court, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Plea Agreement and Order of Forfeiture, that are subject to forfeiture.

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution 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 the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[1] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** 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.

APPENDIX "C"
Denial of Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10258-HH

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ANDRES FERNANDO CABEZAS,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: NEWSOM, HULL, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX "C"

APPENDIX "D"
Omnibus Order Granting Time Extension

ORDER
SUPREME COURT OF THE UNITED STATES
2020 U.S. LEXIS 1643
No. 589.
March 19, 2020, Decided

Editorial Information: Subsequent History

Later proceeding at In re Order, 2020 U.S. LEXIS 2196 (U.S., Apr. 15, 2020)

Judges: {2020 U.S. LEXIS 1}Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari: IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3. IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection. IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted**{2020 U.S. LEXIS 2}** by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection. IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument. These modifications will remain in effect until further order of the Court.

APPENDIX "D"

APPENDIX "E"
Notice of No Objection to R&R

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS. **CASE NO: 6:17-cr-148-Orl-40TBS**

ANDRES FERNANDO CABEZAS

NOTICE OF NO OBJECTION TO REPORT AND RECOMMENDATION

Defendant **ANDRES FERNANDO CABEZAS** has no objection to the Report and Recommendation issued by the Magistrate Judge on October 18, 2017 regarding the plea of guilty entered by **ANDRES FERNANDO CABEZAS**.

October 18, 2017

ANDRES FERNANDO CABEZAS

Counsel for **ANDRES FERNANDO CABEZAS**

Copies to:
United States Attorney
Counsel of Record
District Judge

APPENDIX "E"

APPENDIX "F"
Magistrate's R&R

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS. CASE NO: 6:17-cr-148-Orl-40TBS

ANDRES FERNANDO CABEZAS

REPORT AND RECOMMENDATION CONCERNING PLEA OF GUILTY

The Defendant, by consent, has appeared before me pursuant to Rule 11, F.R. Cr.P. and Rule 6.01(c)(12), Middle District of Florida Local Rules, and has entered a plea of guilty to Count ONE of the Superseding Information. After cautioning and examining the Defendant under oath concerning each of the subjects mentioned in Rule 11, I determined that the guilty plea was knowledgeable and voluntary and that the offense charged is supported by an independent basis in fact containing each of the essential elements of such offense. I therefore recommend that the plea agreement and the plea of guilty be accepted and that the Defendant be adjudged guilty and have sentence imposed accordingly.

Because an offense to which the Defendant entered a guilty plea is an offense listed in 18 U.S.C. § 3142(f)(1)(A), (B) or (C), the Defendant is subject to the provisions of 18 U.S.C. § 3143(a)(2) upon adjudication of guilt.

Date: October 18, 2017

THOMAS B. SMITH
UNITED STATES MAGISTRATE JUDGE

NOTICE

A party waives the right to challenge on appeal a finding of fact or conclusion of law adopted by the district judge if the party fails to object to that finding or conclusion within fourteen days after issuance of the Report and Recommendation containing the finding or conclusion.

Copies furnished to:

United States Attorney
Counsel of Record
District Judge

APPENDIX "F"

APPENDIX "G"
District Court's Adoption of R&R

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS. **CASE NO: 6:17-cr-148-Orl-40TBS**

ANDRES FERNANDO CABEZAS

ACCEPTANCE OF GUILTY PLEA AND ADJUDICATION OF GUILT

Pursuant to the Report and Recommendation of the United States Magistrate Judge (Doc. 73) entered October 18, 2017, to which the parties have waived the 14 day objection period, the plea of guilty of the defendant is now accepted and the defendant is adjudged guilty of Count One of the Superseding Information.

Sentencing is scheduled for January 10, 2018 at 3:30 PM before the undersigned.

DONE and ORDERED in Orlando, Florida this 20th day of October 2017.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies:
Counsel for the Defendant
United States Attorney
United States Magistrate Judge
United States Marshal Service
United States Probation Office
United States Pretrial Services

APPENDIX "G"

APPENDIX "H"

Summary of Circuits Adopting Miscarriage of Justice Exemption

Circuits with Miscarriage of Justice Exemption to Appeallate Waivers

United States v. Velez-Luciano, 814 F.3d 553, 559 (1st Cir. 2016)("The general rule is that when knowing and voluntary, an appellate waiver is generally enforceable, absent an indication that the waiver would work a miscarriage of justice.")

United States v. Grimes, 739 F.3d 125, 128-129 (3d Cir. 2014)("we will enforce an appellate waiver ... unless [] enforcing the waiver would work a miscarriage of justice")

United States v. Adams, 814 F.3d 178, 182 (4th Cir. 2016)("We will refuse to enforce and otherwise valid [appeal] waiver if to do so would result in a miscarriage of justice")

United States v. Litos, 847 F.3d 906, 910 (7th Cir. 2017)("because it would be unjust to make Litos alone owe the full amount of restitution ... we've decided to ignore the appellate waiver.")

United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003)("Assuming that a waiver has been entered into knowingly and voluntarily, we will still refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice.")

United States v. Harris, 628 F.3d 1203, 1205 (9th cir. 2001)("Absent some miscarriage of justice, however, "we will not exercise the jurisdiction to review the mertis of [an] appeal if we conclude that [the defendant] knowingly and voluntarily waived "the right to bring the appeal.")

United States v. Lonjose, 663 F.3d 1292, 1297 (10th Cir. 2011)(holding that appeal waivers are valid and enforceable where "enforcing the waiver would not result in a miscarriage of justice.")

United States v. Guillen, 561 F.3d 527, 530-31 (D.C. Cir. 2009)("Nor should a waiver be enforced if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice.")

APPENDIX "H"