
No. 20-6363

IN THE
SUPREME COURT OF THE UNITED STATES

Andres F. Cabezas,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the Eleventh Circuit Court of Appeals
Appeal No. 18-10258

PETITION FOR REHEARING

Andres F. Cabezas
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QUESTIONS PRESENTED

1. If a timely objection is made to a plea agreement's factual basis before judgment is entered but after a district court's acceptance of a plea, is the error preserved for purposes of harmless error review?
2. What is the minimum showing required by the government for a court to find a factual basis to be sufficient?
3. Is the Eleventh Circuit's interpretation of receipt of child pornography that criminalizes viewing outside the conduct prohibited by 18 U.S.C. § 2252(a)(2)?

STATEMENT OF FACTS

The course of proceedings in Andres Cabezas's petition for certiorari is encompassed in this statement of facts.

In the plea agreement's factual basis, the government provided no purported specificities as to when Cabezas saw the illegal video, how he obtained it from the technologically hidden "dark web", or proffered any evidence independent of statements for the charge of conviction. See Dkt. 67. The plea hinged on statements made by government agents, who reported vague and inaccurate claims that Cabezas had verbally confessed to viewing child pornography in an unrecorded custodial interview. Dkt. 1 at 15; Dkt. 14 at 19/21-22.

The receipt of child pornography charge was a fabrication used to induce a guilty plea from Cabezas, which he later recanted of and attempted to withdraw. Dkt. 90 (motion to withdraw plea); Dkt 90-1 (letter recanting of plea admissions); Dkt 93 at 18 (objections to PSR's offense conduct on basis of actual innocence); Dkt. 110 at 103/23 (Cabezas's sworn testimony proclaiming innocence). The district court denied the requests and objections to the plea's factual basis, citing to an untested affidavit and the plea agreement's factual basis. Dkt. 110 at 6-7.

On appeal, despite Cabezas having objected to the factual basis before the district court, the Eleventh Circuit reviewed the sufficiency of the plea's factual basis for plain error, reasoning that because Cabezas had not timely objected to the magistrate's report and recommendation, he had waived his right to review. United States v. Cabezas, 797 Fed. Appx. 415, 417 (11th Cir. 2019)(citing United States v. Garcia-Sandobal, 703 F.3d 1278, 1282 (11th Cir. 2013)). Relying on Cabezas's admissions at the plea colloquy alone, the appellate court ruled that the factual basis was sufficient. Id. Cabezas petitioned for certiorari.

Shortly thereafter, Cabezas received an admission from the FBI that there was no record of evidence of child pornography in his case file. See Cabezas v. Federal Bureau of Investigation, No. 1:19-cv-00145-CJN, Dkt. 30-1 (D.D.C. 2020)(FBI documentation showing no claimed exemptions for information of minor victims). Further, in December 2020, Cabezas filed a motion for a return of his digital property from the device purportedly used by him to commit the crime. Dkt. 170. The government, through silence, did not oppose the action. Per the motion, nor did it deny that their agents had attempted to return the iPhone to Cabezas at the prison. Id. On January 11, 2021, the petition for certiorari was denied. Cabezas now timely petitions for rehearing based on previously unraised issues.

PETITION FOR REHEARING

Andres F. Cabezas respectfully requests this Court grant his petition for rehearing for his petition for certiorari. A petition for rehearing on a denial of certiorari "shall be limited to intervening circumstances of controlling effect or to other substantial grounds not previously presented." Supreme Court Rule 44.2. Here, Cabezas presents grounds that had been previously omitted that implicate the validity of his conviction, which has further support in developments in other proceedings (Statement of Facts, supra) to have been a miscarriage of justice. Cabezas respectfully requests this Court to rehear his petition for certiorari with the following grounds, with emphasis on the government's actions supporting that no crime had been committed by Cabezas.

1. Timeliness of Post-Plea-Acceptance Objections to a Factual Basis

The Eleventh Circuit's rule that defendants waive opportunities for preserving error of a guilty plea's factual basis, if not made concomitantly with the court's acceptance, is contrary to the Federal Rule of Criminal Procedure 11(b)(3). Specifically, Rule 11(b)(3) indicates that the court must determine the factual basis for the plea after its acceptance but before entering judgment, as in prior the end of sentencing hearing (see Fed. R. Crim. P. 32(k)(1)). This post-plea acceptance finding is the only one that counts. Congress elucidated this in the 1966 Advisory Committee Notes for the current language of the Rule. Burton v. United States, 483 F.3d 1182 (9th Cir. 1973); see United States v. Moran, 452 F.3d 1162, 1171-72 (10th Cir. 2006) ("Rule 11 also contemplates the existence of the factual basis for the plea both when the court accepts the plea, and when it enters judgment on it.").

Cabezas had objected to the factual basis prior to sentencing, Dkt. 93 at 18, and the district overruled the objections and made the determination that the factual basis was adequate at sentencing. Dkt. 110 at 67. Per the rules, the district court's only required finding on the sufficiency of a factual basis was the finding made before judgment, i.e. at sentencing. And the objected-to court's finding at sentencing should have been the only one considered by the appellate court for review purposes.

The appellate court's rulings permitting the district court to determine a factual basis for a plea at its acceptance is in error. In Cabezas's circumstances, the error resulted in Cabezas's issue undergoing rigorous plain error review, which prevented further scrutiny of Cabezas's actual-innocence-based objections, including the vagaries of the government's proffers of the criminal activity purportedly conducted by Cabezas (Dkt. 1 at 15), along with

the plain non-existence of independent evidence supporting the charge of conviction. The appellate court instead permitted the district court's reliance on hearsay to find the conviction valid. The Eleventh Circuit's current rule, essentially, prevents defendants from preserving objections to a factual basis if it is brought to the court's attention after the plea's acceptance, even it would be considered timely. This is also in spite of the rules of criminal procedure permitting withdraw of the plea after a court's acceptance for a fair and just reason (including, presumably, actual innocence). Fed. R. Crim. P. 11(d)(2). An action that Cabezas attempted. Dkt. 90.

Cabezas respectfully requests this Court grant the rehearing and order the Solicitor General to respond for further briefing of when an objection to a factual basis is considered timely.

2. The Minimum Standard for a Sufficient Factual Basis

When the appellate court determined that the district court had not erred in finding a sufficient-factual basis to the plea agreement, it did so by exclusively relying on Cabezas's admission at the plea colloquy, which involved the following exchange:

Court: Beginning at page 18 of your plea agreement and continuing on to page 19 is a section titled facts. What it says in there about you, is that true?

Cabezas: Yes, your honor.

Court: Is that what you did?

Cabezas: Yes, your honor.

Dkt. 84 at 19/3-9. That was it. The factual determination was a yes or no question from an unseen document by the mentally ill Cabezas, who was diagnosed with a personality disorder that made him want to please authorities figures. Dkt. 97-1 at 6-7 (Sep. 8, 2017 letter from psychologist diagnosing Avoidant

Personality Disorder). A mental illness known by, but not disclosed by, counsel to the court. Compare Id. with Dkt. 84 at 3-4 (counsel only mentioning depression). The appeals court never considered the quality of the colloquy, and the lack of independent evidence connecting Cabezas to the receipt of child pornography charge, it only concerned itself with the admissions.

Regardless, the Eleventh Circuit's determination that admissions alone are sufficient to determine a factual basis is not unique. See United States v. Christeson, 653 F.3d 697, 699 (8th Cir. 2011); United States v. Torrellas, 455 F.3d 96, 99 (2d Cir. 2006). In contrast, the D.C. Circuit finds that a factual basis requires more than admissions: "To demonstrate a satisfactory factual basis, the government must have evidence from which a reasonable juror could conclude that the defendant was guilty as charged." In re Sealed Case, 153 F.3d 759, 771 (D.C. Cir. 1998).

This Court's guidance is needed; reliance on admissions alone is ripe for abuse and conviction of the actually innocent, which is what happened in Cabezas's case. Under the Eleventh Circuit's standard, anyone can plead to anything if the government approves, even false charges induced by intimidation, deception, or preying on the ignorance of a defendant and a defense attorney with no scruples. This is not a hypothetical. Cabezas, and surely others, pleaded to charges they are innocent of, and the truncation of the district court's truth finding process permitted this for the sake of efficiency, which should be secondary.

The D.C. court's standard, an inverse of the actual innocence standard, offers a defendant much more protection from a miscarriage of justice. Providing for its own concerns of efficiency, this Court could provide a similar standard, and one which is not far removed from its decision in Opper v. United States,

348 U.S. 84, 93 (1954). In Opper, this court found that admissions alone were not enough unless corroborated by independent evidence. By having the government provide at least one source of independent corroborating evidence, the courts can be assured that the factual basis is sufficient and grounded in truth.

In Cabezas's case, there is no independent evidence. It is a repeated story, with words and nothing else to support it but itself. That is not to say that evidence could not have been acquired, if it existed. The FBI has custody of the device purportedly used to receive the child pornography, and the corresponding passcodes. But no evidence has ever or will exist, because Cabezas did not receive child pornography. His challenge to the guilty plea implicates not only actual innocence, but also a miscarriage of justice.

In order for the justice system to work, Cabezas (or anyone) may not be permitted to plead guilty to a lie. Brady v. United States, 397 U.S. 742, 747 (1970). Cabezas respectfully requests this Court rehear his petition for certiorari with this issue in order to promote alignment of the circuits.

3. Eleventh Circuit Including Prohibiting Viewing by 18 U.S.C. § 2252A

In its opinion, the Eleventh Circuit resolved Cabezas's vagueness challenge to 18 U.S.C. § 2252A by citing its proposition in Woods v. United States, 684 F.3d 1045, 1058 (11th Cir. 2012): "we [] hold that the words 'knowingly' and 'received' clearly conveyed that a person who intentionally viewed, acquired, or accepted child pornography from an outside source violated § 2252A." Cabezas, 797 Fed. Appx. at 417 (emphasis added). However, the Eleventh Circuit's unique holding of § 2252A prohibiting the act of intentionally viewing is not described in the attendant statute. The statute states: "Any person who knowing receives or distributes any [child pornography]..." 18 U.S.C. § 2252A(a)(2). Receiving an object requires that the user takes dominion and control over the object. United

States v. Romm, 455 F.3d 990, 998 (9th Cir. 2006). Viewing, unless demonstrating that the object was also in the receivers control, cannot be prohibited per the language of this statute.

To illustrate a hypothetical act of intentional viewing without receiving, imagine a Zoom teleconference meeting involving multiple individuals who's goal is to simply talk about movies. At one point, a participant turns the camera to show scenes of a bootleg superhero movie to the other participants that is playing on his television. The other participants, not objecting to seeing content, are intentionally viewing the bootleg but have neither custody nor control of the broadcasted content. Have the Zoom viewers, having willingly agreed to participate in the teleconference (and even perhaps considering the participants know that one of them to has a penchant for bootleg movies) intentionally watched the movie, and therefore received it? And what if, instead of a Zoom meeting, each of the viewers watched the bootleg movie through binoculars from across the street? In either scenario, the viewers are intentionally viewing, but have neither custody nor control over what they are watching.

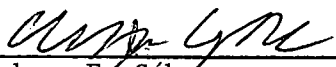
Indeed, viewing is not an element of the crime under § 2252A. If an offender downloads child pornography, but does not view it, he has still completed the crime. It is only the act of intentionally receiving the contraband that is illegal. See United States v. Millner, 527 F.3d 54, 64-69 (3d Cir. 2008)(conviction upheld although defendant denied viewing electronically stored files); United States v. Osbourne, 935 F.2d 32, 34 & n.2 (4th Cir. 1991)(affirming conviction because defendant had ordered child pornography, even though he never viewed the pictures). Viewing, in short is only evidence of intent to receive, not an element of the offense, and cannot be used to satisfy the elements of a crime.

The conduct alleged by the government that Cabezas had committed does not encompass receipt. Dkt. 1 at 15. Cabezas requests that this court rehear his petition for certiorari, and order the Solicitor General to respond.

CONCLUSION

Cabezas respectfully requests this Court grant him rehearing on the basis of the above mentioned new developments in other proceedings and his newly presented grounds.

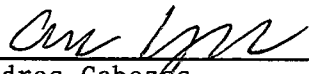
Respectfully submitted by Andres F. Cabezas on February 5, 2021:



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CERTIFICATE OF GOOD FAITH


I hereby certify that this document consists of issues not raised before in the prior petition for certiorari to this Court and 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