

MAY 31 2016

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DION MARLIN NICHOLS,

Defendant - Appellant.

No. 15-10183

D.C. No. 4:13-cr-00338-JSW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted May 24, 2016**

Before: REINHARDT, W. FLETCHER, and OWENS, Circuit Judges.

Dion Marlin Nichols appeals from the district court's judgment and challenges the 108-month sentence imposed following his guilty-plea conviction for possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B).

We dismiss.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

Nichols contends that his sentence is illegal because the district court violated his rights to due process and effective assistance of counsel at sentencing by relying, without notice, on evidence outside the record to discredit a defense expert. The government argues that this appeal should be dismissed based on an appeal waiver contained in the parties' plea agreement. We review de novo whether to enforce an appeal waiver. *See United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009). The record does not support Nichols's contention that the district court rejected the conclusions of psychologist Dr. Charles Flinton based on its experience with Dr. Flinton in another case. To the contrary, the record reflects that the district court acted within its discretion by rejecting Dr. Flinton's conclusions in light of the actual evidence of Nichols's admitted history. *See United States v. Yi*, 704 F.3d 800, 807 (9th Cir. 2013). Accordingly, Nichols's sentence is not illegal, and we dismiss this appeal in light of the valid appeal waiver. *See Watson*, 582 F.3d at 988.

DISMISSED.