No. 18-

==========

IN THE

SUPREME COURT OF THE UNITED STATES

DIETER CHARLES VOGT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

==========

PETITION FOR WRIT OF CERTIORARI

==========

STEPHEN ROBERT LACHEEN
LaCheen & Wittels, LLP
1429 Walnut St., Suite 1301
Philadelphia, PA 19102
(215) 735-5900
slacheen@slacheen.cnc.net

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

Attorneys for Petitioner

April 2019

QUESTION PRESENTED

Should the order of the court of appeals denying a certificate of appealability be reversed and remanded, because it is manifestly incorrect to suggest that no reasonable jurist could disagree with a district court order summarily denying a motion under 28 U.S.C. § 2255, where that order directly conflicts with the controlling decisions of this Court and the plain language of § 2255?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Vogt and respondent United States). There were no co-defendants or co-appellants.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Constitution, Statutes and Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Dieter Charles Vogt respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability to challenge the dismissal of his motion to vacate sentence under 28 U.S.C. § 2255.

OPINIONS BELOW

The Eleventh Circuit's order (per Wilson, J.), filed January 16, 2019, is attached as Appendix A. It is not published. The United States District Court for the Southern District of Florida (Moore, Ch.J.) wrote a memorandum opinion (designated "Order Denying 28 U.S.C. § 2255 Motion"), filed July 17, 2018. That Order is not published in the Federal Supplement or otherwise available on electronic databases. A copy is attached as Appx. B. The district court's unpublished order denying a certificate of appealability, filed August 23, 2018, is Appx. C. The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit on direct appeal, dated September 6, 2002, is noted at 48 Fed. Appx. 740 (table); a copy is Appx. D.

JURISDICTION

On January 16, 2019, the United States Court of Appeals for the Eleventh Circuit filed its order denying a certificate of appealability. Appx. A. No petition for rehearing was filed by any party. As a result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari is due for filing not later than

April 16, 2019. This petition is timely filed on or before that due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). See *Hohn v. United States*, 524 U.S. 236 (1998) (confirming certiorari jurisdiction following denial of certificate of appealability in § 2255 case).

TEXT OF FEDERAL STATUTES INVOLVED

Chapter 153 of Title 28, U.S. Code ("Habeas Corpus"), provides, in pertinent part:

> **§ 2253. Appeal**
>
> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) * * * *
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific

issue or issues satisfy the showing required by paragraph (2).

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) * * * *

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) * * * *

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

* * * *

STATEMENT OF THE CASE

In 2018, petitioner Dieter Charles Vogt filed a motion under 28 U.S.C. § 2255 to challenge his 65-year sentence. Without calling for a response or inviting factual supplementation, the district court denied this motion the next day, declaring it to be filed too late. Despite a showing that the summary disposition violated the 2255 statute and several of this Court's cases, both the trial court and the court of appeals, with only conclusory explanations, refused to issue a certificate of appealability.

In 1999, petitioner was a 29-year-old dual German-South African citizen who worked as a summer camp counselor in Florida supervising a cabin of 13-year-old boys. Several campers or their parents accused him of touching boys inappropriately in bed, taking photographs of boys as they slept, and carrying a CD of such pictures with him on an interstate trip.

A federal grand jury sitting in the Southern District of Florida returned a two-count indictment on November 22, 2000, charging petitioner with possession of child pornography. By superseding 16-count indictment filed February 28, 2001, the grand jury charged petitioner with possession of material containing child pornography, 18 U.S.C. § 2252(a)-(4)(B); using a minor to produce such depictions, *id.* § 2251(a) (five counts); transporting illicit depictions, *id.* § 2252(a)(1); sending child pornography by international email, *id.* § 2252(a)(1) (five counts); and traveling interstate for the purpose of engaging in a sexual act with a minor, *id.* § 2423(b) (four counts).

After unsuccessfully moving for suppression of evidence, Vogt stood trial before a jury. After about

seven days of trial, the jury found petitioner not guilty by reason of insanity on the four interstate travel counts, but guilty on the other twelve charges.

Following a two-and-a-half day sentencing hearing, including extensive testimony about petitioner's mental condition as well as expert testimony addressing the recidivism risk of sex offenders after conviction and imprisonment, the district court on August 20, 2001, imposed an upward departure sentence of 780 months (65 years) in the custody of the Bureau of Prisons. The perceived statistical risk of recidivism, based on the Guidelines' under-representation of past criminal conduct, was the principal rationale given by Judge Moore for imposing such a severe sentence. After a separate restitution hearing, the district court entered an amended judgment, from which petitioner took a timely direct appeal.

On appeal, Vogt challenged the denial of the suppression motion, the framing of certain jury instructions, and the constitutionality of his excessive sentence. An Eleventh Circuit panel affirmed the conviction and sentence by non-precedential *per curiam* opinion filed September 6, 2002. Appx. D. Following the denial of a rehearing petition, petitioner filed a timely petition for certiorari. That petition was denied on March 24, 2003 (No. 02-1166).

On July 16, 2018, petitioner Vogt filed a first, *pro se* motion under 28 U.S.C. § 2255 to vacate his sentence. The motion was in the form required by the district court's Local Rules and was supported by a 17-page, single-spaced memorandum of law with several appended exhibits. The motion advanced claims for relief, stated on the face of the *pro se*

motion as follows: (1) Denial of meaningful sentencing consideration; (2) Violation of mandatory sentencing principles; (3) Imposition of an excessive, inappropriate and unsupportable virtual-"life" sentence; (4) Ineffective assistance of counsel; (5) Discrepancy between oral and written sentence; (6) Prosecutorial misconduct, including *Brady* violations.

The § 2255 motion's six designated claims were explained in the memorandum accompanying the motion. Read liberally in light of petitioner's *pro se* status, the well-documented memorandum articulated several constitutional claims, including: (1) prejudgment of the sentence, in violation of procedural due process; (2) violation of due process in that the sentence was predicated upon a subsequently-debunked scientific theory; and (3) ineffective assistance of sentencing counsel and abandonment by appellate counsel.

The district court denied petitioner's § 2255 motion the day after it was filed, without calling for a response or for any supplementation, and without any hearing. *See* Fed.R.Gov. §2255 Proc. 4(b). The denial came in the form of a three-page memorandum-order dated, filed and entered July 17, 2018. The summary dismissal of petitioner's § 2255 motion was predicated solely on the district court's conclusion that the motion was filed outside the one-year statute of limitations, *see* 28 U.S.C. § 2255(f), and that the motion did not allege any proper basis for allowing equitable tolling of the statute of limitations. Appx. B. In disregard of Fed.R.Gov. §2255 Proc. 11(a), the denial order did not address the question whether a certificate of appealability ("COA") would be allowed.

In response to the summary dismissal, and in light of the violation of Rule 11(a), petitioner, by counsel, filed a timely motion on August 14, 2018 under Fed.R.Civ.P. 59(e) to amend the judgment.[1] That motion did not seek reconsideration on the merits, but rather requested only that the district court allow a COA. The court granted the motion to amend, insofar as it sought a determination of COA, but denied issuance of a certificate. Appx. C. By way of explanation for its denial of a COA, the District Court, without explication, summarily declared that "Petitioner has not raised an issue regarding the denial of a constitutional right which could be debatable among reasonable jurists, or is otherwise reasonably adequate to warrant further proceedings."

Petitioner filed a timely notice of appeal from the order (as amended) denying his § 2255 motion. In accordance with Circuit procedure, he then filed an application for a COA, with an incorporated, 18-page memorandum of law. The memorandum explained why petitioner was entitled to a COA allowing him to pursue and file an appellate brief. The issues he sought to be certified were:

> A. On the Merits:
>
> 1. Whether the Due Process Clause bars a judge from determining the sentence to be imposed prior to hearing the entirety of the defendant's sentencing presentation.
>
> 2. Whether the Due Process Clause protects against continued service of a lengthy sentence,

[1] Civil Rule 59(e) applies to proceedings under § 2255. See *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264–65 (1978); Fed.R. §2255 Proc. 12.

the duration of which was predicated upon ostensibly scientific facts which have been disproven by subsequent scientific advancements.

3. Whether the Sixth Amendment's guarantee of effective assistance of counsel is violated by an attorney's failure to raise and preserve issues at trial sufficiently to allow appellate review, and by the failure of counsel at the conclusion of the appellate process to inform the client of the final disposition of the appeal or of the availability of, potential bases for, and statutory deadline for the filing of a post-conviction collateral attack.

B. Procedurally:

Whether the files and records of this case conclusively show that defendant Vogt's § 2255 motion was untimely, as to all issues, and that equitable tolling could not apply, particularly without affording the pre-dismissal notice required by the Supreme Court in *Day v. McDonough* or any development of the record.

Three months later, on January 16, 2019, a single Circuit Judge issued a one-page order denying the application. The court of appeals also offered no analysis in support of its denial of a COA. Rather, the order states, in full:

> Dieter Charles Vogt moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, Vogt must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28

> U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). Because Vogt has failed to satisfy the *Slack* test for his claims, his motion for a COA is DENIED.

Appx. A. Petitioner did not seek rehearing in the court of appeals. This petition follows.

. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii).*** The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231 and 28 U.S.C. § 2255; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

REASONS FOR GRANTING THE PETITION

In holding that no reasonable jurist could disagree with a district court opinion that directly violates at least two of this Court's decisions, the Circuit Judge's order disregards this Court's consistent precedent explicating the standard for allowing a certificate of appealability.

This Court has been called upon repeatedly to reverse the courts of appeals' failure to apply the well-established standard for issuance of a certificate of appealability. The present case is another, calling for a summary grant of certiorari, vacatur of the order below, and remand with directions to apply the governing standard and grant the requested certificate of appealability ("COA").

This Court's cases clearly and firmly establish that a COA must be allowed pursuant to 28 U.S.C. § 2253(c)(1)(B) and Fed.R.App.P. 22(b)(1) whenever the correctness of the district court's disposition is at least "debatable" among jurists of reason. See *Buck v. Davis,* 580 U.S. —, 137 S.Ct. 759, 773–75 (2017) (reiterating and applying governing standard for issuance of COA); *Tennard v. Dretke*, 542 U.S. 274, 282–83 (2004) (denouncing court of appeals' "paying lipservice" to COA standard while improperly pre-judging the merits); *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003) ("threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it"); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have

been resolved in a different manner"), reaffirming *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (former "certificate of probable cause" standard).

To obtain a COA, the showing of possible error need not be conclusive. Far from it. As explained in *Miller-El*, a "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. In short, § 2253(c) establishes a low threshold for granting a COA. *Buck v. Davis,* 137 S.Ct. at 773–75. "We reiterate what we have said before: A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'" *Id*. 774 (bracketed insertions original), quoting *Miller-El*, 537 U.S. at 327, 348. Despite binding Circuit precedent acknowledging the proper standard, see, *e.g.*, *Lambrix v. Sec'y, Dept. of Corrections*, 872 F.3d 1170, 1179 (11th Cir. 2017) (per curiam); *Gonzalez v. Sec'y, Dept. of Corrections*, 366 F.3d 1253, 1267–68 (11th Cir. 2004); *Putman v. Head*, 268 F.3d 1223, 1227–29 (11th Cir. 2001), the lesson taught by this Court's cases remains unlearned in practice, as the present case illustrates.

When a § 2255 motion has been rejected for a procedural reason, as here (*i.e.*, timeliness), rather than on the merits, the showing necessary to obtain a COA is explicated in *Slack v. McDaniel*, decided nearly 20 years ago. That standard has two parts: the motion to vacate must facially "state" (*i.e.*, aver) the denial of a constitutional right, and the procedural ground for the district court's decision must be debatable. 529 U.S. at 478.

Because his § 2255 motion more than sufficiently alleged that petitioner Vogt's sentence was imposed in violation of his constitutional rights, and because reasonable jurists could (to say the least) disagree with the district court's summary disposition of the procedural ground of statute of limitations/equitable tolling, the court of appeals was bound by law to grant the requested certificate of appealability.

A. "*Substantial showing of denial of a constitutional right" – The § 2255 motion sufficiently alleged constitutional claims.*

The district court rejected petitioner Vogt's *pro se* application for a COA on the sole ground that "the Court finds that Petitioner has not raised an issue regarding the denial of a constitutional right which could be debatable among reasonable jurists, or is otherwise reasonably adequate to warrant further proceedings." Appx. C. The court below thus addressed and rejected the application for COA solely at the first step, as defined by this Court in *Slack v. McDaniel*, that is, the presentation of a claim of violation of a constitutional right. On that initial step, however, a reasonable jurist could readily conclude that petitioner satisfied the standard, as to at least three of his six stated issues.

First, the § 2255 motion alleged that petitioner. Vogt's sentence was prejudged prior to the commencement, or at least prior to the last session, of the three-day hearing on sentencing held on August 8–10, 2001. The memorandum in support of petitioner's § 2255 motion quoted from the sentencing transcript in support of this contention, and explained the reasoning that supported an inference of improper pre-judgment. This stated a clear and simple violation

of basic procedural due process under the Fifth Amendment.

Second, the motion averred that the three-category "horizontal" departure in criminal history calculation under USSG § 4A1.3 (p.s.) – which increased petitioner's suggested sentence (in this pre-*Booker*, "mandatory guidelines" case) from a range of 292–365 months (level 40, category I) to a range of 360–life (category IV)[2] – was based on factual claims about sex offender recidivism that have since been disproven by new and more reliable scientific research. This ground (new scientific developments refuting the supposedly scientific factual basis for a deprivation of liberty) also describes, at least debatably, a Due Process violation, as two Circuits have held. See *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016) (examining debunking of "shaken baby syndrome" evidence); and *Lee v. Supt., Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015), explaining *Lee v. Glunt*, 667 F.3d 397, 403 n.5 (3d Cir. 2012) (new developments in fire science negated cause-and-origin theories used to prove arson).

Finally, the § 2255 motion contended that petitioner did not enjoy the effective assistance of counsel at sentencing and on appeal in certain specified respects that could have affected the outcome of the proceedings. As the transcript shows, trial counsel failed to present allocution on petitioner Vogt's behalf when invited to do so prior to the imposition of sentence, and failed to present any realistic sentencing plan on his client's behalf to ward off a *de facto*

[2] The district court also granted the government's motion for a two-level upward departure in offense level, from Level 40 to Level 42.

life sentence. Further, as the Eleventh Circuit panel pointed out on appeal, appellate counsel failed to challenge the upward sentencing departures: "Vogt makes no argument [in his brief] concerning whether the district court correctly applied the guidelines addressing upward departures or whether the government carried its burden of proof and, thus, has abandoned any guideline-related issue he might have had." Appx. 16a.

Despite those signals that a § 2255 might be warranted, the motion to vacate alleged, counsel then failed to alert his client that several issues had been decided on appeal on the basis of the failure of his prior counsel to preserve them, and explain how this created a foundation for a timely § 2255 motion. Counsel also gave other inappropriate and inaccurate advice about petitioner's § 2255 rights. On its face, this stated a cognizable violation of the Sixth Amendment right to effective assistance of counsel. Accordingly, petitioner clearly satisfied the first prong of the *Slack v. McDaniel* test for issuance of a COA. Yet the application was denied without explanation.

B. *The procedural grounds for denial were at least debatable; in fact, they were plainly wrong under this Court's cases.*

The district court denied petitioner's § 2255 motion on the basis of the statute of limitations, a procedural ground. Because reasonable jurists could disagree with that ruling, particularly in light of its having been made summarily, the requested COA should have been granted.[3]

[3] The district court did not address this second requirement under *Slack v. McDaniel* in its order

Section 2255, as amended by AEDPA, imposes a one-year statute of limitations, running from the last of any of four dates. 28 U.S.C. § 2255(f). The most common of these, set forth in subsection (f)(1), is the date when a defendant's conviction "became final," as defined by this Court in *Clay v. United States*, 537 U.S. 522 (2003). In petitioner Vogt's case, as the motion conceded and as the district court properly noted, that date was March 24, 2003. Appx. 3a; see *Vogt v. United States*, 538 U.S. 925 (2003) (order denying certiorari). Absent circumstances implicating any of the other three accrual dates, petitioner's § 2255 was therefore due for filing not later than March 24, 2004. Instead, he filed his first and only § 2255 motion on July 16, 2018. Certainly, this raised a significant, *prima facie* question of timeliness and/or diligence. For several reasons, however, reasonable jurists could – indeed, would be bound to – disagree with the district court's summary dismissal of the *pro se* motion as untimely.

First, the AEDPA statute of limitations is not jurisdictional. To the contrary, untimeliness of filing is an affirmative defense for the government to invoke or waive. *Day v. McDonough*, 547 U.S. 198, 209 (2006). Indeed, before summarily dismissing a petition on this basis, this Court ruled in *Day*, the court *must provide the parties notice* of its concerns and tentative intentions, and then extend a prior opportunity to be heard: "[B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Id.* 210. Moreover, any *sua sponte* invocation of a

_____(cont'd)

amending the judgment and denying a COA. Appx. C. The court below, however, referenced both aspects. Appx. A.

limitations defense by the district court must be supported, this Court ruled, by an on-the-record assessment of "'whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." *Id*.

In petitioner's case, the district court did not comply with the mandatory notice requirement imposed in *Day v. McDonough* before dismissing the § 2255 motion on the basis of the statute of limitations. Nor does its opinion reveal any weighing or evaluation of the "interests of justice" in this connection. *See* Appx. B.

Accordingly, it is, to say the least, debatable among reasonable jurists whether the district court below should have complied with binding pronouncements of this Court and invited a response from the government first, to see whether, in the interests of justice, the United States might have waived any timeliness question. See *Wood v. Milyard*, 566 U.S. 463 (2012) (abuse of discretion for court to dismiss based on timeliness issue that the State declined to advance, and thus waived). At the very least, a reasonable jurist might conclude, the district court was also obligated under *Day* to invite a further response from petitioner himself, to see whether he wished to further explicate his compliance with the statute of limitations or his entitlement to equitable tolling. The failure of the court below to recognize the existence (or at least the potential for finding) this error by granting a COA was therefore in error.

Second, as to one of petitioner Vogt's three substantial constitutional claims – a new scientific consensus refuting the erroneous factual assertions invoked to justify the upward departure – the

applicable statute of limitations would be one year from "the date on which the facts supporting the claim ... could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). That date is not clearly established on this record but rather would require factual development, including perhaps an evidentiary hearing.[4] As to one substantial constitutional claim set forth in the § 2255 motion, at least, it is thus not certain that the one-year statute of limitations had even expired when the *pro se* motion was filed. See *Mayle v. Felix*, 545 U.S. 644 (2005) (statute of limitations under AEDPA applies separately to each claim).

At the time of sentencing, to justify imposition of a lengthy upward departure sentence, the court relied on scientific "facts" that were thought to be valid. See, *e.g.*, the now-debunked statistics cited in this Court's decisions in *Smith v. Doe*, 538 U.S. 84, 103 (2003); *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003); *McKune v. Lisle*, 536 U.S. 24, 33–34 (2002) (all referencing putative recidivism rates of up to 80%). When it was that petitioner learned of the news article cited in his motion in support of this claim (*see*

---

[4] In support of his *pro se* claim in this regard, Mr. Vogt cited only a March 17, 2017, article published in *The New York Times*. (The *Times* article, in turn, appears to be based on an essay published in the on-line magazine *Slate* a week or so earlier, which cites and links to many scientific studies. See David Feige, *The Supreme Court's Sex-Offender Jurisprudence Is Based on a Lie*, www.slate.com/articles/news_and_politics/jurisprudence/2017/03/_sex_offender_bans_are_based_on_bad_science.html (most studies report a recidivism rate for released sex offenders of around 3.5%).)

note 4 *ante*), or of the information reported in the article, would need to be explored further on remand, perhaps with the benefit of an evidentiary hearing. Also to be decided is whether the article references a sufficient newly-developed scientific consensus to qualify as establishing new "facts" for purposes of invoking the Due Process principle underlying the cases cited at p. 14 *ante*, and if so, as of when. *See generally* Tamar Rice Lave & Franklin Zimring, *Assessing the Real Risk of Sexually Violent Predators*, 55 AM. CRIM. L. REV. 705 (2018). A summary dismissal, however, was (at least debatably) not permissible, as the court below was duty-bound to recognize.

Third, a reasonable jurist could dispute the manner in which (and grounds on which) the district court summarily dismissed petitioner's invocation of equitable tolling to overcome any statute of limitations that might apply and which the government might elect to invoke. To have the benefit of equitable tolling, a petitioner must establish two elements: diligence, and extraordinary circumstances beyond his control. See *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) (appointed counsel's mistake in calculating statute of limitations held not to qualify as "extraordinary circumstance"). A reasonable jurist might conclude that the "files and records of the case" do not "conclusively show," 28 U.S.C. § 2255(b), that petitioner could not satisfy these elements – particularly if afforded the opportunity with the aid of counsel to develop the record – rendering the summary dismissal of his motion erroneous. See *Fontaine v. United States*, 411 U.S. 213 (1973) (per curiam) (enforcing prohibition of summary dismissal, and requirement of hearing, unless "the files and

records of the case conclusively show that the prisoner is entitled to no relief").

As to both components of equitable tolling, a reasonable jurist might take note that petitioner Vogt was found by the jury to have suffered from a "severe mental disease," 18 U.S.C. § 17(a), which he established at trial by "clear and convincing evidence," *id.*(b), warranting a (rare) verdict of Not Guilty by Reason of Insanity on several counts at trial. He also alleged facts about being confined in a local jail (not a federal prison with an appropriate library), in solitary confinement for extended periods, transported from institution to institution, both abandoned and misinformed by his attorneys, and repeatedly deprived of copies of his legal files, for years on end. See *Lawrence*, 549 U.S. at 337 (mental incapacity, if proven, may support equitable tolling); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (cited with approval by this Court in both *Holland v. Florida,* 560 U.S. 631, 651 (2010) (equitable tolling doctrine applies), and *Maples v. Thomas*, 565 U.S. 266, 282 (2012) (whether effective abandonment by counsel may support equitable tolling).

The district court's memorandum order (Appx. 4a) cites two Eleventh Circuit cases (from 2000 and 2004) for its conclusion that these circumstances by their nature fail to justify equitable tolling. But the court of appeals' former categorical approach to equitable tolling factors, typified in those cases, was subsequently rejected by this Court in cases the courts below ignored. See *Holland*, 560 U.S. at 649–52 ("often the 'exercise of a court's equity powers ... must be made on a case-by-case basis'," *id.* 649 (ellipsis original; internal citation omitted); "emphasizing the

need for 'flexibility,'" and "for avoiding 'mechanical rules'," *id*. 650). *Holland* further held that in a federal post-conviction proceeding, in a setting where no deference is due to any state court finding (which is necessarily so as to any § 2255 application), serious attorney error or misconduct (but not a mere "garden variety" mistake) can itself suffice to support equitable tolling. *Id.* 650–51. Yet the court below failed to recognize that a reasonable jurist could therefore conclude that the authority on which the district court relied has been overruled and does not support that court's conclusion.

Moreover, equitable tolling requires only "reasonable diligence" by the prisoner, not "maximum feasible diligence." *Holland*, 560 U.S. at 653; cf. *McQuiggin v. Perkins*, 569 U.S. 383, 391–92 (2013) (criteria for equitable tolling). Indeed, petitioner's *pro se* motion relayed facts which could rise to the level of abandonment by counsel, not mere negligence of counsel, which can satisfy both elements. See *Maples*, 565 U.S. at 281–83 (attorney abandonment is different from ordinary negligence); see also *Christeson v. Roper*, 574 U.S. —, 135 S.Ct. 891 (2015) (per curiam). For example, petitioner's supporting § 2255 memorandum alleged, appellate counsel "failed to communicate to Movant that the Court of Appeals had decided certain issues based upon trial counsel's failure to raise and/or preserve such issues for appeal, which in turn created viable issues upon which Movant could base a timely motion for post-conviction relief." In addition, the memorandum continued:

> Trial counsel gave Movant incorrect advice with regard to available options for seeking post-conviction relief under either 28 U .S.

> Code §2255 or F.R.Cr.P. 33; attempted to dissuade Movant from seeking a second opinion; and provided counter-productive opinions to counsel from whom Movant eventually did seek a second opinion in that regard.

Id.

For these reasons, not only did the § 2255 motion allege cognizable constitutional violations, but the procedural grounds for dismissal were also plainly debatable. Yet the court below, without explanation, simply denied that a reasonable jurist could disagree with the district court's conclusion on equitable tolling, as well as its decision to reach that conclusion summarily without inviting any response from the parties or expansion of the record. Appx. 1a.

No new law need be established to resolve this case. The Eleventh Circuit simply refused to follow controlling precedent with respect to Certificates of Appealability, instead "paying lipservice" to those standards as articulated by this Court. See *Tennard v. Dretke*, 542 U.S. at 283. To enforce the binding effect of its own precedent, the Court should grant the writ, summarily reverse the order of the court below, and remand with directions to issue a COA on the constitutional issues identified above in the Statement of the Case.

CONCLUSION

For the foregoing reasons, petitioner Vogt prays that this Court grant his petition for a writ of certiorari, reverse the order of the court of appeals, and remand for further proceedings.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

STEPHEN ROBERT LACHEEN
LaCheen & Wittels, LLP
1429 Walnut St., Suite 1301
Philadelphia, PA 19102
(215) 735-5900
slacheen@slacheen.cnc.net

Attorneys for Petitioner

Dated: April 16, 2019