APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13937-G

DIETER CHARLES VOGT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

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 (I) 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.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 4:18-cv-10109-KMM

DIETER CHARLES VOGT,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER DENYING 28 U.S.C. § 2255 MOTION

THIS CAUSE is before the Court on Dieter Charles Vogt's 28 U.S.C. § 2255 Motion challenging his sentence. *§ 2255 Mot*. (ECF No. 1); *Mem*. (ECF No. 3). For the following reasons, the Motion is DENIED.

I. Background

In 2001 the Court sentenced Vogt to 780 months' imprisonment following his convictions for child-pornography related offenses. S.D. Fla. 00-cr-10029, *Amended Judgment* (ECF No. 180). Vogt appealed. S.D. Fla. 00-cr-10029, *Notice of Appeal* (ECF No. 170). On November 6, 2002, the Eleventh Circuit affirmed Vogt's convictions and sentences. S.D. Fla. 0-cr-10029, *Mandate* (ECF No. 207). On March 24, 2003, the Supreme Court denied Vogt's petition for certiorari. *Mot*. at 3.

On July 16, 2018, Vogt filed a § 2255 Motion challenging his sentence on various grounds. *§ 2255 Mot*. Vogt acknowledges that his § 2255 Motion is untimely and argues that he is entitled to equitable tolling of the limitations period because (1) trial counsel failed to properly advise him of his options for seeking relief pursuant to § 2255, and (2) due to over

600 days of lockdown and confinement in the Special Housing Unit he could not access his legal documents or conduct legal research. *Mem*. at 13–17. Vogt also contends that he is entitled to review under 28 U.S.C. § 2241. *Mem*. at 2 n.1.

II. Discussion

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations for filing a § 2255 motion. 28 U.S.C. § 2255(f). The limitations period begins to run from the latest of four different events, only one of which is relevant here: "the date on which the judgment becomes final." *See id*. "Because AEDPA's limitations period is not jurisdictional, it 'is subject to equitable tolling in appropriate cases.'" *Lugo v. Sec'y, Fla. Dept. of Corrs.*, 750 F.3d 1198, 1207 (11th Cir. 2014) (quoting *Holland v. Florida*, 560 U.S. 631, 645 (2010)). A movant is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649.

As Vogt concedes, a review of the record reveals that he filed his § 2255 Motion well-past the one-year statute of limitations.[1] The Court concludes that Vogt is not entitled to equitable tolling of the limitations period. First, Vogt admits that he did not purse his rights diligently. *Mem*. at 13–16. Second, neither of

[1] Vogt's conviction became final in March 2003 when the Supreme Court denied certiorari; therefore, he had until March 2004 to timely file a § 2255 motion. *See* 28 U.S.C. § 2255(f).

the circumstances that Vogt identifies—trial counsel's alleged failure to properly advise Vogt of his options for seeking § 2255 relief and Vogt's restricted access to legal documents and legal research stemming from lockdown and confinement in the Special Housing Unit—qualify as extraordinary circumstances that trigger equitable tolling. *Dodd v. United States*, 365 F.3d 1273, 1283–84 (11th Cir. 2004) (periods of time in which a prisoner is separated from his legal papers do not constitute extraordinary circumstances); *Atkins v. United States*, 204 F.3d 1086, 1089–90 (11th Cir. 2000) (restricted access to law library, lock-downs, and solitary confinement do not qualify as extraordinary circumstances to warrant equitable tolling); *Wakefield v. R.R. Ret. Bd.*, 131 F.3d 967, 970 (11th Cir. 1997) (pro se status and ignorance of the law do not warrant equitable tolling).

The Court also concludes that Vogt is not entitled to relief under § 2241. The 'savings clause' of § 2255 permits a prisoner to file a § 2241 petition only if an otherwise available remedy under § 2255 is 'inadequate or ineffective' to test the legality of his detention." *Darby v. Hawk-Sawyer*, 405 F.3d 942, 945 (11th Cir. 2005). "The savings clause only applies to 'open a portal' to a § 2241 proceeding when (1) the 'claim is based upon a retroactively applicable Supreme Court decision; (2) the holding of that Supreme Court decision establishes the petitioner was convicted for a non-existent offense; and (3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised." *Id*. Vogt has not even attempted to satisfy the three-part test outlined above and is therefore not entitled to relief under § 2241.

III. Conclusion

For the foregoing reasons and UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 17th day of July, 2018.

K. Michael Moore
K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-cv-10109-KMM

DIETER CHARLES VOGT,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER ON MOTION TO ALTER JUDGMENT

THIS MATTER is before the Court upon Petitioner's Motion to Amend the Judgment (ECF No. 8), seeking a ruling upon, and issuance of, a Certificate of Appealability. A prisoner appealing denial of a petition brought under 28 U.S.C. § 2255 must first obtain a Certificate of Appealability. *Martinez v. U.S.,* No. 09-22374-CIV, 2010 WL 4811754, at *4 (S.D. Fla. Nov. 19, 2010). A Certificate of Appealability shall issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make such a showing, petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke,* 542 U.S. 274, 282, (2004) or, that "the issues presented were adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell,* 537 U.S. 322, 335–36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

After a review of the record, 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. *Martinez*, 2010 WL 4811754 at *4.

Accordingly, it is ORDERED AND ADJUDGED that Petitioner's Motion to Alter Judgment (ECF No. 8) is GRANTED IN PART and DENIED IN PART. The Court's Order Dismissing Case (ECF No. 4) is hereby AMENDED to reflect the Court's DENIAL of a Certificate of Appealability.

DONE AND ORDERED in Chambers at Miami, Florida, this 23d day of August, 2018.

s/K.M. Moore
K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

APPENDIX D

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 06 2002
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14944
Non-Argument Calendar

D.C. Docket No. 00-10029-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DIETER CHARLES VOGT,

Defendant-Appellant.

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

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(September 6, 2002)

Before CARNES, HULL and FAY, Circuit Judges.

PER CURIAM:

Dieter Charles Vogt appeals his convictions and sentences for possession of child pornography, 18 U.S.C. § 2252(a)(4)(B), using a minor to produce child pornography, 18 U.S.C. § 2251(a), transportation of

child pornography, 18 U.S.C. § 2252(a)(1), and transportation of child pornography by computer, 18 U.S.C. § 2252(a)(I). Vogt contends the district court should have suppressed evidence found in the execution of search warrants. He argues the court misled the jury in its unanimity instruction. Finally, Vogt claims his sentences, totaling 780 months in prison, violate due process and the Eighth Amendment.

A federal grand jury indicted Vogt on one count of possession of child pornography, 18 U.S.C. § 2252(a)(4)(B), five counts of using a minor to produce child pornography, 18 U.S.C. § 2251(a), one count of transportation of child pornography, 18 U.S.C. § 2252(a)(1), five counts of transportation of child pornography by computer, 18 U.S.C. § 2252(a)(I), and four counts of travel for the purpose of engaging in sexual activity with a minor, 18 U.S.C. § 2423(b). This was based, in part, on evidence obtained by police while executing two search warrants (the "Car Warrant" and the "Bag Warrant").

Vogt moved to suppress the evidence the police found in the execution of the warrants, arguing lack of specificity, lack of probable cause, and lack of good faith reliance on the warrants. After an evidentiary hearing before a magistrate judge, the district court upheld the validity of the warrants.

At the end of the trial, in instructing the jury on one count of the indictment, the court informed the jurors that they must unanimously agree beyond a reasonable doubt that at least one item and the same item constituted child pornography. Vogt did not raise any unanimity objection to the jury instructions. The jury found Vogt guilty on all counts except the

molestation counts on which they found Vogt not guilty by reason of insanity.

At sentencing, the government moved for several upward departures from the 292 to 365 months' incarceration set forth in the sentencing guideline calculations. One of the bases the government urged for an upward departure was Vogt's likelihood of recidivism, pursuant to U.S.S.G. § 4A1.3. The district court heard a great deal of evidence concerning whether Vogt might reoffend and then granted the upward departures. The district court sentenced Vogt to several sentences totaling 780 months incarceration.

MOTION TO SUPPRESS

Vogt makes three arguments against the validity of the searches. First, he contends the Car Warrant was lacking in specificity. Second, Vogt argues the Car Warrant was not based on probable cause. He discusses decisions of other Circuits invalidating computer searches for evidence of other crimes that turned up evidence of child pornography. Vogt notes the Car Warrant permitted only searches for, not into, computers. Third, Vogt argues the good faith exception to the exclusionary rule is not applicable to the execution of either warrant.

A district court's ruling on a motion to suppress presents mixed questions of law and fact. United States v. Ramirez-Chilel, 289 F.3d 744, 748-49 (11 th Cir. 2002). We accept the findings of fact as true unless they are clearly erroneous, but review the application of the law to those facts de novo. Id., 289 F.3d at 749. The facts are to be construed in the light most favorable to the party who prevailed below.

United States v. Hall, 47 F.3d 1091, 1094 (11th Cir.), cert. denied, 516 U.S. 816 (1995).

The validity of a warrant is assessed on the basis of the information the police disclosed, or had a duty to disclose, to the issuing judge. Maryland v. Garrison, 480 U.S. 79, 85, 107 S.Ct. 1013, 1017, 94 L.Ed.2d 72 (1987). We consider the nature of the case under investigation. United States v. Weinstein, 762 F.2d 1522, 1532 n.4 (11th Cir. 1985), opinion modified on rehearing, 773 F.2d 673, cert. denied, 475 U.S. 1110 (1986). We must strike a balance between the practical necessities of law enforcement and the likelihood of a violation of personal rights. Id.

Specificity Warrants must particularly describe the place to be searched and the things to be seized. U.S. Const., amend. IV. A warrant's descriptions need not meet technical requirements. The fourth amendment requires only that the warrant describe the premises and the items in such a way that the searching officer may with reasonable effort ascertain and identify the place to be searched and the items to be seized. United States v. Santarelli, 778 F.2d 609, 614 (11th Cir. 1985); Weinstein, 762 F.2d at 1532. The warrant simply must be as specific as the circumstances and the nature of the activity under investigation permit. Santarelli, 778 F.2d at 614.

Probable Cause Warrants may issue only on probable cause. U.S. Const., amend. IV. Whether probable cause exists is a common sense, practical question. Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). The issue is whether, given all the circumstances set forth in the supporting affidavit, there is a fair probability that contraband or evidence of a crime will be found in a

particular place. Id. 462 U.S. at 238, 103 S.Ct. at 2332. After-the-fact scrutiny of the sufficiency of an affidavit should not take the form of de novo review. Id. 462 U.S. at 236, 103 S.Ct. at 2331. Instead, we pay great deference to a determination of probable cause, reviewing only to ensure that the court had a substantial basis for concluding that probable cause existed. Id., 462 U.S. at 236, 238-39, 103 S.Ct. at 2331, 2332.

Only items specified in the warrant may be seized. United States v. Jenkins, 901 F.2d 1075, 1081 (l1th Cir.), cert. denied, 498 U.S. 901 (1990). An exception to this rule occurs when, in the course of performing a lawful search for an item listed on the warrant, the officer comes across other incriminating items. Id. To seize such other items as come into plain view, the officer must (1) have independent justification for being in a position to see the items; (2) discover the items inadvertently; and (3) immediately observe that the items are evidence. Id., 901 F .2d at 1081-82. The officer must have probable cause to believe the items are evidence of a crime. Id., 901 F.2d at 1082.

Good Faith Under the good faith exception to the exclusionary rule, evidence seized by a police officer who conducted a search or seizure in violation of the Fourth Amendment will not be suppressed if the officer's conduct was objectively reasonable. United States v. Leon, 468 U.S. 897, 919-20, 104 S.Ct. 3405,3419,82 L.Ed.2d 677 (1984).

Upon review of the record and upon consideration of the briefs of the parties, we discern no reversible error.

At the suppression hearing, Detective Christine Scott testified she talked with N.R., A.U.'s mother,

and interviewed A.U. and M.D. Scott learned that Vogt was going to the camp for a weekend and then returning to South Africa. Scott learned what type of rental car Vogt had reserved, but was unable to learn the color or license tag number. Scott knew Vogt was expected to return briefly to the U residence and requested N.R. to provide her with details concerning Vogt's car. Scott did not tell the judge the specifics of Vogt's vehicle because N.R. provided that information after Scott obtained the warrant. Scott stated A.U. told her Vogt had touched him in his genital area. A.U. told Scott Vogt had taken digital photographs and shown them to A.U. on his computer.

Scott learned from N.R. and A.U. that Vogt had a computer with him at their home and did not appear to leave the computer behind. Scott wanted to search Vogt's computer for evidence of molestation, such as emails, addresses, names and photographs.

When police executed the Car Warrant, they seized many items, including two laptop computers and a detachable hard drive. Scott testified the expert who analyzed this equipment had to break into the computers because they were password protected and had encrypted areas. The expert needed two computers and more than 1500 hours to extract all the information on the computers. The government ended up with close to 10,000 pages of printed documents from the equipment.

Scott admitted she did not have a warrant nor Vogt's consent to take the bag into custody. After obtaining the bag, Scott sought a warrant to search it. Scott stated Detective Jackson had inventoried bag and told her it contained a laptop computer.

Detective Jackson claimed the bag was partially open when he received it. He did not search or inventory the bag, but saw what appeared to be a computer keyboard inside. Jackson first saw the contents of the bag when he watched another detective perform an inventory. Jackson saw a keyboard and other computer equipment. The district court credited this testimony.

Under these circumstances, the Car Warrant was sufficiently specific and was based on probable cause. Vogt makes no argument concerning the district court's finding that the Bag Warrant was valid and thus has abandoned any argument he might have had. See United States v. Cunningham, 161 F.3d 1343, l344 (11th Cir. 1998). Because the warrants were valid, we need not reach the issue of the good faith exception to the exclusionary rule. See United States v. Miller, 24 F.3d l357, l360 (lIth Cir. 1994).

JURY INSTRUCTION

Vogt argues that the portion of the jury instruction that told the jury they had to find that only one image was pornographic, denied him his right to a unanimous verdict on each count. Vogt contends that this confusion was not cured by the district court's unanimity instruction. Vogt admits his failure to raise a unanimity objection below entitles him only to plain error review, but contends the error here was so fundamental it is plain error.

We generally review jury instructions de novo to determine whether they misstate the law or misled the jury. See United States v. Richardson, 233 F.3d 1285, 1292 (11th Cir. 2000), cert. denied, 532 U.S. 913 (2001). The district court has broad discretion in formulating a jury charge so long as the charge as a

whole accurately reflects the law and the facts. Id. On appeal, we examine whether the charge, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. Id. We will not reverse a conviction unless, after examining the entire charge, we find that the issues of law were presented inaccurately, the charge included crimes not contained in the indictment, or the charge improperly guided the jury in such a substantial way as to violate due process. Id.

At trial, Vogt never raised a unanimity issue. This issue, therefore, will be reviewed for plain error. This requires that error be plain, and that it affect substantial rights and implicate the fairness, integrity, or public reputation of judicial proceedings. United States v. Hansen, 262 F.3d 1217, 1248 (11th Cir. 2001), cert. denied, 122 S.Ct. 2326 (2002). When the evidence of guilt is overwhelming, any error does not affect substantial rights. United States v. Cano, 289 F.3d 1354, 1364 (l1th Cir. 2002).

Upon review of the record and upon consideration of the briefs of the parties, we discern no reversible error. The instruction complained of is clear and concise and in accord with the requirements of the law.

There was no plain error in the jury instructions.

UPWARD DEPARTURE

Vogt argues that his 780 months total sentence is unconstitutional because his crimes were the product of a treatable mental disorder. He contends his sentences offend procedural due process, substantive due process, and the Eighth Amendment.

Vogt makes no argument 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. Cunningham, 161 F.3d at 1344.

Objections to the constitutionality of a sentence generally are reviewed de novo. United States v. Miles, 290 F.3d 1341, 1348 (l1th Cir. 2002). Other than once making reference to proportionality and injustice, Vogt did not do much to preserve this issue. Issues raised for the first time on appeal are reviewed for plain error. Hansen, 262 F.3d at 1248. This requires that error be plain and that it affect substantial rights and implicate the fairness, integrity, or reputation of judicial proceedings. Id. Regardless of the standard of review, the outcome is the same.

In non-capital cases, the Eighth Amendment encompasses, at most, a narrow proportionality principle. United States v. Reynolds, 215 F.3d 1210, 1214 (11th Cir.), cert. denied, 531 U.S. 1000 (2000). We must make a threshold determination that the sentence imposed is grossly disproportionate to the offense committed. Id.

Only minimal procedural due process protections are required at sentencing. United States v. Erves, 880 F.2d 376, 379 (l1th Cir.), cert. denied, 493 U.S. 968 (1989). Punishment must not be based on unreliable information or result from retaliation for exercising a constitutional right. Id.

Vogt argues only that his sentence shocks the conscience, citing a civil case.

Upon review of the record and upon consideration of the briefs of the parties, we discern no reversible error. The sentences imposed are all within the statutory maximums, do not seem grossly disproportionate and are in accord with others imposed for such crimes. The record fully supports the rulings of the sentencing judge.

Vogt's sentence does not violate the Eighth Amendment nor either aspect of the due process clause.

CONCLUSION

The district court did not err in refusing to suppress the contested evidence. The jury instruction did not constitute plain error. Vogt's sentences are not unconstitutional. Accordingly, we affirm Vogt's convictions and sentences.

AFFIRMED.