No. 22-5394

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC CHRISTOPHER FALKOWSKI, ET AL.,
Petitioner,

—against —

UNITED STATES OF AMERICA,
Respondent.

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

By: **ERIC CHRISTOPHER FALKOWSKI**

Reg. No. 24951-075

Federal Correctional Institution Gilmer

PO Box 6000

Glenville, WV 26351-6000

Petitioner, pro se (incarcerated)

QUESTION(S) PRESENTED

1. Whether USSG § 1B1.1's serious-bodily-injury enhancement clause—as relative here to the Controlled Substance Act, 21 U.S.C. § 801 et seq.—is impermissibly overbroad or void for vagueness?

   (*n.b.*, Codefendants, jointly, severally, or otherwise have only an acknowledged interest in the outcome of the first question presented on certiorari.)

2. Whether the equitable tolling doctrine—as applicable to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—is a dead letter of caselaw?

3. Whether, under Sup. Ct. 12.4 and 13.3, a petitioner's ability to join in a codefendant's petition for certiorari to the United Supreme Court alters the AEDPA's one-year limitations period?

   (See, e.g., *Kemp v. United States*, (No. 21-5726) 142 S. Ct. 752, 211 L. Ed. 2d 471, 2022 U.S. LEXIS 81, 90 U.S.L.W. 3206 (U.S., June 13, 2022))

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

Codefendants

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OPINION BELOW

The Sixth Circuit's opinions affirming the judgment of the District Court, *Falkowski v. United States*, (No. 21-6111) 2022 U.S. App. LEXIS 12747 (6th Cir., May 11, 2022); Rehearing denied, by Panel *Falkowski v. United States* (citation omitted) (6th Cir., June 6, 2022); Rehearing denied, by En Banc *Falkowski v. United States* (citation omitted) (6th Cir., June 22, 2022), is unpublished but included in Appendix A-1 to 3.

JURISDICTION

The initial decision of the Court of Appeals affirming the District Court's denial/dismissal of the underlying habeas proceeding was entered on May 11, 2021. The Court of Appeals entered its final order affirming the District Court's Memorandum Opinion and Order (by petition for rehearing en banc) on June 22, 2022. In accordance with Supreme Court Rule 13.3, a petition for writ of certiorari must be filed within ninety days of the date on which the Court of Appeals entered its final order. The instant Petition is filed before the putative deadline of September 22, 2022, and is thus timely. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 12.4 and 13.3.

RELATED CASES

(1) *Williams v. United States*, (No. 21-6280) 211 L. Ed. 2d 410, 2021 U.S. LEXIS 6164, 2021 WL 5869532 (U.S., Dec. 13, 2021).

(2) *Barrett v. United States*, (No. 21-6265) 211 L. Ed. 2d 409, 2021 U.S LEXIS 6230, 2021 WL 5869525 (U.S., Dec. 13, 2021).

(3) *Bradley v. United States*, (No. 21-6852) 142 S. Ct. 117, 212 L. Ed. 2d 44, 2022 U.S. LEXIS 810 (U.S., Feb. 22, 2022).

(4) *United States v. Williams, et al.*, (Nos. 18-6343/19-5745/19-5764) 998 F.3d 716, 2021 U.S. App. LEXIS 15764, 2021 FED App. 0115P (6th Cir., May 26, 2021); Rehearing denied by, En Banc *United States v. Williams, et al.*, 2021 U.S. App. LEXIS 24809 (6th Cir., Aug. 18, 2021).

(5) *Falkowski v. United States*, No. 6:20-cv-00915-CEM-DAB (M.D. Fla., May 20, 2020, Filed/Pending) (Motion to Vacate, Set Aside, or Correct Sentence, Pursuant to 28 U.S.C. § 2255)

(6) *United States v. Falkowski*, No. 6:20-cr-900224-CEM-DAB (M.D. Fla., Mar. 16, 2017, closed) (Related Judgment in a Criminal Case)

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

I. USSG § 1B1.1, cmt. 1(L):

> Section 1B1.1 governs the level and type of conduct which triggers when the United States Sentencing Guidelines Manual calls for a "Base Offense Level [of at least] 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance."

USSG § 2D1.1(a)(2).

II. Equitable Tolling Doctrine (Rule of Common Law; 1963):

> (1) The doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period has expired, in which case the statute is suspended or tolled until the plaintiff discovers the injury.
>
> (2) The doctrine that if a plaintiff files a suit first in one court and then refiles in another, the statute of limitations does not run while the litigation is pending in the first court if various requirements are met.

Black's Law Dictionary (5th Pocket Ed.; Thompson-Reuters)

III. Supreme Court Rules 12 & 13:

a. Rule 12 states in pertinent that:

> "Parties interest jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition."

Sup. Ct. R. 12.4.

b. Rule 13 states in pertinent that:

> "[I]f a petitioner for rehear is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (where or not the requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgement."

Sup Ct. R. 13.3.

STATEMENT OF THE CASE

NOW pending before the United States Supreme Court is Eric Christopher Falkowski's ("Falkowski" or "Petitioner") pro se Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit ("Petition"). Jonathan Barrett; Johnny Williams, Jr.; and Joedon Bradley; and Lakrista Knowles ("Codefendants"), parties jointly or severally, have only a presumed interest in the judgment regarding the outcome of "question one" of the instant Petition.

By means of certiorari, Petitioner ultimately Petitioner seeks to have the ORDERS adjudging his underlying Motion to Vacate, Set Aside, or Correct a Sentence Pursuant to 28 U.S.C. § 2255 (Civ. Doc. 1; "Motion to Vacate") as untimely VACATED—if not for his (1) colorable claims of actual innocence or his (2) sensible reliance on the equitable tolling, but (3) in light of Sup. Ct. R. 12.4 and 13.3.

From a timeliness standpoint, all questions presented in the Petition, cumulatively, implicate the nexus between the AEDPA, a seemingly moribund equitable tolling doctrine, and Supreme Court certiorari mechanics. Simply put, Petitioner asserts that if he could have presented the underlying Motion to Vacate earlier—before the putative October 1, 2022 deadline— he would have done so.

DID THE LOWER COURTS ABUSE THEIR DISCRETION IN FAILING TO RECOGNIZE PETITIONER'S COLORABLE CLAIMS OF ACTUAL INNOCENCE?

I. ACTUAL INNOCENCE: COUNT SIX

In the case at bar, Petitioner relies on the toxicology report of Anthony Wheeler, the decedent—although he neither possess a copy nor has ever reviewed a copy—as his "strong proof of actual innocence." The existence of this toxicology report and its results are evidenced by the Pre-Sentence Report ("PSR"), and the existence of this toxicology report has never been refuted by the Government on habeas review or otherwise. Falkowski here concedes that he has not tendered any new evidence that was not presented at trial. But this is merely because no evidence was presented at trial, as he was convicted pursuant to a guilty plea. Nonetheless, he only pleaded guilty because he did not learn of the toxicology report until the summer of 2020—nearly a year beyond the date which he was sentenced, July 1, 2019. This toxicology report is clear and reliable scientific evidence that is exculpatory in nature. It is evidence which was withheld or inadvertently overlooked by Falkowski's defense counsel, David I. Komisar, until, again, nearly a year after he was convicted and sentenced.

The fact that counsel failed to consult with Petitioner regarding the revised PSR, can be proven through various facts: Falkowski was housed at the Dekalb County Jail, Fort Payne, Alabama, at the time the revised PSR was issued. Dekalb County Jail records (if they exist at this time) would evidence that the only attorney/client visit counsel participated in with Falkowski, was a 15-minute "video

visit" which took place shortly before the July 1, 2019 sentencing hearing. During this video visit:

> **Mr. Komisar asked**: "have you received a copy of the PSR?
>
> **Falkowski stated**: "No, but we reviewed a copy of the original PSR together." ❖
>
> **Mr. Komisar stated**: "Nothing has changed, but let me know if you have any objections to the PSR."

Falkowski did not note anything worth objecting to in the original PSR, therefore he failed to lodge any formal objects with Komisar during the video visit. However, he also cannot recall the inclusion of any facts pertaining to Mr. Wheeler's toxicology report in the original version of the PSR.

Petitioner asserts that this toxicology report proves—as evidenced through the PSR—that Mr. Wheeler's "death was caused by a combination of illegal drugs not solely the fentanyl distributed as part of this case" (PSR, p. 12, Footnote). It is clear from the Memorandum Opinion (Civ. Doc. 17) and Order (Civ. Doc. 18) that the District Court misunderstood the standard in which to gauge a claim of actual innocence. In the Memorandum Opinion, Judge Richardson stated: "challenges to the

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❖ Komisar reviewed the preliminary copy of the PSR with Petitioner on or about February 2018, while Falkowski was being held at the Robertson County Jail, in Springfield, Tennessee.

weight or credibility of the evidence do not establish innocence, and clams of insufficient evidence short of establishing actual innocence—which appears to be at most all that Petitioner is claiming here—will not be reviewed in a § 2255 proceeding." *Falkowski v. United States*, (No. 3:21-cv-00657) 2021 U.S. Dist. LEXIS 220023, at *19 (M.D. Tenn., Nov. 15, 2021) (internal quotations omitted; citing various cases). This particular claim is of relevance to the instant Petition, namely because it should have, at the very least, availed Falkowski access to equitable tolling under the "actual innocence gateway"—as there exist irrefutable evidence (via the PSR) that Petitioner is in fact innocent of Count Six. See, e.g. *McQuiggin v. Perkins*, 596 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) (actual innocence offers a gateway for a habeas petitioner to obtain review of his claims of constitutional magnitude, even after the statute of limitations has expired).

There are essentially two (2) prongs for a petitioner to meet before he can pass through this gateway: (1) he must possess strong evidence to substantiate his innocence, and (2) "in light of all the evidence, it [must be] more likely that not no reasonable juror would have convicted him[;]" if both of these prongs are met, he has established grounds for equitable tolling. *Phillips v. United States*, 734 F.3d 573, 582 (6th Cir. 2013) (internal quotations omitted; with slight alteration). It is clear that the Sixth Circuit misapprehended Petitioner's claim of actual innocence regarding Count Six, as he has clearly met both prongs at least on this particular claim. Petitioner, again, (1) points to the Mr. Wheeler's toxicology report through the PSR; and (2) the fact that "the [G]overnment voluntarily dismissed Count Six before trial[,]" (*United*

States v. Williams, 998 F.3d 716, 727 (6th Cir. 2021) (Sixth Circuit affirming lower court's judgments on consolidated appeal of Codefendants)) as proof that even the United States conceded at one point that no reasonable juror would have convicted defendants on—at least—this count. It appears as though—on application for COA before the Court of Appeals—the Circuit Court assumed that Petitioner was merely asserting his innocence by pointing to the fact that the Government dismissed Count Six before the trial of his Codefendants, however, Petitioner only asserted this fact to evidence that he was able to meet the aforementioned second prong of the actual innocence gateway. See *Falkowski,* 2022 U.S. App. LEXIS 12747 (Appendix A-3). Falkowski attached a copy of Page 12 of the PSR—which evidences the existence of the toxicology report—as an exhibit filed with his petition for rehearing en banc. Nevertheless, on denial of rehearing by panel and en banc, the Circuit Court provided no comment or acknowledgment regarding the evidence submitted by Petitioner.

II. ACTUAL INNOCENCE: COUNTS TWO, FOUR, FIVE, & SEVEN THROUGH TEN

In *Burrage v. United States*, 571 U.S. 204, 204, 143 S. Ct. 881, 187 L. Ed. 2d 715 (2014), the United States Supreme Court held that the death-results enhancement requires that drugs distributed by the defendant were "a but-for cause of [the victim's] death]." *Id.*, 571 U.S. at 218-19. In *Harrington v. Ormond*, 900 F.3d 246 (6th Cir. 2018), the Sixth Circuit held that a *Burrage* claim "is properly construed as one of actual innocence[,]"... because "the death-results enhancement [is] an element that must be submitted to the jury and found beyond a reasonable doubt."

Id., at 249 (citing *Burrage*, 571 U.S. at 210). Just the same, the serious-bodily-injury-results penalty is an element of the offense which must be submitted to the jury and found beyond a reasonable doubt. Thus, analogously, challenges to the serious-bodily-injury-results enhancement are properly construed as arguments of actual innocence.

As originally enacted, Controlled Substance Act, 21 U.S.C. § 801 et seq. ("Section 801") tied the penalties for drug offense to both type of drug and quantity involved, with no provision for mandatory minimum sentences. However that chanced in 1988 when Congress enacted the Anti-Drug Abuse Act, 100 Stat. 3207—which redefined the offense categories, increased the maximum penalties, and set minimum penalties for many offenders including the "death or serious bodily injury results" enhancement. With respect to violations involving distribution of Schedule I or II substances (the types of drugs defined as the most dangerous and addictive, Section 801 subsequently imposed sentences ranging from 10 years to life imprisonment for large-scale distributions, 21 U.S.C. § 841(b)(1)(A); from 5 to 40 years for medium-scale distributions, 21 U.S.C. § 841(b)(1)(B); and not more than 20 years for smaller distributions, 21 U.S.C. § 841(b)(1)(C). These default sentencing rules do not apply, however, when death or serious bodily injury results from the use of the distributed substance. 21 U.S.C. § 841(b)(1)(A)-(C). "In those instances, a defendant shall be sentenced to a term of imprisonment which shall be not less than 20 or more than life, a substantial fine, or both." *Burrage,* 571 at 204.

Section 801 imposes a 20-year mandatory minimum sentence on a defendant who unlawfully distributes a Schedule I or II drug, when "death or serious bodily

injury results." 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C). Under Section 801, the United States Sentencing Guidelines Manual ("Guidelines" or "USSG") calls for a "Base Offense Level (Apply the greatest) [of]... 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance." USSG § 2D1.1(a)(2).

Here, Falkowski argues that he and Codefendants are actually innocent of Counts: Two, Four, Five, Seven, Eight, Nine, and Ten of the indictment and judgment. Specifically, Petitioner argues that the United States Sentencing Commission stepped beyond the Congressional limits by defining the clause "serious bodily injury"—as relevant to the Section 801—to necessarily include conduct well beyond its ordinary "statutory" meaning (*i.e.*, the inclusion of "medical intervention" and "hospitalization"), by way of its Guidelines commentary. See USSG § 1B1.1, cmt. 1(L); concurrence *United States v. Havis*, 927 F.3d 393, 386-87 (6th Cir. 2019) (en banc) (per curiam). Petitioner puts forth that the portions of Section 801 relevant to this argument, are overbroad and constitutional invalid [as applied] under the void for vagueness doctrine[.]" *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995). This is based on the statutes failure to adequately define the clause "serious bodily injury," as applied to Counts: Two, Four, Five, Seven, Eight, Nine, and Ten. The word "serious" is not superfluous; instead, it reinforces that Congress intend to penalize only conduct—in this case the distribution of controlled substances—which results in substantial and quantifiable injury to the victim of the conduct.

The clause's fatal flaw is not per se its vagueness, but rather its specificity. The word "death is defined as "1: the end of life[,] 2: the cause of loss of life[,] 3: a cause of ruin[,] 4: the state of being dead[,] 5: DESTRUCTION, EXTINCTION[, or] 6: SLAUGHTER[.]" The Merriam-Webster Dictionary (7th Ed. 2016). However, although a simple grouping of grammatically related words, the Sentencing Commission clearly believed that the clause "serious bodily injury" was not as easily defied. In response to the apparent indefiniteness of this clause, the Sentencing Commission included a comprehensive definition for the clause by way of its Guidelines' commentary. The Sentencing Commissions commentary defines "serious bodily injury" as one involving extreme physical pain or protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization or physical rehabilitations." USSG § 1B1.1 cmt. N. 1(L).

The Government will certainly argue that the definition of "serious bodily injury" provided by the Guidelines is very clear and contrary to Petitioner's arguments, would not force "persons of common intelligence... [to] guess at its meaning and differ as to its application[,]" (or something to this effect). See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). In the instant case, the Government will likely rely on the fact that "several [victims] survived after they were given Narcan, but most likely would have died without medical intervention[;]" (Crim. Doc. 832; PageID No. 7678, at 17-18), and but for this "medical intervention," the victims may have died. The Government may even rely on the fact that several victims were hospitalized," in order to sustain the convictions

under Counts: Two, Four, Five, Seven, Eight, Nine, and Ten. However, such contentions should fail for the forgoing reasons. Statements such "[the victims] most likely would have died without medical intervention", requires impermissible conjecture and invites too much arbitrariness to support an enhancement that imposes a 20-year statutory minimum on a defendant. The Guidelines' definition for "serious bodily injury," Petitioner concedes, does include terms such as "requiring medical intervention" and hospitalization," but these terms are referenced to only by way of the Sentencing Commission's commentary under § 1B1.1. The *actual* Guidelines, as opposed to the Sentencing Commission's commentary, "pass[ ] through the gauntlets of congressional review[,]" (*Havis*, at 386) and do not mention terms such as "medical intervention" or hospitalization." No ordinary person would equate the administration of Narcan to "serious bodily injury"—as the clause would normally be understood—without first paying deference to the Sentencing Commission's commentary.

Thus, the Sentencing Commission stepped beyond its congressional mandate by increasing the scope of the "serious bodily injury results" enhancement to necessarily include conduct well beyond the clause's ordinary meaning. See, e.g., *United States v. Riccardi*, 989 F.3d 476, 479 (6th Cir. 2021) (holding that "guidelines commentary many only interpret, not add to the guidelines themselves)"; also *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (holding that the Sentencing Commission's use of commentary to expand the reach of an otherwise clear guideline "deserves no deference").

In the instant case, the Government's use of the "serious bodily injury" enhancement—as applied under§ 1B1.1—is actually akin to the "reckless risk of death or serious bodily injury," which is not typically punished under the relevant drug statutes. The Guidelines do provide for an enhanced penalty for offenses if the crime involved the conscious or reckless risk of death or serious bodily injury under USSG § 2B1.1(b)(15)(C), however, that particular guideline only provides for a two-level increase and is not commonly applicable under Section 801, because such risk of death or serious bodily injury (reckless or otherwise) is inherent to nearly all offenses involving Schedule I and II substances (particularly opioids). Additionally, the dangerousness and addictiveness of such scheduled substances have already been incorporated in the Guidelines byway of the Drug Quantity Table under USSG § 2D1.1(c).

As a working example, it has even been held that "[a]ctual injury need not occur for the enhancement to apply." *United States v. Vivit*, 214 F.3d 908, 920 (7th Cir. 2000). Such rationale— a finding that "actual injury need not occur," which is based solely on the aforementioned commentary—contravenes the plain construction of the congressionally vetted Guidelines and relevant statutes. Further, the Guidelines do not adequately define the level of "medical intervention" or "hospitalization" needed to trigger the enhancement—as medical intervention and hospitalization can be rendered for ailments in which a patient would recover without such treatment being required (*e.g.*, hospitals are regularly inundated with patients who seek treatment or hospital admittance for benign ailments—such as common

colds, bumps and bruises, minor lacerations, and the like—from which these patients would likely recover without any such medical treatment). Thus, the relevant Guideline and commentary are equally vague—despite being well-intentioned.

To survive an as-applied vagueness challenge, the statute must (1) define the conduct it prohibits with sufficient definiteness and (2) establish minimal guidelines to govern law enforcement. See, *e.g.*, *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004) (a criminal statute "cannot be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application") (internal quotation marks omitted; with slight alteration). Because the applicable Guideline and statutes only satisfy both prongs of the as-applied-vagueness challenge by way of the Sentencing Commission's commentary, the "serious bodily injury" clause is, again, void for vagueness. Ultimately, the Sentencing Commission's commentary "has no independent legal force [as] it serves only to interpret the Guidelines' text, not to replace or modify it." *Stinson v. United States*, 508 U.S. 36, 44-46, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993).

"Due Process requires that Congress provide meaningful standards to guide the application of its laws." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (with slight alteration). Again, a law that lacks such standards is void for vagueness. "In our constitutional order, a vague law is not law at all" because it violates due process by filing to put ordinary people on notice of "what the law demands of them." *United States v. Davis*, 588 U.S. ---, 139 S. Ct. 2319, 2323, 204 L. Ed. 2d 757 (2019) (internal citation omitted). Further, "'[v]ague laws also

undermine the Constitution's separation of powers" by threaten[ing]' to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.*, 139 S. Ct. at 2325. Hence, Petitioner reiterates, the "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. As this Court has explained, "the imposition of a criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by [theoretical situations]". *Davis*, 139 S. Ct. at 2326.

"The void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standardless discretion in the jury to fix a penalty." *United States v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed 2d 755 (1979). As a corollary to the vagueness doctrine, where a statute is ambiguous, "the rule of lenity must be applied to restrict criminal statues to conduct clearly covered by those statutes." *United States v. Hockings*, 129 F.3d 1069, 1072 (9th Cir. 1997). Because the relevant statutes rely on the Sentencing Commission's commentary to define and enhance the scope of the "serious bodily injury" clause, again, the clause is void for vagueness as applied. Here, Petitioner argues that the Sentencing Commission stepped beyond its strictures and, as a result, the convictions under Counts: Two, Four, Five, Seven, Eight, Nine, and Ten should be vacated. As, in summary, "a law beyond the power of Congress, for any reason, is no law at all." *Bond v. United States*,

564 U.S. 211, 228, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011) (citing *Nigro v. United States*, 276 U.S. 332, 341, 48 S. ct. 388, 72 L. Ed. 600 (1929)).

DID THE LOWER COURTS ERR IN FAILING TO RECOGNIZE THAT PETITIONER'S CLAIMS, CUMULATIVELY, WARRANTED HIS RELIANCE ON THE EQUITBLE TOLLING DOCTRINE?

I. WAS THE MOTION TO VACATE TIMELY ON ACCOUNT OF THE RULE 60(B) MOTION BEING A "PROPERLY FILED" HABEAS APPLICATION, OR WAS RELIACE ON EQUITABLE TOLLING APPROPRIATE DUE TO THE RULE 60(B) MOTION BEING A DEFECTIVE HABEAS MOTION?

The AEDPA establishes a one-year statute of limitations for both habeas petitions under 28 U.S.C. § 2254 and motions to vacate under 28 U.S.C. § 2255. For the most part, §§ 2254 and 2255 are counterparts of one another and the law applicable to one generally applies to the other. *Davis v. United States*, 417 U.S. 333, 343-44, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974); *Metheny v. Hamby*, 835 F.2d 672, 673-74 (6th Cir. 1987). The statutory tolling provisions of 28 U.S.C. § 2244(d)(2) provides that the time during which a properly filed application for post-conviction relief was pending is not counted toward the limitations period. See, *e.g.*, *Ott v. Johnson*, 192 F.3d 510, 512 (5th Cir. 1999). Petitioner identifies that any lapse of time before the proper filing of an application for post-conviction relief is counted against the one-year limitations period. See *Bennett v. Artuz*, 199 F.3d 116, 122 (2d Cir. 1999). However, of course, the limitations period is tolled as long as the application

remains pending. See *Isham v. Randle*, 226 F.3d 691, 693 (6th Cir. 2000). Because there exist sound reason to approach the AEDPA limitations period the same under both §§ 2254 and 2255, and because to do so is faithful with both Congress' intent and habeas corpus jurisprudence and well-established doctrine, § 2254 precedents apply to AEDPA limitations issues arising under § 2255 and vice versa. See, e.g., *United States v. Bendolph*, 409 F.3d 155 (3d Cir. 2005), cert. denied, 547 U.S. 1123, 126 S. Ct. 1908, 164 L. Ed. 2d 685 (2006)

The Supreme Court has suggested that state petitioners under § 2254 may mitigate tensions caused by the AEDPA's statutory limitations period "by filing a 'protective' petition in federal court" and asking tit to stay and abbey a habeas proceeding "until state remedies are exhausted." *Pace v. DiGuglielmo*, 544 U.S. 408, 416, 1125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). This mitigation techniques suggested by the Supreme Court for state petitioners, is not too dissimilar from the one employed by Falkowski by way of his Motion to Reopen Judgment, Pursuant to Rule 60(b) (Crim. Doc. 815; "Rule 60(b) Motion"). As he has repeatedly asserted throughout the underlying habeas proceeding, the Rule 60(b) Motion served many purposes, but most of all, its primary aim was to bide time and clear the path for his latter Motion to Vacate.

The Sixth Circuit has held that equitable tolling applies where the petitioner has filed a defective pleading. See, e.g., *Truit v. Cty. Of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 435, 457-58, 112 L. Ed. 2d 435 (1990) ("We have allowed equitable tolling in situations

where the claimant actively pursued his judicial remedies by filing a defective pleading during the statutory period")).Petitioner argues that his Rule 60(b) Motion was a bona fide and timely habeas corpus motion, but concedes it was only defective in the manner that it was a rather unconventional method in which to challenge the underlying judgment. Conversely, running contrary to this common-law principle, the Court of Appeals virtually obliterated access to equitable tolling when—on application for certificate of appealability (COA)—it stated: "the only proper means for Falkowski to have secured additional time for his § 2255 was to have filed a timely direct appeal." *Falkowski*, 2022 U.S. App. LEXIS 12747, at *6 ("Order"; p. 4, at 14-15).

The Supreme Court has stated, "where a common-law principle is well established,... courts may take it as given that Congress has legislated with an expectation that the principle will apply" absent statutory cues to the contrary. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991); see also *Eskridge, Interpreting Law*, at 348 ("[C]ourts will assume that legislatures act against the background of the common law"). So, for example, a federal statute of limitations ordinarily is subject to equitable tolling even when the text is silent because "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002); see *Nelson, Statutory Interpretation*, at 629 ("[C]ourts frequently understand federal statues to come with some unstated qualifications or embellishments suggested by principles of general jurisprudence"); and also *Lonzano*

v. Montoya Alvarez, 572 U.S. 1, 10, 134 S. Ct. 1224, 188 L. Ed. 2d 2000 (2014) (emphasizing that equitable tolling is a "long-established feature of American jurisprudence").

To reiterate, the Rule 60(b) Motion was a "properly filed" application for relief because it was part and parcel of the Government's civil case against him (*i.e.*, the writ of habeas corpus ad prosequendum), Although Falkowski failed to explicitly state this fact in the Rule 60(b) Motion or on appeal, he only failed to do so because he believed the fact was self-evident by the pleading. After all, he specifically alleged therein, that the civil proceeding and his subsequent extradition was integral to the Government's "stratagem" which caused him to waive his protections against self-incrimination under the Fourth and Fifth Amendments. *United States v. Falkowski*, (No. 20-5936) 2021 U.S. App. LEXIS 16796, at * 3 (6th Cir. 2021).

The District Court denied the Rule 60(b) Motion on two erroneous grounds: (1) "the claims were 'entirely conclusory, with absolutely no companying allegations (let alone evidence) of supporting facts'"; and (2) "the motion was untimely because it was filed more than a year after sentencing." *United States v. Doe*, (No. 3:16-cr-00176-2) 2020 U.S. Dist. LEXIS 134847, 2020 WL 4368282, [WL] at *1 (M.D. Tenn., July 30, 2020). On appeal, Petitioner proved—via the sworn affidavit from his now-former wife, Holly Falkowski—that he asked his attorney to file a notice of appeal in a timely manner, and that counsel ultimately failed to do as tasked. He also proved that time Rule 60(b) Motion was in fact timely. However, the Sixth Circuit affirmed the lower court's denial, finding the Rule 60(b) Motion to be inapplicable to criminal

proceedings. However, if the District Court had denied Falkowski due to its belief that Rule 60(b) was then-inaccessible to him (rather than on the two erroneous reasons stated), on appeal, he would have linked the habeas corpus ad prosequendum case to the Rule 60(b) Motion and evinced how the Federal Rules of Civil Procedure then applied.

However, Petitioner argues that even if the courts maintain that the Federal Rules of Civil Procedure were then-unavailable to him, the moment he appealed the District Court's denial of the Rule 60(b) Motion, jurisdiction over those same issues was transferred from the District Court to the Court of Appeals. Ultimately, Petitioner states that because several relevant grounds for relief where pending before the Sixth Circuit—via the Rule 60(b) Motion— before the lapse of the AEDPA's putative one-year limitations period, the AEDPA's limitations period was effectively tolled during the same period in which the appeal was pending.

II. TIMELINE OF NOTABLE EVENTS

Petitioner uses the foregoing "timeline" to illustrate one point: the moment he entered a notice of appeal to the Sixth Circuit—regarding at least those grounds shared between the Rule 60(b) Motion and the Motion to Vacate—the AEDPA's clock was effectively tolled. This is because an appeal is an event of jurisdictional relevance. The moment the notice of appeal was filed and accepted by the appeals court, jurisdiction over those same issues was transferred from the District Court to the

Sixth Circuit. Therefore, it would have been largely incongruous to present—simultaneously—the same issues before the District Court and Court of Appeals.

(a) Date: October 1, 2019

AEDPA's putative one-year deadline begins in *Falkowski* (M.D. Tenn.)

(b) Date: July 8, 2020

Defendant's Motion for Leave to File Untimely Notice of Appeal ("Motion for Untimely Appeal"; Crim. Doc. 812) in *Falkowski* (M.D. Tenn.)

(c) Date: July 29, 2020

Notice of Appeal entered for Rule 60(b) Motion in *Falkowski* (M.D. Tenn.)

(d) Date: July 30, 2020

Appeal for Rule 60(b) Motion docketed in *Falkowski* (6th Cir.)

(e) Date: October 1, 2020

AEDPA's putative one-year statute of limitations lapses in *Falkowski* (M.D. Tenn.)

(f) Date: June 4, 2021

District Court's ruling on Rule 60(b) Motion affirmed on other grounds in *Falkowski*. (6th Cir.)

(g) Date: July 29, 2021

Petition for Rehearing En Banc denied in *Falkowski* (6th Cir.)

(h) Date: August 20, 2021

Instant Motion to Vacate filed in *Falkowski* (M.D. Tenn.)

(i) Date: August 18, 2021

Rehearing En Banc denied in *Williams, et al.* (6th Cir.)

(j) Date: November 15, 2021

Instant Motion to Vacate denied in *Falkowski* (M.D. Tenn.)

(k) Date: November 16, 2021

Final Date for Falkowski to file petition for writ of certiorari, jointly or severally, based on denial of Codefendants' petitions for rehearing en banc (S. Ct.)

(l) Date: November 17, 2021

Adjusted/actual AEDPA one-year statute of limitations period begins, after consideration of Sup. Ct. R. 12.4 and 13.3 (M.D. Tenn.)

Ultimately, the appeal of the Rule 60(b) Motion was filed on July 29, 2020, more than 60 days before the AEDPA's putative one-year limitations period would have lapsed without more. Once the petition for rehearing en banc was denied on the Rule 60(b) Motion, jurisdiction was divested from the Court of Appeals and returned to the District Court, July 29, 2021. The appeal went pending for almost exactly one year (from July 29/30, 2020 to July 29, 2021), thus, the AEDPA's putative limitations period was effectively tolled—again on at least the issues mirrored between the Rule

60(b) Motion and the Motion to Vacate—through that same one-year period. When jurisdiction was returned, Falkowski had at least until October 1, 2021 to file his Motion to Vacate. As the Motion to Vacate was filed on August 20, 2021—more than two months before the new limitations period expired (October 1, 2021) after being effectively tolled—the Motion to Vacate was in fact timely even without benefit of his actual innocence claims or the forgoing Sup. Ct. R. 13.3 or Rule 15(c) or claims.

III. ACTUAL TIMELINESS OF CLAIMS SHARED BETWEEN RULE 60(B) MOTION AND MOTION TO VACATE, PURSUANT TO RULE 15(C)'S RELATION BACK DOCTRINE

As to at least three (3) of Petitioner's claims, (1) ineffective assistance of counsel against his former attorney, Mr. Komisar, for failing to file a timely notice of appeal (see Defendant's Motion for Leave to File Untimely Notice of Appeal ("Motion for Untimely Appeal"); Crim. Doc. 812 at 2-3; July 8, 2020, Decided/Filed); (2) prosecutorial misconduct based on the Government's extraction stratagem, which Falkowski alleged was employed to deprive him of his protections against self-incrimination (see Rule 60(b) Motion, at 1-2); and (3) prosecutorial misconduct based on the Government's use of testimony known to be impeached before the Grand Jury (*Id.),* there is another sound reason as to why they are not time barred.

Under Rule 15(c)(1)(B) of the Federal Rules of Civil Procedure, "an amendment to a pleading relates back to the date of the original pleading when:

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—*or attempted to be set out*—in the original pleading...."

Fed. R. Civ. P. 15(c)(1)(B) (emphasis added).

"[R}elation back depends on the existence of a common core of **operative facts** uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 646 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005). As explained by the *Mayle* court, the addition of new facts does not prevent relation back as long as both the new and old claims are based on the same core of, again, operative facts.

In *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 580-581, 65 S. Ct. 421, 89 L. Ed 465 (1945), a railroad worker was struck and killed by a train car. His widowed spouse sued under the Federal Employer's Liability Act, 45 U.S.C. § 51, et seq., to recover for his wrongful death. She initially alleged various negligent acts. In an amended complaint, this time brought under the Federal Boiler Inspection Act, se specifically alleged negligence for failure to provide the locomotive care with a rear light. The Supreme Court held that the amendment related back, and therefore avoided a statute of limitations bar, even though the amendment invoked a legal theory not suggested by the original complain and relied on facts not originally asserted. See *Id; also Durand v. Hanover Ins. Grp. Inc.,* 806 F.3d 367, 375 (6th Cir. 2015); and *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 252 (6th Cir. 2000).

In *Tiller*, it was immaterial as to whether her complain was first brought under the Federal Employer's Liability Act and then later under the Federal Boiler Inspection Act. Analogously, here, it is immaterially as to whether Petitioner first addressed his claims via a "motion to file an untimely appeal" (which was a pleading actually suggested by his former attorney, Mr. Komisar), under the highly debated Rule 60(b) Motion, and then finally under his Motion to Vacate. What actually matters here—what is material to Petitioner's argument—is that both the Motion for Untimely Appeal and Rule 60(b) Motion were filed before the AEDPA's putative one-year limitations period, October 1, 2020, and that all three motions share "a common core of operative facts." *Mayle*, 545 U.S. at 662, 664. It is also immaterial as to whether these facts were initially asserted via "a barebones document (like the Rule 60(b) motion) that [perhaps did] not suffice under Section 2255[.]" *Falkowski*, 2021 U.S. Dist. LEXIS 220033, at *8-9. What matters most under Rule 15(c)'s relation back doctrine, is that these earlier claims were timely asserted and that the later amended claims merely built upon the earlier foundational claims. Thus, District Judge Richardson can once again spare the histrionics. There is no genuine threat of "the entire policy behind the [AEDPA's] one-year limitations period [being] circumvented[,]" (*Id.)* should this "would-be" Petitioner be granted relief under Rule 15(c) or any other applicable manner suggested herein.

After all, as the Sixth Circuit has explained, "the thrust of Rule 15 is to reinforce the principle that cases 'should be tried on their merits rather than technicalities of pleadings.'" *Miller*, at 248-49. Rule 15(c)(2) "is based on the notion

that once litigation involving particular conduct or a give transaction or occurrence has been instituted, the parties are not entitled to the protection of statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in their original pleading." *Brown v. Shaner*, 172 F.3d 927, 932 (6th Cir. 1999)

Rule 15(c) states in pertinent, "(1)... An amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; (B) the amendment assets a claim or defense that arose out of the conduct, transaction, or occurrence set out—*or attempted to be set out*—in the original pleading[.]" Fed. R. Civ. P. 15(c)(1)(A)&(B). The Rule was designed to remedy a situation where amending a complaint would ordinarily be time-barred, by providing an avenue of relief for a plaintiff who must amend his complaint outside the applicable limitations period. As is well-known and previously discussed, the AEDPA imposes a one-year limitations period on habeas applications under 28 U.S.C. § 2244(d). However, once more, Rule 15(c)(1) creates an exception: "when a prisoner files an original petition within the one-year deadline, and later presents new claims in an amended petition filed after the deadline passes, the new claims relate back to the date of the original petition if the new claims share a 'common core of operative facts' with the original petition." *Cowan v. Stovall*, 645 F.3d 815, 818 (6th Cir. 2022) (citing *Mayle,* 545 U.S. 644, 650).

In the underlying Motion to Vacate, a number of claims therein relate back—pursuant to the unequivocal language of Rule 15(c)—because the Motion to Vacate

merely clarified or amplified certain claims alleged in the initial "properly filed" pleadings (*i.e.,* the Motion for Untimely Appeal and Rule 60(b) Motion). Rule 15(c) expressly states that a petitioner must only "attempt[ ] to... set out" the claims in his original application, for the claims in his amended petition to related back. Fed. R. Civ. P. 15(c)(1)(B). The ordinary construction of Rule 15 evidences that the original filings need not be in the form of an entirely flawless or fully cognizable pleading, for the new, more elaborate claims to appropriately relate back under the rule. One must accept that Congress implemented Rule 15(c) with the doctrines of collateral estoppel and res judicata in mind, and fashioned the rule to prevent a would-be claimant's amended grounds for relief from being time-barred, so long as the latter grounds correlate substantially with the earlier, timely but deficient grounds. If it were necessary for the earlier "timely" claims to be presented in the form of something greater than "a barebones document" as the District Court suggest, Rule 15(c)'s relation back doctrine would serve no practical application, as the initial claims would have likely been resolved on their merits. Hence, any further litigation on those same earlier claims would likely be foreclosed by collateral estoppel, relevant rules of jurisprudence, and other applicable statutes.

ACTUAL TIMELINESS OF MOTION TO VACATE PURSUANT TO SUPREME COURT RULES 12.4 & 13.3, VIA PETITIONS FOR REHEARING EN BANC FILED IN *UNITED STATES V. WILLIAMS, ET AL.*

Falkowski's Motion to Vacate, filed on or about August 20, 2021, appears untimely at first blush as it was filed almost two years after he was sentenced, July 1, 2019, and considering that he did not directly appeal the judgment. Conversely, a clerical error required the court to enter an amended judgment on September 17, 2019, which created a deadline of October 1, 2019, for within which he may have appealed the criminal judgment. Fed. R. App. 4(b)(1)(A). Thus, under the AEDPA, the one-year limitations period would have—without more—commenced on October 1, 2019 and ended on October 1, 2020. Because Falkowski filed his Motion to Vacate on August 11, 2021—after consideration of the putative expiration date of October 1, 2020 under the AEDPA—it appears his habeas petition was "almost eleven months too late[.]" *Falkowski*, 2022 U.S. App. LEXIS 12747, at *4 (Appendix A-3)

Of relevance here, during the aforementioned period, the consolidated appeal of Petitioner's Codefendants was pending in the Sixth Circuit. This appeal was denied May 26, 2021, and all of their related petitions for rehearing en banc were denied August 18, 2021. Although Falkowski was not party to this consolidated appeal, nor any of the petitions for rehearing, he asserts that according to Rule 12.4, he was a party of interest under any possible writ of certiorari to be filed in relation to the criminal judgment. Rule 12.4 unambiguously states in pertinent that:

> "Parties interest jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition."

Sup. Ct. R. 12.4

I. RULE 12. RELEVANT PARTIES ON CERTIORARI REVIEW

Subsection (4) of Sup. Ct. R. 12 states, in pertinent, that "[p]arties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not show on a petition as joined therein at the time the petition is filed may not later join in that petition."

For the sake of brevity, Petitioner reasserts that he was in fact an "interested party", as considered under Rule 12.4, despite that fact that he did not file for rehearing en banc or much less directly appeal the judgment. It is irrelevant as to whether Codefendants' petitions would have been successful were certiorari granted. It is evident that Falkowski had until the petitions for writ of certiorari were filed in *Williams* and *Barrett*—to join as a party in either or both petitions. Or Falkowski may even have joined Bradley's petition for certiorari, which was on denied on February 22, 2021. Nevertheless, even if Falkowski had timely knowledge of his ability to join Codefendants in their respective petitions, he may have decided against the joinder and actually petitioned the Supreme Court "otherwise" or "severally" under Rule 12.4's clear-cut language.

Because Falkowski did not timely file a petition for writ of certiorari after Codefendants' petitions for rehearing were denied, August 18, 2021, the AEDPA's one-year statute of limitations began to run the latest of the date in which he may have petitioned the Supreme Court for writ of certiorari, whether jointly, otherwise, or severally, in relation to *Williams, et al.'s* judgment—which in the end proves to be on or about November 16, 2021. As the Motion to Vacate was denied on November 15, 2021, a mere day before the AEDPA's *adjusted* limitations period commenced, it is now clear that dismissal of the Motion to Vacate was erroneous.

II. RULE 13. IMPACT ON AEDPA'S ONE-YEAR LIMITATIONS PERIOD

Ordinarily a party must petition the Supreme Court for certiorari within 90 days of entry of the relevant judgment. Sup. Ct. R. 13.1. However, under Rule 13.3:

> "[I]f a petitioner for rehear is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (where or not the requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgement."

Id. R. 13.3.

On certiorari, Falkowski contemporaneously asserts that the lower courts failed to account for Rules 12.4 and 13.3, which clearly make his Motion to Vacate timely. While, Falkowski's petition for rehearing en banc (Motion to Vacate) was pending, the Supreme Court decided *Kemp v. United States*, (No. 21-5726) 142 S. Ct. 752, 2022 U.S. LEXIS 81 (U.S., June 13, 2022). In *Kemp*, the Court held, based on Clay v. United States, 537 U.S. 522, 532, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003), that for a federal criminal defendant—who does not file a petition for rehearing on direct appeal—the 90-day period for him to seek certiorari begins to run when the appeals court denies his codefendants' petitions for rehearing on direct appeal. While his petition for rehearing en banc was still pending, Falkowski apprised the court of the decision in *Kemp,* via a letter submitted pursuant to Fed. R. App. P. 28(j), and stated that the Supreme Court's rationale in this case applied to the timeliness of his Motion to Vacate. However, his petition for rehearing en banc nonetheless was denied, June 22, 2022, with no acknowledgment of his 28(j) letter by the appeals court.

REASONS FOR GRANTING THE PETITION

From a "merits" standpoint, the underlying habeas claims take aim directly at so-called "drug-induced homicide and injury" laws, as well as the draconian sentences they often produce. Although not a popular position, Petitioner sides against the over-enforcement of such statutes. USSG §§ 2d1(a)(2) and 1B1.1, cmt. 1(L) represent remnants of the lost "war on drugs" and a return to its empty eye-for-an-eye rhetoric. Most individuals may take no issue with such laws. This is partly due to fear-mongering politicians pandering for votes and career prosecutors, whom push the false narrative that the opioid epidemic is fueled solely by ruthless cartel members and callous drug dealers that care nothing for their customers. The truth of the matter is—according to an analysis of criminal cases by the Health in Justice Action Lab at Northeastern University—approximately half of the people charged under these statues are either friends, spouses or domestic partners, or caretakers of those whom overdose.

Often those with substance abuse disorders themselves are charged with the deaths or injuries of people whom the share their addictions and drugs with. In the federal criminal justice system, there is no Good Samaritan provision for which to protect such individuals from criminal prosecution, should they seek emergency medical assistance in the event of a suspected drug overdose. There is also a lack of oversight regarding how and when these laws are enforced or applied. More often than not, these overdose victims have a smorgasbord of drugs (not solely those distributed during the offense) in their systems at the time of death or injury, making

it nearly impossible to determine actual "but-for-causation." This leads to far too much conjecture and theorization for a penalty that demands a minimum of 20 years imprisonment and as much as life. These nuances are simply absent from existing legislation. Career prosecutors typically use this to their advantage in order to prevent criminal defendants from testing the sufficiently of the evidence at trial.

In the end, the more victims whom fall to drug-induced deaths and injuries, the more drug dealers fall to these overly punitive measures; however, the inverse is also true. The more drug dealers whom fall to these laws and the draconian sentences they produce, the more victims suffer from drug-induced deaths and injuries. One can easily say, such punitive measures do little to protect the individuals that these laws are designed—in part—to protect, while simultaneously jeopardizing what little progress has been made during the opioid epidemic and related overdose crisis. These laws push individuals into the furthers reaches of society; increases the occurrence of overdoses, by decreasing the likelihood that witnesses will call 911 in the event of an overdose emergency; and contribute to sentence disparities by vesting standardless discretion in law enforcement to determine the types of conduct and defendants that warrant such punishment.

CONCLUSION

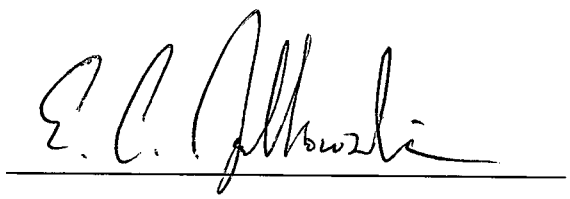
The petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit should be granted for the aforesaid reasons.

DECLARATION

WHEREFORE, I, Eric Christopher Falkowski, Petitioner, declare under penalties and pains of perjury that the foregoing statements and claims are true and correct to the best of my recollection and human ability.

The foregoing petition was executed at Glenville, West Virginia, on the 2nd day of August, 2022.

Respectfully submitted & duly sworn,



Eric Christopher Falkowski

Petitioner, *pro se*