

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND J. KRAYNAK – PETITIONER
vs.

UNITED STATES OF AMERICA – RESPONDENTS,

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

PETITION FOR A WRIT OF CERTIORARI

Stephanie L. Cesare, Esquire
Abom &Kutulakis, L.L.C.
2 West High Street
Carlisle, PA 17013
(717) 249-0900
(717) 249-3344 (fax)

QUESTIONS PRESENTED

- I. Whether Petitioner has sufficiently shown a fair and just reason for requesting withdrawal of his guilty plea such that the trial court shall grant his request to withdraw his guilty plea?

LIST OF PARTIES

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

LIST OF PRIOR PROCEEDINGS

1. *United States v. Raymond Kraynak*, 4:17-CR-00403-001 (Middle District of Pennsylvania); judgment entered on August 9, 2022.
2. *United States v. Raymond Kraynak*, No. 22-2500 (3d Cir.); opinion affirming district court opinion entered on July 20, 2023.
3. *United States v. Raymond Kraynak*, No. 22-2500 (3d Cir.); order denying Petitioner's petition for re-hearing *en banc* entered October 6, 2023.

TABLE OF CONTENTS

| | Page |
|--|------|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 4 |
| A. Procedural Background | 4 |
| B. Factual Background | 5 |
| C. District Court Judgment (Appendix B) | 6 |
| D. The Third Circuit Opinion (Appendix A) | 7 |
| REASONS FOR GRANTING THE PETITION | 8 |
| I. KRAYNAK SHOWED A FAIR AND JUST REASON FOR REQUESTING WITHDRAWAL OF HIS GUILTY PLEA SUCH THAT HE SHOULD HAVE BEEN PERMITTED TO WITHDRAW HIS GUILTY PLEA AND PROCEED WITH A NEW TRIAL, AS OPPOSED TO BEING SENTENCED IN ACCORDANCE WITH THE TERMS OF HIS PLEA AGREEMENT | 9 |
| A. The Lower Courts Erred in Denying Kraynak's Motions to Withdraw his Guilty Plea Because Kraynak Sufficiently Asserted his Innocence | 10 |
| B. The Lower Courts Erred in Denying Kraynak's Motions to Withdraw his Guilty Plea Because Kraynak's Reason for Withdrawing his Guilty Plea— Ineffective Assistance of Counsel—is Sufficiently Strong | 19 |
| C. The Lower Courts Erred in Denying Kraynak's Motions to Withdraw his Guilty Plea Because Kraynak's Withdrawal of his Guilty Plea Would Not Have Prejudiced the Government | 35 |
| II. CONCLUSION | 39 |

INDEX TO APPENDICES

APPENDIX A, Not precedential opinion and judgment of the United States Court of Appeals for the Third Circuit, dated July 20, 2023

APPENDIX B, Judgment entered by the United States District Court for the Middle District of Pennsylvania, dated August 9, 2022; Statement of reasons entered by the United States District Court for the Middle District of Pennsylvania, dated August 3, 2022; Memorandum Opinion entered by the United States District Court for the Middle District of Pennsylvania, dated August 8, 2022; Order entered by the United States Court of Appeals for the Third Circuit denying Petitioner's Petition for Rehearing En Banc, dated October 6, 2023

APPENDIX C, Raymond Kraynak's *pro se* Motion to Withdraw Guilty Plea, dated February 18, 2022; Raymond Kraynak's Motion to Withdraw Guilty Plea, dated April 26, 2022; Raymond Kraynak's Supplemental Motion to Withdraw Guilty Plea, dated July 7, 2022; Raymond Kraynak's Guilty Plea Agreement, dated September 23, 2021

APPENDIX D, Raymond Kraynak's Indictment, dated December 20, 2017

TABLE OF AUTHORITIES

Cases

| | |
|--|----------------|
| <i>Machibroda v. United States</i> , 368 U.S. 487 (1962) | 22 |
| <i>Ruan v. United States</i> , 142 S. Ct. 2370 (2022) | 5, 15, 17 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 687-91 (1984) | 22 |
| <i>United States v. Brown</i> , 250 F.3d 811, 815 (3d Cir. 2001)..... | 11, 12 |
| <i>United States v. Day</i> , 969 F.2d 39, 42, 45 (3d Cir. 1992)..... | 21 |
| <i>United States v. Hamilton</i> , 510 F.3d 1209, 1214 (10th Cir. 2007) | 12 |
| <i>United States v. James</i> , 928 F.3d 247, 255 (3d Cir. 2019)..... | 12, 17, 21 |
| <i>United States v. Jones</i> , 336 F.3d 245, 252 (3d Cir. 2003) | 11, 12, 21, 38 |
| <i>United States v. Sgarlat</i> , 705 F.Supp. 2d 347, n. 5 (E.D. Pa. 2010) | 39 |

Statutes

| | |
|-----------------------------|-----------|
| 21 U.S.C. § 841(a)(1) | 4, 15, 20 |
| 21 U.S.C. § 856(a)(1) | 4 |
| 28 U.S.C. § 1254(1)..... | 2 |

Rules

| | |
|------------------------------------|-------|
| Fed. R. Crim. P. 11(c)(1)(C)..... | 4 |
| Fed. R. Crim. P. 11(d)(2)(B) | 3, 11 |

Regulations

| | |
|------------------------------|----|
| 21 C.F.R. § 1306.04(a) | 16 |
|------------------------------|----|

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below from the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The not precedential opinion and judgment of the United States Court of Appeals for the Third Circuit appears in Appendix A to this petition.

The memorandum opinion and judgment entered by the United States District Court for the Middle District of Pennsylvania, as well as the Order denying Petitioner's petition for rehearing entered by the United States Court of Appeals for the Third Circuit, appears in Appendix B to this petition.

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit issued the opinion in this case was July 20, 2023. The date on which the United States Court of Appeals for the Third Circuit denied Petitioner's petition for rehearing in this case was October 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Crim. P. 11(d)(2)(B)

A defendant may withdraw a plea of guilty or nolo contendere: (1) before the court accepts the plea, for any reason or no reason; or (2) after the court accepts the plea, but before it imposes sentence if: (A) the court rejects a plea agreement under 11(c)(5); or (B) the defendant can show a fair and just reason for requesting the withdrawal.

STATEMENT OF THE CASE

A. Procedural Background

On December 20, 2017, Kraynak was charged in a 19-count Indictment with 12 counts of unlawfully distributing and dispensing a controlled substance, in violation of 21 U.S.C. § 841(a)(1); five (5) counts of unlawfully distributing and dispensing a controlled substance resulting in death, in violation of 21 U.S.C. § 841(a)(1); and two (2) counts of maintaining a drug-involved premises, in violation of 21 U.S.C. § 856(a)(1). JA at 79-102.

On September 8, 2021, a jury trial commenced, and after the Government rested their case-in-chief, Kraynak and the Government reached a plea agreement. On September 23, 2021, Kraynak pled guilty to Counts One (1) through 12 of the Indictment—unlawfully distributing and dispensing a controlled substance, in violation of 21 U.S.C. § 841(a)(1)—pursuant to Rule 11(c)(1)(C). *See* Fed. R. Crim. P. 11(c)(1)(C).

On February 18, 2022, Kraynak filed a *pro se* motion to withdraw his guilty plea. On February 23, 2022, the trial court (Brann, M.) issued a letter of record to counsel stating his acceptance of the proposed Rule 11(c)(1)(C) binding plea agreement from September 23, 2021, and scheduled sentencing for March 4, 2022.

On March 4, 2022, after a hearing on Kraynak's motion to withdraw his guilty plea and motion to appoint new counsel, the trial court (Brann, M.) held that Kraynak's prior defense counsel shall move to withdraw as counsel, at which point the trial court would grant the motion and appoint new counsel. On March 14, 2022,

the trial court granted defense counsels' motion to withdraw as counsel and appointed undersigned counsel to represent Kraynak.

On April 26, 2022, Kraynak filed a formal motion to withdraw his guilty plea, along with a brief in support of his motion. On July 7, 2022, Kraynak filed a supplemental motion to withdraw his guilty plea, along with a brief in support of his motion, based upon the recent decision in *Ruan v. United States*. See *Ruan v. United States*, 142 S. Ct. 2370 (2022).

On August 3, 2022, after a hearing, the trial court (Brann, M.) denied Kraynak's motions to withdraw his guilty plea and sentenced Kraynak to 180 months incarceration. Thereafter, on August 8, 2022, the trial court entered an Order, along with an accompanying Memorandum Opinion, confirming its oral order denying Kraynak's motions.

On December 20, 2022, Kraynak appealed the trial court's denial of his motions to withdraw his guilty plea and subsequent conviction and sentence. On July 20, 2023, the United States Court of Appeals for the Third Circuit filed a not precedential opinion affirming the trial court opinion.

On September 25, 2023, Kraynak filed a Petition for Rehearing En Banc, which the United States Court of Appeals for the Third Circuit denied on October 6, 2023.

B. Factual Background

The facts of this case consist of Kraynak, a Doctor of Osteopathy ("D.O."), practicing medicine at Keystone Family Medicine Associates, P.C., and prescribing medications, including Schedule II and Schedule IV controlled substances, to 12

named patients outside the usual course of professional practice and not for legitimate medical purposes. Further, five (5) of the 12 named patients died from drug-related deaths.

In September 2021, Kraynak pled guilty to Counts One (1) through 12 of the Indictment—unlawfully distributing and dispensing a controlled substance outside the usual course of professional practice and not for a legitimate medical purpose. The trial court denied Kraynak's subsequent request to withdraw his guilty plea and sentenced Kraynak to 180 months incarceration.

Kraynak contends in this petition that the trial court erred in denying his motions to withdraw his guilty plea, as he has sufficiently shown a fair and just reason for requesting withdrawal of his guilty plea.

C. District Court Judgment (Appendix B)

The District Court denied Kraynak's motions to withdraw his guilty plea, concluding that all three (3) factors that are to be considered in deciding a defendant's motion to withdraw his guilty plea weigh against granting Kraynak's motions.

More specifically, the District Court concluded that Kraynak did not and cannot credibly assert his legal innocence, that Kraynak's reasons for withdrawing his guilty plea are weak as Kraynak did not receive ineffective assistance of counsel, and that the Government would be prejudiced by Kraynak withdrawing his guilty plea based on the time and money it spent preparing for trial and presenting its case at trial.

In concluding that Kraynak did not and cannot credibly assert his legal

innocence, the District Court concluded that there was no dispute that Kraynak prescribed the identified controlled substances to the identified patients during the identified timeframes and that the evidence produced at trial established that those two (2) elements were met. It then analyzed whether Kraynak knowingly or intentionally issued the controlled substances outside the usual course of professional practice and not for a legitimate medical purpose and concluded that he did.

D. The Third Circuit Opinion (Appendix A)

Kraynak's appeal challenged the District Court's denial of his motions to withdraw his guilty plea and resulting sentence, which was in accordance with the plea agreement and conviction.

The Third Circuit affirmed the District Court's holding, determining that Kraynak did not demonstrate his innocence and that *Ruan v. United States* does not undermine Kraynak's guilt, that Kraynak's proffered reason for withdrawing his guilty plea—that he received ineffective assistance of counsel—is unpersuasive, and that the withdrawal of Kraynak's guilty plea would prejudice the Government. (Appendix A at p. 9).

REASONS FOR GRANTING THE PETITION

Kraynak asks this Court to grant his petition for writ of *certiorari* because he showed a fair and just reason for requesting the withdrawal of his guilty plea, after the trial court accepted his guilty plea but before it imposed sentence, and, therefore, the trial court should have granted Kraynak's motions to withdraw his guilty plea.

More specifically, Kraynak met his burden of showing a fair and just reason for withdrawal of his guilty plea in that he asserted his innocence, he received ineffective assistance of counsel prompting his request to withdraw his guilty plea, and the government would not be unreasonably prejudiced by the withdrawal.

Because the trial court should have granted Kraynak's motions to withdraw his guilty plea, Kraynak's original plea of not guilty to all counts of the Indictment should have been reinstated, and Kraynak should have been given the opportunity for a new trial. Similarly, the trial court should not have sentenced Kraynak in accordance with the terms of the plea agreement.

Kraynak asks this Court to grant review in order to rectify these errors.

I.

KRAYNAK SHOWED A FAIR AND JUST REASON FOR REQUESTING WITHDRAWAL OF HIS GUILTY PLEA SUCH THAT HE SHOULD HAVE BEEN PERMITTED TO WITHDRAW HIS GUILTY PLEA AND PROCEED WITH A NEW TRIAL, AS OPPOSED TO BEING SENTENCED IN ACCORDANCE WITH THE TERMS OF HIS PLEA AGREEMENT.

The lower courts erred in concluding that Kraynak did not meet his burden of showing a fair and just reason for withdrawal of his guilty plea.

Both the District Court and the Third Circuit concluded that the first factor to be considered in deciding a defendant's motion to withdraw his guilty plea—whether the defendant asserts his innocence—weighed against granting Kraynak's motions to withdraw his guilty plea. While the District Court concluded that the evidence presented by the Government at trial supported that Kraynak is both legally and factually guilty of the crimes to which he has pled guilty and that there is no credible evidence of innocence, the Third Circuit erroneously concluded that Kraynak did not "demonstrate" his innocence as opposed to considering and concluding that Kraynak did not "assert" his innocence.

Both the District Court and the Third Circuit further concluded that Kraynak's proffered reason for withdrawing his guilty plea—that he received ineffective assistance of counsel, which essentially rendered his plea involuntary—was weak and unpersuasive because Kraynak did not receive ineffective assistance of counsel. Finally, both the District Court and the Third Circuit concluded that the Government would be prejudiced by Kraynak's withdrawal of his guilty plea due to the resources presumably expended by the Government in preparing for and presenting its case to

the jury during trial prior to Kraynak's request to withdraw his guilty plea.

For the reasons explained in this Argument, the lower courts erred in concluding that Kraynak did not show a fair and just reason for withdrawal of his guilty plea, and, in turn, denying Kraynak's motions to withdraw his guilty plea and sentencing him in accordance with the terms of his plea agreement.

A. The Lower Courts Erred in Denying Kraynak's Motions to Withdraw his Guilty Plea Because Kraynak Sufficiently Asserted his Innocence.

In determining whether a defendant has met the burden of showing a "fair and just reason" for withdrawal of a guilty plea pursuant to F.R.C.P. 11(d)(2)(B), a district court must consider three (3) factors: "(1) whether the defendant asserts his innocence; (2) the strength of the defendant's reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal." *United States v. Jones*, 336 F.3d 245, 252 (3d Cir. 2003), citing *United States v. Brown*, 250 F.3d 811, 815 (3d Cir. 2001). "The burden of demonstrating those factors is substantial and falls on the defendant." *Id.*

Both the District Court and the Third Circuit concluded that the first factor to be considered in deciding a defendant's motion to withdraw his guilty plea weighed against granting Kraynak's motions to withdraw his guilty plea.

1. The District Court Erred in Concluding that Kraynak Did Not Assert his Innocence.

In considering whether Kraynak asserted his innocence, the District Court concluded that the evidence presented by the Government at trial "overwhelming[ly]" established Kraynak's guilt for the crimes to which he pled guilty, and that any

contrary testimony presented by Kraynak at the hearing on his motions to withdraw his guilty plea, “is not believable and is entitled to no weight.” (Appendix B at p. 43).

“Bald assertions of innocence are insufficient to permit a defendant to withdraw his guilty plea.” *Jones*, 336 F.3d at 252. Instead, assertions of innocence “must be buttressed by facts in the record that support a claimed defense.” *Id.*, quoting *Brown*, 250 F.3d at 818. After a defendant has already pleaded guilty, he “must then not only reassert innocence, but give sufficient reasons to explain why contradictory positions were taken before the district court and why permission should be given to withdraw the guilty plea and reclaim the right to trial.” *Id.*, quoting *Jones*, 979 F.2d at 318. “[T]he mere assertion of a legal defense is insufficient; the defendant must present a *credible* claim of legal innocence.” *United States v. James*, 928 F.3d 247, 255 (3d Cir. 2019), quoting *United States v. Hamilton*, 510 F.3d 1209, 1214 (10th Cir. 2007). Legal innocence alone can support withdrawal of a guilty plea. *Id.* at 253.

In considering whether Kraynak asserted his innocence, the District Court concluded that the Government established its *prima facie* case that Kraynak unlawfully distributed and dispensed a controlled substance. (Appendix B at pp. 20-21). More specifically, the District Court held that there was “no dispute” that Kraynak prescribed the identified controlled substances to the identified patients during the identified timeframes and that the “evidence produced at trial plainly establishes that those two elements were met.” (Appendix B at p. 21). The District Court then analyzed the “only dispute” as to Kraynak’s guilt as “whether he

knowingly or intentionally issued the controlled substances outside the usual course of professional practice and not for a legitimate medical purpose.” (Appendix B at p. 21).

In analyzing whether Kraynak issued the controlled substances outside the usual course of professional practice and not for legitimate medical purpose, the District Court asserted that, “Although contested by Kraynak, the evidence overwhelming[ly] supports the conclusion that Kraynak’s prescribing habits as to each of the identified victims was outside the usual course of professional practice and not for a legitimate medical purpose.” (Appendix B at p. p. 21). The District Court cited to evidence presented by the Government at trial, including, but not limited to, expert testimony of Stephen Thomas, M.D., related to “several steps [that] must be taken by doctors when evaluating patients and prescribing controlled substances to those patients,” keeping medical records, and potentially dangerous combinations of controlled substances, in concluding that the evidence “strongly demonstrates” that Kraynak issued the prescriptions to the identified victims outside of the usual course of professional practice and without a legitimate medical purpose. (Appendix B at pp. 21-37).

Here, Kraynak asserted that he is innocent of all of the charges in his *pro se* motion to withdraw his guilty plea, as well as during the hearing on his *pro se* motion to withdraw his guilty plea held on March 4, 2022, and then again in both his motion and supplemental motion to withdraw his guilty plea filed through undersigned counsel, as well as at the hearing on his motions to withdraw his guilty

plea filed through undersigned counsel. Kraynak has maintained the position that he is innocent but that, based on his Prior Counsel's ineffective assistance, he felt like he had no choice but to plead guilty when he did.

At the hearing on Kraynak's *pro se* motion to withdraw his guilty plea and motion to appoint new counsel, held on March 4, 2022, Kraynak asserted that the 12 victims identified in the Indictment were his patients and were treated in the context of a legitimate and valid doctor/patient relationship. Kraynak further explained that, according to the licensing board decision related to an earlier consent order entered into by Kraynak, other than not keeping the best medical records, his conduct was within the standard of care, as there is not a defined standard of care within his field of expertise related to avoiding engaging in "criminal drug distribution."

Kraynak further asserted that the Indictment incorrectly refers to the Pennsylvania Code of Professional and Vocational Standards, which refers to the Medical Practice Act in Pennsylvania, as opposed to the Osteopathic Medical Practice Act, which governs Osteopathic physicians, like Kraynak, as well as incorrectly refers to a list of manners as consisting of "outside the usual course of medical practice and not for a legitimate medical purpose, despite the fact that no law or any other regulation, lists such manners as requirements for physicians.

Further, the District Court acknowledged that Kraynak indeed contested that his prescribing habits were outside the course of professional practice and not for a legitimate medical purpose, which supports that Kraynak asserted his innocence. (See Appendix B at p. 21).

Next, the District Court concluded that the evidence presented by the Government at trial strongly demonstrates that Kraynak “knew or intended” for his prescription practices to be outside of the usual course of professional practice and without a legitimate medical purpose. (Appendix B at p. 37).

“Section 841’s ‘knowing or intentionally’ *mens rea* applies to the statute’s ‘except as authorized’ clause[,]” and “[o]nce a defendant meets the burden of producing evidence that his or her conduct was ‘authorized,’ the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.” *Ruan*, 142 S. Ct. 2370.

The District Court compared Kraynak’s case to *Ruan*, concluding that the Government’s evidence that Kraynak’s conduct violated objective medical standards and that he knew that he was violating those standards “strongly indicates intent.” (Appendix B at p. 38). The District Court specifically cited to evidence that Kraynak had entered into a consent order at some time, which had found that Kraynak had “departed from standards of acceptable medical practice in prescribing controlled substances,” and, as a result of which Kraynak was required to take a course in the management of controlled substances. (Appendix B at pp. 38-39). However, the District Court again acknowledged that Kraynak asserted his innocence in stating that Kraynak “argues that references to the administrative licensing actions taken against him are immaterial.” (Appendix B at p. 39).

The District Court further concluded that, based on the administrative licensing actions and subsequent educational courses that Kraynak was required to

take, “it is evident that Kraynak knew that he was required to keep certain records but failed to do so,” and that it is “also evident that he was aware of the medical standards that apply when issuing opioid prescriptions, but intentionally violated those standards.” (Appendix B at p. 40).

Again, the District Court acknowledged that Kraynak “denies any such intent,” but asserted that the “circumstantial evidence reveals otherwise.” (Appendix B at p. 37). However, it is noted that, at the time of Kraynak’s trial, the Government had the burden of proving that Kraynak prescribed controlled substances in an unauthorized manner, but after the holding in *Ruan*, the Government has the burden of proving, beyond a reasonable doubt, that Kraynak *knowingly or intentionally* prescribed controlled substances in an unauthorized manner. Not only did the Government not prove that Kraynak’s prescribing practices were outside the usual course of professional practice and without a legitimate medical purpose, but it also did not prove that Kraynak intended or knew that his conduct was unauthorized. Further, the consolidated cases addressed in *Ruan* are very similar to Kraynak’s case.

More specifically, Kraynak, like the defendants in *Ruan*, argues that his dispensation of controlled substances was lawful because said substances were dispensed pursuant to valid prescriptions, as well as that his prescribing practices satisfy the standard found in 21 C.F.R. § 1306.04(a), as his prescriptions were “issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” *See* 21 C.F.R. § 1306.04(a).

The District Court summarily concluded that “the evidence

overwhelming[ly] established Kraynak’s guilt for the crimes . . . to which he pled guilty,” that Kraynak “has not and cannot credibly assert his innocence,” and that Kraynak’s “protestations to the contrary are incredible . . .” (Appendix B at p. 43). However, throughout its Memorandum Opinion, the District Court acknowledges that Kraynak has asserted his innocence, while erroneously concluding that that factor weighs against granting Kraynak’s motions to withdraw his guilty plea. Not only did Kraynak sufficiently assert his innocence, but legal innocence alone can support withdrawal of a guilty plea. *See James*, 928 F.3d at 253. Therefore, the District Court erred in denying Kraynak’s motions to withdraw his guilty pleas.

2. The Third Circuit Erred in Considering Whether Kraynak Demonstrated his Innocence and in Concluding that Kraynak Did Not Demonstrate his Innocence.

Not only did the Third Circuit erroneously conclude that the first factor weighed against granting Kraynak’s motions to withdraw his guilty plea, but it also erroneously *considered* the first factor as whether Kraynak “demonstrated” his innocence as opposed to considering whether Kraynak “asserted” his innocence, and ultimately concluded that Kraynak did not “demonstrate” his innocence. (Appendix A at pp. 6-8).

More specifically, while the Third Circuit cited to the same three-factor test for evaluating a motion to withdraw a guilty plea, filed after the trial court has accepted the guilty plea but before it has imposed sentence, as did the District Court—the first factor of which is whether the defendant “asserts his innocence”—the Third Circuit concluded that Kraynak did not “demonstrate his innocence.” (Appendix A at pp. 6-7). The Third Circuit asserted that Kraynak “did not deny having engaged in the

conduct underlying the 12 counts to which he pled guilty, and instead argued only that he is legally innocent.” (Appendix A at p. 7). The Third Circuit further found that Kraynak “identified no ‘facts in the record that support [his] claimed defense’ that the charged conduct fell within the usual course of professional practice.” (Appendix A at p. 7).

As previously mentioned, Kraynak has consistently asserted his innocence, in both denying the conduct underlying the 12 counts to which he pled guilty, as well as pointing to facts in the record to support his defense. He has maintained that he is innocent of all of the charges, including in his *pro se* motion to withdraw his guilty plea, as well as during the hearing on his *pro se* motion to withdraw his guilty plea, and then again in both his motion and supplemental motion to withdraw his guilty plea filed through undersigned counsel, as well as at the hearing on his motions to withdraw his guilty plea filed through undersigned counsel. Further, he has asserted that the 12 victims identified in the Indictment were his patients, all of whom were treated in the context of a legitimate doctor-patient relationship. Kraynak has maintained the position that he is innocent but that he felt that he had no choice but to plead guilty because of his Prior Counsel’s ineffective assistance.

Then the Third Circuit went on to conclude that, to the contrary, “the record makes clear that Kraynak repeatedly failed to keep appropriate medical records, failed to examine or diagnose his patients before prescribing opioids, and failed to note signs of substance abuse in his patients, all of which are compelled by the standard of medical practice.” (Appendix A at p. 7). The Third Circuit stated that,

while Kraynak argued that the Government's evidence and legal authorities pertain to standards for conventional medicine and so are irrelevant to his duties as an osteopathic physician, it was "his burden to show that the professional standards for osteopathic physicians authorize the conduct to which he pled guilty: prescribing controlled substances without having first examined or diagnosed the patient," and that Kraynak "made no showing to that effect." (Appendix A at p. 7).

The Third Circuit erroneously characterized the conduct to which Kraynak pled guilty as "prescribing controlled substances without having first examined or diagnosed the patient," while Kraynak pled guilty to conduct including distributing and dispensing controlled substances that were not prescribed for a legitimate medical purpose, and not in the usual course of professional practice in one or more of 16 manners, as enumerated in the Indictment, among others. Further, while the Third Circuit asserted that it was Kraynak's burden to prove his defense, Kraynak relied on his Prior Counsel to attack the Government's evidence as well as present evidence on Kraynak's behalf, including an expert witness, to prove his defense. However, Kraynak's Prior Counsel provided ineffective assistance to him throughout the course of their representation, which ultimately led to Kraynak attempting to take the path of least resistance by pleading guilty in the middle of his trial.

The Third Circuit further concluded that *Ruan* also does not "undermine Kraynak's guilt," asserting that the holding in *Ruan* is that a "physician may be convicted under § 841 so long as he knew that his conduct was unauthorized," and that, during the plea colloquy, "Kraynak answered in the affirmative when asked

whether he 'kn[ew] that the prescriptions [at issue] were outside the usual course of professional practice and not for a legitimate medical purpose.' " (Appendix A at pp. 7-8).

First, Kraynak's guilty plea was essentially rendered involuntary as a result of his Prior Counsel's ineffective assistance. In other words, Kraynak would not have pled guilty, nor would he have made any of the statements surrounding his guilty plea colloquy but for his Prior Counsel's ineffective assistance. Second, without Kraynak's guilty plea and/or colloquy, the Government did not otherwise meet its burden of proving, beyond a reasonable doubt, that Kraynak knowingly or intentionally prescribed controlled substances in an unauthorized manner, as required by *Ruan*.

In conclusion, the Third Circuit erroneously considered whether Kraynak *demonstrated* his innocence as opposed to whether he *asserted* his innocence, as well as erroneously concluded that Kraynak did not demonstrate his innocence. Not only did Kraynak sufficiently assert his innocence, but legal innocence alone can support withdrawal of a guilty plea. *See James*, 928 F.3d at 253. Therefore, the Third Circuit erred in affirming the District Court's denial of Kraynak's motions to withdraw his guilty pleas.

B. The Lower Courts Erred in Denying Kraynak's Motions to Withdraw his Guilty Plea Because Kraynak's Reason for Withdrawing his Guilty Plea—Ineffective Assistance of Counsel—is Sufficiently Strong.

Both the District Court and the Third Circuit concluded that the second factor to be considered in deciding a defendant's motion to withdraw his guilty plea—his

reason for withdrawing his guilty plea—weighed against granting Kraynak’s motions to withdraw his guilty plea. More specifically, Kraynak asserted that he moved to withdraw his guilty plea based on his Prior Counsel’s ineffective assistance.

A court will permit a defendant to withdraw a guilty plea based on ineffective assistance of counsel if the defendant shows that: (1) the attorney’s advice, under all of the circumstances, was “unreasonable under prevailing professional norms,” and (2) that the defendant “suffered sufficient prejudice from his counsel’s errors.” *Jones*, 336 F.3d at 253-54, citing *United States v. Day*, 969 F.2d 39, 42, 45 (3d Cir. 1992) and *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984). With respect to the prejudice element, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Further, this Honorable Supreme Court has held that “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697. Further, a plea is void if it is induced by threats which deprive it of the nature of a voluntary act. *Machibroda v. United States*, 368 U.S. 487 (1962).

The lower courts concluded that Kraynak did not receive ineffective assistance of counsel.

1. The District Court Erred in Concluding that Kraynak Did Not Receive Ineffective Assistance of Counsel.

The District Court concluded that Kraynak's reasons for withdrawing his guilty plea, based on ineffective assistance of counsel, weighed against granting Kraynak's motions to withdraw his guilty plea, as he did not receive ineffective assistance of counsel. (Appendix B at p. 43). The District Court reasoned that, “[g]iven the overwhelming evidence of guilt presented by the Government, Prior Counsel’s advice to plead guilty was eminently reasonable,” as Kraynak “faced a high likelihood of being convicted of the crimes with which he [was] charged.” (Appendix B at pp. 43-44).

The District Court further concluded that, based on the fact that the Sentencing Guidelines range had Kraynak been convicted of even one (1) of the five (5) counts carrying a mandatory minimum sentence of 20 years' imprisonment would have been 360 months to life imprisonment, Prior Counsel's ability to arrange a plea agreement providing for 15 years' imprisonment was “effective representation under the circumstances.” (Appendix B at p. 44).

Kraynak has consistently asserted that his Prior Counsel was ineffective, as their representation and advice was unreasonable under prevailing professional norms. He has further consistently asserted the specific bases for his Prior Counsel's ineffective assistance, including that his Prior Counsel was ineffective in procuring an appropriate expert witness and offering expert testimony on Kraynak's behalf, as well as ineffective in advising Kraynak to plead guilty during trial. Kraynak's Prior Counsel's ineffective assistance essentially rendered his plea involuntary.

The District Court concluded that the three (3) primary reasons that Kraynak provided to explain why he received ineffective assistance of counsel fail. (Appendix B at p. 44). First, the District Court found that Kraynak's contention that he asked his Prior Counsel to procure a forensic pathologist, but they did not do so, without which Kraynak could not rebut Dr. Thomas' assertion that, but for the prescriptions issued by Kraynak, the five (5) patients named as victims in Counts 13 through 17 would not have died, was without merit. (Appendix B at p. 44). The District Court asserted that, at the change of plea colloquy, Kraynak "made no mention of any dissatisfaction with Prior Counsel's decision not to obtain such an expert, and, to the contrary, Kraynak stated under oath that he was satisfied with his legal representation." (Appendix B at p. 44). The District Court further concluded that:

Even if Kraynak was dissatisfied with the decision to obtain a forensic pathologist, there is no evidence that Kraynak's expert witness, Carol A. Warfield, M.D., a professor and pain specialist at Harvard Medical School, could not adequately attempt to rebut Dr. Thomas' testimony—particularly since her expert report mirrored a defense that Prior Counsel was attempting to mount against those charges related to the victims' misuse of the drugs that Kraynak prescribed.

(Appendix B at p. 45).

The District Court further concluded that there was no evidence of prejudice to Kraynak, asserting that Dr. Warfield's opinion that Kraynak's prescriptions were not outside the usual course of professional practice and had a legitimate medical purpose would have "directly attacked one of the elements necessary to prove the crime of distribution of a controlled substance causing

death,” and that, had Dr. Warfield been successful in undermining that element of the five (5) offenses, “Kraynak would have been acquitted of those charges regardless of whether the prescriptions that he issued were the but-for causes of the identified deaths.” (Appendix B at p. 45).

The District Court concluded that Kraynak’s statement at the change of plea hearing that “Dr. Warfield’s expert report was ‘outstanding’ and that he never would have pled guilty had he read Dr. Warfield’s expert report prior to the change of plea hearing,” further emphasized the lack of prejudice. (Appendix B at p. 46). The District Court asserted that Kraynak “cannot establish that Prior Counsel’s failure to call a forensic pathologist prejudiced Kraynak by causing him to plead guilty,” because Kraynak “admitted under oath that he would have proceeded with trial had he simply read Dr. Warfield’s expert opinion prior to pleading guilty.” (Appendix B at p. 46).

However, here, Kraynak asserts that Prior Counsel ignored his request to procure a forensic pathologist as a potential expert witness, and instead procured a pain specialist initially and then a toxicologist as a potential expert witness. Kraynak had asked his Prior Counsel to procure a forensic pathologist on several occasions, one of which was by facsimile on April 26, 2021. Kraynak asserts that this advice was unreasonable under prevailing professional norms because neither a pain specialist nor a toxicologist would have been able to opine as to the but-for cause of death of the alleged victims in Kraynak’s case, which was not only reasonable, but necessary, to rebut at least one (1) opinion of the Government’s expert witness, Dr. Thomas—

specifically, the opinion that at least some of the victims “would not have died” but-for Kraynak’s prescription practices.

Further, not only did Kraynak’s Prior Counsel fail to procure an expert in forensic pathology, but they were further ineffective in offering the expert testimony they did offer. More specifically, Prior Counsel had filed a notice of intent to offer expert testimony from Dr. Warfield, a professor and pain specialist at Harvard Medical School, but they failed to provide the Government with a summary of Dr. Warfield’s testimony by the deadline ordered by the Court, resulting in the Government filing a motion to compel Kraynak’s Prior Counsel to produce that summary.

Then, at the pretrial conference held on August 9, 2021, just one (1) month prior to trial, Kraynak’s Prior Counsel informed the District Court and the Government that they were attempting to hire an expert toxicologist. On August 13, 2021, Prior Counsel provided the Government with a brief notice of expert opinion related to the proposed testimony of Susan M. Skolly-Danzinger, Pharm.D., prompting the Government to file a motion to preclude Dr. Skolly-Danzinger’s testimony, which was granted by the District Court.

The District Court excluded Dr. Skolly-Danzinger’s testimony based on its conclusion that her opinions were largely unreliable, as many of them were based upon speculation, and that any probative value of Dr. Skolly-Danzinger’s testimony was substantially outweighed by the high likelihood that her opinions would mislead the jury and confuse the issues. The District Court also noted its displeasure with

Prior Counsel's production of a new proposed expert witness "so close to trial."

Further, at the time that Dr. Skolly-Danzinger's testimony was precluded by the District Court, Kraynak's Prior Counsel had still not had their originally proposed expert, Dr. Warfield, prepare an expert report nor did they provide an expert report to the Government. It was not until September 11, 2021, several days after trial had started, that Prior Counsel had Dr. Warfield prepare an expert report, and they did not provide the report to the Government until the second day of Dr. Thomas' testimony.

Additionally, Kraynak asserts that Dr. Warfield, who is a professor and pain specialist at Harvard Medical School, would be as equally unable as Dr. Skolly-Danzinger to testify to a but-for cause of death of the victims. Kraynak has also asserted that he was further discouraged from authorizing Prior Counsel to attempt to offer Dr. Warfield as an expert witness after Prior Counsel's investigator, Matthew Chappell, said, in the presence of Kraynak and his sister, Nancy Abraczinksas, that the defense "did not know what Dr. Warfield was going to say on the stand."

Further, to the contrary of the District Court's assertion that there was no evidence that Dr. Warfield could not adequately attempt to rebut Dr. Thomas' testimony, there was also no evidence presented by Prior Counsel that Dr. Warfield *could* adequately attempt to rebut Dr. Thomas' testimony. In fact, at the hearing on Kraynak's motions to withdraw his guilty plea, Prior Counsel admitted that it was "definitely" going to be an issue for Kraynak's case that the testimony of the toxicologist, Dr. Skolly-Danzinger was precluded by the District Court, since Prior

Counsel had intended to use the toxicologist to contradict the testimony of the Government's expert, Dr. Thomas. Prior Counsel further testified that he was only "fairly confident" that he would be able to present Dr. Warfield's testimony for the same purpose that the Government was presenting Dr. Thomas's testimony.

Finally, Kraynak did indeed suffer prejudice in that if Prior Counsel would have secured a forensic pathologist or even a toxicologist and/or another expert who could provide expert testimony to contradict the testimony of the Government's expert, Dr. Thomas, Kraynak very likely would have proceeded with trial. Kraynak was prejudiced by the fact that, against his wishes to obtain a forensic pathologist as an expert witness, Prior Counsel decided to obtain a toxicologist, the testimony of whom was ultimately precluded by the District Court. Further, Kraynak was prejudiced by the fact that Prior Counsel did not take the necessary steps to ensure that Dr. Warfield could provide expert testimony on Kraynak's behalf, as Prior Counsel did not even have an expert report "in hand" until sometime during the Government's case-in-chief.

Secondly, the District Court concluded that Kraynak's assertions to support his argument that Prior Counsel's advice to enter a plea agreement was unreasonable under prevailing professional norms are "belied by the facts." (Appendix B at p. 46). More specifically, the District Court concluded that, "although Kraynak asserts that he was assured by Prior Counsel that he would be eligible for certain programs that would reduce his actual sentence below 15 years, and that he only subsequently learned through his own research that he would not be eligible for those programs,"

his assertion is belied by the facts, and that Kraynak did not otherwise present any evidence that he in fact did not qualify for any such programs. (Appendix B at p. 46). The District Court further reasoned that, at the change of plea colloquy, Kraynak denied that anyone promised or offered him anything aside from the written plea agreement in order to get him to plead guilty. (Appendix B at pp. 46-47). Finally, the District Court concluded that it did not find credible Kraynak’s “self-serving and contradictory statements that attempt to rebut his sworn statement made during the change of plea hearing.” (Appendix B at p. 46).

The District Court also concluded that Prior Counsel’s testimony at the hearing on Kraynak’s motions to withdraw his plea was persuasive, in that, while Prior Counsel “mentioned the possibility that Kraynak could reduce his sentence to as little as perhaps five years’ imprisonment through certain programs . . . no promises were ever offered, and Prior Counsel was clear that Kraynak may have to serve the entirety of his sentence.” (Appendix B at pp. 46-47). The District Court finally concluded that it could not “find either that Prior Counsel provided deficient advice, or that there was any resulting prejudice based on Prior Counsel’s statements.” (Appendix B at p. 47).

However, Kraynak asserts that many of the reasons that he ultimately decided to plead guilty were based on the verbal conversation with Prior Counsel the day before he pled guilty, which included, among other things, Prior Counsel’s suggestions that Kraynak would not have to serve the entire 15-year-sentence. More specifically, Kraynak’s Prior Counsel told Kraynak that they “want to get him home,”

and that Kraynak could “get out early.” Prior Counsel indicated to Kraynak that he would likely not serve the full 15-year-sentence due to a variety of factors, including, but not limited to, the RDAP program, Kraynak’s age, and the prevalence of COVID-19 and inmates getting out of jail to serve their sentences on house arrest due to COVID-19. Kraynak’s Prior Counsel further advised Kraynak that he could fight to get into a “camp,” which would shorten the length of his sentence even more.

However, after doing his own legal research, Kraynak became aware that, because of the sentencing enhancements related to the deaths involved in his case, he would not be eligible for many of the alternative dispositions described by Prior Counsel. Kraynak asserts that, if his Prior Counsel had informed him that, considering the circumstances of his case, he would not get out of prison early, he would have proceeded with trial.

Kraynak’s son, Mr. Raymond Kraynak, (hereinafter referred to as “Kraynak II”) had been present during the verbal discussion between Kraynak and his Prior Counsel regarding the plea agreement, and he testified at Kraynak’s hearing on his motions to withdraw his guilty plea. Kraynak II testified that the verbal discussion lasted approximately 30-60 minutes, and that the discussion consisted mostly of Kraynak’s Prior Counsel advising Kraynak that the only way to get Kraynak home was to accept the plea offer and that there were options for Kraynak to attempt to shorten the time he would be incarcerated. Kraynak II further testified that Prior Counsel told Kraynak that if he attempted to withdraw his plea, he would be in automatic breach of the plea agreement and the District Court would

automatically sentence him to the maximum term of imprisonment for his charges, and that he would not have the right to appeal.

Further, at the hearing on Kraynak's motions to withdraw his plea, one of Kraynak's former attorneys admitted that he told Kraynak about programs that might be available to him in the Bureau of Prisons ("BOP"), suggesting that they may also reduce the length of his sentence. While Kraynak's Prior Counsel further testified that he would not have guaranteed anything, he proceeded to testify that he explained to Kraynak that his 15-year sentence would likely be reduced to 12-and-a-half years with "good time," and "that was pretty much a guarantee, unless he messed up in prison."

While Kraynak admits that his testimony at his change of plea hearing may contradict his testimony in support of his motions to withdraw his guilty plea, Kraynak asserts that his decision to plead guilty was rendered involuntary by his Prior Counsel's ineffective assistance in inducing him to enter the plea agreement. Kraynak felt like he had no choice but to plead guilty at that time, so he similarly felt like he had no choice but to say what he needed to say at his plea colloquy to have his plea accepted by the District Court. Kraynak clearly suffered prejudice as a result of his Prior Counsel's ineffective assistance, in the form of pleading guilty to crimes he denies having committed.

Third, the District Court concluded that Kraynak's assertion that he had "insufficient time to review the plea agreement and reflect on it in a meaningful way," was undermined by the evidence. (Appendix B at p. 48). More specifically, the District

Court asserted that Kraynak's assertion was undermined by the fact that, during the change of plea colloquy, "Kraynak stated that Prior Counsel had 'adequately explained the plea agreement to' him." (Appendix B at p. 48). The District Court concluded that Kraynak's assertion was further undermined by the fact that the Government "summarized in detail the terms of the plea agreement in open court," and that Kraynak "stated that the Government had accurately summarized the terms of the plea agreement as he understood them." (Appendix B at p. 48). The District Court also cited to the testimony of Prior Counsel offered at the hearing on Kraynak's motions to withdraw his plea that Prior Counsel was "satisfied that Kraynak understood the plea agreement after Prior Counsel reviewed it with him word for word," to support its conclusion that "Kraynak again can demonstrate neither deficient advice nor prejudice." (Appendix B at p. 48).

The District Court further concluded that there was no indication that Kraynak's plea was "coerced or otherwise involuntary," reasoning that Kraynak's assertion that he was pressured into accepting the plea agreement is undermined by his statements made at the change of plea colloquy. (Appendix B at p. 49). More specifically, the District Court found that it conducted a thorough plea colloquy, during which Kraynak "affirmatively stated that he had not been coerced or pressured into pleading guilty, nor had he been promised anything other than what was contained in the plea agreement to get him to plead guilty." (Appendix B at p. 49). The District Court further asserted that Kraynak is a "well-educated doctor, fully understood what he was doing and why he was doing it when he pled guilty and

stated that he had reviewed and understood the plea agreement.” (Appendix B at p. 49).

With respect to Kraynak’s assertion that his Prior Counsel advised him that he needed to answer “yes” to the questions asked of him during the change of plea hearing if he wanted the Court to accept his guilty plea, the District Court again found Prior Counsel’s testimony credible and concluded that Prior Counsel “never advised Dr. Kraynak to say yes to a question even if that answer was a lie.” (Appendix B at pp. 49-50). The District Court cited to the testimony of Prior Counsel to support its conclusion, which consisted of Prior Counsel admitting that he “did not recall ever having said that Kraynak needed to say yes to all questions,” but explaining that “he would have advised Kraynak that Kraynak needed to affirm that he was guilty of the offenses to which he was pleading guilty,” as well as that he “never counseled Kraynak to lie, and that he ordinarily would advise his clients not to say they are guilty to an offense if they were innocent.” (Appendix B at p. 49).

However, Kraynak asserts that his Prior Counsel’s advice for Kraynak to plead guilty was unreasonable under prevailing professional norms. More specifically, Prior Counsel advised Kraynak to accept the plea offer presented by the Government after the Government rested its case-in-chief after only verbally discussing the plea agreement with Kraynak that same and presenting the written plea agreement less than one (1) hour before Kraynak’s case-in-chief was to begin the next day. Kraynak had approximately 35 minutes to review the plea agreement, and during that time, Prior Counsel read the plea agreement to Kraynak, but glossed over

portions of it. Further, during that short period of time, there was an apparent roof leak, which set the fire alarm off, all of which interrupted Kraynak's review of the plea agreement.

In reading the plea agreement to Kraynak, Prior Counsel advised also advised him that the judge was going to ask questions, to which Kraynak had to answer "yes" to have the plea be accepted by the judge. In fact, it was Kraynak's understanding that, if he answered "no" to any of the questions during the plea colloquy, the judge would not accept the plea—therefore, Kraynak affirmatively answered all of the questions during the plea colloquy, including whether he was satisfied with his legal representation from his Prior Counsel up until the date of the plea agreement, despite the fact that Kraynak was *not* satisfied with said representation. Kraynak testified at the hearing on his motions to withdraw his plea that, when he had to admit his guilt to the crimes in the Indictment, he "really had to choke on his words," and paused a lot before admitting such guilt, but that Prior Counsel told him that he had to answer the question.

Kraynak further testified to what his prior defense counsel did *not* discuss with him during this verbal conversation, including, but not limited to, that Kraynak would have to admit his guilt before the district court judge; that any motions, objections, hearings held on the exclusion of witnesses, etc. could not be appealed after Kraynak pled guilty; or that the aforementioned issues could be appealed if Kraynak proceeded with trial.

In addition to the aforementioned instances of ineffective assistance of

counsel, which Kraynak addressed in detail in his motions, Kraynak also testified at the hearing on his motions to withdraw his plea that he had given his Prior Counsel copious amounts of evidence that would have shown that his prescribing habits were within the usual course of medical practice and for a legitimate medical purpose. Additionally, Kraynak had written hundreds, if not near thousands of potential questions that would have delineated illegal prescribing versus legal prescribing.

More specifically, in the approximately four (4) years leading up to Kraynak's trial, despite Kraynak's repeated requests to meet with Prior Counsel, Prior Counsel only met with Kraynak to go over all of the evidence on one (1) occasion. Even during that one (1) occasion, Prior Counsel never went over specific details related to the 12 patients named in Kraynak's Indictment and how that information may be helpful to Kraynak's case. At the time that trial began, Kraynak had not met with either of his prior attorneys to go over the case in relation to the 12 patients named in the Indictment, the Government's allegations against Kraynak, and what Kraynak would do to defend himself in this regard. Further, Prior Counsel never contacted many of the witnesses whom Kraynak wanted to call to testify on his behalf.

Even beyond his Prior Counsel's ineffective assistance of counsel in advising Kraynak to plead guilty, Kraynak further testified to their ineffective assistance of counsel *during* the trial, to include Attorney Thornton's lack of preparation and confusion during trial, as well as their ineffective assistance of counsel in relation to raising the issue of ineffective assistance of counsel. More specifically, Kraynak asked Prior Counsel how to proceed with raising the issue, to

which Prior Counsel responded that there was a form that he could fill out and file with the Court. However, when Kraynak asked Prior Counsel about the form, Prior Counsel advised Kraynak that he had to write a letter regarding his claim of ineffective assistance of counsel and that Kraynak could file it up until the date of sentencing. In fact, both of Kraynak's prior attorneys also testified at the hearing on Kraynak's motions to withdraw his plea, and their testimony was consistent with Kraynak's testimony regarding his prior defense counsel's advice related to Kraynak attempting to withdraw his plea and obtain new counsel.

In summary, it is Kraynak's position that his Prior Counsel's advice for Kraynak to plead guilty was unreasonable because it was ultimately prompted by Prior Counsel's earlier ineffective assistance, which essentially rendered Kraynak's plea involuntary. As a result of Kraynak's Prior Counsel's ineffective assistance, Kraynak suffered sufficient prejudice. There is a reasonable probability that, but for the aforementioned unprofessional errors by Kraynak's Prior Counsel, the result of Kraynak's case would have been different. Further, if Kraynak's prior defense counsel had not made promises to Kraynak that he would not serve the entirety of the 15-year prison sentence included in the plea agreement, in an effort to convince him to enter into the plea agreement, he likely would not have entered the plea agreement.

2. The Third Circuit Erred in Concluding that Kraynak Did Not Receive Ineffective Assistance of Counsel.

The Third Circuit concluded that Kraynak's proffered reasons for withdrawing his guilty plea—that he received ineffective assistance of counsel—were unpersuasive. (Appendix A at p. 8). More specifically, the Third Circuit bound itself

by the District Court’s findings that Kraynak’s Prior Counsel’s strategic choices before and during trial were reasonable and that Prior Counsel’s advice that Kraynak should plead guilty was “eminently reasonable.” (Appendix A at p. 8). The Third Circuit broadly asserted that the determinations of the District Court have “ample support in the record.” (Appendix A at p. 8).

More specifically, throughout Kraynak’s motions to withdraw his plea, as well as the hearings surrounding them, as well as throughout Kraynak’s attempts to appeal the District Court’s denial of his motions to withdraw his guilty plea, Kraynak has pointed to the support in the record for the conclusion that his Prior Counsel’s advice was, under all of the circumstances, “unreasonable under prevailing professional norms,” especially in reference to procuring an appropriate expert witness and offering expert testimony, as well as haphazardly advising Kraynak to plead guilty in the middle of his trial.

Therefore, because the District Court erred in concluding that Kraynak did not receive ineffective assistance of counsel, the Third Circuit also erred in reaching the same conclusion as its conclusion was based on the District Court’s rationale.

C. The Lower Courts Erred in Denying Kraynak’s Motions to Withdraw his Guilty Plea Because Kraynak’s Withdrawal of his Guilty Plea Would Not Have Prejudiced the Government.

Both the District Court and the Third Circuit concluded that the third factor to be considered in deciding a defendant’s motion to withdraw his guilty plea—his reason for withdrawing his guilty plea—weighed against granting Kraynak’s motions to withdraw his guilty plea.

1. The District Court Erred in Concluding that Kraynak’s Withdrawal of his Guilty Plea Would Prejudice the Government.

The District Court initially concluded that the factor of prejudice to the Government is “of little importance given that the other two factors weigh against granting the motion” and that the Third Circuit has held that, where a defendant “failed to meaningfully reassert his innocence or provide a strong reason for withdrawing his plea,” the Government need not show prejudice. (Appendix B at p. 50) (quoting *Jones*, 336 F.3d at 255). The District Court then concluded, nevertheless, that this factor “weighs heavily in favor of denying Kraynak’s motion.” (Appendix B at p. 50).

More specifically, the District Court concluded that the Government spent a “great deal of time and money preparing for trial,” and then spent “nearly three (3) weeks presenting evidence,” specifically referring to testimony from an expert witness who “charges \$550 per hour.” (Appendix B at p. 50). The District Court then asserted that the Government would need to present this evidence if Kraynak were permitted to withdraw his guilty plea, which would be not only “expensive and time consuming,” but would force some witnesses to testify a second time regarding “traumatic experiences from their past.” (Appendix B at pp. 50-51). The District Court finally concluded that this is “significant prejudice” that “weighs in favor of denying” Kraynak’s motions to withdraw his plea. (Appendix B at p. 51).

However, if the district court would have granted Kraynak’s motions to withdraw his guilty plea, the Government would not have been prejudiced by his withdrawal because the delay occasioned by the offering and later withdrawal of his

guilty plea would have been a matter of mere months, and sentencing had not yet occurred.

Further, the delay occasioned by the offering and later withdrawal of Kraynak's guilty plea would have been even shorter had Kraynak's Prior Counsel timely responded to Kraynak's indication that he wished to withdraw his guilty plea, which he expressed in December 2021. Kraynak's Prior Counsel even testified at the hearing on Kraynak's motions to withdraw his plea that, in or around December 2021, when Kraynak and his Prior Counsel met to review the draft of Kraynak's Presentence Investigation Report ("PSR"), Kraynak asked about alleging ineffective assistance of counsel to which Kraynak's Prior Counsel responded that Kraynak could file a motion alleging ineffective assistance of counsel after he was sentenced and that there is a form under the statute that Kraynak can use to file the motion. However, Kraynak's Prior Counsel never provided him with the form, prompting Kraynak to file his *pro se* motion to withdraw his guilty plea.

Kraynak's case stands in contrast with *United States v. Sgarlat*, in which a government witness died between the defendant's guilty plea and subsequent filing of his motion to withdraw the guilty plea. *See United States v. Sgarlat*, 705 F.Supp. 2d 347, n. 5 (E.D. Pa. 2010).

Here, there was no evidence that a government witness died between Kraynak's guilty plea and subsequent filing of his motion to withdraw his guilty plea, nor evidence of any other reason why a government witness would not otherwise have been available to testify at another trial. The District Court erred in concluding that

the Government would have been prejudiced by Kraynak's withdrawal, as the Government had retained all of its evidence in preparation for sentencing.

2. The Third Circuit Erred in Concluding that Kraynak's Withdrawal of his Guilty Plea Would Prejudice the Government.

The Third Circuit concluded that the withdrawal of Kraynak's motions to withdraw his guilty plea would prejudice the Government, erroneously asserting that Kraynak waited until after the Government rested its case to withdraw his plea. (Appendix A at p. 8).

More specifically, the Third Circuit erroneously referred to the timeliness of Kraynak's "withdrawal" of his guilty plea as opposed to referring to the fact that Kraynak waited until after the Government rested its case in chief to plead guilty. (Appendix A at p. 8). However, Kraynak's decision to plead guilty at that point in the trial was a result of the advice of Kraynak's Prior Counsel, which was unreasonable under prevailing professional norms.

Kraynak asserts that the Government expended resources preparing for and presenting its case to the jury as a result of his exercise of the constitutional right to a fair trial, not as a result of his decision to plead guilty and/or withdraw his guilty plea.

II. CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

/s/Stephanie L. Cesare
Stephanie L. Cesare, Esquire
PA 308102
Abom & Kutulakis, LLC
2 W. High St.
Carlisle, PA 17013
717-249-0900 – Phone
717-249-3344 – Fax
slc@abomkutulakis.com
Attorney for Petitioner

January 2, 2024