IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

_____

No. _____

JAMES P. GRIFFIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

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

_____

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January 16, 2020

QUESTIONS PRESENTED

I. Whether the trial court abused its discretion in arbitrarily denying a continuance of trial requested due to Petitioner's documented medical problems.

II. Whether the amount of restitution and forfeiture was incorrectly calculated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Petitioner, James P. Griffin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 7, 2019.

OPINION BELOW

The decision of the Second Circuit, United States v. Griffin, ___ Fed. Appx. ___, 2019 WL 5801712 (2d Cir. 2019), appears in the Appendix hereto, at 1-6.

JURISDICTION

The judgment of the Second Circuit was entered on November 7, 2019. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the assistance of counsel for his defense.**

STATEMENT OF THE CASE

Petitioner was charged by superseding indictment with two separate fraud schemes: a charitable gift annuity ("CGA") scheme which led to charges of mail fraud (counts 1-5), wire fraud (counts 6-13), and money laundering (counts 19-23), and a tax-sheltered retirement investment scheme which led to charges of mail fraud (counts 14-18). In the weeks before trial was scheduled to begin, the district court denied three separate requests for a continuance due to Petitioner's health issues. Following a jury trial, Petitioner was convicted on all counts.

Petitioner, a 71-year-old businessman who had years of experience in the insurance industry, wanted to develop a product to help the disabled community. He set up companies under the umbrella '54Freedom,' a reference to the 54 million individuals with special needs. The corporate mission segued from providing low cost insurance to protect the disabled after their parents died to marketing CGAs that would provide a lifetime income stream, a contribution to the purchaser's charity of choice, and a corresponding tax benefit.

Marketing materials - which were generally not sent directly to potential buyers but rather only to brokers - represented that the CGAs were supported by an A-rated or higher ranked insurance carrier, and thus had no risk of loss of principal. According to the promotional material, an outside insurance company would underwrite the annuities and make the annuity payments. Those buying a CGA from 54Freedom filled out an annuity application that was to be submitted to a partnering insurance company.

Petitioner did not, in fact, purchase annuities for buyers of 54Freedom CGAs. At first, 54Freedom (or a related entity) self-funded the annuities – that is, made the annuity payments directly to the CGA buyers. After a while, those payments ceased. Some of the money that came in to buy the CGAs was redistributed to other 54Freedom companies or used to pay credit card bills. Notwithstanding this, charitable contributions of tens of thousands of dollars were made.

Petitioner also solicited investors in his companies, promising that money from tax-sheltered retirement accounts such as IRAs would be rolled over into similar vehicles so no tax penalties would be incurred. Investors were given forms to set up rollover accounts at PENSCO, a third-party custodian, but the money given to Petitioner's companies was never transferred into the PENSCO accounts. Petitioner also promised to

reimburse investors for any tax penalty that was incurred, but did not do so.

Petitioner testified at trial that he always believed in the mission of 54Freedom, and believed that the companies would become profitable. For example, he had arranged for the printing of 150,000 'Chicken Soup for the Soul' books aimed at the soccer-loving community, which he believed would be a lucrative product. Petitioner testified that the transfer of funds reimbursed his other companies and his wife for monies loaned to the 54Freedom Foundation, and that credit card payments were only for business-related expenses, and was backed up in this regard by testimony from the companies' accountant. His companies had not declared bankruptcy, and were still doing business and continued to generate a revenue stream.

Petitioner explained that investors would receive a promissory note from the company, with the purchase price less than the face amount of the note. This was to insure that, should there be any potential tax liability where an investor was collapsing a tax-sheltered vehicle, the investor would be protected. As for the annuity payments, Petitioner testified that those continued until the SEC became involved. Petitioner maintained, and continues to maintain, that he had no intent to defraud.

The court sentenced Petitioner to a below-guidelines sentence of 60 months on each count of conviction to run concurrently, to be followed by concurrent three-year terms of supervised release. The court ordered restitution in the amount of $2,153,533.93, the same amount as in the order of forfeiture.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial legal importance.

I. Arbitrary denial of a continuance requested due to documented health problems.

Sixteen days before the scheduled start of trial, the defense filed a request for adjournment of trial due to Petitioner's poor health. The request was accompanied by medical records and a letter from Petitioner's rheumatologist, attesting to Petitioner's recent diagnosis of Rheumatoid Arthritis and stating that the accompanying severe pain and fatigue made it difficult for him to function. Defense counsel stated in the letter motion that, for the preceding four months, poor health had constrained Petitioner's ability to participate in the preparation of his defense. The court denied the request, without hearing or explanation.

The defense renewed the continuance motion a week later. It submitted in support a specific request by Petitioner's treating

rheumatologist for a 60-90 day continuance of trial until his arthritis was better under control. The physician stated that treatment had begun, but the medication would take time to fully work into Petitioner's system. This requested continuance, too, was denied the very same day without hearing or explanation.

At the final pretrial conference a few days later, the defense again raised the issue, and asked whether the court would like to speak with the doctor directly. The defense pointed out that Petitioner's prescribed medication was causing fatigue and swelling. The court declined to speak with the doctor personally, stating "that's not going to help me," and reiterated that the trial would not be postponed. The court said that there was an insufficient basis "to adjourn the trial any more."

On appeal, the Second Circuit held that Petitioner failed to meet his burden of showing prejudice, and that therefore the district court did not abuse its discretion in denying the requested continuance. United States v. Griffin, ___ Fed. Appx. ___, 2019 WL 5801712 (2d Cir. 2019), App. at 3. However, the Court noted:

> [T]he District Court did not explain why the submissions [from the physician] were insufficient to support a continuance or why it was satisfied that Griffin's due process and Sixth Amendment right to the effective assistance of counsel would be adequately protected, notwithstanding Griffin's stated concerns to the contrary.

Id. The Court conceded "[a]dmittedly, Griffin has pointed to various facts in the record that support his claim that the District Court's denial of the continuance was in fact arbitrary," but since it did not find that this substantially impaired his defense, ruled against him on appeal. Id.

The decision whether to grant a continuance of trial is traditionally within the discretion of the court. However, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" can violate not only due process, but the Sixth Amendment right to the assistance of counsel as well. Ungar v. Sarafite, 376 U.S. 575, 589 (1964). To determine if a denial is so arbitrary as to violate these constitutional rights depends "particularly in the reasons presented to the trial judge at the time the request is denied." Id.

Here, the denial of a continuance of trial was so arbitrary as to violate Petitioner's constitutional rights. The reasons presented to the trial court justifying a continuance were Petitioner's health problems – specifically, a recent diagnosis of active Rheumatoid Arthritis, triggering acute fatigue, pain, swelling and dizziness. His physician stated this made it "difficult for him to function." The treatment regimen, which was begun towards the end of June 2016, would "take time to fully work into the patients [sic] system." Accordingly, the doctor expressly requested a delay of trial of 60-90 days.

Petitioner's health problems adversely impacted his ability to assist in the preparation of the defense. He was unable to engage in any lengthy trial preparation. He had problems concentrating on "the imminent needs of his case." Although the Court of Appeals found that his health problems did not substantially impair his defense, App. at 3, these problems highlighted by counsel showed why denial of the continuance adversely impacted his defense.

Prior to this health-related request for a continuance, there had been only two prior extensions of time, both stipulated by the parties, since the superseding indictment was handed down. This was not a case that had been languishing, nor was there any "long-standing pattern to delay the trial." Jenkins v Brown, 412 Fed. Appx. 394, 395 (2d Cir. 2011)(request for illness-related continuance mid-trial appropriately denied). Similarly, there was no suggestion of any attempt at "manipulat[ion] so as to obstruct the orderly procedure in the courts …" United States v. Pascarella, 84 F.3d 61, 68-69 (2d Cir. 1996)(citation omitted) (proper to deny defendant's request four days before trial for postponement to allow his newly selected – and fourth – lawyer to prepare).

The trial court did not explain its reasons for denying the continuance, except to express skepticism about Griffin's medical condition and its significance:

> [H]e has a medical condition on the eve of trial he's going to come in with and say this all of a sudden is so bad that I can't sit there in the course of trial for an hour at a time?

Although the defense pointed out that only the diagnosis was recent, but the issues had been ongoing for months, the court – for the third time – simply rejected the request out of hand. It declined to speak personally with the treating physician, who could have answered the question posed by the court. The court held no evidentiary hearings and heard no argument. The court did not question Petitioner about the impact of his medical condition on his ability to concentrate, assist counsel in the preparation of his defense, or generally participate in trial. Indeed, the record reflects that the court would not have even seen Petitioner for several months prior to the first day of trial on July 6, 2016.

The trial court did not assess Petitioner's ability to assist counsel in his defense, either before trial or during the proceedings. It apparently rejected the claim (not actually made) that he could not sit for an hour at a time. The court never addressed the issue raised by the defense – that is, "serious concerns regarding his ability to assist in preparation for the

defense." The right to assist in the preparation of one's defense is a separate and distinct constitutional right, United States v. Ferrarini, 219 F.3d 145 (2d Cir. 2000), *cert. denied sub. nom* Kagan v. United States, 532 U.S. 1037 (2001), and so even assuming that the court found Petitioner had the physical capability to be present at trial (that is, to "sit there in the course of trial for an hour at a time"), this does not necessarily mean that Petitioner had the physical capacity to assist his defense counsel.

It is impossible to quantify or point out specific prejudice ensuing from an inability to effectively assist in the preparation and presentation of the defense. The problems cited by the rheumatologist – in particular, severe pain and fatigue – would necessarily have compromised Petitioner's ability both in advance of trial and at trial to focus, recount relevant events, challenge evidence, and in general assist defense counsel. This is the kind of error – akin to the deprivation of counsel at a critical stage of the proceedings – where no specific showing of prejudice should be required. Satterwhite v. Texas, 486 U.S. 249, 256 (1988)(pervasive Sixth Amendment violation can never be considered harmless).

II. The amount of restitution and forfeiture was incorrectly calculated.

The presentence report calculated the 'loss/amount owed' as $2,153,530.93. The court accepted the calculations set forth therein, and imposed restitution and ordered forfeiture in the amount of $2,153,530.93. This calculation was wrong.

The Second Circuit held that Petitioner waived any challenge to the restitution order, by virtue of not making these challenges at sentencing and by agreeing to the figures set forth in the revised PSR after having objected to the amounts set forth in the initial PSR. App. at 4-5. The Court found that this was a "deliberate and arguably tactical decision." Id. at 4. However, contrary to the Court's finding, the defense did, in fact, object to the calculation of loss at sentencing.

The district court noted at the start of the sentencing hearing: "And I understand at this time, we have resolved the differences as to the restitution, until this morning anyway," and then asked defense counsel to explain the new objection. Defense counsel raised the question of whether the restitution figure accounted for a tax benefit or exemption to investors. Petitioner declined the offer of a continuance of sentencing to "straighten out the record just to get [Petitioner's] complete argument in," and reiterated that he wanted to raise the point that certain investors may have been given a

tax deduction. This should have been sufficient to preserve for appeal the issue of the accuracy of the restitution calculations.

First, the restitution order contained arithmetical errors: For victim No. 20, it calculated loss as $68,571.16. The correct amount is $61,464.44 (amount invested ($82,000) less payments received by investor/victim ($16,878.46) less charitable contribution made ($3,657.10)). For victim No. 22, it calculated loss as $407,937.50, when it should have been $387,125.00 (amount invested ($500,000) less payments received by investor/victim ($87,875.00) less charitable contribution made ($25,000)). These mistakes resulted in an overstatement of total loss/amount owed of $27,919.22.

Second, it overstated investment amounts by certain victims: With regard to victim No. 5, the amount invested, and the loss/amount owed, is shown as $114,313.41. However, the evidence at trial was that victim No. 5's investment was less than that: $101,069.75,[1] plus $7,895.03. The investment by victim No. 21 is shown as $171,736.22. The evidence at trial showed that it was actually $137,388.98. Similarly, the evidence showed that the amount invested by victim No. 26 was not the $80,225.00 listed in the PSR, but rather $10,000 less than that - $70,225.17.

[1] Although the trial testimony of this victim, when shown the check she provided to Griffin, stated that is was in the amount of $106,169.57 (Tr. at 596-97), that check – which was introduced in evidence – is in the amount of $101,069.75.

Third, it understated charitable contributions: As to victim No. 6, it failed to account for an additional charitable contribution to St. Jude's Children's Hospital of $17,000. Accordingly, the loss/amount for this victim totaled $430,563.09, not the $447,563.09 set forth. The evidence at trial also showed that there was an additional charitable contribution made to Today's Promise, Inc., in the amount of $16,105.80.

Fourth, it understated payments received by investor/victims: With regard to victim No. 11, it shows payments received of $12,092.68, where the evidence presented at trial showed a total of $14,539.52 in payments received. With regard to victim No. 21, it shows payments received of $70,000, when the testimony at trial was that $77,000 was repaid to this investor.

Given these numerous errors, which resulted in a significantly higher loss amount than warranted by the facts, this Court should grant this Petition so that Petitioner may be resentenced, and the amount of restitution and forfeiture may be recalculated.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

January 16, 2020

Respectfully submitted,

/s/ Tina Schneider

TINA SCHNEIDER
Counsel for Petitioner