Supreme Court, U.S.
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20-5933

No.

Supreme Court of the United States

JUNIOR GRIFFIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Junior Griffin
Petitioner
78178-054
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Philipsburg, PA 16866

ORIGINAL

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QUESTIONS PRESENTED

Petitioner Junior Griffin was charged with several crimes involving conspiracy, possession and distribution of heroin, cocaine and marijuana. The charges were substantially based on a series of wiretaps. At trial, when the government introduced the wiretap evidence, counsel for Mr. Griffin moved to introduce the remainder of the wiretaps as exculpatory and impeachment evidence. The motion was denied as inadmissible hearsay. Mr. Griffin was convicted. On appeal, the Second Circuit affirmed.

1.) When Mr. Griffin was denied his right to present critical exculpatory and impeachment evidence through the unpresented remainder of the government's surreptitious recordings, was he also denied his constitutional right to present a complete defense

2.) Where multiple additional errors affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's supervisory power to vacate his conviction and sentence?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Second Circuit.

More specifically, the Petitioner Junior Griffin and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Junior Griffin, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on 4-30-20.

OPINIONS BELOW

The 4-30-20 opinion of the Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2020 U.S. App. LEXIS 13879 and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Southern District of New York, was entered on 1-8-19, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States District Court for the Southern District of New York denying admission of exculpatory tapes was handed down from the bench on 3-14-18 and is reprinted in the separate Appendix D to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 4-30-20. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> 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. *Id.*

Fed. Rule of Evidence 106 provides as follows:

> Rule 106. Remainder of or Related Writings or Recorded Statements
>
> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Id. (as amended effective Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1929; Oct. 1, 1987.)

Fed. Rule of Evidence 807 provides as follows:

> Rule 807. Residual Exception
>
> (a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.
>
> (b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing of the court, for good cause, excuses a lack of earlier notice.
> Notes

Id. (As amended effective Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 25, 2019, eff. Dec. 1, 2019)

STATEMENT OF THE CASE

On or about 9-29-16 Junior Griffin was charged with violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 841(b)(1)(B), 21 U.S.C. § 841(b)(1)(C), 21 U.S.C. § 846 (Conspiracy to distribute and possess with intent to distribute specified quantities of heroin, crack cocaine, and marijuana) (Count S1-1).

On or about 3-2-18, Junior Griffin was charged in a superseding indictment with violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 841(b)(1)(B), 21 U.S.C. § 846 (Conspiracy to distribute and possess with intent to distribute 280 grams or more of cocaine base in the form of "crack cocaine" and 500 grams or more of a mixture or substance containing a detectable amount of cocaine) (Count S6-1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (distribution and Possession with Intent to Distribute mixtures and substances with a detectable amount of cocaine) (Count S6-2); 21 U.S.C. § 841(b)(1)(D) (Possession with Intent to Distribute mixtures and substances with a detectable amount of marijuana) (Count S6-3).

These charges arose from an extensive series of conversations recorded by the government and/or government agents.

No motion to suppress was filed or litigated by Mr. Griffin.

On or about 3-5-18 Mr. Griffin proceeded to trial. (Appendix B)

At trial, when the government introduced the wiretap evidence, counsel for Mr. Griffin moved to introduce the remainder of the wiretaps as exculpatory and impeachment evidence. The motion was denied as inadmissible hearsay.

On 3-16-18, Mr. Griffin was found guilty by the jury as to violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 841(b)(1)(B), 21 U.S.C. § 846 (Conspiracy to distribute and possess with intent to distribute 280 grams or more of cocaine base in the form of

"crack cocaine" and 500 grams or more of a mixture or substance containing a detectable amount of cocaine) (Count S6-1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (distribution and Possession with Intent to Distribute mixtures and substances with a detectable amount of cocaine) (Count S6-2).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 30 and a Criminal History of "I" which resulted in a guideline sentencing range 97-121 months and a statutory mandatory minimum of 120 months:

On 1-8-19, Mr. Griffin appeared for sentencing. At sentencing, Mr. Griffin objected to the entire "offense conduct" of the Presentence Report and asserted his innocence. The Court corrected ¶21 of the Presentence Report by removing the allegation that Mr. Griffin provided "large quantities" of crack cocaine but left in place ¶41 where the PSI stated that he had distributed "specified quantities" of crack cocaine and cocaine. With that change, the Court adopted the Presentence Report and sentenced Mr. Griffin to 120 months incarceration. (Transcript of sentencing 1-8-19).

On 1-8-19, Mr. Griffin was sentenced to 120 months incarceration for violations of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 841(b)(1)(B), 21 U.S.C. § 846 (Conspiracy to distribute and possess with intent to distribute 280 grams or more of cocaine base in the form of "crack cocaine" and 500 grams or more of a mixture or substance containing a detectable amount of cocaine) (Count S6-1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) (distribution and Possession with Intent to Distribute mixtures and substances with a detectable amount of cocaine) (Count S6-2). This sentence represented the PSI calculations as modified at sentencing etc. (Appendix B)

The judgment was entered on 1-8-19.

On 1-17-19, a Notice of Appeal was filed. On direct appeal, counsel argued that the district court erred in denying admission of the exculpatory remainder of the wiretaps made by the government.

On 4-30-20, the Court of Appeals denied Mr. Griffin's appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that the district court did not err in excluding certain recorded communications under Fed. R. Evid. 807's residual hearsay exception because defendant failed to satisfy the notice and probative importance requirements since he first requested to introduce the evidence after the court impaneled the jury and after the government had prepared and provided its exhibits for trial. *United States v. Griffin*, 2020 U.S. App. LEXIS 13879 * (2nd Cir. 4-30-20). (Appendix A)

Mr. Griffin demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. GRIFFIN'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[1] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

[1] See also *GACA v. United States,* 411 U.S. 618 (1973); *United States v. Jacobs,* 429 U.S. 909 (1976); *Rea v. United States,* 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens,* 375 U.S. 162 (1963); *Elkins v. United States,* 364 U.S. 206 (1960)..

McNabb, 318 U.S. at 340.

1A.) Mr. Griffin Was Denied His Right To Present Critical Exculpatory And Impeachment Evidence Through The Unpresented Remainder Of The Government's Surreptitious Recordings And, Therefore, Denied His Constitutional Right To Present A Complete Defense

Whether rooted in the Due Process Clause of the Fifth Amendment or in the Compulsory Process Clause of the Sixth Amendment, the Constitution guarantees criminal defendants the right to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *United States v. Blum*, 62 F.3d 63; 1995 U.S. App. LEXIS 20605 **11-12 (2nd Cir. 1995) (citing *United States v. Almonte*, 956 F.2d 27, 30 (2nd Cir. 1992) and *Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)); *United States v. Molina*, 407 F.3d 511; 2005 U.S. App. LEXIS 9041 **25 (1st Cir. 2005); *United States v. Hudson*, 970 F.2d 948; 1992 U.S. App. LEXIS 16608 (1st Cir. 1992).

"[A] defendant must generally be permitted to introduce": evidence directly pertaining to any element of the charged offense or an affirmative defense; "evidence pertaining to collateral matters that, through a reasonable chain of inferences, could make the existence of one or more of the elements of the charged offense or an affirmative defense more or less certain"; and/or evidence that "tends to place the story presented by the prosecution in a significantly different light." *United States v. Hurn*, 368 F.3d 1359, 1363, 95 Fed. Appx. 1359 (11th Cir. 2004). Additionally, "a defendant generally has the right to introduce evidence that is not itself tied to any of the elements of a crime or affirmative defense, but that could have a substantial impact on the credibility of an important government witness." *Id.* Typically, a defendant may present evidence of third-party guilt. See *Holmes v. South Carolina*, 547 U.S. 319, 330-31, 126 S. Ct. 1727, 1734-35, 164 L. Ed. 2d 503 (2006) (holding that a state law preventing evidence of third-

party guilt was "arbitrary" and thus "violate[d] a criminal defendant's right to have a meaningful opportunity to present a complete defense" (quotation marks omitted)).

Moreover, Fed. Rule of Evidence 106 provides that when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. The Advisory Committee Notes states that the rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations. *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 172, 102 L. Ed. 2d 445, 109 S. Ct. 439 (1988).

In Mr. Griffin's case, as set forth above, at trial, when the government introduced the wiretap evidence, counsel for Mr. Griffin moved to introduce the remainder of the wiretaps as exculpatory and impeachment evidence. (Appendix C) The motion was denied as inadmissible hearsay and Mr. Griffin was convicted and the conviction was affirmed on direct appeal. (Appendix D) (Appendix A).

Whether considered under Mr. Griffin's constitutional right to present a defense or Fed. Rule of Evidence 106, Mr. Griffin was prejudiced by the lower courts' rulings.

Based on the foregoing, this Court should VACATE the Court of Appeals decision and REMAND to that Court for reconsideration under Mr. Griffin's right to present a complete defense and Fed. Rule of Evidence 106.

1B.) Multiple Errors In The Courts Below Mandate That Mr. Griffin's Conviction And/Or Sentence Be Vacated.

Mr. Griffin's conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Griffin's conviction and sentence are violative of his right to freedom of speech and to petition and his right to be free of unreasonable search and seizure, his right to due process of law, his rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and his right to be free of cruel and unusual punishment under the constitution. The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Mr. Griffin's sentence. Counsel was ineffective in misadvising him to proceed to trial and to not testify.

First Step Act

Mr. Griffin is entitled to retroactive application of the First Step Act, 115 P.L. 391; 132 Stat. 5194; 2018 Enacted S. 756; 115 Enacted S. 756 (12-21-2018) as hereinafter more fully appears.

Applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with (1) longstanding authority applying favorable changes to penal laws retroactively to cases pending on appeal when the law changes and (2) the text and remedial purpose of the Act. To the extent the Act is ambiguous, the rule of lenity requires the ambiguity be resolved in the defendant's favor. *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Granderson*, 511 U.S. 39, 54 (1994).

Preliminarily, "a presumption of retroactivity" "is applied to the repeal of punishments." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 & n.1 (1990) (Scalia, J., concurring). "[I]t has been long settled, on general principles, that after the expiration or repeal

of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Id.* (quoting *Yeaton v. United States, 5 Cranch* 281, 283 (1809)). The common law principle that repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal applies equally to a statute's repeal and re-enactment with different penalties and "even when the penalty [is] reduced." *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

This Court has long recognized that a petitioner is entitled to application of a positive change in the law that takes place while a case is on direct appeal (as opposed to a change that takes place while a case is on collateral review). *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 710-11 (1974). The Court expressly anchored its holding in *Bradley* on the principle that an appellate court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice" or there is "clear legislative direction to the contrary." Id., 711, 715. It explained that this principle originated with Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103 (1801): "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed." Id., 712 (quoting *Schooner Peggy*, 1 Cranch at 110). Moreover, a change in the law occurring while a case is pending on appeal is to be given effect "even where the intervening law does not explicitly recite that it is to be applied to pending cases...." *Bradley*, 416 U.S. at 715.

Since Mr. Griffin's judgment was not yet "final" on 12-21-18 when the First Step Act was enacted, he is entitled to retroactive application of all relevant portions of the Act. *Id.*

These claims in Argument 1B are submitted to preserve Mr. Griffin's right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

Based on the foregoing, the decision by the Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States,* 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Second Circuit in Mr. Griffin's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Junior Griffin respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[2] to the court of appeals for reconsideration in light of Mr. Griffin's right to present a complete defense and Fed. Rule of Evidence 106.

Junior Griffin

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[2] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).