No. 17-_____

In the Supreme Court of the United States

KEITH GREGORY,

Petitioner,

–v–

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following convictions on one count of violation of 18 U.S.C. § 1349 (conspiracy to commit mail fraud), one violation of 18 U.S.C. § 1343 (wire fraud) and one violation of 18 U.S.C. § 1341 (mail fraud), the trial court sentenced Petitioner Keith Gregory to 120 months. All witnesses testified that Gregory was shielded from knowledge of the criminal enterprise, yet the trial court labeled him the "linchpin" and assessed a loss value of $60 million, a number pulled out of thin air without supporting evidence. Gregory then received a significantly longer sentence than others the jury found far more culpable and who had received millions of dollars.

THE QUESTIONS PRESENTED ARE:

1. Was Petitioner Gregory's sentence unconstitutionally disproportionate to the co-defendants and to the amount of the loss because the lower courts never calculated the amount of loss?

2. Was Gregory's sentence unconstitutionally disproportionate to the co-defendants because it was based upon the false assumption that he was the "lynchpin" of the alleged conspiracy?

3. Was Gregory's sentence unconstitutional given that he received a total of only $68,640.00 from the alleged conspiracy?

4. Was Gregory's sentence unconstitutional because the trial court refused to apply the mitigating factors that would have properly reduced his sentence to a maximum of 18 to 24 months?

PARTIES TO THE PETITION

Petitioner and Defendant-Appellant Below

- Keith Gregory

Respondent and Prosecutor-Appellee Below

- United States of America

Respondents and Co-Defendants-Appellants Below

- David Ball
- Leon Benzer
- Edith Gillespie
- Charles McChesney
- Salvatore Ruvolo

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Gregory ("Gregory") respectfully prays that the court issue a writ of certiorari issue to review the judgment below. Gregory and the United States of America are the only parties to the Petition.

OPINION BELOW

The opinion of the United States District Court for Ninth Circuit ("Ninth Circuit") in this matter was issued on September 25, 2017. The decision appears at App.1a to this petition. The court's opinion is unpublished. On October 9, 2017, Gregory petitioned the Ninth Circuit for panel rehearing. On March 12, 2018, the Ninth Circuit denied the petition for rehearing. The order denying the rehearing appears at App.58a to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND POLICIES AT ISSUE

The following statatutes and policies are reproduced in the appendix:

- 18 U.S.C. § 1349
  Attempt and Conspiracy (App.59a)
- 18 U.S.C. § 1343
  Fraud by Wire, Radio, or Television (App.59a)
- 18 U.S.C. § 1341
  Frauds and Swindles (App.60a)
- 18 U.S.C. § 3553 (App.61a)
  Imposition of a Sentence. Factors to Be Considered in Imposing a Sentence.
- Federal Rule of Criminal Procedure 32(i)(3)(B) (App.63a)
- Guideline § 2B1.1(b)(2)(A)(i) (App.63a)

INTRODUCTION

Gregory respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in this case.

The Ninth Circuit has decided an important federal question that has so far departed from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's supervisory power. Furthermore, the Ninth Circuit's decision has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

The trial court convicted Gregory of one count of violation of 18 U.S.C. § 1349 (conspiracy to commit mail fraud), one violation of 18 U.S.C. § 1343 (wire fraud) and one violation of 18 U.S.C. § 1341 (mail fraud). The crimes were committed in a conspiracy to control Homeowners Associations ("HOAs") in condominium developments in the Las Vegas, Nevada area.

A. Facts Giving Rise to This Case

Co-Defendant Leon Benzer ("Benzer") owned a construction company, Silver Lining Construction ("Silver Lining"). Benzer identified condominium developments that had construction defect settlement funds available or needed repair work done. Benzer then recruited people to act as straw purchasers at the targeted condominium developments.

These straw purchasers made false statements on mortgage applications to purchase the condominiums, including falsely stating that the down payment for the condominium was coming from their savings and income when, in fact, that money was coming from Benzer. Benzer then paid these owners to run for board of directors' seats at the targeted HOAs.

After a majority of an HOA's board of directors was in Benzer's control, the majority voted to contract Silver Lining, Benzer's company, to perform construction work. The HOAs paid Silver Lining to do the entire construction defect work, paid for from the construction defect settlement funds the HOAs had received from prior litigation. Silver Lining ended up performing minimal repair work.

One of the targeted homeowners associations was Vistana Home Owners Association ("Vistana HOA"). Gregory was Vistana's general counsel. Benzer and his associates, who conspired to defraud Vistana HOA, carefully kept Gregory from knowing that they conspired to defraud Vistana HOA. Therefore, Gregory did not know about Benzer's scheme to load the Vistana HOA board of directors with people he had paid. Gregory did nothing to consciously help facilitate the scheme. He made no misrepresentations to hide Benzer's plan.

For example, Benzer associate, Ralph Priola ("Priola"), testified that he attended many meetings with Gregory, at his office with Benzer and HOA board members. But, Priola testified that neither he nor Benzer told Gregory of their scheme to take over the Vistana HOA board of directors, including paying board members to buy condos or run for election on the board of directors.

As Vistana HOA's general counsel, Gregory was in favor of awarding the construction defect repair contract to Silver Lining because it had negotiated a "right of first refusal" contract with Vistana HOA <u>before</u> Gregory became Vistana HOA's general counsel. Although Silver Lining demanded a $1.3 million "mobilization fee" from Vistana HOA, Gregory knew that if Vistana HOA resisted and did not award the repair contract to Silver Lining, Silver Lining could sue Vistana HOA for breach of contract.

Gregory, therefore, coordinated with Benzer to set up an emergency meeting of the Vistana HOA board of directors to vote to award the construction defect litigation contract to Silver Lining. At the emergency meeting, the Vistana HOA board awarded the construction defect remediation contract that included a $1.3 million mobilization fee to Silver Lining.

After the contract was approved, Benzer wrote Gregory two personal checks totaling $12,000.

In a separate matter, Benzer paid Gregory the attorney's fees incurred in representing Arnie Myers, a prospective member of the Jasmine HOA board of directors in an election dispute. Lastly, Gregory submitted a response to a Nevada regulator on behalf of Vistana HOA board president, Steve Wark, who apparently bought his condo with Benzer money.

B. The District Court Proceedings

The trial court convicted Gregory of one count of violation of 18 U.S.C. § 1349 (conspiracy to commit mail fraud), one count of violation of 18 U.S.C. § 1343 (wire fraud) and one violation of 18 U.S.C. § 1341 (mail fraud).

On June 17, 2015, the District Court sentenced Gregory to 120 months on each of the counts, to run concurrently. The District Court also imposed restitution in the sum of $12,154,913.40.

C. The Appellate Court Proceedings

On June 26, 2015, Gregory appealed his conviction, contending there was insufficient evidence to support the verdicts against him. He also appealed the length of his sentence. Four other defendants also appealed their convictions in the district court.

On September 25, 2017, the Ninth Circuit issued its opinion affirming the District Court convictions as to Gregory. The opinion appears at App.1a. On October 9, 2017, Gregory filed a request for a full panel rehearing. The Ninth Circuit issued its order denying a rehearing on March 12, 2018. The order appears at App.58a.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS WERE CHARGED WITH A DUTY TO IMPOSE A CONSTITUTIONALLY FAIR SENTENCE

Gregory was entitled to due process at trial. In criminal cases, due process has been interpreted to require that convictions be based on sufficient evidence presented by the prosecution (*Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

As it relates to Gregory's sentence, the overarching statutory charge for a district court is to "impose a sentence sufficient, but not greater than necessary, to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment" (18 U.S.C. § 3553(a) and (a)(2)).

The District Court should have considered the § 3553(a) factors to decide if they supported the sentence suggested by the parties and the history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences available; the kinds of sentence and the sentencing range established in the Guidelines; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims (*See* 18 U.S.C. § 3553(a)(1)-(7)).

The Guidelines are the "starting point and the initial benchmark" of sentencing (*Kimbrough v. United States*, 552 U.S. 85, 108, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (quoting *Gall*, 552 U.S. at 49, 128 S.Ct. 586)), and the failure accurately to state the Guidelines range at the onset will derail the sentencing proceeding before it even begins. (*Id.*)

The district court must explain its sentence sufficiently to permit meaningful appellate review. A statement reason is required by statute, § 3553(c), and furthers the proper administration of justice. *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2468, 168 L.Ed.2d 203 (2007), (stating that "[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution . . . a district judge "must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.")

This Court can review the decisions below to determine whether the sentence is reasonable; only a procedurally erroneous or substantively unreasonable sentence will be set aside. (*See Id.* at 2459; *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 594, 169 L.Ed.2d 445 (2007).)

It would be procedural error for a district court to fail to calculate, or to calculate incorrectly, the Guidelines range; to treat the Guidelines as mandatory instead of advisory; to fail to consider the § 3553(a) factors; to choose a sentence based on clearly erroneous facts; or to fail adequately to explain the sentence selected, including any deviation from the Guidelines range (*Id.*).

Here, the Ninth Circuit should have considered whether the district court committed significant procedural error, then consider the substantive reasonableness of the sentence.

II. THE LOWER COURTS COMMITTED ERROR BY NEVER DETERMINING THE AMOUNT OF THE VICTIMS' LOSS

The District Court erred when it failed to rule on the loss amount as required by Federal Rule of Criminal Procedure 32(i)(3)(B). In fact, the Ninth Circuit admitted that "[T]he district court never expressly determined the loss amount." The Ninth Circuit's comments show that the District Court "backed into" the loss amount because of the length of the sentences: "[T]he [District] Court appears to have assumed that the loss amount exceeded $50,000,000 because it appears to have applied the Guidelines enhancement when it stated that Benzer's sentence was 'within the Guidelines range.'"

The Ninth Circuit also upheld the District Court's application of a two-level enhancement under Guidelines section 2B1.1(b)(2)(A)(i) because they wrongly claimed Gregory's crimes involved 10 or more victims. The lower courts determined that Vistana HOA contained 702 members who paid monthly dues to the HOA, and that Benzer's scheme diverted the members' dues to Silver Lining.

But that is not true. Benzer's scheme only diverted the HOA's construction defect settlement funds to Silver Lining, not the members' dues. Thus, only Vistana HOA was a victim of the conspiracy.

Thus, the loss was nowhere near $50 million. The evidence at trial was that Gregory received $12,000 in payments from Benzer and $56,640 in attorney's fees from Vistana HOA. Based on that loss figure, Gregory's sentence should have been in the Guidelines' range of 18 to 24 months.

III. GREGORY'S SENTENCE WAS UNFAIR AND UNCONSTITUTIONAL BECAUSE HIS ROLE IN THE CONSPIRACY WAS MINIMAL; MORE CULPABLE CO-DEFENDANTS RECEIVED LESSER SENTENCES

"'When a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction,' due process may require a district court to apply a heightened standard" (*McMillan v. Pennsylvania*, 477 U.S. 79, 87-91, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)).

Gregory's sentence of 120 months' imprisonment was constitutionally unreasonable. The sentence was disproportionate to any loss he caused and disproportionate to his role in the alleged conspiracy and the sentences given to the co-conspirators. Gregory's 120 months' sentence is, therefore, unconstitutional.

Gregory's role was tangential compared to other conspirators who received lesser sentences. Count one of the indictment alleged a conspiracy to commit wire and mail fraud. Sixteen overt acts were alleged in connection with that conspiracy, yet only the ninth and sixteenth alleged overt acts even mentioned Gregory.

Counts two through fifteen charged wire fraud. Only two were said to involve Gregory. The mail fraud charges in counts sixteen through eighteen did not involve Gregory at all.

The mastermind of the conspiracy, Benzer, did not testify at trial. Had Gregory been a major player in the conspiracy, the government would have had Benzer testify against him. No trial witness ever implicated Gregory as a member of any conspiracy to commit mail fraud or wire fraud.

Trial witness Edward Lugo, Benzer's cousin, testified that he never met or spoke with Gregory. Witness Angela Esparza, who helped rig HOA elections, testified that she had not met Gregory, but had only heard of him. She testified that Gregory did not assist her in rigging an election.

Witness Marcella Triana, paid by Benzer to be on an HOA board, could only recall Gregory being involved in such HOA matters as fire alarms, trees and roofing. Witness Ralph Priola, Benzer's "right-hand man," testified that Gregory had nothing to do with false affidavits. He testified that Gregory was not told that Benzer paid people to be HOA board members, or that elections were rigged.

Witness John Leach testified that Gregory appeared to be genuinely concerned about providing good legal service to Vistana HOA. Witness Deborah Genato, Vistana HOA's property manager, testified that she saw no evidence that Gregory's ethics were compromised. She had no reason to believe he was involved in any election irregularities.

Gregory's accountant testified at trial that fees from Vistana HOA represented only 2.5% of Gregory's income. Silver Lining fees amounted to only 3.6% of his income.

Thus, none of the Government's witnesses testified that Gregory was aware of any of the illegal activities in Benzer's conspiracy. Nor did any of the witnesses testify that Benzer's $12,000.00 checks paid to Gregory were solicited for any improper purpose. To the contrary, expert witnesses John Naylor and Dennis Kennedy testified that Gregory's conduct was at all times appropriate and within the bounds of professional ethics.

The evidence at trial, therefore, demonstrated that Gregory did not knowingly participate in any scheme to defraud anyone. He made no false or fraudulent statements. There was simply no evidence at trial to conclude that Gregory conspired with anyone to violate the law in any respect. Instead, Gregory was convicted due to innuendo and speculation.

Therefore, the district court's conclusion that Gregory was "the linchpin" of the operation was so far from what the evidence proved as to question what trial the judge attended. His statement that Gregory played a key role in the takeover of two HOAs, Vistana and Sunset Cliffs was pure fiction.

Gregory's sentence of 120 months is outrageously extreme, even if his minimal involvement in Benzer's scheme were true. Co-defendants with far greater culpability received lenient sentencing compared to Gregory. As Gregory pointed out to the Ninth Circuit, all but one of those co-defendants were found more culpable than him. Ten co-defendants received sentences of only the time they had already served. Fourteen received sentences of less than 24 months.

For example, Edward Lugo, Benzer's moneyman, was involved in every aspect of the conspiracy by paying bribes, rigging elections and committing mortgage fraud. Yet, he received a sentence of only 21 months.

Now deceased co-defendant and attorney Barry Levinson filed a false tax return, stole money from his clients and was fully aware of Benzer's actions of rigging HOA elections. Yet, his sentence of 78 months was still less then Gregory's sentence.

Gregory's sentence is even more ominous given the fact that he had never committed any prior crimes, was forced to give up his license to practice law, and to close down his practice. Losing his ability to practice law was a severe punishment in and of itself. The lower courts never took these factors into consideration.

Given the disparity between Gregory's sentence and the sentences of his co-defendants, and given all of the facts presented at trial and in pre-sentencing, the District Court's sentence of 120 months was unconstitutional. The sentence violated the Eighth Amendment. Gregory's sentence was so "grossly disproportionate to the severity of [his] crime[s]" that it must be overturned (*Solem v. Helm*, 463 U.S. 277, 306 (1983)).

CONCLUSION

Based on the foregoing, Gregory respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Ninth Circuit.

Respectfully submitted,

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