

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :           CRIMINAL ACTION  
  :           :  
  :           :  
  :           :  
  :           :  
HOWARD GUNTER                               :           NO. 12-394-4

MEMORANDUM

Bartle, J.

March 13, 2013

Defendant Howard Gunter, age 77, has been charged in a four defendant indictment with nine counts of fraud involving airplane parts in violation of 18 U.S.C. § 38(a)(1)(A)(B) and (C) and conspiracy in violation of 18 U.S.C. § 371. Before the court is his motion to dismiss the indictment "due to physical incompetence." According to defendant, he suffers from diabetes and is on dialysis three days a week. His medical condition includes metastasic bladder and prostate cancer as well as hypertension. His kidneys, both ureters, and his bladder have been removed. Defendant maintains he is terminally ill. Gunter's home is more than 100 miles from the Courthouse in Philadelphia.

It is the Executive Branch that has "the exclusive authority and absolute discretion" whether to prosecute a criminal action. United States v. Nixon, 418 U.S. 683, 693 (1974). A court may end a prosecution only if there are legal grounds to do so. United States v. Hudson, 545 F.2d 724, 725 (10th Cir. 1976). The poor state of a defendant's health,

whether physical or mental, is not such a basis. Id.; United States v. Jones, 876 F. Supp. 391, 397 n.1 (N.D.N.Y. 1995); United States v. Goldstein, 633 F. Supp. 424, 426 (S.D. Fla. 1986); United States v. Mosley, 502 F. Supp. 601, 605 (N.D.N.Y. 1980). While the court's power does not extend to dismissal of an indictment on its own motion or on the motion of the defendant for the reasons advanced here, the court certainly has authority to postpone a trial because of the condition of a defendant's health or to set a flexible trial schedule for that reason, or to sever his case from that of other defendants. See United States v. Reddy, 2003 WL 22339464 (S.D.N.Y. 2003); United States v. Doran, 328 F. Supp. 1261 (S.D.N.Y. 1971).

The court is sensitive to what appears to be the defendant's serious medical condition. Nonetheless, we have as yet made no determination as to whether Gunter can stand trial or under what conditions. If he is unable to stand trial, there are ways to deal with the situation other than the drastic step of dismissal. The motion of defendant to dismiss the indictment will be denied.

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ORDER

AND NOW, this 13th day of March, 2013, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant Howard Gunter to dismiss the indictment due to physical incompetence (Doc. #73) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.