No. _____

In The

# Supreme Court of the United States

JOHN WHALEY, a/k/a JOHN HOLLY, a/k/a JOHNNY,

*Petitioner,*

v.

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 A WRIT OF CERTIORARI WITH APPENDIX

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## QUESTION PRESENTED

Whether, on remand, imposition of the same twenty-five year term of imprisonment and maximum term of supervised release was both procedurally and substantively unreasonable.

TABLE OF CONTENTS

*Page*

## TABLE OF AUTHORITIES

*Page No.*

Cases



Sentencing Guidelines

## OPINION BELOW

The Second Circuit Court of Appeals decision can be found at 2018 WL 6720797 and a copy of it is attached as Appendix 1.

## JURISDICTION

The Second Circuit filed its decision and order on December 21, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on writ of certiorari.

## STATEMENT OF FACTS

Background

As set forth in the Indictment (EDNY 09-CR-619 (S-1)(SJF)), co-defendant Antonio Rivera (Rivera) and his sister, Jasmin, owned two bars in Long Island, New York: Sonidos, opened in 2005, and Mariachi, opened in 2007. It was alleged that Rivera and co-defendant Jason Villaman, and Mr. Whaley recruited undocumented Latin American women as waitresses at the bars. Once hired, the women were compelled through various means to engage in commercial sex acts and sexual contact with patrons at the bars and elsewhere.

The Trial Evidence as to Mr. Whaley

Jasmin Rivera testified as a cooperating witness and was the main witness. She testified that she and her brother allowed customers at the bars to purchase alcohol for the waitresses in exchange for sitting, dancing and touching them. If they purchased an entire bottle, the customers were permitted to have sex with the waitresses. Mr. Whaley was a childhood friend of Rivera's. His involvement in the bars began in 2007. He transported some of the waitresses to and from work and kept tabs on the waitresses to ensure they did not leave during work hours. He was involved in

discussions about whom to hire and, on occasion, he participated in waitress interviews. He sometimes referred to the waitresses as "wetbacks" and reminded them of their lack of legal status when they expressed a desire to quit. Mr. Whaley also accompanied Rivera and Villaman when they would go to other businesses to look for girls who had quit.

Some of the waitresses confirmed that Mr. Whaley drove them to and from work. Some also stated that he had a key to Sonidos and unlocked the door for waitresses from time to time. A detective testified that he observed Mr. Whaley close one of the bars on one occasion.

The Jury Verdict

Following a jury trial, Mr. Whaley was convicted of seventeen counts, including conspiracies for sex trafficking and alien transportation and harboring (counts 14 and 22, respectively), and the substantive offenses of forced labor (counts 17-21), alien transportation (counts 24-28) and alien harboring (counts 31-35).

The Original Sentence

Mr. Whaley was sentenced to concurrent terms of twenty-five years' imprisonment on counts 14 and 17, and concurrent terms of twenty years' imprisonment on the remaining charges, for a total term of twenty-five years' imprisonment.

The First Appeal

On appeal, this Court affirmed the convictions but noted several sentencing errors requiring a full resentencing. See United States v. Rivera, 799 F.3d 180 (2d Cir. 2015). In particular, it noted that certain sentences exceeded the statutory maximum, and one sentence was based on an erroneous belief as to a mandatory minimum. There were potential errors as to the Guidelines, as well, including a potentially undeserved two-level "serious injury" enhancement for every victim under

USSG §2A3.1(b)(4) and a four-level enhancement under USSG §2A3.1(b)(1) for an offense that involved aggravated sexual abuse as defined in 18 U.S.C. §2241. Because this Court found procedural unreasonableness requiring a resentencing it did not reach Mr. Whaley's claim that his sentence was substantively unreasonable. Id. at 187-88.

The Resentencing

On remand, the parties agreed that, as to imprisonment, there were no applicable mandatory minima. They also agreed that, as to the conspiracy charges, the maximum term of imprisonment was life (count 14) and ten years (count 22). Finally they agreed that, as to the substantive offenses, the forced labor counts (17-21) carried a twenty year maximum term. The parties differed as to the remaining counts, however. As to them – counts 24-28 (alien transportation) and 31-35 (alien harboring) – the government contended that they carried a ten year maximum term and the defense contended that Mr. Whaley acted solely as an accomplice, not a principal, and the offenses therefore carried a five year maximum term.

As to supervised release, the maximum term on count 14 was five years, and for all other counts the maximum term was three years.

According to the Probation Office, Mr. Whaley had a total offense level of 43 and a criminal history category of VI.

Among other things, Mr. Whaley argued that he was entitled to a four-level mitigating role reduction. The Court refused to allow a mitigating role adjustment, finding that he was the "right arm" of and "enforcer" for the most serious offender. The Court sentenced Mr. Whaley to twenty-five years' imprisonment and five years' supervised release on count 14, and lesser concurrent time on all other counts.

## REASONS FOR GRANTING THE PETITION

ON REMAND, IMPOSITION OF THE SAME TWENTY-FIVE YEAR TERM OF IMPRISONMENT AND MAXIMUM TERM OF SUPERVISED RELEASE WAS BOTH PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

A. The Standard of Review

This Court reviews a district court's sentencing decisions for reasonableness. Gall v. United States, 552 U.S. 38, 41 (2007); United States v. Booker, 543 U.S. 220, 264 (2005). Reasonableness has two components, 1) procedural reasonableness and 2) substantive reasonableness. A sentence is procedurally unreasonable if the district court, among other things, "fails to calculate (or improperly calculates the Sentencing Guidelines range." United States v. Chu, 714 F.3d 742, 746 (2d Cir. 2013). Substantive reasonableness requires this Court to determine whether the sentence imposed was reasonable taking into account all of the §3553(a) factors. See United States v. Verkhoglyad, 516 F.3d 122, 127 (2d Cir. 2008). Reversal will result where: 1) a sentence lacks a proper basis in the record; 2) a trial judge's assessment of the evidence leaves the reviewing court with a definite and firm conviction that a mistake has been committed, or 3) the reviewing court has reached the informed judgment that a sentence is otherwise unsupportable as a matter of law. See United States v. Park, 758 F.3d 193, 200-01 (2d Cir. 2014). Stated in short hand, reversal will result where the sentence is "shockingly" high or low or, at the least, it "'stirs' the conscience." United States v. Singh, __ F.3d __, 2017 WL 6327823, *6 (finding substantive unreasonableness); United States v. Aldeen, 792 F.3d 247, 255 (2d Cir. 2015); United States v. Broxmeyer, 699 F.3d 265, 289

(2d Cir. 2012).

District courts are to use the Guidelines as a "starting point," and then make an independent sentencing determination, taking into account the "nature and circumstances of the offense and the history and characteristics of the defendant," and all the statutory factors set forth in 18 U.S.C. §3553(a). All sentences, "whether inside or outside the guidelines range" must be reviewed for abuse of discretion. Gall v. United States, 552 U.S. 38 (2007).

B. Procedural Unreasonableness

Pursuant to USSG §3B1.2, a minimal participant is entitled to a four-level reduction and a minor participant is entitled to a two-level reduction in the total offense level. As to minimal participant (USSG §3B1.2(a)), Application Note 4 provides that: "defendants who are plainly among the least culpable of those involved in the conduct of a group" are deserving. As to minor participant (USSG §3B1.2(b)), Application Note 5 provides that, defendants who are "less culpable than most other participants, but whose role could not be described as minimal" are deserving.

In 2015 (following Mr. Whaley's original sentencing; cf. United States v. Quintero-Leyva, 823 F.3d 519 (9th Cir. 2016) (remanding for new determination as to mitigating role for defendant sentenced before Appendix C, Amendment 794)), Application Note 3 was amended because a study by the Sentencing Commission showed that "mitigating role is applied inconsistently and more sparingly than the Commission intended." Thus, Note (3)(c), now provides:

> In determining whether to apply [a mitigating role adjustment], the court should consider the following non-exhaustive list of factors:
>
> > (i) the degree to which the defendant understood the scope and structure of the criminal activity;
> >
> > (ii) the degree to which the defendant participated in planning or

> organizing the criminal activity;
>
> (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
>
> (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
>
> (v) the degree to which the defendant stood to benefit from the criminal activity.

Mr. Whaley, a driver-janitor, was plainly among the least culpable of the indicted defendants. Rivera and his sister had ownership interests and managed, and advertised for, the bars. Mr. Whaley was derelict and fresh off a three-year prison term. The Riveras offered him a free room, provided that he performed property-wide chores and worked at the bars, which had already been in operation for two years. Mr. Whaley drove waitresses to and from work, was largely absent during work hours, and from time to time, cleaned up thereafter and closed down. It was alleged by the government that he was something of a "right hand" to Rivera, but it was well established that Mr. Whaley had no signatory power for the bars, he did not pay for or draft advertisements, and he was not involved in the intricacies of paying employees, including saving cash proceeds for the waitresses (Jasmin's supposed, but breached, duty, called the "society"). Further, while the government also suggested that Mr. Whaley was involved in hiring, none of the actual waitress-victims testified as such; uniformly they said that Rivera and Jasmin, solely, took them on. Counsel below summed it up in her sentencing memorandum:

> Rivera raised capital to open two bars, managed both of them, got liquor licenses in the name of Jasmin, a nominee, employed dozens of people, managed the supply of the restaurant, the leases, the provision of alcohol, the taxes, etc. Rivera kept all the profits. He

> also beat and forcibly raped many of the victims. Whaley drove a van and swept up. Rivera was convicted of all the substantive charges. Whaley was acquitted of most, being convicted primarily of transportation of aliens, which he acknowledged, and conspiracies.

The Application Note (3)(c) factors are addressed seriatim:

> (i) Mr. Whaley's "degree" of understanding of the scope and structure of the conspiracy was limited. The Riveras had the full understanding. Mr. Whaley had no exposure to or knowledge (78 IQ) of the corporate or financial aspect of the endeavor. He signed on to help (two years after Sonidos was operational) because he was recently released from prison and had no residence or employment. The Riveras gave him a job in lieu of rent.
>
> (ii) Referring to the above, Mr. Whaley did not plan or organize the criminal activity.
>
> (iii) Mr. Whaley had no decision making authority. Jasmin testified that he participated in waitress-hiring decisions, but no waitress testified as such, and even if, he had no final say-so.
>
> (iv) Mr. Whaley was a driver-janitor.
>
> (v) Mr. Whaley did not stand to benefit at all from the profits of the criminal activity. It merely afforded him a room to live in

For the foregoing reasons, the district court's denial of a mitigating role adjustment was procedurally erroneous.

C. Substantive Unreasonableness

In United States v. Singh, supra, _ F.3d _, 2017 WL 6327823, *10, the Second Circuit Court eloquently provided:

> "Sentencing, that is to say punishment, is perhaps the most difficult task of a trial court judge." While there are many competing considerations in every sentencing decision, a sentencing judge must have some understanding of "the diverse frailties of humankind." In deciding what sentence will be "sufficient, but not greater than necessary" to further the goals of punishment, 18 U.S.C. §3553(a), a sentencing judge must have a "generosity of spirit, that compassion which causes one to know what it is like to be in trouble and in pain" (citations omitted).

The sentencing below was not in keeping.

Mr. Whaley, the product of a rape, had a horrifying childhood. His mother was extremely poor and otherwise unfit.[1] Mr. Whaley was raised for a time with an alcoholic uncle and a grandmother who both physically and sexually abused him. ACS required that mother, a minimum wage employee, and son leave the grandmother's residence. For significant periods thereafter, they were homeless. The Department of Social Services revoked Harriette's parental role when Mr. Whaley was 16 and he was "on his own."

Mr. Whaley suffered from a litany of mental health problems, running the gamut from low IQ to paranoia, bi-polar disorder and schizophrenia. His compromised mental/emotional status contributed to antisocial behavior, including assaults on his mother. He was in special education but

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[1] In this regard, attention is directed to this statement from the Sagamore Children's Hospital, "[Mr. Whaley's] mother did not appear to be able to fully comprehend nor appreciate the intensity and gravity of [Mr. Whaley's] psychological difficulties. It was the opinion of the Treatment Team that his mother would not be able to provide the structure and support necessary for [Mr. Whaley] to function in a safe manner outside the hospital."

still showed "incompletes" and pronounced truancy in 9th grade. He dropped out the following year. With this social history, one might expect an equally horrific criminal history. But, while the history is pronounced, it was not generally serious, with only two prior E level (the lowest in New York State) felonies, specifically burglaries, in which nothing was taken. Most of Mr. Whaley's criminal history involved vehicle and traffic offenses.

In the instant offense, Mr. Whaley was used by the Riveras, much as they preyed upon the disadvantaged waitresses. In 2007, he came out of his first prison term (roughly three years) desperate, with no education, employment opportunities or place to live.[2] Rivera allowed him a room in return for maintenance at the residence and the bars, and transportation for the waitresses. The remarks set forth above with regard to mitigating role are included herein by reference. The evidence suggests that Mr. Whaley, almost exclusively a janitor and driver, was utterly dispensable. He performed his menial tasks to keep a roof over his head.

In sentencing Mr. Whaley (again) to twenty-five years' imprisonment and the maximum term of supervised release, the district court noted that "this defendant has had an extensive criminal history [that] didn't deter him at all from making more poor judgments." As explained above, however, the extensive history was non-violent and generally non-serious, resulting in only one term of imprisonment (during which he was unmedicated resulting in little "good time" credit and a maximum term). The poor judgment he exercised in joining the Riveras (who started the offense years before Mr. Whaley was released from prison) was mitigated by his dire personal circumstances and his limited role.

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[2] His mother was then suffering from cancer and would die early in the following year.

Defense counsel below urged the district court to impose a ten-year term of imprisonment and argued that a twenty-five year term was reserved for murders and the like. This argument resonates. Absent the Riveras or similar predators, Mr. Whaley would appear benign. All of his employers (including perhaps the Riveras) laud his industry and ethic. A term of imprisonment of ten years would surely have enforced a message of general and personal deterrence and it would have allowed for additional vocational training (despite his mental challenges, he earned a GED during his prior prison term. No greater term was necessary.

For all of the foregoing reasons, and despite the fact that the imposed term may have been a reduced, non-Guidelines term, the sentence was substantively unreasonable.

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With this case, at the very least, the Supreme Court can better define the circumstances in which mitigating role adjustments should be made following the Sentencing Commission's decision in 2015 that too few district courts were making those adjustments. Permitting, as it should, the adjustment in Mr. Whaley's case would serve the greater purpose of reinforcing the Commission's belief that the district courts are parsimonious in this regard. In addition, the Supreme Court should find substantive error in the twenty-five year term of imprisonment re-imposed after the Circuit found numerous statutory and Guidelines errors to Mr. Whaley's disadvantage on the initial appeal, despite a lack of new bad facts or conduct.

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## CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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