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No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 2019

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MARIA SOLY ALMONTE

Petitioner,

against

UNITED STATES OF AMERICA

Respondent.

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**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEAL  
FOR THE SECOND CIRCUIT**

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/s/ Bruce R. Bryan

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## **ISSUES PRESENTED FOR REVIEW**

1. Whether Almonte's sentence was procedurally unreasonable because the district court failed to determine whether she obstructed justice under Guideline §3C1.1?
2. Whether there was insufficient evidence that Almonte had a reasonable opportunity to observe whether JF was under 14 years of age, and therefore her conviction for Count II should be reversed?
3. Whether the 20-year sentence was substantively unreasonable?

## **PARTIES TO PROCEEDINGS**

The Petitioner in this Court is Maria Soly Almonte. The Respondent is the United States of America.

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**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEAL  
FOR THE SECOND CIRCUIT**

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Petitioner, Maria Soly Almonte, 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, wherein the Second Circuit held that (1) Almonte's sentence was procedurally unreasonable because the district court was not required to determine whether she obstructed justice under Guideline §3C1.1; (2) there was sufficient evidence that Almonte had a reasonable

opportunity to observe whether JF was under 14 years of age, and therefore her conviction for Count II should be reversed; and (3) her 20-year sentence was not substantively unreasonable.



## **OPINION BELOW**

A copy of the Opinion of the United States Court of Appeals for the Second Circuit, dated March 5, 2020, has been published at *United States v. Almonte*, 952 F.3d 83 (2d Cir. 2020). The Opinion is reproduced in Appendix A, *infra*.

## **JURISDICTION**

The Judgment of the United States Court of Appeals for the Second Circuit as set forth in the Opinion in *United States v. Almonte*, 952 F.3d 83 (2d Cir. 2020) is dated and was entered on March 5, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court for the Southern District of New York had jurisdiction of this case pursuant to 18 U.S.C. § 3231.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves, in part, the construction of the due process clause of the Fifth Amendment of the United States Constitution. This case also involves the interpretation of 18 U.S.C. §3553(a) and U.S.S.G. §3C1.1. The pertinent texts of the Constitution, Statute, and Guideline are set forth in Appendix B, *infra*.

## **STATEMENT OF THE CASE**

Almonte (“Almonte”) was found guilty after a jury trial in the District Court for the Southern District of New York (Wood, J.) for conspiracy to commit sex trafficking of minors in violation of 18 U.S.C. §1594 (Count One); substantive crimes of sex trafficking of minors in violation of 18 U.S.C. §1591 (Counts Two and Three); use of interstate commerce to further an unlawful prostitution activity in violation of 18 U.S.C. §1952 (Count Four); and conspiring to use interstate commerce to further an unlawful prostitution activity in violation of 18 U.S.C. §371 (Count Five).

The trial commenced on November 21, 2017 and a verdict of guilt on all counts was reached on December 1, 2017. On November 29, 2018, Almonte was sentenced to 20 years’ imprisonment and five years’ supervised release. On December 17, 2018, the Judgment of Conviction was filed. On December 18, 2018, the Amended Judgment of Conviction was filed. On December 11, 2018, the Notice of Appeal was timely filed.

On appeal to the United States Court of Appeals for the Second Circuit, Almonte contended that (1) her sentence was procedurally unreasonable because the district court had failed to determine whether she obstructed justice under Guideline §3C1.1; (2) there was insufficient evidence that she had a reasonable opportunity to

observe whether the minor victim (“JF”) was under 14 years of age, and therefore her conviction for Count II should be reversed; and (3) the 20-year sentence was substantively unreasonable.

On March 5, 2020, the Second Circuit affirmed Almonte’s conviction and sentence. As to the failure to consider the obstruction of justice enhancement, the Second Circuit reasoned that the district court’s threshold obligation “is to determine the defendant’s offense level and criminal history category” to calculate the advisory Guidelines range of imprisonment. The Second Circuit acknowledged that the government did not request the enhancement, and neither party objected that the Presentence Report did not recommend that the enhancement apply.

The Second Circuit reasoned “[t]here is no requirement that the court...*sua sponte* consider every conceivable applicable guideline.” But under 18 U.S.C. §3553(a), the district court “*shall* consider” the “characteristics of the defendant” and impose a sentence that is “*sufficient* but not greater than necessary, to” among other things “*promote respect for law.*” (emphasis in original). Therefore, a court may consider Almonte’s perjury as a non-guideline factor under §3553(a) without first considering whether the obstruction of justice enhancement under §3C1.1 applied.

The Second Circuit rejected Almonte's argument that 18 U.S.C. §1591(c) is not necessarily a strict liability statute and that the element of "reasonable opportunity to observe" requires more extensive evidence of Almonte's ability to observe the victim than one or two isolated observations. The Second Circuit said the statute does not require that Almonte had a sufficient opportunity to reasonably infer that the victim was under the age of 14. The Second Circuit stated that it is sufficient for a defendant to "merely 'personally confront[ ] an underage victim' to demonstrate 'reckless disregard of the victim's age.'" (quoting *United States v. Robinson*, 702 F.3d 22, 32 n.9 (2d Cir. 2012)). Therefore, the two face-to-face meetings between Almonte and the victim were sufficient.

As to the substantive reasonableness of Almonte's 20-year sentence, the Second Circuit acknowledged that "the mitigating factors in Almonte's case are significant." Nonetheless, the Second Circuit held that the sentence was substantively reasonable because the district court took the mitigating factors into account when imposing sentence.

### **REASONS FOR GRANTING THE PETITION**

Certiorari should be granted because the Opinion of the Second Circuit conflicts with the decisions of this Court in *United States v. Booker*, 543 U.S. 220 (2005); *Gall v. United States*, 552 U.S. 38 (2007) and *Rita v. United States*, 551 U.S.

338, 356 (2007). This case also involves important questions of first impression and public importance.

**A. Almonte’s sentence was procedurally unreasonable because the district court failed to determine whether she obstructed justice under Guideline §3C1.1**

The Presentence Investigation Report plays an important role in the sentencing process. FRCP 32(d) states that when applying the Advisory Sentencing Guidelines, the “presentence report must, among other things..., identify all applicable guidelines...; calculate the defendant’s offense level and criminal history category....; [and] identify any factor relevant to: (i) the appropriate kind of sentence, or (ii) the appropriate sentence within the applicable sentencing range.” The probation officer then gives a copy of the PSR to the parties and they have 14 days within which to object to the report. FRCP 32(e), (f). The failure to timely object to any Guidelines calculations forfeits the right of the party to challenge them on appeal. *See United States v. Eberhard*, 525 F.3d 175, 179 (2d Cir. 2008). At least 7 days before sentencing, the probation officer submits to the court the revised presentence report “containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.” FRCP 32(g).

“At sentencing, the court...must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court

will not consider the matter in sentencing.” FRCP 32(i)(3)(B). The procedural requirement that as to controverted matters, “the court must make either a finding on the allegation or a determination that no finding is necessary...not only protects the defendant’s right to due process,” but “also helps clarify the record on appeal.” *United States v. Garcia*, 900 F.2d 571, 574 (2d Cir. 1990). The Second Circuit has emphasized the importance of...resolving disputed issues on the record.” *Id. See, e.g., United States v. Corace*, 146 F.3d 51, 55-57 (2d Cir. 1998).

**(1) This Court has held that a district court must “consider” the Guidelines before applying the Section 3553(a) factors**

The district court must “give respectful consideration to the guidelines” before it “tailor[s] the sentence in light of other statutory concerns as well.” *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (*quoting Booker*, 543 U.S. 220, 245-46 (2005)). *See Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338, 356 (2007). Section 3553(a) explicitly states that “[t]he court, in determining the particular sentence to be imposed, shall consider [among other things]...the kinds of sentence and the sentencing range established for...the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.” 18 U.S.C. §3553(a).

**(2) The Guideline for Obstruction of Justice**

Section 3C1.1 of the Sentencing Guidelines imposes a two-level upward adjustment when: (1) the defendant willfully obstructs, or attempts to obstruct,

justice with respect to the investigation, prosecution or sentencing of the offense of conviction and (2) the obstructive conduct relates to the offense of conviction, any relevant conduct, or a closely related offense. U.S.S.G. §3C1.1.

The obstruction of justice enhancement requires a finding on all elements of the enhancement. *United States v. Salim*, 549 F.3d 67 (2d Cir. 2008). One of the most important elements of the obstruction of justice enhancement is the requirement that the court find that the defendant's conduct was "willful." Under Section 3C1.1, a defendant must "willfully" obstruct or attempt to obstruct justice. U.S.S.G. §3C1.1. An enhancement under Section 3C1.1 is appropriate "only if the district court makes a finding that the defendant had the 'specific intent to obstruct justice, i.e., that the defendant consciously acted with the purpose of obstructing justice.'" *United States v. Zagari*, 111 F.3d 307, 328 (2d Cir. 1997)).

The failure of the district court to find that the defendant had the specific intent to obstruct justice requires an appellate court to vacate the sentence and remand for resentencing. See *United States v. Bradbury*, 189 F.3d 200, 204 (2d Cir. 1999). "Such a finding is essential" because the term "willfully" implies a *mens rea* requirement. *United States v. Brown*, 321 F.3d 347, 351 (2d Cir. 2003); *United States v. Reed*, 49 F.3d 895, 900 (2d Cir. 1995).

When the claim involves the defendant's testimony at trial, a district court must "review the evidence and make independent findings necessary to establish a

willful impediment to the obstruction of justice.” *United States v. Dunnigan*, 507 U.S. 87, 98 (2d Cir. 1993). The court must establish the “factual predicates” of perjury and that the defendant intentionally made materially false statements specifically to avoid conviction. *Id.* at 95. The failure of a court to make such a finding requires reversal and remand. *See United States v. Brown*, 321 F.3d 347, 352 (2d Cir. 2003).

Guideline §3C1.1 recognizes that a defendant has the constitutional right to testify in his or her own defense. Application Note 2 states that Section 3C1.1 “is not intended to punish a defendant for the exercise of a constitutional right.” U.S.S.G. §3C1.1, n.2. “In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.” *Id.*

**(3) The district court was required to “consider” whether the obstruction of justice enhancement applied before it “considered” the obstruction as a non-guideline factor under §3553(a)**

Almonte’s sentence was procedurally unreasonable because the district court failed to find that she had obstructed justice under Guideline §3C1.1. With regard to the Sentencing Guidelines, the court said that Almonte’s Total Offense Level was “43 is calculated in the presentence report,” that “[t]he PSR does not take into



account her testimony at trial,” and that she was in Criminal History Category III. The court then moved to its consideration of the Section 3553(a) factors.

There was no objection before the court to the PSR’s finding that the obstruction of justice enhancement did not apply. Almonte had a due process right for the court to follow the required procedure. It is irrelevant that the Guidelines range of imprisonment was life. The critical issue was that the court relied on Almonte’s trial testimony as a major reason for imposing the 20-year sentence. Section 3C1.1 was created to guide the court on this issue. The imposition of the obstruction of justice enhancement is governed by rigorous standards. Among other things, the enhancement requires a court to make specific findings that a defendant acted “willfully” when giving testimony “at odds with the evidence.” Here, the court did not.

Almonte suffers from serious mental illnesses, including schizophrenia, that impairs her cognitive abilities. This illness and others have a bearing on whether Almonte acted “willfully” when she testified at trial. Almonte’s mental and physical illnesses were so serious that there was a substantial issue whether she was competent to stand trial and assist in her defense. While she was eventually deemed to be competent to stand trial after a battery of medical tests and evaluations, the seriousness of her mental illnesses remained undisputed. Her mental illnesses were

critically relevant to whether she had acted “willfully” when giving testimony “at odds with the evidence.”

The district court did not find that the PSR was in error when it found that an obstruction of justice enhancement did not apply. The judge merely said that the “PSR does not take into account her testimony at trial.” As such, the court flagged the issue but did not find that Almonte had obstructed justice within the meaning of Guideline Section 3C1.1. Nor did the district court find she had acted “willfully,” *i.e.* acted with the specific intent to avoid conviction through her testimony.

It was only during the court’s discussion of the Section 3553(a) factors that it negatively commented on Almonte’s trial testimony. Yet even the judge’s comments did not satisfy the rigorous requirements for the imposition of the obstruction of justice enhancement. The court said that her testimony “was at odds with the evidence” and that it imposed the 20 years sentence “to deter others...from testifying falsely at trial.” Neither statement constitutes a finding of willfulness.

Even the word “falsely” was insufficient and ambiguous. A person can testify “falsely” and yet not “willfully.” As recognized in Application Note 2 to §3C1.1, testimony may be “false” and yet not “willful.” U.S.S.G. §3C1.1, n. 2. Section 3C1.1 and this Court’s precedent interpreting the Guideline require a higher level of mental culpability and specific findings that the higher level has been met. This is particularly so where Almonte suffered from severe mental illnesses. The court did

not make these findings.

Even the Section 3553(a) factors required the court to consider whether Almonte violated Guideline §3C1.1. Under 18 U.S.C. §3553(a)(4)(A), the court was required to consider “the kinds of sentence and the sentencing range established for...the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.”

Almonte was denied her due process right to have the district court determine whether she violated Guideline §3C1.1. This Guideline imposed a rigorous standard, including that the court determine, based on specific evidence, that she “willfully” gave false testimony. If the district court had considered Guideline §3C1.1, it may well have changed its mind on whether to give Almonte a sentence of 20 years’ imprisonment. Instead, the court ignored the recommendation in the PSR that she receive the mandatory minimum sentence of 15 years. Therefore, her sentence was procedurally unreasonable.

**B. There was insufficient evidence Almonte had a “reasonable opportunity to observe” whether JF was under 14 years of age**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the government, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). But evidence is insufficient when the jury may not reasonably infer that each essential element of the crime charged has been proven beyond a

reasonable doubt. *Id.* at 316. It does “not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty.” *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)). A “mere modicum” of evidence is insufficient to support a conviction. *Jackson*, 443 U.S. at 320. There must exist “substantial evidence” to support the conviction. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

**(1) The element of “reasonable opportunity to observe the victim”**

The knowledge requirement of 18 U.S.C. §1591 may be satisfied by evidence that the defendant had a reasonable opportunity to observe the victim. *See United States v. Robinson*, 702 F.3d 22 (2d Cir. 2012). To prove the knowledge element of Section 1591, the government has three options—“prove beyond a reasonable doubt that: (1) the defendant had knowledge of the victim’s underage status; (2) the defendant recklessly disregarded that fact; or (3) the defendant had a reasonable opportunity to observe the victim.” *Id.* at 32.

**(2) Almonte’s limited contact with JF**

Almonte contends there was insufficient evidence she had a reasonable opportunity to observe JF. While Almonte testified that she saw JF twice, the only specific evidence about any meeting related to the first occasion when JF went to Almonte and asked to work in the prostitution business. Although Almonte said that JF “looked young,” she explained that she did not mean she looked very young. Almonte said she looked seventeen, eighteen or a grown woman. Moreover, the

word “young” is a relative term. For example, a thirty-year-old is “young” when compared to a sixty-year-old. Significantly, JF responded to Almonte “that she has done this before,” thereby communicating to Almonte that she was an experienced prostitute who was older.

The physician’s assistant at JF’s school said JF “looked more mature” when she returned to school in late August or early September 2015. Almonte had just met JF only a few months before. Therefore, it is likely that JF also “looked more mature” to Almonte. The physician’s assistant said JF “looked more mature” because JF had more piercings and tattoos and her clothing looked mature and expensive. Given that JF was working as a prostitute, she also was likely wearing makeup.

It is reasonable to conclude that JF also took efforts to “look more mature” when she met Almonte. JF wanted a job as a prostitute in the business. She would have wanted to look older than 13, particularly when many of the prostitutes in the business were adult women. Just as with the physician’s assistant, JF likely dressed in more mature and expensive clothing when she met Almonte. She also likely wore make up to make herself look “more mature.”

JF never told Almonte her age. JF later told the other prostitutes that she was 14 years old. The other prostitutes apparently believed her. In fact, Ari testified that she and JF were “friend with benefits.” Despite this close intimate relationship, Ari said she believed JF was “about 14” when JF sent her naked photographs of herself

on Facebook. If Ari could not tell that JF was under 14 years old, Almonte certainly could not.

Therefore, the mere fact that Almonte briefly observed JF on one or two occasions was insufficient evidence that Almonte had a “reasonable opportunity” to observe JF and could reasonably infer that JF was under 14 years old. Given that JF was within one year of being 14 years of age, there would have had to be more evidence from which Almonte could infer that JF was under 14.

JF did not testify at trial. Therefore, the jury did not have the opportunity to observe her physical appearance. To prove Almonte had a reasonable opportunity to observe JF, the government was required to introduce more evidence than one or two brief meetings with JF. There had to be sufficient evidence from which Almonte could infer that JF was under 14 years of age. Additional evidence was particularly necessary because JF was less than one year younger than 14 years old. There was no lengthy relationship. In addition, Almonte was a serious drug addict who was habitually high on drugs. Given the distorting effect produced by drugs on her cognitive abilities, Almonte would have needed more than just one or two meetings with JF for her to draw any reasonable inferences about JF’s age.

Almonte acknowledges that there *may* be circumstances in which a face-to-face, in-person meeting will suffice to satisfy the element, but not always. Depending on the circumstances, more evidence may be needed. In the case at bar,

the difference in age between thirteen and fourteen is only one year. More evidence would have been necessary for Almonte to have drawn the requisite inference that JF was under fourteen years of age.

**C. Almonte's 20-year sentence was substantively unreasonable**

Almonte sentence of 20 years was substantively unreasonable for several reasons. Almonte suffered a brutal and tragic childhood that directly contributed to her commission of the instant offense. The district court did not give any weight to the fact that Almonte suffers from serious mental illnesses, including schizophrenia. Impaired intellectual functioning is inherently mitigating.

Almonte's mother bears the greatest responsibility for what transpired, yet she only received a 60-month sentence of imprisonment, thereby creating an unwarranted sentencing disparity. The 20-year sentence does not aid Almonte's rehabilitation, but rather actually hinders her progress. Almonte will likely suffer extraordinary punishment not contemplated by the Guidelines while in prison, due to the nature of her conviction, her vulnerability, and her significant health issues. Almonte will suffer adverse collateral consequences from this conviction, including that she will be required to register as a sex offender. Almonte was for 34 years of age when sentenced and therefore will likely be a lower risk of recidivism upon her release after serving the mandatory minimum sentence of 15 years.

There are several mitigating facts in the offense. This is not the typical sex

trafficking case in which a defendant targets vulnerable children, gains control over them, and keeps them working as prostitutes through physical, emotional and psychological abuse. Almonte became involved in the prostitution business because she was poor and needed money to support herself, her children, and her serious drug addiction. Almonte was compelled because of her obesity to make money in the prostitution business by offering a service to the other prostitutes in the form of finding “clients” and locations for the business. JF was only one year shy of the statutory age of 14 that would have reduced the mandatory minimum sentence to 10 years. There is no evidence that Almonte actually knew JF was 13 years of age from the one or two meetings. JF held herself out to others as 14 years old.

Almonte demonstrated substantial rehabilitation while incarcerated prior to sentencing. Such fact is highly relevant and essential to the determination of an appropriate sentence.



## **CONCLUSION**

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

DATED: May 27, 2020

Respectfully submitted by

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