No. 21- _____

SUPREME COURT OF THE UNITED STATES

Martha Aguirre,

Petitioner,

vs.

The 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

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I. Question Presented

Whether the Due Process Clause is violated when the only witness for the Government linking the appellant to a narcotics conspiracy commits perjury in material testimony before the grand jury relative to an element of knowledge, and then subjectively makes the same misrepresentation before the trial jury in connection with the same subject matter, and the misrepresentation is left uncorrected by the Government.

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Martha Aguirre, an inmate currently incarcerated at FCI Phoenix in Phoenix, Arizona, by and through M. Kirk Okay, CJA counsel of record in the district court and in the United States Court of Appeals for the Second Circuit, respectfully petitions this Court for a writ of certiorari to review the 6 May 2021 Summary Order of the United States Court of Appeals for the Second Circuit affirming the judgment of the district court in this case.

V. Opinions Below

The United States Court of Appeals for the Second Circuit, in a Summary Order entered 6 May 2021, affirmed the judgment of conviction entered in the United States District Court for the Western District of New York. The Summary Order is attached hereto at Appendix 1-14.

VI. Jurisdiction

The Summary Order of the United States Court of Appeals for the Second Circuit was entered on 6 May 2021. Aguirre invokes the jurisdiction of the Court under 28 USC § 1257, having timely filed this petition for a writ of certiorari within ninety (90) days of the entry of the 6 May 2021 Summary Order of the United States Court of Appeals for the Second Circuit.

VII. Constitutional Provisions Involved

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VIII. Statement of the Case

The petitioner was convicted following a jury trial in the United States District Court for the Western District of New York (Buffalo) with one (1) count of narcotics conspiracy in violation of 21 USC § 841 and §846, and with one (1) count of money laundering conspiracy in violation of 18 USC §1956(h). There was one (1) co-defendant at trial, Juan Alfaro, who was also convicted on the same two (2) counts.

The petitioner was sentenced to an aggregate term of imprisonment of 150 months with five (5) years of supervised release.

At trial, the only witness against the petitioner in connection with the narcotics conspiracy count was a co-conspirator, Sonia Hernandez. Prior to her testimony at trial, Hernandez had pled guilty pursuant to a written plea agreement

to the same narcotics conspiracy and money laundering conspiracy the petitioner was charged with.

At trial Hernandez recounted a transcontinental road trip she made with the petitioner from Los Angeles to Buffalo over the 2014 Memorial Day weekend in a rented vehicle into which a large quantity of narcotics had been concealed at the behest of the brother of the petitioner, Herman Aguirre, who was the employer of Hernandez at a payroll processing and employee leasing business he owned in Los Angeles.

Hernandez also testified at trial about how she was arrested less than one (1) month later, in June of 2014, driving another rented SUV with narcotics concealed inside, on an interstate highway in Seward County, Nebraska, enroute again from Los Angeles to Buffalo. The petitioner was not with Hernandez at the time of the Nebraska motor vehicle stop.

In her plea colloquy before the Article III judge in the United States District Court for the Western District of New York prior to her trial testimony, Hernandez, under oath, stated (1) that she had knowledge narcotics were concealed in the rented SUV she drove from Los Angeles to Buffalo over the Memorial Day weekend in May of 2014; (2) that she had knowledge narcotics were concealed in the rented SUV she was driving when she was stopped in Nebraska in June of 2014; and (3) that she lied under oath when she testified before the grand jury that she had no

knowledge of the narcotics concealed in either SUV on the two (2) occasions in question. Hernandez, in prior relevant and material testimony before a federal grand jury, denied all knowledge of either the Memorial Day narcotics, or the Nebraska narcotics, thereby committing perjury before that body.

At trial, Hernandez, in direct contrast to her plea colloquy, testifies unequivocally under cross-examination that she has no knowledge that either SUV contained concealed narcotics. On re-direct examination, Hernandez is asked by the Government if she is aware of the legal definition of knowledge. Hernandez states that she is unaware of that technical legal definition.

Direct Appeal

The United States Court of Appeals for the Second Circuit, by Summary Order entered 6 May 2021, affirms the judgment of conviction entered in the United States District Court for the Western District of New York.

The Second Circuit holds that the doctrine of conscious avoidance supports an inference of knowledge on the part of Hernandez based upon her testimony *inter alia* that "… the less I knew of what was going on, …[the] better for me," App'x 1468–69 and that she had "some sort of suspicion" about what the vehicles contained. As a result, Hernandez "was aware of a high probability of the fact" that the trips were in service of drug trafficking and she "consciously avoided

confirming that fact." *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993).

IX. REASONS FOR GRANTING THE WRIT

The Court should clarify a subjective standard for deliberate ignorance knowledge that will avoid the appearance of a due process violation similar to that which occurred in *Napue v. Illinois,* 360 U.S. 264 (1959).

The doctrine of conscious avoidance weaves in and out of this case like a classical Greek chorus. For example, although not featured as a part of this petition, the Second Circuit in their 6 May 2021 Summary Order, relies upon the doctrine of conscious avoidance to establish the second (scienter) element of the 21 USC §1959(h) money laundering conspiracy cause of action that was challenged by the petitioner in the direct appeal. The Second Circuit notes near the outset of the Summary Order that "[t]he defendants concede that there was a money laundering conspiracy and that drug-trafficking proceeds passed through their bank accounts." The Panel must find support for this conclusory statement of concession in the fact that neither one of the co-defendants at trial challenged either the first or the third elements of the money laundering conspiracy cause of action in their direct appeals. Only the instant petitioner challenged the second element of knowledge, and the Second Circuit found that knowledge was proved beyond a reasonable doubt at trial through the application of the doctrine of deliberate ignorance. Interestingly, the Second Circuit, on Page 7 of the Summary Order,

states that "Aguirre purportedly never asked where the money came from, despite the large sums involved." This observation must be gratuitous since the petitioner never waived her right to remain silent. The petitioner does not note that she refrains from confirming the source of the monies deposited into the Kamora bank account(s) in her affidavit that is read into the record on Pages 892–94 of the Appendix.

Turning to the issue that is the focus of this petition, and as noted *supra*, the Second Circuit also utilizes the doctrine of conscious avoidance to excuse the many misrepresentations of Sonia Hernandez at trial.

The Second Circuit states on Page 10 of the Summary Order:

> This [*sic*] is no contradiction between Hernandez's guilty plea and her testimony. Based on her testimony, a reasonable juror could infer that Hernandez "was aware of a high probability of the fact" that the trips were in service of drug trafficking and she "consciously avoided confirming that fact." *Rodriguez*, 983 F.2d at 458. Hernandez's guilty plea to participating in the drug conspiracy is therefore consistent with her testimony that she lacked specific knowledge about what she was transporting because she deliberately avoided confirming her suspicions.

The difficulty with this, however, is that when Hernandez denies knowledge of the narcotics in her trial testimony, she is not relying upon the doctrine of willful blindness to support an inference that is consistent with both knowledge, and with the admission of knowledge that she makes under oath in her plea colloquy. Sonia Hernandez admits that she has no legal training, and that she is

unaware of the technical legal definition of knowledge: which can be actual, constructive or imputed.

Even though the Second Circuit utilizes the doctrine of conscious avoidance to sustain the apparent contradictions in the testimony, at core, it is apparent that Sonia Hernandez is not relying upon some doctrinal approach to steer a middle course between the creation of a false impression that she is an unwitting employee who is being used as a beast of burden by the mastermind brother of the petitioner, and the avoidance of a perjury trap.

In *Napue v. Illinois*, 360 U.S. 264 (1959), a situation at trial developed when material misrepresentations were made in testimony that were significant enough to be held as perjury. An accomplice testified, falsely, that he was receiving no consideration for his cooperation as a witness for the prosecution. This Court held that the uncorrected perjury in that case represented a violation of the Due Process Clause, even though the testimony presented affected only the credibility of the witness, and did not directly relate to the guilt, or non-guilt, of the accused.

It is unusual to see gradations of knowledge set forth in the factual bases of the written plea agreements that are routinely filed in the federal courts of this country. Knowledge is knowledge, just as a lie is a lie. When Sonia Hernandez denies knowledge of the narcotics until after she was pulled over, is she is really thinking to herself; "If I deny knowledge now, it won't be inconsistent with my

earlier admission of knowledge, because there is enough evidence in this record to demonstrate that I should have asked certain questions, and that I should have known. And that is enough to infer knowledge, so there is no perjury." Or is she just trying to make herself look good as a witness in front of the jury? For whatever reason, she is not forthcoming about her knowledge of the narcotics during her testimony at trial. Hernandez flatly denies knowledge. Repeatedly. At the very least this impacts the credibility of the witness in a manner contemplated by *Napue*. And the only thing the Government does to correct the false testimony is to ask the witness if she had ever been to law school, and if she knows what the legal definition of knowledge is.

This Court has repeatedly addressed whether the Due Process Clause is violated when prosecutors knowingly use false testimony in a criminal trial. In 1935, the Court briefly wrote in *Mooney v. Holohan*, 294 U.S. 103, that prosecutors violate the Due Process Clause if they knowingly present perjured testimony. The Court expanded on its decision in 1957 in *Alcorta v. Texas*, 355 U.S. 28, where it held that a prosecutor's neglect to correct false testimony is equivalent to knowingly presenting perjured testimony. However, in *Alcorta,* the Court refrained from setting a specific standard regarding when false testimony becomes material enough to warrant reversal of a conviction.

After *Napue*, in 1963, the Court decided *Brady v. Maryland*, 373 U.S. 83, which held that the Due process Clause requires prosecutors to disclose all exculpatory evidence to the defense. In 1972, the Court decided in *Giglio v. United States*, 405 U.S. 150, that it is a due process violation if a prosecutor fails to correct perjured testimony if the prosecutor's office was aware of the lie, even if the trial assistant in courtroom was not. In *Giglio*, the Court also decided the threshold materiality for *Napue* claims, holding: "A new trial is required if the false testimony could […] in any reasonable likelihood have affected the judgment of the jury." *Id* at 154.

This case presents an opportunity for the Court to articulate a strict standard against which the knowing use of subjective perjury at trial may be tested.

X. Conclusion

For the foregoing reasons, Martha Aguirre respectfully requests that this Court issue a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit.

DATED: August 4, 2021

Respectfully Submitted,

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Certificate of Compliance

As counsel of record, I hereby certify that this Petition complies with the word count limitation set forth in Rule 33(h) of the Rules of the Supreme Court of the United States. I am relying upon the word count of the word processing system (Microsoft Word) used to prepare the Petition, which indicates that **2540** words are contained herein.

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Appendix