In the United States Court of Appeals for the Second Circuit

No. 16–1694

UNITED STATES OF AMERICA

v.

RUDELL L. CLARK MULLINGS,
Defendant/Appellant.

On Appeal from the Judgment of Sentence of the U.S. District Court for the Eastern District of New York in No. 1:15–cr–538–1 (Korman, J.)

BRIEF FOR APPELLANT

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Appellant

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I. STATEMENT OF SUBJECT–MATTER AND APPELLATE JURISDICTION

The district court exercised subject matter jurisdiction pursuant to 18 U.S.C. §3231. This Court has jurisdiction pursuant to 18 U.S.C. §3742(a) and 28 U.S.C. §1291. Defendant/appellant Rudell L. Clark Mullings was sentenced on May 4, 2016. App.3a, 93a–126a. Judgment was entered on May 13, 2016. App.128a. Mullings filed his timely notice of appeal on May 26, 2016. App.133a.

II. STATEMENT OF THE ISSUE ON APPEAL

1. Did the district court err as a matter of law, thereby necessitating defendant's resentencing, when it expressly and repeatedly relied on the five–year minimum sentence for rape imposed under New York State law when imposing an 84–month (seven year) sentence of imprisonment on defendant–appellant Rudell L. Clark Mullings, whose applicable Sentencing Guidelines range for the crime of conviction was 12 to 18 months?

III. STATEMENT OF THE CASE

This is an appeal from the judgment of sentence that Senior U.S. District Judge Edward R. Korman imposed on former federal correctional officer defendant–appellant Rudell L. Clark Mullings in the U.S. District Court for the Eastern District of New York in open court on May 4, 2016, as memorialized in the judgment entered May 13, 2016. App.93a–132a.

Beginning on April 14, 2014, defendant–appellant Rudell L. Clark Mullings worked as a correctional officer at the Metropolitan Correctional Center, an administrative security federal correctional center located in Manhattan. 3/2/16 PSR at 3.

The victim, who is pseudonymously identified in the district court record as Jane Doe, has been serving a federal sentence of imprisonment since 2006. *Id.* Her first sentence, imposed in November 2006 in the Southern District of New York, was for a term of 120 months (10 years). *Id.* In December 2012, Ms. Doe was sentenced in the Southern District of New York to a prison term of 360 months (30 years) to run concurrently to her original sentence for various additional offenses. *Id.* Ms. Doe's projected release date from federal prison is November 2035. *Id.*

On February 14, 2015, defendant Mullings had sexual intercourse with Ms. Doe at the Metropolitan Correctional Center. *Id.* at 4. At that time, Ms. Doe was a federal prisoner who was under the custodial, supervisory, and disciplinary authority of defendant Mullings. *Id.*

Later that day, Ms. Doe — who apparently is cooperating as an informant for the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives — placed a telephone call to a special agent who was her contact there telling the agent that she had been forced by a male at the prison into having sex. *Id.* at 4–5. Ms. Doe stated that the male had ejaculated on her clothing, and the ATF agent advised Ms. Doe to keep the clothing as evidence. *Id.* at 5.

On February 25, 2015, Ms. Doe met with special agents from the Office of the Inspector General. *Id.* Ms. Doe told the special agents that her hesitation in reporting the incident stemmed from, in part, her having exchanged romantic letters with another correctional officer for whom "she had romantic feelings." *Id.*

The initial Presentence Investigation Report (PSR) that the Probation Department prepared in this case concluded that "the defendant held the victim, restricting her movements and preventing her from moving away

from him, as he inserted his penis into her vagina." *Id.* That initial PSR, and all subsequent ones, concluded that the sexual intercourse was not consensual and that defendant Mullings's offense level computation should be increased by two points for the victim related adjustment of physical restraint of the victim. *Id.* at 5, 8.

When defendant Mullings was contacted by investigators, he did not deny that he had sexual intercourse with the victim. *Id.* at 6. His Mirandized statement, provided in the presence of defense counsel, asserted that Ms. Doe initiated the sexual contact and maintained that the sexual intercourse was consensual. *Id.*

On November 23, 2015, federal prosecutors charged defendant Mullings in a one–count information with sexual abuse of a ward in violation of 18 U.S.C. § 2243(b). App.7a–8a. That same day, Mullings pleaded guilty to the offence by means of an open plea, in the absence of any plea agreement. App.12a–55a. The plea included a waiver of venue, as the offense occurred in the Southern District of New York. App.34a–35a.

During the plea allocution, the description of the facts providing a basis for the plea did not include any mention whatsoever of Ms. Doe's contentions that the sex was non–consensual or that she had been

physically restrained during the offense. App.19a–20a, 35a–37a. The prosecution's Sentencing Guidelines calculation at the plea hearing correctly anticipated a term of imprisonment ranging from 12 to 18 months. App.30a.

Until 2006, the statutory maximum sentence that could be imposed for sexual abuse of a ward in violation of 18 U.S.C. §2243(b) was one year. In 2006, Congress increased the statutory maximum sentence to 15 years. The offense in this case occurred in 2015.

In March 2016, the Probation Office issued its initial Presentence Investigation Report. The PSR noted that defendant Mullings had a lengthy and distinguished 20–year record of military service on behalf of the United States. 3/2/16 PSR at 13. The defendant is divorced and has three adult children, two of whom are gainfully employed and the third of whom is pursuing her education full–time. *Id.* at 10–11. The defendant has heart and vascular disease, is overweight, and slept with the assistance of a CPAP device. *Id.* at 12. The defendant had no prior criminal history whatsoever. *Id.* at 9.

The PSR, accepting the victim's assertion that the sexual intercourse was non–consensual and that the victim was physically restrained during the

commission of the crime, noted that the U.S. Sentencing Guidelines calculation produced a total offense level of 13 and a criminal history category of I, producing a Sentencing Guidelines imprisonment range of 12 to 18 months. *Id.* at 8–9, 16.

Federal prosecutors filed a sentencing memorandum in which the government concluded: "the government respectfully requests that the Court upwardly depart from the guidelines or impose a variance or non–guidelines sentence higher than the applicable guidelines range of 12 to 18 months' incarceration." App.82a. The federal government's submission, however, did not propose any specific sentence or sentencing range that the government viewed as proper. App.72a–82a.

In a Third Addendum to the PSR that the Probation Office issued on May 4, 2016, the Probation Office recalculated defendant Mullings's total offense level to equal 18. 5/4/16 PSR Third Addendum at 2. This recalculation resulted from the Probation Office's having added two points for obstruction of justice and eliminating the earlier subtraction of three points for acceptance of responsibility. *Id.* A total offense level of 18 in criminal history category I produces a Sentencing Guidelines range of 27 to 33 months. *Id.* As noted below, however, when the district court imposed

sentence on defendant Mullings, the district court rejected the Probation Office's suggestions for imposing a two point increase for obstruction of justice or revoking the subtraction of three points for acceptance of responsibility. Statement of Reasons at 1; App. 100a. Thus, the Guidelines range in effect, when the district court imposed sentence, was 12 to 18 months based on a total offense level of 13 and criminal history category I under the 2015 version of the Guidelines. Statement of Reasons at 1.

At sentencing, Senior U.S. District Judge Edward R. Korman rejected the Probation Office's and the federal prosecutor's requests that he impose sentence based other than on a Sentencing Guidelines calculation consisting of a total offense level of 13 and a criminal history category of I, producing a Sentencing Guidelines range of 12 to 18 months. *Id.*; App.100a.

Nevertheless, Judge Korman chose to impose a sentence of 84 months (seven years), explaining:

> If looked upon as a upward departure from the guidelines, it seems quite clear to me that the guidelines for this particular offense which the offense itself doesn't really reflect the nature of the crime for this — the acts which were necessary to make out a factual basis, don't reflect the seriousness of the offense, essentially he was in a position of being a guard in a prison institution which consent is simply not something that can be assumed. In fact, under New York Penal Law, which I looked at just out of curiosity, it says that someone who is incarcerated

> can never been deemed to have consented to any sexual act with a prison guard or — it's even broader than the word prison guard. So the notion of consent in this context is really — it has no place and I think the most important part of what goes into the sentence here is the necessary to send a message to people who are in positions similar to his, that this conduct is totally unacceptable and deserves severe punishment.
>
> There are people — the fact that this victim was in jail for rather serious crimes does not justify subjecting her to what she was subjected to by the defendant. And I think it's necessary really to send him to send the message that will hopefully deter others from taking advantage of vulnerable people in a situation where they are in no position to consent and certainly no position to be put in — to be forced to — into sexual activity by prison guards.
>
> So there are extraordinary circumstances that would justify this departure and alternatively, even if I didn't, (indiscernible) my guidelines in my judgment are ludicrous in this case. But even if I did not impose a guidelines sentence and simply considered all the 3553(a) factors, they would justify the sentence I gave for the same reasons.
>
> I've taken into account his personal history and the fact that he rendered distinguished service for twenty years while in the military and the sentence I gave him is actually above the minimum for rape in New York which is five years, but I think is appropriate under the circumstances.

App.120a–22a.

The sentence of incarceration that the district court imposed thus was four and two–thirds to seven times longer than the applicable Sentencing Guidelines range of 12 to 18 months.

IV. SUMMARY OF THE ARGUMENT

Defendant/appellant Rudell L. Clark Mullings was employed as a correctional officer at a federal correctional institution in Manhattan, New York City, when in February 2015 he had sexual intercourse on a single occasion with a female inmate who was under his supervision. The inmate, who served as an informant for a federal law enforcement agency, thereafter brought Mullings's unlawful conduct to the attention of one of her law enforcement contacts.

In November 2015, federal prosecutors charged defendant Mullings in a one–count information with sexual abuse of a ward in violation of 18 U.S.C. § 2243(b). That same day, Mullings pleaded guilty to the offence by means of an open plea, in the absence of any plea agreement. The description of the facts providing a basis for the plea did not include any mention whatsoever of Ms. Doe's contentions that the sex was non–consensual or that she had been physically restrained during the offense.

The Probation Office proceeded to prepare a Presentence Investigation Report that accepted as true the victim's allegations that the sex was non–consensual and that she had been restrained during the offense. Even after including an enhancement for restraint of the victim, the Sentencing

Guidelines range that the Probation Office calculated for the offense was 12 to 18 months' of imprisonment. Senior U.S. District Judge Edward R. Korman of the Eastern District of New York, who imposed the sentence that is the subject of this appeal, accepted as correct that 12– to 18–month Sentencing Guidelines range.

On May 4, 2016, after hearing argument from the prosecution and defense counsel, a victim impact statement from the victim, and a brief apologetic statement from the defendant, Judge Korman imposed a sentence of imprisonment of 84 months (seven years). Twice during his oral explanation of reasons for imposing the 84–month sentence, Judge Korman relied expressly on the fact that the minimum sentence for the crime of rape under New York State law was five years. App.121a, 122a.

Under this Court's precedents, and the similar precedents of numerous other federal appellate courts, it is impermissible for a district court to rely on the sentence of imprisonment that a defendant would have received had the crime instead been prosecuted under state law as a factor in determining what federal sentence of imprisonment to impose. Judge Korman's admitted repeated reliance on the five–year minimum sentence for rape available under New York State law — the only sentencing factor

that he mentioned on two separate occasions during his oral recitation of reasons for imposing an 84–month sentence — therefore necessitates this Court's vacatur of the 84–month sentence followed by a remand for a resentencing at which the district court is instructed not to rely directly or indirectly on this unquestionably impermissible sentencing factor.

V. ARGUMENT

A. The District Court Erred As A Matter Of Law, Necessitating Resentencing, In Relying On The New York State Law Sentence For Rape As Justification For Imposing An 84–Month Sentence In Lieu Of The Guidelines Range Of 12 To 18 Months

In *Riascos–Hurtado* v. *United States*, 2015 WL 3603965 (E.D.N.Y. 2015), Judge Dearie explained that plaintiffs in that civil suit for money damages against the United States alleged they were sexually assaulted by Theodore Raines, a correctional counselor at the Metropolitan Detention Center in Brooklyn, a facility operated by the Federal Bureau of Prisons. *Id.* at *1. According to Judge Dearie's opinion, Raines raped plaintiff Riascos–Hurtado on two separate occasions. *Id.* The opinion proceeds to explain that Raines pleaded guilty to the charge of sexual abuse of a ward in

violation of 18 U.S.C. §2243(b) and was sentenced to a term of 16 months' of imprisonment. *Id.* at *3.

Riascos–Hurtado demonstrates that defendants who have engaged in criminal conduct as serious or even more serious than the conduct in which defendant–appellant Rudell L. Clark Mullings engaged have received sentences within the applicable Sentencing Guidelines range. Of course, under the current non–mandatory Sentencing Guidelines regime, whatever sentence a district judge chooses to impose is ordinarily evaluated under an abuse of discretion standard. *See United States* v. *Daugerdas*, 837 F.3d 212, 230 (2d Cir. 2016).

In this case, both the Probation Office and the prosecution argued that the sentence imposed should reflect either a departure from the Sentencing Guidelines or a variance in reliance on the statutory sentencing factors set forth in 18 U.S.C. §3553(a). App.82a; 5/4/16 PSR Third Addendum at 3. In imposing a sentence of 84 months' of imprisonment in this case, however, Judge Korman's discussion of the reasons for his selection of that sentence leave no doubt that they were improperly influenced by the fact that, under New York State law, the minimum sentence for the crime of rape is five years.

As Judge Korman explained in imposing the 84–month sentence in this case:

> If looked upon as a upward departure from the guidelines, it seems quite clear to me that the guidelines for this particular offense which the offense itself doesn't really reflect the nature of the crime for this — the acts which were necessary to make out a factual basis, don't reflect the seriousness of the offense, essentially he was in a position of being a guard in a prison institution which consent is simply not something that can be assumed. **In fact, under New York Penal Law, which I looked at just out of curiosity, it says that someone who is incarcerated can never been deemed to have consented to any sexual act with a prison guard or — it's even broader than the word prison guard.** So the notion of consent in this context is really — it has no place and I think the most important part of what goes into the sentence here is the necessary to send a message to people who are in positions similar to his, that this conduct is totally unacceptable and deserves severe punishment.
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> There are people — the fact that this victim was in jail for rather serious crimes does not justify subjecting her to what she was subjected to by the defendant. And I think it's necessary really to send him to send the message that will hopefully deter others from taking advantage of vulnerable people in a situation where they are in no position to consent and certainly no position to be put in — to be forced to — into sexual activity by prison guards.
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> * * *
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> I've taken into account his personal history and the fact that he rendered distinguished service for twenty years while in the military and **the sentence I gave him is actually above the**

> **minimum for rape in New York which is five years**, but I think is appropriate under the circumstances.

App.120a–22a (emphasis added).

Judge Korman's first reliance on New York State criminal law in sentencing defendant Mullings was improper, in that under the very offense of conviction — 18 U.S.C. §2243(b) — the existence or non–existence of the victim's consent is not a defense. App.118a. Thus, there was no need to rely on New York State law for that proposition. And the second reason that Judge Korman gave likewise fails to persuade. The fact that correctional officers who have sexual relations with inmates are subject to prosecution under 18 U.S.C. § 2243(b) without regard to whether the sexual contact was consensual, subjecting those offenders to prison sentences, the lasting consequences of being a convicted federal felon, and ongoing registration as sexual offenders, should more than suffice to send a message that the conduct will not be countenanced. Moreover, federal prosecutors have the option of pursuing indictments and convictions under 18 U.S.C. §2241(a)(1), titled "Aggravated Sexual Abuse by Force or Threat," offering a maximum term of life imprisonment and carrying a far more severe Federal Sentencing Guidelines range even for first–time offenders.

Judge Korman's explanation of the reasons for his choice of an 84–month sentence in this case demonstrates that the most important factor in his decision to impose a seven–year sentence was that the minimum penalty for the offense of rape under New York State law is five years — a fact to which he referred twice in imposing sentence, both at the start and at the conclusion of his explanation for imposing a seven–year sentence, a sentence four and two–thirds times as long as the top of the applicable Sentencing Guidelines range (and seven times as long as the bottom of the applicable Sentencing Guidelines range). App.121a, 122a. Indeed, the sentence imposed in this case equates to the five year minimum sentence for rape under New York State law plus an additional two years for violating the federal law giving rise to the judgment of sentence.

In *United States* v. *Malone*, 503 F.3d 481, 482–83 (6th Cir. 2007), the Sixth Circuit held "that a district court's consideration of a defendant's possible state court sentence as part of its sentencing calculus is improper and renders the resulting sentence unreasonable," thereby constituting reversible error. In *Malone*, the Sixth Circuit explained that it "only address[ed] the district court's consideration of Malone's likely state court sentence because it is dispositive . . . ." *Id.* at 484.

The Sixth Circuit began its analysis by observing that "[i]n two recent opinions, this Court has vacated a defendant's sentence because of the district court's consideration of impermissible factors." *Id.* at 484. The Sixth Circuit then proceeded to explain that "[a]lthough an issue of first impression in this Court, a number of our sister circuits have concluded that it is impermissible for a district court to consider as part of its sentencing calculus the sentence that a defendant likely would have received had he been prosecuted in state court." *Id.* at 485.

The Sixth Circuit continued, "[l]ooking to these other circuits, post–*Booker*, the Third, Fourth, Seventh, Eighth, and Tenth circuits have uniformly found it improper for a district court to consider state court sentences for comparable crimes when fashioning a federal defendant's sentence." *Id.* at 485. Because the district court engaged in this very same impermissible sentencing analysis, the Sixth Circuit in *Malone* vacated the defendant's sentence and remanded for resentencing. *Id.* at 486–87.

Similarly, in *United States* v. *Jeremiah*, 446 F.3d 805, 808 (8th Cir. 2006), the Eighth Circuit held that "[t]he District Court was neither required nor permitted under §3553(a)(6) to consider a potential federal/state sentencing disparity in imposing Jeremiah's sentence." *See also United States*

v. *Willis*, 139 F.3d 811, 812 (11th Cir. 1998) (per curiam) ("This court has recently held that a departure based on a theoretical sentence that a defendant might have received had he been prosecuted in state court is unwarranted.") (citing *United States* v. *Searcy*, 132 F.3d 1421, 1421–22 (11th Cir. 1998) (per curiam)).

This Court — the Second Circuit — has itself likewise recognized that a district court should not rely on a hypothetical state court sentence for a state law crime similar to the federal crime of conviction in deciding what federal sentence to impose. In *United States* v. *Johnson*, 505 F.3d 120, 123–24 (2d Cir. 2007), this Court held that "we cannot say that the District Court erred by declining to adopt an approach that would have decreased sentencing disparities between Johnson and any similarly–situated state defendant but *increased* sentencing disparities between Johnson and any similarly–situated federal defendant prosecuted in different states."

Similarly, in *United States* v. *Haynes*, 985 F.2d 65 (2d Cir. 1993), this Court explained:

> Additional reasons strongly counsel against departure based on the disparity between state and federal sentencing regimes. It has been often stated that the sentencing guidelines were adopted by Congress to achieve uniformity in federal sentencing for similarly situated defendants. Allowing

> departure because a defendant might have been subjected to different penalties had he been prosecuted in state court would make federal sentences dependent on the law of the state in which the sentencing court was located, resulting in federal sentencing that would vary from state to state. To adopt this rationale for departure would surely undermine Congress' stated goal of uniformity in sentencing.

Id. at 69–70 (internal citations omitted). Even under the current non–mandatory Sentencing Guidelines regime, district courts should continue to prioritize Congress's goal of sentencing uniformity. *See* 18 U.S.C. §3553(a)(6).

Because a federal district court commits legal error in relying on a hypothetical state law sentence for an analogous state law offense in deciding what sentence of incarceration to impose for a federal offense such as 18 U.S.C. §2243(b), this Court should vacate the 84–month sentence of incarceration that the district court imposed in this case and remand for resentencing.

This Court has recognized that where a district court has relied on both proper and improper sentencing factors in departing from the Sentencing Guidelines, a remand for resentencing is necessary. *See United States* v. *Barresi*, 361 F.3d 666, 672 (2d Cir. 2004). Although this Court long ago recognized that "[w]hen a sentencing court relies on a combination of

permissible and impermissible factors to justify a departure, the sentence will be affirmed if an appellate court determines the district court would have imposed the same sentence absent reliance on the impermissible factors," *United States* v. *Payton*, 159 F.3d 49, 61 (2d Cir. 1998), affirmance is not appropriate here, because it is impossible to know what sentence the district court would have imposed on Mullings had the district court not opted to use as the starting point in its sentencing determination the five–year minimum sentence for rape under New York State law.

Neither the Probation Office's Presentence Investigation Report nor any of the sentencing–related filings of the parties relied on or even mentioned the minimum sentence for rape under New York State law in discussing what sentence the district court should impose on Mullings. App.57a–82a. Thus, after imposing a particularly harsh seven–year sentence on Mullings, it came as a complete surprise to everyone when the district court repeatedly relied on the minimum five–year sentence for rape under New York State law as a justification for its seven–year sentence in this case. App.121a, 122a.

The Sixth Circuit, in vacating and remanding the sentence imposed in *United States* v. *Malone*, 503 F.3d 481, 482–83 (6th Cir. 2007), following the

federal government's appeal challenging the district court's impermissible reliance on state law in imposing a below–Guidelines sentence, did not require the federal government to demonstrate that it raised any objection in the district court to the district court's impermissible reliance on state law as a precondition to prevailing on appeal. The absence of any objection from Mullings's trial counsel to the district court's entirely unexpected and legally erroneous reliance on New York State law for imposing an upward departure here likewise should not preclude Mullings from prevailing on his sentencing challenge in this appeal.

Indeed, under this Court's ruling in *United States* v. *Leung*, 40 F.3d 577 (2d Cir. 1994), there was no need for Mullings through his counsel to object to the district court's impermissible reliance on New York State law as the basis for its 84–month sentence in order to preserve this legal challenge for this Court's review:

> The Government argues that we should not reach the merits of this issue because Leung failed to object to the contested remarks at the sentencing hearing. However, Leung did not forfeit her right to challenge the sentencing remarks on appeal. The first remark was somewhat ambiguous, and a defendant is understandably reluctant to suggest to a judge that an ambiguous remark reveals bias just as the judge is about to select a sentence. The second remark, which referred to Leung's ethnicity and which could be thought to give meaning to the

> first remark, occurred after the sentence had been imposed. This situation is not comparable to one where a defendant fails to object to factual statements in a presentencing report, or fails to object to a proposed legal ruling regarding an application of the Sentencing Guidelines. **In a variety of circumstances in which a party could not reasonably have been expected to raise a contemporaneous objection at a sentencing hearing, we have allowed the objection to be raised for the first time on appeal.**

Id. at 586 (citations omitted; emphasis added**)**. The district court's unexpected and impermissible reliance on New York State law in imposing an 84–month sentence on Mullings is among the "variety of circumstances in which a party could not reasonably have been expected to raise a contemporaneous objection at a sentencing hearing." *Id.*

In section VIII (titled "Additional Basis for the Sentence in this Case") found on page four of the Statement of Reasons portion of the judgment filed under seal in the district court, Judge Korman gave these additional reasons (quoted below in regular type for ease of comprehension even though this text appears in all capital letters in the Statement of Reasons itself):

> The Court upwardly departs because of the extraordinary circumstances in the case; the position of authority the deft held over a victim who could not consent, and the act was accomplished by use of physical force; the Guidelines do not

> reflect the serious nature of the crime committed, the need for specific deterrence.

Statement of Reasons (filed under seal) at 4.

As even Judge Korman himself noted during the sentencing hearing, the crime as to which Mullings pleaded guilty, sexual abuse of a ward in violation of 18 U.S.C. § 2243(b), presupposes that the defendant is in a position of authority over the victim and also presupposes that the victim cannot consent by rendering any claim of consent irrelevant to the offense. App.118a. Moreover, the Guidelines sentence of 12 to 18 months, which Judge Korman accepted as applicable in this case, already included an enhancement for restraint of the victim, thus taking the use of physical force into account. App.119a. Finally, "specific deterrence" refers to deterring the specific offender from engaging in future criminal acts, a questionable goal in a case in which the offense in question was the defendant's first and only charged violation of the law. 3/2/16 PSR at 9. Accordingly, the district court's Statement of Reasons fails to demonstrate that the district court would have imposed the identical 84–month sentence of imprisonment on Mullings in the absence of the district court's

impermissible reliance of New York State law's five–year minimum sentence for rape.

In the event that this appeal results in a resentencing, it is defendant–appellant Mullings's intent to seek to withdraw his agreement that the offense involved use of force and that the victim did not consent, based on both ineffective assistance of prior counsel and the federal prosecutor's post–sentencing disclosure of information from another cooperating female witness also confined at the Metropolitan Correctional Complex at the time of the offense. According to the government's disclosure, provided by the prosecution to defense counsel after Mullings's sentencing had occurred, another witness who also serves as an informant for the federal government has reported to her handlers that the sexual conduct between defendant Mullings and the victim was consensual, and also reported that the victim initiated the sexual contact in the hope of either receiving an award of damages or a reduction in sentence.

VI. CONCLUSION

For the reasons set forth above, defendant–appellant Rudell L. Clark Mullings respectfully requests that his sentence be vacated and this case be remanded for a new sentencing proceeding, at which he will seek to proceed to a *Fatico* hearing on the issues of restraint of the victim and non–consensual sexual contact.

Respectfully submitted,

Dated: February 3, 2017

/s/ Howard J. Bashman

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Appellant

CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(A) because this brief does not exceed 30 pages.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14–point Book Antiqua font.

Dated: February 3, 2017

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Second Circuit.

Dated: February 3, 2017

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel hereby certifies that the electronic copy of this Brief for Appellant is identical to the paper copies filed with the Court.

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Dated: February 3, 2017

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that counsel listed immediately below on this Certificate of Service is a Filing User of the Second Circuit's CM/ECF system, and this document is being served electronically on him by the Notice of Docket Activity:

Hiral Deepak Mehta

Dated: February 3, 2017

/s/ Howard J. Bashman
Howard J. Bashman