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.)

REPLY BRIEF FOR APPELLANT

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I. INTRODUCTION

The Brief for Appellee that federal prosecutors have filed, although it urges affirmance, nowhere attempts to defend the lawfulness of the district court's admitted reliance on New York State law in deciding what sentence of imprisonment to impose on defendant–appellant Rudell L. Clark Mullings. Instead, the government's brief does everything possible to downplay that reliance, even stretching the facts to suggest that the record is somehow clear that the district judge would have imposed the same 84–month (seven–year) sentence on Mullings in the absence of any reliance on New York State law.

The government's Brief for Appellee, in its factual recitation, repeatedly uses the term "rape" to describe the offense that Mullings committed, notwithstanding that no federal criminal statutory offense by the name of "rape" exists in the U.S. Code. The one and only offense to which Mullings pleaded guilty, and now stands convicted, is for sexual abuse of a ward in violation of 18 U.S.C. §2243(b). That federal criminal offense does not encompass the elements of common law rape. As explained in the Brief for Appellant, federal prosecutors could have pursued a charge against Mullings under 18 U.S.C. §2241(a)(1), titled "Aggravated Sexual Abuse by

Force or Threat," if they believed that Mullings had raped the victim of his offense. Why the federal government's brief insists on referring to Mullings's offense as "rape" when the only relevance of that term is to bolster Judge Korman's unlawful reliance on the five–year minimum sentence for the crime of "rape" under New York law, the Brief for Appellee never explains.

The federal government proceeds as though Mullings should be thankful he did not receive the maximum sentence of 15 years, but rather only seven years, all but ignoring that the Sentencing Guidelines calculation for his offense was 12 to 18 months, even after including an enhancement for use of force against the victim. The victim reported no physical injuries as a result of the offense, and the only evidence of the victim's psychological injuries comes from the in–court statement of the victim, who may or may not be reliably describing them.*

* The federal government's observation (USA Br. at 22) that Mullings waived a *Fatico* hearing at his original sentencing is correct, but that waiver was based on the evidence and testimony then available to him, which at the time would have made the issue of consent a "he said"–"she said" dispute. The letter the prosecution turned over to counsel for defendant after sentencing — advising that another jailhouse informant concluded based on previously undisclosed information that the victim initiated sexual contact with Mullings for the victim's own benefit — revealed

Significantly, many of the cases on which the federal government relies most heavily in its Brief for Appellee actually support defendant–appellant Mullings's request for resentencing. The case the government relies on to argue that this Court should review only for plain error instead confirms that the district court's reliance here on the five–year sentence for rape under New York State law was so unexpected that it would not be proper for Mullings to be penalized for his trial attorney's failure to object on the spot. Rather, ordinary harmless error review (which is more favorable to the criminal defendant), rather than rigorous plain error review (which is less favorable to the criminal defendant), is the proper standard of review here, even under the cases on which the federal government relies.

Similarly, the cases on which the federal government relies to argue that the district court's reliance on the five–year minimum sentence for rape under New York law was harmless error in fact demonstrate exactly the

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information and the identities of potential witnesses that Mullings had no knowledge of or access to when he decided to forgo a *Fatico* hearing at the original sentencing. The post–sentencing disclosure of that newly revealed information could permit the district court, at resentencing, to allow Mullings to reconsider and revoke his original decision to forgo a *Fatico* hearing now that additional, relevant evidence may be available that Mullings, due to no fault of his own, had no knowledge of at the time of the original sentencing proceeding.

opposite – that a resentencing with instructions not to rely on the New York state sentence for rape is the only proper outcome here.

For these reasons, as discussed in more detail below, defendant–appellant Mullings respectfully requests that his sentence be vacated and this case be remanded for a new sentencing proceeding

II. ARGUMENT IN REPLY

A. Plenary versus abuse of discretion review

The federal government's Brief for Appellee attempts to reframe the question presented as implicating the abuse of discretion standard of review, rather than the error of law standard as requested in the opening Brief for Appellant. (Compare USA Br. at 2 with Appellant's Br. at 11). This issue is of no moment, however, because Mullings prevails under either standard.

As the U.S. Supreme Court has observed, a federal district court necessarily abuses its discretion when it commits an error of law harmful to the appealing party. *See Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . . .").

B. Ordinary harmless error review (a standard under which Mullings prevails), rather than rigorous plain error review (as requested by the prosecution), is the appropriate standard of review here

The procedural error that this case presents — a federal district judge's improper and unlawful reliance on the sentence available for the defendant's offense under the law of the state in which the crime was committed — is not an error that arises with any frequency at sentencing (as the paucity of the case law on the subject illustrates), nor is it an error as to which either Mullings or counsel for the federal government had any advance notice heading into sentencing in this case. Both of these facts are undisputed on this record.

In *United States* v. *Villafuerte*, 502 F.3d 204 (2d Cir. 2007), the principal case on which the federal government relies in arguing that Mullings's appeal should be subjected only to plain error review, this Court explicitly noted that plain error review is not appropriate in cases — such as this one — in which the error arises very infrequently and the parties had no advance, pre-sentencing notice of the issue before the sentencing occurred. *See id.* at 208 ("we have been more likely to avoid the full rigors of plain error analysis when the sentence was imposed without giving the appellant . . . prior notice of the aspect of the sentence challenged on

appeal"; *see also id.* ("we have declined to overlook a lack of objection where the sentencing issue was not particularly novel or complex") (internal quotations omitted).

In accordance with *Villafuerte*, as in the cases Mullings cited in his opening brief on appeal (*see* Appellant's Br. at 19–21), this Court should hold that Mullings is not limited to plain error review because the sentencing issue presented herein rarely arises and was not the sort of sentencing error that defense counsel could or should be expected to recognize and object to on the spot.

C. This Court should reject the federal government's efforts to downplay both the district judge's pervasive reliance on New York law in imposing sentence and the case law requiring resentencing under these very circumstances

From start to finish when explaining the reasons for imposing an 84–month sentence of imprisonment on defendant–appellant Mullings, Judge Korman undeniably had New York law, and its five–year minimum sentence for rape, at the forefront of his mind. App.120a–22a.

Although the federal government correctly notes in its appellate brief that Judge Korman also discussed other considerations in deciding what

sentence to impose, it is impossible to know to what extent or degree Judge Korman's decision to impose an 84–month sentence was influenced by his improper consideration of the existence of a five–year minimum sentence for rape under New York State law.

Improper reliance on state law in deciding what federal sentence of imprisonment to impose for a federal statutory offense raises numerous concerns that the federal government's Brief for Appellee entirely ignores. To begin with, although Judge Korman accurately stated that the minimum sentence of imprisonment for "rape" under New York State law, when viewed as a class B violent felony, is five years (N.Y. Penal Law §70.02(3)(a)), Judge Korman overlooked that the offense to which defendant–appellant Mullings pleaded guilty did not encompass the same elements as the crime of "rape" under New York law. Indeed, the New York State crime most analogous to the one that Mullings pleaded guilty to is found in N.Y. Penal Law §130.25 — "Rape in the third degree," a class E felony. The minimum sentence for that offense under New York law is 16 months. *See* N.Y. Penal Law §70.00(3)(b).

Even greater non–uniformity would be introduced into federal sentencing if the district judges of the other two states within the Second

Circuit — Connecticut and Vermont — were to rely on the sentencing laws of those states to decide what federal criminal sentence to impose on a former federal prison guard convicted of sexual abuse of a ward.

Under Connecticut law, the minimum sentence of imprisonment for rape is two years. *See* Conn. Gen. Stat. §53a–70(b)(1). And the Connecticut state law offense most analogous to the federal criminal offense of sexual abuse of a ward carries with it only a nine–month mandatory minimum sentence. *See* Conn. Gen. Stat. §53a–71(b).

Under Vermont law, a defendant convicted of non–consensual sexual assault faces a three–year mandatory minimum sentence of incarceration. *See* Vt. Stat. Ann. tit. 13, §3252(f)(1). And the Vermont state law offense most analogous to the federal criminal offense of sexual abuse of a ward has no mandatory minimum sentence of incarceration and carries a maximum sentence of imprisonment of five years. *See* Vt. Stat. Ann. tit. 13, §3257(b).

Enabling federal district judges within the Second Circuit to explicitly rely on the available state law sentence for a federal criminal offense not only introduces uncertainty with regard to whether the most analogous state law offense has been selected, but it also seriously imperils

uniformity, which remains a central goal of federal criminal sentencing. This Court should therefore reject the federal government's efforts to dismiss the district court's sentencing error in this case as insignificant.

D. The prosecution's harmless error argument finds no support in this record

The government's final ground for affirmance asserts that the district court committed harmless error at most because the district court conceivably could impose the same sentence on remand without any explicit reference to the minimum sentence for the crime of rape under New York State law.

The two cases on which the federal government relies, however, provide no support for its harmless error argument. In *United States* v. *Jass*, 569 F.3d 47 (2d Cir. 2009), the district court explicitly stated on the record at the defendant's original sentencing that it would have imposed exactly the same sentence regardless of whether a two–point enhancement was or was not available. *Id.* at 68. Under those particular circumstances, this Court held that the district court's erroneous resolution of the two–point enhancement issue constituted harmless error. *Id.*

Similarly, in *United States* v. *Sanchez*, 517 F.3d 651 (2d Cir. 2008), this Court rejected the federal government's harmless error argument, because the district court had not "indicated clearly that the district court would have imposed the same sentence had it had an accurate understanding of its authority." *Id.* at 665. In common with this Court's ruling in *Sanchez*, nowhere in this record did Judge Korman explicitly state or even suggest that he would have imposed the same 84–month sentence of incarceration on defendant–appellant Mullings in the absence of any unlawful reliance on the fact that the minimum sentence for rape under New York State law was five years.

As a result, the federal government's harmless error argument cannot succeed on this record.

III. CONCLUSION

For the reasons set forth above and in the opening Brief for Appellant, defendant–appellant Rudell L. Clark Mullings respectfully requests that his sentence be vacated and this case be remanded for a new sentencing proceeding.

Respectfully submitted,

Dated: May 30, 2017

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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 15 pages.

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Dated: May 30, 2017

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATE OF SERVICE

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

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