

No 19-5760

IN THE  
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.  
FILED

JUN 11 2019

OFFICE OF THE CLERK

ALY TOURE - PETITIONER

vs.

MICHAEL CAPRA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

APPELLATE DIVISION: FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

ALY TOURE

SING SING CORR. FACILITY, 354 HUNTER ST.

OSSINING, NEW YORK 10562

N/A

QUESTIONS PRESENTED

1. DID THE APPELLATE DIVISION VIOLATE CLEARLY ESTABLISHED FEDERAL SUPREME COURT RATIFIED LAW ?
2. DID THE LOWER COURT OVERLOOK DEFENDANTS SIGNIFICANT MENTAL HEALTH ISSUES ?
3. DID MR. TOURE VAIDLY WAIVE HIS RIGHT TO APPEAL WHEN THE WRITTEN WAIVER USED UNENFORCEABLE LANGUAGE AND THE COURTS ALLOCUTION DID NOT CURE THE DEFECT ?

JURISDICTION

[ ] For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case  
Was \_\_\_\_\_

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States  
Court of Appeals on the following date: \_\_\_\_\_, and a copy  
of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari  
was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in  
Application No. \_\_\_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

[ ] For cases from State Court:

The date on which the highest state court decided my case was 4/7/19  
A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] A timely petition for rehearing was thereafter denied on the  
following date: \_\_\_\_\_, and a copy of the order denying  
rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for writ of certiorari  
was granted to and including \_\_\_\_\_ date on \_\_\_\_\_ (date) in  
Application No. \_\_\_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a)

UNITED STATES CONSTITUTIONAL AMENDMENTS -4-6-8-14-15

UNITED STATES CONSTITUTIONAL AMENDMENT 14

NEW YORK STATE CONSTITUTIONAL AMENDMENTS-ARTICLES 1-5-6-

FEDERAL CASES

EDWARDS v. ARIZONA, 451 U.S. 477 (1981)

JOHNSON v. ZERBST, 304 U.S. 458

SMITH v. DEPARTMENT OF JUSTICE, 218 F.Supp.2d 357 (WDNY 2002)

STATE CASES

PEOPLE v. BARONE, 101 A.D.3d 585(1st.Dept. 2012)

PEOPLE v. BRADSHAW, 18 N.Y.3d 257(2011)

PEOPLE v. CHERRY, 127 A.D.3d 533(2015)

PEOPLE v. FERREIRA, 144 A.D.3d 612(1st.Dept.2016)

PEOPLE v. FISHER, 143 A.D.3d 623(1st,Dept.2016)

PEOPLE V. HERNANDEZ, 154 A.D.3d 560(1st.Dept.2017)

PEOPLE V. LUGO, 154 A.D.3d 515(1st.Dept.2017)

people V. MASON, 143 A.D.3d 569(1st.Dept.2016)

PEOPLE V. MOORE, 155 A.D.3d 513(1st.Dept.2017)

PEOPLE v. MORALES, 104 A.D.3d 560(1st.Dept.2013)

PEOPLE v. OGUENDO, 105 A.D.3d 447(1st.Dept.2013)

PEOPLE V. POWELL, 140 A.D.3d 401(1st.Dept.2016)

PEOPLE V. REYES, 142 A.D.3d 868(1st.Dept.2016)

PEOPLE v. RIVERA, 156 A.D.3d 420(1st.Dept.2017)

PEOPLE v. SANTIAGO, 119 A.D.3d 484(1st.Dept.2014)

PEOPLE v. WALKER, 132 A.D.3d 568(1st.Dept.2015)

STATUTES

C.P.L. § 450.10

PENAL LAW § 70.00

## STATEMENT OF THE CASE

Aly Toure was born in 1987 in Guinea. He did not complete high school, making it only through the 11th grade, He came to the United States on a visa in 2004,Id, At the time of the pre-sentence interview, Mr. Toure's mother still resided in Guinea, and his Father was deceased.

Mr. Toure has a history of mental health needs, for which he participated in out-patient mental health care(PSR 4), He had been hospitalized in the past for psychiatric reasons and even attempted suicide, beyond his mental health needs, Mr. Toure suffered from substance abuse issues in his late teens and early 20s, specifically the use of heroin and alcohol. Despite these issues, Mr. Toure had stable housing with his uncle and consistent employment. Around the time of the instant incident, he was employed at a 99 cent store in Harlem.

In the early morning hours of December 13,2013, the complainant heard a knock at her door. She cracked open the door to see a "dark skinned male" in her private vestibule area, allegedly displaying a knife.

The male, later identified as Mr. Toure, a young upstairs neighbor of the complainant, forced himself into the complainants home, and penetrated complainants vagina with his penis". Afterward, the male directed the complainant to the bathroom, where he used water to clean complainants genitals.

On April 22,2015, a pre sentence interview was performed with Mr. Toure via teleconferencing. This incident marked the second time Mr. Toure was arrested in New York, His involvement with the criminal justice system prior to instant case was minor. In 2009, Mr. Toure was convicted of possession of a forged instrument and sentenced to time served, Mr. Toure was also convicted of "obstruction" in Georgia, and sentenced to probation, Mr. Toure was arrested as a "deportable alien" by Immigration and Custom

Enforcement in November 2009.

Mr. Toure indicated that he suffered from serious mental illnesses- including, schizophrenia, auditory hallucinations, and paranoia, but did not blame his actions on these issues. He fully admitted his guilt during the pre-sentence interview. However, likely due to his mental illnesses, Mr. Toure reported that he blacked out at the time of the offense, and had no memory of what happened on the night of the incident.

On April 20, 2015, Mr. Toure pleaded guilty to rape in the first degree in exchange for a sentence of 15 years incarceration plus 20 years post-release supervision and SORA conditions. The plea was also predicated on Mr. Toure's waiver of the right to appeal.

The Court began the plea allocution by asking Mr. Toure whether he wanted to plead guilty. Mr. Toure confirmed that he did, and the court advised him that this conviction would expose him to deportation. The court ensured defense counsel had advised Mr. Toure on the immigration consequences of the plea, and Mr. Toure confirmed he was satisfied with counsel's representation.

The court explained to Mr. Toure that by pleading guilty, he was giving up certain rights, including the right to trial, and to remain silent among others, Mr. Toure understood he would be waiving those rights.

As a separate condition of the plea, the court explained, Mr. Toure was giving up his right "to go to a higher court than myself with any legal issues connected to your case, your plea or your sentence" Mr. Toure confirmed he went over the waiver with defense counsel, and that he was agreeing to waive his appellate rights by signing the written waiver in court, The court made no further mention of appellate rights or the waiver of the right to appeal.

The court performed a brief factual allocution, during which Mr. Toure admitted to the court's recitation that, "on December 13, 2013, in Bronx County you engaged in sexual intercourse with Luz Torres by forcible compulsion" The matter was adjourned for sentencing.

The original sentencing date was set for May 5, 2015, On that date, defense counsel expressed Mr. Toure's desire to vacate the plea, First , although he admitted guilt in the pre-sentence investigation, Mr. Toure, also discussed his mental illnesses. He consistently recounted that he "blacked out" and did not remember what happened on the night of the incident. The court was specifically concerned because these statements "contradicted his admission of guilt".

Second, the court referenced a letter Mr. Toure sent to the court in which he did not ask for plea vacatur, but requested a lesser sentence because of his mental illnesses. He did not want his mental health issues to be lost on the court. With that the case was adjourned until May 19, 2015 for further investigation of Mr. Toure's claims.

On May 19, 2015, a new attorney was assigned to represent Mr. Toure to explore the merits of plea withdrawal. After multiple adjournments and months of review, Mr. Toure and his new attorney decided to keep the plea agreement intact.

On September 8, 2015, Mr. Toure was sentenced to the promised 15 years incarceration, plus 20 years post release supervision, a waiver of right to appeal, and SORA restrictions.

## REASONS FOR GRANTING THE PETITION

FURTHER GUIDANCE FROM THIS COURT IS WARRANTED TO CLARIFY  
WHAT ROLE DOES BEING AN "DEPORTABLE ALIEN" PLAY IN  
SENTENCING EXPOSURE ? COUPLED WITH MENTAL HEALTH ISSUES  
WHICH REQUIRE TREATMENT?

In determining an appropriate sentence, a Court should consider the crime charged, the particular circumstances of the offender, and the purposes of Penal sanction, People v. Farrar, 52 N.Y.2d 302, People v. Suite, 90 A.D.2d 80,

Aly Toure pleaded guilty to rape in the first degree, Penal Law §130.35, a class B felony. The minimum term that Mr. Toure could receive for first-degree rape is five years incarceration. See; Penal Law 70.00, 70.02(1)(a), 70.02(3)(a), In light of Mr. Toure's severe mental health issues, a 15 year sentence is severe, We respectfully submit that the minimum sentence of five years is appropriate where, as here, Mr. Toure was battling significant and persistent mental health issues.

Additionally, Mr. Toure did not validly waive his right to Appeal. The Court failed to fully explain that appellate rights are separate and distinct from the trial rights automatically forfeited by a guilty plea.

The Court used misleading language that made it seem like an appeal on any grounds would not be possible. The written waiver of appeal cannot make up for the poor allocution because it contains language purporting to prohibit Mr. Toure from filing a notice of appeal. As a result, Mr. Toure's purported agreement to waive the right to appeal violated due process and cannot be enforced. See; U.S. Const, Amends, V, XIV; N.Y. Const. Art 1, § 6.



### QUESTION ONE

#### DID THE APPELLATE DIVISION VIOLATE CLEARLY ESTABLISHED FEDERAL SUPREME COURT RATIFIED LAW?

The sentence imposed was severe and should be reduced to the Minimum Sentence in the Interest of Justice.

Mr. Toure suffered from significant mental health issues. He was admitted to the hospital for treatment on at least one occasion, and sought treatment from professionals for psychiatric reasons. Specifically, Mr. Toure reported diagnoses of schizophrenia, auditory hallucinations, and paranoia, Mr. Toure also made attempts at suicide.

Mr. Toure repeatedly contended that he did not have any memory of the night of the incident, likely due to his mental health. This is evidenced by the statement he made to the pre sentence investigators, as well as consistent representations to the Court. However, Mr. Toure still accepted that he committed a crime. Importantly, Mr. Toure is not a repeat offender requiring an increased sentence because he has not learned from prior mistakes.

Our argument is not that the sentence imposed by the court was an abuse of discretion. Rather, this court should exercise its discretion to reduce that sentence in the interests of justice. This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under circumstances, even though the sentence may be within the permissible statutory range" and even though it was not an abuse of discretion. People v. Delgado, 80 N.Y.2d 780,783; See; People v Barone, 101 A.D.3d 585. This sentence review power may be exercised in the interest of justice and no deference need be afforded to the sentencing court. See Delgado, 80 N.Y.2d 783;

This is true even if the sentence was a bargained for agreeme. See; People v. Thompson, 60 N.Y.2d 520; People v. Morales, 104 A.D.3d 560.

In determining an appropriate sentence, a court should consider the crime charged, the particular circumstances of the offender, and the purpose of penal sanction. People v. Farrar, 52 N.Y.2d 302, People v. Suitte, 90 A.D.2d 80, The objectives of punishment are not only deterrence, rehabilitation, retribution and isolation, see; People v. king, 146 A.D.2d 648, but also the "promotion of [the defendant's] successful and productive reentry and reintegration into society..." Penal Law § 1.05(6).

The sentencing court must be guided by the overriding principle that the minimum sentence should be imposed consistent with the public's protection, the offenses' gravity, and the defendant's rehabilitative needs. See. People v. Notey, 72 A.D.2d 279. In light of these penal objectives, and the specific needs of Mr. Toure, this Court should reduce his sentence.

Given the importance, clarity on this issue is critical, and this Court should address this issue and reverse the lower Courts decision in this case.

## QUESTION TWO

### DID THE LOWER COURT OVERLOOK DEFENDANTS SIGNIFICANT MENTAL HEALTH ISSUES.

Mr. Toure suffered from a mental illness, and had instances of substance abuse in his past. Multiple times during the pendency of the case, Mr. Toure consistently referenced how his mental health affected him. Particularly, in both the pre-sentence investigation, and the letter he sent to the court, Mr. Toure brought the court's attention to his mental health needs, and the effect it had on him. He never denied that punishment for his action was warranted, and even accepted jail as appropriate.

He simply wanted his mental health issues to be seriously considered, and the sentence to reflect his personal rehabilitation needs. As Mr. Toure wrote, "All I'm asking for is fairness and justice." His statement evinced an understanding that punishment was appropriate, but the length felt unfairly punitive, and counter to the goals of penal sanctions.

In this case, there is no positive societal value of keeping Mr. Toure incarcerated for more than the minimum of five years, particularly because the underlying offense is an aggravated felony under federal immigration law, mandating Mr. Toure's deportation to Guinea at the completion of his prison term. See; Smith v. Department of Justice, 218 F.Supp.2d 357.

Further, there is no reason to believe that an additional ten years incarceration would be any more effective against recidivism than the minimum. In fact, the best way to prevent recidivism in this case would be mental health care. See; John Caher, System too often fails the Mentally Ill. N.Y.L.J. May 18, 2000. ( "The State's correctional system is ill-equipped to care for those with mental illness, and prison is hardly a place to improve one's psychiatric health").

The gravity of Mr. Toure's offense did not require a sentence above the minimum. Indeed, courts have reduced sentences for those convicted of

similarly serious offenses to terms less than Mr. Toure's. See, People v. Ferrer, 250 A.D.2d 860. (reducing the sentences for rape in the first degree and sodomy in the first degree from consecutive indeterminate terms of 12½ to 25 years imprisonment to consecutive indeterminate terms of 7½ to 15 years imprisonment, respectively); People v. Griffin, 111 A.D.3d 1355. (finding adequate a sentence of 10 years incarceration for a defendant convicted of rape in the first degree and endangering the welfare of a child where the defendant had two prior felony convictions, one for a sexual offense.

Further, this Court has deemed sentences of five years' incarceration as adequate punishment for other first felony offenders convicted of class B felonies. See; People v. Walker, 132 A.D.3d 568(1st, Dept. 2015) (affirming a five year sentence for defendant convicted of robbery in the first degree) People v. Cherry, 127 A.D.3d 533; People v. Reyes, 142 A.D.3d 868(1st. Dept. 2016). Further, this Court has also reduced a sentence of four to 12 years for first degree manslaughter to a sentence of two to six years, where defendant had "minimal criminal history." See; People v. Cooper, 146 A.D.2d 494.(1st Dept. 1989).

Reduction of Mr. Toure term of imprisonment will not free him from all oversight. Mr. toure is a deportable alien, and this conviction rendered him mandatorily deportable. Shorting the sentence will in essence expedite the deportation. even in the event that he is not deported, he would still be subject to 20 years' post-release supervision and SORA monitoring.

Due to Mr. Toure's mental health needs, his otherwise petty contact with the criminal justice system, and the extensive supervision he would be subject to following incarceration, this Court should reduce his sentence.

### QUESTION THREE

DID MR. TOURE VAIDLY WAIVE HIS RIGHT TO APPEAL WHEN THE WRITTEN WAIVER USED UNENFORCEABLE LANGUAGE AND THE COURT'S ALLOCUTION DID NOT CURE THE DEFECT ?

Neither the written waiver nor the oral allocution performed by the Court constituted a valid waiver of Mr. Toure's Appellate rights, First, the written waiver contained language this Court has explicitly struck down as too chilling of a defendants appellate rights. Second, the court below failed to explain to Mr. Toure the separate and distinct nature of the appellate rights he was waiving, and used misleading language that suggested an appeal on any grounds would not be possible. Because of these blatant defects, the waiver is unenforceable and does not bar this Court's review of the merits of Mr. Toure's claim.

Generally, a waiver constitutes "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S.458, ( The determination of whether there has been an intelligent waiver, must depend, in each case, upon the particular facts and circumstances surrounding that case). While a defendant may waive his right to appeal a judgment, See; People v. Bradshaw, 18 N.Y.3d 257, it must not be done in a cursory or superficial way. The trial court must "ensyre that defendants understand what they are surrendering when they waive the right to appeal. " People v. Lopez, 6 N.Y.3d 248(2006). For the waiver to be enforceable, the record must reflect that the defendant made the waiver voluntarily , intelligently, and knowingly. People v. Moissett, 76 N.Y.2d 909,911.

To ensure this standard is met "the terms and conditions of the agreement and the defendant's understanding of them should be placed upon the record to facilitate appellate review." People v. Seaberg, 74 N.Y.2d 1,11(1989).

The written waiver Mr. Toure signed included language purporting to prohibit him from filing a notice of appeal. Written waivers with this

language have consistently been struck down by this court. See; People v. Ferreira, 144 A.D.3d 612, People v. Mason, 143 A.D.3d 623, People v. Moore, 155 A.D.3d 513, People v. Simmerman, 144 A.D.3d 425.

The plain language of the written waiver at issue required that Mr. Toure: 1) waive "any and all rights to appeal including the right to file a notice of appeal; 2) "waive his right to appeal and file a notice of appeal" 3) accept the sentencing court's ratification of this "waiver of said defendants right to appeal and file a notice of appeal" 4. As this Court has repeatedly held, that precise language discourages defendants from filing notices of appeal. See; People v. Santiago, 119 A.D.3d 484.

The instant written waiver's explicit exception for "any constitutional speedy trial claim.. the legality of the sentence, my competency to stand trial and the voluntariness of this plea waiver" does not cure the defect. This Court has repeatedly rejected the conclusion that this particular written waiver still "is valid because it "permits the filing of a notice of appeal for constitutional speedy trial claims or challenges to the sentence. Powell, 141 A.D.3d 401. Indeed, Powell explicitly rejected this claim finding that the waiver still "discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver of the plea agreement itself." 140 A.D.3d 401. Further, there are myriad of other claims that are not foreclosed by a valid appeal waiver that are not explicitly exempted, although the language made it seem as though the listed claims are exhaustive.

Nor did the court's allocution make up for the deficiency of the written waiver, particularly where the allocution echoed the sentiment that any appellate claim is unreviewable ("That means you give up the right you have to go to a higher court than myself with any legal issues connected to your case, your plea or your sentence"). While there is no

specific script the judge needs to use to make a waiver valid, "some judicial examination of the waiver itself with a manifestation expressed on the record, as may be appropriate, is necessary to show" that a waiver was knowing and voluntary. People v. Calvi, 89 N.Y.2d 868-871.

Here, the court made only a passing mention of the separate nature of appellate rights from the trial rights given up by a guilty plea, See; People v. Oguendo, 105 A.D.3d 447(1st Dept. 2013) (waiver of right to appeal held invalid where the record reflected only a "fleeting reference" to the waiver and conflated it with description of defendant's sentence).

The court told Mr. Toure only that "as a separate condition of your you are being required to waive your right to appeal. That means you give up the right you have to go to a higher court than myself with any legal issues connected with your case, your plea or your sentence." With this statement being the only on-the-record indication of Mr. Toure's understanding of the waiver of the right to appeal, it is insufficient to render the waiver enforceable. the Court never corrected the misleading nature of the written waiver. In fact, the court strengthened the implication that an appeal on any ground would be impossible.

While the court confirmed that Mr. toure had an off-the-record conversation regarding the waiver with defense counsel, this does not make up for a sufficient allocution on the record. This is particularly true given that the court was on notice of Mr. Toure's mental health issues.

Taken with his failure to finish high school and minimal contacts with the criminal justice system, it cannot be assumed that Mr. Toure had a firm understanding of the waiver. See; Seaberg, 74 N.Y.2d 1-11. (noting that, in order to be enforceable, a waiver must be knowing, voluntary and intelligent, which is achieved where the trial court considers all relevant facts, including "the nature and terms of the agreement and the age, experience and background of the accused").

Because the record is insufficient to establish Mr. Toure had a firm understanding of the waiver, and the written waiver explicitly attempted to prevent Mr. toure from filing a notice of appeal(as is his to do), it is unenforceable. This Court should reach the merits of the argument.

CONCLUSION

FOR THE REASON STATED, THIS COURT SHOULD USE  
ITS POWER IN THE INTEREST OF JUSTICE TO REDUCE  
THE IMPOSED SENTENCE FROM FIFTEEN YEARS  
INCARCERATION TO THE MINIMUM OF FIVE YEARS

RESPECTFULLY SUBMITTED

*Aly B. Toure*

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