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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

CARY R. ILIFF, :

Defendant-Appellant.:

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STATEMENT PURSUANT TO RULE 5531

1. The Superior Court Information number in the court below was 11/09.
2. The full names of the original parties were People of the State of New York against Cary R. Iliff. There has been no change of parties on this appeal.
3. This action was commenced in Supreme Court, Queens County.
4. This action was commenced by the filing of an indictment.
5. This appeal is from a judgment convicting appellant, on a guilty plea, of sexual abuse in the first degree.
6. This is an appeal from a judgment of conviction rendered May 4, 2009.
7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

### PRELIMINARY STATEMENT

Appellant appeals from a judgment of the Supreme Court, Queens County, rendered on May 4, 2009, convicting him, upon a guilty plea, of sexual abuse in the first degree, and sentencing him to 5 years in prison with 5 years of post-release supervision (Mullins, J., at plea and sentence).

Appellant filed a notice of appeal, and on September 15, 2010, this Court granted him leave to appeal as a poor person and assigned Lynn W. L. Fahey as appellate counsel.

Appellant is currently incarcerated pursuant to the judgment. No stay application has been made.

Appellant had no co-defendants.

### QUESTION PRESENTED

Whether appellant's sentence as a second felony offender was illegal given that the predicate Connecticut crime on which the sentence was based encompassed conduct that did not constitute a felony in New York.

## STATEMENT OF FACTS

### Introduction

Appellant Cary Iliff pled guilty to sexual abuse in the first degree in exchange for a determinate predicate-felony-offender sentence of 5 years in prison followed by 5 years of post-release supervision.

The predicate felony of which he was convicted in Connecticut, C.G.S.A. § 53a-71(a)(4), includes conduct that does not constitute a felony in the State of New York. Nevertheless, the sentencing court used that conviction to adjudicate Mr. Iliff a predicate felony offender under P.L. § 70.06.

### The Plea

On January 6, 2009, Mr. Iliff waived his rights to a grand jury and to appeal and agreed to plead guilty to one count of sexual abuse in the first degree, the only charge he faced (P. 2).<sup>1</sup> Although the court explained that Mr. Iliff had a right to be prosecuted by indictment filed by a grand jury, it made no similar explanation concerning Mr. Iliff's right to appeal (P. 2). Nor did the court assure that defense counsel had explained the consequences of waiving his right to appeal. Instead, the court simply found that Mr. Iliff had

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<sup>1</sup> Numbers in parentheses preceded by "P." and "S.," refer to pages of the plea and sentencing transcripts, respectively.

executed, in open court, written waivers of grand jury and appeal, after "conferring with [his] attorney" (P. 3).<sup>2</sup>

In exchange for pleading guilty, the court agreed to impose a determinate sentence of 5 years in prison with 5 years of post-release supervision (P. 2-3). During the plea allocution, Mr. Iliff admitted that he had "subjected the complaining witness to sexual contact by touching [his] penis to her vagina by means of forcible compulsion" (P. 4). The court then advised Mr. Iliff of his Boykin rights and elicited that no one was forcing him to plead guilty and that no other promises were made (P. 5).

#### The Predicate Felony Adjudication

The People filed a predicate felony statement, including a certificate of disposition dated October 20, 2008), alleging that Mr. Iliff had been convicted in Connecticut Superior Court of sexual assault in the second degree under Connecticut General Statutes Annotated § 53a-71(a)(4) (See Statement Pursuant to C.P.L. § 400.21; Criminal Docket Sheet,

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<sup>2</sup> The written waiver stated that Mr. Iliff acknowledged having been advised of his right to appeal including, but not limited to, the right to counsel, and that he was waiving his right to submit a brief arguing "any issues relating to the conviction and sentence," including ineffective assistance of counsel, predicate felony adjudication, and "pre-trial hearings, motions, plea & sentence" (Waiver of Right to Appeal and Other Rights, in Supreme Court file).

Connecticut Superior Court, in Supreme Court file).<sup>3</sup>

Subsection 4 of C.G.S.A. § 53a-71 provides as follows:

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: . . . (4) such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare.

On May 4, 2009, prior to sentencing, the court stated that the People had alleged that Mr. Iliff had previously been convicted, in Connecticut Supreme [sic] Court, of "sex abuse in the second degree," and that he was sentenced to 10 years in prison, later reduced to 7 years with 5 years of probation (S. 2). Mr. Iliff admitted that he was the person who had been convicted of that crime and declined to challenge the constitutionality of that conviction (S. 2).

#### Sentencing

Relying on the plea bargain, the court imposed a determinate term of 5 years in prison to be followed by 5 years of post-release supervision (S. 3). The court also warned Mr. Iliff that he was subject to registration requirements under the Sexual Offender Registration Act (S. 3).

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<sup>3</sup> The People's predicate felony statement and the Connecticut docket sheet, as well as a copy of C.G.S.A. § 53a-71(4), have been submitted as exhibits on appeal for the Court's convenience.

## ARGUMENT

APPELLANT'S SENTENCE AS A SECOND FELONY OFFENDER WAS ILLEGAL BECAUSE THE PRE-DICATE CONNECTICUT CRIME ON WHICH THE SENTENCE WAS BASED ENCOMPASSED CONDUCT THAT DID NOT CONSTITUTE A FELONY IN NEW YORK.

Mr. Iliff was sentenced as a second felony offender based on his prior Connecticut conviction for sexual assault in the second degree under C.G.S.A. § 53a-71(a)(4). That statute provides that "[a] person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . (4) such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare." Because no such crime exists in the State of New York, the Connecticut statute encompasses conduct that would not constitute a felony in New York. Therefore, Mr. Iliff's Connecticut conviction did not constitute a predicate felony and his sentencing as a second felony offender was illegal, and violated his due process rights. Accordingly, this Court should vacate his sentence and remand the case to Supreme Court for resentencing. U.S. Const., Amend. XIV; N.Y. Const., Art I, § 6; Patterson v. New York, 432 U.S. 197 (1977); People v. Muniz, 74 N.Y.2d 464 (1989).

A conviction in a foreign jurisdiction can only be considered a predicate felony for sentencing purposes in New York if the sentencing court determines that the conviction was for "an offense for which a sentence to a term of

imprisonment in excess of one year . . . was authorized and is authorized in this state." Penal Law § 70.06. The "is authorized in this state" prong of that determination requires an inquiry into whether the foreign conviction "has an equivalent among New York's felony-level crimes." Muniz, 74 N.Y.2d at 467.

That inquiry generally is limited to the terms of the statute itself, without regard to whatever non-operative facts may have been alleged in the foreign indictment or information. See People v. Olah, 300 N.Y. 96, 98-99 (1949). Only where the foreign statute proscribes different acts, some of which would constitute New York felonies and some of which would not, may a court resort to acts alleged in the accusatory instrument-and then, only as a means of isolating and identifying the statutory crime the defendant committed. Muniz, 74 N.Y.2d at 468; see Gold v. Jackson, 5 N.Y.2d 243 (1958). As this Court has explained, non-operative acts contained in an accusatory instrument alleging a crime under a statute that proscribes only one kind of act "cannot be considered because such acts were irrelevant to the prior conviction and therefore defendant had no interest in disputing them." People v. Kruszeski, 87 A.D.2d 638, 639 (2d Dept. 1982).

C.G.S.A. § 53a-71(a)(4) proscribes only one act: sexual intercourse with someone under eighteen when the actor is the "guardian or otherwise responsible for the general supervision of such person's welfare" C.G.S.A. § 53a-71(a)(4). Therefore,



this Court may not look to the factual allegations of the Connecticut accusatory instrument; rather, the determination of whether Mr. Iliff's Connecticut conviction constituted a predicate felony must be made by statutory comparison alone. Muniz, 74 N.Y.2d at 468; People v. Gonzalez, 61 N.Y.2d 586 (1984).

There is no statute in the New York Penal Law that proscribes sexual intercourse with a minor where the perpetrator is a guardian of, or has a supervisory relationship with, the victim. The closest similar New York Statute is P.L. § 255.25, incest in the third degree. However the New York Statute is much more narrow, limiting the prohibition to "sexual conduct" between those "related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece." Id. Nowhere in P.L. § 255.25, or anywhere else in the New York Penal Law,<sup>4</sup> is "such person's guardian or otherwise responsible for the general supervision of such person's welfare" (see C.G.S.A. § 53a-71(a)(4)), a necessary element of a crime. Furthermore, under P.L. § 255.25, the ages of the actors are irrelevant, whereas the Connecticut statute applies only where there is a guardianship or general supervision responsibility to someone

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<sup>4</sup> The only other conceivable New York crimes appear in Article 130 of the Penal Law. But the rape and sexual abuse felonies in that Article all require a lack of consent or an age discrepancy between perpetrator and victim not present in the Connecticut statute. See P.L. §§ 130.25, 130.30, 130.35, 130.45, 130.50, 130.65.

who is *under the age of eighteen*. The felony for which Mr. Iliff was convicted has no counterpart under the New York Penal Law that would render it a predicate felony under P.L. § 70.06. Muniz, 74 N.Y.2d at 468 Kruszeski, 87 A.D.2d 638; Gonzalez, 61 N.Y.2d 586.

As this Court has repeatedly held, a defendant is "entitled" to have his sentence vacated, and the case remanded for resentencing, when an erroneous predicate felony adjudication results in an illegal sentence. Burgos, 97 A.D.2d at 827-28; see Kruszeski, 87 A.D.2d at 639; People v. Cappucci, 94 A.D.2d 746, 746 (2d Dept. 1983); People v. White, 96 A.D.2d 541 (2d Dept. 1983). As a result, that Mr. Iliff, declined to dispute the charge that he was predicate felon or to challenge the constitutionality of that statement (S. 2), rendering his claim unpreserved, has no bearing on whether his sentence should be vacated. And since the erroneous adjudication rendered the sentence he received illegal, his claim of error survived his waiver of his right to appeal. See People v. Seaberg, 74 N.Y.2d 1 (1989).<sup>5</sup> Accordingly, this Court must reverse Mr. Iliff's adjudication as a second felony

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<sup>5</sup> And even if Mr. Iliff's illegal sentence claim could be waived, because the trial court failed to inquire, on the record, whether Mr. Iliff "understood the implications of the waiver" and to explain to him "the extent of the appellate rights he would be required to waive," People v. Dongo, 244 A.D.2d 353 (2d Dept. 1997), the purported waiver was invalid and is unenforceable. See People v. Callahan, 80 N.Y.2d 273 (1992); People v. McCaskell, 206 A.D.2d 547 (2d Dept. 1994) (written waiver signed in open court invalid when the court made no record inquiry as to whether the defendant understood the waiver's implications or whether he voluntarily agreed to it).

offender, vacate his sentence, and remand the case to Supreme Court for resentencing.

**CONCLUSION**

THIS COURT MUST REVERSE MR. ILIFF'S  
ADJUDICATION AS A SECOND FELONY OFFENDER,  
VACATE HIS SENTENCE, AND REMAND THE CASE  
TO SUPREME COURT FOR RESENTENCING.

Respectfully submitted,

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January 19, 2012