To Be Argued by:
David Billingsley, Esq.

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,

Respondent,

— against —

Cornel Anderson,

Defendant-Appellant.

Brief for Defendant-Appellant

Christina Swarns, Esq.
Attorney for Defendant-Appellant

Rosemary Herbert, Esq.
Supervising Attorney

by: David Billingsley, Esq.
dbillingsley@appellatedefender.org
Staff Attorney

Office of the Appellate Defender
11 Park Place, Suite 1601
New York, New York 10007
212.402.4100

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The People of the State of New York, Respondent, — against — Cornel Anderson, Defendant-Appellant.	Ind. No. 3142-2011

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on February 20, 2013, by the Supreme Court, Bronx County. Cornel Anderson was convicted after a guilty plea of one count of assault in the first degree, N.Y. Penal Law § 120.10(1). Mr. Anderson received a determinate term of nine years imprisonment followed by five years post-release supervision. Justice Judith Lieb presided over the plea and sentencing.

Timely notice of appeal was filed. No stay of execution has been sought. Mr. Anderson is currently serving his sentence in the custody of the Department of Corrections and Community Supervision.

QUESTIONS PRESENTED

1. Where the record demonstrates that, for 49 years, Cornel Anderson had lived a productive, crime-free life, and that he accepted responsibility by turning himself in and pleading guilty, is his eight-year sentence for first-degree assault unduly harsh and excessive?

2. Where the court conflated the independent right of appeal with the rights waived by pleading guilty, and failed to explain what claims cannot be waived by a waiver of right to appeal, and where Mr. Anderson signed a written waiver that was fundamentally misleading about the effect of filing a notice of appeal and unfairly discouraged him from pursuing claims that cannot be waived, was Mr. Anderson's purported waiver of appeal invalid?

INTRODUCTION

Before his arrest in this case, Cornel Anderson had never been in trouble with the law and had been continuously employed for 14 years. His first arrest came, at the age of 49, when he snapped and attacked his partner after discovering her infidelity. He turned himself in to the police a few hours later and pled guilty to assault in the first degree.

Although Mr. Anderson's offense was very serious, it was an aberration. His sentence of eight years was unduly harsh because Mr. Anderson had lived a stable, productive and crime-free life prior to this offense, and there is every indication that he will return to a productive law-abiding life upon release. The waiver of appeal made as part of his plea agreement was invalid because the court failed to explain that the right of appeal is an independent right and that some claims survive a waiver of appeal. In addition, Mr. Anderson signed a written waiver that has been held to be invalid by this Court, as it is fundamentally misleading about the effect of filing a notice of appeal, and unfairly discouraged him from pursuing an appeal.

For these reasons, this Court should reduce Mr. Anderson's sentence to a term of incarceration closer to the minimum sentence of five years.

STATEMENT OF FACTS

Before this offense, Cornel Anderson had never had a run-in with the law. Presentence Investigation (hereinafter, "PSI") at 3. He was earning $690.00 a week as a chef at Golden Krust, a job he had held for 14 years. *Id.* at 4. He had no history of substance abuse. *Id.*

On September 7, 2011, Mr. Anderson got into an argument with Jean Brown, his partner with whom he lived, and with whom he has a daughter Renese. PSI at 2. He believed that Ms. Brown was cheating on him. *Id.* at 3. Unfortunately, the argument escalated and Mr. Anderson "snapped." *Id.* at 2, 3. He attacked Ms. Brown, striking her and threatening to kill her. *Id.* He attempted to stab her with a kitchen knife, and in the process severely cut her hand, an injury for which she would later require surgery. *Id.* at 4.

Mr. Anderson then left the apartment, believing Ms. Brown was dead. Voluntary Disclosure Form (hereinafter "VDF") at 1. However, Ms. Brown was alive and called the police. PSI at 3. The police obtained Mr. Anderson's cell phone information and called him. VDF at 1. Mr. Anderson did not attempt to flee or deny his crime; he chose instead to face the consequences by turning himself in. *Id.* at 1. He told the police a few hours after the incident, "When the police called me I turned myself in even though I knew she was dead." *Id.* Mr. Anderson admitted what he had done and was arrested.

Mr. Anderson was charged with attempted murder, assault in the first degree, as well as several lesser counts of assault, criminal possession of a weapon, strangling, unlawful imprisonment, and two counts of endangerment of the welfare of a child. *See* Indictment No. 3142-2011 at 1. The charges of endangering the welfare of a child were later dismissed due to the insufficiency of the grand jury testimony. *See* Decision and Order, dated Feb. 9, 2012. Ultimately, Mr. Anderson pled guilty to assault in the first degree, in exchange for a sentence of eight years, followed by five years' post-release supervision. P. 5. [1]

During the plea allocution, the court never informed Mr. Anderson that the right of appeal is a right independent from those waived by a guilty plea. *See* P. 9-11. The judge switched back and forth between explaining the right of appeal and the consequences of pleading guilty. First, she asked if Mr. Anderson understood that he was giving up the right to appeal:

> THE COURT: Do you understand as part of your plea bargain you are waiving your right to appeal? Once you are sentenced, the case will be over. You will not be able to take the case to a higher court seeking to raise other issues, understand?
>
> THE DEFENDANT: Yes.

P. 9. She then asked if he understood that his plea would result in a violent felony conviction. *Id.* She followed this by asking if Mr. Anderson if he understood that,

[1] For convenience, the transcript of the plea proceeding will be denoted as "P.", the transcript of the sentencing proceeding will be denoted as "S."

if he was not a United States citizen, his guilty plea may result in deportation. *Id.* The court then asked if Mr. Anderson had "any questions for me or your attorney[,]" to which Mr. Anderson responded, "No." *Id.*

Justice Lieb then returned to the waiver of appeal, saying again that "as part of your plea bargain you waive your right to appeal. Once you are sentenced, the case will be over, you will not be able to take the case to a higher court seeking to raise errors, change agreement, or raise issues, you understand?" P. 10. The judge explained that a defendant had a right to an attorney on appeal. *Id.* Then she explained what an appeal was:

> THE COURT: […] Appeal proceeding before another court on an appeal, defendant may argue an error took place in the court which requires reversal of the conviction, and neither new proceedings in court or dismissal [sic]. Defendant may argue on appeal sentence imposed was harsh and excessive and request lesser sentence if one permitted by law.
>
> Understand the explanation of what appeal is?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Willing to give up right to appeal the case, including right to appeal court's earlier decisions in return for plea and sentence promised you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you waive your right to appeal voluntarily and of your own free will?
>
> THE DEFENDANT: Yes.

Id. at 10-11. The court then instructed Mr. Anderson to "review the written waiver form with your attorney," and "[i]f you still wish to waive the right to appeal[,] sign in open court. *Id.* at 11.

The written waiver contained a clause stating that Mr. Anderson waived "any and all rights to appeal including the right to file a notice of appeal with exception of any constitutional speedy trial claim …, the legality of the sentence, my competency to stand trial, and the voluntariness of this plea and waiver." Waiver of the Right to Appeal, dated Feb. 1, 2013. It contained another clause which read:

> If the defendant or the defendant[']s attorney files a notice of appeal that is not limited by a statement to the effect that the appeal is solely with respect to a constitutional speedy trial claim or legality of the sentence, they agree that the District Attorney and the Court shall deem such filing to be a motion by the defendant to vacate the conviction and sentence, and will result, upon the application and consent of the District Attorney, in the plea and sentence being vacated and this indictment being restored to its pre-pleading status.

Id. Mr. Anderson signed this waiver.

At sentencing, Mr. Anderson again admitted that he "intentionally cut [Ms.] Brown with a knife." S. 3. Mr. Anderson's attorney refuted allegations made in the presentencing report, including claims that Ms. Brown had paid all the bills and that their daughter was in the room when he assaulted Ms. Brown. S. 4. Defense counsel pointed out that the child endangerment charges were dismissed because the grand jury testimony did not support this allegation. *Id.*

Mr. Anderson expressed remorse over the incident. He said, "I just want to say I'm really sorry about the incident, what happened, you know. I'm really, really sorry about it. And I know I made a big mistake." *Id.* In response, the court stated that she appreciated that "you thought about what you did and that you are sorry[,] [b]ut given the nature of this crime, it is very horrendous." *Id.* at 5-6.

Mr. Anderson was sentenced to eight years in prison and five years of post-release supervision. S. 6.

ARGUMENT

POINT I

CORNEL ANDERSON'S SENTENCE WAS UNDULY HARSH AND EXCESSIVE BECAUSE HE HAD LIVED A STABLE, PRODUCTIVE, AND CRIME-FREE LIFE PRIOR TO THIS FIRST ABERRATIONAL OFFENSE AT THE AGE OF FORTY-NINE.

A sentence closer to the minimum of five years is appropriate in this case because Cornel Anderson's offense, while serious, was an aberration. For forty nine years, Mr. Anderson lived a crime-free life, and at the time of the offense, he had been employed for fourteen years at the same job. PSI at 3-4. Mr. Anderson accepted responsibility for his actions, turning himself in a few hours after the incident, VDF at 1, and entering a guilty plea. Thus, his sentence of eight years' imprisonment is excessive and unduly harsh because there is every indication that he will resume his life as a productive, contributing member of society and maintain a law-abiding life when he is released.

This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances . . . without deference to the sentencing court." *People v. Delgado*, 80 N.Y.2d 780, 783 (1992). The Court should consider "the nature of the crime, the defendant's circumstances, the need for societal protection, and the prospects for the defendant's rehabilitation." *People v. Fernandez*, 84 A.D.3d 661, 664 (1st Dep't 2011) (internal quotation omitted). The

Court should also consider these factors with a view toward imposing the "minimum amount of confinement" necessary. *People v. Notey*, 72 A.D.2d 279, 282-83 (2d Dep't 1980) (internal citation omitted).

Even for violent crimes, New York courts have repeatedly reduced sentences where the defendant's "productive, crime free-life [sic]" prior to the offense demonstrates that the offense was "aberrational." *Fernandez*, 84 A.D.3d at 664-65. In *Fernandez*, the court reduced the defendant's sentence for manslaughter to time served where the defendant was 52 years old at time with no previous criminal record, observing that the offense was "aberrational" and "wholly out of character." *Id.* at 664. Similarly, in *People v. Pagan*, 159 A.D.2d 6, 14 (1st Dep't 1990), the court reduced another manslaughter sentence where the 44 year-old defendant had a "history of productive employment" and no prior felonies, and the offense was an "aberrational unpremeditated act inconsistent with his essentially stable and law-abiding past existence." *See also People v. Demeritt*, 291 A.D.2d 726, 729 (3d Dep't 2002) (sentence for attempted murder reduced by 10 years where defendant was 53 years old and had no prior felonies); *People v. Milan*, 189 A.D.2d 627, 628 (1st Dep't 1993) (reducing sentence where defendant fired gun at police officers responding to 911 call during domestic dispute but his "prior criminal history consist[ed] solely of a 1981 conviction for harassment," showing that the instant offense was an "isolated incident"); *People v. Musa Kuramura*,

148 A.D.2d 331, 331 (1st Dep't 1989) manslaughter sentence reduced where the defendant had strong employment history, no prior criminal history, and the offense occurred at age 35); *People v. Chambers*, 123 A.D.2d 270, 270 (1st Dep't 1986) (reducing sentence for defendant who pled guilty to first-degree manslaughter, noting that at age 28 he "had never been in trouble with the law before," which was a "special circumstance[] deserving of recognition").

Here, Mr. Anderson had lived a productive and crime-free life for 49 years prior this offense. He had no previous criminal record. PSI at 3. He had maintained stable employment as a cook at Golden Krust for 14 years prior to this offense. PSI at 4. Clearly, this offense was an aberration that was "wholly out of character" for someone who had spent nearly 50 years as a law-abiding, contributing member of society. *Fernandez*, 84 A.D.3d at 664. None of these facts is an excuse for seriously injuring the complainant with a knife upon discovering her infidelity, but they do show that the offense was an "aberrational, unpremeditated act inconsistent with his essentially stable and law-abiding past existence." *Pagan*, 159 A.D.2d at 14.

Mr. Anderson also accepted responsibility by turning himself in to police and pleading guilty. Mr. Anderson knew that he would face serious consequences for his actions because, immediately after the incident, he thought that Ms. Brown was dead. VDF at 1. Yet instead of attempting to evade the authorities, he

voluntarily went to the police station when the police called: "When the police called me I turned myself in even though I knew she was dead." *Id.* There, he gave a statement to the police admitting his conduct. He also expressed remorse at sentencing, saying that he was "really, really sorry," and that knew "[he] made a big mistake." S. 5. *See Musa Kuramura*, 148 A.D.2d at 331 (defendant "continually expressed remorse" over offense).

A sentence closer to the minimum term is also warranted because Mr. Anderson will be well past the age of 50 when he is released. As people age, they are increasingly unlikely to commit crime. *See* Roberto Flores De Apodaca et al., *Differentiation of the Age Curve Trajectory by Types of Crime*, Am. J. Humanistic Research Vol. 1, 1 (2005) (criminal behavior peaks well before the age of 30 years old and declines substantially as age increases). Given the aberrational nature of his offense, Mr. Anderson simply does not pose a risk to society similar to that of a younger person, or one with a pattern of criminal conduct. The record here "fails to suggest that [Mr. Anderson] is a hardened criminal who deserves a prison term of the length imposed here," *Musa Kuramura*, 148 A.D.2d at 331, as he has demonstrated a strong potential to maintain stable employment and contribute productively to society upon his release.

Mr. Anderson pled guilty to assault in the first degree, for which the minimum sentence is five years – a significant period of time to spend in prison,

and a severe penalty for a person who has otherwise led a law-abiding and productive life. An eight-year prison sentence is therefore unduly harsh and excessive, and should be reduced to a term of incarceration closer to the minimum.

POINT II

THE PURPORTED WAIVER OF APPEAL WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY WHERE THE WRITTEN WAIVER OF APPEAL WAS INVALID AND THE COURT FAILED TO EXPLAIN THE SEPARATE AND DISTINCT NATURE OF THE RIGHT OF APPEAL AND DESCRIBED THE SCOPE OF THE WAIVER INACCURATELY.

A valid waiver of the right of appeal must be knowing, intelligent, voluntary, and not contrary to public policy. *People v. Ramos*, 152 A.D.2d 209, 210 (1st Dep't 1989). "[A] trial court must make certain that a defendant's understanding of the waiver, along with the other terms and conditions of a plea agreement is evident on the face of the record." *People v. Bradshaw*, 18 N.Y.3d 257, 265 (2011) (internal quotation marks omitted). The right of appeal is a separate and distinct right from that of the right to trial, and certain claims survive even an express waiver of appeal. *People v. Lopez*, 6 N.Y.3d 248, 256 (2006); *People v. Campbell*, 97 N.Y.2d 532 (2002); *People v. Hankerson*, 305 A.D.2d 288 (1st Dep't 2003).

Here, Mr. Anderson signed a written waiver that has been invalidated by this Court because it fundamentally mischaracterizes the right of appeal and unfairly discourages defendants from pursuing an appeal. The waiver of appeal was also invalid because the court obfuscated the separate and distinct nature of the right of appeal, and failed to explain the types of claims that survive a waiver of appeal.

A. The written waiver Mr. Anderson signed has already been held invalid and unenforceable because it fundamentally mischaracterized the effect of filing a notice of appeal and unfairly discouraged Mr. Anderson from pursuing appeal.

The written waiver mischaracterized the effect of filing a notice of appeal. The written waiver stated:

> If the defendant or the defendant[']s attorney files a notice of appeal that is not limited by a statement to the effect that the appeal is solely with respect to a constitutional speedy trial claim or legality of the sentence, [the defendant and defense counsel] agree that the District Attorney and the Court shall deem such filing to be a motion by the defendant to vacate the conviction and sentence, and will result, upon the application and consent of the District Attorney, in the plea and sentence being vacated and this indictment being restored to its pre-pleading status.

Waiver of the Right to Appeal, dated Feb. 1, 2013. This Court has held that this language is unenforceable and renders the purported waiver of appeal invalid. *See People v. Santiago*, 119 A.D.3d 484 (1st Dep't 2014). In *Santiago*, this Court recognized that there is no statutory authority to treat a notice of appeal as a motion to vacate a conviction or sentence under these circumstances, so the language is fundamentally misleading and inaccurate, thereby invalidating the waiver. *Id.* at 485.

The written waiver also stated that Mr. Anderson was waiving "any and all rights to appeal including the right to file a notice of appeal[.]" Waiver of the Right to Appeal, dated Feb. 1, 2013. This Court has found that this language also renders the waiver unenforceable and invalid. *See People v. Powell*, 140 A.D.3d 401 (1st

Dep't 2016). As in *Powell*, the written waiver stated that Mr. Anderson could file a notice of appeal for certain constitutional claims or the legality of the sentence, but "it still 'discourages defendants from filing notices of appeal even when they have claims that cannot be waived[.]'" *Id.* at 401 (quoting *Santiago*, 119 A.D.3d at 485-86).

Thus, when Mr. Anderson signed this waiver, he was misled about the consequences of raising a claim on appeal and unfairly discouraged from raising any claims that he retained. The waiver is therefore invalid.

B. The court's explanation of the appeal waiver obfuscated the separate and distinct nature of the right of appeal.

When the court conflates an appeal waiver with the rights waived by a guilty plea the waiver is invalid. *Lopez*, 6 N.Y.3d 248 at 256. "The record must establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty--the right to remain silent, the right to confront one's accusers and the right to a jury trial, for example." *Id.*

The judge here never explained that the right to appeal is a separate right. She characterized the appeal waiver as though it were a component of Mr. Anderson's guilty plea when she asked him if he understood that, "as part of your plea bargain you are waiving your right of appeal." S. 9. This characterization conveyed that pleading guilty automatically waives the right to appeal.

The judge further obscured the separate and distinct nature of the right of appeal by switching back and forth between her explanation of the consequences of the guilty plea and the right of appeal. Immediately after asking whether Mr. Anderson understood that he was waiving his right of appeal "as part of your plea bargain," she asked if he understood that his guilty plea could have immigration consequences. *Id.* When Mr. Anderson said that he did, the judge then switched back to the right to appeal, saying that by giving up the right to appeal he was waiving the right to "raise errors, change agreement [sic], or raise issues[,]" and explained possible bases for appeal. *Id.* at 9-10. By intermixing the consequences of a guilty plea itself with the nature and possible bases of appeal, this further gave the impression that the court was going through a list of automatic consequences of a guilty plea. Therefore, the waiver is invalid because this Court "cannot be certain that the defendant comprehended the nature of the waiver of appellate rights." *Lopez*, 6 N.Y.3d at 256.

C. The court also failed to explain that certain claims survive an express waiver of appeal.

"Because only a few reviewable issues survive a valid appeal waiver, it is all the more important for trial courts to ensure that defendants understand what they are surrendering when they waive the right to appeal," and to ensure that such understanding "is evident on the face of the record." *Lopez*, 6 N.Y.3d 248, 256

(2006). The claims that survive a waiver include challenges to the legality of the sentence, a constitutional speedy trial claim, challenges to competency to stand trial, or voluntariness of the guilty plea itself. *See People v. Campbell*, 97 N.Y.2d 532 (2002); *People v. Hankerson*, 305 A.D.2d 288 (1st Dep't 2003).

The court here did not explain that certain claims survive a waiver of appeal. Rather, the judge stated twice that "once you are sentenced, the case will be over[,]" – giving the impression that Mr. Anderson was making a blanket waiver of all rights to "raise errors, change agreement [sic], or raise issues[.]" S. 9-11. She said that Mr. Anderson was giving up the right to argue "an error took place in the court which requires reversal of the conviction, and neither new proceedings in court or dismissal [sic]", and the right to argue that "the sentence imposed was harsh and excessive and request [a] lesser sentence if one [is] permitted by law. " *Id*. The court explained only what Mr. Anderson would lose once "the case [was] over," not what claims he would retain. Since, on the face of the record, it is not clear that Mr. Anderson understood the scope of the waiver, the waiver is invalid. *Lopez*, 6 N.Y.3d at 256.

In sum, not only did the on-the-record explanation fail to convey the separate and distinct nature of the right of appeal from the rights waived by a guilty plea, and that certain claims are cannot be waived, but the written waiver also added to and compounded those defects with its misleading characterization of the

effect of filing a notice of appeal and unfair discouragement of pursuing an appeal. Since the record demonstrates that Mr. Anderson's waiver was not knowing and intelligent, the waiver was invalid and unenforceable. *Santiago*, 119 A.D.3d at 485-86; *Lopez*, 6 N.Y.3d at 256.

CONCLUSION

For the foregoing reasons, this Court should reduce Mr. Anderson's sentence to a term closer to the minimum.

Dated: New York, New York
March 1, 2018

Respectfully submitted,

Christina Swarns, Esq.
Attorney for Defendant-Appellant

Rosemary Herbert, Esq.
Supervising Attorney

by: _____
David Billingsley, Esq.
dbillingsley@appellatedefender.org
Staff Attorney

Office of the Appellate Defender
11 Park Place, Suite 1601
New York, New York 10007
212.402.4100

ADDENDA

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York, Respondent, — against — Cornel Anderson, Defendant-Appellant.	Ind. No. 3142-2011

Statement Pursuant to Rule 5531

1. The indictment number in the court below was 3142-2011.
2. The full names of the original parties were "The People of the State of New York" against "Cornel Anderson."
3. This action was commenced in Supreme Court, Bronx County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment rendered on February 20, 2013, by Supreme Court, Bronx County. Cornel Anderson was convicted after guilty plea of one count of assault in the first degree, N.Y. Penal Law § 120.10(1). Mr. Anderson received a determinate term of eight years imprisonment followed by five years post-release supervision. Justice Judith Lieb presided over the plea and sentencing. Timely notice of appeal was filed. No stay of execution has been sought. Cornel Anderson is currently serving his sentence in the custody of the Department of Corrections and Community Supervision.
6. Cornel Anderson has been granted leave to appeal as a poor person on the original record and typewritten briefs.

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York, Respondent, — against — Cornel Anderson, Defendant-Appellant.	Ind. No. 3142-2011

Printing Specification Statement

1. The following statement is made in accordance with First Department Rule 600.10.

2. Cornel Anderson's brief was prepared with Microsoft Word 2010 with Times New Roman typeface 14 point in the body and 12 point in the footnotes.

3. The text of the brief has a word count of 3,851 as calculated by the processing system and is 19 pages.