

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

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THE PEOPLE OF THE STATE OF NEW YORK, :  
 :  
 Respondent, :  
 :  
 -against- :  
 : **MEMORANDUM OF LAW**  
 MIGUEL DE LOS SANTOS, :  
 : **Ind. No. 3444/2002**  
 Petitioner/Defendant. :  
 :  
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**ARGUMENT**

**APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE ON APPEAL BY FAILING TO CITE TRIAL COUNSEL AS RENDERING INEFFECTIVE ASSISTANCE. N.Y. CONST. ART. I, SECTION 6; U.S. CONST. AMENDS. VI, XIV.**

This Court should grant petitioner's writ of error *coram nobis* and reverse his conviction, or, alternatively, order a *de novo* appeal on the premise that appellate counsel's brief makes no mention that trial counsel rendered ineffective assistance by failing to properly review official court documentation which would have revealed that the lower court lacked subject matter jurisdiction.

- a. Trial Counsel Rendered Ineffective Assistance In Failing To Object That The Lower Court Lacked Jurisdiction Since Petitioner Was Not Arraigned And Count Three Of The Indictment Was Insufficient

As an initial matter, upon petitioner being extradited from North Carolina on May 30, 2013, he was not arraigned

within twenty-four hours of his arrival as required by CPL §120.90. The reason being, petitioner contends, is because no indictment was filed in court initially, and the court did not produce any documents or indictment to establish that the grand jury foreperson and the ADA filed an indictment in 2002 against petitioner. He was arraigned four days after his arrival to New York on June 3, 2013.

To substantiate this claim, petitioner relies on page 3 of the first arraignment transcript in which the Honorable Brue Allen states: "I'd like to find out what's going on." See, Exhibit - "C" Pages 1-4, First Arraignment Transcript dated June 3, 2013. See, also, Exhibit - "C" pg.5, Court Case Information, Initial Report of Indictment Number dated June 3, 2013.

It appears that the People deleted petitioner's name from the Indictment, before the indictment was filed against his co-defendant, since he was not arrested in 2002. Petitioner was never indicted again, if the indictment was filed against petitioner in 2002, the indictment was not sealed. Absent of arraignment, the court never acquired requisite control of the petitioner's person with respect to the accusatory instrument and was therefore precluded from setting the court of further proceedings

into action. See, CPL §1.20(9). See, also, *People v. Mitchell*, 235 AD2d 834 (A.D. 3 Dept. 1997).

By letter dated October 6, 2017, and in further support of the aforementioned, Fernando Parra from the Court Action Processing Unit, in reply to a letter mailed by petitioner, informed him that his "case started directly in Supreme Court. There are no Criminal Court papers." ". . . Your Indictment is not sealed." See, Exhibit - "D", Letter dated October 6, 2017 by Court Action Processing Unit, Fernando Parra, SCC.

Furthermore, another reason petitioner was not arraigned within twenty-four hours of his arrival as required by CPL §120.90 was because CPL §210.10 was not followed. No indictment was filed against petitioner since petitioner was not arrested and there was no sealed indictment and no record upon a warrant of arrest in court pursuant to CPL §210.10(3). Also, it should be worth noting that the indictment, in relation to kidnapping in the first degree (count three), failed to state sufficient facts. Namely, the indictment fails to state the name of the third person the prosecution alleged petitioner compelled and also fails to state "to pay or deliver . . . as ransom" which is a required element of kidnapping in the first degree. See, PL §135.25(1). Indeed, a person is guilty of

kidnapping in the first degree when he abducts another person and when: his intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct, or to refrain from engaging in particular conduct.

Petitioner contends that since the indictment (count three) failed to state several elements to support the charge of kidnapping in the first degree, Flora Duffy, an alleged Justice of the Supreme Court, illegally signed an arrest warrant for Mr. De Los Santos' arrest. The only plausible reason Ms. Duffy (whom is not a Supreme Court Justice) would illegally sign the warrant is because a judge must have refused to sign said warrant, noticing that the factual allegations in the accusatory instrument failed to provide reasonable cause to believe that the petitioner committed the offense charged. This is particularly true since the accusatory instrument upon which the warrant is premised must be sufficient on its face pursuant to the requirements of CPL §§100.40, 120.20(1)(a). See, Practice Commentary to CPL §100.40.

In fact, a common requirement for the sufficiency of an information, misdemeanor complaint, or felony complaint is that the instrument must demonstrate that the factual allegations in the accusatory instrument "provide



reasonable cause to believe that the defendant committed the offense charged." CPL §100.40(1), (3) and (4).

The term "reasonable cause" is "usually equated with probable cause." *People v. Johnson*, 66 NY2d 398, 414, n.2 (1985) and thus the statutory requirement of "reasonable cause" is in accord with the constitutional requirement of "probable cause" for an arrest with or without a warrant. *See, Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) ("Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed"); *People v. Carrasquillo*, 54 NY2d 248, 254 (1981) ("the basis for such a belief must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place").

Here, the lower court lacked subject matter jurisdiction since Ms. Duffy illegally signed the warrant which triggered, not only petitioner's illegal arrest, but his prosecution. The indictment lacked sufficient elements to substantiate the crime of kidnapping in the first degree. *See, e.g., Exhibit - "A", Warrant of Arrest dated*

June 13, 2002 & Letter dated January 4, 2018 by Assistant Deputy Counsel, Shawn Kerby.

Perhaps this is the reason why petitioner was informed by the Court Action Processing Unit that his case never went before the criminal court and therefore there are no criminal court documents and no sealed indictment. See, Exhibit - "D", Letter dated October 6, 2017 by Court Action Processing Unit, Fernando Parra, SCC.

It should be noted that, no indictment was filed as sealed under CPL §210.10(3). For instance, by letter dated July 11, 2017, petitioner requested a copy of the warrant of arrest. By response dated August 9, 2017, Fernando Parra informed petitioner that "[w]arrants and information on warrants can only be obtained from the District Attorney's Office at One Hogan Place Room 732, New York, NY 10013." See, Exhibit - "K", Letter dated July 11, 2017 & Response letter dated August 9, 2017.<sup>1</sup>

The fact that the court informed petitioner that "[w]arrants and information on warrants can only be obtained from the District Attorney's Office" only confirms that the warrant of arrest here was altered since it was

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<sup>1</sup> Petitioner requested a copy of the warrant of arrest from the District Attorney's Office. Notably, by response dated September 7, 2017 & October 3, 2017, petitioner was granted access to "any Warrants issued by Hon. Flora Duffy." See, e.g., Exhibit - "K", Letters dated September 7, 2017 & October 3, 2017.

issued out of the jurisdiction of the court. However, upon information and belief, and by letter dated January 4, 2018, Mr. De Los Santos was informed that Ms. Duffy does not appear as a Justice in their database. See, e.g., Exhibit - "A", Letter dated January 4, 2018 by Assistant Deputy Counsel, Shawn Kerby.

Also worth noting is the fact that appellate counsel, by letter dated May 1, 2019, informed petitioner that "[w]e have verified with the Office of Court Administration that there has never been a lawyer or a judge in New York State by [the name of Flora Duffy]." Interestingly, appellate counsel was concerned "that the copy of the arrest warrant that [petitioner] provided is not authentic, or has been altered, because, among other things, the title of the document states that it is an arrest warrant from the 'Supreme court of the City of New York.'" Appellate Counsel continues by stating "[t]here is no Supreme Court of the City of New York, only a Supreme Court of the State of New York, and a Criminal Court of the City of New York."

Appellate Counsel states "[t]he fact that the court issuing the warrant is misidentified, together with the fact that a fictitious judge is listed as having ordered the warrant, suggests that the document was altered at some point. If you're able to provide me with further

information about where this arrest warrant originated, perhaps this is something that can be investigated further. If this is actually the warrant, and was endorsed by a non-existent judge, then perhaps this might present a claim, but it does not appear to be an authentic document." See, Exhibit - "B", Letter by Edward V. Sapone, Appellate Counsel dated May 1, 2019 at p.3 ¶6; and p.4 ¶1-2.

b. Trial Counsel Rendered Ineffective Assistance In Failing To Object On Insufficiency Grounds; And That The Lower Court Lacked Jurisdiction In Charging The Jury On The Prosecution's Theory

During the lower court's instructions, it charged the jury, in relation to the Prosecution's theory, a theory that was not placed in the indictment, and out of the statutory requirements PL §135.25(1). The following excerpts states as follows:

JURY CHARGE

In this case it is the prosecution's theory that Manuel Gonzalez was kidnapped in order to compel Wilson Gonzalez to pay money for drugs that were allegedly purchased from Mr. Dellos Santos.

See, T: 431, lines 16-19.

As previously mentioned, a person is guilty of kidnapping in the first degree when he abducts another person and when: his intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct, or to refrain from engaging in

particular conduct. PL §135.25(1). The lower court did not properly charge the jury with all of the elements required to support kidnapping in the first degree. As a consequence, it lacked subject matter jurisdiction since it charged the jury with a theory that was not properly placed in the indictment. This was error.

The prosecution's theory was that Manuel Gonzalez was kidnapped in order to compel Wilson Gonzalez to pay money for drugs that were allegedly purchased from the petitioner. This theory was not substantiated, and trial counsel failed to voice an objection on the basis that the evidence against petitioner was not legally sufficient to support his conviction of kidnapping in the first degree. The statute requires that a ransom demand be "made" to a third person. In retrospect, there is not a single appellate decision where the adjustment had been applied to a defendant who did not intend for his demands to reach a third party. No direct evidence was ever put before the jury that proved petitioner had any contact with Wilson Gonzalez, even by telephone or person to person, which is the statutory requirements of kidnapping in the first degree. PL §135.25(1). Also, as charged to the jury, petitioner never had any contact with Mr. Wilson Gonzalez and was acquired to the drugs charged by the jury, that

charge was not proven. During trial, Mr. Gonzalez testified as follows:

**WILSON GONZALEZ/DIRECT/MR. DRUCKER**

**Q.** At any time before you went to the police were you aware of the defendant trying to reach you?

**A.** No, because I did not have a phone.

\* \* \*

**WILSON GONZALEZ/CROSS/MR. WILLIAMS**

**Q.** Good afternoon, Mr. Gonzalez. Have you even been threatened by this man?

**A.** No.

**Q.** You testified earlier you said that he was never your boss, correct?

**A.** No he was never my boss.

\* \* \*

**A.** I had an accident. I fell from a forth floor and I am handicap now and I don't work.

**Q.** Before your unfortunate accident how were you supporting yourself?

**A.** I worked in construction.

**Q.** Have you ever been involved in the drug business, Mr. Gonzalez?

**A.** No.

See, Trial Transcripts pages 236, 237, 239.

c. Trial Counsel Rendered Ineffective Assistance In Failing To Object On The Basis That The Trial Court Charge The Jury With Kidnapping In The Second Degree

During deliberation, the jury requested that the trial court instruct them on the law regarding first degree kidnapping. Notably, the court charged the jury with kidnapping in the second degree when petitioner was initially charged with first degree kidnapping. The prosecution, however, after previously informing the trial court that "the first count is Kidnapping in the First Degree[]"; and that "[t]he second count is the Felony Murder for Kidnapping[]" in which "Kidnapping first degree involves abduction with other elements[]", trial counsel failed to voice an objection while the trial court erroneously charge the jury with second degree kidnapping. See, T: 449. See, also, Writ of Error Coram Nobis at pp.7-8.

Petitioner contends that since the People failed to prove by legally sufficient evidence that "[...] [petitioner] abducted Manuel Gonzalez with the intent to compel Wilson Gonzalez to pay for drugs that were allegedly purchased for [petitioner][]" , the trial court somehow changed the theory of first degree kidnapping to second degree kidnapping since the elements of first degree kidnapping were not substantiated by the People. This was error, since the trial court lacked jurisdiction to charge the jury on second degree kidnapping. Defense counsel,

instead of placing an objection and requesting for the charge of kidnapping to be dismissed, remained silent while the court continued to erroneously charge the jury.

Defense counsel had everything to gain and nothing to lose by once again informing the trial court that "the first count is Kidnapping in the First Degree[]"; and that "[t]he second count is the Felony Murder for Kidnapping[]" in which "Kidnapping first degree involves abduction with other elements." See, T: 408-09, 449-451.<sup>2</sup>

It should be worth noting that, on May 23, 2021 & June 20, 2021, Private Investigator Sonya Glover interviewed Mr. Swisher. In her second interview, Mr. Swisher, after being duly sworn, indicated that he served as the jury foreman on petitioner's case in July of 2014. Mr. Swisher explained that it was his request to the judge. He had several concerns with kidnapping in the first degree. He had the judge explain the kidnapping in the first degree and he explained the charge and he was comfortable with it. He further indicated that he "recognize court exhibit 1 as not [his] handwrit[ing]." He initialized the bottom left corner.

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<sup>2</sup> It should be worth nothing that petitioner was not charged with kidnapping in the second degree. See, Exhibit - "F", Verdict Sheet.



Mr. Swisher also indicated that he recognized court exhibits 2 and 3 as his handwriting in which he also initialized on the bottom left corner.

In Mr. Swisher's affidavit, he indicates that he "cannot attest to whom signatures are on the three exhibits for it is redacted. See, Exhibit - "G", Affidavit of Randall Swisher dated June 20, 2021; along with Court Exhibits 1-3, Jury Notes; and report by Private Investigator Sonya Glover dated June 6, 2021.

Mr. Swisher's affidavit along with the report prepared by Private Investigator Sonya Glover speak volumes since it supports petitioner's allegations that appellate counsel should have taken the appropriate measures to ensure that court exhibits 1 through 3, i.e., the jury notes, were not intentionally fabricated. Instead, appellate counsel prepares the appeal obviously without reviewing the jury notes. Simply put, appellate counsel failed to take the appropriate measures.

d. Trial Counsel Rendered Ineffective Assistance In Failing To Object On The Basis That The Trial Court Failed to Charge The Jury With Serious Physical Injury, The Fifth Statutory Element of Unlawful Imprisonment In The First Degree

During the lower court's instructions, it charged the jury, in relation to counts four and five of the indictment with the crime of unlawful imprisonment in the first degree

on the theory that acting in concert with others petitioner unlawfully imprisoned Angelly Ortiz & Carlos Ortiz. During this charge, however, the lower court failed to instruct the jury on the definition of serious physical injury which is the fifth statutory element of the offense charged. The following excerpts states as follows:

**THE COURT**

Count 4, unlawful imprisonment in the first-degree.

This is regarding Angelly Ortiz.

Count 4 charges Mr. Dellos Santos with unlawful imprisonment in the first-degree on the theory that acting in concert with others he unlawfully imprisoned Angelly Ortiz.

Under our law a person is guilty of unlawful imprisonment in the first-degree when he restrains another person under circumstances which exposed that other person to a risk of serious physical injury.

I remind you that restrain means to restrict a person's movements intentionally and unlawfully in such a manner to interfere substantially with her liberty by moving her from one place to another or by confining her either to the place where the restriction commenced or in a place to which she had been moved without her consent and without knowledge that the restriction is unlawful.

In order for you to find Mr. Dellos Santos guilty of this count the prosecution is required to prove beyond a reasonable doubt:

One, that on October 8, 1999 in New York Mr. Dellos Santos acting in concert with others restricted the movements of Angelly Ortiz in such a manner as to interfere substantially with her

liberty by moving her from one place to another or by confining her either in the place where the restriction began or in a place to which she had been moved.

Two, that the movements of Ms. Ortiz were restricted without her consent.

Three, that Mr. Dellos Santos acted intentionally.

Four, that the restriction of Ms. Ortiz movements was unlawful. And that Mr. Dellos Santos knew that.

Five, that Mr. Dellos Santos or one or more people acting with him restrained Ms. Ortiz under circumstances which exposed her to a risk of serious physical injury.

If you find that the prosecution has proven all of these elements to your satisfaction beyond a reasonable doubt then you must find Mr. Dellos Santos guilty of this count.

On the other hand, if you find that the prosecution has failed to prove one or more of these elements beyond a reasonable doubt then you must find him not guilty.

See, T: 433-34.

#### **THE COURT**

Count 5 charges Mr. Dellos Santos with unlawful imprisonment in the first-degree on the theory that acting in concert with others he unlawfully imprisoned Carlos Ortiz. It is the same as the last one. The same elements but this time you look at the action vis-à-vis Carlos Ortiz.

So, in order for you to find Mr. Dellos Santos guilty of Count 5 the prosecution is required to prove beyond a reasonable doubt that on October 8, 1999 in New York Mr. Dellos Santos acting in concert with others restricted the movements of Carlos Ortiz in such a manner as to interfere substantially with his liberty by moving him from

one place to another or by confining him either in a place where the restriction began or in a place to which he had been moved.

Two, that his movements were restricted without his consent. That Mr. Dellos Santos acted intentionally. That the restriction was unlawful. And Mr. Dellos Santos knew that. And that Mr. Dellos Santos or one of more people acting in concert with him restrained Mr. Ortiz under circumstances which exposed him to risk of serious physical injury.

If you find that the prosecution has proven all of these elements beyond a reasonable doubt then you must find Mr. Dellos Santos guilty of this count of unlawful imprisonment.

On the other hand, if you find that the prosecution has failed to prove one or more of these elements beyond a reasonable doubt then you must find him not guilty.

See, T: 434-36.

Although the lower court mentioned serious physical injury in relation to both charges, it failed to instruct the jury on the definition of serious physical injury which is the fifth statutory element of the offense charged. In fact, petitioner contends that he was prejudiced in trial counsel's failure to properly place an objection to the court's failure to instruct the jury on said definition since the evidence relied upon by the People to support counts four and five, unlawful imprisonment of Angelly Ortiz & Carlos Ortiz, was insufficient.

The People failed to present sufficient evidence that petitioner acted intentionally, in concert with others, to restrict Angelly & Carlos Ortiz's movement under circumstances that exposed them to a risk of serious physical injury. To the contrary, the evidence elicited on cross-examination of Angelly Ortiz showed that petitioner did not have a gun, did not participate in the beating of her husband, and that another man in the apartment appeared to be in control. (A. 70-71). According to Ms. Ortiz, petitioner, who was sitting on the couch, said "they're doing the same thing to my family," (A. 57), and asked the others why they were tying her wrists when she had not done anything. (A. 62).

Similarly, Carlos Ortiz testified that a voice said, while one of the intruders had a gun to his chest: "Don't do that to that man. He doesn't have anything to do with this". (A. 128). Carlos also testified that one of the other men in the living room was watching Pedro. (A. 133).

In *People v. Crane*, 156 AD2d 704 (A.D. 2 Dept. 1989), the defendant was charged with robbery in the first degree. There, the trial court erred in omitting from its charge pertaining to the elements of robbery in the first degree (Penal Law §160.15(3)), the statutory definition of

"serious physical injury". See, Penal Law §10.10(10). See, also, *People v. Crane*, 156 AD2d at 705.

Here, the trial court did not instruct the jury on all elements of the kidnapping charge. Although the judge instructed the jury on the murder based on kidnapping, after the jury sent a note at pages 449-551 of the trial transcripts, it failed to charge the jury upon the definition of serious physical injury which is a sub element of kidnapping in the second degree as well as kidnapping in first degree.

e. Appellate Counsel Rendered Ineffective Assistance

Appellate counsel's brief makes no mention that trial counsel rendered ineffective assistance by failing to properly review official court documentation which would have revealed that the lower court lacked subject matter jurisdiction, resulting in the indictment being insufficient.

Instead, appellate counsel rendered constitutionally inadequate performance since he omitted significant and obvious issues while pursuing issues that were plainly unpreserved for appellate review and without merit. See, e.g., *People v. Delos Santos*, 143 AD3d 479 ("[d]efendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice" . . . "[d]efendant

did not preserve his claim that the verdict was repugnant . . . and we decline to review it in the interest of justice" . . . "[t]here is no merit to defendant's suggestion that repugnancy should be assessed based on the evidence in the particular case, or the evidentiary theory advanced by the People at trial" . . . "[d]efendant failed to preserve his contention that the trial judge improperly responded to a jury note . . . and we decline to review it in the interest of justice" . . . "[d]efendant's challenges to the admission of hearsay testimony and the People's opening statement and summation are unpreserved, and we decline to review them in the interest of justice)." *People v. Delos Santos*, 143 AD3d at 479-80. [citations omitted].

There is no plausible explanation why appellate counsel raised issues that were plainly unpreserved for appellate review or without merit. To make matters worse, appellate counsel knew that the issues raised were unpreserved or without merit since he requested this Court to review said claims in the interest of justice. It can be argued that from the moment appellate counsel began reviewing the record and conducting minimum legal research, it became obvious to him that he was rolling the dice, sort of speak, with petitioner's chances of being successful on

appeal. This is particularly true, since the issues were either unpreserved for appellate review or without merit.

Another blunder committed by appellate counsel was when reviewing the record in preparation for petitioner's appeal, he should have noticed that there were two different handwritten jury notes in connection with the jury's request regarding felony murder for kidnapping. A review of these notes (Exhibit - "F") establishes that someone within the court system intentionally fabricated the note requesting the judge's instruction/law regarding felony murder for kidnapping because Mr. Swisher requested for kidnapping in the first degree and the judge changed the context of the note and instructed on kidnapping in the second degree. See, Exhibit - "F", Letter dated July 30, 2020, by Court Action Processing Unit, Fernando Parra, SCC; along with two different handwritten jury notes, both dated July 10, 2014; one requesting the judge's instruction/law regarding felony murder for kidnapping, not written by foreperson Mr. Swisher; and all additional jury notes with Verdict Sheet made by the foreperson Mr. Swisher. See, also, Pages 444 & 449 of transcript to review the judge's instruction that Mr. Swisher is the foreperson and he will write down any questions and 449, to review the wrong instruction in kidnapping in the second degree.

*K. Kammerer*



A competent appellate attorney, would have certainly realized this discrepancy within the jury notes and perhaps requested for his client's permission to file a motion to vacate judgment in order to bring the issue to the trial court's attention and in the interim, develop the record.<sup>3</sup> In the event that motion would have been denied, either after an evidentiary hearing or without a hearing, appellate counsel could have moved this court to consolidate the denial of the motion to vacate judgment with the direct appeal in order to provide this Honorable Court the opportunity to review the two different handwritten jury notes. Instead, appellate counsel misses the mark and raises issues that were either unpreserved for appellate review or without merit.

Even more astonishing, is the fact that when appellate counsel was retained, he informed the lower court, by letter dated August 8, 2014, about his "intention to file post-trial motions on behalf of Mr. Dellos Santos in advance of sentencing. In fact, nine months later, i.e., July 14, 2015, appellate counsel informed petitioner that he was "drafting our brief" and to write him "with

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<sup>3</sup> It should be worth noting that, petitioner's family paid appellate counsel, Edward V. Sapone, the total sum of \$30,000 for his services in perfecting petitioner's appeal as of right. At that time, petitioner's family would have provided Mr. Sapone with additional funds in order to have him file a motion to vacate judgment under CPL §440.10.

[petitioner's] thoughts on the potential appellate issues, and any issues that would support a future claim of Ineffective Assistance of Counsel against [his] trial counsel." See, Exhibit - "B", Letters by Appellate Counsel Edward V. Sapone dated August 8, 2014 & July 14, 2015. Notably, no post-conviction motions were ever filed by counsel.<sup>4</sup>

It is well settled that, "[e]ffective appellate representation by no means requires counsel to brief or argue every issue that may have merit. When it comes to the choice of issues, appellate lawyers have latitude in deciding which points to advance and how to order them." *People v. Stultz*, 2 NY3d 277, 285 (2004); *Jones v. Barnes*, 463 U.S. 745, 754 (1983). See, also, 32 NY Jur.2d Criminal Law: Procedure §927; 33 Carmody-Wait2d §184:287.

However, "a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo v. Henderson*, 13 F.3d 528, 533 (2 Cir. 1994). Indeed, appellate counsel should have argued ineffective assistance of trial counsel for the errors mentioned above. See, e.g., *People v.*

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<sup>4</sup> During the sentencing phase, appellate counsel also informed the court that "there will be an appeal and a 440, but that in no way suggests that Mr. Delos Santos wants to rectify his affidavit." See, Exhibit - "L", Sentencing Minutes page 13 & 14.

*Jarvis*, 98 AD3d 1323 (A.D. 4 Dept. 2012) (writ of error *coram nobis* granted where defendant was denied effective assistance of appellate counsel because counsel failed to argue ineffective assistance of trial counsel), *rev'd* 113 AD3d 1058, *aff'd* 25 NY3d 968; *People v. Turner*, 10 AD3d 458 (A.D. 2 Dept. 2004) (same) *aff'd* 5 NY3d 476 (2005).

A defendant is entitled to effective assistance of appellate counsel, as a matter of law. *People v. De La Hoz*, 131 AD2d 154, 156 (A.D. 1 Dept. 1987). In reviewing claims of ineffective assistance, however, "care must be taken to 'avoid both confusing true ineffectiveness \* \* \* with mere losing tactics and according undue significance to retrospective analysis.'" *Id.* (Citations omitted).

In *Strickland v. Washington*, 466 US 668 (1984), the Supreme Court said that, to sustain a claim of ineffective assistance, a defendant must establish both that counsel's conduct was not reasonably competent and that this resulted in legal prejudice to him. *Id.* The *Strickland* Court noted:

"Judicial scrutiny of counsel's performance must be highly deferential \* \* \* [The] court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" *De La Hoz*, at 157.

(citing *Strickland*, at 689-690). See, also, *Kimmelman v. Morrison*, 477 US 365 (1986); *Darden v. Wainwright*, 477 US 168 (1986).

However, New York employs a different standard. "[W]hat constitutes effective assistance varies according to the unique circumstances of each representation." *People v. Baldi*, 54 NY2d 137, 146. "Thus, th[e] Court [of Appeals] has long applied a flexible standard to analyze claims based upon a deprivation of rights guaranteed under the New York State Constitution due to counsel's alleged ineffectiveness." *Id.* "[S]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." *Id.* at 147. See, also, *People v. Stultz*, 2 NY3d 277 (applying the *Baldi* standard of ineffective assistance of trial counsel to issues of ineffective assistance of appellate counsel).

The core of the inquiry is whether defendant received "meaningful representation." *People v. Benevento*, 91 NY2d 708 (1998). When viewed under the standard in *Strickland* or *Baldi*, appellate counsel's representation was deficient. Under the federal standard, petitioner's counsel was incompetent, because he raised issues that were

plainly unpreserved and without merit, while the record had claims of a meritorious nature, specifically, ineffective assistance of trial counsel for the errors previously mentioned. See, *People v. Jarvis*, 98 AD3d 1323 (writ of error *coram nobis* granted where defendant was denied effective assistance of appellate counsel because counsel failed to argue ineffective assistance of trial counsel), rev'd 113 AD3d 1058, aff'd 25 NY3d 968; *People v. Turner*, 10 AD3d 458 (same) aff'd 5 NY3d 476 (2005).

Similarly, under New York law, petitioner's counsel rendered less than meaningful assistance, because, in failing to raise issues that, based on existing case law and official court documentation, he did not obtain the reversal, or, for that matter, the modification, that was petitioner's right, as a matter of law. Under these particular circumstances, petitioner has made a clear showing of the existence of issues that were essentially overlooked, and issues that warrant reversal. *People v. De La Hoz*, 131 AD2d 154, 156. See, also, *People v. Jarvis*, 98 AD3d 1323, *supra*; *People v. Turner*, 10 AD3d 458, *supra*; *Mayo v. Henderson*, 13 F.3d 528, 533 (2 Cir. 1994).

Hence, this Court's decision affirming petitioner's direct appeal [*People v. Santos*, 143 AD3d 479] should be reversed and a new trial ordered. Alternatively, petitioner

should be given the opportunity to file an appellant brief arguing this issue of ineffective assistance of trial counsel.

**CONCLUSION**

For all of the above stated reasons, petitioner, Miguel De Los Santos, respectfully urges this Honorable Court to grant the relief sought; and any other or further relief, as this Court may deem just and proper.

**DATED:**

Respectfully submitted,  
*Miguel De los Santos*  
Miguel De Los Santos,  
#14-A-5516  
Shawangunk Correctional Fac.  
P.O. Box 700  
Wallkill, N.Y. 12589

TO:

Honorable Cyrus R. Vance, Jr.  
New York County DA  
One Hogan Place  
New York, N.Y. 10013

Edward V. Sapone, Esq.  
Appellate Counsel  
40 Fulton Street (23<sup>rd</sup> Fl.)  
New York, N.Y. 10038

# **EXHIBIT -A-**

**WARRANT OF ARREST DATED JUNE 13, 2002 &  
LETTER DATED JANUARY 4, 2018, BY ASSISTANT  
DEPUTY COUNSEL, SHAW KERBY.**

SUPERIOR COURT

# Warrant of Arrest

SUPREME COURT OF THE CITY OF NEW YORK

Part	Return Part	County	SUPREME COURT NUMBER/YEAR
70	70	NEW YORK	03444-2002

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any Police Officer of the City of New York.

An Accusatory instrument having been filed with this Court charging

**DELOSSANTOS, MIGUEL**

the defendant in the criminal action herein, with the Commission of the Offense of

PL12525F

AND

The defendant not having been arraigned upon the accusatory instrument by which this criminal action against the defendant was commenced and this Court requiring the defendant's appearance before it for the purpose of arraignment.

The defendant having been arraigned upon the accusatory instrument by which this criminal action against the defendant was commenced and this criminal action being pending in this Court and this Court requiring the defendant's appearance before it.

The defendant having been convicted of and having been sentenced to and this Court requiring the defendant's appearance before it.

You are, therefore, commanded forthwith to arrest the defendant named above and bring him before this Court without unnecessary delay.

By Order of the Court:

**FLORA DUFFY**  
JUSTICE OF THE SUPREME COURT

Bail Condition Violated:

Date of Warrant

6/13/2002

NCIC No:	DCJS No:	DCA No:
Defendant Name	DELOSSANTOS, MIGUEL	Sex: M
AKA:	Ht: 507	Wt: 165
Race: W	DOB:	Age: 55
Eyes: BRO	Hair: BLK	Skin Tone: UNK
Driver Lic No:	Yr Lic Exp:	Lic St:
SSN:		NYSID #
ADDRESS:		
Arrest Date:	1/1/0001	Precinct:
Charge	PL	Penal Law 12525
Dept/Agency	Command:	Tax Reg #
Officer Name:		Shield #





NEW YORK STATE  
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS  
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL  
COUNSEL

January 4, 2018

Mr. Miguel delos Santos  
14A5516  
Shawangunk Correctional Facility  
P.O. Box 700  
Wallkill, New York 12589

Dear Mr. delos Santos:

In response to your correspondence, our attorney registration records reflect an attorney identified as "F. Maureen Duffy" as admitted to practice law in 1975, and she is registered currently at the following business address: 134 Emerson Avenue, Hartsdale, New York 10530-1350.

Please be advised that we are unable to identify "Flora Duffy" or "F. Maureen Duffy" as a current judge in our judicial database.

Very truly yours,

Shawn Kerby  
Assistant Deputy Counsel

# **EXHIBIT -B-**

**LETTERS BY EDWARD V. SAPONE, APPELLATE  
COUNSEL DATED MAY 1, 2019; AUGUST 8, 2014;  
AND JULY 14, 2015.**

## SAPONE & PETRILLO, LLP

William S. Petrillo, Esq., Partner  
Edward V. Sapone, Esq., Partner

MANHATTAN  
1 Penn Plaza, Suite 5315  
New York, New York 10119  
Telephone: (212) 349-9000  
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E-mail: ed@saponepetrillo.com

Chase S. Ruddy, Esq., Senior Associate

LONG ISLAND  
1103 Stewart Avenue, Suite 200  
Garden City, New York 11530  
Telephone: (516) 678-2800  
Facsimile: (516) 977-1977  
E-mail: william@saponepetrillo.com

May 1, 2019

Miguel De Los Santos  
DIN: 14A5516  
Shawangunk Correctional Facility  
200 Quick Road  
P.O. Box 700  
Wallkill, New York 12589

Re: *People v. Miguel De Los Santos*  
Ind. No.: 3444N/2002

Dear Miguel:

I've had an opportunity to review the additional issues that you'd like included in your CPL §440.10 motion and conducted extensive research. I've divided the issues into three categories, which I will discuss in detail below.

### **Jurisdictionally Insufficient Indictment**

You'd like to argue in the CPL § 440.10 motion that the indictment was jurisdictionally defective because most of the elements from the statutory definitions are missing.

While I agree with you that the indictment provided only minimal information, and may not even have specifically listed each of the elements of the charged crimes, it was nonetheless jurisdictionally sufficient. An indictment does not need to list all of the elements of the charged crimes. An indictment is jurisdictionally adequate if it identifies the Penal Law title of the crime and incorporates the elements through the title or reference to the Penal Law section of the crime charged. See People v. Ray, 71 N.Y.2d 849, 850 (1988); People v. Cohen, 52 N.Y.2d 584, 586 (1981).

An indictment is jurisdictionally defective only if it does not charge the defendant with the commission of a particular crime. See People v. Iannone, 45 N.Y.2d 589, 600 (1978). An indictment is a jurisdictionally defective indictment only if it accuses a defendant of performing acts that "simply do not constitute a crime," Id. at 600, or "fails to allege that the defendant committed acts constituting every material element of the crime charged." People v. D'Angelo, 98 N.Y.2d 733, 734-35 (2002).

Here, each count in the indictment included both the Penal Law section and the title of the offense:

- Count One charged murder in the second degree under Penal Law §125.25(3);
- Count Two also charged murder in the second degree under Penal Law §125.25(3);
- Count Three charged kidnapping the first degree under Penal Law §135.25(1);
- Count Four charged unlawful imprisonment in the first degree under Penal Law §135.10;
- Count Five also charged unlawful imprisonment in the first degree under Penal Law §135.10;
- Count Six charged burglary in the first degree under Penal Law §140.30(1);
- Count Seven charged criminal sale of a controlled substance in the first degree under Penal Law §220.43(1); and
- Count Eight charged conspiracy in the second degree under Penal Law §105.15.

No more was required for a jurisdictionally sufficient indictment. While the indictment here contained only minimal facts, those facts were enough, because those facts alleged “where, when and what the defendant did.” Iannone, 45 N.Y.2d 598.

You also point out that the voluntary disclosure form did not supplement the indictment with any acts, facts, or crimes. I agree with you. But any complaint that the indictment, bill of particulars, or voluntary disclosure form fails to include sufficient facts must be raised at the time those pleadings are filed.

Here, there is no suggestion in the record that your attorney complained that the indictment failed to provide adequate notice of the charges against you or requested a more detailed bill of particulars. Absent such a complaint, the adequacy of the indictment cannot be raised on appeal or in a post-conviction motion. See, e.g., People v. Wiredo, 138 A.D.2d 652, 654 (2d Dep’t 1988)(“If the defendant did not avail himself of the opportunity to move for a bill of particulars requesting more specificity in ... the indictment, he may not be heard to complain at this juncture” [i.e., following his conviction after trial]).

While there is no doubt that your trial attorney could have requested a bill of particulars, it would be impossible to show that you were prejudiced by that failure, a necessary component of any ineffective assistance of counsel claim.

### Invalid Arrest & Indictment

You’d like to argue in the CPL §440.10 motion that the indictment and arrest warrant were improper because the only way the prosecution could have proceeded without an arrest was by sealed indictment under CPL §210.10(3).

You are correct that because you were not arrested before your indictment, and there was no felony complaint, CPL §210.10 applied. But there is nothing in the record to suggest that CPL §210.10 was not followed. CPL §210.10(3) permits the direct presentment of an indictment, that is, the prosecutor can obtain an indictment even if the defendant has not been arrested. In that case, once the indictment is obtained, the superior court must order that the indictment be filed



as a sealed instrument and an arrest warrant ordered. There is nothing to suggest that the indictment was not ordered sealed by the Supreme Court. ✓

Even if the procedural prerequisites of CPL §210.10 were not followed, they cannot be challenged now. A defendant's arraignment, without an objection to the jurisdiction of the court, secures the jurisdiction of the Supreme Court over both the defendant and the resulting prosecution, even if the provisions of CPL §210.10 for obtaining personal and subject matter jurisdiction over the defendant and the case are not followed. See People v. James, 147 A.D.3d 1211, 1212 (3d Dep't 2017). The validity of an arrest is immaterial to the validity of a subsequent conviction. See People v. Grant, 16 N.Y.2d 722 (1965). A defendant's participation in the proceedings without objection is a submission to the jurisdiction of the court. See People v. Golston, 13 A.D.3d 887 (3d Dep't 2004). ✓

Because your case was presented to a grand jury in 2002, there was no need for the prosecution to re-present it upon your arrest, that is, because you were indicted in 2002, the court was not required to indict you again in 2013.

You indicated that because your name was "scratched" from the indictment, the prosecution could not proceed against you. The 2002 indictment not only charged you, but it also charged Rafael De Los Santos, Juan Pilne, and Ellerman Valverde. Your name was redacted from the copy of the indictment contained in the Supreme Court file because you had not been arrested, and the cases against each of the four other co-defendants proceeded without you. Redacting your name on the copy was consistent with the fact that the indictment was sealed as to you. That your name was redacted or scratched on this copy of the indictment does not mean that you were removed from the indictment, or that the indictment ceased to be valid as against you. It merely means that your name was removed from this copy. Even if it could have been argued that scratching your name from the indictment rendered it somehow invalid (and I don't believe it could), that challenge could only have been made at the time you were arraigned on the indictment following your arrest in 2013.

### The Arrest Warrant

You've also indicated that you want to challenge the arrest warrant in the CPL §440.10 motion.

The problem with such a claim based on the arrest warrant that you provided is that the copy that you provided does not appear to be authentic, or appears to have been altered. You are correct that the warrant is purportedly authorized by Flora Duffy, as a Justice of the Supreme Court, and there was no Supreme Court Justice by that name in 2002. We have verified with the Office of Court Administration that there has never been a lawyer or a judge in New York State by that name.

I'm concerned, however, that the copy of the arrest warrant that you provided is not authentic, or has been altered, because, among other things, the title of the document states that it is an arrest warrant from the "Supreme Court of the City of New York." There is no Supreme



Court of the City of New York, only a Supreme Court of the State of New York, and a Criminal Court of the City of New York.

The fact that the court issuing the warrant is misidentified, together with the fact that a fictitious judge is listed as having ordered the warrant, suggests that the document was altered at some point. If you're able to provide me with further information about where this arrest warrant originated, perhaps this is something that can be investigated further. If this is actually the warrant, and was endorsed by a non-existent judge, then perhaps this might present a claim, but it does not appear to be an authentic document.



I recognize that you believe that the proceedings against you were unfair and unlawful for the reasons that you've pointed out. Unfortunately, the law appears to be against you on the issues that you have identified. I am ethically bound not to raise any claims on your behalf that have no legal support. Further, including claims in your motion that are without any legal basis would also doom any chance you have of prevailing on the CPL §440.10 motion that I've prepared, and of which you have a copy.

Kindly get back to me with any questions. In particular (1) provide me with any further information you can about where your copy of the arrest warrant originated; and (2) if you disagree with my assessment of the issues addressed above, provide any case law you believe supports your challenges to the indictment and the jurisdiction of the court. As I've explained, I'm eager to include any bona fide issues that I can on your behalf, but I need law to support them.

If you accept my analysis of the issues, which I reached only after careful research, I would ask that you please return to my office the affidavit that I sent to you back on January 24, 2019. As a reminder, I need you to sign the affidavit with a notary public before sending it back. We need to include your affidavit when we file the final CPL §440.10 motion with the Court.

Sincerely,

Edward V. Sapone  
Edward V. Sapone

**EDWARD V. SAPONE, LLC**

LAW FIRM  
40 Fulton Street, 23<sup>rd</sup> Floor  
New York, New York 10038

—  
Telephone: (212) 349-9000  
Facsimile: (212) 349-9003  
E-mail: edward@saponelaw.com

*BY FACSIMILE*

August 8, 2014

Hon. Ruth Pickholz  
Supreme Court Justice  
New York County Supreme Court  
Part 66  
111 Centre Street, Room 1047  
New York, NY 10013

Re: *People v. Miguel Dellos Santos*  
*Ind. No.: 3444/2002*

Judge Pickholz:

I am newly retained counsel to Defendant Miguel Dellos Santos in the above referenced case. I was retained by Mr. Dellos Santos's family today for post-trial motions, sentencing and appeal. I filed my notice of appearance in the case this morning.<sup>1</sup>

I left a message for the assigned Assistant District Attorney David Drucker, who I understand is on trial, and I spoke with Mr. Dellos Santos's trial counsel, Norman Williams, Jr., who informed me that the sentencing hearing, scheduled for Monday, August 11, 2014, has been adjourned to September 10, 2014.

I write to inform the Court of my intention to file post-trial motions on behalf of Mr. Dellos Santos in advance of sentencing.

I look forward to addressing the Court on September 10, 2014.

Respectfully submitted,

/s/ Edward V. Sapone  
Edward V. Sapone

cc: Mr. David Drucker, Esq.  
Assistant District Attorney

---

<sup>1</sup> I'm attaching a courtesy copy for the Court's file.

**EDWARD V. SAPONE, LLC**

LAW FIRM  
40 Fulton Street, 23<sup>rd</sup> Floor  
New York, New York 10038

Telephone: (212) 349-9000  
Facsimile: (212) 349-9003  
E-mail: info@saponeilaw.com

*VIA REGULAR MAIL*

July 14, 2015

Miguel De Los Santos  
DIN: 14A5516  
Auburn Correctional Facility  
135 State Street  
Auburn, New York 13024

Re: *People v. Miguel De Los Santos*  
Ind. No.: 3444/2002

Dear Miguel:

As you know, we submitted our Notice of Appearance for you.

We are drafting our brief which will include, among other issues, whether the verdict was repugnant, the sufficiency of the evidence, any unfair prejudice resulting from the evidence of your alleged involvement in narcotics offenses, the process by which you were identified and any erroneous jury instructions.

Please write us with your thoughts on the potential appellate issues, and any issues that would support a future claim of Ineffective Assistance of Counsel against your trial counsel.

We are mailing you three separate packages that contain all documents we have regarding your case.

Warm Regards,

/S/ Edward V. Sapone  
Edward V. Sapone



135 State stree

13021

# **EXHIBIT -C-**

**PAGES 1-4, FIRST ARRAIGNMENT TRANSCRIPT  
DATED JUNE 3, 2013; PAGE 2 OF 10, COURT CASE  
INFORMATION, INITIAL REPORT OF INDICTMENT  
NUMBER DATED JUNE 3, 2014.**

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK : CRIMINAL TERM : PART 45  
-----

3 THE PEOPLE OF THE STATE OF NEW YORK

4 -against- Indictment

5 MIGUEL DE LOS SANTOS, 3444/02

6 Defendant.

7 -----

8 111 Centre Street  
9 New York, New York

10 June 3, 2013

11 BEFORE:

12 HONORABLE JUSTICE BRUCE ALLEN

13 A P P E A R A N C E S :

14 BRIDGET BRENNAN, ESQ.  
15 Special Narcotics Prosecutor  
16 New York County

17 BY: WESLEY CHENG, ESQ.  
For the People

18 NORMAN WILLIAMS, ESQ.  
19 For the Defendant

20 DIANA DAVILA-MONGE  
21 Sr. Court Reporter

22

23

24

25

## Proceedings

1 COURT CLERK: Calling number two on the  
2 calendar Indictment Number 3444 of 2002 the People  
3 of the State of New York against Miguel De Los  
4 Santos.

5 The defendant, his attorney and the  
6 assistant district attorney are present in the  
7 courtroom.

8 Counsel, please state your appearance for  
9 the record.

10 MR. CHENG: Wesley Cheng on behalf of the  
11 Special Narcotics Prosecutor.

12 MR. WILLIAMS: Norman Williams appearing  
13 on behalf of the defendant.

14 MR. CHENG: I would request a short  
15 adjournment.

16 We just need to be able to pull the file  
17 and get the voluntary disclosure form and the  
18 indictment so we can arraign him properly on the  
19 next date.

20 THE COURT: Has he been printed?

21 Do we have prints?

22 MR. CHENG: We don't have prints yet.

23 THE COURT: Are you going to take him to  
24 do that?

25 When can we do this arraignment?

## Proceedings

1 MR. CHENG: How long does it generally  
2 take for prints?

3 THE COURT: One day, the same day.

4 MR. CHENG: I request two weeks, Judge,  
5 to get it done in that time.

6 THE COURT: Two weeks.

7 MR. CHENG: That's also to get the  
8 voluntary disclosure form and the indictment.

9 THE COURT: Mr. Williams.

10 MR. CHENG: Should we request a shorter  
11 adjournment, Judge?

12 THE COURT: It's a very old case.

13 MR. CHENG: I can request a week, Judge.

14 THE COURT: I'd like to find out what's  
15 going on.

16 MR. WILLIAMS: Depending on how quickly  
17 you get the information together, I will probably  
18 make a bail application.

19 THE COURT: Does he have a hold?

20 COURT OFFICER: There is no hold.

21 THE COURT: All right.

22 MR. CHENG: June 10th, Judge.

23 I will inform everyone.

24 THE COURT: 6/10 for a possible bail  
25 application and arraignment.

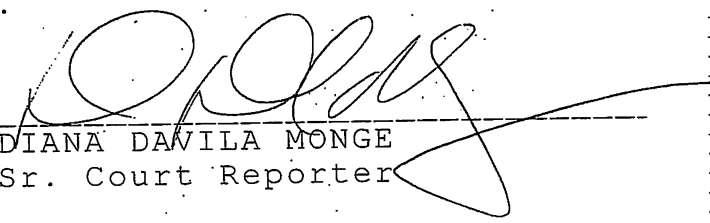
Proceedings

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The defendant will be held until then.  
The warrant is vacated.

-0-

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPTION OF  
THE MINUTES TAKEN BY ME.

  
DIANA DAVILA MONGE  
Sr. Court Reporter

Arrest Date: May 30, 2013 12:00 pm (12:00:00)

**Name:** MIGUEL DELOS SANTOS  
**Date of Birth:** December 27, 1957  
**Sex:** Male  
**Race:** White  
**Ethnicity:** Hispanic  
**Height:** 5' 08"  
**Weight:** 155  
**Age at time of crime/arrest:** 41  
**Address:** 470 WEST 145 STR, MANHATTAN, NY  
**Fax Number:** M31810  
**Place of Arrest:** NYCPD 30  
**Arrest Type:** Unknown  
**Date of Crime:** October 08, 1999  
**Place of Crime:** NYCPD 30  
**Criminal Justice Tracking No.:** 66081130H  
**Arresting Agency:** NYCPD PCT 030  
**Arresting Officer ID:** 75422837  
**Arrest Number:** M13648484  
**Arraignment:** New York County Criminal Court

**Arrest Charges:**

-- Murder:Depraved Indifference

PL 125.25 Sub 02 Class A Felony Degree 2 NCIC 0999

**Court Case Information**

--**Court:** New York County Supreme Court **Case Number:** 03444N-2002

June 03, 2013

**Initial Report Of Indictment Number**

June 10, 2013

**Arraigned**

-- Murder:Intention

PL 125.25 Sub 01 Counts: 2 Class A Felony NCIC 0999

-- Kidnapping:With Intent To Collect Ransom

PL 135.25 Sub 01 Class A Felony NCIC 1099

-- Criminal Sale Controlled Substance-1st:2 Oz Narcotic Drug

PL 220.43 Sub 01 Class A Felony NCIC 3599

-- Burglary:Dwelling With Explosives Or Deadly Weapon

PL 140.30 Sub 01 Class B Felony NCIC 2299

-- Unlawful Imprisonment-1st Degree

**Repository Inquiry**  
Case No:1 DIN Number - 14A5516 - PRR

New York State Division of Criminal Justice Services  
Alfred E. Smith Building, 80 South Swan St.  
Albany, New York 12210. Tel:1-800-262-DCJS  
Michael C.Green, Executive Deputy Commissioner of the NYS Division of Criminal Justice Services

● **Identification Information** ↑

**No Photo Available**

**Name:**

MIGUEL A DE LOS SANTOS    MIGUEL DELOS SANTOS  
MIGUEL DELOSSANTOS      CACH DELOSSANTOS

**Date of Birth:**

December 27, 1957    November 10, 1957    December 27, 1947

**Place of Birth :**

Dominican Republic    USA

**Address:**

470 WEST 145 STR, MANHATTAN, NY  
41-11 PARSONS BLVD, FLUSH.#407, NY  
41-11 PARSONS BLVD, FLUSHING, NY  
1785 TOWNSEND AVE, BRONX, NY

*Este Lado NO, Solo el otro que es la segunda pagina*

<b>Sex:</b>	<b>Race:</b>	<b>Ethnicity:</b>	<b>Skin Tone:</b>
Male	White	Hispanic	Light/Medium/Dark
<b>Eye Color:</b>	<b>Hair Color:</b>	<b>Height:</b>	<b>Weight:</b>
Brown	Brown	5' 08"	179

**SSN:**

**NYSID#:**

04076530Y

**III Status:** Criminal record in other states or in multiple FBI files for NYS

**Alien Number:**

028365364

**Country of Deportation:**

**Country of Citizenship:**

**Deportation Date:**

● **NYS Criminal History Information**



↓ **Cycle 4**

**Violent Felony Offense**

**Arrest/Charge Information**



# **EXHIBIT -D-**

**LETTER DATED OCTOBER 6, 2017 BY COURT  
ACTION PROCESSING UNIT, FERNANDO PARRA,  
SCC.**

October 6, 2017

Mr. Miguel de los Santos 14A5516  
Auburn Correctional Facility  
P.O. Box 618  
Auburn, New York 13024

Re: Court Documents  
Ind.# 03444-2002

Dear Mr. De los Santos:

I strongly suggest that you seek legal advise at the facility where you are housed so that if I have not been clear with you, they can better answer your questions. I have tried several times to explain to you and your family members that there is only one file in existence related to your case. Your family members already copied **ALL** the public documents in that file. I have also many times explained to you and your family that your case was not heard in Criminal Court. Your case started directly in Supreme Court. **There are no Criminal Court papers.** In your latest letter you refer to the "sealing" of your indictment. Your Indictment is not sealed. As far as different copies of the Indictment: we did not provide you with copies, your family members made the copies themselves. There is only one Indictment. **We have no other documents to provide you with.**

Respectfully yours,

Fernando Parra, SCC  
Court Action Processing Unit  
Supreme Court, Criminal Term

Encl.

# **EXHIBIT -E-**

**PAGE 2 OF INDICTMENT, THIRD COUNT FILED  
JUNE 13, 2002.**

VALVERDE of the crime of MURDER IN THE SECOND DEGREE, P.L. §125.25(3), committed as follows:

The defendants, in the County of New York, City of New York, on or about October 8, 1999, engaged in the attempted commission and commission of the crime of kidnapping, and, in the course of such crime, and in furtherance thereof, and of the immediate flight therefrom, a participant in the crime caused the death of Manuel Gonzalez, not a participant in the crime.

THIRD COUNT

AND THE GRAND JURY AFORESAID, by this indictment, accuses the defendants ~~\_\_\_\_\_~~

RAFAEL DE LOS SANTOS, JUAN PILNE a/k/a PUNALADA and ELLERMAN VALVERDE of the crime of KIDNAPPING IN THE FIRST DEGREE, P.L. §135.25(1) in that:

The defendants, in the County of New York, City of New York, on or about October 8, 1999, abducted Manuel Gonzalez with the intent to compel a third person to engage in particular conduct.

FOURTH COUNT

AND THE GRAND JURY AFORESAID, by this indictment, further accuses the defendants ~~\_\_\_\_\_~~

~~\_\_\_\_\_~~ RAFAEL DE LOS SANTOS, JUAN PILNE a/k/a PUNALADA and

# **EXHIBIT -F-**

**LETTER DATED JULY 30, 2020, BY COURT; ALONG WITH TWO DIFFERENT HANDWRITTEN JURY NOTES, BOTH DATED JULY 10, 2014; AND ALL ADDITIONAL JURY NOTES WITH VERDICT SHEET MADE BY THE FOREPERSON MR. SWISHER.**

Supreme Court  
of the  
State of New York



100 CENTRE STREET  
New York, N.Y. 10013

July 30, 2020

Shawangunk Correctional Facility  
P.O. Box 700  
Walkill, NY 12589  
Attn: Miguel DeLos Santos Din: 14A5516

Ind: 3444-2002

Dear Mr. DeLos Santos:

In response to your request, enclosed please find a certified copies of the Verdict sheet and Jury notes for the above referenced case.

Respectfully yours,

K. Kammerer, SCC  
Court Action Processing Unit  
Supreme Court, Criminal Term

enc



SUPREME COURT OF THE STATE OF NEW YORK

PART 66

JUSTICE R. PICKHOLZ

DATE July 10<sup>th</sup>

TIME 1:30

We the jury request Judges instructions/law

on Count 6 Burglary in the first degree and

on Count 8 Conspiracy in the second degree

DATE July 30 2020  
I hereby certify that the foregoing  
paper is a true copy of the original  
thereof, filed in my office.



JURY FOREPERSON

*Melton Adan Toranzo*  
County Clerk and Clerk of the  
Supreme Court New York County  
OFFICIAL USE

COURT EXHIBIT NO.



SUPREME COURT OF THE STATE OF NEW YORK

PART 66

JUSTICE R. PICKHOLZ

DATE July 10<sup>th</sup>

TIME 1:30

We the jury request Angelly Ortiz Direct - Oct  
6<sup>th</sup> Conversation with Manuel after Pedro  
left - 1<sup>st</sup> conversation



JURY FOREPERSON

30 2020

DATE

I hereby certify that the foregoing paper is a true copy of the original hereof, filed in my office.

*Malton Adams Tinsley*  
County Clerk and Clerk of the  
Supreme Court New York County  
OFFICIAL USE

COURT EXHIBIT NO.	
-------------------	--

SUPREME COURT OF THE STATE OF NEW YORK

*Julius Sano*

PART 66

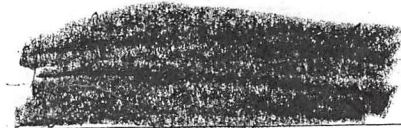
DATE *6/3/20*

JUSTICE R. PICKHOLZ

TIME *2:52p*

We the jury request *reached a verdict*

Multiple horizontal lines for text entry, currently blank.



JURY FOREPERSON

DATE **JUL 30 2020**

I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office.

*Milton A. T...*  
County Clerk and Clerk of the  
Supreme Court New York County  
OFFICIAL USE

COURT EXHIBIT NO. **VII**

SUPREME COURT OF THE STATE OF NEW YORK

PART 66

COUNTY NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against

Miguel De Los Santos

Defendant.

INDICTMENT No. 3444-2002

JUSTICE R. PICKHOLZ

DATE 07-09-14

COUNT NUMBER	CRIME	GUILTY	NOT GUILTY
1	MURDER IN THE SECOND DEGREE (In the course of and in furtherance of Burglary)		✓
2	MURDER IN THE SECOND DEGREE (In the course of and in furtherance of kidnapping)	✓	
3	KIDNAPPING IN THE FIRST DEGREE	✓	
4	UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE (Angelly Ortiz)	✓	
5	UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE (Carlos Ortiz)	✓	
6	BURGLARY IN THE FIRST DEGREE		✓
7	CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE		✓
8	CONSPIRACY IN THE SECOND DEGREE		✓

DATE JUL 30 2020

I hereby certify that the foregoing paper is a true copy of the original hereof, filed in my office.

*Milton Aldan Tringali*  
 County Clerk and Clerk of the  
 Supreme Court New York County  
 OFFICIAL USE



# EXHIBIT -G-

AFFIDAVIT OF RANDALL SWISHER DATED JUNE  
20, 2021; ALONG WITH COURT EXHIBITS 1-3, JURY  
NOTES.



the document. On the lower left a notarized date of July 2020 and the redacted signature of the foreman.

9. I recognize court exhibit 1 as not my handwritten. I have initial the bottom left corner. *RWS*

10. I recognize court exhibit 2 as my handwritten. I have initial the bottom left corner *RWS*

11. I recognize court exhibit 3 as my handwritten. I have initial the bottom left corner. *RWS*

12. I cannot attest to whom signatures are on the three exhibits for it is redacted. *RWS*

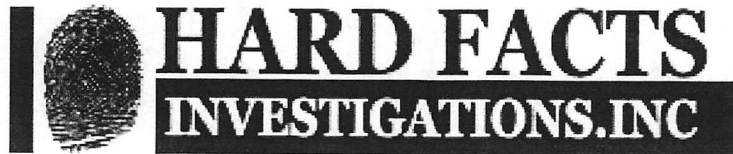
Dated: *6/20/2021*

*Randall Swisher*  
Randall Swisher

State of New York  
County of *Queens, NY*

Sworn before me this day: *6/20/2021*  
*Debra Herron*  
Notary

**Debra Herron**  
Notary Public, State of New York  
No. 01HE6348682  
Qualified in Queens County  
Commission Expires October 3, 2024



**WITNESS INVESTIGATION  
CONFIDENTIAL INVESTIGATIVE REPORT**

Report Date: June 6, 2021

Client Name: Jesus Diaz

Defendant: Miguel De Los Santos

**WITNESS INFORMATION**

<b>Name: Randall SWISHER</b>	<b>Interview of Subject: Positive Results</b>
<b>Address: 340 E. 48<sup>th</sup> STREET NEW YORK, NY 10017</b>	<b>Relationship to Subject: Not Related</b>
<b>DATE: May 23, 2021</b>	<b>Statement Taken: No/ Record</b>

**In this report Mr. Swisher will be known as the witness.**

May 23, 2021, Hard Facts Investigation Private investigator Sonya Glover interviewed Mr. Randall Swisher. The interview took place inside 340 East 48st, New York NY, apartment 2D on the second floor. We revisited June 20, 2021 for second interview. . Mr. Swisher, (the witness), was asked if he remembered serving as a foreman on a jury trial in the borough of Manhattan in July of 2014. Mr. Swisher stated he did remember sitting on a murder trial and was willing to assist in any way.

The witness was not offered, nor did he receive any compensation/ gratuity for his testimony during this interview. The witness had a clear recollection of the trial. The witness was given three exhibits, each with the title Supreme Court of the State New York, including the judge's name Justice R. Pickholz on the far top left of the document. On the lower left a notarized date of July 2020 and the redacted signature of the foreman. He stated that he did submit two of the documents exhibit two and three to the judge all except for exhibit one. He could not attest to the signature at the bottom where indicated foreman because it was redacted. The written request above he believes that is his handwritten.

The witness explained that it was his request to the judge. He had several concerns:

- The witness was not sure of the instruction that the judge outlined regarding the testimony of the co-defendants. However, the judge did explain that process to them.
- The witness had the judge explain the kidnapping in the first degree, and the judge explained the charge, and he was comfortable with it.

That was all that the witness could remember. He really understood the direction of the court.

The witness stated that the judge instructed that all correspondence goes through the foreman. Exhibit one should not have been prepared without his knowledge.

This report concludes our report with Randall Swisher (the witness).

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Sonya Glover PI  
Hard Facts Investigations  
PO Box 283  
Valley Stream, NY 11582  
[Onlythefactsnyc@gmail.com](mailto:Onlythefactsnyc@gmail.com)  
516-597-0727



SUPREME COURT OF THE STATE OF NEW YORK

PART 66

JUSTICE R. PICKHOLZ

DATE 12:35  
TIME 7/10/14

We the jury request the judge's instructions / law regarding  
felony murder or kidnapping.

30 2020

DATE  
I hereby certify that the foregoing  
paper is a true copy of the original  
thereof, filed in my office.



JURY FOREPERSON

*Melton Alden Tinsley*  
County Clerk and Clerk of the  
Supreme Court New York County  
OFFICIAL USE

COURT EXHIBIT NO. 1 NOT His written

SUPREME COURT OF THE STATE OF NEW YORK

PART 66

JUSTICE R. PICKHOLZ

DATE July 10<sup>th</sup>

TIME 1:30

We the jury request Angelly Ortiz Direct - Oct  
6<sup>th</sup> Conversation with Manuel after Pedro  
left - 1<sup>st</sup> conversation



JURY FOREPERSON

30 2020

DATE

hereby certify that the foregoing paper is a true copy of the original hereof, filed in my office.

*Milton Alden Tinsley*

County Clerk and Clerk of the Supreme Court New York County OFFICIAL USE

COURT EXHIBIT NO. 2 *RWS*



# **EXHIBIT -K-**

**LETTER DATED JULY 11, 2017 & RESPONSE  
LETTER DATED AUGUST 9, 2017; AND RESPONSE  
LETTERS FROM DISTRICT ATTORNEY'S OFFICE  
DATED SEPTEMBER 7, 2017 & OCTOBER 3, 2017.**



Miguel de los Santos Din 14-A-5516  
Shawangunk Correctional Facility  
P.O. Box 700  
Wallkill, New York 12589

July 11, 2017

Clerk of the Court  
New York County  
Supreme Court Criminal Term  
100 Centre Street  
New York City, New York 10013

**Re: REQUEST FOR CONTENTS IN COURT FILE**  
**People v. DELLOS SANTOS Ind. No. #3444/02**

Dear Sir/Madam:

Pursuant to Judicial Law, § 255 and Civil Practice Law and Rule, § 8019(f), I request to that county clerk of the supreme court to provide me with ALL the contents in the courts file under indictment number #3444/02 . People v. DELLOS SANTOS In addition, I respectfully requesting the following documents:

- ◆ Copy of any Warrants.
- ◆ Copy of the Supporting Information for the Warrant.
- ◆ Please provide me with the name and business contact information of the stenographer who recorded the Warrant proceeding
- ◆ Copy of any Extradition Order.
- ◆ Copy of the court order sealing the Indictment.
- ◆ Please provide me with the name and business contact information of the stenographer who recorded the proceedings where the Court issued order sealing indictment.
- ◆ Please provide a chronology list of all my court appearances. And
- ◆ People Respond to Defense's Omnibus Motion.

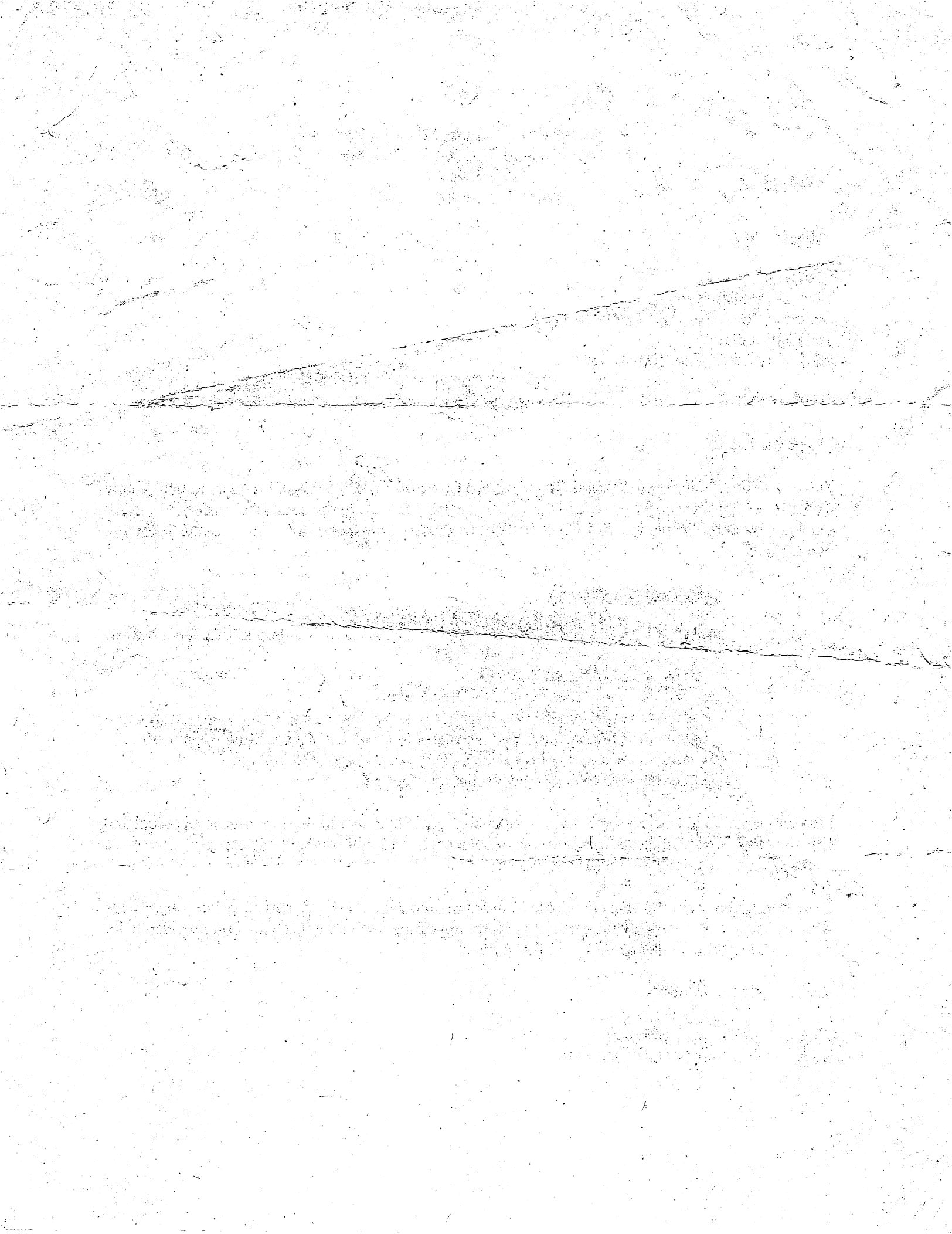
I further inquire as to whether there is a cost for such request and should there be any costs associated with the production of my request, advise me of such cost and I will immediately comply the court's instruction for the procurement of said papers.

Moreover, in the event the court is unable to fulfill my request, or should deny it, please provide me with the name and address of the person(s) I can for appealing such denial. Thank you in advance for your time, attention and cooperation in this matter.

Respectfully Submitted

  
Miguel dellos Santos Din 14-A-5516

cc: file/ms



August 9, 2017

Mr. Miguel de Los Santos 14A5516  
Shawangunk Correctional Facility  
P.O. Box 700  
Walkill, NY 12589

Re: Court Documents  
Ind.# 03444-2002

Dear Mr. De Los Santos:

In response to your request, we apologize that our response to your last letter went to Auburn by mistake. I am enclosing a copy of that letter.

Also, since we sent that letter, your relatives have been to the Clerk's Office in a couple of occasions and ordered the file and copied everything that was public in your file. One thing that we tried to make them understand and possibly you need to understand as well is that there is only one file in this court pertaining to your case. Your relatives were looking for documents from Criminal Court but your case never went to Criminal Court, therefore there are no Criminal Court documents.

We also explained to them that any document in your list that is not found among the documents that they copied in the Clerk's Office will have to be obtained from other agencies.

Warrants and information on warrants can only be obtained from the District Attorney's Office at One Hogan Place Room 732, New York, NY 10013. Your relatives were given the phone numbers for the Clerk's Office should they have any additional questions (646-386-4000), as well as the Reporter's Office (stenographer in your letter) (646-385-4400).

Respectfully yours,

Fernando Parra, SCC  
Court Action Processing Unit  
Supreme Court, Criminal Term

encl.

DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



CYRUS R. VANCE, JR.  
DISTRICT ATTORNEY

September 7, 2017

Miguel de los Santos  
DIN 14-A-5516  
Shawangunk Correctional Facility  
PO Box 700  
Wallkill, New York 12589

Re: F.O.I.L. Request  
People v. de los Santos, Ind. 3444/2002

Dear Mr. de los Santos:

I am an Assistant District Attorney in New York County and have been assigned to be the Records Access Officer in connection with your request under the Freedom of Information Law (F.O.I.L.). The original request was received by this office on or about September 5, 2017. I have reviewed the file, and am prepared to render a decision upon your request with respect to this case file.

Specifically, you requested documents which was utilized to “convince a judge that enough cause exists to make an arrest and thus allow him to sign the warrants.” I will take notice that the records your are requesting relate to your August 10, 2017, request for warrants and the “Supporting Information for the warrant.” As I have granted you access to four pages of warrants, and as you have remitted payment, I have included the records herein.

The warrants themselves state “the defendant not having been arraigned upon the accusatory instrument by which this criminal action against him was commenced and this Court requiring his appearance before it for the purpose of arraignment.” The accusatory instrument is the Indictment. The “Supporting Information” to the Indictment is the Grand Jury proceeding. You are denied access to the Grand Jury minutes and any exhibits as Grand Jury proceedings are secret proceedings. As such, those records are inaccessible under F.O.I.L. Criminal Procedure Law § 190.25(4) specifically prohibits the disclosure of grand jury proceedings, which are secret and not subject to disclosure except by court order. *See Public Officers Law* § 87(2)(a); *see also Newton v. District Attorney of Bronx County*, 186 A.D.2d 57 (1st Dept. 1992); *Matter of Hall v. Bongiorno*, 305 A.D.2d 508, 509 (2d Dept. 2003).



DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



CYRUS R. VANCE, JR.  
DISTRICT ATTORNEY

October 3, 2017

Miguel de los Santos  
DIN 14-A-5516  
Shawangunk Correctional Facility  
PO Box 700  
Wallkill, New York 12589

Re: F.O.I.L. Request  
People v. Miguel delos Santos, Ind. 3444/2002

Dear Mr. de los Santos:

I am an Assistant District Attorney in New York County and have been assigned to be the Records Access Officer in connection with your request under the Freedom of Information Law (F.O.I.L.). The original request was received by this office on or about September 25, 2017. I have reviewed the file, and am prepared to render a decision upon your request with respect to this case file.

You are granted access to "any Warrants issued by Hon. Flora Duffy against ... Rafael delos Santos." It consists of one page and answers your request you labeled as 1. You are also granted access to the Voluntary Disclosure Form (Bill of Particulars) for Rafael delos Santos. It consists of 5 pages.

There are 6 pages in total and I will provide you with copies upon receipt of a check or money order payable to the **New York County District Attorney's Office** in the amount of \$1.50 (based upon a .25 cents per page reproduction fee).

You are denied access to "the extradition [sic] warrant signed by the Governor of the State of New York for Rafael delos Santos," (your request 2) "the Plea agreements for Rafael delos Santos and Juan Rincon," (your request 3) DD-5 "(7)" (your request 6) and "all notes submitted by the jury," (your request 7) as no such records exist in the above referenced file. Under F.O.I.L., an agency cannot provide a record which it does not possess. *See* Public Officers Law § 89(3); *see also* *Matter of Franklin Schwartz*, 57 A.D.3d 338 (1<sup>st</sup> Dept. 2008), *lv. dismissed* 12 N.Y.3d 880 (2008).

# EXHIBIT -L-

SENTENCING MINUTES PAGE 13.

1 children, I ask your Honor to consider that those very same  
2 goals of sentencing could be achieved with a sentence of  
3 15 years to life.

4 Thank you.

5 THE COURT: Does your client wish to be heard?

6 THE DEFENDANT: Yes. I've always asked for God to  
7 take Manuel in his reigns and that God protect his family,  
8 take care of them, bless them forever and the same way as  
9 every one who is present here, but I also want to say that  
10 my trial was unconstitutional and illegal.

11 When one has trust in one's lawyer and one's lawyer  
12 does not try to bring into light the facts, the facts that  
13 he has, the facts that he has and the duty that he has to  
14 bring into light so that the jury and you, your Honor, can  
15 take and make the correct decisions based on the  
16 constitution and of God, that is fraud and a lack of  
17 representation on the part of the defense attorney.

18 That is all.

19 MR. SAPONE: So, your Honor, as a result of his  
20 first lawyer's representation at trial, there will be an  
21 appeal and a 440, but that in no way suggests that Mr. Delos  
22 Santos wants to rectify his affidavit. He withdraws that  
23 voluntarily. He now has me representing him. We are going  
24 to move forward and file the appeal on the 440 and we  
25 withdraw the affidavit and we don't want you to consider

Denise Y. Taylor,

# EXHIBIT -M-

TRIAL TRANSCRIPTS



## WILSON GONZALEZ / DIRECT / MR. DRUCKER

1 after.

2 Q. Before or after you went to the police?

3 A. That's what I don't remember.

4 Q. And did you speak to the police detectives in  
5 Manhattan?

6 A. They went to get me in Connecticut.

7 Q. And did they tell you about what happened to Manuel,  
8 your cousin Manuel?

9 A. Yes.

10 Q. And at any time before you went to the police were you  
11 aware of the defendant trying to contact you either directly or  
12 through people in your family?

13 MR. WILLIAMS: Objection. Asked and answered already,  
14 your Honor.

15 THE COURT: I will allow it.

16 INTERPRETER: Could you repeat that last part, please.

17 Q. At any time before you went to the police were you  
18 aware of the defendant trying to reach you?

19 A. No, because I didn't have a phone or anything.

20 Q. And you're not aware of any phone call to your brother  
21 or to your father?

22 A. I don't remember. If I'm not mistaken I don't  
23 remember. I was 20-years-old. That was 15 years ago.

24 Q. And, again, so it's clear, you first learned Manuel was  
25 killed after you had gone, after you spoke to the police; is



## WILSON GONZALEZ / CROSS / MR. WILLIAMS

1 that correct?

2 A. I don't remember. As I said, I can't remember.

3 Q. And soon after that did you leave the United States?

4 A. After I declared, I testified, I left the United  
5 States. I went to Europe. Then I came back from Europe to  
6 testify again. I testified again and here I am again  
7 testifying.

8 Q. And you live in Europe now?

9 A. Yes.

10 Q. And you've been living there since 1999; is that  
11 correct?

12 A. Yes, from '99.

13 MR. DRUCKER: No further questions.

14 CROSS-EXAMINATION

15 BY MR. WILLIAMS:

16 Q. Good afternoon, Mr. Gonzalez.

17 Have you ever been threatened by this man?

18 A. No.

19 Q. ~~You testified earlier you said that he was never your~~  
20 ~~boss, correct?~~

21 A. ~~No, he was never my boss.~~

22 Q. ~~Now, he used to date your cousin Wendy, right?~~

23 A. ~~Yes.~~

24 Q. ~~Who met him first, you or Wendy?~~

25 A. ~~Wendy.~~



## WILSON GONZALEZ / CROSS / MR. WILLIAMS

1 A. I don't understand, in what way?

2 Q. What do you do for work?

3 A. I had an accident. I fell from a forth floor and I am  
4 handicap now and I don't work.

5 Q. Before your unfortunate accident how were you  
6 supporting yourself?

7 A. I worked in construction.

8 Q. Have you ever been involved in the drug business, Mr.  
9 Gonzalez?

10 A. No.

11 MR. WILLIAMS: Thank you. Nothing further.

12 MR. DRUCKER: No questions.

13 THE COURT: Okay. Thank you.

14 (Witness is excused).

15 THE COURT: We're going to take just a five minute  
16 break, jurors.

17 (Recess).

18 THE COURT: Mr. Drucker, who is your next witness?

19 MR. DRUCKER: Retired Detective Dimuro.

20 THE COURT: Jury in.

21 COURT OFFICER: Jurors entering.

22 THE COURT: Next witness.

23 MR. DRUCKER: People call retired Detective Gerard  
24 Dimuro.

25 COURT OFFICER: Witness entering.

## SUMMATION/DRUCKER

1 (The jury was excused and exits the courtroom.)

2 MR. DRUCKER: One legal point on your charge.

3 THE COURT: Of course.

4 MR. DRUCKER: The first count is Kidnapping in  
5 the First Degree. The second count is the Felony Murder for  
6 Kidnapping. Kidnapping first degree involves abduction with  
7 other elements.

8 (Continued on next page.)

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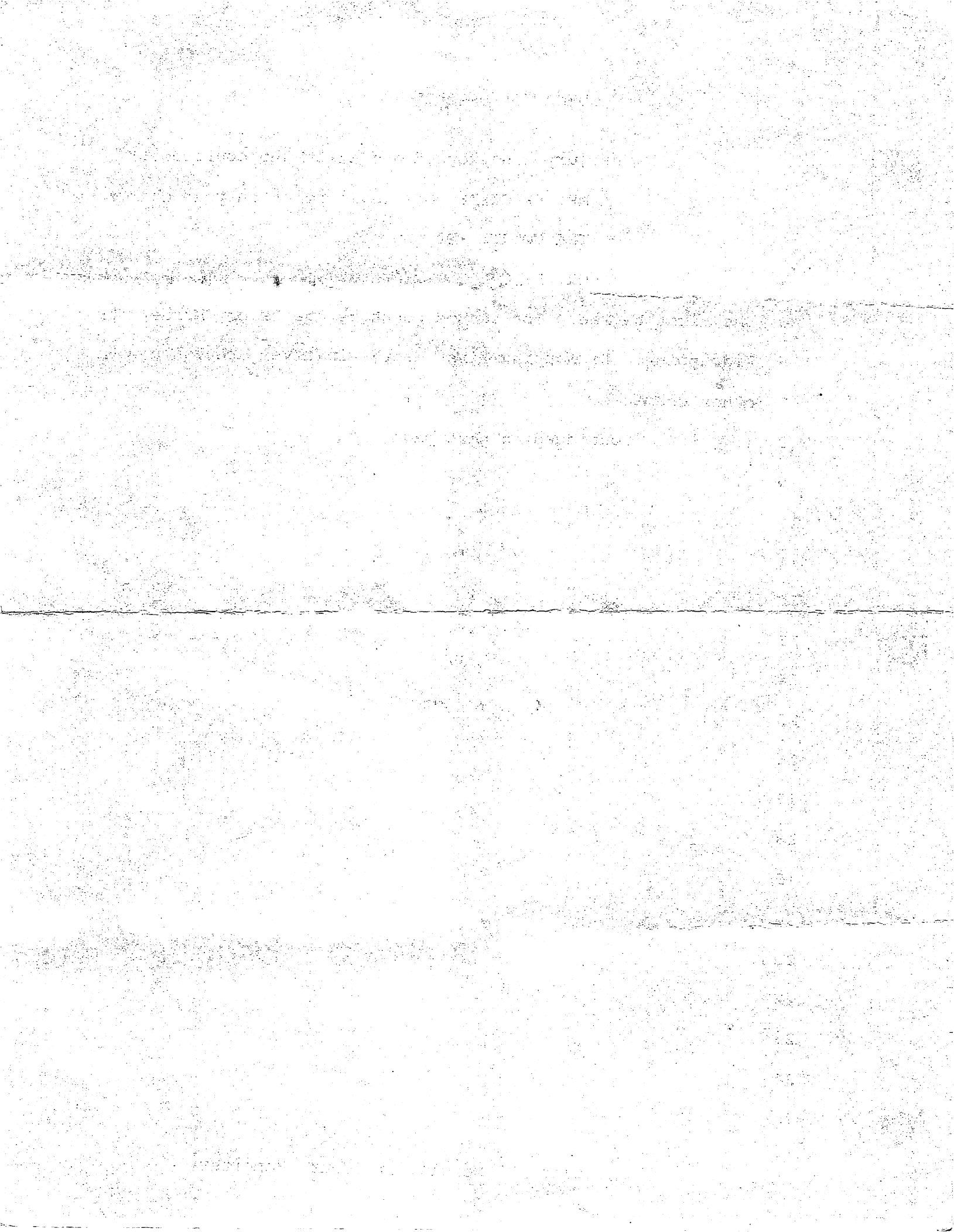
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## Proceeding

1 CONTINUED BY

2 MR. DRUCKER:

3 Which I believe we've fully proven.

4 But, the Count 2, the felony murder kidnapping would  
5 not require.

6 THE COURT: I know.

7 MR. DRUCKER: Kidnapping first-degree.

8 THE COURT: We handled that.

9 MR. DRUCKER: Okay. Then I'll shut up.

10 THE COURT: Thank you.

11 Anything else anybody wants to tell me that's obvious?

12 MR. WILLIAMS: No, your Honor.

13 THE COURT: Thank you.

14 \*\*\*\*\*

15 (Proceedings were concluded until July 10, 2014)

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## JURY CHARGE

1 the furtherance of that kidnapping caused the death of  
2 Manuel Gonzalez. And that Mr. Gonzalez was not a  
3 participant in that crime.

4 If you find that the prosecution has proven both of  
5 these elements beyond a reasonable doubt then you must find  
6 Mr. Dellos Santos guilty of murder in the second-degree in  
7 this count.

8 On the other hand, if you find that the prosecution has  
9 not proven either one or both of these elements beyond a  
10 reasonable doubt then you must find him not guilty.

11 \* **Now, the third count charges Mr. Dellos Santos with**  
12 **kidnapping in the first-degree.**

13 Again, a person is guilty of kidnapping in the first  
14 degree when he abducts another person with the intent to  
15 compel another person to engage in a particular conduct.

16 **In this case it is the prosecution's theory that Manuel**  
17 **Gonzalez was kidnapped in order to compel Wilson Gonzalez**  
18 **to pay money for drugs that were allegedly purchased from**  
19 **Mr. Dellos Santos.**

20 I have already given you all of the definitions that  
21 pertain to the legal definitions of abduct. And that  
22 applies here.

23 In order for you to find Mr. Dellos Santos guilty of  
24 kidnapping in the first-degree the prosecution must prove  
25 not only that acting in concert with others he abducted Mr.

Lourdes Torres-Fuster, Senior Court Reporter

\*  
Instruction  
on Count 3



## JURY CHARGE

1 Gonzalez but that he did so with the intent to compel a  
2 third person to engage in certain conduct in this case in  
3 order to compel Wilson Gonzalez to pay them.

4 In order for you to find Mr. Dellos Santos guilty of  
5 kidnapping in the first-degree the prosecution is required  
6 to prove from all the evidence in the case beyond a  
7 reasonable doubt:

8 One, that on October 8, 1999 in New York Mr. Dellos  
9 Santos acting in concert with others restricted the  
10 movements of Manuel Gonzalez in such a manner as to  
11 interfere substantially with his liberty by moving him from  
12 one place to another or by confining him in the place where  
13 the restriction began or to a place to which he had been  
14 moved.

15 Two, that he did so without the consent of Mr.  
16 Gonzalez.

17 Three, that he intended to do so.

18 Four, that the restriction of Mr. Gonzalez movements  
19 were unlawful. And Mr. Dellos Santos knew that it was  
20 unlawful.

21 Five, that Mr. Dellos Santos restrained Mr. Gonzalez  
22 with the intent to prevent his liberation by using or  
23 threatening to use deadly physical force. And that Mr.  
24 Dellos Santos abducted Manuel Gonzalez with the intent to  
25 compel Wilson Gonzalez to pay for drugs that were allegedly

Lourdes Torres-Fuster, Senior Court Reporter



## JURY CHARGE

1 purchased for Mr. Dellos Santos.

2 If you find that the prosecution has proven each of  
3 these elements beyond a reasonable doubt then you must find  
4 Mr. Dellos Santos guilty of this count of kidnapping.

5 On the other hand, if you find that the prosecution has  
6 failed to prove one or more of these elements then you must  
7 find him not guilty.

8 Count 4, unlawful imprisonment in the first-degree.

9 This is regarding Angelly Ortiz.

10 Count 4 charges Mr. Dellos Santos with unlawful  
11 imprisonment in the first-degree on the theory that acting  
12 in concert with others he unlawfully imprisoned Angelly  
13 Ortiz.

14 Under our law a person is guilty of unlawful  
15 imprisonment in the first-degree when he restrains another  
16 person under circumstances which exposed that other person  
17 to a risk of serious physical injury.

18 I remind you that restrain means to restrict a person's  
19 movements intentionally and unlawfully in such a manner to  
20 interfere substantially with her liberty by moving her from  
21 one place to another or by confining her either to the  
22 place where the restriction commenced or in a place to  
23 which she had been moved without her consent and without  
24 knowledge that the restriction is unlawful.

25 In order for you to find Mr. Dellos Santos guilty of

Lourdes Torres-Fuster, Senior Court Reporter

## JURY CHARGE

1 this count the prosecution is required to prove beyond a  
2 reasonable doubt:

3 One, that on October 8, 1999 in New York Mr. Dellos  
4 Santos acting in concert with others restricted the  
5 movements of Angelly Ortiz in such a manner as to interfere  
6 substantially with her liberty by moving her from one place  
7 to another or by confining her either in the place where  
8 the restriction began or in a place to which she had been  
9 moved.

10 Two, that the movements of Ms. Ortiz were restricted  
11 without her consent.

12 Three, that Mr. Dellos Santos acted intentionally.

13 Four, that the restriction of Ms. Ortiz movements was  
14 unlawful. And that Mr. Dellos Santos knew that.

---

15 Five, that Mr. Dellos Santos or one or more people  
16 acting with him restrained Ms. Ortiz under circumstances  
17 which exposed her to a risk of serious physical injury.

18 If you find that the prosecution has proven all of  
19 these elements to your satisfaction beyond a reasonable  
20 doubt then you must find Mr. Dellos Santos guilty of this  
21 count.

22 On the other hand, if you find that the prosecution has  
23 failed to prove one or more of these elements beyond a  
24 reasonable doubt then you must find him not guilty.

25 Count 5 charges Mr. Dellos Santos with unlawful

Lourdes Torres-Fuster, Senior Court Reporter



## JURY CHARGE

1           imprisonment in the first-degree on the theory that acting  
2           in concert with others he unlawfully imprisoned Carlos  
3           Ortiz. It is the same as the last one. The same  
4           elements but this time you look at the action vis-a-vis  
5           Carlos Ortiz.

6           So, in order for you to find Mr. Dellos Santos guilty  
7           of Count 5 the prosecution is required to prove beyond a  
8           reasonable doubt that on October 8, 1999 in New York Mr.  
9           Dellos Santos acting in concert with others restricted the  
10          movements of Carlos Ortiz in such a manner as to interfere  
11          substantially with his liberty by moving him from one place  
12          to another or by confining him either in a place where the  
13          restriction began or in a place to which he had been moved.

14          Two, that his movements were restricted without his  
15          consent. That Mr. Dellos Santos acted intentionally.  
16          That the restriction was unlawful. And Mr. Dellos Santos  
17          knew that. And that Mr. Dellos Santos or one or more  
18          people acting in concert with him restrained Mr. Ortiz  
19          under circumstances which exposed him to risk of serious  
20          physical injury.

21          If you find that the prosecution has proven all of  
22          these elements beyond a reasonable doubt then you must find  
23          Mr. Dellos Santos guilty of this count of unlawful  
24          imprisonment.

25          On the other hand, if you find that the prosecution has  
            Lourdes Torres-Fuster, Senior Court Reporter



## JURY CHARGE

1 failed to prove one or more of these elements beyond a  
2 reasonable doubt then you must find him not guilty.

3 Count 6 charges Mr. Dellos Santos with burglary in the  
4 first-degree on the theory that he or someone acting in  
5 concert with him was armed with a deadly weapon while  
6 burglarizing Apartment 33 at 478 West 145 Street.

7 The penal law states a person is guilty of burglary in  
8 the first-degree when he knowingly enters unlawfully a  
9 dwelling with the intent to commit a crime. And when he  
10 uses or threatens the immediate use of a dangerous  
11 instrument. In this case a gun.

12 The term dwelling means a building which is usually  
13 occupied by a person who sleeps there at night.

14 Where a building consist of two or more units  
15 separately secured or occupied each unit is considered both  
16 a separate building in itself and part of the main  
17 building.

18 According to the law a person unlawfully enters a  
19 dwelling when he has no permission to do so. And he  
20 knowingly enters the dwelling unlawfully when he is aware  
21 that he doesn't have permission.

22 A person also enters a dwelling unlawfully when he  
23 enters by means of a trick or deception.

24 In addition, the prosecution must prove that at the  
25 time that Mr. Dellos Santos entered the building he

## PROCEEDING

1 comes in.

2 \*\*\* (DELIBERATIONS) \*\*\*

3 THE COURT: We have a note. I'm going to read to them  
4 the charge on murder in the second-degree and kidnapping.

5 MR. DRUCKER: Yes, your Honor.

6 COURT OFFICER: Jury entering.

7 MR. WILLIAMS: Your Honor, may we approach briefly?

8 THE COURT: Yes.

9 (Discussion at the bench was held off the record).

10 THE COURT: Okay. So you asked me for the instructions  
11 on the law regarding felony murder. Regarding the  
12 kidnapping. And I will do that.

13 The penal law states a person is guilty of murder in  
14 the second-degree when acting either alone or with one or  
15 more other persons he commits or attempts to commit a  
16 kidnapping and in the course of and in furtherance of the  
17 crime or of the immediate flight from the crime he or  
18 another participant causes the death of a person other than  
19 one of the participants.

20 Under our law a person is guilty of kidnapping in the  
21 second-degree when he abducts another person. To abduct  
22 means to restrain a person with the intent to prevent the  
23 person's liberation either by secreting or holding him in a  
24 place where he is not likely to be found or by using or  
25 threatening to use deadly physical force.

Lourdes Torres-Fuster, Senior Court Reporter

## PROCEEDING

1           Restrain means to restrict a person's movements  
2 intentionally and unlawfully in such a manner as to  
3 interfere substantially with his liberty by moving him from  
4 one place to another or by confining him either in a place  
5 where the restriction began or in a place to which he has  
6 been moved without consent and with knowledge that the  
7 restriction is unlawful.

8           A person restricts another's movements intentionally  
9 when his goal, his conscious objective is to restrict that  
10 person's movement.

11          A person restricts another's movement unlawfully when  
12 he is not authorized by law to do so and when he is aware  
13 that the restriction is not authorized by law.

14          A person is moved or confined without consent when such  
15 is accomplished by physical force, intimidation or  
16 deception.

17          Intent means conscious objective or purpose.

18          Thus, a person acts with intent to prevent another's  
19 liberation either by secreting or holding him in a place  
20 where he is not likely to be found or by using or  
21 threatening to use deadly physical force when that person's  
22 goal or purpose is to do so.

23          Deadly physical force means physical force which under  
24 the circumstances in which it is used is readily capable of  
25 causing death or other serious physical injury.

          Lourdes Torres-Fuster, Senior Court Reporter

## PROCEEDING

1           In order for you to find Mr. Dellos Santos guilty of  
2           murder in the second-degree the prosecution is required to  
3           prove from all the evidence in this case beyond a  
4           reasonable doubt:

5           One, that on October 8, 1999 in New York Mr. Dellos  
6           Santos acting in concert with others committed a  
7           kidnapping.

8           And, two, that in the course of and in furtherance of  
9           the commission of that kidnapping Mr. Dellos Santos or  
10          another participant in the kidnapping caused the death of  
11          Manuel Gonzalez and Mr. Gonzalez was not a participant in  
12          the crime.

13          If you find that the prosecution has proven beyond a  
14          reasonable doubt both of these elements then you must find  
15          him guilty of murder in the second-degree as charged in  
16          this count.

17          On the other hand, if you find that the prosecution has  
18          not proven one or both of those elements beyond a  
19          reasonable doubt then you must find him not guilty.

20                 I hope that helped you.

21                 So bring the jury in to deliberate.

22                 COURT OFFICER: Jurors.

23                 THE COURT: Please, I want them to stay.

24                 COURT OFFICERS: Yes.

25                 (Jurors exit the courtroom).

Lourdes Torres-Fuster, Senior Court Reporter