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

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

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.[1]

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

[1] 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.[2]

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

[2] It should be worth nothing that petitioner was not charged with kidnapping in the second degree.

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 §10.00 (10). *See, also, People v. Crane*, 156 AD2d at 705.

There, the Appellate Division found that the crime of robbery in the first degree, as charged in the indictment, is defined as a forcible stealing of property during the course of which the defendant or a participant in the crime "[uses] or threatens the immediate use of a dangerous instrument" (Penal Law §160.15(3)). *Id.* There, the court found that the term "'dangerous instrument' is

defined, *inter alia*, as 'any instrument * * * which, under the circumstances in which it is used * * * is readily capable of causing death or other serious physical injury' (Penal Law §10.00(13) [emphasis added])."

There, the Appellate Division found that "[i]n view of the fact that the term 'serious physical injury' is relevant to the issue of whether the defendant used or threatened the use of a dangerous instrument during the course of the robbery, the jury should have been instructed as to the definition thereof (Penal Law §10.00(10))." *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, at a minimum, one of the jury notes since they have two different handwritings. In particular, both have different handwritings. *See,* Exhibit – "F", Letter dated May 9, 2019 by Court Action Processing Unit, Fernando Parra, SCC; along with two different jury notes, both dated July 10, 2014; and all additional jury notes with Verdict Sheet made by the foreperson Mr. Swisher. *See, also,* Pages 444 & 449 of

transcript to distinguish the different handwritings of jury notes.

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. He further indicated that he "recognize court exhibit 1 as not [his] handwrit[ing]." He initialized the bottom left corner.

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.

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.[3] 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 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

[3] 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.

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 [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.[4]

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*,

[4] 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.

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. 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,

Miquel 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 (23rd Fl.)
New York, N.Y. 10038