

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- : **WRIT OF ERROR**  
: **CORAM NOBIS**  
MIGUEL DE LOS SANTOS, :  
: **Ind. No. 3444/2002**  
Petitioner/Defendant. :  
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**PRELIMINARY STATEMENT**

This application for a writ of error *coram nobis* is premised upon the grounds of ineffective assistance of appellate counsel. By decision and order of this Court dated October 6, 2016 (*People v. Santos*, 143 AD3d 479 (A.D. 1 Dept. 2016)) this Court affirmed petitioner's direct appeal stemming from a Judgment of the Supreme Court, New York County, rendered December 10, 2014, (Honorable Ruth Pickholz, J.).

**STATEMENT OF FACTS**

On July 10, 2014 Miguel De Los Santos ("Mr. De Los Santos and/or Petitioner") was convicted, after a jury trial, of the crimes of Murder in the Second Degree [PL §125.25(3)]; Kidnapping in the First Degree [PL §135.25(3)]; and Unlawful Imprisonment in the First Degree (two counts) [PL §135.10]. He was subsequently sentenced to an indeterminate prison term of 25 years to life.

Mr. De Los Santos was charged in a nine-count indictment with offenses that allegedly occurred in the early morning hours of October 8, 1999, and the weeks leading up to that day. (A. 3-12).<sup>1</sup> The People alleged that Mr. De Los Santos, with four others, entered the apartment of Manuel Gonzalez ("Manuel") on 145th Street in Manhattan. Their alleged intent was to kidnap Manuel because they believed that Manuel's cousin Wilson had cheated Mr. De Los Santos out of five kilograms of cocaine that he allegedly gave on consignment. They intended to kidnap Manuel to cause Wilson to pay his debt.

During the course of the alleged kidnapping, Manuel was accidentally shot and killed. While Mr. De Los Santos did not pull the trigger or ever even possess the gun that killed Manuel, he was alleged to have been the cause of the men entering the apartment, as it was his money they were trying to collect.

Mr. De Los Santos was charged with two counts of Murder 2 Count One, in furtherance of Burglary, and Count Two, in furtherance of Kidnapping. Count Three charged Kidnapping 1. Counts Four and Five charged Unlawful

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<sup>1</sup> Numbers followed by the letter "A" refers to the pages of the trial transcripts submitted as an appendix by appellate counsel during the direct appeal process. The letter "T" followed by a number refers to the pages of the trial transcripts. All transcripts will be submitted to the court upon request.

Imprisonment 1 (of Manuel's wife, Angelly Ortiz, and her father, Carlos Ortiz, who were visiting Manuel). Count Six charged Burglary 1. Count Seven charged Criminal Sale of a Controlled Substance 1. And Count Eight charged Conspiracy 2 (narcotics). Count 9, a kidnapping conspiracy, was dismissed on motion of the People at the conclusion of the evidence (A. 208).

At the conclusion of the trial, the jury returned a verdict of guilty on counts two through five, and not guilty on counts one, six, seven and eight.

Mr. De Los Santos was sentenced on December 10, 2014, to a period of 25 years to life imprisonment on the top count of felony murder, with the sentences on the other counts to run concurrently.

### Background Facts

#### a. The Warrant of Arrest

On June 13, 2002 Flora Duffy, an alleged Justice of the Supreme Court, New York County, signed an arrest warrant for Mr. De Los Santos' arrest. 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. The letter, in its entirety, states as follows:

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

See, Exhibit - "A", Warrant of Arrest dated June 13, 2002 & Letter dated January 4, 2018 by Assistant Deputy Counsel, Shawn Kerby.

By letter dated May 1, 2019 and in relation to the arrest warrant, Appellate Counsel Edward V. Sapone informed petitioner, in pertinent part, as follows:

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.

See, Exhibit - "B", Letter by Edward V. Sapone, Appellate Counsel dated May 1, 2019.

b. The Arraignment

On May 30, 2013, approximately eleven years later, Mr. De Los Santos was extradited from North Carolina. He was not arraigned within twenty-four hours of his arrival. He was subsequently arraigned on June 3, 2013.

During this arraignment hearing, the lower court did not produce any documents or indictment to establish that the grand jury foreperson and the ADA filed an indictment in 2002 against Mr. De Los Santos.

In fact, the Honorable Brue Allen can be heard stating: "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.

c. No Criminal Court Action

By letter dated October 6, 2017, the Court Action Processing Unit informed Mr. De Los Santos that his case never went before the criminal court and therefore there are no criminal court documents and no seal indictment. The letter, in its entirety, states as follows:

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. You case stated 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.**

See, Exhibit - "D", Letter dated October 6, 2017 by Court Action Processing Unit, Fernando Parra, SCC.

d. Count Three of The Indictment

As previously mentioned, Mr. De Los Santos was charged, in regards to count three, with kidnapping in the first degree. That charge as written, states as follows:

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 KIDDAPPING 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.

See, Exhibit - "E", Page 2 of Indictment, Third Count Filed June 13, 2002 against co-defendant.

e. The Trial Court Instructs The Jury On The Prosecution's Theory

During the lower court's instructions, it instructed the jury, in relation to the Prosecution's theory, a theory that was not placed in the indictment and was against the statutory requirement. 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.

f. The Trial Court Instructs The Jury On Kidnapping In the Second Degree

During the lower court's instructions, it instructed the jury on kidnapping in the second degree, when petitioner was initially charged with committing kidnapping in the first degree. The following excerpts states as follows:

**PROCEEDINGS**

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

**MR. DRUCKER:** Yes, your Honor.

**COURT OFFICER:** Jury entering.

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

**THE COURT:** Yes.

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

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

\* \* \*

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

See, T: 449.

g. The Two Different Jury Notes

On May 9, 2019, Mr. Delos Santos requested a copy of all jury notes in connection with his conviction. After noticing some discrepancies within the notes, he subsequently made a second request for the same notes. While reviewing and comparing said notes, he realized that



the notes he requested, for the judge's instruction regarding felony murder for kidnapping, had two different handwritings on them. In particular, both appear to have different handwritings. See, Exhibit - "F", Letter dated May 9, 2019, by Court Action Processing Unit, Fernando Parra, SCC; and all additional jury notes with Verdict Sheet made by the foreperson Mr. Swisher.

h. The Affidavit of Randall Swisher

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, respectively.

## PROCEDURAL HISTORY

### a. Appellate Counsel's Brief

In 2015, appellate counsel filed an appellant brief with this Court. In that brief, counsel argued: (i) the jury's verdict of guilty on count three was repugnant based on its decision to acquit appellant of counts seven and eight; (ii) appellant's convictions of counts two through five should be vacated as they were not supported by legally sufficient evidence; (iii) appellant's convictions of counts two through five should be vacated as they were against the weight of the credible evidence; (iv) the people committed prosecutorial misconduct by repeatedly engaging in unfairly prejudicial and inflammatory argument during opening statement and closing argument denying appellant a fair trial; and (v) the trial judge's read-back of a prosecution witness's direct testimony was unfairly prejudicial and appellant's conviction should be vacated. See, Exhibit - "H", Direct Appeal Brief filed by Edward V. Sapone, dated September 11, 2015.

### b. Respondent's Brief

Shortly thereafter, the Respondents filed their brief opposing the claims raised by appellate counsel. See, Exhibit - "I", Respondent's Brief filed by Sheryl Feldman.

### c. Appellate Counsel's Reply Brief

Appellate counsel filed a reply brief to Respondent's brief. See, Exhibit - "J", Reply Brief Filed by Edward V. Sapone, dated May 20, 2016.

d. This Court's Decision

On October 6, 2016, this Court affirmed Mr. De Los Santos's direct appeal. *People v. De Los Santos*, 143 AD3d 479. This Court found that "[d]efendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence . . . [t]here is no basis for disturbing the jury's credibility determination." *People v. Santos*, 143 AD3d at 479. [citations omitted].

The Court also found that "[d]efendant did not preserve his claim that the verdict was repugnant in convicting him of second-degree murder and first-degree kidnapping, but acquitting him of criminal sale of a controlled substance in the first degree and conspiracy to commit that offense . . . and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, since the jury could have acquitted defendant of the drug and conspiracy counts for failure to prove beyond a reasonable doubt any of the elements of those offenses which were not also elements of

the murder and kidnapping counts, as charged to the jury . . . [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." *Id.* [citations omitted].

The Court continued by finding that "[d]efendant failed to preserve his contention that the trial judge improperly responded to a jury note by reading back less than two pages of one witness's testimony on direct examination, instead of assigning that task to nonjudicial court personnel, and we decline to review it in the interest of justice. As an alternative holding, we find that the trial judge should not have participated in the readback, since that practice is generally disfavored . . . but that this error was harmless in light of the overwhelming evidence of defendant's guilt and the brevity of the readback." *Id.* [citations omitted].

In regard to the admission of hearsay, this Court found that "[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. Were we to review them, we would find them unavailing. Moreover, any error in these matters

was harmless in light of the overwhelming evidence of guilty. *Id.*

The Issue on Appeal

Appellate counsel's direct appeal brief makes no mention that trial counsel rendered ineffective assistance by failing to properly review official court documentation which would have revealed that the court lacked subject matter jurisdiction, resulting in the indictment being insufficient in several respects. The following issue, petitioner contends, should have been raised by appellate counsel on appeal:

**TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO PROPERLY REVIEW OFFICIAL COURT DOCUMENTATION WHICH WOULD HAVE REVEALED THAT THE LOWER COURT LACKED JURISDICTION, RESULTING IN THE INDICTMENT BEING INSUFFICIENT IN SEVERAL RESPECTS. N.Y. CONST. ART. I, SECTION 6; U.S. CONST. AMENDS. VI, XIV.**

**THE INSTANT APPLICATION**

By application, Mr. Del Los Santos petitions this Court for a writ of error *coram nobis* pursuant to the authority of *People v. Bachert*, 133 AD2d 482 (A.D. 3 Dept. 1987); and to vacate a decision and order of this Court in (*People v. De Los Santos*, 143 AD3d 479 (A.D. 1 Dept. 2016)).

Specifically, Mr. De Los Santos contends that he was denied his Federal and State Constitutional right to the effective assistance of appellate counsel. Appellate counsel's direct appeal 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 in several respects. Instead, appellate counsel raised issues that were plainly unpreserved for appellate review and meritless. N.Y. Const. Art. I, Sec. VI; U.S. Const. amends. VI, XIV.

**CONCLUSION**

For all of the above stated reasons, including the reasons within the attached Memorandum of Law, petitioner, Miguel De Los Santos, 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 Delos 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