Appendix " A "

A1-A3

Appendix "A"

Francisco Tineo-Santos, 13-A-0532
Wende Correctional Facility
3040 Wende Road
Alden, NY 14004

~~22-138~~ 10-12-418

CLERK'S OFFICE
U.S. COURT OF APPEALS
UNITED STATES COURTHOUSE
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NEW YORK, NY 10007

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LEGAL MAIL – Open only in the presence of the inmate.
See 28 C.F.R. 540.18, 540.19(a), 540.19(c).

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A-1

S.D.N.Y. – N.Y.C.
19-cv-5038
Vyskocil, J.
Cott, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of May, two thousand twenty-four.

Present:

Dennis Jacobs,
Robert D. Sack,
Richard J. Sullivan,
Circuit Judges.

Francisco Tineo-Santos,

Petitioner-Appellant,

v. 23-7901

Paul Piccolo, Superintendent of Southport Correctional Facility,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability ("COA"). Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has failed to show that

> (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right.

Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe

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United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 3, 2024
Docket #: 23-7901
Short Title: Tineo-Santos v. Piccolo

DC Docket #: 1:19-cv-5038
DC Court: SDNY (NEW YORK CITY)
Trial Judge - Mary Kay Vyskocil

NOTICE OF CASE MANAGER CHANGE

The case manager assigned to this matter has been changed.

Inquiries regarding this case may be directed to 212-857-8513.

Appendix " B "

B1-B5

Appendix "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCISCO TINEO-SANTOS,

Petitioner,

-against-

PAUL PICCOLO, *Superintendent of Southport Correctional Facility*,

Respondent.

1:19-cv-5038-MKV-JLC

ORDER DENYING MOTION TO REOPEN

MARY KAY VYSKOCIL, United States District Judge:

Pro se petitioner Francisco Tineo-Santos ("Petitioner") brings a letter motion pursuant to Rule 60 of the Federal Rules of Civil Procedure seeking relief from an Order of the Court and requesting that the Court reopen this habeas proceeding. For the reasons that follow, Petitioner's motion is DENIED.

BACKGROUND

On September 14, 2022, this Court issued a Memorandum Opinion and Order adopting an Order and Report and Recommendation issued by Magistrate Judge James Cott (the "September 14 Order"). [*See* ECF Nos. 53, 58]. In the September 14 Order, the Court denied Petitioner's habeas petition pursuant to 28 U.S.C. § 2254 and declined to issue a certificate of appealability because Petitioner "failed to make a substantial showing of a denial of a constitutional right." [ECF No. 58 at 8]. Thereafter, as a result of the September 14 Order, the case was closed.

On October 20, 2022, Petitioner filed in the Second Circuit Court of Appeals a Notice of Appeal of this Court's September 14 Order. [ECF No. 61]. After the appeal was noticed, in a *pro se* letter docketed November 10, 2022, Petitioner asked this Court for, as relevant here, an extension of time to submit a motion under Rule 60 to "alter/amend . . . the judgment entered on

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September 14, 2022." [ECF No. 65]. In an Order dated December 5, 2022, the Court denied that request without prejudice, explaining that the request implicated the Court's September 14 Order and the Court lacks jurisdiction over aspects of a case involved in a pending appeal (the "December 5 Order"). [ECF No. 67 at 2–3]. In another *pro se* letter docketed December 15, 2022, Petitioner again requested relief from the September 14 Order. [ECF No. 69]. On December 28, 2022, the Court again denied that request without prejudice for the reasons explained in the December 5 Order (the "December 28 Order"). [ECF No. 70]. Finally, in yet another *pro se* letter docketed February 1, 2023, Petitioner *again* requested relief from the September 14 Order. [ECF No. 71]. On May 10, 2023, the Court again issued an Order denying that request without prejudice for the reasons outlined in its December 5 Order and reiterated in its December 28 Order (the "May 10 Order"). [ECF No. 73]. Thereafter, Plaintiff filed in the Second Circuit a Notice of Appeal of the May 10 Order [ECF No. 76], but later withdrew that appeal [ECF No. 82].

On June 29, 2023, the Second Circuit resolved Petitioner's appeal of the Court's September 14 Order. *See Tineo-Santos v. Piccolo*, 2023 WL 7284607 (2d Cir. June 29, 2023). [ECF No. 80]. The Second Circuit dismissed the appeal without opinion, stating that Petitioner failed to "ma[ke] a substantial showing of the denial of a constitutional right." *Tineo-Santos*, 2023 WL 7284607, at *1 (quoting 28 U.S.C. § 2253(c)). In a *pro se* letter docketed July 21, 2023, following the Second Circuit's dismissal of his appeal, Petitioner renewed his motion for relief from the Court's September 14 Order pursuant to Rule 60 and to reopen this habeas proceeding. [ECF No. 79]. Petitioner has since filed two *pro se* letters seeking the Court's confirmation of receipt of his motion. [ECF Nos. 81, 83].

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DISCUSSION

The Court lacks jurisdiction to resolve Petitioner's motion. As outlined above, the Court dismissed Petitioner's petition for a writ of habeas corpus in its September 14 Order. A certificate of appealability did not issue, and the case was closed. Petitioner appealed the September 14 Order to the Second Circuit. The Second Circuit dismissed Petitioner's appeal without opinion, finding that Petitioner had not made a substantial showing of the denial of a constitutional right. *See Tineo-Santos*, 2023 WL 7284607, at *1.

The law of the case doctrine bars the Court from granting Petitioner's Rule 60 motion and reopening this habeas proceeding. *See Wright v. Poole*, 81 F. Supp. 3d 280, 286–87 (S.D.N.Y. 2014). Under the law of the case doctrine, "[w]hen an appellate court has once decided an issue, the trial court, at a later stage of the litigation, is under a duty to follow the appellate court's ruling on that issue." *Brown v. City of Syracuse*, 673 F.3d 141, 147 (2d Cir. 2012) (internal quotation marks omitted). The doctrine "also bars re-litigation in district court of matters implicitly decided by an appellate court, as well as re-litigation of matters that could have been raised on appeal but were not." *Wright*, 81 F. Supp. 3d at 287; *see Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010); *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001). The arguments Petitioner makes in support of his present Rule 60 motion were raised before the Second Circuit. Moreover, any other issue Petitioner now asserts in requesting relief from the Court's September 14 Order could have been raised on his appeal from that Order. The Second Circuit issued a mandate dismissing that appeal in its entirety. Accordingly, the Court lacks jurisdiction to grant relief from the September 14 Order pursuant to Rule 60. *See Wright*, 81 F. Supp. 3d at 287.

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CONCLUSION

For the foregoing reasons, Petitioner's motion for relief pursuant to Rule 60 and to reopen this case is DENIED because the Court does not have jurisdiction to grant the requested relief. IT IS HEREBY ORDERED that Petitioner is barred from filing future papers in this closed action without leave of Court. Accordingly, the Clerk of Court is respectfully directed to decline future filings from Petitioner. The Clerk of Court is respectfully requested to terminate the motion pending at docket entry number 79 and to send a copy of this Order to the *pro se* Petitioner at the address of record.

SO ORDERED.

Date: November 7, 2023
New York, NY

Mary Kay Vyskocil

MARY KAY VYSKOCIL
United States District Judge

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United States District Court
Southern District of New York

Francisco Tineo-Santos (Din #13A0532),
Petitioner,

-VS-

Case No.: 19-CV-5038

Paul Piccolo,
Respondent.

Notice of Appeal

Notice is hereby given that Francisco Tineo-Santos, Pro Se Plaintiff in the above-entitled Matter, appeals to the United States Court of Appeals for the Circuit from the final judgment entered in this action on November 7, 2023 Denying the Rule 60 of the Federal Rules of Civil Procedure Seeking relief from a final Judgment & Order of the Court and requesting to reopen the habeas proceeding. (Dkt. #84).

Date: November 17, 2023
Erie, New York

Plaintiff, Pro Se.
Francisco Tineo-Santos (#13A0532)
Wende Correctional Facility
3040 Wende Rd, P.O. Box. 1187
Alden, New York 14004-1187

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCISCO TINEO-SANTOS,

Petitioner,

-v-

PAUL PICCOLO, Superintendent of Southport Correctional Facility,

Respondent.

ORDER & REPORT AND RECOMMENDATION

19-CV-5038 (MKV) (JLC)

JAMES L. COTT, United States Magistrate Judge.

Petitioner Francisco Tineo-Santos seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 following his conviction for second-degree murder. He also requests reconsideration of the Court's January 21, 2021 Opinion and Order denying him leave to amend his petition and to stay and hold the case in abeyance while he exhausted a new ineffective assistance of counsel claim in state court. For the reasons set forth below, the Court denies Tineo-Santos' motion for reconsideration and recommends that his petition be denied.

I. BACKGROUND[1]

In the early morning of May 10, 2009, Tineo-Santos got into a livery cab to go home. Petitioner's Memorandum in Support of his Claims for Habeas Corpus Relief ("Pet. Mem."), Dkt. No. 3, at 3–4. During the ride, a dispute between Tineo-Santos and the cab driver, Roberto Pita, arose after Tineo-Santos mistakenly gave him an incorrect address. *Id.* Tineo-Santos then shot Pita three times, causing the car to crash. *Id.* at 2–4; Respondent's Memorandum of Law in Opposition to Tineo-Santos' Petition ("Opp."), Dkt. No. 13 at 2. Two bystanders who were nearby when the shots were fired went to the scene of the incident and observed Tineo-Santos and Pita in the cab. Trial Transcript ("Tr."), Dkt. No. 14-2–14-5, at 14–39, 103–06. The police arrived at the scene soon thereafter and arrested Tineo-Santos, who was brought to St. Barnabas Hospital ("St. Barnabas") for his injuries. *Id.* at 243, 257, 261. Pita was pronounced dead at the scene. *Id.* at 280–81.

Tineo-Santos underwent surgery that same day, after which he was transferred to the recovery unit of the hospital. Pet. Mem. at 7. Two detectives entered the recovery unit approximately three hours later, and interviewed Tineo-Santos and obtained a written statement from him. *Id.* at 2; Tr. at 18–19. In the interview, Tineo-Santos admitted that he had shot Pita. Pet. Mem. at 3. At the

[1] The following facts are drawn from the record of proceedings before the state trial court. To the extent the state court transcript does not contain certain information (*e.g.*, the contents of the written and the video statements made by Tineo-Santos during his post-arrest interviews), the Court has cited to the parties' submissions in this proceeding for that information. In view of Tineo-Santos' conviction, the evidence presented at trial is summarized in the light most favorable to the verdict. *See, e.g.*, *Garbutt v. Conway*, 668 F.3d 79, 80 (2d Cir. 2012) (citation omitted).

time of his written statement, Tineo-Santos was taking several medications, including Demerol, Phenergan, and Percocet. *Id.* at 7 (citing to medical records). An assistant district attorney, Dominick DiMaggio ("ADA DiMaggio"), arrived at the hospital the next day, and after receiving permission to speak with Tineo-Santos from the St. Barnabas Risk Management department ("Risk Management"), obtained a video statement from him admitting to the shooting. *Id.* at 3. Tineo-Santos also stated that he appreciated that Pita was not pressing charges, even though by that time, unbeknownst to Tineo-Santos, Pita had already passed away. *Id.* at 4. For both interviews, Tineo-Santos agreed to waive his *Miranda* rights. Tr. at 141; *see* Opp. at 2; Pet. Mem. at 2.

A. *Huntley* Hearing

Tineo-Santos moved to suppress the statements taken from him at the hospital, and a *Huntley* hearing was held on December 22, 2011. *See* Huntley Transcript ("Huntley Tr."), Dkt. No. 14 at 1–24. ADA DiMaggio, who took the video statement, was the sole witness at the hearing concerning both the written and video statements. *See id.*; Pet. Mem. at 2. While most of the *Huntley* hearing involved testimony about the video statement, there was also some limited testimony about the written statement. *See* Huntley Tr. at 5 ("There was a written statement that the defendant had made some time just prior to me actually going on videotape with him. That was also incorporated into the video."); *id.* at 9 (identifying written statement); *id.* at 18–20 (questions on cross-examination about the time, location, and interviewer that took the statement). Following the direct

and cross-examination of ADA DiMaggio, Tineo-Santo's trial attorney—David Segal—did not call any witnesses or present any argument, but simply "rest[ed] on the record." *Id.* at 23. The court then ruled, finding a "knowing, intelligent and voluntary waiver by the defendant, both to [the] written statement as well as to the video statement" and denied the motion to suppress. *Id.* at 24.

B. Trial

At the trial, the People called several witnesses. Two of them testified that they had left a deli on the night of the incident when they heard three gunshots, and they watched the taxicab crash. After arriving at the scene of the crash, one of the witnesses observed Tineo-Santos in the backseat of the car reaching for a pistol, and both witnesses observed the driver lying in the front of the car. Tr. at 14–39, 103–06. ADA DiMaggio also testified, stating that Risk Management had "cleared" him to speak with Tineo-Santos in the hospital and, within a few hours, he arrived at the hospital, advised Tineo-Santos of his *Miranda* rights, and then proceeded to take Tineo-Santos' video statement. *Id.* at 136–44. The Court then admitted Tineo-Santos' video statement and his written statement into evidence.

Following a recess, Segal objected to the admission of the written statement, claiming that a *Huntley* hearing had not been held as to the written statement. Tr. at 168–74. Specifically, Segal contended that the People "never said they were going to use that [written] statement" and that there was no *Huntley* hearing held as to that statement. *Id.* at 169. Segal again reiterated that he believed that "the video was coming in and that was it" and that he was "objecting to [the written

statement]" and he did not "want the written statement coming in" as evidence. *Id.* at 170, 172. The court then read into the record the *Huntley* hearing minutes, in which the motion to suppress both the video and the written statements had been denied. *Id.* at 174. Upon hearing this ruling, Segal "withdr[e]w what [he] said." *Id.*

The People continued to present its case. Testimony was elicited from the vice president for Quality and Clinical Services at St. Barnabas, who explained the Risk Management policy for visits from the police, *id.* at 221–38, as well as from a police officer who responded to the shooting, who described the scene of the crime and how she secured the gun, *id.* at 245–49. Finally, a medical examiner testified about Pita's autopsy. *See id.* at 318–54.

Tineo-Santos did not present a defense. *See id.* at 356. In summation, his attorney noted that the "most important part of th[e] case . . . is [the] video [statement]," *id.* at 395, but that the ADA had manipulated Tineo-Santos into making that statement and that the People did not call the detective who had taken the written statement "because it would [have] hurt them," *id.* at 399.

The court submitted to the jury the charge of second-degree murder and, alternatively, first-degree manslaughter. Tr. at 455–64. Deliberations lasted from December 11 through December 24, 2012, adjourning for four days for various reasons during this period. *See* Pet. Mem. at 11, 13. During their deliberations the jury reported multiple deadlocks, and the court issued an abbreviated *Allen* charge and then a full *Allen* charge before the jury ultimately returned a verdict of guilty of second-degree murder. Tr. at 650. On January 18, 2013, Tineo-Santos was

sentenced to 25 years to life. *See* Transcript of Sentencing Hearing, Dkt. No. 14-5 at 1–13; Petition for Writ of Habeas Corpus by a Person in State Custody ("Pet."), Dkt. No. 1, ¶ 3.

C. Post-Conviction Proceedings

Following sentencing, Tineo-Santos appealed his conviction to the First Department. Pet. ¶ 9. He also challenged the conviction by bringing an ineffective assistance of counsel claim under New York Criminal Procedure Law Section 440.10 on April 13, 2016. Pet. ¶ 11. Specifically, Tineo-Santos argued that the failure of his trial counsel, Segal, *inter alia*, to present any arguments or to call as a witness the detective who took Tineo-Santos' written statement at the *Huntley* hearing amounted to ineffective assistance of counsel. *See* Opp. Ex. 2, Dkt. No. 13-2, at 30–31.

In a Decision and Order dated November 21, 2016, the New York State Supreme Court, Bronx County denied Tineo-Santos' Section 440.10 motion, holding that Tineo-Santos did not establish that he was prejudiced by Segal's performance. *See* Pet. Ex. B, Dkt. No. 1–2, at 13–18. First, the court found that "[t]he voluntariness of both the written and video statements was not tainted by police misconduct," *id.* at 13, as "a police deception technique of stating to [a] suspect that the murder victim is still alive in and of itself does not invalidate the voluntariness of a statement made subsequent to a proper *Miranda* warning," *id.* at 15. In light of the "absence of promises made to or threats made against" Tineo-Santos at the time he made the statements, his relatively limited interaction with law enforcement

personnel, and the fact that Tineo-Santos was only "lightly sedated," the court concluded that the "written and video statements were voluntary." *Id.* Second, the court held that, even if the statements were not voluntary and Segal had successfully suppressed both statements, "the results would not have been completely dispositive of the proceeding." *Id.* at 17. The court noted that the evidence presented at trial included, *inter alia*, two eyewitnesses and the testimony of the responding officer and concluded that "in the totality of the circumstances, defendant was not deprived of a fair trial based on counsel's failure to object to the voluntariness of the written and videotape statements." *Id.* at 17–18. The court then opined that it was not necessary to determine whether counsel's performance was deficient because Tineo-Santos had failed to establish prejudice, but nonetheless added that Segal "performed effectively" and "provided competent, meaningful, and effective, counsel." *Id.* at 20.

Tineo-Santos appealed this ruling, and this appeal was consolidated with his direct appeal. *See* Pet. Ex. C. In resolving the consolidated appeal, on April 10, 2018, the First Department affirmed the trial court's ruling on the Section 440.10 motion, denied Tineo-Santos' argument on direct appeal that his statements should have been suppressed, and affirmed Tineo-Santos' conviction. Pet. Ex. D, Dkt. 1-4, at 21–24. The First Department ruled that "it was objectively reasonable for counsel to believe that admission of the statements, and the video statement in particular, might—without the risk of putting his client on the stand—encourage the jury to find a lack of homicidal intent, elicit sympathy for his client, or at least

do no harm." *Id.* at 22. The First Department went on to conclude that "even if counsel had actually obtained suppression of all statements, the People's case was still overwhelming, and we are unpersuaded that defendant was denied the right to a fair trial." *Id.* at 22–23. On May 31, 2018, the New York State Court of Appeals denied leave to appeal. Ex. E, Dkt. No. 1–5; Pet. ¶ 9.

D. Habeas Proceedings

On May 30, 2019, Tineo-Santos, represented by counsel, timely filed his petition for a writ of habeas corpus along with supporting papers, arguing that the state court decisions were based on "an unreasonable application of clearly established Federal law" that violated his Sixth Amendment right to a fair trial and to effective assistance of counsel. Pet. ¶ 23; Pet. Mem. at 19–27.[2] In his petition, Tineo-Santos contends that at the *Huntley* hearing, his attorney failed to make any challenge to the voluntariness of the written and video statements taken from him, thus rendering ineffective assistance of counsel. Pet. ¶ 12(a); Pet. Mem. at 26–27. Respondent filed a memorandum of law and declaration in opposition to the petition on November 18, 2019. Declaration of T. Charles Won in Opposition to Petition for

[2] Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner has one year from the "date on which the judgment became final by the conclusion of direct review" to make an application for a writ of habeas corpus. 28 U.S.C. § 2244 (d)(1)(A). Since the Court of Appeals issued its decision denying leave to appeal on May 31, 2018, and the time to seek a writ of certiorari expired 90 days thereafter, Tineo-Santos' conviction became final on August 29, 2018. *See, e.g., Smith v. Lord*, 230 F. Supp. 2d 288, 291 (E.D.N.Y. 2002) (conviction final "when the United States Supreme Court denies the prisoner's petition for a writ of certiorari or the time for seeking such a writ has expired, which is 90 days"). Tineo-Santos' petition was filed before the one-year deadline and therefore is timely.

a Writ of Habeas Corpus and Memorandum of Law ("Won Decl."), Dkt. No. 13. Petitioner submitted his reply papers on March 5, 2021. Petitioner's Reply Memorandum of Law in Support of his Claims for Habeas Corpus Relief ("Pet. Reply"), Dkt. No. 36.

Prior to submitting his reply papers earlier this year, Tineo-Santos filed a motion to amend and to stay and hold in abeyance his petition on February 28, 2020 in light of evidence produced by the New York City Police Department in response to a Freedom of Information Law ("FOIL") request. *See* Dkt. Nos. 21, 25–28. Specifically, on August 27, 2019, the NYPD produced to Tineo-Santos "a 911 SPRINT Report and (3) Complaint Follow-Up Reports detailing witness statements." Dkt. No. 28 at 4. Tineo-Santos contended that the 911 report "creates a significant presumption of innocence," Dkt. No. 26–10 (Proposed Amended Petition) ¶ 12, "Ground Two: Ineffective assistance of counsel" at (a), because it suggests that another person was at the scene of the crime. Dkt. No. 28 at 9–10. In light of this 911 Report, Tineo-Santos sought to amend his petition to bring ineffective assistance of counsel claims as a result of trial counsel's failure to introduce the 911 transcript at trial, and appellate counsel's failure to "appraise the Supreme Court, Bronx County of the existence of the 911 recording" in the section 440.10 motion. Dkt. No. 26-10 ¶ 12.

By Opinion and Order dated January 27, 2021, the Court denied Tineo-Santos' motion to amend and stay the proceedings because, *inter alia*, he failed to establish that "good cause" existed for not exhausting his claims earlier. Dkt. No.

30. Following this decision, Tineo-Santos moved for reconsideration under Rules 59(e) and 60(b)(1) of the Federal Rules of Civil Procedure with supporting papers on February 24, 2021. Motion for Reconsideration, Dkt. No. 33; Declaration of Alexander M. Dudelson ("Dudelson Reconsid. Decl."), Dkt. No. 34; Memorandum of Law in Support of Motion for Reconsideration ("Pet. Reconsid. Mem."), Dkt. No. 35. Respondent submitted a declaration in opposition to the motion for reconsideration and an attached memorandum of law on March 16, 2021. Declaration of T. Charles Won in Opposition of Motion for Reconsideration ("Won Reconsid. Decl."), Dkt. No. 38.

A series of extension requests to file reply papers followed. The Court originally gave Tineo-Santos until April 6, 2021 to file his papers. Dkt. Nos. 39–40. A further extension was then requested because of purported difficulties in preparing the petitioner's declaration, and the Court then granted an extension until April 13, 2021. Dkt. Nos. 41–42. A third extension request was then sought and reluctantly granted, with the admonition that it was not clear from the record why it would take 42 days to file reply papers on a motion for reconsideration in a counseled case, even if petitioner was having issues with law library access, as was contended. Dkt. Nos. 43–44. Tineo-Santos then made a further extension request to file by May 11, 2021, which the Court granted with the warning that there would be no further extensions. Dkt. Nos. 45–46.[3]

[3] All extension requests were made on consent.

Tineo-Santos finally filed his reply papers on May 11. Dkt. No. 47. In these papers, he requested that the Court allow him to add his now apparently exhausted claim of ineffective assistance of appellate counsel (as it relates to counsel's purported failure to raise the issue of the 911 call in a section 440.10 motion) because it was now exhausted. In light of this argument, the Court then directed respondent to submit his position with respect to this application by May 21, which he did by filing a "declaration in opposition to motion to amend" and a memorandum of law ("Resp. Opp. Mem."). Dkt. Nos. 48–49.

Finally, on June 8, 2021, notwithstanding that he is represented by counsel in this habeas proceeding, Tineo-Santos filed *pro se* a declaration in support of a request for an extension of time for 30 days "to be able to consult with my presently representing counsel, prepare legal documents and motions that needs to be file [sic] with this Court on my behalf for this action and be able to secure the discovery forms and evidence that I am in essential need to attach to Motions, Legal Documents and Petition need to be file [sic] with this Court in relation to my habeas corpus proceedings." Dkt. No. 50, at 5.[4]

The Court will first address Tineo-Santos' motion for reconsideration and then turn to the merits of his petition.

[4] Docket Numbers 51 and 52 are copies of the papers filed at Docket No. 50.

II. ANALYSIS

A. The Motion for Reconsideration is Denied

Tineo-Santos has moved for reconsideration under Rules 59(e) and 60(b)(1) of the Federal Rules of Civil Procedure. "[T]o prevail on a Rule 59(e) motion to alter or amend a judgment, a movant must either (1) present factual matters or controlling decisions the court overlooked that might materially have influenced its earlier decision or (2) demonstrate the need to correct a clear error or prevent manifest injustice." *QS Holdco Inc. v. Bank of Am. Corp.*, No. 18-CV-824 (RJS), 2020 WL 6321712, at *1 (S.D.N.Y. Jan. 6, 2020) (citations and quotations omitted). Under Rule 60(b)(1), a court may grant a motion for reconsideration due to "mistake, inadvertence, surprise, or excusable neglect."

"A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources . . . and appropriate only when a court overlooks 'controlling decisions or factual matters that were put before it on the underlying motion' and which, if examined, might reasonably have led to a different result." *Benjamin v. Goord*, No. 02-CV-1703 (NRB), 2010 WL 3341639, at *1 (S.D.N.Y. Aug. 18, 2010) (citations and quotations omitted). "Rules 59 and 60 should be narrowly construed and strictly applied to avoid repetitive arguments already submitted to the Court." *Wong v. Healthfirst, Inc.*, No. 04-CV-10061 (DAB), 2007 WL 1295743, at *1 (S.D.N.Y. Apr. 25, 2007) (citations and quotations omitted). Ultimately, "[t]he decision to grant or deny a motion for reconsideration rests within the sound discretion of the district

court." *In re Taneja*, No. 17-CV-9429 (JGK), 2019 WL 1949839, at *1 (S.D.N.Y. Apr. 19, 2019).

Here, Tineo-Santos requests that the Court reconsider its decision denying his motion to amend and stay the proceedings. *See Tineo-Santos v. Piccolo*, No. 19-CV-5038 (MKV) (JLC), 2021 WL 266561, at *6-7 (S.D.N.Y. Jan. 27, 2021) (the "Opinion"). In its Opinion, the Court found, *inter alia*, that Tineo-Santos had failed to show "'good cause' for not exhausting his ineffective assistance of appellate counsel claim prior to instituting this habeas proceeding." *Id.* at *6. In doing so, the Court noted that, based on the information provided in respondent's declaration, Tineo-Santos had "apparently filed a *coram nobis* writ . . . alleging ineffective assistance of appellate counsel on a variety of grounds, but not on the ground presented" in the motion—*i.e.*, that appellate counsel failed to introduce the 911 recording. *Id.* at *6 n.7.

Contrary to respondent's representations, it turned out that Tineo-Santos "did in fact file a *pro se coram nobis* writ in the Appellate Division – First Judicial Department" in which he had argued that "he was denied effective assistance of counsel when his Appellate Counsel failed to raise issues regarding the 911 Sprint Report." Pet. Reconsid. Mem. at 11; *see* Dudelson Reconsid. Decl., Ex. I, Dkt. No. 34-9, ¶¶ 21–24, 32. Tineo-Santos' counsel admits that he "mistakenly relied on" respondent's representations about the "arguments made to the Appellate Division – First Judicial Department regarding the 911 recording" and that he "should have rebutted the omission of [respondent] in a reply." Dudelson Reconsid. Decl. ¶¶ 15–

16.[5] However, the blame does not lay squarely on respondent. Indeed, respondent's counsel emailed a copy of Tineo-Santos' application for a writ of *coram nobis* and specifically asked Tineo-Santos' counsel if he "plan[ned] to add the issue raised in the coram as part of your application to stay the habeas, or should I consider the coram as a separate matter pursued pro se by defendant," to which Tineo-Santos' counsel responded that "[t]his one has nothing to do with me" and "I am doing a 440.10 application based on the 911 call, as set forth in my proposed mixed petition. I have no idea what he is doing in the [coram] application." *See* Won Reconsid. Decl., Ex. 1, Dkt. No. 38-1, at 1.

This correspondence is revealing of two things. First, it appears that Tineo-Santos did not intend to move to amend the petition by adding an ineffective assistance of appellate counsel claim, an issue that was unclear as the Court noted in its Opinion, because Tineo-Santos' counsel advised respondent that he had "nothing to do with" the *coram nobis* application and that his representation of Tineo-Santos was limited to the Section 440.10 application "as set forth in [the] proposed mixed [*habeas*] petition." *See id.*; *Tineo-Santos*, 2021 WL 266561, at *2 ("Although Tineo-Santos proposes to amend his petition to add just a single additional claim, "Ground Two: Ineffective assistance of counsel," he appears to be

[5] Tineo-Santos' counsel attempts to justify his mistaken reliance on respondent's representations by stating that he did so "during a time that he was not in his office due to the pandemic." Pet. Reconsid. Mem. at 12; *see* Dudelson Decl. ¶ 12. However, it is unclear why being out of his office would have made any difference here, where respondent emailed a copy of the application for a writ of *coram nobis* to which Tineo-Santos' counsel responded that same day. *See* Won Decl., Ex. 1 (Dkt. No. 38-1).

asserting two separate ineffective assistance of counsel claims under this caption—one against his trial counsel and one against his appellate counsel—premised on each counsel's failure to introduce the 911 Report."). Second, the fact that Tineo-Santos' counsel denied the relevance of the writ of *coram nobis*, but now, after the Court has denied Tineo-Santos' motion, urges that the *coram nobis* proceeding must be considered, strongly suggests that the motion for reconsideration is simply an attempt to relitigate issues already decided. For these reasons alone, the motion for reconsideration lacks merit. *See Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided.").

Moreover, Tineo-Santos has failed to establish how consideration of his *coram nobis* proceeding at the time his stay motion was adjudicated might reasonably have led to a different result. As the Court explained in its Opinion denying the motion, "Tineo-Santos has failed to meet his burden by showing 'good cause' for not exhausting his ineffective assistance of appellate counsel claim prior to instituting this habeas proceeding." *Tineo-Santos*, 2021 WL 266561, at *6. Nothing that Tineo-Santos has presented to the Court changes the fact that he has not satisfied this "good cause" requirement to stay and hold the habeas proceeding in abeyance.

Notably, even if the Court were to reach the merits of Tineo-Santos' claim, the result would not be different.[6] Petitioner is claiming, essentially, that the 911

[6] Respondent also contends that petitioner failed to exhaust this claim. Resp. Opp. Mem. at 4. But Tineo Santos had to proceed by *coram nobis* before raising the claim in this habeas proceeding, and that, in fact, he has now done.

report would have established that another person was present in the livery cab, and therefore it would exonerate him. But as the Court noted in its Opinion, "there does not appear to be anything in the record containing any mention of [petitioner] ever describing (in his statements or otherwise) a third individual in the livery cab, which is ostensibly why he has now presented the 911 Report as the predicate for his proposed new claims. He alleges only that he 'always stated' the existence of a third person to his attorneys." 2021 WL 266561, at *7 n.9 (citing Tineo-Santos Decl. ¶ 22). No other information about a third person is provided, despite Tineo-Santos having given both a written and a video statement about the incident. As the respondent points out, in convicting Tineo-Santos the jury ultimately credited the two eyewitnesses, who only saw Pita and Tineo-Santos inside the livery cab, and they would not have had any testimony from an anonymous caller explaining what she had purportedly seen, or under what circumstances the caller had observed the incident. Resp. Opp. Mem. at 5. It strains credulity to think that the jury would have credited the statement of an anonymous individual – assuming this statement would even have come into evidence – instead of the eyewitnesses who testified at trial.[7] Thus, given all of these circumstances, appellate counsel justifiably did not raise in the 440.10 motion that Tineo-Santos' trial counsel had rendered ineffective assistance of counsel by not utilizing the 911 report.

[7] Petitioner never addresses the admissibility of the 911 Report in his submissions to the Court.

Ultimately, the Court does not believe a different result would have obtained even if this evidence had been part of the trial, or that a "manifest injustice" would occur unless it ruled otherwise. For all these reasons, Tineo-Santos' motion for reconsideration is denied.[8]

B. Tineo-Santos' Petition Should Be Denied

Upon finding that Tineo-Santos' motion for reconsideration is without merit, the Court will now address his underlying habeas petition requesting relief under 28 U.S.C. § 2254(d).

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[8] Tineo-Santos' belated motion that he filed *pro se*, in which in conclusory fashion he seeks an extension of time for vague purposes and unspecified discovery, is also denied. As chronicled in the recitation of the procedural history, the Court gave him ample time to submit his reply papers on his motion for reconsideration. Moreover, discovery in habeas proceedings is limited, and Tineo-Santos has not provided any justification for discovery in this case. "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rather, Rule 6(a) of the Rules Governing Section 2254 Proceedings provides that a "judge may, for good cause, authorize a party to conduct discovery. . . ." 28 U.S.C. § 2254, Rule 6(a). Good cause requires more than "[g]eneralized statements regarding the possible existence of discoverable material." *Pizzuti v. United States*, 809 F. Supp. 2d 164, 176 (S.D.N.Y. 2011) (citations omitted); *see also Gonzalez v. United States*, No. 12-CV-5226 (JSR) (JLC), 2013 WL 2350434, at *3 (S.D.N.Y. May 23, 2013), *reconsideration denied in part*, 2013 WL 4453361 (S.D.N.Y. July 9, 2013); *Edwards v. Superintendent, Southport C.F.*, 991 F. Supp. 2d 348, 364 (E.D.N.Y. 2013) (citations omitted). Moreover, "Rule 6 does not license a petitioner to engage in a 'fishing expedition' by seeking documents 'merely to determine whether the requested items contain any grounds that might support his petition, and not because the documents actually advance his claims of error.'" *Gonzalez*, 2013 WL 2350434, at *3 (quoting *Pizzuti*, 809 F. Supp. 2d at 176).

1. Standard of Review

Pursuant to 28 U.S.C. § 2254(d), an application for a writ of habeas corpus should only be granted if adjudication of the claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

In his petition, Tineo-Santos seeks relief under Section 2254(d)(1), the "unreasonable application" clause. "A state court decision involves an unreasonable application of . . . clearly established Federal law when the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Cosey v. Lilley*, 460 F. Supp. 3d 346, 376 (S.D.N.Y. 2020) (citing *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000)) (quotations omitted). "This inquiry focuses not on whether the state court's application of clearly established federal law is merely incorrect or erroneous, but on whether it is objectively unreasonable, a substantially higher threshold." *Colon v. Sheahan*, No. 13-CV-6744 (PAC) (JCF), 2016 WL 3919643, at *8 (S.D.N.Y. Jan. 13, 2016), *adopted by* 2016 WL 3926443 (July 14, 2016); *see Arroyo v. Lee*, 831 F. Supp. 2d 750, 759 (S.D.N.Y. 2011) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."). At the same time, "[w]hile the test requires some increment of incorrectness beyond error, . . . the increment need not be great; otherwise *habeas*

relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Arroyo*, 831 F. Supp. 2d at 758 (cleaned up) ("This standard 'falls somewhere between merely erroneous and unreasonable to all reasonable jurists.'"). Ultimately, the petitioner "bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013).

2. Federal Standard for Ineffective Assistance of Counsel Claims

The federal standard for assessing an ineffective assistance of counsel claim is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to prevail on an ineffective assistance of counsel claim, a defendant must establish (1) "that [his] counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 688, 694. In order to satisfy the "performance" prong, a petitioner must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "Such errors include 'omissions [that] cannot be explained convincingly as resulting from a sound trial strategy, but instead arose from oversight, carelessness, ineptitude, or laziness.'" *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2d Cir. 2009) (citations omitted). "Judicial scrutiny of counsel's performance must be highly deferential" and there is a "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Strickland, 466 U.S. at 689. "Under the second prong—the prejudice prong—a 'reasonable probability' of a different result is a 'probability sufficient to undermine confidence in the outcome.'" *Wilson*, 570 F.3d at 502. "The prejudice prong can be satisfied 'even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" *Id.* "A defendant's ineffective assistance of counsel claim fails if the defendant does not meet both prongs of the *Strickland* standard." *Hamilton v. Lee*, 707 F. App'x 12, 15 (2d Cir. 2017).

Given the deferential standard under *Strickland* and Section 2254(d), "[a] federal court may reverse a state court ruling only where it was so lacking in justification that there was . . . [no] possibility for fairminded disagreement." *Fischer v. Smith*, 780 F.3d 556, 561 (2d Cir. 2015) (quotation omitted). "The question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

3. Application

Here, for the reasons discussed below, Tineo-Santos has established that the First Department unreasonably applied the performance prong under *Strickland* as it relates to the written statement taken from him, but has failed to establish that it unreasonably applied the prejudice prong.

a. Performance Prong Under Strickland

The First Department found that, because there was overwhelming proof that defendant intentionally killed the victim, "it was objectively reasonable for counsel to believe that admission of the statements . . . [might] encourage the jury to find a lack of homicidal intent, elicit sympathy for his client, or at least do no harm." Pet. Ex. D at 22.[9] In doing so, it concluded that Tineo-Santos had failed to establish an absence of strategic or legitimate explanations for his counsel's actions. *Id.*

i. Video Statement

With respect to the video statement, the First Department found that Tineo-Santos failed to establish the performance prong under *Strickland*. It reasoned, in part, that his trial attorney, Segal, made a strategic decision to allow the video statements to be admitted and theorized about why Segal may have wanted the video statement to be admitted—the statement might "encourage the jury to find a lack of homicidal intent, elicit sympathy for his client, or at least do no harm," *id.*—but those reasons, perfectly plausible on their own, are undermined by the record as Segal did not pursue such a strategy. To the contrary, Segal attempted to discredit the video statement in summation, arguing that ADA DiMaggio "had manipulated Mr. Santos into making the video statement while he was under the influence of medication." Opp. Ex. 2 at 14 (citing to Tr. at 396–98, 401); *see* Opp. Ex. 3 at 17–18.

[9] The decision is reported at 160 A.D.3d 465 (1st Dep't 2018).

Moreover, it is clear from the record that Segal challenged the admission of the video statement at the *Huntley* hearing and sought its suppression. *See* Huntley Tr. at 3–19. As Segal explained in his September 1, 2015 letter submitted in response to the ineffective assistance of counsel allegations, he cross-examined ADA DiMaggio about whether Tineo-Santos understood the questions and voluntarily made the video statement, questioned the ADA about any threats or promises made to Tineo-Santos, and then rested on the record because he believed that the "video spoke for itself as to the issues at the *Huntley* hearing." Opp. Ex. 2 at 28–29 (citing Segal's Sept. 1, 2015 Letter). While Segal's strategy to suppress the video statement leaves much to be desired—particularly given the potential issues with the initial written statement that might have impacted the admissibility of the second statement, as Tineo-Santos points out (Pet. Mem. at 26)—"[s]trategic decisions regarding the challenging of evidence and witnesses cannot be second-guessed in an effort to support an ineffective assistance of counsel claim," *Loucks v. Capra*, No. 16-CV-3115 (NSR) (JCM), 2019 WL 4921722, at *12 (S.D.N.Y. Mar. 28, 2019) (quoting *Miller v. Graham*, No. 14-CV-5901 (KAM), 2018 WL 3764257, at *14 (E.D.N.Y. Aug. 8, 2018)), *adopted by* 2019 WL 4917191 (Oct. 4, 2019); *Ortiz v. Barkley*, 558 F. Supp. 2d 444, 453 (S.D.N.Y. 2008) ("a decision not to call a particular witness—'even one[ ] that might offer exculpatory evidence—is ordinarily not viewed as a lapse in professional representation'") (quoting *United States v. Best*, 219 F.3d 192, 201 (2d Cir. 2000)). Moreover, "[i]t is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument,

for counsel does not have a duty to advance every nonfrivolous argument that could be made." *Arroyo v. Eckert*, No. 18-CV-5819 (PGG) (JLC), 2020 WL 3884892, at *18 (S.D.N.Y. May 28, 2020) (report and recommendation) (quoting *Clark v. Stinson*, 214 F.3d 315, 322 (2d Cir. 2000)).

Because Segal's decision to cross-examine ADA DiMaggio and then rest on the record falls comfortably within an attorney's strategic discretion, his conduct appears reasonable. In any event, there is no evidence to establish that the First Department applied the facts of this case in an objectively unreasonable manner in determining that Tineo-Santos did not satisfy the performance prong of *Strickland*.

ii. Written Statement

As for the written statement, the First Department found that any failure by Segal to challenge the written statement would also have been objectively reasonable as a strategic decision. Pet. Ex. D at 22. To the extent that Segal decided not to challenge the written statement, that decision falls within his discretion as to trial strategy and does not constitute objectively unreasonable conduct under the performance prong of *Strickland*. *See Awan v. United States*, No. 09-CV-0359 (JS), 2009 WL 3245884, at *3 (E.D.N.Y. Sept. 30, 2009) ("an action or omission that might be considered sound trial strategy does not amount to ineffective assistance"); Pet. Ex. D at 22 (listing reasonable strategies for allowing the statements to be admitted).

However, it appears that Segal's failure to challenge the written statement was not a strategic decision but rather an oversight on his part. As Tineo-Santos

points out, "Segal did not seem to grasp the scope of the *Huntley* hearing or evidentiary rulings" and he "himself acknowledged that he did not want the written statement coming in"—effectively negating a basis for finding Segal's decision to be strategic. Pet. Mem. at 25. Indeed, Segal made clear his mistaken belief at trial, stating that "a *Huntley* hearing was held as to the video" but not the written statement and that the People "never said anything about the [written] statement." Tr. at 169. Accordingly, unlike his actions relating to the video statement, there is no evidence to suggest that Segal considered and made an affirmative decision to abandon the suppression of the written statement. Instead, Segal failed to challenge the written statement altogether based on an erroneous belief that the People did not seek to admit it. *See* Pet. Mem. at 7 (Segal stating his belief that "the People never said they were going to use that [written] statement").

In light of these circumstances, "the question . . . is not whether a suppression motion would have succeeded, or even whether it *necessarily* should have been made; it is whether counsel's failure to investigate the option, consider its strategic merits and demerits, and then make an informed decision about it fell below an objective standard of reasonableness." *Lopez v. Greiner*, 323 F. Supp. 2d 456, 476 (S.D.N.Y. 2004). Whether an attorney's failure to seek to suppress evidence falls below a standard of reasonableness "depends on how a reasonable New York practitioner would have assessed the potential risks and benefits of such a motion, including its potential merits and possible strategic reasons to forego it." *Id.* at 474.

Here, a reasonably competent New York attorney would have investigated the circumstances surrounding the written statement given that Tineo-Santos had provided it shortly after surgery and while on medication, and apparently under the belief that the victim was alive and not pressing charges. *See* Pet. Mem. at 4 (Tineo-Santos stated he appreciated Pita was not pressing charges during his video statement (citing video statement)); *id.* at 27 ("Mr. Tineo-Santos was administered several medications, including but not limited to Demerol, Phenergan and Percocet") (citing medical records). Indeed, but for his mistaken belief that the People did not seek to admit the written statement, Segal himself acknowledged that he would have challenged the admissibility of the written statement. Tr. at 172 ("Judge, I'm objecting to [the written statement] coming in in [sic] evidence. I don't want the written statement coming in."). Taken together, Segal's conduct—his failure to appreciate that the People sought to admit the inculpatory written statement, and his failure to investigate admissibility of that statement and make a strategic decision as to suppression—falls below an objective standard of reasonableness. *See, e.g., Cornell v. Kirkpatrick*, 665 F.3d 369, 379–80 (2d Cir. 2011) (trial counsel's failure to object to venue due to oversight constituted objectively unreasonable performance). The First Department's proffer of hypothetical strategic reasons why Segal may have foregone suppressing the written statement was thus an unreasonable application of *Strickland* as it failed to analyze Segal's performance in light of his oversight (and instead assumed he made an affirmative decision to forego suppressing the written statement). *See Lopez*,

323 F. Supp. 2d at 478 ("Insofar as Justice Snyder denied Lopez's ineffective-assistance claim on the ground that 'objective[ly] reasonable strategies exist to explain why defense counsel would have chosen not to controvert the warrant,' her decision unreasonably applied *Strickland*, for in this case the inquiry under federal law is not whether a hypothetical, reasonably competent attorney may have had a strategic reason not to make a motion to suppress; it is whether Lopez's counsel in fact neglected his 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'") (citing *Strickland*, 466 U.S. at 691).

b. Prejudice Prong Under Strickland

In determining that counsel's performance was not prejudicial, the First Department found that "even if counsel had actually obtained suppression of all statements, the People's case was still overwhelming" and "Defendant's argument about any alleged weaknesses in the prosecution's case [was] unpersuasive." Ex. D at 22–23. This application of *Strickland* was not unreasonable.

To satisfy the prejudice prong, Tineo-Santos needs to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome,' and thus the chance of an alternate result must be 'substantial,' not just 'conceivable.'" *Waiters v. Lee*, 857 F.3d 466, 480 (2d Cir. 2017) (internal citations) omitted). "[I]n the context of suppression motions[,] 'the defendant must also prove

that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.'" *Watson v. New York*, No. 07-CV-1111 (RJS) (RLE), 2011 WL 4639812, at *2 (S.D.N.Y. Oct. 6, 2011) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). Moreover, where "a conviction is supported by overwhelming evidence of guilt," prejudice will not be found. *Sepulveda v. Lee*, No. 11-CV-487 (CS) (JCM), 2015 WL 5703135, at *13 (S.D.N.Y. Sept. 28, 2015) (quotation and citation omitted); *see Waiters*, 857 F.3d at 480 ("a verdict or conclusion with ample record support is less likely to have been affected by the errors of counsel than 'a verdict or conclusion only weakly supported by the record'" (citation omitted)).

Here, the First Department appropriately found that the evidence was overwhelming and, therefore, Tineo-Santos has failed to satisfy the prejudice prong. *See* Pet. Ex. D at 22–23. Tineo-Santos argues that the evidence was not overwhelming and focuses on the evidence establishing intent.[10] He contends that the statements provided the "only direct evidence relating to his motive and intent," Pet. Mem. at 25, and were "central to the prosecution's case" as the prosecutor "placed a great emphasis" on the statements in summation, Pet. Reply at 6, and emphasizes that the case was close as the jury deliberated from December 11 to 24

[10] Under New York law, "[a] person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person." N.Y. Penal Law § 125.25 (McKinney).

and at several stages the court was prepared to declare a mistrial, Pet. Mem. at 25. In opposition, respondent contends that habeas relief should be denied because "[h]ad petitioner never said a word to the police, the proof that he intentionally killed Roberto Pita still would have been completely overwhelming" given the eyewitness accounts that Pita was "slumped over and near death, in the driver's seat, and petitioner [was] injured but nevertheless reaching for a pistol, in the back." Opp. at 5.

The record contains ample proof independent of the statements to support Tineo-Santos' conviction. While Tineo-Santos' argument that the statements provided the only direct evidence of intent is accurate, he fails to address why the strong circumstantial evidence in the record is insufficient to establish intent. *See United States v. Heras*, 609 F.3d 101, 106 (2d Cir. 2010) ("The law has long recognized that criminal intent may be proved by circumstantial evidence alone."); *Lopez v. Superintendent of Five Points Corr. Facility*, No. 14-CV-4615 (RJS) (JLC), 2015 WL 1300030, at *17 (S.D.N.Y. Mar. 23, 2015) ("guilt beyond a reasonable doubt may be established entirely by circumstantial evidence") (citation omitted) *adopted by* 2015 WL 2408605 (May 20, 2015). Indeed, Tineo-Santos seemingly acknowledges the strong circumstantial evidence against him, including that there was testimony from multiple witnesses and a medical examiner, but attempts to diminish this evidence by merely pointing out that the case "becomes much stronger when [his] statement is added." Pet. Reply at 7. Taken together, the evidence before the jury—including the fact that Tineo-Santos and Pita were the only people

in the taxi, Pita had been shot three times while driving, and a gun was found near Tineo-Santos at the scene of the accident—provides more than enough to support the second-degree murder conviction such that there is not a reasonable probability that the result would have been different even without the errors of counsel.

In any event, to warrant habeas relief, a petitioner "must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the [First Department] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 698–99 (2002); *see Colon v. Sheahan*, No. 13-CV-6744 (PAC) (JCF), 2016 WL 3919643, at *8 (S.D.N.Y. Jan. 13, 2016) ("Even if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." (cleaned up)), *adopted by* 2016 WL 3926443 (S.D.N.Y. July 14, 2016)). Tineo-Santos has failed to meet this doubly deferential standard.[11] *See Waiters*, 857 F.3d at 477 n.20 ("the Supreme Court has indicated that double deference is appropriate when evaluating Strickland claims governed by § 2254(d)") (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

[11] In fact, Tineo-Santos focused his arguments solely on the *Strickland* standard and did not address the additional deferential treatment afforded to the First Department's decision under Section 2254(d)(1).

Ultimately, "[t]his is not a case where [the absence of the statements] would have so clearly 'alter[ed] the entire evidentiary picture' that the [] court's decision is indefensible" given the other evidence that supported his conviction. *Waiters*, 857 F.3d at 484 (citations omitted). Instead, given the record, the First Department could have reasonably concluded that, even without the statements, the verdict would have been the same. Because Tineo-Santos has not established that the First Department's decision to deny his ineffective assistance of counsel claim was an unreasonable application of *Strickland*, his petition should be denied.

III. CONCLUSION

For the reasons set forth above, the Court denies Tineo-Santos' motion for reconsideration and his *pro se* extension request. The Court also recommends that the petition for a writ of habeas corpus be denied. The Clerk is respectfully directed to close Docket Nos. 33 and 52 and mark them as "denied."

PROCEDURE FOR FILING OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Order and Report and Recommendation to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to such objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Mary Kay Vyskocil, United States Courthouse, 500 Pearl Street, New York, New York 10007, and to the chambers of the undersigned, United States Courthouse, 500 Pearl

Street, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Vyskocil.

FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).

SO ORDERED.

Dated: August 13, 2021
New York, New York

JAMES L. COTT
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCISCO TINEO-SANTOS,

Petitioner,

-against-

PAUL PICCOLO, Superintendent of Southport Correctional Facility,

Respondent.

19-CV-5038 (MKV)

MEMORANDUM ORDER ADOPTING REPORT AND RECOMMENDATION

MARY KAY VYSKOCIL, United States District Judge:

Petitioner Francisco Tineo-Santos filed a petition for a writ of habeas corpus ("Habeas Petition") pursuant to 28 U.S.C. § 2254, challenging his state court conviction for second-degree murder. (Petition For Writ Of Habeas Corpus ("Pet.") [ECF No. 1]). In his habeas petition, Mr. Tineo-Santos challenges the state-court decision denying his ineffective assistance of counsel ("IAC") claim, arguing that his trial counsel, David Segal, failed at a pre-trial *Huntley* hearing,[1] to adequately challenge statements made by Mr. Tineo-Santos in which he confessed to shooting Roberto Pita, the victim in his state court charge for second-degree murder. (*See* Pet. ¶ 12(a); Petitioner's Memorandum in Support of his Claims for Habeas Corpus Relief ("Pet. Br.") 19–28).

Magistrate Judge James L. Cott issued a thorough and carefully reasoned Report and Recommendation (the "Report") that the Habeas Petition be denied. (Report and Recommendation ("Report") [ECF No. 53] at 30).[2] Petitioner and Respondent Paul Piccolo each timely filed objections. (Respondent's Objections [ECF No. 56], Petitioner's Objections [ECF No. 57].)

[1] A *Huntley* hearing is held pursuant to *People v. Huntley*, 15 N.Y.2d 72, 77–78, 204 N.E.2d 179, 183, 255 N.Y.S.2d 838, 843 (N.Y. 1965), to determine the admissibility of statements made by a criminal defendant.

[2] Magistrate Judge Cott also denied the Petitioner's motion for reconsideration of a denial of his motion for leave to amend and to stay the proceeding and yet another extension request, to which neither party has objected. (Report at 30).

PROCEDURAL BACKGROUND

The relevant facts underlying this action are set forth in the Report, and the Court assumes familiarity with them. In his habeas petition, Petitioner alleges that he did not receive effective assistance of counsel because, at the *Huntley* hearing, his trial counsel failed to make an adequate challenge to a written and a video confession he had given. (Pet. ¶ 12(a); Pet. Br. 19–28). Plaintiff challenged his conviction on this ground to the trial court, and on appeal to the Appellate Division, which denied Petitioner's claim that his statements should have been suppressed. (Report at 2). The New York Court of Appeals later denied Petitioner leave to appeal. (Report at 2–3).

In recommending denial of the petition, Magistrate Judge Cott found that Petitioner had not established that the First Department's decision to deny his IAC claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), which both sides agree govern Petitioner's claim. (Report at 30). *Strickland* lays out a two-part test. First, Petitioner must establish "that [his] counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. And second, Petitioner "must show that the deficient performance prejudiced the defense." *Id.* at 687.

Magistrate Judge Cott analyzed the First Department's order denying Mr. Tineo-Santos' IAC claim as to both the video statement and the written statement. With respect to the first prong of the *Strickland* analysis, Magistrate Judge Cott concluded that Mr. Segal had acted within the range of reasonable professional assistance when he challenged the admissibility of Mr. Tineo-Santos' video confession. (Report at 22–23). However, with respect to Mr. Tineo-Santos' written confession, Magistrate Judge Cott found that the First Department had unreasonably applied *Strickland*, since Mr. Segal's failure to challenge that confession was the result of an oversight, not a strategic decision, and therefore fell below an objective standard of reasonableness. (Report

at 23–26). Nonetheless, Magistrate Judge Cott concluded that the First Department's application of the prejudice prong of the *Strickland* analysis was not unreasonable because the record contains ample evidence, independent of Mr. Tineo-Santos' confession, to support his conviction. (Report at 26–30).

Both parties have objected to the Report. Respondent objects to Magistrate Judge Cott's finding that Mr. Segal failed to seek suppression of Mr. Tineo-Santos' written confession, arguing that therefore the performance prong of the *Strickland* test was not met with respect to the written statement. (*See* Respondent Objection at 2). Petitioner objects to Magistrate Judge Cott's finding that Mr. Segal acted within the range of reasonable professional assistance when he challenged the admissibility of Mr. Tineo-Santos' video confession *and* to the finding that Petitioner was not prejudiced by the failure to suppress the written and video statements. (*See* Petitioner Objection at 1).

DISCUSSION

In reviewing a Report and Recommendation, this court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). When objections have been made to the Report, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 712 F.3d 761, 768 (2d Cir. 2013).

Having reviewed the submissions and conducted a *de novo* review, the Court overrules the objections of both parties. As a preliminary matter, the Court's review of the state court decision is highly deferential under both *Strickland* and section 2254(d)(1). Any determination of a factual issue made by a state court must be presumed correct unless the petitioner can show by clear and

convincing evidence that such presumption should not apply. *See* 28 U.S.C. § 2254(e)(1); *Burt v. Titlow*, 571 U.S. 12, 18–19 (2013).

Under *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential" and there is a "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. A federal court may not issue a writ of habeas corpus unless the Petitioner can show that the "state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002); *see also Calaff v. Capra*, 215 F. Supp. 3d 245, 250 (S.D.N.Y. 2016).

As such, to prevail on his habeas petition, Mr. Tineo-Santos must show both that his claim prevails under federal law *and* that the state court's application of federal law was objectively unreasonable. *See Waiters v. Lee*, 857 F.3d 466, 477 n.20 (2d Cir. 2017) ("[T]he Supreme Court has indicated that *double deference* is appropriate when evaluating *Strickland* claims governed by § 2254(d)." (emphasis in original)).

I. Respondent's Objection Is Overruled

Respondent objects to the Report's finding that trial counsel failed to seek suppression of the written statement due to oversight, that the failure was not due to a strategic decision, and thus, Petitioner has satisfied the performance prong of the *Strickland* test with respect to the written statement. (Respondent's Objections at 2). Respondent contends that Mr. Segal was aware that the *Huntley* hearing involved the written statement, pointing to statements made by the Assistant District Attorneys at the hearing. (Respondent's Objections at 3–4). Of course, the fact that others were aware does not mean that Mr. Segal also was so aware. Moreover, the record supports the

conclusion that Mr. Segal "did not seem to grasp" that the *Huntley* hearing involved the written statement, because he did not believe the government intended to introduce it. (Report at 23–24.)

Respondent also contends that Mr. Segal challenged the written statement at the *Huntley* hearing since he asked questions about that statement when he cross-examined the Assistant District Attorney who took the video statement about the circumstances of the video statement. (Respondent's Objections at 4). However, it is clear from Mr. Segal's questioning and remarks at the trial proceeding that he did not know that the admissibility of the written statement was at issue in the *Huntley* hearing. In fact, as explained by Magistrate Judge Cott, when the written statement was admitted into evidence at the trial, Mr. Segal explicitly stated that it was his understanding that the *Huntley* hearing only involved the video statement, not the written statement. (*See* Report at 4–5; Trial Transcript ("Tr.") [ECF Nos. 14-2–14-5] at 169:13–170:20). Accordingly, it was unreasonable for the First Department to speculate on possible reasons why Mr. Segal may have wanted the written statement to be admitted into evidence and conclude that the failure to challenge was a strategic move, rather than the result of an obvious mistake, when it is clear from the record that his failure to challenge the written statement was the result of an oversight, not strategy. Counsel mistakenly believed the government would not seek to introduce the written statement. Respondent's objection is overruled.

II. Petitioner's Objections Are Overruled

Petitioner objects to the Report's findings that the state-court's decision did not unreasonably apply *Strickland* when it found (a) that Mr. Segal's challenge of the video statement in the *Huntley* hearing was within the wide range of reasonable professional assistance and (b) that

there was sufficient additional evidence, independent of Mr. Tineo-Santos' statements, to support his second-degree murder conviction.

A. Performance Prong of *Strickland*

Petitioner first contends, in connection with the video statement, that Mr. Segal's failure to present at the *Huntley* hearing any arguments or to call as a witness the detective who had taken Mr. Tineo-Santos' written statement amounted to an ineffective assistance of counsel. (Petitioner's Objections at 20–21). Specifically, Petitioner argues that Mr. Segal failed to adequately challenge whether the circumstances surrounding his first written statement were so coercive as to prevent him from making a voluntary confession in the subsequent video statement. (Petitioner's Objections at 21).

As Magistrate Judge Cott concluded, it is clear from the record that Mr. Segal did challenge the admission of the video statement at the *Huntley* hearing. (Report at 22; Huntley Transcript ("Huntley Tr.") [ECF No. 14] at 3:1–19:18). Mr. Segal cross-examined the Assistant District Attorney who took the video statement about whether Mr. Tineo-Santos understood the questions at the time of his statement, whether his statements were voluntary, and whether any threats or promises were made to Mr. Tineo-Santos. (Huntley Tr. at 8:1–19:18). Mr. Segal then rested on the record because he believed that the "video spoke for itself as to the issues at the *Huntley* hearing." (*See* Report at 22).

While Petitioner may disagree with this strategy, "the conduct of examination and cross-examination is entrusted to the judgment of the lawyer, and [a reviewing] court on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken." *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998); *see also United States v. Corley*, No. 13-CR-48 (AJN), 2020 WL 4676650, at *12 (S.D.N.Y. Aug. 11, 2020). Given this

highly deferential standard, the State Court's conclusion that Mr. Segal's representation fell within the wide range of reasonable professional assistance was not objectively unreasonable. Petitioner's objection to this finding is therefore overruled.

B. Prejudice Prong of *Strickland*

Petitioner also contends that, but for the failure of his trial attorney to suppress the statements, there was a reasonable probability that the outcome of the case would have differed. (Petitioner's Objections at 22–23). Specifically, Petitioner contends that Mr. Tineo-Santos' statement was the only *direct* evidence of his intent. (Petitioner's Objections at 22).

As Magistrate Judge Cott concluded, the record contains sufficient evidence, independent of Mr. Tineo-Santos' statements, to support the finding by the state court that there was enough evidence for a jury to convict and Petitioner was not prejudiced by counsel's purported failures. (*See* Report at 28–29). This includes evidence that Mr. Tineo-Santos and Mr. Pita were the only people in the taxi at the time of the shooting, that Mr. Pita was shot three times while driving, and that a gun was found near Mr. Tineo-Santos at the scene of the crime. On this record, it was not objectively unreasonable for the state court to conclude that there was sufficient additional evidence to support Mr. Tineo-Santos' second-degree murder conviction. *See Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996) ("Guilt beyond a reasonable doubt may be established entirely by circumstantial evidence."); *see also Lopez v. Superintendent of Five Points Corr. Facility*, No. 14-CV-4615 RJS JLC, 2015 WL 1300030, at *17 (S.D.N.Y. Mar. 23, 2015), *report and recommendation adopted*, No. 14-CV-4615 RJS JLC, 2015 WL 2408605 (S.D.N.Y. May 20, 2015). Accordingly, Petitioner's objections are overruled.

CONCLUSION

For the above reasons, the Court overrules the objections of both Petitioner and Respondent. The Report is ADOPTED in its entirety and Mr. Tineo-Santos' habeas petition is DENIED. The Court declines to issue a certificate of appealability because Mr. Tineo-Santos has failed to make a substantial showing of a denial of a constitutional right. *See* 28 U.S.C. 2253(c)(2).

The Clerk of Court is respectfully requested to close this case.

SO ORDERED.

Date: September 14, 2022
New York, NY

Mary Kay Vyskocil

MARY KAY VYSKOCIL
United States District Judge

Appendix " C "

C1-C2

Appendix "C"

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See 28 C.F.R. 540.18, 540.19(a), 540.2(c).

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Five Points Corr. Facility
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Romulus, NY 14541

[redacted]

Francisco Tineo-Santos, 13-A-0532
Wende Correctional Facility
3040 Wende Road
Alden, NY 14004

C-1

MANDATE

S.D.N.Y. – N.Y.C.
19-cv-5038
Vyskocil, J.
Cott, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of May, two thousand twenty-four.

Present:

Dennis Jacobs,
Robert D. Sack,
Richard J. Sullivan,
Circuit Judges.

Francisco Tineo-Santos,

Petitioner-Appellant,

v. 23-7901

Paul Piccolo, Superintendent of Southport Correctional Facility,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability ("COA"). Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has failed to show that

> (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right.

Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam).

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

MANDATE ISSUED ON 06/07/2024

C-2

Appendix " D "

D1-D17

Appendix "D"

Francisco Tineo-Santos, 13-A-0532
Wende Correctional Facility
3040 Wende Road
Alden, NY 14004

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: December 1, 2023
Docket #: 23-7901
Short Title: Tineo-Santos v. Piccolo

DC Docket #: 1:19-cv-5038
DC Court: SDNY (NEW YORK CITY)
Trial Judge - Mary Kay Vyskocil

DOCKETING NOTICE

A notice of appeal filed by Francisco Tineo-Santos in the above referenced case was docketed today as 23-7901. This number must appear on all documents related to this case that are filed in this Court. For pro se parties the docket sheet with the caption page, and an Acknowledgment and Notice of Appearance Form are enclosed. In counseled cases the docket sheet is available on PACER. Counsel must access the Acknowledgment and Notice of Appearance Form from this Court's website http://www.ca2.uscourts.gov.

The form must be completed and returned within 14 days of the date of this notice. The form requires the following information:

YOUR CORRECT CONTACT INFORMATION: Review the party information on the docket sheet and note any incorrect information in writing on the Acknowledgment and Notice of Appearance Form.

The Court will contact one counsel per party or group of collectively represented parties when serving notice or issuing our order. Counsel must designate on the Acknowledgment and Notice of Appearance a lead attorney to accept all notices from this Court who, in turn will, be responsible for notifying any associated counsel.

CHANGE IN CONTACT INFORMATION: An attorney or pro se party who does not immediately notify the Court when contact information changes will not receive notices, documents and orders filed in the case.

An attorney and any pro se party who is permitted to file documents electronically in ACMS must notify the Court of a change to the user's mailing address, business address, telephone number, or e-mail. To update contact information, a Filing User must access PACER's Manage My Appellate Filer Account, https://www.pacer.gov/psco/cgi-bin/cmecf/ea-login.pl. The Court's records will be updated within 1 business day of a user entering the change in PACER.

D-2

A pro se party who is not permitted to file documents electronically must notify the Court of a change in mailing address or telephone number by filing a letter with the Clerk of Court.

CAPTION: In an appeal, the Court uses the district court caption pursuant to FRAP 12(a), 32(a). For a petition for review or original proceeding the Court uses a caption pursuant to FRAP 15(a) or 21(a), respectively. Please review the caption carefully and promptly advise this Court of any improper or inaccurate designations in writing on the Acknowledgment and Notice of Appearance form. If a party has been terminated from the case the caption may reflect that change only if the district court judge ordered that the caption be amended.

APPELLATE DESIGNATIONS: Please review whether petitioner is listed correctly on the party listing page of the docket sheet and in the caption. If there is an error, please note on the Acknowledgment and Notice of Appearance Form. Timely submission of the Acknowledgment and Notice of Appearance Form will constitute compliance with the requirement to file a Representation Statement required by FRAP 12(b).

For additional information consult the Court's instructions posted on the website.

Inquiries regarding this case may be directed to 212-857-8551.

United States District Court
Southern District of New York

Francisco Tineo-Santos (Din#13-R-0532),
Petitioner,

-VS-

Paul Piccolo,
Respondent.

Case No.: 19-CV-5038
Notice of Appeal

Notice is hereby given that Francisco Tineo-Santos, Pro Se Plaintiff in the above-entitled Matter, appeals to the United States Court of Appeals for the Second Circuit from the final Judgment entered in this action on November 7, 2023 Denying the Rule 60 of the Federal Rules of Civil Procedure Seeking relief from a final Judgment & Order of the Court and requesting to reopen the habeas proceeding. (Dkt. #84).

Date: November 17, 2023
Erie, New York

Plaintiff, Pro Se
Francisco Tineo-Santos (#13A0532)
Wende Correctional Facility
3040 Wende Rd, P.O. Box. 1187
Alden, New York 14004-1187

D-4

Francisco Santos #13A-0532
Wende Correctional Facility
3040 Wende Rd, P.O. Box 1187
Alden, New York 14004-1187

WENDE
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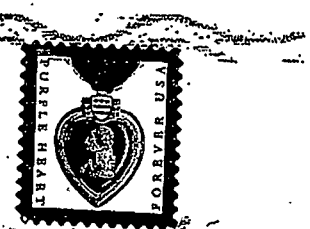

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New York, New York 10007

Appeal
D/C

10007-1399

Legal Mail

D-5

New York States Docs Offenders Correspondence Program
Francisco Santos #13A0532

CLOSED,APPEAL,HABEAS,CASREF,ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:19-cv-05038-MKV-JLC

Tineo-Santos v. Piccolo
Assigned to: Judge Mary Kay Vyskocil
Referred to: Magistrate Judge James L. Cott
Case in other court: U.S. Court of Appeals, 2nd Circ., 22-02736
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 05/30/2019
Date Terminated: 09/14/2022
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Francisco Tineo-Santos

represented by **Alexander Martin Dudelson**
Law Offices of Alexander M. Dudelson
26 Court Street
Suite 2306
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718-855-5100
Fax: 718-624-9552
Email: adesq@aol.com
ATTORNEY TO BE NOTICED

V.

Respondent

Paul Piccolo
Superintendent of Southport Correctional Facility

represented by **David M. Cohn**
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Bronx, NY 10451
718-838-6652
Email: cohnda@bronxda.nyc.gov
ATTORNEY TO BE NOTICED

Tae-Hoon Charles Won
District Attorney's Office
Bronx County
215 East 161st Street
Bronx, NY 10451
718) 838-7097
Fax: (718) 590-6523
Email: wonc@bronxda.nyc.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/30/2019	1	PETITION FOR WRIT OF HABEAS CORPUS pursuant to 28 U.S.C. 2254. (Filing Fee $ 5.00, Receipt Number ANYSDC-16986668)Document filed by Francisco Tineo-Santos. (Attachments: # 1 Exhibit A - Uniform Sentence and Commitment, # 2 Exhibit B - Decision of the New York Supreme Court, Bronx County: Criminal Term, (Price, J.), # 3 Exhibit C - Certificate Granting Leave to Appeal, # 4 Exhibit D- Decision and Order of the Appellate Division - First Department, # 5 Exhibit E- Certificate Denying Leave to Appeal to the New York Court of Appeals)(Dudelson, Alexander) (Entered: 05/30/2019)
05/30/2019	2	CIVIL COVER SHEET filed. (Dudelson, Alexander) (Entered: 05/30/2019)
05/30/2019	3	BRIEF re: 1 Petition for Writ of Habeas Corpus,, *Memorandum of Law in Support.* Document filed by Francisco Tineo-Santos.(Dudelson, Alexander) (Entered: 05/30/2019)

05/31/2019		***NOTICE TO ATTORNEY REGARDING PARTY MODIFICATION. Notice to attorney Alexander Martin Dudelson. The party information for the following party/parties has been modified: Superintendent Paul Piccolo. The information for the party/parties has been modified for the following reason/reasons: party text was omitted;. (pc) (Entered: 05/31/2019)
05/31/2019		***NOTICE TO ATTORNEY REGARDING CIVIL. CASE OPENING STATISTICAL ERROR CORRECTION: Notice to attorney Alexander Martin Dudelson. The following case opening statistical information was erroneously selected/entered: Cause of Action code 28:1441hb; County code Bronx;. The following correction(s) have been made to your case entry: the Cause of Action code has been modified to 28:2254; the County code has been modified to Chemung;. (pc) (Entered: 05/31/2019)
05/31/2019		CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Ronnie Abrams. Please download and review the Individual Practices of the assigned District Judge, located at http://nysd.uscourts.gov/judges/District. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Please download and review the ECF Rules and Instructions, located at http://nysd.uscourts.gov/ecf_filing.php. (pc) (Entered: 05/31/2019)
05/31/2019		Magistrate Judge James L. Cott is so designated. Pursuant to 28 U.S.C. Section 636(c) and Fed. R. Civ. P. 73(b)(1) parties are notified that they may consent to proceed before a United States Magistrate Judge. Parties who wish to consent may access the necessary form at the following link: http://nysd.uscourts.gov/forms.php. (pc) (Entered: 05/31/2019)
05/31/2019		Case Designated ECF. (pc) (Entered: 05/31/2019)
06/04/2019	4	ORDER: It is hereby: ORDERED that the Clerk of Court serve a copy of this Order and the underlying petition, by certified mail, upon the Attorney General of the State of New York and the District Attorney of Bronx County. IT IS FURTHER ORDERED that, within sixty (60) days of the date of this Order, Respondent shall serve and file (1) an answer to the petition and (2) the transcripts, briefs and opinions identified in Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner may serve and file reply papers, if any, within thirty (30) days from the date he is served with Respondent's answer. SO ORDERED. (Signed by Judge Ronnie Abrams on 6/4/2019) (ks) (Entered: 06/05/2019)
06/06/2019		Mailed a copy of 1 Petition for Writ of Habeas Corpus, 4 Order to Answer, to Attorney General of the State of New York by Certified Mail # 7017 2680 0000 1025 4618 and to District Attorney's Office of Bronx County by Certified Mail # 7017 2680 0000 1025 4625. (nb) (Entered: 06/06/2019)
07/08/2019	5	NOTICE OF APPEARANCE by Tae-Hoon Charles Won on behalf of Paul Piccolo. (Won, Tae-Hoon) (Entered: 07/08/2019)
07/23/2019	6	ORDER REFERRING CASE TO MAGISTRATE JUDGE. Order that case be referred to the Clerk of Court for assignment to a Magistrate Judge for Habeas Corpus. Referred to Magistrate Judge James L. Cott. (Signed by Judge Ronnie Abrams on 7/23/2019) (rj) (Entered: 07/24/2019)
07/31/2019	7	FIRST LETTER MOTION for Extension of Time addressed to Magistrate Judge James L. Cott from ADA T. Charles Won dated July 31, 2019. Document filed by Paul Piccolo.(Won, Tae-Hoon) (Entered: 07/31/2019)
07/31/2019	8	ORDER granting 7 Letter Motion for Extension of Time. The request for a 60-day extension to October 4, 2019, to file a response to the petition is hereby granted, on consent. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 07/31/2019)
10/01/2019	9	LETTER MOTION for Extension of Time addressed to Magistrate Judge James L. Cott from ADA T. Charles Won dated October 1, 2019. Document filed by Paul Piccolo.(Won, Tae-Hoon) (Entered: 10/01/2019)
10/01/2019	10	ORDER granting 9 Letter Motion for Extension of Time. The request for an additional 30-day extension to November 4, 2019, to file a response to the petition is hereby

		granted, on consent. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 10/01/2019)
10/30/2019	11	LETTER MOTION for Extension of Time addressed to Magistrate Judge James L. Cott from ADA T. Charles Won dated October 30, 2019. Document filed by Paul Piccolo.(Won, Tae–Hoon) (Entered: 10/30/2019)
10/30/2019	12	ORDER granting 11 Letter Motion for Extension of Time. The request for an additional extension, to November 18, 2019, to file a response to the petition is hereby granted, on consent (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 10/30/2019)
11/18/2019	13	DECLARATION of T. Charles Won in Opposition. Document filed by Paul Piccolo. (Attachments: # 1 Exhibit NYCPL 440 decision, # 2 Exhibit Petitioner's state appellate brief, # 3 Exhibit Respondent's state appellate brief, # 4 Exhibit Petitioner's state appellate reply brief)(Won, Tae–Hoon) (Entered: 11/18/2019)
11/18/2019	14	STATE COURT TRANSCRIPT of proceedings in the Supreme Court, County of Bronx, Case Number 1920/2009, held on December 22, 2011 before Judge Megan Tallmer. (Attachments: # 1 State trial transcript, # 2 State trial transcript, # 3 State trial transcript, # 4 State trial transcript, # 5 State trial transcript)(Won, Tae–Hoon) (Entered: 11/18/2019)
12/04/2019	15	LETTER MOTION for Extension of Time to File Response/Reply addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated December 4, 2019. Document filed by Francisco Tineo–Santos.(Dudelson, Alexander) (Entered: 12/04/2019)
12/05/2019	16	ORDER granting 15 Letter Motion for Extension of Time to File Response/Reply. Petitioner's time to file his reply is hereby extended to January 6, 2020, on consent. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 12/05/2019)
01/03/2020	17	LETTER MOTION for Extension of Time addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated January 3, 2020. Document filed by Francisco Tineo–Santos.(Dudelson, Alexander) (Entered: 01/03/2020)
01/03/2020	18	ORDER granting 17 Letter Motion for Extension of Time. Application granted. Petitioner will have until February 7, 2020 to file his motion for leave to amend and to stay and hold his petition in abeyance. Respondent will have until March 8, 2020 to respond to petitioner's application, and any reply papers will be due by March 22, 2020. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 01/03/2020)
02/06/2020		NOTICE OF CASE REASSIGNMENT to Judge Mary Kay Vyskocil. Judge Ronnie Abrams is no longer assigned to the case..(wb) (Entered: 02/06/2020)
02/07/2020	19	LETTER MOTION for Extension of Time *to file Motion to Amend and Stay and Hold the Petition in Abeyance* addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated February 7, 2020. Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 02/07/2020)
02/07/2020	20	ORDER granting 19 Letter Motion for Extension of Time. Application granted. Petitioner will have until February 28, 2020 to file his motion for leave to amend and to stay and hold his petition in abeyance. Respondent will have until March 30, 2020 to respond to petitioner's application, and any reply papers will be due by April 13, 2020. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 02/07/2020)
02/28/2020	21	**FILING ERROR – DEFICIENT DOCKET ENTRY** – MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus.*, MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition.* Document filed by Francisco Tineo–Santos. (Attachments: # 1 Declaration of Francisco Tineo–Santos, # 2 Declaration of Alexander M. Dudelson, # 3 Exhibit A – Petition for Writ of Habeas Corpus, # 4 Exhibit B – Memorandum of Law in Support of Petition, # 5 Exhibit C – Declaration in Opposition to Petition, # 6 Exhibit D – Memorandum of Law in Opposition to Petition, # 7 Exhibit E – FOIL Request, # 8 Exhibit F – David Segal

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		File, # 9 Exhibit G – Order of Supreme Court, Bronx County (CPL 440.10), # 10 Exhibit H – Decision, Appellate Division – First Judicial Department, # 11 Exhibit I – Trial Testimony of Witnesses, # 12 Exhibit J – Proposed Amended Petition, # 13 Memorandum of Law in Support of Motion).(Dudelson, Alexander) Modified on 3/30/2020 (ldi). (Entered: 02/28/2020)
03/24/2020	22	LETTER MOTION for Extension of Time addressed to Magistrate Judge James L. Cott from ADA T. Charles Won dated March 24, 2020. Document filed by Paul Piccolo..(Won, Tae–Hoon) (Entered: 03/24/2020)
03/24/2020	23	ORDER granting 22 Letter Motion for Extension of Time. Application granted, on consent. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 03/24/2020)
03/30/2020		***NOTICE TO ATTORNEY TO RE–FILE DOCUMENT – DEFICIENT DOCKET ENTRY ERROR. Notice to Attorney Alexander Martin Dudelson to RE–FILE Document 21 MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus*. MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition*. ERROR(S): Supporting documents must be filed separately, each receiving their own document number. Declaration in Support of Motion and Memorandum of Law in Support of Motion are both found under the event list Replies, Opposition and Supporting Documents. (ldi) (Entered: 03/30/2020)
04/10/2020	24	DECLARATION of T. Charles Won in Opposition re: 21 MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus*. MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition*.. Document filed by Paul Piccolo..(Won, Tae–Hoon) (Entered: 04/10/2020)
04/23/2020	25	MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus*., MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition*. Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 04/23/2020)
04/23/2020	26	DECLARATION of Alexander M. Dudelson in Support re: 25 MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus*. MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition*.. Document filed by Francisco Tineo–Santos. (Attachments: # 1 Exhibit A – Petition for Writ of Habeas Corpus, # 2 Exhibit B – Memorandum of Law in Support of Petition, # 3 Exhibit C – Declaration in Opposition to Petition, # 4 Exhibit D – Memorandum of Law in Opposition to Petition, # 5 Exhibit E – Foil Response, # 6 Exhibit F – Segal File, # 7 Exhibit G – Order of Supreme Court, Bronx County, # 8 Exhibit H – Decision, Appellate Division – First Judicial Department, # 9 Exhibit I – Trial Testimony from Witnesses, # 10 Exhibit J – Proposed Amended Petition).(Dudelson, Alexander) (Entered: 04/23/2020)
04/23/2020	27	DECLARATION of Francisco Tineo–Santos in Support re: 25 MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus*. MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition*.. Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 04/23/2020)
04/23/2020	28	MEMORANDUM OF LAW in Support re: 25 MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus*. MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition*. . Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 04/23/2020)
09/15/2020	29	LETTER addressed to Magistrate Judge James L. Cott from F. Santos, dated 9/8/20 re: I request that you review, at your most and best convenient time, Case No. 20–cv–4493(LLS), specifically the Order of Dismissal rendered by the Hon. Louis L. Stanton explaining its determination and referring to the above–entitled action(Case No. 19–cv–5038) etc. Document filed by Francisco Tineo–Santos.(sc) (Entered: 09/16/2020)

01/27/2021	30	OPINION AND ORDER re: 25 MOTION to Amend/Correct *Petition for a Writ of Habeas Corpus*. MOTION to Stay *and hold proceeding in abeyance until the New York state courts have issued all requisite rulings to exhaust the claims in the proposed amended petition*. filed by Francisco Tineo–Santos. For the reasons set forth above, Tineo–Santos' motion to amend his petitionand stay and hold in abeyance these habeas proceedings is denied. The Clerk is respectfully directed to close Docket No. 25 and mark it as "denied." If Tineo–Santos wishes to submit reply papers in response to Respondent's opposition to the petition (which were originally due on January 6, 2020 (Dkt. No. 16)but never filed), he has until February 19, 2021 to do so. SO ORDERED. (Signed by Magistrate Judge James L. Cott on 1/27/2021) (kv) (Entered: 01/27/2021)
01/27/2021		Set/Reset Deadlines: Replies due by 2/19/2021. (kv) (Entered: 01/27/2021)
02/12/2021	31	LETTER MOTION for Extension of Time to File Response/Reply addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated February 12, 2021. Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 02/12/2021)
02/12/2021	32	ORDER granting 31 Letter Motion for Extension of Time to File Response/Reply. Application granted. Absent good cause shown, there will be no further extensions. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 02/12/2021)
02/24/2021	33	MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1)*. Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 02/24/2021)
02/24/2021	34	DECLARATION of Alexander M. Dudelson in Support re: 33 MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1)*.. Document filed by Francisco Tineo–Santos. (Attachments: # 1 Exhibit A – Writ of Habeas Corpus, # 2 Exhibit B – Response to Foil Request, # 3 Exhibit C – File sent by trial counsel to appellate counsel, # 4 Exhibit D – Decision and Order of Supreme Court, Bronx County, November 21, 2016, # 5 Exhibit E – Decision and Order of Appellate Division, dated April 10, 2018, # 6 Exhibit F – Testimony of Trial Witnesses, # 7 Exhibit G – Memo of Law in Support of Motion to Stay and Hold in Abeyance, # 8 Exhibit H – Opposition to Motion to Stay and Hold in Abeyance, # 9 Exhibit I – Coram Nobis Writ to Appellate Division, # 10 Exhibit J – Order Denying Coram Nobis Writ, dated August 20, 2020, # 11 Exhibit K – Order Denying Leave to Court of Appeals, dated December 2, 2020, # 12 Exhibit L– Opinion and Order, Hon. James L. Cott, Dated January 27, 2021).(Dudelson, Alexander) (Entered: 02/24/2021)
02/24/2021	35	MEMORANDUM OF LAW in Opposition re: 33 MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1)*. . Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 02/24/2021)
03/05/2021	36	BRIEF re: 13 Declaration in Opposition, *Memorandum in Reply*. Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered: 03/05/2021)
03/11/2021	37	ORDER with respect to 33 Motion for Reconsideration re 33 MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1)*. filed by Francisco Tineo–Santos, 30 Memorandum & Opinion. On February 24, 2021, petitioner submitted a motion for reconsideration of this Court's January 27 decision. To date, respondent has not filed any opposition papers. Accordingly, the Court directs respondent to file a response no later than March 17, 2021. If respondent fails to do so, the Court will treat petitioner's motion as unopposed. SO ORDERED. (Signed by Magistrate Judge James L. Cott on 3/11/2021) (kv) (Entered: 03/11/2021)
03/11/2021		Set/Reset Deadlines: Responses due by 3/17/2021 (kv) (Entered: 03/11/2021)
03/16/2021	38	DECLARATION of T. Charles Won in Opposition re: 33 MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1)*.. Document filed by Paul Piccolo. (Attachments: # 1 Exhibit Email correspondence).(Won, Tae–Hoon) (Entered: 03/16/2021)
03/23/2021	39	LETTER MOTION for Extension of Time to File Response/Reply addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated March 23, 2021. Document filed by Francisco Tineo–Santos..(Dudelson, Alexander) (Entered:

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		03/23/2021)
03/23/2021	40	ORDER granting in part and denying in part 39 Letter Motion for Extension of Time to File Response/Reply re 39 LETTER MOTION for Extension of Time to File Response/Reply addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated March 23, 2021., 33 MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1).* Replies due by 4/6/2021. The application is granted to the extent that any reply papers must be filed by April 6, 2021. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 03/23/2021)
04/06/2021	41	LETTER MOTION for Extension of Time *to file reply to respondent's opposition to motion for reconsideration* addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated April 6, 2021. Document filed by Francisco Tineo-Santos..(Dudelson, Alexander) (Entered: 04/06/2021)
04/06/2021	42	ORDER granting 41 Letter Motion for Extension of Time. Application granted. If counsel receives the declaration and can file it with any reply papers before April 13, he should do so. The Court originally denied an extension to April 13, and is only granting it because of the delay in receiving the declaration. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 04/06/2021)
04/12/2021	43	LETTER MOTION for Extension of Time to File Response/Reply *on consent* addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated April 12, 2021. Document filed by Francisco Tineo-Santos..(Dudelson, Alexander) (Entered: 04/12/2021)
04/12/2021	44	ORDER granting 43 Letter Motion for Extension of Time to File Response/Reply re 43 LETTER MOTION for Extension of Time to File Response/Reply *on consent* addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated April 12, 2021. The Court reluctantly grants this request, even though it is on consent. It remains unclear why it should take 42 days to file reply papers on a motion for reconsideration in a counseled case, even if petitioner has issues with law library access. Reply papers are intended only to respond to the opposition papers; a court will not consider arguments that are raised for the first time on reply. It is concerning that petitioner is apparently submitting copies of exhibits on reply (and unclear why petitioner, and not petitioner's counsel, has such exhibits in the first place). Counsel should be mindful that If petitioner's reply papers raise new arguments, they will likely not be considered. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 04/12/2021)
04/26/2021	45	LETTER MOTION for Extension of Time *to file reply to respondent's opposition to motion for reconsideration* addressed to Magistrate Judge James L. Cott from Alexander M. Dudelson dated April 26, 2021. Document filed by Francisco Tineo-Santos..(Dudelson, Alexander) (Entered: 04/26/2021)
04/26/2021	46	ORDER granting 45 Letter Motion for Extension of Time. Granted. No further extensions. (HEREBY ORDERED by Magistrate Judge James L. Cott)(Text Only Order) (Cott, James) (Entered: 04/26/2021)
05/11/2021	47	REPLY to Response to Motion re: 33 MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1). Declaration of Alexander M. Dudelson.* Document filed by Francisco Tineo-Santos..(Dudelson, Alexander) (Entered: 05/11/2021)
05/12/2021	48	ORDER. In light of Mr. Dudelson's reply declaration (Dkt. No. 47) filed yesterday, in which he requests that the Court allow petitioner to add his now apparently exhausted claim of ineffective assistance of appellate counsel (as it relates to counsel's purported failure to raise the issue of the 911 call in a section 440.10 motion), the Court directs respondent to submit his position with respect to this application by May 21, 2021. To the extent respondent is able to do so, he is directed to provide the Court with a copy of petitioner's writ of error coram nobis, the First Department's decision denying the writ on August 20, 2020, and the Court of Appeals' denial on December 2, 2020 in order to complete the record. (HEREBY ORDERED by Magistrate Judge James L. Cott) (Text Only Order) (Cott, James) (Entered: 05/12/2021)

05/20/2021	49	DECLARATION of T. Charles Won in Opposition re: 47 Reply to Response to Motion,. Document filed by Paul Piccolo. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit).(Won, Tae-Hoon) (Entered: 05/20/2021)
06/07/2021	50	LETTER addressed to Clerk of Court from Francisco Tineo-Santos dated 5/30/2021 re: Originally signed and dated Notice of Motion, Declaration in Support, and a Declaration of Service for filing with this Court under the above-entitled action. Document filed by Francisco Tineo-Santos. (vfr) (Entered: 06/08/2021)
06/08/2021	51	LETTER addressed to Clerk of Court from Francisco Tineo-Santos dated 5/31/2021 re: Originally signed, dated and notarized Affidavit of Service for the Notice of Motion submitted with this Court for filing under the above-entitled action. Document filed by Francisco Tineo-Santos. (vfr) (Entered: 06/08/2021)
06/08/2021	52	NOTICE OF MOTION, re: for Extension of Time to File Response/Reply or motion. Document filed by Francisco Tineo-Santos. (Attachments: # 1 Declaration, # 2 Declaration of Service)(sc) (Entered: 06/08/2021)
08/13/2021	53	ORDER & REPORT AND RECOMMENDATION re: 33 MOTION for Reconsideration re; 30 Memorandum & Opinion *Pursuant to Rule 59(e) and 60(b)(1).* filed by Francisco Tineo-Santos, 52 MOTION for Extension of Time to File Response/Reply. filed by Francisco Tineo-Santos. For the reasons set forth above, the Court denies Tineo-Santos motion for reconsideration and his pro se extension request. The Court also recommends that the petition for a writ of habeas corpus be denied. The Clerk is respectfully directed to close Docket Nos. 33 and 52 and mark them as "denied." (And as further set forth herein.) SO ORDERED. (Objections to R&R due by 8/27/2021), Motions terminated: 52 MOTION for Extension of Time to File Response/Reply. filed by Francisco Tineo-Santos, 33 MOTION for Reconsideration re; 30 Memorandum & Opinion,,, *Pursuant to Rule 59(e) and 60(b)(1).* filed by Francisco Tineo-Santos. (Signed by Magistrate Judge James L. Cott on 8/13/2021) (jca) (Entered: 08/13/2021)
08/20/2021	54	LETTER MOTION for Extension of Time *to file Objections to the Report and Recommendations* addressed to Judge Mary Kay Vyskocil from Alexander M. Dudelson dated August 20, 2021. Document filed by Francisco Tineo-Santos..(Dudelson, Alexander) (Entered: 08/20/2021)
08/20/2021	55	ORDER granting 54 Letter Motion for Extension of Time. GRANTED. The deadline for objections is extended to September 10, 2021. SO ORDERED. Objections to R&R due by 9/10/2021. (Signed by Judge Mary Kay Vyskocil on 8/20/2021) (kv) (Entered: 08/20/2021)
08/26/2021	56	OBJECTION to 53 Report and Recommendations Document filed by Paul Piccolo..(Won, Tae-Hoon) (Entered: 08/26/2021)
09/10/2021	57	OBJECTION to 53 Report and Recommendations Document filed by Francisco Tineo-Santos..(Dudelson, Alexander) (Entered: 09/10/2021)
09/14/2022	58	MEMORANDUM ORDER ADOPTING REPORT AND RECOMMENDATIONS for 53 Report and Recommendations, Terminate Motions. For the above reasons, the Court overrules the objections of both Petitioner and Respondent. The Report is ADOPTED in its entirety and Mr. Tineo-Santos' habeas petition is DENIED. The Court declines to issue a certificate of appealability because Mr. Tineo-Santos has failed to make a substantial showing of a denial of a constitutional right. See 28 U.S.C. 2253(c)(2). The Clerk of Court is respectfully requested to close this case. SO ORDERED. (Signed by Judge Mary Kay Vyskocil on 9/14/2022) (tg) Transmission to Orders and Judgments Clerk for processing. (Entered: 09/14/2022)
09/14/2022	59	CLERK'S JUDGMENT re: 58 Order Adopting Report and Recommendations in favor of Paul Piccolo against Francisco Tineo-Santos. It is hereby ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Order dated September 14, 2022, the Court has overruled the objections of both Petitioner and Respondent. The Report is ADOPTED in its entirety and Mr. Tineo-Santos' habeas petition is DENIED. The Court has declined to issue a certificate of appealability because Mr. Tineo-Santos has failed to make a substantial showing of a denial of a constitutional right. See 28 U.S.C. 2253(c)(2); accordingly, the case is closed. (Signed by Clerk of Court Ruby Krajick on 9/14/2022) (Attachments: # 1 Right to Appeal) (km) (Entered: 09/14/2022)

10/20/2022	60	MOTION for Leave to Appeal in forma pauperis. Document filed by Francisco Tineo–Santos..(nd) (Entered: 10/24/2022)
10/20/2022	61	NOTICE OF APPEAL from 59 Clerk's Judgment,,,. Document filed by Francisco Tineo–Santos. Form D–P is due within 14 days to the Court of Appeals, Second Circuit..(nd) (Entered: 10/24/2022)
10/20/2022		Appeal Remark as to 61 Notice of Appeal filed by Francisco Tineo–Santos. The Court has declined to issue a certificate of appealability..(nd) (Entered: 10/24/2022)
10/24/2022		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 61 Notice of Appeal..(nd) (Entered: 10/24/2022)
10/24/2022		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 61 Notice of Appeal filed by Francisco Tineo–Santos were transmitted to the U.S. Court of Appeals..(nd) (Entered: 10/24/2022)
10/27/2022		USCA Case Number 22–2736 from the U.S. Court of Appeals, 2nd Circ. assigned to 61 Notice of Appeal filed by Francisco Tineo–Santos..(nd) (Entered: 10/27/2022)
10/27/2022	62	NOTICE RE: re: 60 MOTION for Leave to Appeal in forma pauperis., 61 Notice of Appeal. USCA Case No. 22–2736. An appeal in the above–referenced case has been docketed in the Court of Appeals. According to the district court docket sheet or other available information, appellant has moved for leave to proceed in forma pauperis in district court on October 20, 2022 and that motion is pending. The appeal may not move forward until the motion is determined. Please direct the motion to the appropriate judge for determination. Upon the grant or denial of the motion, please enter the order and transmit it to the Court of Appeals..(nd) (Entered: 10/27/2022)
10/27/2022	63	ORDER GRANTING IFP APPLICATION: Leave to proceed in this Court without prepayment of fees is authorized. 28 U.S.C. § 1915. SO ORDERED. (Signed by Judge Mary Kay Vyskocil on 10/27/2022) (tg) (Entered: 10/27/2022)
11/10/2022	64	ORDER terminating Motion for Leave to Appeal in forma pauperis [ECF No. 60]. In an Order dated October 27, 2022, the Court granted leave for petitioner to proceed in forma pauperis on appeal [ECF No. 63]. (HEREBY ORDERED by Judge Mary Kay Vyskocil)(Text Only Order) (Entered: 11/10/2022)
11/10/2022	65	LETTER addressed to Judge Mary Kay Vyskocil from F. Tineo–Santos, dated 10/10/22 re: Pro se Plaintiff requests that the Court grant an extension to file a reconsideration for the Motion to amend the petition to include the Ineffective Assistance of Trial and Appellate Counsel claim relating to the 911 call eyewitness testimony; and an order granting and instructing the Clerk to provide me with a certified copy of all documents entered in the case dockets etc. Document filed by Francisco Tineo–Santos.(sc) (Entered: 11/11/2022)
11/10/2022		Request for Copies of documents Received: Re 65 Letter. Request for copy of all documents from F. Tineo–Santos received on 11/10/22. Transmission to Records Management for processing. (sc) (Entered: 11/11/2022)
11/17/2022	66	AFFIDAVIT in Support re: 60 MOTION for Leave to Appeal in forma pauperis. Document filed by Francisco Tineo–Santos. (tp) (Entered: 11/18/2022)
12/05/2022	67	ORDER: A. Request for an Extension of Time to File a Motion for Reconsideration. The motion for reconsideration is not at issue on appeal. The Notice of Appeal is limited to this Court's September 14 Order, and that Order only briefly mentioned in a footnote that Magistrate Judge Cott had resolved Petitioner's motion for reconsideration without objection. [ECF No. 61.] The Court may therefore consider Petitioner's request for an extension of time to file a motion for reconsideration. The request is DENIED. Petitioner seeks an extension of time to file a motion for reconsideration of Magistrate Judge Cott's decision denying Petitioner's motion to amend. The relevant decision was issued by Magistrate Judge Cott on January 27, 2021–nearly two years ago. [ECF No. 30.] Moreover, Petitioner's former counsel already filed a motion for reconsideration of that decision in February 2021, which Magistrate Judge Cott denied well over a year ago, on August 13, 2021. [ECF Nos. 33, 53.] It is unclear if Petitioner seeks to move for reconsideration of this nearly two–year–old decision under Federal Rule of Civil Procedure 59 or 60. Under either rule, the request is egregiously untimely. Under Rule 59, a petition must be filed "no

		later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(e). Under Rule 60, the motion must "be made within a reasonable time" but in any event, "no more than a year after the entry of the judgment." Fed. R. Civ. P. 60(c)(1). Accordingly, the request for an extension of time to file another motion for reconsideration is DENIED. B. Request for a Copy of Documents. Petitioner's second request, for an order instructing the Clerk to provide Petitioner with a copy of all certified documents entered in this case is GRANTED IN PART. The Clerk of Court is directed to provide copies of the requested records to Petitioner in accordance with their standard practices. It appears from a review of the docket in this case that the Clerk of Court already may have done so. C. Request for an Extension of Time to Submit a Rule 59 or Rule 60 Motion. Petitioner's final request, for an extension of time to submit a motion "seeking reconsideration... of the judgment entered on September 14, 2022" pursuant to Rules 59 and 60 clearly implicates this Court's September 14 Order. Given the pending appeal, the Court DENIES without prejudice Petitioner's request for an extension of time to file a Rule 59 motion. See Griggs, 459 U.S. at 58; see also Fed. R. Civ. P 62.1(a)(2). The Court DENIES without prejudice the request for an extension of time to file a Rule 60 motion for the same reason. Id. The Clerk of Court is respectfully requested to send a copy of this Order to the pro se Petitioner at the address of record. SO ORDERED. (Signed by Judge Mary Kay Vyskocil on 12/5/2022) (tg) (Entered: 12/05/2022)
12/05/2022		Transmission to Docket Assistant Clerk. Transmitted re: 67 Order to the Docket Assistant Clerk for case processing. (tg) (Entered: 12/05/2022)
12/06/2022		Mailed a copy of 67 Order, to Francisco Tineo–Santos DIN: 13A0532 Wende Correctional Facility 3040 Wende Road Alden, NY 14004–1187. (dsh) (Entered: 12/06/2022)
12/15/2022	68	LETTER from F. Tineo–Santos, dated 12/7/22 re: Via this letter, I respectfully seek your assistance to obtain a courtesy free copy of the general docket sheet of this case in its entirety. Document filed by Francisco Tineo–Santos.(sc) (Entered: 12/15/2022)
12/15/2022		Request for Copy of the updated Docket Sheet Received: Re 68 Letter. Request for Docket Report, from F. Tineo–Santos received on 12/15/22. Transmission to Pro Se Assistants for processing. (sc) (Entered: 12/15/2022)
12/15/2022	69	LETTER addressed to Judge Mary Kay Vyskocil from F. Tineo–Santos, dated 12/12/22 re: "RELIEF FROM JUDGMENT PURS. TO 60, FED.R.CIV.P. BASED ON OVERSIGHT, OMISSION & MISREPRESENTATION" – Please accept this correspondence as Plantiff's Pro Se letter motion seeking relief from the 9/14/22 Judgment entered by this Court denying the Writ of Habeas Corpus Petition based on oversight by the Court, omission of the fact and fraud(misrepresentation & misconduct) committed by the Respondent's Counsel of Record etc. Document filed by Francisco Tineo–Santos.sc) Modified on 12/16/2022 (sc). (Entered: 12/16/2022)
12/16/2022		Request for Copies/Transcripts/Docket Sheet Processed: Mailed copy of Docket Sheet to Francisco Tineo–Santos, DIN: 13A0532 at Wende Correctional Facility 3040 Wende Road Alden, NY 14004–1187 on 12/16/2022. (sha) (Entered: 12/16/2022)
12/28/2022	70	ORDER: Petitioner's request for a copy of his docket sheet is GRANTED. The Clerk of Court is respectfully requested to provide Petitioner with a copy of his docket sheet in accordance with standard practices. It appears from a review of the docket in this case that the Clerk of Court may have already processed this request. Petitioner's second request, for relief under Rule 60, is DENIED without prejudice for the reasons already outlined in the Order dated December 5, 2022. [ECF No. 67.] The Clerk of Court is respectfully requested to send a copy of this Order to the pro se Petitioner at the address of record. SO ORDERED. (Signed by Judge Mary Kay Vyskocil on 12/28/2022) (tg) Transmission to Docket Assistant Clerk for processing. (Entered: 12/28/2022)
01/03/2023		Mailed a copy of 70 Order,to Francisco Tineo–Santos, DIN: 13A0532 at Wende Correctional Facility 3040 Wende Road Alden, NY 14004–1187. (dsh) (Entered: 01/03/2023)
02/01/2023	71	LETTER addressed to Judge Mary Kay Vyskocil from F. Tineo–Santos, dated 1/21/23 re: Please accept this correspondence as Petitioner's Pro Se Letter Motion seeking relief from the 9/14/22 Judgment, entered by this Court, denying the Habeas petition,

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		to reopen the habeas proceeding pursuant to Rule 60(a), 60(b) etc on the basis of Fraud on the Court committed by the respondent's counsel. Document filed by Francisco Tineo–Santos.(sc) (Entered: 02/02/2023)
05/10/2023	72	LETTER from F. Tineo–Santos, dated 5/4/23 re: I am addressing this inquiry letter to your full attention in seeking your assistance to provide me with the status of all the filed documents in this case since January of 2023. Please take notice that I am litigating this case Pro Se and, to this date, I have not received notice of my submitted Pro Se motions etc. since 1/1/23. Document filed by Francisco Tineo–Santos.(sc) Modified on 5/11/2023 (sc). (Entered: 05/10/2023)
05/10/2023		Request for Copy of the updated Docket Sheet Received: Re 72 Letter. Request for Docket Report from F. Tineo–Santos received on 5/4/23. Transmission to Pro Se Assistants for processing. (sc) (Entered: 05/10/2023)
05/10/2023		Request for Copies/Transcripts/Docket Sheet Processed: Mailed copy of Docket Sheet to Francisco Santos, 13A0532 at Wende Correctional Facility, Wende Road, P.O. Box 1187, Alden, NY, 14004–1187 on 5/10/2023. (sha) (Entered: 05/10/2023)
05/10/2023	73	ORDER: For the same reasons previously outlined in this Court's December 5, 2022 and December 28, 2022 Orders, Petitioner's request for relief under Rule 60 is DENIED without prejudice. This Court will not–and indeed, cannot–pass upon issues "involved in the [pending] appeal." Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). Petitioner is on notice that if he files any further repetitious filings challenging the September 14, 2022 Opinion and Order, before the Second Circuit's resolution of the pending appeal, the Court will direct Petitioner to show cause why an order barring him from filing any future pro se petitions without first obtaining leave of court should not be entered. See Aponte v. Horn, No. 15–CV–2201 (KAM), 2016 WL 868198, at *2 (E.D.N.Y. Mar. 4, 2016). Petitioner's request for a copy of "all documents" in this matter "since January 1, 2023" is GRANTED. The Clerk of Court is respectfully requested to provide Petitioner with a copy of his docket sheet in accordance with standard practices. It appears from a review of the docket in this case that the Clerk of Court may have already processed this request. The Clerk of Court is respectfully requested to send a copy of this Order to the pro se Petitioner at the address of record. SO ORDERED. (Signed by Judge Mary Kay Vyskocil on 5/10/2023) (tg) Transmission to Docket Assistant Clerk for processing. (Entered: 05/10/2023)
05/11/2023		Mailed a copy of 73 Order to Francisco Tineo–Santos, DIN: 13A0532 at Wende Correctional Facility, 3040 Wende Road, Alden, NY 14004–1187. (kh) (Entered: 05/11/2023)
06/30/2023	74	LETTER from F. Tineo–Santos, dated 6/25/23 re: Due to difficulties I have been experiencing with my out–going legal mail not being timely allowed out of the Wende C.F. by the Prison Staff etc., I want to request to be provided with a received notice and/or acknowledgement of filing of my 6/5/23 Notice of Appeal etc. Document filed by Francisco Tineo–Santos.(sc) (Entered: 07/03/2023)
06/30/2023	75	Request for Copy of the updated Docket Sheet Received: Re 74 Letter. Request for Docket Report, from F. Tineo–Santos received on 6/30/23. Transmission to Pro Se Assistants for processing. (sc) (Entered: 07/03/2023)
06/30/2023	76	NOTICE OF APPEAL from 73 Order. Document filed by Francisco Tineo–Santos. Form D–P is due within 14 days to the Court of Appeals, Second Circuit.(km) (Entered: 07/05/2023)
06/30/2023	77	AFFIDAVIT of Francisco Tineo–Santos re: 76 Notice of Appeal. Document filed by Francisco Tineo–Santos. (km) (Entered: 07/05/2023)
07/05/2023		Request for Copies/Transcripts/Docket Sheet Processed: Mailed copy of Docket Sheet to Francisco Tineo–Santos, 13A0532 at Wende Correctional Facility, 3040 Wende Road, P.O. Box 1187, Alden, NY, 14004–1187 on 7/5/2023. (sha) (Entered: 07/05/2023)
07/05/2023		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 76 Notice of Appeal. (km) (Entered: 07/05/2023)

07/05/2023		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 76 Notice of Appeal filed by Francisco Tineo–Santos were transmitted to the U.S. Court of Appeals.(km) (Entered: 07/05/2023)
07/13/2023	78	NOTICE OF APPEARANCE by David M. Cohn on behalf of Paul Piccolo..(Cohn, David) (Entered: 07/13/2023)
07/21/2023	79	LETTER MOTION to Reopen Case addressed to Judge Mary Kay Vyskocil from F. Tineo–Santos, dated 7/12/23. Document filed by Francisco Tineo–Santos.(sc) (Entered: 07/24/2023)
08/03/2023	80	MANDATE of USCA (Certified Copy) as to 61 Notice of Appeal filed by Francisco Tineo–Santos. USCA Case Number 22–2736. Appellant, pro se, moves for a certificate of appealability, to hold the appeal in abeyance, and to remand the matter to the district court. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); see Miller–El v. Cockrell, 537 U.S. 322, 327 (2003).. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 8/3/2023..(nd) (Entered: 08/03/2023)
08/07/2023	81	LETTER from F. Timeo–Santos, dated 8/3/23 re: I am seeking this Court's assistance and for providing me with confirmation of received and filing of my 7/12/23 Pro Se Letter motion under this case. Document filed by Francisco Tineo–Santos.(sc) (Entered: 08/08/2023)
08/07/2023		Request for Copy of the updated Docket Sheet Received: Re 81 Letter. Request for Docket Report from F. Timeo–Santos received on 8/7/23. Transmission to Pro Se Assistants for processing. (sc) (Entered: 08/08/2023)
08/25/2023	82	MANDATE of USCA (Certified Copy) as to 76 Notice of Appeal filed by Francisco Tineo–Santos. USCA Case Number 23–6732. Appellant, pro se, moves to withdraw the above–captioned appeal. IT IS HEREBY ORDERED that the motion is GRANTED. The appeal is deemed WITHDRAWN.. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 08/25/2023..(nd) (Entered: 08/25/2023)
09/08/2023	83	LETTER from F. Timeo–Santos, dated 9/1/23 re: I am addressing this inquiry letter to your full attention in seeking your assistance to secure filing confirmation of my submitted 7/12/23 Pro Se Letter Motion seeking to reopen the habeas proceeding and relief of the 9/14/22 judgment etc. Document filed by Francisco Tineo–Santos.(sc) (Entered: 09/12/2023)
11/07/2023	84	ORDER DENYING MOTION TO REOPEN denying 79 Letter Motion to Reopen Case. For the foregoing reasons, Petitioner's motion for relief pursuant to Rule 60 and to reopen this case is DENIED because the Court does not have jurisdiction to grant the requested relief. IT IS HEREBY ORDERED that Petitioner is barred from filing future papers in this closed action without leave of Court. Accordingly, the Clerk of Court is respectfully directed to decline future filings from Petitioner. The Clerk of Court is respectfully requested to terminate the motion pending at docket entry number 79 and to send a copy of this Order to the pro se Petitioner at the address of record. SO ORDERED. (Signed by Judge Mary Kay Vyskocil on 11/7/2023) (tg) Transmission to Docket Assistant Clerk for processing. (Entered: 11/07/2023)
11/07/2023		Mailed a copy of 84 Order on Motion to Reopen Case, to Francisco Tineo–Santos, DIN: 13A0532 at Wende Correctional Facility, 3040 Wende Road, Alden, NY 14004–1187. (sha) (Entered: 11/07/2023)
11/22/2023	85	NOTICE OF APPEAL from 84 Order on Motion to Reopen Case. Document filed by Francisco Tineo–Santos. Form D–P is due within 14 days to the Court of Appeals, Second Circuit.(km) (Entered: 11/29/2023)
11/29/2023		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 85 Notice of Appeal.(km) (Entered: 11/29/2023)
11/29/2023		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 85 Notice of Appeal filed by Francisco Tineo–Santos were transmitted to the U.S. Court of Appeals. (km) (Entered: 11/29/2023)

Appendix " E "

E1-E7

Appendix "E"

22-2736

Francisco Tineo-Santos
#13-A-0532
Wende Correctional Facility
3622 Wende Road
Box 1187
Alden, NY 14004

E1

MANDATE

S.D.N.Y. – N.Y.C.
19-cv-5038
Vyskocil, J.
Cott, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of June, two thousand twenty-three.

Present:

Gerard E. Lynch,
Raymond J. Lohier, Jr.,
Joseph F. Bianco,
Circuit Judges.

Francisco Tineo-Santos,

Petitioner-Appellant,

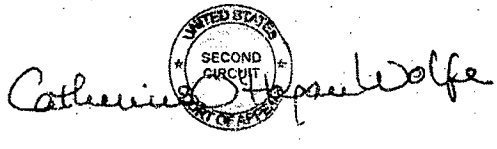
v. 22-2736

Paul Piccolo, Superintendent of
Southport Correctional Facility,

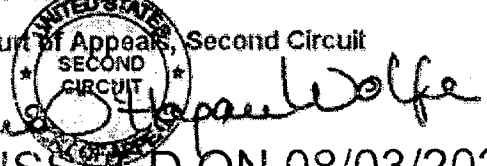
Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, to hold the appeal in abeyance, and to remand the matter to the district court. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



MANDATE ISSUED ON 08/03/2023

E2

General Docket
Court of Appeals, 2nd Circuit

Court of Appeals Docket #: 22-2736
Nature of Suit: 3530 PRISONER PET-Habeas Corpus
Tineo-Santos v. Piccolo
Appeal From: SDNY (NEW YORK CITY)
Fee Status: IFP Granted

Docketed: 10/26/2022
Termed: 06/29/2023

Case Type Information:
1) Prisoner
2) State
3) Habeas Corpus

Originating Court Information:
District: 0208-1 : 19-cv-5038
Trial Judge: Mary Kay Vyskocil, U.S. District Judge
Trial Judge: James Lloyd Cott, U.S. Magistrate Judge
Date Filed: 05/30/2019

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
09/14/2022	09/14/2022	10/20/2022	10/26/2022

Prior Cases:
None

Current Cases:
None

Panel Assignment: Not available

E3

Francisco Tineo-Santos (State Prisoner: 13-A-0532) Petitioner - Appellant	Francisco Tineo-Santos, - [NTC Pro Se] Wende Correctional Facility 3622 Wende Road Box 1187 Alden, NY 14004
Paul Piccolo, Superintendent of Southport Correctional Facility Respondent - Appellee	David M. Cohn, - Direct: 718-838-6652 [COR NTC Government] Bronx County District Attorney's Office 198 East 161st Street Bronx, NY 10451 Nancy Darragh Killian, Esq., Assistant District Attorney **Terminated:** 10/28/2022 Direct: 718-838-7494 [COR NTC Government] Bronx County District Attorney's Office 198 East 161st Street Bronx, NY 10451

E4

Francisco Tineo-Santos,

Petitioner – Appellant,

v.

Paul Piccolo, Superintendent of Southport Correctional Facility,

Respondent – Appellee.

E5

10/26/2022	1	NOTICE OF PRISONER APPEAL, with district court docket, on behalf of Appellant Francisco Tineo-Santos, FILED. [3408552] [22-2736] [Entered: 10/26/2022 07:16 PM]
10/26/2022	2	DISTRICT COURT MEMORANDUM ORDER ADOPTING REPORT AND RECOMMENDATION, dated 09/14/2022, RECEIVED.[3408553] [22-2736] [Entered: 10/26/2022 07:19 PM]
10/26/2022	3	DISTRICT COURT JUDGMENT, dated 09/14/2022, RECEIVED.[3408554] [22-2736] [Entered: 10/26/2022 07:19 PM]
10/26/2022	4	ELECTRONIC INDEX, in lieu of record, FILED.[3408555] [22-2736] [Entered: 10/26/2022 07:19 PM]
10/26/2022	5	INSTRUCTIONAL FORMS, to Pro Se litigant, SENT.[3408556] [22-2736] [Entered: 10/26/2022 07:20 PM]
10/26/2022	6	NOTICE, re: pending district court IFP motion, to district court, SENT.[3408557] [22-2736] [Entered: 10/26/2022 07:23 PM]
10/28/2022	7	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee Paul Piccolo, FILED. Service date 10/27/2022 by US mail. [3409651] [22-2736] [Entered: 10/28/2022 10:30 AM]
10/28/2022	8	ATTORNEY. David M. Cohn, [7], in place of attorney Nancy D. Killian, SUBSTITUTED.[3409895] [22-2736] [Entered: 10/28/2022 01:27 PM]
10/28/2022	9	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee Paul Piccolo, FILED. Service date 10/27/2022 by US mail.[3409915] [22-2736] [Entered: 10/28/2022 01:38 PM]
11/03/2022	11	PAPERS, Form D-P, RECEIVED.[3414223] [22-2736] [Entered: 11/04/2022 10:47 AM]
11/03/2022	12	LETTER, dated 10/28/2022, on behalf of Appellant Francisco Tineo-Santos, requesting an extension of time to file brief, RECEIVED. Service date 10/28/2022 by US mail.[3414293] [22-2736] [Entered: 11/04/2022 11:31 AM]
11/04/2022	10	DISTRICT COURT ORDER, dated 10/27/2022, granting IFP, RECEIVED.[3414219] [22-2736] [Entered: 11/04/2022 10:44 AM]
11/04/2022	15	ORDER, dated 11/04/2022, denying letter request for an extension of time to file the brief as unnecessary, reminding Appellant that his motion for certificate of appealability is due November 23, 2022, copy to pro se appellant, FILED.[3414461] [22-2736] [Entered: 11/04/2022 01:27 PM]
11/07/2022	16	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE FORM, on behalf of Party Francisco Tineo-Santos, FILED. Service date 11/01/2022 by US mail.[3416338] [22-2736] [Entered: 11/08/2022 02:15 PM]
11/07/2022	17	MOTION, to hold appeal in abeyance, on behalf of Appellant Francisco Tineo-Santos, FILED. Service date 11/01/2022 by US mail.[3416340] [22-2736] [Entered: 11/08/2022 02:15 PM]
11/10/2022	21	MOTION ORDER, denying motion to hold appeal in abeyance as moot, [17], filed by Appellant Francisco Tineo-Santos, copy to pro se appellant, FILED. [3418124][21] [22-2736] [Entered: 11/10/2022 12:56 PM]
11/17/2022	22	MOTION, to proceed in forma pauperis, on behalf of Appellant Francisco Tineo-Santos, FILED. Service date 11/17/2022 by US mail.[3424029] [22-2736] [Entered: 11/22/2022 08:54 AM]
11/21/2022	24	MOTION, for certificate of appealability, on behalf of Appellant Francisco Tineo-Santos, FILED. Service date 11/07/2022 by US mail.[3424370] [22-2736] [Entered: 11/22/2022 11:59 AM]
11/22/2022	23	

E6

		DEFECTIVE DOCUMENT, Motion to proceed in forma pauperis, [22], on behalf of Appellant Francisco Tineo-Santos, copy sent to pro se appellant, FILED.[3424036] [22-2736] [Entered: 11/22/2022 08:57 AM]
11/22/2022	25	DEFECTIVE DOCUMENT, Motion for certificate of appelability, [24], on behalf of Appellant Francisco Tineo-Santos, copy sent to pro se appellant, FILED.[3424373] [22-2736] [Entered: 11/22/2022 12:01 PM]
11/28/2022	26	MOTION, for certificate of appealability, to hold appeal in abeyance, to remand appeal, on behalf of Appellant Francisco Tineo-Santos, FILED. Service date 11/14/2022 by US mail.[3428159] [22-2736] [Entered: 11/29/2022 05:34 PM]
11/29/2022	28	CURED DEFECTIVE MOTION, FOR CERTIFICATE OF APPEALABILITY, [26], [26], [26], on behalf of Appellant Francisco Tineo-Santos, FILED.[3428162] [22-2736] [Entered: 11/29/2022 05:35 PM]
12/15/2022	35	STRIKE ORDER, striking Appellant Francisco Tineo-Santos, motion, to proceed in forma pauperis, [22], from the docket, copy to pro se appellant, FILED.[3437607] [22-2736] [Entered: 12/15/2022 01:50 PM]
12/15/2022	36	LETTER, dated 12/07/2022, on behalf of Appellant Francisco Tineo-Santos, requesting case status, RECEIVED. Service date 12/07/2022 by US mail.[3438077] [22-2736] [Entered: 12/15/2022 07:51 PM]
12/15/2022	37	NOTICE, Case Status, SENT.[3438078] [22-2736] [Entered: 12/15/2022 07:51 PM]
12/19/2022	38	MOTION, to remand appeal, on behalf of Appellant Francisco Tineo-Santos, FILED. Service date 12/12/2022 by US mail.[3439899] [22-2736] [Entered: 12/19/2022 08:45 PM]
03/09/2023	45	ORDER, dated 03/09/2023, ordering the Appellant to submit to this Court, within 30 days of the date of this order, a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement setting out the date Appellant deposited the notice of appeal in the prison's internal mail system and stating whether first-class postage was prepaid, by JAC, RSP, JFB, copy to pro se appellant, FILED.[3480922] [22-2736] [Entered: 03/09/2023 12:40 PM]
03/23/2023	46	SUPPLEMENTARY PAPERS TO MOTION, [26], [26], [26], on behalf of Appellant Francisco Tineo-Santos, FILED. Service date 03/16/2023 by US mail.[3488710][46] [22-2736] [Entered: 03/23/2023 05:09 PM]
05/11/2023	50	LETTER, dated 05/04/2023, on behalf of Appellant Francisco Tineo-Santos, requesting case status, RECEIVED. Service date 05/04/2023 by US mail.[3514482] [22-2736] [Entered: 05/11/2023 06:47 PM]
05/11/2023	51	NOTICE, Case Status, SENT.[3514485] [22-2736] [Entered: 05/11/2023 07:05 PM]
06/29/2023	55	MOTION ORDER, denying motion to remand appeal, for certificate of appealability, to hold appeal in abeyance [38][26] filed by Appellant Francisco Tineo-Santos, and the appeal is dismissed, by GEL, RJL, JFB, copy to pro se Appellant, FILED. [3535826][55] [22-2736] [Entered: 06/29/2023 02:52 PM]
06/29/2023	56	NEW CASE MANAGER, Yenni Liu, ASSIGNED.[3535827] [22-2736] [Entered: 06/29/2023 02:53 PM]
08/03/2023	57	CERTIFIED COPY OF ORDER, dated 06/29/2023, determining the appeal to SDNY, copy to pro se Appellant, ISSUED.[Mandate][3551177] [22-2736] [Entered: 08/03/2023 02:28 PM]

E7

Appendix " F "

F1-F39

Appendix "F"

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF ERIE) S.S.:

I, Francisco Tineo-Santos (Din# 13-A-0532), being duly sworn, deposes and says:

I am the applicant in the enclosed Prosecutorial Misconduct Complaint

I have on this 18th day of December, 2022, placed and submitted within the institutional mailbox located at:

Wende Correctional Facility
3040 Wende Road, PO Box. 1187
Alden, New York 14004-1187

The following:

Prosecutorial Misconduct,
Actual Innocence Claim and
Wrongful Conviction Complaint
dated December 18, 2022

To be mailed and delivered via the United States Postal Service upon the following parties:

District Attorney
Bronx County District
Attorney's Office
198 East 161st Street
Bronx, New York 10451

Chief Administrative Judge
Bronx County Supreme Court
Criminal Division
Hall of Justice
265 East 161st Street
Bronx, New York 10451

Respectfully Submitted,

Defendant, Pro-Se.
Francisco Tineo-Santos (Din# 13-A-0532)

Sworn to Before Me This 19
Day of December, 2022.

Notary Public

COREY L WAINWRIGHT
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01WA6438278
Qualified in Erie County
My Commission Expires August 8, 2026

Francisco Tineo-Santos (Din# 13-A-0532)
Wende Correctional Facility
3040 Wende Road, PO Box. 1187
Alden, New York 14004-1187

ATTN: **District Attorney**
Bronx County District
Attorney's Office
198 East 161st Street
Bronx, New York 10451

ATTN: **Chief Administrative Judge**
Bronx County Supreme Court
Criminal Division
Hall of Justice
265 East 161st Street
Bronx, New York 10451

Indictment No.:**1920-2009**

December 18, 2022

Prosecutorial Misconduct, Actual Innocence Claim and Wrongful Conviction Complaint

Sir or Madam,

I am respectfully addressing this **Prosecutorial Misconduct & Wrongful Conviction Complaint (Actual Innocence Claim)** to your full attention pursuant to **Rule 3.8**(among other Rules governing the Professional Conduct of Prosecutors), **3.1 & 3.6 of the New York States Rules of Professional Conduct** (Effective April 1, 2009 & Amended on October 1, 2022) in seek of the remedy **Consistent with Justice**. I have been incarcerated since May 10, 2009, already served over 13 consecutive years and still serving, for the **Wrongful Conviction** of **Intentional Second Degree Murder, PL § 125.25(1)**, secured by the Prosecutor through the knowing introduction of false evidence and the omission of exculpatory available evidence, causing the **Spoliation of the** eyewitness exculpatory testimony.

Attached to this complaint in support are the following documents;

* **Exhibit "A"**: A True and Correct copy of the NYPD created and maintained diagram reflecting the actual distance between the corner of 177th Street with Davidson Avenue and the Crahsed car wall;

* **Exhibit "B"**; A True and Correct copy of the NYPD created & Maintained 911 call report reflecting that over Seven(7) actual 911 caller eyewitnesses reported the crashed car incident and Mr. Devurge nor Mr. Arango Did not made the call.

I. STATEMENT OF FACTS

A. Rule 3.8 of the Professional Conduct

According to the New York State Rules of Professional Conduct under Rule 3.8, **"Special Responsibilities of Prosecutors and Other Governement Lawyers"**, clearly states that "(a)A Prosecutor or other government lawyer shall not **institute, cause to be institute or maintain a criminal charge** when the Prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause";

"(b)A Prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel of the existence of evidence or information known to the Prosecutor or other government lawyer **that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence**, except when relieved of this responsibility by a Protective order of a tribunal";

"(c)**When a Prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted**, the Prosecutor **shall within a reasonable time;** (1)disclose that evidence to an appropriate court or Prosecutor's Office; or (2)**if the conviction was obtained by that Prosecutor's Office,** (A)**notify** the appropriate court and the defendant that the Prosecutor's Office possesses such evidence unless a court authorizes delay for good cause shown; (B)**disclose that evidence** to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, **and a court authorizes delay for good cause shown;** and (C)**undertake or make reasonable effort** to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside."

Further, under Section (d) of this rule it states that **"When a Prosecutor knows of clear and convincing evidence established that a defendant was convicted, in a prosecution by the Prosecutor's Office, of an offense that the defendant did**

not commit, the Prosecutor shall seek a remedy consistent with Justice, applicable law, and the circumstance of the case."

The Courts have held that "Evidence that was favorable to defendant charged with felony murder and that was suppressed by prosecutor was 'material,' as was relevant to determining if prosecutor committed a **Brady** violation and violated rule of Professional Conduct requiring prosecutors to make timely disclosure to defense counsel known evidence that tended to negate the **guilt of accused, mitigate the degree of the defense, or reduce the sentence**; Prosecutor's nondisclosure of the evidence, **which evidence undermined the credibility of key witnesses for the Prosecution, interrupted the trial, foreclosed a full trial record, prevented the defense's cross-examination of detective, and precluded a jury verdict**." In matter of Kurtzrock, 192 A.D.3d 197, 138 N.Y.S.3d 649.

i. 911 Call Report

On the 9th day going into the 10th day of May, 2009, the Defendant ("Plaintiff/Petitioner") was involved in a car crashed accident involving three(3) other people, a total of three(3) individuals including the Defendant were inside the crashed car.

At 00:54:46 hours **(12:54:46am)** on May 10, 2009 the first 911 caller [1] eyewitness contacted the NYPD 911 hotline to report that she/he eyewitness the **"CAB DRIVER--WAS--SHOT"** at the location of West 177th St. with cross street of Davidson Avenue. See the herein Attached Exhibit ("Ex.") "B". At 00:55:27 hours **(12:55:27am)** another 911 caller [2] eyewitness reported that she/he eyewitness the **"DRIVER--WAS--BEING-SHOT"**. See Ex. "B". At 00:58:14 hours **(12:58:14am)** another 911 caller [3] eyewitness reported that she/he eyewitness that **"THE CAB DRIVER IS [S]HOT AT LOC[ATION]---INSIDE THE SCHOOLYARD----POSS CRASHED INTO THE SCHOOL--"**. See Ex. "B".

At 00:59:01 hours **(12:59:01am)** another 911 caller [4] eyewitness reported that she/he eyewitness that **"THERE IS A FIREARM..N THE BAC.. INSIDE THE FR[O]NT SEAT...DR[I]V[E]R POSS DOA....N THERE IS A PASS[E]NG[E]R INSIDE THE VEH[ICLE]"**. See Ex. "B". At 00:59:38 hours **(12:59:38am)** another 911 caller

[5]eyewitness reported that she/he eyewitness that **"SOMEONE SHOT--IN SCHOOLYARD-----CAB CRASHIN[G] to SCHOOL".** See Ex. "B". At 01:00:09 hours **(01:00:09am)** another 911 caller [6]eyewitness reported that she/he eyewitness that **"M[A]L[E] SHOT AT LOC[ATION]... [redacted]... M[A]L[E] at LOC[ATION] POSS DEAD IN CAR... AIDED M[A]L[E] IS TAXI DRIVER..".** See Ex. "B".

At 01:01:10 hours **(01:01:10am)** another 911 caller [7]eyewitness reported that she/he eyewitness that **"DR[I]V[E]R STILL IN VEH[ICLE]---UNK[NOWN] DESC[RIPTION] OF PERPS---STS POSS FIREARM IN FRONT SEAT OF CAB".** See Ex. "B". At 01:01:15 hours **(01:01:15am)** another 911 caller [8]eyewitness reported that she/he eyewitness that **"M[A]L[E] SHOT IN BL[AC]K TAXI... PERP RAN.. UNK[NOWN] DIR[ECTION] OF FLIGHT.... NO DESC[RI]P[TION]..".** See Ex. "B". At 01:03:01 hours **(01:03:01am)** the First Responding Emergency Team Ambulance **(25/26G3)** reported first arriving at the scene of the car crashed accident. See Ex. "B". At 01:10:20 hours **(01:10:20am)** the First Responding NYPD Police Officers reported first arriving at the scene of the car crashed accident. See Ex. "B". **A total of over Seven(7) individual eyewitness called the 911 hotline to report their eyewitness testimony of the car crashed accident prior to the First Responding Emergency team Ambulance and NYPD Police Officers arrival at the scene of the Car Crashed accident.** See Ex. "B". Neither one(1) of this 911 call belong to, nor were made by Mr. Devurge nor Mr. Arango.

On May 10, 2009 at **1:47am** the Defendant was received at the Emergency Room of the St. Barnabas Hospital via Ambulance "Accompanied by Police [Officer] Ortiz[,] badge# **19607**[,] 46 P[re]c[inc]t". See Defendant's Medical Record filed as Evidence at Trial. For the time frame between **1:47am through 10:00am** the Defendant was being kept under assessments and preparation for major surgery of his suffered severe injuries resulting from the car crashed accident. For the time frame between approximately **10:10am through 2:01pm** the Defendant was kept in a **Operation Room** for treatment, major surgery, of his

severely suffered injuries at St. Barnabas Hospital. For the time frame between approximately **2:02pm through 7:00pm** the Defendant was kept in the **Intensive Care Unit** ("I.C.U.") room recovering, recuperating, from the major surgery that he had just underwent. According to Defendant's Medical Record created and maintained by St. Barnabas hospital, that were introduced at the Trial as evidence exhibit label by the Court as **"Defense A"**, On May 10, 2009 at Specifically **7:00pm** the Defendant was transferred from the **I.C.U.** room into, and received by his assigned nurse, a stable regular hospital room for further recovery under the full custody of the NYPD. See Defendant's Medical Record introduced at Trial as **"Defense A".**

On May 10, 2009 at 16:15 hours **(5:15pm)** NYPD Detectives Mr. Brennan and Mr. Ader secured the Coerced Compliant False Self-Incriminating Confession Written Statement from the Defendant while maintaining the Defendant under the Full Custody of the NYPD, under the Coerced influence of not pursuing criminal charges against the Defendant in return for the Written Statement, and while the Defendant was being kept under the **"Incommunicado"** status for over Sixteen(16) consecutive hours after the incident, and just less than three(3) consecutive hours after Defendant was received by the **I.C.U.** area after the Major surgery.

On May 11, 2009, at **3:35pm**, one(1) day after the Coerced Compliant False Self-incriminating confession Written Statement was secured from the Defendant by the NYPD Detectives Mr. Brennan & Mr. Ader through False Promises, Assistant District Attorney Dominick Dimaggio secured the Coerced Compliant False Self-Incriminating confession Video Statement from the Defendant while in the presence of both NYPD Detectives Mr. Brennan & Mr. Ader, while the Defendant was being kept under the same Coerced atmosphere, under the same Coerced influence of False Promises made by the Law Enforcements (NYPD Detectives Mr. Brennan & Mr. Ader) and while the Defendant was being kept under the

same **"Incommunicado"** status under the full custody of the NYPD, handcuffed to the bed rail at St. Barnabas Hospital.

B. Trial Proceedings

i. Witness Ms. Kramer

the People called Ms. Debra Kramer ("Ms. Kramer"), the St. Barnabas Hospital designated Vice President of Quality and Clinical Service. Ms. Kramer explained that one of the responsibilities of the Hospital's Risk Management area was to evaluate requests for contact with patients, including requests from Law Enforcements, to determine whether a patient was sufficient **"Stable"** for such contact. See Trial Transcript ("Tr.") at Page("Pg.") #221-#238. Ms. Kramer clearly stated that if a NYPD Detective wants to interview a Patient, the Detective need to obtain clearance from the Risk Management area First. See Tr. at Pg. #236-#238. Ms. Kramer also stated that while a Patient is being held in **I.C.U.**, per hospital established policy, Clearance **SHALL NOT BE APPROVE NO AUTHORIZE** for a Law Enforcement to interview the patient. See Tr. at Pg. #224. Furthermore, on various occasions Ms. Kramer have clearly stated that she **did not** had any knowledge of this case. See Tr. at Pg. #225 at Line ("L.") #4-#6; also at Pg. #228-#236.

ii. Witnesses Mr. Devurge & Mr. Arango

The People Called Mr. Renee Devurge ("Mr. Devurge") and Mr. Gregory Arango ("Mr. Arango") as their **Key Witnesses**. The People clearly stated that there were **NO WRITTEN MATERIALS CONCERNING THIS TWO(2) SPECIFICALLY CALLED WITNESSES** created, noted nor maintained by neither the Bronx County District Attorney's Office nor the NYPD. See Tr. at Pg. #27 at L. #1-#19. Mr. Devurge and Mr. Arango stated that they were drinking beers and played domino's outside a bodega nearby on Davidson Avenue for the time they came out of work at **4:00pm** on May 9, 2009 until **12:00am** on May 10, 2009. See Tr. at Pg. #48-#49. Mr. Devurge stated that Mr. Arango and himself left their job

together at 4:00pm and went to the **bodega** together from work. See Tr. at Pg. #48 at L. #12-#25. Mr. Devurge stated that he drank **Seven(7) beers** and Mr. Arango drank the **Same amount of beers as he did.** See Tr. at Pg. #49 at L. #11-#24.

Mr. Arango stated that he went home after work and wen to the **bodega** from his home at **8:00pm.** See Tr. at Pg. #117 at L. #3-#19. Mr. Arango stated that he **only darnk one(1) beer** that night. See Tr. Pg. #119 at L. #1-#15. Both Mr. Devurge and Mr. Arango stated that they were standing on the corner of 177th Street & Davidson Avenue when they both heard gun shots and saw the **"Taxi"** pass by them, plowing through the fence and crashing into the School Wall. See Tr. Pg. #104 at L. #1-#21. Mr. Devurge stated that the distance between the corner in which they stood (177th Street & Davidson Avenue) and the School wall in which the **"Taxi"** crashed into, was the size of the Court room. See Tr. Pg. 57 at L. #1-#10.

Mr. Devurge stated that the First responding team arriving at the crashed car scene was the NYPD Police Officers with their firearms (weapons) out in hand pointing toward them. See Tr. Pg. #44 at L. #6-#17. Mr. Devurge stated that **only** Mr. Arango and himself were standing at the corner of 177th Street & Davidson Avenue when the **"Taxi"** passed by them, and nobody else was down the street. See Tr. Pg. #51 at L. #19-#22, and; at Pg. #55 at L. #17-#22. Mr. Arango stated that the First Officer arriving at the scene arrived in a marked police car colored **"Blue and white".** See Tr. Pg. #132 at L. #18 through Pg. #133. Neither one(1) of this specifically called witnesses (Mr. Devurge nor Mr. Arango) called the 911 hotline to report the crashed car incident.

iii. Witness NYPD Police Officer Mr. Cross

The People called NYPD Police Officer Mr. Daniel Cross ("P.O. Cross"). P.O. Cross stated that on May 10, 2009 he responded to the location of 177th & Davidson Avenue within the

School yard in relation to a radio run he received over his radio, "a 911 call or an assault in progress, and also came over at the same time as a 53, which is a car accident with a pin, which means someone is either pinned inside or outside of the vehicle." See Tr. Pg. #240 at L. #4-#13. P.O. Cross stated that the "black standard Lincoln town Car.. had went through a fence that is around the school yard at 177th in Davidson Avenue. It went through the fence, **cross approximately a football field or so of distance and crashed into the wall."** See Tr. Pg. #11-#18.

P.O. Cross stated that as the First Officer on the scene, upon approaching the crashed car, he noticed that **"the back door was opened."** See Tr. Pg. #244 at L. #1. P.O. Cross stated that once he recovered the firearm from the body of the deceased, Mr. Pita, by removing his NYPD service "firearm from my holster as we're trained in the academy and at the range, I removed my gun from my holster, placed it in my waistband, I put on my gloves that I had in my back packet and picked up the firearm from the butt of the gun to **conserve any, you know, evidence from the gun, pulled the slide to the back,** for the most part that makes the gun safe so that no rounds are in the chamber, a round fell out of the chamber. I took the gun and put it into my holster to keep it safe from anything, picked up the round off the ground and placed the extra round in my empty handcuff case." See Tr. Pg. #245 at L. #20 through Pg. #246. P.O. Cross stated that he recovered the firearm (gun) from the deceased's, Mr. Pita's, left armpit, specifically tucked between the left armpit and the ribcage of the deceased, Mr. Pita, body. See Tr. Pg. #253 at L. #4-#21.

P.O. Cross stated that upon his arrival with the Lieutenant Donovan, there were three(3) or Four(4) people (individuals) standing "off to the driver's side of the vehicle and the car had crashed into the wall". See Tr. Pg. #257 at L. #2-#22. P.O. Cross stated that when he got there the "**rear**

performed his testing due to Detective tejada being unable to testify at trial and no longer working for the unit. See Tr. Pg. #301 at L. #16-#25. DT. Fox stated that he received a total of **Three(3) Cartridge Casings from a .9 Millimeter Luger and Two(2) .9 Millimeter Caliber Class Bulls with a Six(6) right twist** for testing with the firearm and ammunition recovered from the scene. See Tr. Pg. #309 at L. #15-#20. DT. Fox stated that he determined that the received **three(3) Cartridge Casing** were fired from this firearm and the **two(2) bullets** received were also fired from this firearm. See Tr. Pg. #309 at L. #20-#23.

DT. Fox stated that Detective Tejada had "fired one of the cartridges, then I(DT. Fox) fired the remaining cartridge." See Tr. Pg. #311 at L. #15-#19. DT. Fox stated that he received **two(2) bullets** that were recovered from the scene and did not had them with him at the time. See Tr. Pg. #311 at L. #18-#23. DT. Fox stated that in this particular case Detective Tejada himself marked the tested bullets as **ST-67**, that Detective Tejada fired **two(2) Cartridge** and he fired **one(1) bullet**, for which were introduced as evidence under **People's #10**. See Tr. Pg. #315 at L. #1-#12. **DT. Fox, as the ballistic expert whom had examined the firearm and bullets did NOT testified to examining the bullets that killed Mr. Pita and recovered from Mr. Pita's body, with the bullets that were tested on the firearm recovered from Mr. Pita's possession and the scene.**

v. Dr. Smiddy

The People called Doctor Monica Smiddy ("Dr. Smiddy"). Dr. Smiddy stated that she was employed by the Office of the Chief Medical Examiner of the New York City. Dr. Smiddy stated that she held the job title of Medical examiner #2 and was a Forensic Pathologist for close to 20 years up-to the date she gave her testimony on December 7, 2012. See Tr. Pg. #317 at L. #5-#11. Dr. Smiddy stated that she performed the autopsy of Mr. Pita's deceased body on May 10, 2009. See Tr. Pg. #319 at L. #1-#20.

Dr. Smiddy stated that Mr. Pita's body had three(3) "Clustered" gunshot wounds entrance all on the right side of the body, for which were behind the right ear, behind the right shoulder and on the right upper back. See Tr. Pg. #332 at L. #1-#6; also Pg. #342 at L. #8-#10. Dr. Smiddy stated that the bullets recovered from Mr. Pita's deceased body were removed from the body, cleaned, labeled, placed in an envelope and placed in the **ballistic safe** by her, and subsequently logged in the ballistic safe log book. See Tr. Pg. #344 at L. #20-#25. **Dr. Smiddy did not testified nor stated that the NYPD ballistic specialist were provided with the recovered bullets from Mr. Pita's deceased body to be tested with the firearm and bullet casing recovered from the scene introduced at Trial by the People as the "Murder Weapon".** A total of **Three(3)** bullets were recovered from the inside of gunshot wounds in Mr. Pita's deceased body and were secured in the **ballistic safe** by Dr. Smiddy during the conducted autopsy.

vi. Jury Charge and Deliberation

On December 11, 2012 at **10:50am** the jury were entered into the court, and charged by the Court, submitting the charges to the jury of (i)**Intentional Second Degree Murder, PL § 125.25(1)**; in the alternative (ii)First Degree Manslaughter, PL § 125.20(1); (iii)Criminal Possession of weapon, PL § 265(1)(b), and; (iv)Criminal Possession of a weapon, PL § 265(3). See Tr. Pg. #454-#464. The Court **BIB NOT** charged the jury with the words of **"in order to find defendant guilty of Intentional Murder in Second Degree (PL § 125.25(1)), the jury was required to find that defendant's state of mind was that of depraved indifference"**, pursuant to **People V. Fulmore**, 64 A.D.3d 1146(2009). Deliberation began following the court's charge, and the alternative jurors were discharged. See Tr. Pg. #472-#496.

The jury requested and received both the Coerced-Compliant False Self-incriminating confessions (Written & Video statements), Defendant's Medical Record and a read-back of NYPD

P.O. Cross' testimony. See Tr. Pg. #499-#504; Pg. #479 at L. #16-#18, and; Pg. #493 at L. #11-#23 (Jury Notes, Court's **Exhibit #3 & #4**). Deliberation were canceled on Tuesday, December 11, 2012 and adjourned to Wednesday, December 12, 2012 at **2:45**, due to Juror Anthony Figueroa's Mother being hospitalized. See Tr. Pg. #510-#515.

Upon resumed of Deliberation on Thursday, the Jurors requested and received a rereading of the **Intentional Second Degree Murder Charge** and the Court's **Instructions on Intent**, for which, did not contained the wordings of **"in order to find defendant guilty of Intentional Murder in Second Degree (PL § 125.25(1)), the jury are required to find that defendant's state of mind was that of depraved indifference"**, as required by law & consistent with Justice. See Tr. Pg. #522 & Pg. #526-#531 (Juror Notes, Court's **Exhibit #5**). On Friday, December 14, 2012 Court adjourned deliberation to Monday, December 17, 2012 due to the Juror Foreperson, Mr. Lawson, suffering from asthma and another Juror, Mr. Colon, had a job interview to attend to. See Tr. Pg. #536-546. On Monday, December 17, 2012 the Juror resumed deliberation and following lunch recess, the Court received a note from the Jurors stating that it was **"Deadlock on count 1"** and asking **"what is the next step"**. See Tr. Pg. #564. The Court then received another note from the Jurors requesting and receiving the **replay** of the Coerced-Compliant False Self-Incriminating Confession Video Statement. See Tr. Pg. #569, and; Juror Note, Court's **Exhibit #8**. At 4:29pm the Court adjourned the deliberation until the next day. See Tr. Pg. #570.

On Tuesday, December 18, 2012 upon the commenced of the Court, one of the Jurors, Ms. Princess Smith, contacted the Court to informed them that she could not appear for resuming deliberation. See Tr. Pg. #574 at L. #4-#8. On this same date, prior to the adjournment, another Juror, Ms. Maria Martinez, requested to be **excused from being a Juror** and from continuing

deliberation due to her using up all **Fifteen(15)** of her **Paid days off work for jury service.** See Tr. Pg. #583-#585. On Wednesday, December 19, 2012 deliberation resumed and the Jurors requested and received reinstructions on the **Intentional Second Degree Murder** charge together with the **definition of intent**, for which, once again **DID NOT** contained the wordings of **"in order to find defendant guilty of intentional Murder in Second Degree (PL § 125.25(1)), the Jury were required to find the defendant's state of mind was that of depraved indifference".** See Tr. Pg. #587-#592; also See Juror Notes, Court's **Exhibits #9 & #10.** Following the issued Juror notes, court's **Exhibits #9 & #10,** upon lunch recess, the jurors again issued another note reporting that **"after a lot of deliberation we continue to be deadlock. We have discussed the case many time and cannot reach a unanimous decision at this point.** See Tr. Pg. #594-#595; Also see Juror Note, Court's **Exhibit #11.**

Following the issued Juror notem, Court's **Exhibit #11,** reporting their **Second deadlock and difficulties** to render a **unanimous decision,** several jurors reported having problems; the foreperson, Mr. Lawson, was unable to return until the following afternoon; Juror #2, Mr. Pantejo, was **"actively feeling ill;"** Juror #6, Mr. Figueroa, who had to take his mom to the hospital, was stating his aunt was sick and needed to be off jury service to take care of his cousin; and Juror Ms. Smith who was ill the day prior, was having concerns about **not getting paid** for further jury service, as she was not getting paid any longer. See Tr. Pg. #595. Upon receiving the jurors problem report, the court stated that it **"personally think"** that the jurors were not **"ever going to resolve count 1".** See Tr. Pg. #596.

The Court's inquiry of the jurors revealed that Juror Mr. Pantoja, Mr. Lawson and Ms. Smith could return the next day, but that Juror Martinez could return the next day finding it a **"hardship"** because her employer would **no longer pay for her jury service,** and Juror Mr. Figueroa and Ms. Negron could **Not return** the next day due to personal and work commitments,

respectively, but could return on Friday, December 21, 2012. See Tr. Pg. #600-#608. The court further acknowledged, observed and recognized that it was **"impossible to proceed right now"**, and the jurors' **hardship** complaints **"might very well amount to physical hostility"**. see Tr. Pg. #611-#612.

On Friday, December 21, 2012 the Court received a note from the juror foreperson, Mr. Lawson, stating that he had **underwent emergency toe surgery**, but that he could return to resume deliberation on the following Monday, December 24, 2012, if it was not raining. See Tr. Pg. #618 at L. #5-#11. The Court further found, acknowledged and observed that **"at this point"** the Court **"believe either one(1) or both of the provision of the CPL would justify a mistrial, 310.60 or 280.10. The impossibility of continuing in a timely fashion and/or that the jury deliberated for an extensive period of time without a verdict. And I'm(the Court) satisfied that no agreement is likely within a reasonable time"**. See Tr. Pg. #618 at L. #12-#19.

Despite the Juror Ms. Negron expressed complaint and **hardship** in returning to resume deliberation on **Monday, December 24, 2012** due to having **Family Christmas Plans** that started on the **Morning of Monday, December 24, 2012**, and stating to the Court that **thus she did not wanted to put aside her Family Christmas Plans** for the purpose of coming to court for deliberation, by stating that **"wouldn't want to do it, but if i had to do it"**, she could work for half a day **only**, the court still forced the juror to come in on **Monday, December 24, 2012.** See Tr. Pg. #625-#626.

On Monday, December 24, 2012, at **10:15am** deliberation resumed and at **10:16am** the jury returned a **Guilty Verdict** of **Intentional Second degree Murder, PL § 125.25(1),** against the Plaintiff. See Tr. Pg. #648-#649.

IV. Arguments

A. Actual Innocence Claim

The New York State Penal Law("PL") Section("§") **125.25(1)** clearly states in part that "A person is guilty of **Murder** in the **Second Degree** when; **1.** with **intent to cause the death of another person, he causes the death of such person** or of a third person".

Despite the Fact that the People's Case chief Evidence introduced at trial consisted of the (a)Coerced Compliant False Self-Incriminating Confessions (Written & Video Statements), and the (b)two(2) called witnesses (Mr. Devurge & Mr. Arango) False/Perjured Testimony, further being constantly introduced & referred to in support to all legal proceedings securing the Conviction & Maintaining the wrongful conviction of **Intentional Second Degree Murder, PL § 125.25(1),** the Prosecutor **knowingly cause, Permitted and Continues to Maintain** the wrongful conviction of **Intentional Second Degree Murder** against the Defendant with no probable cause, evidence (neither Factual, Direct nor Circumstantial), to support the Elements for **Intent beyond a reasonable doubt** that on May 10, 2009 the Defendant actually (i)had possession of a firearm; (ii)fired a firearm; (iii)had possession of the recovered firearm; (iv)Shot Mr. Pita with the **intentrion,** with malice aforethought, to **"cause the death"** of Mr. Pita and **causing the death** of Mr. Pita. Where as mentioned herein-above, supported by the Trial Transcript and available evidences, clearly proves the innocence of the Defendant, where in Fact, the **Only Firearm** recovered from the crime scene was found in the possession of Mr. Pita. The Fact that this same firearm was adequately preserved in evidence and placed under official forensic expert test resulting in DNA & Finger Prints obtained/secured from the firearm that **DID NOT Matched** Defendant's DNA nor Finger-Prints.

Further, this same recovered & Preserved firearm underwent forensic expert tests resulting to the conclusion that this same firearm **DID NOT Fired** the **Bullets** that were adequately

recovered from the inside of Mr. Pita's deceased body during the conducted autopsy. This recovered bullets were adequately preserved & secured in a **"Ballistic Safe"** by the Doctor who conducted the autopsy, Dr. Smiddy, for the purpose of preserving and making them available to the NYPD and Prosecutor for testing.

Despite the Fact that the Prosecutor **DID NOT** presented nor introduced admissible evidence (neither factual, direct nor circumstantial), excluding the Coerced-Compliant False Self-Incriminating Confessions (Written & Video Statements), at Trial to support & prove the Elements of **Intent Beyond a Reasonable Doubt** as require by Law and consistent with Justice. The evidence that were secured and preserved by the crime scene team from the Crashed Car incident scene **actually and factually** proves beyond a reasonable doubt that the Defendant **DID NOT** committed the offense being accused of, and the Fact that a Third(3rd) person was involved and was the perpetrator of the offense committed. The following factual and direct evidence actually proves that Defendant **DID NOT** had possession of a firearm, **DID NOT** fired the firearm recovered, **DID NOT** shoot Mr. Pita, and **DID NOT killed nor** caused the death **of Mr. Pita on May 10, 2009;**

(1)No firearm were recovered from the possession of the Defendant;

(2)The **Only Firearm** that was recovered from the crime scene and presented at Trial as the "Murder Weapon" was recovered from the possession of Mr. Pita;

(3)The Fact that **Finger Prints & DNA** were recovered and preserved from the same & only firearm recovered from the crime scene that **DID NOT Matched** the Defendant's Finger Prints nor DNA;

(4)This same & **Only Firearm** recovered, and introduced at trial as the **"Murder Weapon"**, underwent forensic expert testing that resulted in the Firearm **NOT** being the same firearm that fired the bullets that were recovered from Mr. Pita's deceased body;

(5)The Fact that there were over **Seven(7)** eyewitnesses who actually called the 911 hotline & reported the crime, specifically reporting a **Third(3rd) Person** being involved and the

"Perp" running away from the crime scene prior to the arrival of the First Responding Emergency Team, and;

(6)No evidence were introduced at trial to support the conviction of **Intentional Second Degree Murder, PL § 125.25(1),** beyond a reasonable doubt, that are not **False or Perjured,** rebut and undermine by the actual **Direct and Factual** evidenced available, inter alia; DNA, Finger Prints, and 911 Callers eyewitnesses reports.

For over Thirteen(13) consecutive years, and continuing to take place, this wrongful conviction have been knowingly **caused, permitted to be cause and continues to be maintained** by the Prosecutor in Violation of the U.S. Constitutional Rights, New York State Constitutional Rights and Rules of the Professional Conduct of New York, inter alia, Rule 3.8.

For the herein-above mentioned reasons and referred to Direct & Factual Evidence available for this instant case that were and continue to be intentionally misrepresented by the Prosecutor, the Pro Se Defendant to this Complaint respectfully request that a Affidavit along with admissible documentary evidence be provided by the Bronx County District Attorney, not the Assistant District Attorney, to prove/show Probable Cause to Maintain the Conviction of **Intentional Second Degree Murder, PL § 125.25(1),** against the Defendant.

B. Prosecutorial Misconduct

In this instant case, the Prosecutor's Case have been constructed entirely and solely on the theory of that **"Only two(2) Individuals"** were involved in the Crashed Car incident, the Defendant & the Deceased, accusing the Defendant of **intentionally causing the death of Mr. Pita by shooting Mr. Pita three(3) times with the firearm, recovered from Mr. Pita's body, with the intention to kill Mr. Pita.** In support of this "Only Two(2) individuals" theory the Prosecutor's Case Chief Evidence introduced at the Grand Jury to secured the indictment were both the Coerced Compliant False Self-Incriminating Confessions

(Written & Video Statements) secured by the Law Enfrocements with False Promises. At Trial the Prosecutor supported this **"Only Two Individuals"** theory by introducing as their Chief Evidence both of the Coerced Compliant False Self-Incriminating Confession (Written & Video Statement) and the **Perjured/False** testimony of Called witnesses Mr. Devurge & Mr. Arango to secure the conviction of **Intentional Second Degree Murder.**

The Prosecutor knowingly and Intentionally Misrepresented the Facts to the Jury and the Courts, constantly introducing and referring to this specific false, coerced and perjured evidence and testimony, to ensure to maintain the Defendant's Wrongful Conviction of **Intentional Second Degree Murder.** Further, continues to refuse to undertake, or cause the undertaken, actions in seek of a remedy consistent with Justice, that is relief of the Judgment & Wrongful conviction, allowing the constant Miscarriage of justice to be transfer from one(1) Court to another, From the State to Federal Level Court, despite the available exculpatory & exonerating Direct & Factual evidence in the possession of the Prosecutor, inter alia; (1)The Finger Prints and DNA recovered from the only recovered firearm, introduced at trial as the **"Murder Weapon"**, that **DID NOT Matched** the Defendant's Finger Prints nor DNA; (2)The Fact that the only recovered firearm from the crime scene, and introduced at Trial as the **"Murder Weapon", DID NOT Matched** the bullets that were actually recovered and preserved from Mr. Pita's deceased body during the conducted autopsy; (3)The Fact that **NO Firearm** were recovered from the possession of the Defendant, and; (4)The Fact that **actual** 911 caller eyewitnesses available testimony reporting the **Third(3rd) Person**, the **"Perp"**, running away from the crime scene prior to the arrival of the First Responding Emergency Team.

i. Coerced Compliant False Self-Incriminating Confession (Written & Video Statements)

In this instant case the **Only Firearm** recovered, that have been introduced by the Prosecutor as the **"Murder Weapon"** at the Grand Jury to Secure the Legal Proceedings and at

Trial to secured the wrongful conviction, have been adequately preserved and both DNA & Finger Prints obtained/recovered from this same firearm that **DID NOT Matched** Defendants Finger Prints nor DNA. This same firearm was put through Forensic Expert testing that resulted/concluded in the conclusion that this firearm **DID NOT FIRED** the bullets that were recovered from the Mr. Pita's deceased body and were subsequently secured in a **"Ballistic Safe"** by Dr. Smiddy during the conducted autopsy.

The Fact that there were actual 911 calls of eyewitness reporting seeing the **Third(3rd) Person**, the **"Perp"**, running away from the crime scene prior to the arrival of the First Responding Emergency Team. The Fact that the NYPD crated & maintained investigation documents, reports and evidence of this case **DID NOT** contained any reports, notes, documents, materials nor statements relating to the People's Called Witnesses Mr. Devurge & Mr. Arango supporting the allegations that they were present at the crime scene on May 10, 2009. The Fact that the NYPD created and Maintained records of the 911 call report for this case reflecting that neither of the People's Called Witnesses Mr. Devurge nor Mr. Arango called 911 to report what they "Witnesses".

All the herein-above mentioned and referred to exculpatory factual and direct evidence have always been in the possession of, and known by the Prosecutor and the Bronx County District Attorney, yet, the Prosecutor have and continues to knowingly and intentionally **Cause, Permit and Maintain** the Wrongful conviction of **Intentional Second Degree Murder, PL § 125.25(1)**, against the Defendant by constantly referring to the Coerced Compliant False Self-Incriminating Confessions secured through false promises by the Law Enforcements and referring to the Two(2) called Witnesses (Mr. Devurge & Mr. Arango) **False/Perjured** testimony in support of a **"Only Two(2) Individuals"** involved in the Crashed Car theory.

It have been clearly established that a Prosecutor has a duty and is "require to not only disclose information he knows but also information he 'should have know", where in this

instant case not only have the prosecutor continues to not inform the Court of the exculpatory/exonerating evidence supporting the Fact of the **Third(3rd) Person** involved, but as well have and continues to refuse to disclose to the court and the Defendant the exculpatory evidence, inter alia; the DNA & Finger Prints recovered from the firearm introduced at trial as the **"Murder Weapon"**, and misleading the Court by misrepresentation of the Facts pertaining to the **Third(3rd) Person**, specifically when the Prosecutor purposely allowed the suppression and **"Spoliation"** of the 911 caller eyewitness exculpatory testimony supporting the **Third(3) Person Defense.**

Further, it have been established that the **"Prosecutor's Office** is an entity and as such it is the spokeman for the government. A **Promise made** by one attorney [or Law enforcements] must be attributed for these purpose, to the government", where in this instant case the **False Promise Made** by the NYPD Police Detectives Mr. Brennan and Mr. Ader to not criminally prosecute the Defendant in return for the Defendant's Coerced Compliant False Self-Incriminating Confessions (Written & Video Statements) have been known by the Prosecutor, yet, the Prosecutor have and continues to mislead the Grand Jury, the Trial Courts and all post-judgment proceeding Courts, and this Court for the purpose of maintaining the wrongful conviction against the Defendant for Political purpose disregarding Justice and the available exculpatory/exonerating evidence.

The American Bar Association's Standards for Criminal Justice, Specifically referred to in **Giglio,** provided that;

> **"The Prosecuting Attorney's Obligation under this Section extend to Material and information in the Possession of Control of members of his staff and of any other who have participated in the Investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office."**

It has been recognized and discussed by the Supreme Court in **Kyles V. Whitley** "that a prosecutor has a duty

to learn of any exculpatory evidence known to other acting on government's behalf. A Prosecutor 'should know' of evidence in **the Possession of the Police Officers who are investigating the Case."**

In this instant Case no only did the Prosecutor knew that the NYPD Police Detectives secured the Written statement through False Promises of not criminally prosecuting the Defendant, while the Defendant was being held under the **"Incommunicado"** status, under the coerced atmosphere and while the Defendant was being held in the I.C.U., but as well, the Prosecutor knew that the Hospital did not allowed nor authorized the interview of the Defendant by the NYPD Detectives while the Defendant was being held in I.C.U. in accordance with Hospital Policy. The Prosecutor, despite knowing this facts, secured the subsequently obtained Video Statements while the Defendant was still being kept under the same **"Incommunicado"** status, under the same influence of false promises and under the same coerced atmosphere that the Written Statements was secured, handcuffed to the bed rail, deprived of a free will and without the hospital authorization to conduct said interview of the defendant by the Law Enforcement.

Further, the Prosecutor have known, knew and should had known that the 911 caller eyewitness reporting the **Third(3rd) Person** running from the crime scene, did not only supported a **Third(3rd) Person Defense,** supported the Defendant's innocence, and negated the Defendant's Guilt of the accused offense, but as well that this specific eyewitness testimony is relevant, material, and exculpatory essential for Defendant's defense and unfavorable to the People's Case as it completely undermined it and impeaches the People's Called two(2) Witnessses. The Prosecutor intentionally introduced this secured Coerced Compliant False Self-Incriminating Confessions (Written & Video Statements) along with the misrepresentation of the Facts relating to the Voluntariness of the confessions, the **Third(3rd) Person** Involvement, the **DNA & Finger Prints** recovered from the

firearm presented at Trial as the **"Murder Weapon"** and the available exculpatory/exonerating evidence supporting Defendant's innocence of the accused offenses, during the grand jury to secure the indictment, during trial to secure the wrongful conviction and constantly during all post-judgment proceedings to maintain the same wrongful conviction against the Defendant for political gain and in conflict with Justice.

The Prosecutor have not proved its burden to the admissibility of the secured Coerced Compliant False Self-Incriminating Confessions (Written & Video Statements) as being obtained Voluntarily from the Defendant while the Defendant was being deprived of a free will and being held in a coerced atmosphere under the influence of false promises by the Law Enforcement.

In Contrary, aside from the Prosecutor's constantly misleading and misrepresentation of the Facts, the Prosecutor placed the Bronx County Assistant District Attorney Mr. Dimaggio on the stand who testified by hearsay relating to the obtaining of the Written Statement, and provided Perjured/False testimony in relation to the authorization of the hospital in allowing the Law Enforcements to interview the Defendant while the Defendant was being kept in I.C.U., in violation of hospital policy, to secure both Written and Video Statements.

The Prosecutor intentionally introduced **"Overview"** testimony provided by the called witness Mr. Kramer, thus the "Courts have characterized such overview testimony as **Inherently Troubling** and have **Condemned Its Use** because it might allow juries to be exposed to statements of Facts or Credibility assessments that may be contained in the overview witness for the prosecutor", See **U.S. V. Case, 356 F.3d 104, 118-119**; Alse See **U.S. V. Garcia-Morales, 382 F.3d at 17**, as an attempt to prove their burden for the Voluntariness of the Coerced Compliant False Self-Incriminating confessions. This Called witness overview testimony of the Risk Management procedure and responsibilities provided at Trial **DID NOT Contained** any factual evidence relating to the Law enforcement, both the NYPD Police Detective and ADA

Mr. Dimagio, being provided with the authorization to conduct the interview of the Defendant while the Defendant was being held in I.C.U., securing the Written & Video Statements. Though this introduced "Overview" testimony provided by Ms. Kramer **DID IN Fact** supported the factual and direct evidence that both the Coerced Compliant False Self-Incriminating confessions were actually secured in violation of St. Barnabas Hospital established policy preventing Law Enforcements and the District Attorney's staff from conducting interview of Patients being held in I.C.U. status, The Video Statement speaks for itself reflecting that the Defendant was handcuffed to the bed rail, in the presence of the NYPD Detectives Mr. Brennan & Mr. Ader who had made the false promise resulting in the securing of the Coerced Compliant False Self-Incriminating Confession Written Statements, and reflecting the Defendant **giving thanks for NOT being Criminally Prosecuted.**

The Bronx County District Attorney and Prosecutor have knowingly **Caused, Permitted and Continues to Cause the Maintaining** of the wrongful conviction of **Intentional Second Degree Murder, PL § 125.25(1)**, against the Defendant by constantly misleading the Courts, misrepresenting the Facts and referring to the introduced Case Chief Evidence, the Coerced Compliant False Self-Incriminating Confessions and the two(2) called Witnesses (Mr. Devurge & Mr. Arango) **False/Perjured** Testimony, in support to the Prosecutor's theory of the **"Only Two(2) Individuals"** being involved in the Crashed Car incident despite all Factual and Direct exculpatory & exonerating evidence that have been and continues to be in the possession of the Bronx County District Attorney's Office, that also completely undermines the Prosecutor's Case and introduced perjured testimony at trial to secure the conviction.

For the herein-above mention and referred to reasons, supported by the Factual and Direct evidence available and in the possession of the Prosecutor, the Pro Se Defendant respectfully request that this court orders and instruct the

Prosecutor to provide a Affidavit along with admissible documentary evidence by the Bronx County District Attorney, Not a Assistant District Attorney, to support & prove its burden beyond a reasonable doubt the Voluntariness of the secured Coerced Compliant False Self-Incriminating Confessions secured by the NYPD Police Detective and the Bronx County Assistant District Attorney Mr. Dimagio and not through false promises while the Defendant was being held under **"Incommunicado"** status and deprived of a free will.

ii. False/Perjured Testimony Intentionally Introduced at Trial to Secure the Conviction

In this instant case the Prosecutor constructed Case is solely on the theory of **"Only Two(2) Individuals"** being involved in the Crashed Car incident on May 10, 2009 resulting in One(1) of the Two(2) individuals being shot dead by the other individual involved. In support to its theory, the Prosecutor knowingly introduced at Trial the **Perjured & False** Testimony of Called Witnesses Mr. Devurge & Mr. Arango, despite all the available Factual & Direct evidence undermining and impeaching this two witness testimony, inter alia; the available eyewitness testimony of actual 911 callers, the 911 call report. Further, the Prosecutor had at all time in their possession the following Factual & Direct evidence that completely undermines it's theory and impeaches its called witnesses; (1)The Finger Prints & DNA that were recovered & preserved from the **Only Firearm** that was recovered from the crime scene and introduced at Trial by the Prosecutor as the **"Murder Weapon"**, not matching the Defendant's DNA nor Finger Prints, and; (2)The over **Seven(7)** actual 911 caoller eyewitnesses testimony reporting the Crashed Car incident and the **Third(3rd) Person** running away from the crime scene (Mr. Devurge nor Mr. Arango Called the 911 hot-line to report the crime).

The Prosecutor knew, aside from knowing the Fact that this Two(2) called witnesses (Mr. Devurge & Mr. Arango) were never present at the crime scene and their **False/Perjured** Testimony are completely undermined and impeached by all the

Factual and Direct **exculpatory/exonerating** evidence in the prosecutor's possession, inter alia; (a)This Two(2) called witnesses (Mr. Devurge & Mr. Arango) **DID NOT CALLED** 911 to report the **"Witness"** crime on May 10, 2009 as the other actual eyewitness did called; (b)This Two(2) called witnesses **WERE NEVER INTERVIEWED** by any NYPD staff, Detective nor Members on the night, nor the following days, of the Crashed Car incident as all other actual witnesses were interviewed and follow-up report created; (c)This Two(2) called witnesses identification, information and/or statement relating to the Crashed Car Incident were never created nor maintained by the NYPD investigating staff during the conducted investigation of the case, and; (d)This Two(2) called witnesses were **NEVER INTERVIEWED** by the investigating NYPD Detective during the conducted investigation of the case undermining completely the allegation that this two witnesses were ever present at the crime scene or witnessed the crime. Yet, the Prosecutor intentionally and knowingly introduced this two(2) called witnesses **Perjured/False Testimony to Cause, Permit and Maintain** the wrongful conviction against the Defendant for political gain with complete conflict and disregard to Justice.

As it have been discussed by the Courts and established, A Prosecutor has a Special duty not to mislead the Courts or Defendants, and the use or False or Misleading evidence to secure a conviction is unethical, violating due process. See **U.S. V. Myerson, 18 F.3d 153, 40 Fed.R.Evid.Serv. 601(2d Cir.1994); ABA Criminal Justice Standard § 3-6.6(a)(4th Ed.2015)("Prosecutor should not offer evidence that the prosecutor does not reasonably believe to be true");** also See, **e.g.,Dinh Tan Ho V. Thaler, 495 Fed.Appx. 488(5th Cir.2012), Cert. denied, 133 S.Ct. 1634, 185 L.Ed.2d 617(2013)**("Prosecutor presented statements of witnesses to police that prosecutor knew were false and which statements witnesses later recanted, thereby misleading jury into believing recanted statements were true").

It ave been discussed and clarified by the Courts that the knowing use of **Perjure** testimony, whether solicited or nor, deprives the Defendants of a Fair trial when the Prosecutor's **Case Chief Evidence** is Material to guilt or innoncence or punishment. See **Giglio V. U.S.**, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104(1972); **Mooney V. Holohan,** 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406(1935); **Pyle V. State of Kansas,** 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214(1942); **Bapue V. People of State of Ill.,** 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217(1959); **Shih Wei Su V. Filion,** 335 F.3d 119(2d Cir.2003); Also See **Jenkins V. Artus,** 294 F.3d 284(2d Cir.2002).

Courts also have discussed and clarified that **Misrepresentation of the Facts to the Courts and Defense Counsel** is not only **unethical,** but may be **ground for reversal.** See **Davis V. Zant,** 36 F.3d 1538(11th Cir.1994)("Prosecutor mislead jury by falsely representing that government witness never confessed"); **U.S. V. Valentine,** 820 F.2d 565(2d Cir.1987)("Prosecutor misrepresents grand jury testimony of uncalled witnesses as conforming to prosecutor's Trial theory").

In this instant case, despite all the herein-above mentioned and referred exculpatory/exonerating evidence being in the possession of the Prosecutor, specifically the Direct and Factual Evidence supporting the **Third(3rd) Person Defense** and Defendants **Actual Innocence of the offenses being accused of,** the recovered Firearm **NOT** being the actual **"Murder Weapon"**, the recovered **Finger Prints and DNA** from the only recovered Firearm **NOT MATCHING** the Defendant's Finger Prints nor DNA, and the recovered **Bullets** from the inside of the deceased, Mr. Pita's, body **WERE NOT** fired from the recovered Firearm, the Prosecutor mislead the jury and the court by misrepresenting the Facts and stating that the Defendant was in possession of the recovered firearm; that the Defendant used the recovered firearm; that the Defendant shot & killed Mr. Pita with the recovered firearm, and; that the Defendant and the deceased, Mr. Pita, were the **"Only Two(2) Individuals"** in the Crashed Car as the crime

took place. See Valentine ("Prosecutor misrepresents grand jury testimony of uncalled witnesses as conforming to prosecutor's trial theory").

In this instant Case, despite the Fact that the Bronx County District Attorney had possession of the NYPD investigating files, documents, notes and records for over **three(3)** years prior to the commenced of the trial for this case, specifically reflecting that no type of notes, documents, nor interview reports existed relating to this two(2) called witnesses (Mr. Devurge & Mr. Arango) contained within the discovery documents/evidence, the Prosecutor knew that this two(2) called witnesses testimony were false, Perjured, and completely undermined by the actual Factual & Direct exculpatory evidences available and in the Prosecutor's possessions, yet, introduced their perjured/false testimony at trial.

Despite the Fact that the NYPD investigating files, documents and reports does not contained any type of created record of this two(2) called witnesses (Mr. Devurge & Mr. Arango), and that the Prosecutor met on over three(3) separate occasions with this two(2) witnesses in person years after the incident of May 10, 2009 and months prior to the commencement of Trial in 2012, the following Factual and Direct evidence in the possession of the Prosecutor completely undermined and impeached this two(2) called witnesses False/Perjured Testimony, yet, the Prosecutor introduced their testimony at trial to secure the wrongful conviction;

A)The First Responding NYPD Police Officer at the scene stated that upon his arrival the **"back Passenger door"** was the one(1) door that was opened, not the front passenger door as showed at the picture introduced at trial, yet, this two(2) witness Perjured testimony stated that it was the **"Front Passenger Door"** that was open upon their arrival at the scene;

B)The 911 caller eyewitness reporting seeing the **Third(3rd) Person, the "Perp"**, actually **Running away from the crime scene**, not toward the crime scene, prior to the arrival of the First Responding Emergency Team, yet, this two(2) called

witnesses perjured testimony contained the false statement that they "alleged" **Both ran after/toward the Crashed Car and stayed next to the car until the arrival of the NYPD Police and no one ran away from the Crashed Car**, and;

C)The NYPD diagram reflecting the distance between the coner of 177th street & Davidson Avenue, and the School wall in which the Car Crashed, of being a distance of over **323'10"**, yet, this two(2) witness perjured testimony contain the statement that said distance from the corner they stood, 177th Street & Davidson Avenue, to the School Wall in which they "Witnessed" the Car Crash was of a distance of the **size of the Court room**. See Ex. "A".

Yet, the Prosecutor, knowing that this two(2)(called witnesses Perjured/False testimony were completely undermined by the available Factual & Direct exculpatory evidence in their possesion, intentionally introduced them at Trial, intentionally misleading the Jury & the Court, for the purpose of securing the wrongful conviction.

For the herein-above mentioned reasons and referred to Factual & Direct evidence in support, the Pro Se Defendant respectfully request that a Affidavit along with admissible documentary evidence be provided by the Bronx County District Attorney, Not by a Assistant District Attorney, to provide probable cause to maintain the conviction of **Intentional Second Degree Murder, PL § 125.25(1)**, against the Defendant.

C. Miscarriage of Justice

Despite the Facts contained in the Trial Proceedings Transcript showing that the Jury were not only having severe difficulties and hardship in continuing deliberation, specifically after expressing it to the court and the Court's own observation and acknowledgment of the manifest requiring a Mistrial, the Court disregarded it and allowed the Prosecutor to introduce "Overview" testimony of witnesses to secure the wrongful conviction.

The Fact that the Prosecutor intentionally introduced **"Overview"** testimony of witnesses and experts, the Fact that the Prosecutor misrepresented the Facts and refusing to inform the Jury and the Courts of the exculpatory evidence in the possession of the Prosecutor, inter alia; (i)The Fact that the **Only Recovered Firearm NOT** being the firearm that was used to shoot the bullets **recovered from the deceased body** in this case; (ii)The Fact that the **Finger Print & DNA** recovered & Preserved from the **Only** Recovered Firearm **DID NOT Matched** Defendant's Finger Prints nor DNA; (iii)The Fact that there were **Actual** 911 caller eyewitnesses testimony reporting eyewitnessing the **Third(3rd) Person**, the "Perp", **actually running away**, not **Toward** the Crashed Car Scene, **Prior to** the arrival of the NYPD; (iv)The Fact that the NYPD Police Detectives and Assistant Attorney General obtained the Coerced Compliant False Self-Incriminating Confessions (Written & Video Statements) from the Defendant through False Promises, and; (v)The Fact that the Called Witnesses (Mr. Devurge & Mr. Arango) testimony are not onlu **False/Perjured**, but are as well **Completely Undermined** by the **Actual Factual & Direct Evidence** in the Possession of the Bronx County District Attorney.

The Fact that the Legal Proceedings and the Conviction of **Intentional Second Degree Murder, PL § 125.25(1),** have been secured by the Prosecutor by the knowing introduced of the Coerced Compliant False Self-Incriminating Confessions and the Two(2) Called Witnesses "Mr. Devurge & Mr. Arango) **Perjured/False** Testimony, the Courts, From the State through the Federal Courts, Continues to affirm the Conviction of the **Intentional Second Degree Murder, PL § 125.25(1)**, inconsistent with Justice and further refuses to provide the Defendant with the remedy consistent with Justice, that is a New Fair Trial without the false testimony, Coerced Compliant False Self-Incriminating Confessions and without the "Overview" testimonys, by stating that **"had defendant succeeded in suppressing the written & video statements, the result would not have been completely dispositive of the proceeding. The People had two(2)**

eyewitnesses (Mr. Devurge & Mr. Arango) to the scene of the taxi cab crash containing <u>exactly two(2) people</u> **(the Defendant & the Deceased) in the vehicle and the testimony of the responding police office"**, disregarding the Fact that aside from this intentionally introduced False evidence and **"Overview"** testimony at trial by the Prosecutor, the Prosecutor **HAVE NOT** proved beyond reasonable doubt the Element for **Intentional Second Degree Murder** pursuant to **PL § 125.25(1).**

As it have been discussed, clarified and established by the Court of Appeals for the Second Circuit in **Drake V. Portuondo,** 553 F.3d 230 at ***240**(January 23, 2009) holding that "Since at least 1935, it has been **established law of the United States** that a Conviction obtained through testimony the Prosecutor knows to be false is **repugnant to the Constitution.** See **Mooney V. Holohan,** 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791(1935). This is because, in order to **reduce the danger of false conviction,** we rely on the Prosecutor not to be simply a party in litigation whose sole object is the conviction of the Defendant before him. The Prosecutor is an officer of the Court whose **duty** is to present a forceful and **truthful Case to the Jury, not to win at any cost.** See **e.g., Jenkins V. Artus,** 294 F.3d 284, 296 N.2(2d Cir.2002)**(noting the duty of prosecutors under New York Law 'to seek justice, not merely to convict'), Shih Wei Su V. Filion,** 335 F.3d 119, 126(2d Cir.2003). Supreme Court holdings have long **'established that a conviction obtained through use of false evidence, known to be such by representative of the state must fall under the Fourteenth Amendment.' Napue V. Illinois,** 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217(1959)(emphasis added); See also **United States V. Agur,** 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342(1976); **Giglio V. United States,** 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104(1972). 'The same result obtains when the state, although no soliciting false evidence, allows it to go **uncorrected when it appears.' Napue,** 360 U.S. at 269, 79 S.Ct. 1173."

Further, the Court have also discussed and stated that "**Agurs** identified the test as whether 'the prosecutor knew, or should have known, of the **Perjure**" making reference and quoting that "[T]he [Supreme] Court has **consistently held** that a conviction **obtained** by the knowing use of **perjured testimony is fundamentally unfair.** and **must be set aside** if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' **Agurs,** 427 U.S. at 103, 96 S.Ct. 2392(Footnote omitted); see also **Shih Wei Su,** 335 F.3d at 129. In **United States V. Wallach,** we summarized the materiality standard under **Napue,** explaining that the 'question is whether the jury's verdict **'might'** be altered.' 935 F.2d 445, 456(2d Cir.1991)(quoting **Sanders V. Sullivan,** 863 F.2d 218, 225(2d Cir.1988). We have interpreted Supreme Court **precedent** as holding that 'if it is established that the government knowingly **permitted** the introduction of false testimony **reversal is virtually automatic.' Shih Wei Su,** 335 F.3d at 127(quoting **Wallach,** 935 F.2d at 456)). This **'Strict standard of materiality'** is appropriate 'not just because [such cases] ... involve Prosecutorial Misconduct, but more importantly because they involve a **corruption of the truth-seeking function of the trial process.' Agurs,** 427 U.S. at 104, 96 S.Ct. 2391."

Finally, the court have established, clarified and stated in **Napue,** 260 U.S. 264 at ***269,** cited by **People V. Waters,** 35 Misc.3d 855||Supreme Court, Bronx County, New York)(April 5, 2012), that "the Principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, **does not cease** to apply merely because the False testimony goes only to the credibility of the Witness. The jury's estimate of **truthfulness and reliability** of a given witness may well be **determinative of guilt or innocence,** and it is upon such subtle factor as the possible interest of the witness in testifying falsely that a Defendant's life or liberty may depend", referring

and quoting **People V. Savvide,** 1 N.Y.2d 554, 557, 154 N.Y.2d 885, 887, 136 N.E.2d 853, 854--855, stated by the New York State Court of Appeals;

> **"It is of no consecuence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter *270 what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.*** That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."**

As in this instant case, the Prosecutor while being aware that the Coerced Compliant False Self-Incriminating Confessions were secured through False Promises, knew that the two(2) called witnesses (Mr. Devurge & Mr. Arango) Testimony were **False/Perjured** and completely undermined by the existing exculpatory evidence in the Prosecutor possession, the Prosecutor knowingly **Cause, Permitted and allowed** this False and Perjured evidence to be introduced at the Grand Jury to secure the indictment, at Trial to secure the wrongful conviction and continues to referred to as evidence to maintain the same wrongful conviction against the Defendant, refusing to take corrective action to provide the Defendant with the available remedy consistent with Justice.

Conclusion

Due to this Tainted Conviction of **Intentional Second Degree Murder, PL § 125.25(1),** being secured & maintained against the Defendant by the Prosecutor through the knowing introduced False, Perjured and Coerced Evidence, for the Prosecutor to undertake immediate actions to seek the remedy

consistent with Justice as discussed herein-above mentioned by the Courts, by;

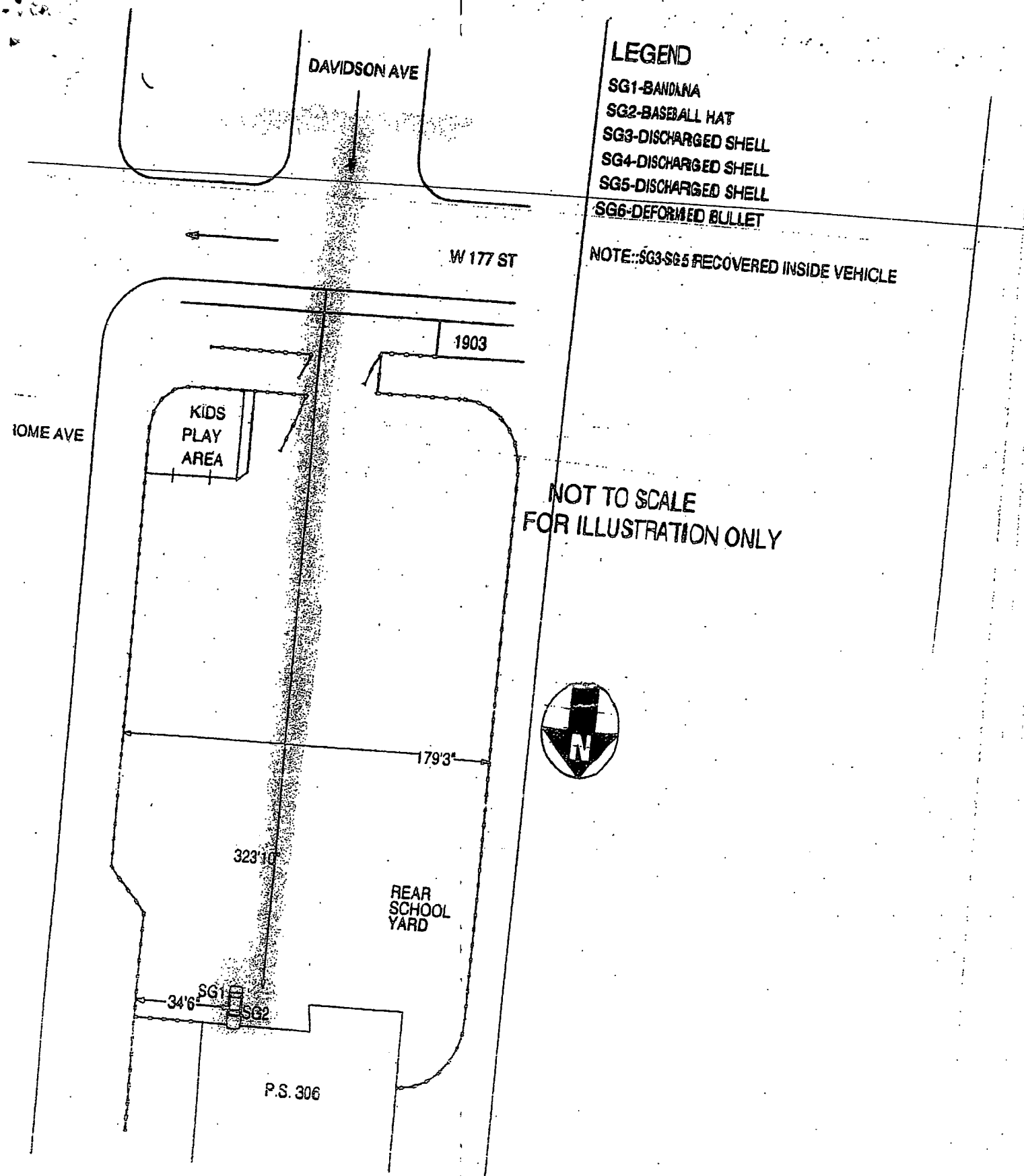
(I)Exonerating the Defendant from the Tainted Wrongful Conviction, as an alternative;

(II)Informing the Court in seek of Setting Aside the Conviction, Reversing and Remanding the Matter for a New Trial and Evidentary Hearings, consistent with Justice.

Respectfully Submitted,

Defendant, Pro Se.
Francisco Tinoco-Santos #DIN#13-A-0332)
Wende Correctional Facility
3040 Wende Road, PO Box. 1187
Alden, New York 14004-1187

C.C.: FILE,
Other Government's entities.



CSU # 09/475 HOMICIDE

REAR SCHOOL YARD OF P.S. 306

Print View

Executed: 8/27/2019 17:18

NYPDFINEST Executed by: [redacted]

New York City Police Department
911

Job Number: N00908

Occurence Precinct: 046 Date: 5/10/2009

Create Time: 5/10/2009 00:54 Assigned Precinct: 046

Address Disposition Time: 5/10/2009 10:57 Final Precinct: 046

Street Number: Priority: 2

Place:

Street Name: WEST 177 STREET Cross Street: DAVIDSON AVENUE HSE Property Indicator:

Intersecting Street: NOT AVAILABLE

Narrative

{2009130005446} --MC STS--POSS CAB DRIVER--WAS--SHOT AT THE LOC--
{2009130005459} NO DESCRPT-OF-PERP--ANON MC REF CB--ANI-ALI [redacted] SPRINT NEXTEL-IDEN [redacted] W SECTOR
COS:WPH1 LAT:040.848606 LON:-073.910565 OPER 1273-CP52
{2009130005527} --ANOTHER--CALL--MC--STS--DRIVER--WAS--BEING--SHOT--AT--ANI-ALI [redacted] CELL SITE T MOBILE 2016 DAVIDSON
AVE SECTOR W COS:WPH2 LAT:040.849860 LON:-073.910157 OPER 2463-CP70--
{2009130005551} 20 ETA 0059
{2009130005557}----ANOTHER CALL----MC STS HEARD SHOTS THEN HEARD A SMASH---STS SEES CAR POSS SMASHED INTO WALL OF
SCHOOL----PS 306---- [redacted] ----NOT AT LOC----CB [redacted] ANI-ALI [redacted]
[redacted] RESD LAT:LON:OPER 1940-CP63
{2009130005814} ---THE CAB DRIVER IS HOT AT LOC--INSIDE THE SCHOOLYARD------POSS CRASHED INTO THE SCHOOL------
{2009130005832} --ANI-ALI [redacted] SPRINT NEXTEL-IDEN [redacted] T W SECTOR COS:WPH1 LAT:040.848606 LON:-073.910565
OPER 1112-CP86
{2009130005901} ANOTHER CALL MC STS SME... STS THERE IS A FIREARM IN THE BAC INSIDE THE FRONT SEAT... DRVR POSS
DOA ... N THERE IS A PASSNGR INSIDE THE VEH... OPR 195 DPP03
{2009130005938} ANOTHER CALL--- FEM STS SOMEONE SHOT----IN SCHOOLYARD--------CAR CRASHINTOSCHOOL----OPR 2017
CP28
{2009130005941} ... [redacted] .OPR 1051 PP030....OPR 1051 PP030
{2009130005951} ANI-ALI [redacted] COS:RESD LAT:LON:OPER 2017-CP28
{2009130010009} ...ANOTHER CALL.... FC STS ML SHOT AT LOC..... [redacted] ... ML AT LOC POSS DEAD IN CAR.... AIDED ML IS TAXI
DRIVER...
{2009130010110} ----ANOTHER CALL-----ANON FC STS SME------STS DRVR STILL IN VEH-----UNK DESC OF PERPS----STS POSS
FIREARM IN FRONT SEAT OF CAB--- [redacted] SPRINT NEXTEL-IDEN [redacted] W SECTOR COS:WPH1 LAT:040.848606
LON:-073.910565 OPER 1056-CP82
{2009130010115} ...FC STS ML SHOT IN BLK TAXI...PERP RAN...UNK DIR OF FLIGHT...NO DESCP... [redacted] ... ANI-ALI-
[redacted] CELL SITE TMOBILE [redacted] SECTOR NE LAT:040.844399 LON:-073.913784 OPER 12[illegible]-PP041
{2009130010123} 17 EMS STS SHOT FIRED AT LOC
{2009130010301} 25 EMS ONSCENE 26G3 BLSN.
{2009130010420} --ANOTHER CALL MC STS CALLED BEFORE--STS SOMEONE SHOT UP A CAB AT LOC---STS FD NOW--UNK ON PERPS--
HEARD 2 SHOTS PRIOR--ANON MC REF CB--OPR 1611 CP68
{2009130010440} 20 ETA 0107
{2009130010527} .. SPCT DAWSON NTFD...
{2009130010534} ....PPCT DILLARD NTFD IN REGARDS....SPCT DAWSON
{2009130010550} 20 ETA 0105
{2009130010721} 25 EMS ONSCENE C171 UNKN
{2009130010841} 20 ETA 0108
{2009130011020} ---48 LT2--IMPACT LT----D1716
{2009130013515} 21 .
{2009130014106} 21 . . 26G STANDBY ON A 83 ON THE DOA AND 19C3 82 TO H 83
{2009130014608} 21 . .
{2009130021633} 21
{2009130051106} ---AUTH OF 46 BASE VIA LL---CONFIRMED DOA--- D2305
{2009130051452} ---SPCT DAVIS NTFD---02305

(2009130093301) —AUTH BASE—UNIT STILL OUT IN REGS D1387

Origi. Radio Code:	34S2				
Resource Count:	4	Current Radio Code:	34S2	Final Radio Code:	93Q
Claimant Name:	ANON MC REF CB	Current Resource:	SP7	Final Resource:	SP7
ANI/ALI Number:	[redacted]	Claimant Phone:		Subway Used?	NO
ANI/ALI Text:	CELL SITE-TMOBILE 1605 TOWNSEND AVE SECTOR NE LAT:040.844399 LON:-073.913784 OPER 1254-PP041	Call Back:	[redacted]		