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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 12

FERNANDO MALDONADO,

Appellant.

20 Eagle Street
Albany, New York 12207
January 11, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on our calendar
2 is appeal number 12, the People of the State of New
3 York v. Fernando Maldonado.

4 Counsel.

5 MR. O'NEILL: Good afternoon, Your Honors,
6 and may it please this court. Louis O'Neill of White
7 & Case, pro bono, for Mr. Maldonado, together with
8 co-counsel, Legal Aid Society.

9 I'd request three minutes of rebuttal, your
10 Honor.

11 CHIEF JUDGE DIFIORE: Three, sir?

12 MR. O'NEILL: Three.

13 CHIEF JUDGE DIFIORE: Three.

14 MR. O'NEILL: This is a curious case where
15 defendant obtained nothing, neither title, nor
16 possession, nor any money to the property in
17 question, it was cho - - -

18 JUDGE STEIN: How could this not be, at
19 least, a purported transfer?

20 MR. O'NEILL: I'm glad - - -

21 JUDGE STEIN: What is a purported transfer,
22 if it's not this?

23 MR. O'NEILL: So a purported transfer deals
24 with a voidable deed; a deed that can be undone.
25 It's a deed obtained by trickery; I trick someone

1 into signing his name to the deed, and I file it.

2 That's a - - -

3 JUDGE STEIN: And why isn't this a voidable
4 deed?

5 MR. O'NEILL: It's not a voidable deed
6 because it was - - - it's - - - it's akin, as Justice
7 Rivera said in Faison v. Lewis, it's akin to a - - -
8 a forged deed. It's a spurious and powerless paper;
9 it's a void paper.

10 JUDGE GARCIA: But that's - - - that's a
11 real property case and a real property term; this a
12 criminal statute. So it says purported transfer.

13 As I understand your argument, it would
14 leave nothing but a transfer, because you're saying
15 obtain title in a voidable case, title is good if
16 it's sold to a third party, which is the, I think,
17 the gist of those cases.

18 So purported transfer has a meaning in the
19 criminal larceny statute. And if this isn't a
20 purported transfer, then I don't know what would be.

21 MR. O'NEILL: Well, Your Honor, I - - - I
22 would respectfully disagree. There's no - - -

23 JUDGE GARCIA: And - - - in a second follow
24 - - - when you're answering this, was this void
25 versus voidable issue raised below in the trial

1 court?

2 MR. O'NEILL: Absolutely, it was, Your
3 Honor. This was preserved completely in three or
4 four places, and in fact, the People brought over an
5 appeals assistant to argue it. It was ruled upon, it
6 - - - it's clearly preserved on this question.

7 As to why this is not a purported transfer,
8 there is absolutely no evidence support in the
9 criminal law, and by the way, this court's job is to
10 harmonize the law across the state, and where else
11 would we look but to Real Property Law when a deed is
12 in question or a forgery is in question.

13 JUDGE GARCIA: But the Real Property Law
14 has nothing to do with the purported transfer under
15 the criminal statute. It means something.

16 MR. O'NEILL: Right.

17 JUDGE GARCIA: There's no indication
18 anywhere that it means void versus voidable deed
19 under the Real Property Law. So it has to mean
20 something other than obtain title, which seems to be
21 the gist of your argument.

22 MR. O'NEILL: If - - - if it means what
23 you're suggesting, Your Honor, then you can file any
24 paper and obtain anything, as this court said in
25 Dorothy v. Martin (ph.) - - -

1 JUDGE GARCIA: Which I think is also a real
2 property case, but - - -

3 MR. O'NEILL: It is, but it has criminal
4 elements to it.

5 JUDGE GARCIA: I - - - I don't - - - I
6 don't understand that argument either, because here,
7 it wasn't as if he walked in and said, I own the
8 world - - - the Empire State Building, he paid - - -
9 he had property tax records, he had produced all
10 these other records, he filed this quitclaim deed,
11 which shows up in the real property system, he's the
12 purported owner in that real property system, if you
13 go and log on, so I don't really see the analogy to,
14 I walk in and I just say, I own the Empire State
15 Building.

16 MR. O'NEILL: Well, that's what he did. He
17 said I own this building, and it applies to - - -

18 JUDGE GARCIA: Well, he filed a quitclaim
19 deed - - -

20 MR. O'NEILL: He did. I - - -

21 JUDGE GARCIA: - - - that then shows up in
22 the official system saying he's at least partly
23 record owner.

24 MR. O'NEILL: Which would happen with any
25 property that anyone tried to claim - - -

1 JUDGE STEIN: And there's - - - there's
2 testimony that - - - that the actual owner would - -
3 - would have to go through a - - - a - - - you know,
4 a legal proceeding to get that deed off the records.

5 MR. O'NEILL: A civil proceeding, again,
6 not a criminal - - - to Judge Garcia's point, not a
7 criminal proceeding at all. Again, you can't bring a
8 full weight - - -

9 JUDGE STEIN: But - - - but it still goes -
10 - - but the point is, and you say this is not a
11 voidable deed, but it's a deed that is on record in
12 the County Clerk's office, and - - - and if someone,
13 you know, wanted to rely on that deed, they could,
14 unless the owners went and said, wait a minute, this
15 is a mistake, would do have to do, and they would
16 have to get it undone. Why isn't that - - -

17 MR. O'NEILL: That's an enormous - - -

18 JUDGE STEIN: - - - was isn't that the same
19 thing as being voidable?

20 MR. O'NEILL: Because it's an enormous leap
21 from doing that to taking possession, or control, or
22 title to a building.

23 JUDGE STEIN: Yeah, but - - -

24 JUDGE GARCIA: But that's obtaining title.

25 MR. O'NEILL: - - - the statute has two

1 things. It says - - -

2 MR. O'NEILL: It's not in obtaining title.

3 JUDGE STEIN: - - - obtaining title or
4 purported transfer. So - - -

5 MR. O'NEILL: It's - - - it's a nullity, as
6 Justice Rivera pointed out, it's a nullity; it
7 doesn't exist. A forged or - - - a deed akin to a
8 forgery under Faison v. Lewis, 2013, in this court,
9 it doesn't exist; it has no legal power.

10 JUDGE GARCIA: It - - - it doesn't have an
11 effective transferring legal title as a - - - the
12 other type of voidable deed would have if a third
13 party buys it. But it is not a nullity. And I
14 think, as Judge Stein was pointing out, because it
15 has real effects. It has real effects - - -

16 MR. O'NEILL: But not criminal law effects,
17 Your Honor, not - - -

18 JUDGE GARCIA: - - - on the property owner.
19 Under property law.

20 MR. O'NEILL: But you said you shouldn't
21 rely on property law.

22 JUDGE GARCIA: But on the ownership
23 interest of these condominium - - - on the condo
24 owners, they - - - they have a cloud on their title,
25 they can't mortgage, they can't sell without leaving

1 that cloud, and they have to go through a civil
2 proceeding to do that.

3 So that, it seems is the problem we're
4 having with your definition of purported title, as
5 just a solely, a real property term that goes to
6 whether or not an innocent third party purchaser
7 actually obtains title.

8 MR. O'NEILL: Let's look then at the
9 history of purported transfer, where it comes from,
10 the Model Penal Code. In 1954, in May, in the draft
11 of the Model Penal Code, the word was not there. It
12 continued to not be there in 1955, in May. It
13 appears in May 1962, in the draft, and the commentary
14 is, this is a minor verbal change, the addition of
15 "purported".

16 It - - - it's - - - there's no way that the
17 - - -

18 JUDGE STEIN: But it has to have some
19 meaning.

20 MR. O'NEILL: Certainly. It means that
21 this is - - -

22 JUDGE STEIN: Okay.

23 MR. O'NEILL: - - - a voidable deed. A
24 voidable deed is a purported deed. I have
25 transferred, through trickery, my property to you,

1 it's an actual transfer under Termotto, this case's
2 decision, 1993, and it can be undone. A - - - a - -
3 -

4 JUDGE STEIN: Where does it say that?

5 MR. O'NEILL: Termotto stands for the
6 proposition that you must transfer either title or
7 procession to steal - - -

8 JUDGE STEIN: I know. I understand.

9 MR. O'NEILL: - - - real property.

10 JUDGE STEIN: Were - - - where does the
11 Penal Law say that the intention was only to prevent
12 this - - - obtaining a title by trickery?

13 MR. O'NEILL: The Penal Law is silenced on
14 the definition of purported. Which is why the rule
15 of lenity is so important here. People v. Golb.
16 When there is confusion about what something means,
17 the tie goes to the defendant, not the People.

18 Now our - - - our definition - - - our
19 suggestion is more plausible than the People's; they
20 have no support for their definition.

21 JUDGE GARCIA: Counsel, I'm sorry. Your
22 light is on there on the warning light, but could you
23 address the reliance issue on the false pretenses?

24 MR. O'NEILL: Absolutely. It's Black
25 Letter Law that to steal property under a theory of

1 false pretenses, the owner of the property must rely
2 on the false pretenses, not some third party, not the
3 registry, not the - - - anyone else, it's the owner.

4 JUDGE GARCIA: Um-hum.

5 MR. O'NEILL: And here, so many things
6 happened where the People proved the opposite, that
7 no one was relying on this. No one believed that Mr.
8 Maldonado owned the building. Any time anything he
9 did, the water bill, the stop work order, the mail
10 delivery, it changed it back - - -

11 JUDGE FAHEY: Didn't they find answers,
12 HFDC - - - HDFC, and what was the other one, MDC,
13 didn't they rely on it?

14 MR. O'NEILL: They're not the owner of the
15 building.

16 JUDGE FAHEY: Yeah, that's true.

17 MR. O'NEILL: They're not the owner.

18 JUDGE FAHEY: Yeah. Yeah.

19 MR. O'NEILL: It's reliant - - - it's Black
20 Letter Law. The owner must rely on the property.
21 Chaitin, Termotto - - -

22 JUDGE GARCIA: That would be ineffective
23 claim here.

24 MR. O'NEILL: That's as ineffective - - -
25 it's an element of the crime, it wasn't some

1 appellate lawyer trying to find - - - the defense
2 lawyer himself said, oh my god, I made a mistake,
3 please call me ineffective, I missed an element of
4 the crime. That's settled black law in this court,
5 and the court wouldn't allow him to be removed.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.
7 Counsel.

8 MR. NEUBORT: May it please the court. My
9 name is Solomon Neubort, I represent the People.
10 Good afternoon.

11 This was a purported transfer.

12 JUDGE GARCIA: Counsel, I don't mean to
13 stop you, but just to follow up, while we have this
14 topic on the table, on the reliance issue. It seems
15 clear to me there is no reliance by the owner here.

16 MR. NEUBORT: Well, Your Honor, I - - - I
17 would just point out that it's true that the label
18 that the prosecutor gave to this theory was larceny
19 by false pretenses, but in fact, as articulated, it
20 never was the common law case of larceny by false
21 pretenses - - -

22 JUDGE GARCIA: Counsel, there's two
23 problems with that, to me. One is, I think under our
24 case law, you have to choose a theory; you can't just
25 charge Section 1 of the Statute. And two, you chose

1 this one, not only as a theory in the courtroom, but
2 as charged to the jury.

3 MR. NEUBORT: Actually, as charged to the
4 jury, there was never any statement about reliance.
5 The court says to the jury, to find the defendant
6 guilty, you must find - - - the court speaks about -
7 - - about the elements of larceny by false pretenses,
8 but then says, in order to find the defendant guilty,
9 here's what you got to do, and doesn't speak at all
10 about - - -

11 JUDGE GARCIA: I - - - I saw that. But
12 then, there's a note - - - first, he says - - - he
13 gives that instruction, and he includes reliance.
14 Then, he says you have find these elements. But
15 then, a note comes out. And in response to that
16 note, he sends back in as the elements, the reliance
17 issue.

18 MR. NEUBORT: Again, he speaks about the
19 elements of reliance, but then says, in order to find
20 the defendant guilty, and again, reiterates, here is
21 what you have to find, and then again omits reliance.

22 So for the jury, what they had to find was,
23 the court says, here's the sum, and here's what you
24 have to find, and says that there's no rely - - - in
25 fact, defense counsel is saying there was ineffective

1 assistance of counsel for failing to preserve this
2 issue, but now he - - - he seemed to be suggesting
3 that, in fact, reliance was there, but it wasn't.

4 And in fact, if you look at page - - -

5 JUDGE FAHEY: Well - - -

6 MR. NEUBORT: - - - 650 - - -

7 JUDGE FAHEY: - - - can I just - - - slow
8 down. Can I - - - so your argument is, is that we
9 have to rely on the actual charge, not - - - not the
10 charge that should have been given.

11 MR. NEUBORT: Correct.

12 JUDGE FAHEY: Right. And that we're
13 limited to that actual charge - - -

14 MR. NEUBORT: Cor - - -

15 JUDGE FAHEY: - - - and as a result of
16 that, we can't get into the reliance issue. Isn't
17 that the core of your argument?

18 MR. NEUBORT: Correct. If you look at page
19 40 of my brief, you'll see a - - - a quotation of the
20 actual charge as given.

21 Plus, I would just point out, had defense
22 counsel - - -

23 JUDGE ABDUS-SALAAM: I'm sorry, counsel,
24 before you leave this issue, you're saying the court
25 gave the charge under the CJII?

1 MR. NEUBORT: The court ultimately said,
2 here's what you have to find in order to find the
3 defendant guilty.

4 JUDGE ABDUS-SALAAM: No, they - - -

5 MR. NEUBORT: After giving the elements of
6 the crime under the CJI, then says, okay, so bottom
7 line - - -

8 JUDGE ABDUS-SALAAM: It skipped over allia
9 - - - reliance.

10 MR. NEUBORT: Skips over reliance and says,
11 here's what you got to find. You got to find that
12 the defendant went into the county clerk, filed
13 fraudulently - - - wrongfully filed a deed, and that
14 he intended, thereby, to deprive the owners of their
15 ownership, and that the value of the property was one
16 million dollars.

17 JUDGE STEIN: So if - - -

18 MR. NEUBORT: That's what the sum - - -

19 JUDGE STEIN: So was it ineffective for
20 counsel?

21 MR. NEUBORT: No, and here's why. Because
22 the label, larceny by false pretenses, was never
23 discussed as - - - as the elements of the crime; it
24 was relating to a different conversation.

25 The court - - - the defendant was trying to

1 obtain a charge on claim of right, and - - - on the
2 affirmative defense of claim of right, and so the
3 question became, are you - - - the prosecution, the
4 court wanted to know, are you arguing that this was a
5 classic case of larceny of dispossessing the owner of
6 the physical possession, are you saying that anyone
7 was thrown out of their apartment, are you saying
8 this was a title type of claim?

9 And so the prosecutor said, yes, it's a
10 larceny by false pretenses, but not talking about the
11 elements. When asked, what is your theory of the
12 case, what was larceny; if you look at page 655,
13 A655, here's what the prosecutor says. "Walking into
14 a clerk's office, a government office, and filing a
15 deed in which you assert an ownership interest to the
16 exclusion of the rightful owner, that is the
17 completed larceny, Your Honor."

18 So while they were talking about larceny by
19 false pretenses, that was just to distinguish the
20 case from a classical case of taking.

21 Had the defendant objected and said, look,
22 Your Honor, there is no reliance in this case, I move
23 to dismiss, the prosecutor might very well have
24 responded by saying, we called it larceny by false
25 pretenses; it's really larceny by purported taking.

1 There is no - - - you're not going to find in books -
2 - -

3 JUDGE FAHEY: When was this - - -

4 MR. NEUBORT: - - - the name larceny by
5 purported taking.

6 JUDGE FAHEY: When - - - was this issue
7 first raised in the 3 - - - in the 330.30 motion,
8 post-trial?

9 MR. NEUBORT: The defendant - - - yes, the
10 reliance issue was first raised in the 330.30 motion.

11 JUDGE FAHEY: So it wasn't - - -

12 MR. NEUBORT: Had he raised it at trial - -
13 -

14 JUDGE FAHEY: Slow down. So it wasn't
15 preserved - - -

16 MR. NEUBORT: Yes.

17 JUDGE FAHEY: - - - that's your first
18 argument. And your second argument is that the
19 actual - - - that the verdict has to conform to the
20 actual charge, not the model charge.

21 MR. NEUBORT: Correct. And as far as
22 ineffective assistance of counsel, had he objected in
23 a timely manner, the prosecutor, presumably, would
24 have said, my theory, again, is that this is larceny
25 by purported taking throughout the trial, kept as

1 articulating the theory of larceny - - -

2 JUDGE FAHEY: Well let me ask you this. If
3 he had - - - if he had objected, what the court have
4 to modify its instruction and include the reliance
5 element in the charge?

6 MR. NEUBORT: No, because, again, the
7 People's theory, as articulated, really wasn't
8 larceny by false pretenses, it was larceny by
9 purported taking.

10 JUDGE FAHEY: Um-hum.

11 MR. NEUBORT: And so you don't have to have
12 any reliance, because it wasn't larceny by false
13 pretenses. But they called that - - -

14 JUDGE GARCIA: But that - - -

15 MR. NEUBORT: - - - they gave it a label -
16 - -

17 JUDGE GARCIA: I'm sorry, counsel - - -

18 MR. NEUBORT: - - - a generic label.

19 JUDGE GARCIA: That larceny by purported
20 taking is Section 1 of the larceny definition.

21 MR. NEUBORT: Correct.

22 JUDGE GARCIA: But isn't it our case law
23 that you can't - - - you can charge that in the
24 indictment for pleading purposes - - -

25 MR. NEUBORT: Correct.

1 JUDGE GARCIA: But in order to convict for
2 larceny, you have to have one of the theories
3 enunciated - - - articulated in the second section of
4 the Statute.

5 MR. NEUBORT: No. It could - - - it could
6 be a - - - enunciated in the first subsection. The
7 defendant was charged in the indictment only with
8 larceny without a subsection.

9 JUDGE GARCIA: Which is sufficient for
10 pleading purposes.

11 MR. NEUBORT: Correct.

12 JUDGE GARCIA: But not for conviction, as I
13 read our case law.

14 MR. NEUBORT: Correct. But as articulated,
15 the prosecutor, throughout trial, articulated the
16 theory, putting aside the label, said, again, and I
17 read it to you, when asked what is your theory, the
18 prosecutor says, on page 655, and this is throughout
19 the trial. "Walking into a clerk's office, a
20 government office, and filing a deed in which you
21 assert an ownership interest to the exclusion of the
22 rightful owner, that is the completed larceny, Your
23 Honor."

24 JUDGE STEIN: So which - - - which
25 provision under subdivision (2) does that fall into?

1 MR. NEUBORT: No, subdivision (1).

2 JUDGE GARCIA: But you can't convict on
3 subdivision (1).

4 MR. NEUBORT: You could convict under - - -
5 I'm sorry, Your Honor. You can convict either under
6 subdivision (1) or subdivision (2). The - - - there
7 is - - - subdivision (2) only codifies some of the
8 odder types of the common law forms of larceny, like
9 larceny by trick, larceny by false promise, larceny
10 by false pretenses.

11 But common, - - - but the regular form of
12 larceny, larceny of going over to somebody and
13 stealing their wallet, taking their car, taking their
14 bicycle, that is a subdivision (1) case. And
15 essentially, as articulated by the People, throughout
16 the trial, putting aside the label, it was always
17 that this was a purported - - - this was larceny by
18 purported transfer.

19 They gave it the wrong name, larceny by
20 false pretenses, but no one was misled by it because
21 the prosecutor, throughout the trial, kept saying
22 what it was, and had the - - - but for ineffective
23 assistance of - - - ineffective assistance purposes,
24 had the defendant objected at trial, the People would
25 have said, our theory is larceny by purported

1 transfer, not larceny by false pretenses, and so he
2 would have gained nothing by this.

3 JUDGE RIVERA: So at trial, the prosecutor
4 never said the theory was larceny by false pretenses.

5 MR. NEUBORT: Not the - - -

6 JUDGE RIVERA: We will not find that
7 anywhere in the transcript.

8 MR. NEUBORT: No, no. He says that the - -
9 - they were talking about whether the defendant was
10 entitled to a charge of - - - on the affirmative
11 defense of claim of right, and so they said, are you
12 talking about the classic case of dispossession, or
13 are talking about transfer of title, he said no, as
14 you say, it's larceny by false pretenses.

15 But when actually articulating what the
16 theory is, not the name, he kept saying throughout,
17 and then appeals assistant came in, kept saying
18 throughout, this is larceny that's about a purported
19 transfer.

20 So if, for ineffective - - - so the claim,
21 the legal sufficiency claim is unreserved. For
22 ineffective assistance of counsel purposes, had the
23 defendant objected and said, where's the reliance,
24 then we would have clarified and said, no, no, we
25 called it larceny by false pretenses, in fact, no one

1 was misled, it's really larceny by purported
2 transfer.

3 JUDGE RIVERA: Okay. So just to clarify.
4 I'll try it again. There's nowhere in this
5 transcript, you're in the trial, that the prosecutor
6 said it's larceny by false pretenses. Nowhere to be
7 found.

8 MR. NEUBORT: No, it is to be found. The
9 prosecute - - - the court says, I think this is
10 larceny by false pretenses. The prosecutor says,
11 yes, but it was in the context of an affirmative
12 offense, whether that affirmative defense of - - - of
13 claim of right should be.

14 But when asked, can you articulate how this
15 larceny occurred, so again, for the final time, the
16 prosecutor says - - -

17 JUDGE RIVERA: Isn't that about the
18 unfolding of the events, as opposed to your theory?

19 MR. NEUBORT: I'm sorry?

20 JUDGE RIVERA: Isn't that response, how did
21 this occur, this is the events that constitute the
22 larceny by false pretenses?

23 MR. NEUBORT: No, Your Honor.

24 JUDGE RIVERA: Isn't that what that
25 response means?

1 MR. NEUBORT: No, I don't think so, Your
2 Honor. I think it was just - - - but - - - but
3 again, this is a - - - an unpreserved claim, so it's
4 only about ineffective assistance of counsel.

5 JUDGE RIVERA: No, we're talking about the
6 ineffective assistance of counsel.

7 MR. NEUBORT: So there's no - - - there's
8 nothing preventing the - - - the People, during
9 trial, to say, look, as it's unfolding, we've
10 misspoke and we called it larceny by false pretenses,
11 and no one was misled by it - - -

12 JUDGE RIVERA: Is it not theory of the case
13 - - -

14 MR. NEUBORT: I'm sorry?

15 JUDGE RIVERA: - - - midtrial? You can
16 change your theory of the case midtrial?

17 MR. NEUBORT: Well, it's not changing the
18 theory of how it occurred; they're just changing the
19 name of the crime from larceny by false pretenses to
20 larceny by purported transfer. They're not changing
21 - - - they're not saying the defendant did something
22 other than what they were always alleging in the
23 opening statement, then on summation, nobody ever
24 spoke about larceny by false pretenses, no one - - -
25 the words, larceny by false pretenses, were never

1 uttered in the opening statement - - -

2 CHIEF JUDGE DIFIORE: Counsel.

3 MR. NEUBORT: - - - or in the closing
4 statement by either party.

5 CHIEF JUDGE DIFIORE: Can you take an extra
6 moment and speak to the forgery issue?

7 MR. NEUBORT: Yes, Your Honor. The - - -
8 the claim of a forged instrument is unreserved for
9 appellate review, and this court, in Cunningham, in a
10 footnote, left open the question of whether or not
11 someone who has no relationship whatsoever with a
12 corporation, who signs his her own - - - her own name
13 to a corporate check, could be found guilty of having
14 forged the document. And I think that the answer is,
15 yes, if you reach this question, but it's
16 unreserved.

17 The answer is yes because, unlike
18 representing another person, a corporation can only
19 be represented by an agent. So it's the agent who
20 now personifies the corporation, takes on the
21 personality of the corporation, and so even if you
22 sign your own name, it's a signature that's
23 extensively the signature of the corporation.

24 Because the corporation can't sign its
25 name. It can - - - you can't find a signature

1 saying, HDFC; the signature would have to say
2 somebody's name. So you wouldn't be able to forge a
3 corporate signature at all.

4 JUDGE ABDUS-SALAAM: If the name is yours
5 on both sides of the ledger, as the grantor and the
6 grantee, I don't - - - I don't - - -

7 MR. NEUBORT: I'm sorry, Your Honor. If
8 you look - - - are you talking about for the forgery
9 or for the deed?

10 JUDGE ABDUS-SALAAM: The forgery, yes.

11 MR. NEUBORT: No. If you look at the - - -
12 if you look at respondent's appendix page R818,
13 you'll see, there's the signature on the bottom of
14 the deed, purporting to transfer from the first party
15 to the second party, the property, it says, Fernando
16 Maldonado, owner. Then on page 821, where it has the
17 transfer report, again, the HDFC can't sign its name,
18 so the defendant is signing as the owner, and the
19 owner goes, it's clear - - - sorry, wrong page, has -
20 - - it's the owner is going for both - - - when you
21 read the whole document - - -

22 JUDGE GARCIA: And it seems there was some
23 confusion here over what the deed is. And the deed,
24 I think, as you point out, is R818, which is the
25 actual - - -

1 MR. NEUBORT: Correct.

2 JUDGE GARCIA: - - - quitclaim deed, which
3 is signed by the defendant on behalf of the company,
4 as opposed to that report, which I think is in the
5 supplement - - - the appellant's appendix, which is
6 only the report of the transfer, right?

7 MR. NEUBORT: Correct - - - so I think when
8 you - - - when it says there, in witness thereof,
9 it's never signed by the purchasee - - - the
10 purchaser, because the purchaser is never going to be
11 the one who is going to be able to be the witness;
12 the seller is the one who might witness it.

13 JUDGE GARCIA: The quitclaim deed is an
14 actual transfer from HDFC to both as co - - - fifty
15 percent owners.

16 MR. NEUBORT: Correct.

17 JUDGE GARCIA: Both the individual - - -

18 MR. NEUBORT: As joint owners.

19 JUDGE GARCIA: - - - and defendant, joint
20 owners, owners in common, whatever, and - - - and the
21 company - - -

22 MR. NEUBORT: Correct.

23 JUDGE GARCIA: - - - and the corporation.

24 MR. NEUBORT: An ostensibly stating that
25 Fernando Maldonado owns sufficient shares in HDFC to

1 transfer from the corporate - - - from his corporate
2 ownership to his personal ownership.

3 CHIEF JUDGE DIFIORE: Thank you Mr.
4 Neubort.

5 MR. NEUBORT: Thank you.

6 CHIEF JUDGE DIFIORE: Mr. O'Neill.

7 JUDGE GARCIA: Counsel, could you address
8 this issue on is it sufficient for conviction, merely
9 to charge purported transfer, under Section 1 of the
10 Statute?

11 MR. O'NEILL: There is no case in this
12 court where a - - - a - - - you can charge it, but
13 you can't convict upon it.

14 And I - - - I - - - the prosecution has
15 tried to do prosecution by ambush here, Your Honors.
16 And I - - - I must say, the People overcharged this
17 case, considerably. They should have charged
18 offering a false instrument for filing. Now, they're
19 scrambling to find a theory that works. They're - -
20 - they're actually misstating the record, and I have
21 to correct it.

22 Page A810, and I quote, this is the court
23 charging the jury.

24 "A person wrongfully obtains property from
25 another - - - from an owner, when that person makes a

1 false representation of past or existing fact, while
2 aware that the representation is false, and obtains
3 possession and title to the property, as a result of
4 the owner's reliance on such representation."

5 JUDGE GARCIA: Right.

6 MR. O'NEILL: That's the first one.

7 JUDGE GARCIA: And that's when the note
8 comes out and he recharges them, essentially.

9 MR. O'NEILL: And he simply reads obtains -
10 - -

11 JUDGE GARCIA: Right.

12 MR. O'NEILL: - - - purported transfer,
13 which no one in the courtroom understood.

14 JUDGE GARCIA: And that's 810.

15 MR. O'NEILL: It was unclear. That's
16 correct.

17 JUDGE GARCIA: Right.

18 MR. O'NEILL: But - - - but to the
19 questions about the - - - your question, Your Honor,
20 about the theory, the People said numerous times,
21 671, 784, 785, our exclusive theory here is reliance
22 by - - - by false pretenses. To back away from that
23 is prosecution by ambush; it's unfair, is unbecoming,
24 it's inappropriate. There was reliance here.

25 JUDGE GARCIA: I think their argument,

1 though, is not that we want to back away from it now,
2 but we would have backed away from it is then.

3 Right.

4 So if you would have made this argument in
5 the trial court, we could have switched gears then,
6 because we weren't locked into that, in terms of
7 that's a jury charge, but it really doesn't affect
8 how we we've been presenting the case. Because I
9 understand their argument, what they would have used
10 as only Section 1, purported transfer.

11 MR. O'NEILL: There's absolutely no theory
12 that the People could work on for these facts. Only
13 false pretenses would work. So there's nowhere to
14 back away to.

15 JUDGE STEIN: Is that because of your
16 position that a purported transfer doesn't apply
17 here?

18 MR. O'NEILL: No, Your Honor, because
19 there's no reliance by the owner of the property,
20 which is settled Black Letter Law.

21 JUDGE STEIN: No, but if you - - - if you -
22 - - if you could convict under subdivision (1) alone,
23 then you don't need reliance.

24 MR. O'NEILL: No, it's still a theory of
25 false pretenses. So the owner would - - - how did

1 you get the prop - - - how did you obtain the
2 property when it's a building? You had to have the
3 owner rely upon the false pretenses.

4 JUDGE STEIN: Well - - - well, your - - -
5 your adversary - - - the People are saying that it
6 doesn't have to be false pretenses; it's enough,
7 under subdivision (1), if there was a purported
8 transfer, by whatever means.

9 We - - - we'd have to then revisit that,
10 because a purported transfer means, I sign, in
11 crayon, a deed from myself to myself, for someone's
12 property, and file it, and I've stolen - - - I've
13 then completed grand larceny, and that just cannot
14 be, for - - - for all the reasons we talked about in
15 the - - - in the earlier session.

16 Thank you, Your Honors.

17 CHIEF JUDGE DIFIORE: Thank you.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Fernando Maldonado, No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: January 17, 2017