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

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APPELLATE DIVISION, SUPREME COURT, FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DOMINIC FRANZA,

Defendant-Appellant.

AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION

N.Y. Co. Ind. No. 11987/91

Cal. Date: April 17, 1997

CAROL A. REMER-SMITH, an attorney duly admitted to practice before the courts of this state, affirms that:

1. I am an Assistant District Attorney of counsel to ROBERT M. MORGENTHAU, District Attorney of New York County, and I submit this affirmation in response to defendant's pro se motions, seeking an order granting oral argument on the appeal, and various relief regarding exhibits filed in support of a post-conviction motion.

2. On or about March 18, 1997, this Court granted appellate counsel ten minutes of argument time; the pro se motion seeking argument time is thus moot.

3. Defendant's applications regarding his post-conviction exhibits are similarly moot, but for a different reason: this Court has denied repeated pro se motions to enlarge the record to include defendant's self-authenticated documents. For example, while the People took no position with respect to a June 1996 motion, on July 15, 1996, this Court denied it, giving defendant leave to identify the documents at issue (M-3904). And, although acknowledging the propriety of including documents filed with the

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Article 440 motion, in a September 10, 1996 responsive motion, the People did **not** concede that the exhibits defendant sought to include in the record were either authentic or unaltered (pro se Exhibit "C," ¶2). Apparently finding that defendant had not met his burden to authenticate the exhibits, this Court denied the motion on October 17, 1996, as defendant concedes (¶12).[1] On that date it also denied a motion to dismiss the indictment based on allegations of "fraud" in obtaining the conviction(M-5469, M-5358). On December 5, 1996, this Court similarly denied a motion for summary reversal (M-6783, M-6784).

3. To the extent that defendant seeks to enlarge the record to include those exhibits by renewing his August 6, 1996 motion to that effect (¶12; pro se Exhibit "D"), it too should be denied.[2] Defendant has utterly failed properly to authenticate or establish that the exhibits have not been altered; nor do the People make any concessions to that effect in this response. Tellingly, defendant did not include the exhibits he wishes to incorporate, precluding any meaningful response. In any event, a list of documents or exhibits, without more, does not meet movant's affirmative burden (¶¶3-5). Of course, since defendant neither wrote the documents nor took the photographs, he can hardly "authenticate" them. In fact, many of the items listed were apparently marked for

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[1] This and subsequent paragraph cites are to the pro se motion presently before this Court.

[2] Apparently copies of these exhibits were not sent to this Office since defendant assumed that the People had copies because they "came from their office" (¶6).

identification and only used to cross-examine witnesses. As such each item is obviously not a trial exhibit, and this Court should deny the application to include it as part of the appellate record.

4. Moreover, an examination of the list shows that these exhibits would hardly assist this Court to evaluate the legal sufficiency of the trial evidence. As the presiding court indicated in its order denying the post-conviction motion, defendant's claims rest upon a "Byzantine" and "self-serving" analysis of the record. In fact, defendant selectively views the trial record and relies exclusively on a fanciful conspiracy theory, which has no support in the record (cf. ¶8; pro se Exhibit "D"). His use of exhibits to support that theory is similarly flawed. Since the exhibits are not properly authenticated, this Court should summarily deny that motion.

5. Finally, while defendant asserts that the People have somehow "tampered" with his exhibits (¶¶9-11; pro se Exhibit "E"), he has not substantiated that complaint. The mere fact that the People cited a 460.15 motion (183 hand-numbered pages) which had incorporated his 139-page 440 motion hardly supports a "tampering" claim. Indeed, to the extent that a clerk made some claim about the state of the exhibits, he/she may have perceived defendant's yellow highlighting of those exhibits as "tampering (see ¶¶9-10; pro se Exhibit "B," ¶5). Since defendant's application for a protective order is based on a faulty premise, it too should be denied.

WHEREFORE, the People urge this Court summarily to deny the motions for the reasons indicated above.

Dated: New York, New York
April 1, 1997

CAROL A. REMER-SMITH
Assistant District Attorney
Appeals Bureau

cc: Perry Reich, Esq.
325 East Sunrise Highway
Lindenhurst, New York 11757-2501

Dominic M. Franza
92A3659
Comstock Correctional Facility
P.O. Box 51
Comstock, New York 12821

Calendar Date: April 17, 1997

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AFFIRMATION IN OPPOSITION

N.Y. Indictment No. 11987/91
Cal. No. 92-13416

ROBERT M. MORGENTHAU
District Attorney
New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

By: CAROL A. REMER-SMITH
Assistant District Attorney
Appeals Bureau
Of Counsel