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June 26, 1997

Honorable Richard C. Wesley
Judge of the Court of Appeals
501 Hall of Justice
Civic Center Plaza
Rochester, New York 14614

Re: People v. Dominic Franza
N.Y. Indictment Number 11987/91

Your Honor:

This letter is submitted in opposition to defendant's application for leave to appeal to the Court of Appeals. On April 3, 1992, defendant was convicted, after a jury trial, of three counts of Attempted Murder in the Second Degree and one count of Criminal Possession of a Weapon in the First Degree. He was sentenced to three indeterminate prison terms of from eight and one-third to twenty-five years for the attempted murder counts and to an indeterminate prison term of from three to nine years for weapons possession, each term was to run consecutively to the others.

On appeal, defendant argued that the jury's verdict was against the weight of the evidence. Second, he claimed that the hearing court wrongly denied his motion to controvert search warrants. Third, defendant challenged several evidentiary rulings and the way in which the court reached those rulings. Fourth, he contended that the circumstantial evidence charge did not apprise the jury of the proper standard. Fifth, defendant complained that the consecutive sentences imposed were illegal as well as excessive. Finally, pro se, defendant argued that the trial court improperly denied his post-conviction motion.

On May 13, 1997, the Appellate Division, First Department, unanimously affirmed. It found that "circumstantial evidence of guilt, including several highly incriminating items of handwriting evidence, was legally sufficient, and the verdict was not against the weight of the evidence." Slip Op. 60703-70763A at 36. It held that defendant's contention that there was no probable cause for issuance of a search warrant for his apartment was without merit. Id. at 36-37. Also, the court found that the circumstantial evidence charge conveyed the appropriate standards. Nor did it perceive an abuse of discretion in sentencing. Defendant's

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remaining contentions, including those pertaining to the post-conviction motion, were found to be without merit. Id. at 37.

In a pro se leave letter, defendant repeats six claims rejected by the Appellate Division; he emphasizes the CPL 440.10 arguments (Leave Letter at 1-19). Also defendant faults appellate rulings on the legal sufficiency of the evidence, probable cause to search, and the circumstantial evidence charge (id. at 19-30). He argues that the trial and appellate courts incorrectly denied his application to impeach his own witness (id. at 32-33). Finally, defendant raises two unpreserved claims for the first time: (1) the trial court improperly responded to a jury request and (2) he was not present during a "secret pretrial hearing" (id. at 34-39).

First, since the Appellate Division held that the jury's verdict was supported by legally sufficient evidence and was not against the weight of the evidence, defendant's claim in that regard is not a proper issue for review by this Court. People v. Bleakley, 69 N.Y.2d 490 (1987); People v. Patterson, 39 N.Y.2d 288 (1976); People v. Cashin, 259 N.Y. 434 (1932). And, because it cannot be said that the evidence was insufficient as a matter of law, this Court has no power to assess the credibility of witnesses or the weight of the evidence. People v. DeCrescente, 53 N.Y.2d 995, cert. denied, 454 U.S. 857 (1981); People v. Rizzo, 40 N.Y.2d 425 (1976). Indeed, proof of defendant's culpability was overwhelming, excluding every hypothesis but that of guilt (see People's Brief, Point I at 50-64), and defendant concedes that he did not controvert the specifics of the crimes at trial (Leave Letter at 3-4, 12). Notwithstanding his claims to the contrary, defendant was convicted on extremely credible evidence.

Defendant contested the minutiae of each crime for the first time in a pro se post-conviction motion. Totally familiar with the evidence, the trial judge found the allegations of fraud to be "completely unsubstantiated"; the claim of collusion to be "nothing but self-serving, wishful thinking"; the analysis of the record to be "Byzantine"; and specific claims to be "without merit" (Decision of October 19, 1993 at 2-4). The record legally and factually belied defendant's claims; defendant's "proof" offered no material support for them. Thus, the People were not required to refute those factual allegations, and summary denial was proper under CPL Section 440.30(4). See People v. Brown, 56 N.Y.2d 242, 247 n* (1982); cf. Leave Letter at 13-14, 16-18.

In fact, when an allegation of fact essential to support such a motion is made solely by a defendant and is unsupported by any evidence, the trial court may deny the motion without a hearing. CPL §440.30(4)(d)(i). Indeed, mere conclusory allegations alone

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were insufficient here to establish that the People had knowingly elicited false testimony. Defendant utterly failed to produce credible evidence that the complained-of proof was false or that the prosecutor knew it. See People v. Brown, 56 N.Y.2d at 246-47; see also CPL §440.30(4). Not surprisingly, the Appellate Division agreed that the claim was meritless.

Indeed, the power to vacate judgment and grant a new trial rests within the unlimited discretion of the trial court, and this Court has no power to review that exercise, especially when it cannot be said that the trial court abused its discretion. See People v. Baxley, 84 N.Y.2d 208, 212 (1994); People v. Crimmins, 38 N.Y.2d 407, 409, 415 (1975); People v. Friedgood, 58 N.Y.2d 467 (1983). Nor can defendant prevail on the merits. See People's Brief, Point I at 62-64 and Point VI at 94-102. Since defendant deliberately chose not to controvert certain facts at trial, he cannot challenge them after his trial strategy proved unsuccessful. This Court should decline to review this claim.

Third, to the extent that defendant faults the ruling of the trial court, affirmed by the Appellate Division, that there was probable cause to search his apartment, such a determination involves questions of fact or mixed questions of law and fact, ordinarily beyond this Court's powers of review. People v. Burr, 70 N.Y.2d 354, 361 (1987); People v. Hicks, 68 N.Y.2d 234, 238 (1986); People v. Dory, 59 N.Y.2d 121, 127 (1983). Here, the record amply supports a finding of probable cause. People v. Pinchback, 82 N.Y.2d 857, 858 (1993); People v. Bigelow, 66 N.Y.2d 417, 423, 424 n* (1985); see People's Brief, Point II at 64-71; cf. Leave Letter at 25-28. Nor does defendant raise any legal issue which would warrant review by this Court.

Fourth, the trial court correctly ruled that defendant did not meet his statutory burden to impeach his own witness. Defendant actually sought to prove an affirmative fact through that evidence -- an act specifically prohibited by CPL 60.35. See People's Brief, Point III at 82-85; cf. Leave Letter at 32-34. Fifth, the unremarkable charge on circumstantial evidence fully and succinctly conveyed the appropriate standards to the jury. See People v. Sanchez, 61 N.Y.2d 1022, 1024 (1984); see also People's Brief, Point IV at 86-89; cf. Leave Letter at 28-31.

Further, the claims which defendant raises for the first time in his leave application should be rejected. In his letter, defendant concedes that these claims were not preserved at trial (at 36, 39). As such, they are beyond this Court's review powers. People v. Washington, 64 N.Y.2d 961 (1985); People v. Rodriguez, 56 N.Y.2d

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557 (1982). In any event, these claims are based upon a misreading of the record and are without merit.

For example, the allegation that there was a "secret pretrial hearing" which defendant did not attend is based on a incomplete reading of the record (see Leave Letter at 37-39). At the hearing, Detective Giorgio was unable to produce certain notes, which were in another file. A few days later, on the morning of February 13, 1992, Giorgio produced the notes and defense cross-examination resumed in defendant's presence (see 2H110-33). Had defendant been absent, the hearing would not have proceeded; nor did counsel ever complain that defendant was not present. In fact, immediately after this testimony, voir dire commenced in defendant's presence (see 2H138). It is not dispositive that this conclusion of the hearing is not reflected in the court work sheet, since the transcript accurately reflects these events. Defendant's right to be present at a material stage of his trial was not abridged.

Finally, defendant's claim respecting a response to a jury note also misapprehends the record. During evening deliberations, the jury had asked to hear Detective Breslin's testimony comparing handwriting on the note on the flower box with "exemplars provided by defendant to Detective Giorgio." Given the need to isolate the testimony in question, the jury was advised that it would hear the testimony in the morning. The court answered other notes before sequestering the jury (1967-74). The next morning, the foreperson interrupted the court reporter's reading to ask that Exhibit 62, used by the expert to demonstrate his opinion, be displayed. He also asked that the reporter start at the beginning of the required testimony; both requests were honored (1991-93). At the conclusion of the reading, the foreperson said that the jury wanted to resume its deliberations and needed no further testimony (1993).

Defendant now asserts that the jury wanted testimony relating to a file taken from his apartment (Leave Letter at 34-39). This claim is utterly belied by the words of the request and the foreperson's remarks (1967-70). Not surprisingly, at trial no one construed the note in such a tortuous fashion. And, the care taken by the court to be responsive is reflected in its suggestion that the jury send out exhibits which had prompted the note (1970-71; see 1990). The jury was obviously satisfied with the response; nor did defense counsel object to this procedure. This specious claim should be rejected.

In sum, the Appellate Division correctly applied settled law to the facts of this case when considering defendant's various claims. Defendant has neither presented an issue which merits consideration by this Court nor established a need for a telephone conference.

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Based on the appellate decision, as well as for the reasons indicated above and in their responsive brief, the People respectfully request that this Court deny leave to appeal to the Court of Appeals.

Respectfully submitted,

S/Car-s
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