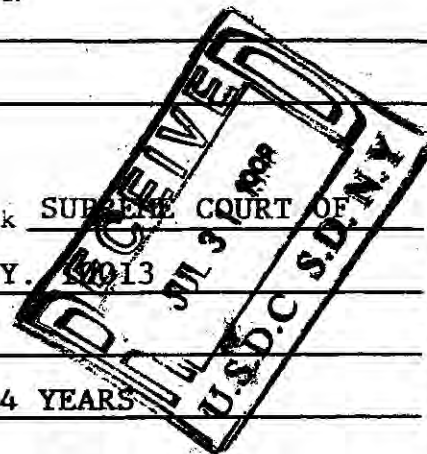


Ex. 4

United States District Court		District SOUTHERN DISTRICT OF NEW YORK
Name DOMINIC M. FRANZA	Prisoner No. 92A3659	Case No.
Place of Confinement GREAT MEADOWS CORRECTIONAL FACILITY COMSTOCK, N.Y.		
Name of Petitioner (include name under which convicted) DOMINIC M. FRANZA		Name of Respondent (authorized person having custody of petitioner) V. SUPERINTENDENT JAMES STINSON
The Attorney General of the State of: DENNIS C. VACCO		
PETITION		
1. Name and location of court which entered the judgment of conviction under attack <u>SUPREME COURT OF NEW YORK COUNTY, 111 CENTRE STREET, NEW YORK, N.Y.</u>		
2. Date of judgment of conviction <u>APRIL 8, 1992</u>		
3. Length of sentence <u>MINIMUM OF 28 YEARS AND A MAXIMUM OF 84 YEARS</u>		
4. Nature of offense involved (all counts) <u>THREE COUNTS OF ATTEMPTED MURDER IN THE SECOND DEGREE [NEW YORK PENAL LAW §§110/125.25 (1)], ONE COUNT OF CRIMINAL POSSESSION OF A DANGEROUS WEAPON IN THE FIRST DEGREE, [NEW YORK PENAL LAW §265.04].</u>		
5. What was your plea? (Check one) (a) Not guilty ☒ (b) Guilty ☐ (c) Nolo contendere ☐ If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: 		
6. If you pleaded not guilty, what kind of trial did you have? (Check one) (a) Jury ☒ (b) Judge only ☐		
7. Did you testify at the trial? Yes ☐ No ☒		
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐		



United States District Court		District SOUTHERN DISTRICT OF NEW YORK
Name DOMINIC M. FRANZA	Prisoner No. 92A3659	Case No.
Place of Confinement GREAT MEADOWS CORRECTIONAL FACILITY COMSTOCK, N.Y.		Doc #1
Name of Petitioner (include name under which convicted) DOMINIC M. FRANZA		Name of Respondent (authorized person having custody of petitioner) V. SUPERINTENDENT JAMES STINSON

The Attorney General of the State of: **DENNIS C. VACCO**

PETITION

1. Name and location of court which entered the judgment of conviction under attack **SUPREME COURT OF
NEW YORK COUNTY, 111 CENTRE STREET, NEW YORK, N.Y. 10013**
2. Date of judgment of conviction **APRIL 8, 1992**
3. Length of sentence **MINIMUM OF 28 YEARS AND A MAXIMUM OF 84 YEARS**
4. Nature of offense involved (all counts) **THREE COUNTS OF ATTEMPTED MURDER IN THE
SECOND DEGREE [NEW YORK PENAL LAW §§110/125.25 (1)], ONE COUNT OF
CRIMINAL POSSESSION OF A DANGEROUS WEAPON IN THE FIRST DEGREE,
[NEW YORK PENAL LAW §265.04].**

5. What was your plea? (Check one)

(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

- (a) Name of court APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT
- (b) Result LOWER COURT JUDGMENT AFFIRMED AND DENIAL OF CPL §440.10 MOTION
- (c) Date of result and citation, if known MAY 13, 1997, A.D.2d, 658 N.Y.S.2d 4
- (d) Grounds raised INSUFFICIENCY OF EVIDENCE AND WEIGHT; INSUFFICIENCY OF PROBABLE CAUSE FOR SEARCH WARRANT; ERRONEOUS EVIDENTIARY RULINGS; FLAWED CIRCUMSTANTIAL EVIDENCE CHARGE; IMPROPER DENIAL OF CPL §440.10 MOTION

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

- (1) Name of court NEW YORK COURT OF APPEALS
- (2) Result LEAVE TO APPEAL APPLICATION DENIED

(3) Date of result and citation, if known AUGUST 25, 1997, 90 N.Y.2d 904

(4) Grounds raised IMPROPER DENIAL OF CPL §440.10; INSUFFICIENCY OF EVIDENCE AND WEIGHT; INSUFFICIENCY OF PROBABLE CAUSE FOR SEARCH WARRANT; FLAWED CIRCUMSTANTIAL EVIDENCE CHARGE; IMPROPER EVIDENTIARY RULINGS; IMPROPER RESPONSE TO JURY REQUEST; HEARING HELD WITHOUT DEFENDANT IMPROPER

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court NO PETITIONS MADE

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court SUPREME COURT OF NEW YORK COUNTY
- (2) Nature of proceeding CPL §440.10 POST CONVICTION MOTION; IT SHOULD BE NOTED THE DENIAL OF THIS MOTION WAS CONSOLIDATED WITH DIRECT APPEAL
- (3) Grounds raised COURT LACKING JURISDICTION OF ACTION; JUDGMENT PROCURED BY FRAUD ON THE PART OF PROSECUTOR, PERSONS ACTING FOR, IN BEHALF OF PROSECUTOR; MATERIAL EVIDENCE ADDUCED AT TRIAL RESULTING IN THE

JUDGMENT WAS FALSE AND WAS, PRIOR TO THE ENTRY OF JUDGMENT, KNOWN BY THE PROSECUTOR TO BE FALSE; MATERIAL EVIDENCE ADDUCED BY THE PEOPLE AT TRIAL RESULTING IN THE JUDGMENT WAS PROCURED IN VIOLATION OF CONSTITUTION; BRADY AND ROSARIO VIOLATIONS; INEFFECTIVE ASSISTANCE OF COUNSEL

- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result TRIAL COURT DENIED MOTION

(6) Date of result OCTOBER 19, 1993

(b) As to any second petition, application or motion give the same information:

(1) Name of court APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

(2) Nature of proceeding WRIT OF ERROR, CORAM NOBIS APPLICATION

(3) Grounds raised RECEIVING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒ **NO HEARING WARRANTED IN THIS PROCEEDING**

(5) Result DENIED IN ENTIRETY

(6) Date of result JUNE 11, 1998

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☒

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

WRIT OF ERROR, CORAM NOBIS APPLICATIONS ARE NOT APPEALABLE TO THE COURT OF APPEALS. IT SHOULD BE NOTED THERE WERE THREE STATE WRIT OF HABEAS CORPUS APPLICATIONS MADE. THE SUBSTANCES AND DISPOSITIONS APPEAR AT PAGE 8 ATTACHED HERETO, DUE TO THE LACK OF SPACE IN THIS PETITION.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (h) Denial of right of appeal.

- A. Ground one: Trial Court's denial of petitioner's CPL §440.10 post conviction motion constituted a denial of due process of law and equal protection of the law.

Supporting FACTS (state *briefly* without citing cases or law) _____

DUNAWAY HEARING

Det. Giorgio. claimed, other than his visual observation of petitioner's writing to the threatening letters Mrs. Mendez received, which he felt matched, the only forensic evidence existing being the handwriting comparisons of the exemplars given by petitioner (Continued on page 10, attached hereto).

- B. Ground two: Denial of Effective Assistance of Appellate Counsel.

Supporting FACTS (state *briefly* without citing cases or law) _____

Within the Writ of Error Coram Nobis application, petitioner used an appendix numbered method for the exhibits. Petitioner has for this Court's guidance set forth in papers hereto attached and marked "*" in the box, Petitioner has broken down what each appendix number pertains too and where it can be located in the writ of habeas corpus exhibits. (Continued on page 40, attached hereto).

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing NO PRELIMINARY HEARING

(b) At arraignment and plea MARK HELLER, ESQ.

(c) At trial ALLEN L. BRENNER, ESQ.

(d) At sentencing ALLEN L. BRENNER. ESQ

(e) On appeal PERRY S. REICH, ESO, 325 EAST SUNRISE HIGHWAY, LINDENHURST, N.Y. 11757-7600. PRO-SE ON SUPPLEMENTAL BRIEF

(f) In any post-conviction proceeding PRO-SE ON CPL §440.10 MOTION AND WRIT OF ERROR

(g) On appeal from any adverse ruling in a post-conviction proceeding PRO-SE (SAME AS ABOVE)

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

7/16/98
(date)

Dominic M. Franza
Signature of Petitioner

ADDITIONAL PETITIONS MADE

Third petition

(1) Name of Court: Supreme Court of the State of New York, Washington County

(2) Nature of Proceeding: State Writ of Habeas Corpus

(3) Ground Raised: Trial Court's intentional refusal to accept for filing defendant's 2nd CPL §440.10 post conviction motion, by refusing said motion directly addressed to the Trial Court Part 32, thereby, defendant receiving said package containing the motion returned unopened. Such actions violating due process of law. Being unlawfully detained as a result.

(4) Did you receive an evidentiary hearing on your petition, application or motion?: No

(5) Result: Washington County Court denied the Writ

(6) Date of Result: October 12, 1995

Forth petition

(1) Name of Court: Supreme Court of the State of New York, Washington County

(2) Nature of Proceeding: Writ of Habeas Corpus

(3) Ground Raised: Reopened pre-trial hearing held without defendant violated due process of law. Being unlawfully detained as a result.

(4) Did you receive an evidentiary hearing on you petition, application or motion?: No

(5) Result: Washington County Court denied the Writ

(6) Date of Result: September 18, 1996

Fifth petition

- (1) Name of Court: Supreme Court of the State of New York, Washington County
- (2) Nature of Proceeding: State Writ of Habeas Corpus
- (3) Ground Raised: Improper read back given to jury's request violated due process of law. Being unlawfully detained as a result.
- (4) Did you receive an evidentiary hearing on your petition, application or motion?: No
- (5) Result: Washington County Court denied the Writ
- (6) Date of Result: September 22, 1996

Did you appeal to the highest state court having jurisdiction the result of the action taken on any petition, application or motion?

- (1) Third petition: Yes
- (2) Forth petition: Yes
- (3) Fifth petition: No

If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

It would of been futile to appeal the denial of the fifth petition. The Court's were not giving any rythm to defendant.

STATEMENT OF FACTS

DUNAWAY HEARING

Det. Giorgio, claimed, other than his visual observations of petitioner's writing to the threatening letters Mrs. Mendez received, which he felt matched, the only forensic evidence existing being the handwriting comparisons of the exemplars given by petitioner

to the floral note and found to be his. There being no other evidence or forensic evidence connecting petitioner to the shooting or the explosive mailed to P.R. of any type (Exhibit 1, pages [Det. Giorgio] 153-154, 259-267, 281-283; [Det. Giorgio] 341-344, 346,349, 354; Exhibit 2; pages 7-8; Exhibit 3, pages 9-11).^{1 & 2 & 3}

TRIAL

THREATS TO MR. NELSON DACOSTA

On July 8, 1990, Mr. Dacosta made a Police report, claiming he received a threatening phone call. Mr. Dacosta denied making any report, in that someone threatened to kill his Family and him, on defense direct. Not telling his Family of any threatening phone call (Exhibit 2, page 15; Exhibit 4, pages [P.O. Aponte] 151-152, 163; [Mr. Dacosta] 1610-1611).⁴

On cross, Mr. Dacosta admitted in making the report to P.O. Aponte. Claiming a man called asking for his wife, who owed \$200.00 for avon products. Telling P.O. Aponte about a threat so a trace could be done. Later, a lady called claiming a misunderstanding (Exhibit 2, page 15; Exhibit 4, [Mr. Dacosta] 1617-1621).

JULY 16, 1990, INCIDENT

On July 16, 1990, at 7:30 P.M., two men went to Mr. Dacosta's Mother's apartment, Mrs. Josephine Mendez, posing as Police Officers, looking for Mr. Dacosta. The shorter male having a canvas bag. Mrs. Mendez did not report this incident to the Police. Mrs. Mendez apprised her son as to what transpired and also, Debbie Dacosta (Exhibit 2, page 13; Exhibit 4, pages [Mrs. Mendez] 260-264, 267; [Mr. Dacosta] 1610-1611).

-
- 1- Attached as Exhibit 1 hereto Pretrial Transcripts 1-474.
 - 2- Attached as Exhibit 2 hereto prose appellate brief 1-59.
 - 3- Attached as Exhibit 3 hereto appellate counsel's brief 1-43.
 - 4- Attached as Exhibit 4 hereto Trial Transcripts 1-2001.

JULY 17, 1990, SHOOTING INCIDENT

On July 17, 1990, at 7:20 P.M., a man was observed outside by Mrs. Mendez with a box of flowers, who later appeared at her door, claiming to have flowers for Mrs. Franza. Mrs. Mendez did not lock the door and proceeded to ask Mrs. Franza, who was showering, if she wanted the flowers (Exhibit 2, pages 13, 15; Exhibit 3, page 14; Exhibit 4, pages [Mrs. Mendez] 222, 224, 271-273; [Mrs. Franza] 313).

The man at the door entered the apartment, encountering Mrs. Mendez with a dagger in his left hand and a gun in the other, in front of the bathroom door, who opened fired upon her at a distance, in which Mrs. Mendez sustained 5 gunshot wounds. Mrs. Mendez engaged in a toughing match with Mrs. Franza to keep the bathroom door closed, until finally falling down between the bathroom and bedroom doors (Exhibit 2, pages 13-14, 16; Exhibit 3, page 15; Exhibit 4, pages [Mrs. Mendez] 225-229; [Mrs. Franza] 313).

Mrs. Franza, finally opened the door and observed her Mother falling down on the door frame and the man for three seconds, then the man shot her once in the face, falling backwards played dead, feeling the man hovering over her (Exhibit 2, pages 15-16; Exhibit 3, page 15; Exhibit 4, pages [Mrs. Franza] 313-314).

Mrs. Franza, waited till hearing nothing, then turning to her Mother, who was gagging with blood, her dentures choking her, telling her Mother please don't die, stuck her fingers down her Mothers throat to clear her. Placing her hand on her Mother's chest, blood would gush out (Exhibit 2, page 16; Exhibit 4, pages [Mrs. Franza] 314).

Mrs. Franza, then crawled to the phone in the bedroom and called 911. After calling 911, Returned back to her Mother, who's eyes were white. Then crawling to the front of the apartment for help. Mrs. Mendez's neighbor came and closed the door. Later the Police arrived (Exhibit 2, page 16; Exhibit 3, page 15; Exhibit 4, pages [Mrs. Mendez] 229-230; [Mrs. Franza] 314).

The Police asked Mrs. Franza who did this, but could not talk anymore, due to the pain and swelling. Mrs. Franza, could not stop the blood from coming out of her mouth. Mrs. Franza, wrote on the wall her Father's work # and claiming petitioner sent the shooter. Mrs. Franza, was then taken to the Hospital (Exhibit 2, page 16; Exhibit 4, pages [Mrs. Franza] 314-315).

At the Hospital, nine Doctor's tried to make Mrs. Mendez come back to life, telling her, yes, Mrs. Mendez, come on, you can do it, you can do it (Exhibit 2, page 16; Exhibit 4, pages [Mrs. Franza] 315).

Mrs. Mendez was shown 1 crime scene photo and Mrs. Franza was shown 2 crime scene photo's. Both claimed these photos fairly and accurately depicted the apartment the day of the shooting. The foyer where the shooting occurred; where the man was standing, while firing; where Mrs. Mendez fell; where the bathroom is and the bedroom, where the phone is (Exhibit 2, pages 14, 16-17; Exhibit 4, pages [Mrs. Mendez] 232-234; [Mrs. Franza] 316, 324; Exhibit 5, see exhibit 5 thereof, photos 11, 14, 15).⁵

Outside the crime scene a Mr. Benitez observed 2 men running from the crime scene. The smaller man having a canvas bag (Exhibit 2, page 14; Exhibit 4, pages [Mr. Benitez] 80, 91, 94).

5- Attached as Exhibit 5 hereto CPL §440.10 post conviction motion exhibits 1-67.

P.O. Aponte and P.O. Alexander, both responded to the crime scene, who observed upon entering the apartment a naked woman on the floor, bleeding from a facial wound. The woman motioning to the wall, wanting to write something, writing Father, sent on wall. Writing on a pad for 5 minutes before the paramedics arrived, an address, house, sent husband. P.O. Alexander, being designated the safeguard Officer, her duties to make sure no one entered the apartment, so the evidence would not be disturbed (Exhibit 2, pages 17-18; Exhibit 4, pages [P.O. Aponte] 141-143, 146-147, 150; [P.O. Alexander] 177-180, 188-189).

P.O. Aponte was shown 2 crime scene photo's and P.O. Alexander shown 1 crime scene photo. Both claimed these photos fairly and accurately depicted the apartment the day of the shooting. Where Mrs. Franza was on the floor, when first entering the apartment; where Mrs. Franza wrote on the wall, the blood on the wall from Mrs. Franza's hand's; where flower box and note on a chair in the foyer area were. P.O. Aponte was shown and recognized the pad in which Mrs. Franza made notes in (Exhibit 2, pages 17-19; Exhibit 4, pages [P.O. Aponte] 150, 153-157; [P.O. Alexander] 185-187; Exhibit 5, see exhibit 5 thereof, photos 3, 6, 19).

Det. Giorgio, arrived at the crime scene, while Mrs. Mendez was being removed from the apartment. Observing a Det. Montouri and P.O. Aponte talking to Mrs. Franza. Looking at the crime scene observing a floral box with a piece of paper, with Mrs. Franza's name and with directions to another address if there was no answer. Det. Giorgio was shown the floral receipt, who claimed it was such at the crime scene (Exhibit 2, pages 18-19; Exhibit 4, pages [Det. Giorgio] 580, 668; ; Exhibit 5, see exhibit 31).

EVIDENCE RECOVERED AT CRIME SCENE

Det. Osbourn, of the crime scene unit, arrived at the crime scene. Observing, blood, a box of flowers on a chair along with a handwritten delivery slip on top in the foyer area. Observing, blood in the rear hallway and bedroom. Observing, 2 deformed lead bullets on the floor, one in the rear hallway, one in the bathroom. After making a visual inspection of the apartment, spoke to Det. Montoya and P.O. Alexander. Then proceeded to photograph the different pieces of evidence, flower box, note and bullets (Exhibit 2, page 20; Exhibit 4, pages [Det. Osbourn] 514-516).

Det. Osbourn, gave the floral box, note and bullets to P.O. Alexander to voucher (Exhibit 2, pages 19-21; Exhibit 4, pages [P.O. Alexander] 180-184; [Det. Osbourn] 518-520, 522, 525).

Det. Osbourn, was shown 4 crime scene photos, recognizing them to be the photos he took. Such photos fairly and accurately depicted the apartment the day of the shooting. Where the floral box and note on the chair were; revealing the flowers in the box, placed in the kitchen sink; where the bullet was on the bathroom floor, and that such bullet was in that position when first noticed. Det. Osbourn, also recognized the floral note, flower box and ribbon, when shown (Exhibit 2, pages 20-21; Exhibit 4, pages [Det. Osbourn] 517-524; Exhibit 5, see exhibit 5 thereof, photos 5, 6, 18, 20).

Det. Osbourn, stated once again, the bullet in the bathroom depicted in the photo was in that position on the floor and that no other bullets were recovered in the apartment. Taking only 20 photos at the crime scene (Exhibit 2, page 21; Exhibit 4, pages [Det. Osbourn] 525).

A.D.A. Brancato, during opening statement, claimed, the bullets were .38 caliber semi-wad cutters bullets. Such being used for target practice and that testimony will be heard that petitioner is a gun buff, belongs to a gun club and target shoots. Mrs. Franza supplied such testimony (Exhibit 3, page 15; Exhibit 4, pages [A.D.A. Brancato] 42; [Mrs. Franza] 311, 328-329, 331, 352-353; [Det. Giorgio] 574).

Det. Osbourn, after investigating typed up report on everything done. Claiming, Det. Ortiz, was assigned to case, now Det. Giorgio is (Exhibit 2, pages 21-22; Exhibit 4, pages [Det. Osbourn] 529, 537; Exhibit 5, see exhibit 2-4 thereof.

HANDWRITING EXEMPLARS AND COMPARISONS

On August 24, 1990, Det. Giorgio, voluntarily acquired from petitioner, 10 handwriting exemplars of the floral note to have such compared to the floral note left at the crime scene. Det. Giorgio, furnished the copy of the floral note in his writing for petitioner to copy from. Giving petitioner's exemplars and his exemplar to Det. Breslin to compare (Exhibit 2, page 22; Exhibit 3, page 16; Exhibit 4, pages [Det. Giorgio] 592-594).

Det. Breslin, document examiner, examined the exemplars to the floral note and arrived at the conclusion the exemplars matched (Exhibit 2, page 22; Exhibit 3, page 16; Exhibit 4, pages [Det. Breslin] 1197-1200).

Det. Breslin, was shown and recognized an exhibit he prepared, having the questioned writing on the floral note. Also, recognizing an exhibit as a file called Mr. Franza's file and using this exhibit in the preparation of the prior exhibit. Det. Breslin, demonstrated his conclusions as to petitioner's handwriting matching to the floral note (Exhibit 2, page 22; Exhibit 4, pages [Det. Breslin] 1201-1211).

JURY NOTES DURING DELIBERATION

The jury requested a read back of Det. Breslin's testimony, with respect to his conclusions as to petitioner being the writer of the floral note, with respect to the 10 exemplars provided by petitioner to Det. Giorgio. Read back commenced. There after convicting petitioner (Exhibit 2, pages 22-23; Exhibit 4, pages 1967-1971, 1973-1974, 1991-2001).

PROSECUTOR'S OPENING AND CLOSING STATEMENTS

A.D.A Brancato, outlined the testimonies surrounding the shooting incident, evidence recovered and testimonies surrounding the exemplars (Exhibit 2, page 23; Exhibit 4, pages [A.D.A. Brancato] 28, 32-38, 42-47, 1845, 1848-1864, 1866-1867, 1870, 1875-1879, 1884, 1890-1891, 1903).

CRIME SCENE NOT CONTROVERTED AND WOUNDS STIPULATED TOO

Trial counsel Mr. Brenner, did not controvert the crime scene happenings, as acknowledged by the Trial Court. Stipulating to the wounds Mrs. Mendez and Mrs. Franza sustained. Also, that Mrs. Mendez would of died if she did not receive medical attention (Exhibit 2, page 23; Exhibit 4, pages [Trial Court and trial counsel] 318-319, 1472).

CASE IN CHIEF

After the People rested, the prosecutor conceded their case in chief dealth with handwriting and handwriting being used as the basis to identify the perpetrator (Exhibit 2, pages 58-59; Exhibit 4, pages 1507-1508).

CPL §440.10 POST CONVICTION MOTION

On July 20, 1993, petitioner filed a CPL §440.10 post conviction motion. Charging violations of CPL §440.10 [1] in that; the Court did not have jurisdiction of the action, 2), the judgment being procured by misrepresentation and fraud on the part of the prosecutor, and persons acting in behalf of the prosecutor, 3), material evidence adduced at trial resulting in the judgment was false, and was, prior to the entry of the judgment, known by the prosecutor to be false, 4); the judgment being obtained in violation of a right of petitioner's under the constitution of New York State and United States [no probable cause for arrest, Discovery, Brady violations and Confrontation violations, 5); being denied effective assistance of counsel. Petitioner sought vacation of conviction and or a hearing (Exhibit 6, pages 1-139) ⁶

Petitioner, outlined the pretrial and trial testimonies in relation to the shooting incident and evidence recovered of Mrs. Franza; Mrs. Mendez; P.O. Aponte; P.O. Aleaxnder; Det. Osbourn; Det. Breslin and Det Giorgio, as priorly mentioned (Exhibit 6, pages 3-8, 46-48, 53, 54-57, 60-66, 70-74).

Providing the Trial Court, with discovery documentary evidence from the District Attorney's office, including the crime scene photos, enlargements of such and Sunset and weather reports , revealing a fabrication of the evidence recovered at the crime scene and the testimonies in relation to the shooting incident, to wit:

A Certified Naval Observatory report from the Chief Astronomer, revealing on July 17, 1990, the day of the shooting, Sunset was at 8:24 P.M. and literature stating beyond 8:24 P.M. there was

6- Attached as Exhibit 6 hereto CPL §440.10 post conviction motion.

natural light outside (Exhibit 2, page 47; Exhibit 5, see exhibit 6 therein; Exhibit 6, page 9).

Certified Weather reports, revealing no weather conditions present obstructing natural light outside at Sunset and beyond (Exhibit 2, page 47; Exhibit 5, see exhibits 7-8 therein; Exhibit 6, pages 9-13).

The Audubon Society Field Guide to North American Weather book, revealing in July the Earth's tilt toward the Sun prolongs twilight, there being more intensity in Sunlight (Exhibit 5, see exhibit 9 therein; Exhibit 6, pages 14-16).

Claiming for the reasons above, there should be no reason for there not to be natural light outside at Sunset (Exhibit 6, page 16).

Petitioner provided, crime scene photo 13 with a small blow up attached to the rear, revealing a clock with the time to be 8:14. Additionally, providing crime scene photos 12,9,7,4, such revealing it to be nighttime outside. Such revealing a physical impossibility, for it to be nighttime outside. Photos being taken in the spring of fall, when it get dark outside earlier. Also, providing Det. Osbourn's handwritten notes and forensic report, which reflect the order of photo taking, so that there is no question as to the order of photo taking (Exhibit 2, page 47; Exhibit 5, see exhibit 5 thereof, photos 13,12, 9, 7, 4; Exhibit 6, pages 7-8, 16-17).

At this juncture, petitioner attaches hereto as Exhibit 7, as such reveals a miscarriage of justice, 3 blowups of crime scene photo 9, revealing a man luminated by the flash of the camera in the street through the window. In the CPL §440.10 motion, mention was made that a man luminated by the flash of the camera can be

seen outside. That the camera was working fine to of picked up this man and so if there was natural light outside, so too it would of registered (Exhibit 5, see exhibit 5 thereof, photo 9; Exhibit 6, 23, 28-29, 39, 42-44).

At this juncture, as well, petitioner attaches hereto as Exhibit 8, as such reveals a miscarriage of justice, a report from Compu-Weather Experts, Inc, dated October 3, 1997. This report reveals petitioner was entirely correct in his studies of the Certified Weather reports, of which, petitioner had no formal training, in reaching the conclusion there was natural light outside at Sunset.

At this juncture, also, petitioner attaches hereto as Exhibit 9, as such reveals a miscarriage of justice, 9 photos of 187st, between Laurel Hill and Amsterdam avenues, the location of the shooting. These photos reveal, plenty of open space for natural light to shine upon the area, as it was mentioned there were no tall building to obstruct natural light outside (Exhibit 6, page 13).

Petitioner provided the Medical records of Mrs. Franza and Mrs. Mendez, revealing well in excess of 6 gunshot wounds were sustained between the two, when it was testified too 6 were sustained between the two. All being, through and through from a .22 caliber weapon. Such revealing a physical impossibility in that Det. Osbourn recovered only 2 bullet from a .38 caliber (Exhibit 2, pages 46-47; Exhibit 5, see exhibit 12 thereof, Rosario Material #'s 285-286, 289, 292-294, 297-299, 301-304, 395-396, exhibit 13, Rosario Material #'s 1623, 1625, 1629, 1634, 1636-1637, 1641, 1684; Exhibit 6, page 48-50).

Mrs. Mendez's Medical records, also revealing, carbon particles on Mrs. Mendez's hand, revealing the gun was extremely close when shot, not at a distance as testified too (Exhibit 2, page 48; Exhibit 6, page 54, 60).

Petitioner, further claimed and revealed the crime scene photos taken by Det. Osbourn, within themselves contained physical tampering, in that, objects were changed, moved and missing from one photo to another, to wit (Exhibit 2, page 48; Exhibit 6, page 50-53):

Two photos revealing the same area of a wall, each showing a different porcelain picture on the wall. One round the other oval. The tops and bottoms of the pictures being different, as well the figurines in one photo are missing in the other (Exhibit 2, page 48; Exhibit 5, see exhibit 5 thereof, photos 1, 3; see also exhibit 15, 16 thereof; Exhibit 6, page 53).

At this juncture, as such reveals a miscarriage of justice, I would like to add a very important fact that was not revealed in the CPL §440.10 motion. In Exhibit 5, exhibit 5 thereof, photos 1, see also exhibit 15 thereof, reveals the left side of the picture, in which there is a vast black inlay touching the left side of the frame. In Exhibit 5, exhibit 5 thereof, photos 3, see also exhibit 16 thereof, looking to the left of the left figurines hand, above what appears to be an animals head, to the left there is an open space, which can be seen, that goes all the way to touch the left side of the frame. Looking at this open space it is the same color as the rest of the photo, gold, not black as in photo 1, 15, reveals. A physical impossibility.

There being a blood stain on a rag on the floor shaped like an "S", in another photo the "S" is gone (Exhibit 2, page 48; Exhibit 5, see exhibit 5 thereof, photos 11, 14, see also exhibits 66-67 thereof; Exhibit 6, page 51).

There being 3 remote controls on a table, 2 black one silver, in another photo one black remote is gone (Exhibit 2, page 48; Exhibit 5, see exhibit 5 thereof, photos 7-8; Exhibit 6, page 50-51).

There being a lamp and table inches away from a wall, in another photo the lamp and table are gone (Exhibit 2, page 48; Exhibit 5, see exhibit 5 thereof, photos 11, 13; Exhibit 6, page 52).

There being a black box under a table, in another photo the black box is gone (Exhibit 2, page 48; Exhibit 5, see exhibit 5 thereof, photos 5, 8; Exhibit 6, page 51-52).

There being a large white object draped over a chair, in another photo the white object is gone (Exhibit 2, page 48; Exhibit 5, see exhibit 5 thereof, photos 2, 4, see also exhibit 14 thereof; Exhibit 6, page 52).

At this juncture, as such reveals a miscarriage of justice, I would like to add a very important fact that was not revealed in the CPL §440.10 motion. In Exhibit 5, see exhibit 5 thereof, photo 2, there is a rather big wire with a piece of duct tape less than 3" to 4" above the opening to the living room to the right side on the wall, directly above the chairs. In Exhibit 5, see exhibit 5 thereof, photo 4, the wire and the tape is gone.

There being a wall with blood, pencil writing, which Mrs. Franza allegedly wrote on the wall at the front of the apartment. In other photos the blood and pencil marks are gone (Exhibit 2, page 48-48; Exhibit 5, see exhibit 5 thereof, photos 2, 3, 19; Exhibit 6, page 52-53).

There being a box of flowers on a chair with a note on top, in another photo the note is gone (Exhibit 2, page 49; Exhibit 5, see exhibit 5 thereof, photos 4, 6; Exhibit 6, page 53A).

There being a small white object right center of the rug in the bathroom, in another photo the white object is gone (Exhibit 2, page 49; Exhibit 5, see exhibit 5 thereof, photos 14-15; Exhibit 6, page 53A).

The last photo taken, revealing 1 bullet on the bathroom floor. In other prior photos the bullet is gone and a rug where the bullet once was, when Det. Osbourn testified the bullet was in that position in the last photo when seen (Exhibit 2, pages 49-50; Exhibit 5, see exhibit 5 thereof, photos 14-15, 20; Exhibit 6, page 48).

There being a chair with a flower box on top and a floral delivery note on top. Such, butted to the front of a stereo holder, with a blue shirt draped over the back side of the chair, covering the side of the stereo holder, In another photo the side of the stereo holder can be seen (Exhibit 5, see exhibit 5 thereof, photos 4, 6; Exhibit 6, page 51).

Further, revealing the below:

No damage shown anywhere on the bathroom door or blood as bullets passed through Mrs. Mendez, while standing in front of the bathroom door. A physical impossibility (Exhibit 2, page 47; Exhibit 5, see exhibit 5 thereof, photos 14-15; Exhibit 6, page 50).

No extreme amounts of blood at the front of the apartment, just very small drops of blood where Mrs. Franza was allegedly found as the crime scene photos reveal. When Mrs. Franza was to of been bleeding profusely at this location for 5 minutes (Exhibit 2, page, 49; Exhibit 5, see exhibit 5 thereof, photos 2, 3, 5, 11, 14; Exhibit 6, pages 62-65).

No blood drops on the gold rug, from the rear to the front of the apartment, as Mrs. Franza crawled to the front of the apartment from the rear, where she was found bleeding profusely (Exhibit 2, page 49; Exhibit 5, see exhibit 5 thereof, photos 2, 3, 5, 11, 14; Exhibit 6, pages 62-63).

No footprints in the blood on the wood floor where Mrs. Mendez was allegedly shot as E.M.S. tended to her. Being a physical impossibility (Exhibit 2, page 49; Exhibit 5, see exhibit 5 thereof, photo 14; Exhibit 6, pages 62-63).

Petitioner, claimed the above reveals a fabrication of the evidence and the testimonies being tailored to the crime scene (Exhibit 2, pages 50-51; Exhibit 6, pages 53-56).

Petitioner, further provided the trial Court with numerous pieces of material conclusive evidence, revealing the trial testimonies with respect to the shooting scenario was fabricated, revealing such was tailored to the crime scene photos. In that, there were two men in the apartment, not one as testified too. Also, the shooting of Mrs. Mendez was at the front of the apartment, not the rear, to wit (Exhibit 2, page 51; Exhibit 6, page 53-57):

The Federal search warrant affidavits and arrest warrant affidavit, revealing the shooting of Mrs. Mendez was at the front of the apartment and the shooter proceeding to the rear of the

apartment shooting Mrs. Franza once (Exhibit 2, page 51; Exhibit 5, see exhibits 23-25 thereof; Exhibit 6, pages 59-60).

The Crime Victim Board application of Mrs. Franza, who stated, 2 men pushed her Mother into the apartment and shot her when she answered the door, shooting Mrs. Franza once, when she came to the rescue (Exhibit 2, page 51; Exhibit 5, see exhibit 21 thereof; Exhibit 6, page 58).

A Puerto Rico Police report, revealing Mrs. Mendez was shot when she answered the door. Information from Mrs. Mendez's Sister (Exhibit 2, page 51; Exhibit 5, see exhibit 26 thereof; Exhibit 6, page 60).

N.Y.P.D. reports, reflecting 2 men were in the apartment. Information from 1 report, from Mr. Dacosta, who was informed by his Mother Mrs. Mendez (Exhibit 2, page 52; Exhibit 5, see exhibits 18-20 thereof; Exhibit 6, page 57-58).

A N.Y.P.D. report from the Identification section, revealing Mrs. Mendez gave 2 completely separate descriptions for 2 perpetrators for the shooting incident (Exhibit 2, page 51-52; Exhibit 5, see exhibit 17 thereof; Exhibit 6, page 57).

A District Attorney Data sheet, revealing when Mrs. Mendez opened the door she was shot (Exhibit 2, page 52; Exhibit 5, see exhibit 22 thereof; Exhibit 6, page 58-59).

A.D.A. Brancato, stating, Mrs. Franza was in the rear of the apartment when Police arrived (Exhibit 2, page 52; Exhibit 4, pages 39-40; Exhibit 6, page 126).

Petitioner, claimed, the role of savior was utilized to enhance the case, in that Mrs. Mendez held the bathroom door closed to protect her Daughter from being shot and Mrs. Franza tending to her Mother at the rear of the apartment, where the shooting never happened (Exhibit 2, page 52; Exhibit 6, page 75).

Petitioner, further provided Mrs. Mendez's Medical records, revealing, that Mrs. Franza stating, 9 Doctors were trying to bring her Mother back to life at the Hospital was Fraudulent. Mrs. Mendez having a 98% survival rate and being fully awake and responsive at the Hospital when arriving (Exhibit 2, pages 52-53; Exhibit 5, see exhibit 12 thereof, Rosario Material #'s 286, 289, 300-301, 413-414; Exhibit 6, pages 65-66).

Petitioner asserting all the above reveals the crime scene photos, evidence recovered therein and the testimonies being tailored to such were indeed fraudulent and the role of savior being utilized to enhance the case. All being highly inflammatory and prejudicial. The jury convicting petitioner based upon Det. Breslin's read back requested, pertaining to the floral note, which did not exist (Exhibit 2, page 53; Exhibit 4, pages 1967-1971, 1973-1974; Exhibit 6, pages, 65, 72, 137-138).

The facts below, pertains to the explosive sent to Puerto Rico and the CPL §440.10 post conviction motion.

PUERTO RICO PIPE BOMB

During the marriage in November of 1989, Mrs. Franza went to Puerto Rico, due to her Brother Wilfred Dacosta dying. She gave petitioner information where she could reached, her Grandmother's

phone number and Aunt's address 2629 Paseo Aguilla, Levittown, Catano, Puerto Rico (Exhibit 2, page 29; Exhibit 4, pages [Mrs. Franza] 334-335; Exhibit 6, page 89).

Mrs. Franza's Grandmother's lived with Miss Evelyn Figueroa Lamboy at 2629 Paseo Aguilla, telephone #809-784-1630, who's name was Rosa Lamboy Matos, as Miss Lamboy Claimed. Mrs. Mendez, stated her Mother's name was Rosa Lamboy, Mrs. Franza, claimed her Grandmother's name was Rosa Lamboy Roman. Mrs. Franza, also, claimed her Aunt's name was Angeles Evelyn, Evelyn Norris, having two names (Exhibit 2, pages 28-29; Exhibit 4, pages [Miss Lamboy] 754-758, [Mrs. Mendez] 244-246), [Mrs Franza] 310; Exhibit 6, pages 83, 84, 88, 92-93).

On February 5, 1991, Upon returning from work, Miss Lamboy received a notification on her gate from Federal Express with her name, phone number and address and having to pay a certain amount of money, that she had a very valuable camera from New York (Exhibit 2, page 29; Exhibit 4, page [Miss Lamboy] 759; Exhibit 6, page 83).

On February 6, upon returning from work, her neighbor from 2630 told Miss Lamboy, another employee from Federal Express tried to leave a package. She was willing to pay for the package (Exhibit 2, page 29; Exhibit 4, pages 659-760; Exhibit 6, pages 83-84).

Miss Lamboy, proceeded to her Sister's house "Elba", informing her that there was a package for her. The following day calling Federal Express, who told her to leave the money with her neighbor. That day, Miss Lamboy gave the check to her neighbor (Exhibit 2, page 30; Exhibit 4, pages [Miss Lamboy] 761-762; Exhibit 6, page 84).

On February 8, after returning from work at 7:00 P.M., the neighbor called Miss Lamboy to hand over the package. Miss Lamboy slightly opened the package and observed instruments of a bomb. Telling her neighbor someone playing a very bad joke. The Police arrived 25 minutes later and Agent Avalez taking items (Exhibit 2, page 30; Exhibit 4, pages [Miss Lamboy] 763-766; Exhibit 6, pages 84).

Miss Lamboy, was shown a photo of a black case and that the photo accurately depicting how the case appeared on February 8, 1991. Additionally, Miss Lamboy, was shown the document she received from Federal Express on February 5, having her name, phone # 809-784-1630 and address 2629 Paseo Aguilla, SECE, Catano, Puerto Rico, the sender U.S.A. Electronics (Exhibit 2, page 30; Exhibit 4, [Miss Lamboy] 767-770; Exhibit 6, pages 84-85).

Agent Garcia, of the explosive division working with Agent Hadock in Puerto Rico arrived at 2629 Paseo Aguilla and dismantled the explosive. Agent Garcia, found it necessary to interview Miss Lamboy, due to a Sergeant claiming another woman received the package, defense counsel objected (Exhibit 2, page 31; Exhibit 4, pages [Agent Garcia] 1063-1102; Exhibit 6, page 79-80).

DOCUMENTS IN CONNECTION WITH PUERTO RICO BOMB

Agent Chris Behan, of A.T.F., learned on February 11, 1991, A bomb was sent via Federal Express to the Roman Family. The Agent was shown and recognized a Federal Express Airways Bill, received from Thomas Sullivan from Federal Express, with the #'s 400-0602-5224 (Exhibit 2, page 31; Exhibit 4, pages [Agent Behan] 840-841, 857-858; Exhibit 5, see exhibit 44 thereof; Exhibit 6, page 78).

Agent Behan, was shown and recognized an American Express Money Order from American Express. Bringing such to Det. Breslin (Exhibit 2, page 31; Exhibit 4, pages [Agent Behan] 884-885; Exhibit 5, see exhibit 46 thereof).

Thomas Sullivan, for Federal Express, was shown the package tracking inquiry, which was never placed in evidence, stating such shows where a package has been, which, indicated the package in question, air bill #400-0602-5225 (Exhibit 2, 31-31; Exhibit 4, page [Mr. Sullivan] 1105-1108; Exhibit 5, see exhibit 45 thereof; Exhibit 6, page 78-79).

Mr. Sullivan, further stated, the air bill contained the # of the American Express Money Order (Exhibit 2, page 32; Exhibit 4, page [Mr. Sullivan] 1109-1111; Exhibit 6, page 79).

Det. Giorgio, was shown and recognized a voucher he prepared. Containing handwriting exemplars of petitioner to have compared to the Federal Express Airways Bill and American Express Money Order. Requesting Det. Breslin to do analysis, who later claimed petitioner wrote the documents (Exhibit 2, page 33; Exhibit 4, page [Det. Giorgio] 615-619, [Det. Breslin] 1211-1226; Exhibit 6, page 96).

Det. Breslin, claimed petitioner wrote the Floral note, Federal Express Airbill and American Express Money Order (Exhibit 2, page 33; Exhibit 4, [Det. Breslin] 1236).

In October of 1991, Det. Breslin, after having hundreds of pages of petitioner's writing, could not arrive at the authorship of the Federal Express Airbill and American Express Money Order. After, receiving the exemplars from Det. Giorgio arrived at authorship as petitioner (Exhibit 2, page 34; Exhibit 4, page [Det. Breslin] 1333, 1346-1350, 1354-1355; Exhibit 6, page 96).

PROSECUTOR'S OPENING AND CLOSING STATEMENTS

A.D.A. Brancato, outlined the testimonies surrounding the bomb and documents (Exhibit 2, page 34; Exhibit 4, pages [A.D.A. Brancato] 25, 31, 49-50, 52-53, 59, 67-68, 1819-1820, 1828-1829, 1881, 1904).

CPL §440.10 POST CONVICTION MOTION

Within the prior CPL §440.10 motion, petitioner provided the Trial Court with discovery documentary evidence from the District Attorney's office, revealing a fabrication of the evidence and the testimonies in relation to the Puerto Rico pipe bomb, to wit:

Puerto Rico Newspapers, revealing the explosive was mailed to the Pantoja Family at 2615 Paseo Aguilla, who were willing to accept the package and take it to it's owner. The package having the name of Miss Lamboy's as they were informed by Sergeant Navedo of Police Headquarter's for Levittown (Exhibit 2, page 53; Exhibit 5, see exhibits 47-48, 51 thereof; Exhibit 6, page 80-81).

Puerto Rico Police report's, revealing Miss Lamboy's telephone # being different as testified too by Miss Lamboy and reflected on the Federal Express Airbill. Revealing as well, Mrs. Pantoja was asked to abandon her residence as the Police did not know what was going on and Miss Lamboy calling Mr. Pantoja to come over and view the package contents (Exhibit 2, page 53; Exhibit 5, see exhibits, 49-50; Exhibit 6, page 81, 91).

The Package Tracking Inquiry, revealing the package had an incorrect recipient address, when the package was alleged to of gone to the right address as Mrs. Franza gave the address to petitioner, plus phone number (Exhibit 2, page 54; Exhibit 5, see exhibit 45 thereof; Exhibit 6, page 82, 93).

Petitioner, claimed the above reveals a fabrication of the evidence, such being tailored to the testimonies. Mentioning, the Federal Express Airbill having the name Roman Family when the Police stated the package had Miss Lamboy's name (Exhibit 2, page 54; Exhibit 6, page 88-89, 93-94, 78, 96, 98-99, 102-103).

Petitioner, further claimed below:

As a result of the fabricated evidence, Discovery (Rosario) and Brady violations occurred. The real evidence and documents, revealing exactly what happened at the shooting and bomb were never handed over. Such precluding the defense from cross examining and impeaching the witness (Exhibit 2, pages 54-55; Exhibit 6, page 128-134).

As a result of the fabricated floral note, there was no probable cause for arrest, as such was the only evidence connecting petitioner to the shooting (Exhibit 2, page 55, Exhibit 6, page 70-72, 106-107, 135-136).

Receiving ineffective assistance of counsel. In that, trial counsel entirely failed to subject the People's case to meaningful adversarial testing, in exercising an extremely poor tactical decision in never revealing the fabrications through utilizing the CPL §440.10 motion exhibits, which trial counsel had before trial began, such mentioned herein (Exhibit 2, page 55; Exhibit 6, pages 53B, 75-77, 97, 100-101, 103, 105-113, 128).

The prosecution being fully aware of the fabrication and never made a full disclosure of the falsities. Never dealing fairly with petitioner and candor to the Court, violating petitioner's due process rights (Exhibit 2, page 55; Exhibit 6, pages 75, 97-98, 101, 105, 136-137).

That, as a result of the above the Court lost subject matter jurisdiction. As the indictment was predicated on the same fabricated evidence (Exhibit 2, page 56; Exhibit 6, pages 125, 134; Exhibit 10, pages [Mrs. Franza] 5-14, 15-24, 41-57, 75-81 [Mrs. Mendez] 4-14, 15-21, 22-31 [Det. Ortiz] 29-40 [Det. Giorgio] 22-31 [Det. Breslin] 108-143). ¹⁰

AUGUST 23, 1993, SUMMARY JUDGMENT MOTION

On August 23, 1993, petitioner filed a summary judgment motion, as a result of the District Attorney's office failing to file an opposition to the CPL §440.10 motion. The People failing to controvert the motion, thereby conceding and defaulting. The facts being within the the District Attorney's knowledge as the material evidence coming from them (Exhibit 11, pages 1-4). ¹¹

SEPTEMBER 1, 1993, PROCEEDING

On September 1, 1993, a proceeding was held without petitioner's presence. The Court directed that petitioner be present in Court on September 27, 1993. Counsel objected to the Court assigning him to represent me, mentioning as well, petitioner objecting to the assignment and submitting a five page letter to the Court, objecting. The Court stated, all issues will be dealt with on the adjourned date. Counsel at petitioner's request, informed the Court that Petitioner is opposing the timeliness of the response and that petitioner is opposing any proceeding whatsoever without him in Court (Exhibit 12, pages 1-3; [Letter], pages 1-5). ¹²

10- Attached as Exhibit 10 hereto Indictment Transcripts.

11- Attached as Exhibit 12 hereto 8/23/93 summary judgment motion.

12- Attached as Exhibit 12 hereto 9/1/93 proceeding transcripts.

SEPTEMBER 14, 1993, SUMMARY JUDGMENT MOTION

On September 14, 1993, petitioner filed a second summary judgment motion. As a result, of the District Attorney's office failing to respond to the first summary judgment motion. The People failing once again to controvert the facts, thereby, conceding and defaulting. Their failure to oppose being deliberate rather than inadvertent avoidance (Exhibit 13, pages 1-6). ¹³

DISTRICT ATTORNEY'S OPPOSITION

Shortly thereafter, the filing of the second summary judgment motion, the District Attorney's office served petitioner with the opposition, dated September 14, 1993, the same day the second motion was filed, stating verbatim (Exhibit 2, page 34): ¹⁴

3. The defendant's motion should be denied for two reasons. One, the defendant's motion is untimely, and second, the defendant's motion is without merit.

Defendant's motion is untimely due to a pending appeal, see C.P.L. §440.10 (2)(b), or otherwise due to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period, see C.P.L. §440.10 (2)(c).

Second, the defendant's motion sets forth no legal precedents justifying the requested legal remedy. Additionally, the defendant's motion is confusing, factually inaccurate and without merit.

Wherefore, it is respectfully requested that, except as consented to herein, defendant's motion should be denied.

SEPTEMBER 27, 1993, PROCEEDING

On September 27, 1993, a proceeding was held with petitioner's presence. The Court stated, the motion is now submitted and there will be a decision next week. A.D.A. Squirrel, handed the Court the opposition, not knowing if the Court or defense has a copy.

13-Attached as Exhibit 13 hereto 9/14/93 summary judgment motion.

14- Attached as Exhibit 14 hereto D.A.'s opposition.

Counsel, handed the Court a copy of petitioner's reply to the opposition, which was not notarized. A.D.A. Squirrel waived the notarization. Counsel stated petitioner's position is that the opposition is legally insufficient as a matter of law and that they failed to comply with the statutory requirements in response to a CPL §440. The Court stated, it will read the papers and make a determination and would render a decision on October 18, 1993 (Exhibit 15, pages 1-6). ¹⁵

REPLY TO OPPOSITION

Petitioner, claimed the opposition was conclusory and lacked factual evidence to support, thereby conceding as a failure to refute. Stating, if petitioner's motion was confusing as they stated, than how could the D.A.'s office not understanding the motion say it was factually inaccurate and without merit. The statutory provisions being claimed by the D.A.'s office being ridiculous, in not knowing if petitioner's motion is untimely or failing to take or perfect an appeal. There being a deliberate evasiveness to the CPL §440.10 motion. The D.A.'s office having hundreds of vast resources to discern the facts and not making a claim there ignorance was unavoidable and with diligent effort they could not discern the facts (Exhibit 2, page 35; Exhibit 16, pages 1-10).
16

REQUEST TO BE PRODUCED IN COURT ON OCTOBER 18, 1993

Petitioner filed a request to be produced in Court on October 18, 1993, for the decision, to defend and in the event if the Court did not understand anything in the CPL §440.10 motion to ask petitioner for any clarification. Lastly, reminding the Court the People have conceded (Exhibit 17, pages 1-2). ¹⁷

- 15- Attached as Exhibit 15 hereto 9/27/93 proceeding transcripts.
16- Attached as Exhibit 16 hereto reply to opposition.
17- Attached as Exhibit 17 hereto 10/18/93 request.

COURT'S DECISION

On October 19, 1993, the Court ruled on petitioner's CPL §440.10 motion. The Court held the motion was based largely on unsubstantiated charges. Petitioner's motion being Byzantine. That sufficient facts appear in the record, for adequate review on appeal, therefore a hearing not being needed to enlarge the record. Petitioner's assertions being selfserving, wishful thinking. Lastly, the evidence being overwhelming and that counsel and the prosecutor doing exemplary work. The motion being denied in all respects (Exhibit 2, page 35; Exhibit 18, pages 1-4). ¹⁸

PRO-SE APPELLATE BRIEF

Petitioner, argument on appeal, stated:

The Trial Court's order summarily denying appellant's C.P.L. §440.10. Subd. [1] post conviction motion pursuant to C.P.L. §440.10. 2 [B] upholding the presumption of regularity and indictment, when sufficient facts do not appear in the record, sufficient facts and documentary evidence not being shown to be insufficient as a matter of law, not being in dispute that appellant has been denied due process of the law (N.Y. Const. Art. 1§6; U.S. Const. Art. 7, 14th Amendment); the right against unreasonable searches and seizures (N.Y. Const. Art. 1§12; U.S. Const. Art. 7, 4th Amendment); receiving ineffective assistance of counsel (N.Y. Const. Art. 1§6; U.S. Const. Art. 7, 6th Amendment), in that the prosecutors knowingly presented false evidence and testimony at the Grand Jury, Pretrial and trial as well Rosario and Brady violations, defense counsel with knowledge, constitutes a denial of due process of law within the meaning of Article 1, Section 6 of the State Constitution, and Article 7, 14th Amendment, Section 1, of the Federal Constitution, as well, constituting a denial of equal protection of the law within the meaning of C.P.L. §440.30. Subd. 3 [A, B, C], Article 1, Section 11 of the State Constitution, and Article 7, 14th Amendment, Section 1, of the Federal Constitution (Exhibit 2, page 38).

Breaking down the argument into 6 subdivisions A-F, as follows:

18- Attached as Exhibit 18 hereto Court's decision on CPL §440.10.

A) That, the Trial Court committed error by its failure to adhere to the statutory mandate of C.P.L. §440.30 and follow the dictates of the Court of Appeals, constituted a denial of due process of law and equal protection of the law. In that, petitioner's averments have not been shown to be insufficient as a matter of law; the allegations were neither refuted or conclusively refuted by unquestionable documentary proof; the facts supported with evidence not being contradicted by a Court record or other official document or made solely by petitioner and unsupported by any other evidence; there not being other circumstances establishing that there is no reasonable possibility that appellant's allegations are true. Petitioner, as well, stated the evidence coming from the District Attorney's office (Exhibit 2, pages 38-42).

B) That, the Trial Court committed error by its failure to adhere to the Court of Appeals dictates holding what is not disputed is deemed conceded constituted a denial of due process of law and equal protection of the law. The reasons being for the above in "A", due to the People failing to controvert the facts and documentary evidence in any form or manner (Exhibit 2, pages 42-43).

C) That, the Trial Court committed error by upholding the presumption of regularity constituted a denial of due process of law and equal protection of the law. In that, the People failed to come forward to sustain the presumption of regularity. Not taking issue with petitioner's documentary evidence from the District Attorney's office (Exhibit 2, pages 44-46).

D) That, the Trial Court committed error by holding the motion unsubstantiated, wishful thinking and without merit constituted a denial of due process of law and equal protection of the law. As a result, of subdivisions A-C above. Petitioner, also, outlined in detail the documentary evidence mentioned herein at pages 17-25, 29-31, revealing the CPL §440.10 motion was completely substantiated, thereby the motion not being wishful thinking and without merit (Exhibit 2, pages 46-56).

E) That, the Trial Court committed error in holding sufficient facts appear in the record constituted a denial of due process of law and equal protection of the law. In that, nowhere in the record is the attack set forth in subdivision "D" present anywhere in the record. Therefore, the Trial Court's reliance on CPL §440.10 (2)(b), being unauthorized (Exhibit 2, page 56).

F) That, the Trial Court committed error by upholding the indictment constituted a denial of due process of law and equal protection of the law. As a result of subdivision "D". In that, the fraudulent evidence was presented before the grand jury (Exhibit 2, pages 56-59).

DISTRICT ATTORNEY'S APPELLATE BRIEF

The District Attorney's office, claimed the Trial Court was correct in denying petitioner's CPL §440.10 motion (Exhibit 19, pages 92-102). ¹⁹

PRO-SE REPLY BRIEF

Petitioner, steadfastly held, the CPL §440.10 motion was substantiated, with documentary evidence from the District Attorney's office and the motion as a whole with merit (Exhibit 20, pages 21-26). ²⁰

19- Attached as Exhibit 19 hereto D.A.'s Appellate Brief 92-102.

20- Attached as Exhibit 20 hereto pro-se reply brief 21-26.

Petitioner, revealed, while the District Attorney claimed the Trial Court was correct in denying the CPL §440.10 motion, pursuant to CPL §440.10 (2)(b), in that sufficient facts appear in the record, they claimed this was true of nearly all of petitioner's claims. As well, conceding the allegations were unsupported by the trial record. Such being in direct contradiction to the Court's order (Exhibit 20, pages 23-24).

Further revealing, the controversion set forth in the CPL §440.10 motion are not present anywhere in the trial record, pertaining to shooting incident, as reflected at Exhibit 4, pages 318-319 (Exhibit 20, pages 23-24):

Mr. Brenner: As the Court pointed out, the defendant does not controvert what took place in the apartment. There is limited probative value of these photographs establishing a position of the shooter vis-a-vis the victims.

The Court: Defense counsel is correct in pointing out that the defense does not controvert the event. The jury will hear and has heard and will continue to hear testimony throughout this trial that there was --

Mr. Brenner: A shooting.

Further revealing, the controversion set forth in the CPL §440.10 motion are not present anywhere in the trial record, pertaining to the Puerto Rico Bomb and documents. There being only four witnesses, who gave testimony relating to the encountering of the bomb, who were not cross examined, as to anything contained in the CPL §440.10 motion (Exhibit 20, page 24; Exhibit 4, pages [Miss Lamboy] 754-770; [A.T.F. Agent Behan] 857-858, 884-885; [Agent Garcia] 1063-1102; [Mr. Sullivan] 1104-1127]

As a result, of the above, there being no circumstances, which, would authorize, thereby, mandating the denial of the motion pursuant to CPL §440.10 (2)(b) (Exhibit 20, page 25).

MOTION SEEKING TO FILE THE CPL §440.10 MOTION EXHIBITS

WITH THE APPELLATE DIVISION, FIRST DEPARTMENT

DISTRICT ATTORNEY'S OPPOSITION

On August 6, 1996, petitioner, with leave of the Court, filed a motion seeking to file the CPL §440.10 motion exhibits, so that such could be reviewed on appeal. The District Attorney's office, in opposition, took no position to the filing of the exhibits and agreed they should be part of the record (Exhibit 21, pages 1-8; Exhibit 22, pages 1-4). 21 & 22

APPELLATE DIVISION DECISION

On May 13, 1997, the Appellate Division affirmed the conviction and the denial of the CPL §440.10 motion, holding said without merit. The Court Also denied the motion to file the CPL §440.10 motion, within the decision (Exhibit 23). 23

REARGUMENT OF APPEAL AND RENEWED MOTION

TO FILE CPL §440.10 MOTION EXHIBITS

On June 3, 1997, petitioner filed a motion for reargument and to file the CPL §440.10 motion exhibits. Petitioner, stated, the Court erred, constituting a miscarriage of justice in holding the pro-se brief without merit, by overlooking and misapprehending the facts and law of the case (Exhibit 24, pages 1-15). 24

- 21- Attached as Exhibit 21 hereto Motion to file exhibits.
- 22- Attached as Exhibit 22 hereto opposition.
- 23- Attached as Exhibit 23 hereto Appellate Division Decision.
- 24- Attached as Exhibit 24 hereto reargument and renewed motion.

Petitioner, outlined the testimonies at trial, the evidence provided in the CPL §440.10 motion and that there was never any controversions of the facts at trial. Such controversion taking place in the CPL §440.10 motion (Exhibit 24, pages 1-15).

Further revealing, the District Attorney's office nor the Trial Court ever claimed, petitioner failed to provide documentary evidence in support. Nor the District Attorney's office ever claiming the documentary evidence not coming from them, as petitioner stated (Exhibit 24, page 13).

Petitioner, asking the Court to allow the CPL §440.10 motion exhibits to be filed, as the District Attorney's office held these exhibits should be filed (Exhibit 24, page 15).

OPPOSITION TO REARGUMENT

The District Attorney's office, claimed the Trial Court was correct in holding petitioner's motion unsubstantiated and wishful thinking in denying the CPL §440.10 motion, as well, the Appellate Divisions affirmance of the Trial Court's decision. Stating petitioner presented no credible contrary proof. The District Attorney's office did claim, the details of the crime were contested for the first time in the CPL §440.10 motion. Motion was denied. (Exhibit 25, pages 1-4). ²⁵

LEAVE APPLICATION TO COURT OF APPEALS

Petitioner, filed a leave application to the Court of Appeals. Petitioner outlined the testimonies at trial, the evidence provided in the CPL §440.10 motion, seeking leave, as a result of the Court's below committing error in failing to correct this fraudulent conviction. Leave was denied (Exhibit 26, [1] pages 1-19, [2] 1-6). ²⁶

25- Attached as Exhibit 25 hereto opposition to reargue motion.
26- Attached as Exhibit 26 hereto Leave Applications.

WRIT OF ERROR CORAM NOBIS CLAIMING

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

On November 10, 1997, petitioner filed a Writ of Error Coram Nobis application and a Memorandum of Law, claiming ineffective assistance of appellate counsel (Exhibit 27, pages 1-92 [Writ of Error Coram Nobis Application]; Exhibit 28, pages 10132 [Memorandum of Law]. 27 & 28

Before addressing the inadequacies of appellate counsel's brief, petitioner outlined the prior motions made to the Court from counsel and petitioner, seeking reassignment of appeal. Such appearing below:

1) That on March 11, 1996, petitioner filed with the Appellate Division, First Department, requesting that assigned counsel be relieved of representation, outlining appellate counsel's magnitude of inaccuracies in preparing the brief (Exhibit 27, page 4; Exhibit 28, page 45; Exhibit 29, pages 1-12). 29

2) That on April 1, 1996, petitioner filed a response to appellate counsel's motion seeking reassignment. Outlining counsel contradicting himself. As well, expressing dissatisfaction overall. Equally, filing an addendum in support of ex-parte motion in that Andrea Hirsch, Esq. is willing to accept assignment (Exhibit 27, page 4; Exhibit 28, page 45; Exhibit 30, pages 1-11 [April 1, 1996 motion and addendum])). 30

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- 27- Attached as Exhibit 27 hereto Writ of Error Coram Nobis.
 - 28- Attached as Exhibit 28 hereto Memorandum of Law.
 - 29- Attached as Exhibit 29 hereto Ex-parte motion.
 - 30- Attached as Exhibit 30 hereto response and addendum.

3) That on May 13, 1996, petitioner filed another addendum in support of ex-parte motion, informing the Court that petitioner has instructed counsel to remove the CPL §440.10 issue and that petitioner will raise such. Apprising the Court that counsel informed he would file the brief as is, despite the many showings of his inaccuracies (Exhibit 27, page 4; Exhibit 28, page 45-46; Exhibit 31, pages 1-3). ³¹

That on June 6, 1996, the Appellate Division denied counsel and petitioner's applications for reassignment. Granting petitioner's cross motion to the extent of permitting petitioner to file a pro-se brief, limited to 60 pages (Exhibit 27, page 4; Exhibit 28, page 46; Exhibit 32). ³²

That in June of 1996, counsel filed the brief as is (Exhibit 27, page 4; Exhibit 28, page 46; Exhibit 3). That on August 5, 1996, petitioner filed his pro-se brief (Exhibit 27, page 4-7; Exhibit 28, page 47; Exhibit 2).

Petitioner addressed the inadequacies of appellate counsel's filed brief, pertaining to all of counsel's Points. In that counsel, engaged in discourses and failed to relate important facts, and failing to direct the Court to those portions of the record relied upon by page citations and other errors (Exhibit 27, pages 9-20; Exhibit 28, pages 48-59).

Of most notable mention, being counsel's argument in Point I, revolving around identification:

Counsel claiming the People thought very little of the handwriting evidence. When the People's case in chief revolved around handwriting, which the Trial Court held and the A.D.A. Conceded.

31- Attached as Exhibit 31 hereto Addendum.

32- Attached as Exhibit 32 hereto Court's Decision.

As well, counsel, failing to relate the fact that Det. Breslin stated there was a margin of error in forensic science, after being asked if there was a margin of error in handwriting forensic science. Counsel As well, failing to direct the Court to where portions claimed are in the record to support his argument. Counsel's point not addressing the problematic issue for the prosecution, that there is a margin of error, which would be a significant impediment for the prosecution, as their case in chief rested on handwriting (Exhibit 27, pages 9-10; Exhibit 28, pages 48-50).

Counsel, further, citing a case which does not intergrate with the facts, as counsel attempted to intergrate. There being no discussion of counsel's facts and no citation to any case indicating under the circumstances posed, that the Court should credit such argument (Exhibit 27, page 11; Exhibit 28, pages 50-51).

Counsel's assessment of motive being a discourse. Such revolving around Miss Gonzalez, petitioner's girlfriend (Exhibit 26, page 11; Exhibit 28, page 51).

Counsel failing to relate the facts that Mrs. Franza claimed petitioner beat her on two occasions. One of which she came back home, within one week after obtaining an order of protection and on the other date when the beating was to of occurred, petitioner was at the Hospital with his Mother the entire day, as claimed by Mrs. Franza. Equally failing to state the substances of the threats, in that petitioner would kill her and her Family, which Mrs. Franza stated. Revealing the fact, Mrs. Franza never stated petitioner stated he would sent others during the threats. Most importantly, counsel failing to state, Mrs. Franza stated the shooter was hovering over her, after he shot her once, when this was to of been a hit on Mrs. Franza. Such facts negating any intent to commit murder (Exhibit 27, pages 11-12; Exhibit 28, page 51).

There being no discussion of counsel's facts and no citations to any case indicating under the circumstances posed by counsel that the Court should credit such argument. Once again, counsel failing to direct the Court to those portions of the record relied upon by page citation (Exhibit 27, page 12; Exhibit 28, page 52).

Counsel's assessment of the circumstantial evidence and Nelson Dacosta being a rambling discourse. Counsel failing to relate the facts, that all the circumstantial evidence could not be connected to petitioner. And, that Det. Breslin's handwriting analysis contained a margin of error (Exhibit 27, page 12-13; Exhibit 28, page 52).

Counsel, claiming Mr. Dacosta's wife left with the children as a result of the threat being factually inaccurate. There being no such testimony in the record. The testimony demonstrating she left before the threat (Exhibit 27, page 13; Exhibit 28, page 52).

Counsel's rendition, revolving around Mr. Dacosta, not negating any intent on petitioner's alleged part in the crimes, which filed in the face of the Appellate Division's decision. Counsel's rendition being a word for word rendition as stated in the defense summation (Exhibit 27, page 13; Exhibit 28, page 53).

There being no discussion of the facts that would support counsel's contentions and no citations to any case indicating the Court should credit such argument (Exhibit 27, page 13; Exhibit 28, page 53).

The District Attorney's office in opposition claimed as a whole, appellate counsel effectively presented the issues he raised. The claims being well researched and intelligently presented. Counsel making the best argument possible in light of compelling evidence

of petitioner's guilt. They claimed it was not ineffective for appellate counsel to make his strong arguments relating to identity, limit the argument about motive, and forego a discussion of intent. Petitioner in response contended the District Attorney's claims are without merit (Exhibit 33, pages 1-30, see pages 8-17; Exhibit 34, pages 1-12, see pages 1, 4-5). 33 & 34

After addressing the inadequacies of appellate counsel's brief, petitioner, before elaborating on meritorious issues ignored by appellate counsel, once again brought to the Court's attention a motion filed with the Court on June 17, 1996 (Exhibit 27, page 21; Exhibit 28, page 94).

That on June 17, 1996, petitioner filed with the Court, for permission to enlarge the pro-se brief, to include three issues that appellate counsel failed to make, of which he was apprised of. Such issues pertaining to reasonable doubt, a read back error and a hearing without petitioner's presence. The Court denied the enlargement requested (Exhibit 35, pages 1-5; Exhibit 36). 35 & 36

Petitioner, asserted he did not receive the quality of representation to which petitioner is entitled too. Appellate counsel not raising a solidly meritorious argument regarding the prosecution not proving petitioner's guilt beyond a reasonable doubt and the elements of intent beyond a reasonable doubt (Exhibit 27, pages 21-45; Exhibit 28, pages 61-85).

33- Attached as Exhibit 33 hereto Opposition.

34- Attached as Exhibit 34 hereto Response.

35- Attached as Exhibit 35 June 17, 1996 motion.

36- Attached as Exhibit 36 Court Decision.

The People failing to prove petitioner's guilt and intent beyond a reasonable doubt, in that, the People's case in chief revolved around Det. Breslin's testimony, who was the only forensic document examiner testifying. Who claimed petitioner's handwriting being on various documents, connecting petitioner to the crimes. Giving irreconcilable testimony pointing to guilt and innocence, in claiming there was a margin of error in forensic science, after being asked if there was a margin of error in handwriting forensic science, which the prosecutor never took issue with. That as a result, such cannot establish guilt beyond a reasonable doubt, according to the United States Supreme Court and the New York Court of Appeals, warranting reversal of the conviction. Which, the jury convicted petitioner upon, evidenced by their request for Det. Breslin's testimony as to his analysis concluding petitioner wrote a floral note left at the scene of the shooting (Exhibit 27, pages 22-24; Exhibit 28, pages 62-64).

Petitioner argued and revealed the fact that all the circumstantial evidence taken from petitioner's apartment and from the Landlord's basement, the Police could not connect the pipe bombs conclusively to all the items seized, which the People conceded too. As well, revealing other situations which were completely unambiguous in petitioner's favor. As a result, the People failing to meet the applicable standards of law to uphold this conviction, as a result of the circumstantial evidence revealing not a scintilla of evidence. That as a result, such showing the proof of guilt emanating from the testimony of Det. Breslin's handwriting conclusions, who, gave irreconcilable testimony (Exhibit 27, pages 24-30; Exhibit 28, pages 64-70).

Petitioner, argued and revealed the fact that the People failed to prove the essential elements of intent, which the People are at all time required to prove. In that, petitioner's alleged handwriting being on various documents connecting petitioner to the crimes, being insufficient to establish intent in acting in concert for the reasons priorly mentioned. In that, as well, the People's offer of Mrs. Franza's testimony to prove intent, who claimed petitioner threatened her, in that he would kill Mrs. Franza and her Family himself, if she left being insufficient to prove any intent. Mrs. Franza never testifying petitioner stated during the threats he would sent others. Equally, Mrs. Franza stating at the shooting scene petitioner sent the shooter, being sheer speculation, which is forbidden (Exhibit 27, pages 30-32; Exhibit 28, pages 70-72).

Petitioner, argued and revealed the most significant fact entirely negating any intent to commit murder. In that, the perpetrator had access to Mrs. Franza, the opportunity to kill Mrs. Franza and did not do so. Mrs. Franza stating, she played dead, feeling the shooter hovering over her. Petitioner arguing, had petitioner sent the shooter to murder Mrs. Franza, then why wasn't she shot again or stabbed, as well, Mrs. Mendez. The shooter having ample time to do so, it only taking a second or two to accomplish the mission that petitioner is alleged to of wanted. That surely the perpetrator was not scared. Such being the predicate for the attempted murder of Miss Matos (Puerto Rico). That the above revealing no intent on petitioner's part to commit the crimes charged and convicted of. As a result, the jury convicting petitioner upon impermissible speculation (Exhibit 27, pages 32-33; Exhibit 28, pages 72-73).

Petitioner, argued and revealed that the People failed to prove intent from petitioner's conduct and the surrounding circumstances. In that, Mrs. Franza after an alleged physical and threatening argument in March or April of 1989, returned back home within a week after obtaining an order or protection, shortly thereafter going to Orlando. As well, after another physical and threatening argument on June 25, 1990, which prompted Mrs. Franza to leave the apartment as she claimed, Mrs. Franza herself stated petitioner was in the Hospital the entire day with his Mother, with her. Petitioner claiming she lied. Also, petitioner on June 28, 1990, calling informing he had purchased cruise tickets and wanting to know if Mrs. Mendez would accept the delivery of a car (Exhibit 27, pages 33-34; Exhibit 28, pages 73-74).

Petitioner, also argued and revealed that petitioner had voluntarily cooperated with all Police request surrounding the investigation, up until the time of arrest (Exhibit 27, page 34; Exhibit 28, page 74).

Petitioner argued and revealed the fact that the People failed to prove any motive. In that, the People's offer of Mrs. Franza's testimony, claiming petitioner threatened to kill her if she left, and her telling the Police petitioner sent the shooter, being insufficient to prove any motive on petitioner's behalf to Murder her Mother or her. Such, due to the fact Mrs. Franza never stated petitioner stated he would sent others. As well, for the reason in that, Mrs. Franza lied as to one incident in which an alleged threat was made (June 25, 1990, incident, petitioner with his Mother in Hospital the entire day) (Exhibit 27, pages 34-35; Exhibit 28, pages 74-75).

Petitioner argued and revealed the fact the People failed to prove any relationship between the alleged accomplices and petitioner. In that, the handwriting, containing a margin of error cannot take the place of substantive evidence, when others persons were involved. As well, for the reasons, there being a complete absence of any proof revealing a shared design, preconceived plan or intent with anyone to commit murder, just speculation for the jury. Petitioner, pointing out the fact Mrs. Mendez stating the floral delivery man was outside looking for an address. Such revealing no preconceived plan on petitioner's part to commit murder (Exhibit 27, pages 35-36; Exhibit 28, pages 75-76).

Petitioner argued the People under the circumstances failed to provide the fact-finder with real, objective proof, leading the Grand Jury and Trial Jury to base an inference on an inference, in an effort to establish indirectly what it could not prove directly. Relying upon a bootstrapping of one inference onto another, without any independent, rational facts to support a finding of unlawful intent (Exhibit 27, pages 37-41; Exhibit 28, pages 77-81).

Petitioner argued and revealed there were competing inferences from the proven facts in the case, which completely revolved around Mr. Dacosta. All the facts leading to Mr. Dacosta and the presence of such precluding a finding of petitioner's guilt beyond a reasonable doubt (Exhibit 27, pages 41-45; Exhibit 28, pages 81-85).

Of most notable mention, petitioner revealed, the hypothesis of petitioner's guilt did not flow naturally from the proven facts. In that, the Court and prosecutor conceded that the view of the evidence supported the view of serious injury (Assault 1°) as opposed to attempting to kill Mrs. Mendez and Mrs. Franza (Exhibit 27, pages 43-44; Exhibit 28, pages 83-84).

Petitioner, also revealed the fact, the prosecutor failed to prove intent to murder, with respect to the Puerto Rico pipe bomb. In that, the Prosecutor failed to elicit testimony this pipe bomb was made to detonate immediately upon opening. Thereby, there being no indication the pipe bomb was sent to kill anyone. The testimony revealing the bomb having a three-thirty-second pyrotechnic fuse attached. As a result Miss Lamboy having ample time to abandon the house. The bomb sent to create damage (Exhibit 27, page 44; Exhibit 28, page 84).

Petitioner, claimed the above coupled with the fact, the perpetrator having access to Mrs. Franza and the opportunity to kill Mrs. Franza did not do so. Mrs. Franza stating she played dead, feeling the shooter hover over her. Arguing, had petitioner sent the shooter to murder Mrs. Franza for leaving, then why wasn't she shot again or stabbed, as well, Mrs. Mendez. The perpetrator having ample time to do so, it only taking a couple of seconds to accomplish the mission. That, surely the perpetrator was not scared. Such being the predicate for the attempted murder of Miss. Matos. That, as well, such coupled with the fact that Mrs. Franza never stated petitioner stated he would sent others, clearly, revealing no intent on petitioner's part to commit the crimes convicted of (Exhibit 27, page 45; Exhibit 28, page 85).

Petitioner, claimed the Court never had the opportunity to consider this argument in the proper form as counsel never incorporated such into his brief (exhibit 27, page 45; Exhibit 28, page 85).

The District Attorney's office in opposition to the above issue, never took issue with the issue. Petitioner in response, brought to the Court's attention the People's segment attacking petitioner's complaint as to appellate counsel raising a poorly drafted sufficiency of the evidence and weight of the evidence point, the People claiming petitioner averred to many aspects of counsel's shortcomings. Apprising the Court that the People's Affidavit references above 63 in petitioner's Affidavit cited by the People having nothing to do with petitioner's complaint against counsel in raising a poorly drafted argument, such areas pertained to the argument that counsel should of made. The People intentionally transposing petitioner's argument that counsel should of made to an improper area to make it appear petitioner made such complaint on that basis. Such being an intentional mischaracterization (Exhibit 34, page 5).

Petitioner asserted once again, he did not receive the quality of representation to which petitioner is entitled too. Appellate counsel not raising an obviously meritorious argument, which should of been seen from a casual reading of the transcripts. Regarding the trial Court giving an improper read back and exhibit to the jury (Exhibit 27, pages 46-51; Exhibit 28, pages 86-91).

Petitioner revealed, the jury numerously requested a read back of Det. Breslin's testimony that pertained to his analysis concluding petitioner being the writer of the floral note left at the scene of the shooting, with respect to the 10 exemplars provided to Det. Giorgio from petitioner. A read back commencing. The foreperson wanting an exhibit and being given such. The foreperson wanting the read back to be reread, beginning where the reference are made to the down stroke of the "F" and the two lines across, said read back commencing (Exhibit 27, page 47; Exhibit 28, page 87).

Petitioner argued and revealed, the read back did not pertain to their request, as well, the exhibit given to them. The read back and exhibit given to the jury pertaining to Det. Breslin's analysis with respect to a file taken from petitioner's apartment pursuant to a search called Mr. Franza's file to the floral note, concluding petitioner wrote the floral note. Petitioner directed the Court to the transcripts, proving said assertion and where the proper segment in the transcripts were, that should of been read (Exhibit 27, pages 47-48; Exhibit 28, pages 87-88).

That as a result, the Court not responding meaningfully to the jury's request, thereby, the jury not receiving the guidance of the Court, such allowing the jury to relegate to its own unfettered course of procedure. As a result imposing upon the jury's duty to articulate the reasons for any doubt, imposing upon the degree of clarity and coherence of thought necessary for the juror's to conclude they harbor a reasonable doubt. Such, being crucial due to the request going to the very heart of the case, as the

People's case in chief revolved around Det. Breslin's testimony, thereby being prejudicial to petitioner. The jury failing to undertake any meaningful discussion with respect to their properly framed request, in conviction petitioner. Such, determined at a time when the jury was left to its own conclusions (Exhibit 27, page 48-50; Exhibit 28, pages 88-90).

Petitioner, brought to the Court's attention, that this violation need not be preserved for review. As well, the fact the jury did not express any concerns over the read back, not being determinative of the issue (Exhibit 27, page 47, 50; Exhibit 28, pages 87, 90).

Petitioner asserted that counsel's failure to raise this issue, deprived petitioner of effective assistance of appellate counsel. It being impossible for any Court to conclude that this error was harmless (Exhibit 27, page 51; Exhibit 28, page 91).

The District Attorney's office in opposition to the above issue claimed the issue was unpreserved for Appellate review. That, counsel cannot be legitimately criticized for failing to raise the issue. That, the silence of the juror's, who interrupted the read back to get what they wanted, as the District Attorney's office claimed, such refuting any inferences that the Court response was not pertinent to their concerns. In response, petitioner, without any needless need to make an expansive reply, claimed the application makes it abundantly clear there was an improper read back and exhibit given to the jury. And, that this issue need not be preserved for Appellate review, as well, the jury's failure to make further request or express dissatisfaction not being determinative of the issue (Exhibit 33, pages 20, 22; Exhibit 34, pages 5-6).

Petitioner, asserted counsel's failure to raise this issue, deprived petitioner of effective assistance of appellate counsel. It being impossible for any Court to find this error harmless (Exhibit 27, page 51; Exhibit 28, page 91).

Petitioner asserted once again, he did not receive the quality of representation to which petitioner is entitled too. Appellate counsel not raising an obviously meritorious argument. Regarding the fact a reopened pretrial hearing was held without petitioner's presence (Exhibit 27, pages 51-54; Exhibit 28, pages 91-94).

Petitioner revealed, Det. Giorgio on January 22 and 23, 1992, testified at pretrial hearings. That, on February 13, 1992 during voir-dire jury selection, Det. Giorgio is reflected as testifying at a reopened pretrial hearing, pertaining to misfiled papers. That, the Trial Court during trial stated there was a reopened hearing, pertaining to misfiled papers (Exhibit 27, page 52; Exhibit 28, page 92; Exhibit 37, pages 110-133). ³⁷

Petitioner argued and revealed, the Court endorsement sheets, listing jury selection, all the witness who testified during pretrial and trial, at times when petitioner was present, not showing Det. Giorgio to of testified on February 13, 1992, in any capacity. In addition, revealing there was no proceeding scheduled on petitioner's case for February 13, 1992. Such Court endorsement sheets, revealing the next proceeding on February 14, 1992 (Exhibit 27, pages 52-53; Exhibit 28, pages 92-93; Exhibit 38, pages 1-8). ³⁸

37- Attached as Exhibit 37 hereto Voir-Dire Transcripts.

38- Attached as Exhibit 38 hereto Court Endorsement Sheets.

That, as a result, of the secret reopened pretrial hearing, without petitioner's presence, involving factual matters, which petitioner would have had knowledge, denying petitioner to help to ensure that the Court's determination was not predicated on the prosecutor's un rebutted view of the facts. As well through confrontation and compulsory process (Exhibit 27, pages 53-54; Exhibit 28, pages 93-94).

The District Attorney's office claimed the above issue was unpreserved for Appellate review. That, the voir-dire transcripts making it clear petitioner was present and assisted counsel. That, counsel would of not allowed such a secret proceeding. That the absence of a notation on the work sheet simply not negating petitioner's presence (Exhibit 33, page 22-23).

In response, petitioner, claimed the application clearly showing petitioner was not present, not assisting counsel and nor was Det. Giorgio present, according to the Court endorsement sheets. That, the transcripts only reflect petitioner allegedly being present when the jury panel entered the Court after the reopened hearing not being dispositive. That, their claim in that counsel would of not proceeded without petitioner, being selfserving, there being many such circumstances. Lastly, addressing their claim that this claim is unpreserved for Appellate review, being meritless, pursuant to Dokes (Exhibit 34, page 6).

Petitioner asserted once again, he did not receive the quality of representation to which petitioner is entitled too. Appellate counsel not raising an obviously meritorious argument. Regarding trial counsel allowing the prosecution during summation to commit errors, as a result receiving ineffective assistance of counsel (Exhibit 27, pages 54-76; Exhibit 28, pages 94-116).

Petitioner, argued that counsel allowed the prosecutor to; refer to matters not in evidence; draw conclusions not fairly inferable from the evidence; draw irrelevant and inflammatory conclusions to prejudice the jury against petitioner; insinuate the impression that petitioner is guilty; allude to personal knowledge of guilt; substituted his own opinion in lieu of expert testimony; voucher for the credibility of the chief witness; become an unsworn witness; denigrate the defense; shift the burden of proof, all without moving for a mistrial or raising proper objections, and asking for curative instructions (Exhibit 27, page 55; Exhibit 28, page 95).

Petitioner, revealed counsel on summation, commented on Det. Breslin's testimony as to his conclusions that petitioner's handwriting being on various documents, thereby, connecting petitioner to the crimes. Bringing out the fact Det. Breslin stated there was a margin of error, there being no such thing as a certain science. Counsel commenting, that the prosecution will take the blowups of the handwriting and put them up before the jury. Once again, counsel stated, that as a certain science, with a margin of error, that it is not proof beyond a reasonable doubt. Counsel, carefully refraining from attacks on the credibility of Det. Breslin. In effect holding the position he is wrong, he's mistaken (Exhibit 27, page 58; Exhibit 28, page 98).

Petitioner, revealed the prosecutor in response stated, one of the things that the jury may of noticed, like others, is that in the two hours counsel presented his summation, counsel making very little mention of the handwriting exhibits that were put before the jury in evidence. That counsel picked up a chart dealing with

the stamps. But, counsel never picking up the exhibits, showing in rather graphic fashion petitioner's handwriting appearing on various documents, as the prosecutor claimed. Counsel leaving them aside. Counsel saying very little of the indented writing. The prosecutor submitting, counsel just didn't forget those exhibits (Exhibit 27, page 58-59; Exhibit 28, page 98-99).

Petitioner, argued, the prosecutor's improper argument having a devastating effect of urging the jury to impute consciousness of guilt by the fact that counsel did not pick up the handwriting exhibits, saying very little of them. Thereby, denigrating the defense, inferring that counsel was not himself convinced of petitioner's innocence. The prosecution, appearing to urge, counsel would not have had to resort to such tactics if he believed petitioner to be not guilty. Conveying the impression petitioner was guilty. That such could only of have served to blur the issues and prejudice the jury against petitioner. Suggesting to the jury that counsel failed to fulfill some obligation, thereby, shifting the burden of proof (Exhibit 27, page 59-60; Exhibit 28, page 99-100).

Petitioner, argued, the statement constituted expressions of personal belief about the strength of the People's evidence against petitioner. Such being highly prejudicial, because the statement having the likely effect of bolstering the People's case in chief [Det. Breslin]. That the jurors were entitled to consider this evidence free of the danger that they would accord undue weight to the prosecutor's personal expressions of belief (Exhibit 27 page 60; Exhibit 28, page 100).

Petitioner, argued, the prosecutor hurt petitioner beyond any hope of rehabilitation, depriving petitioner to a fair trial. Petitioner, defenseless without the opportunity to rebut the strong inference of guilt that the prosecutor maliciously shackled upon petitioner. The prosecutor laying out the only inference which he wanted the jury to draw, that your petitioner was conscious of his guilt, through counsel. The statement not being a fair comment on the evidence, or warranted by law, not by the facts of the record. The statement being intended to influence the verdict. It being difficult to conceive of any statement, which would have been more indelibly impressed upon the juror's mind. That the prosecution ascribing to counsel for petitioner's guilt having no place in the record (Exhibit 27 pages 60-61; Exhibit 28, pages 100-101).

Petitioner, revealed, counsel objected to the prosecutor's statement, in which the Judge stated "That's his comment" in open Court. Counsel at side bar, stating, the comment not being fair on anything having to do with the case, It being a comment on his performance, his strategy and tactics. Such being improper (Exhibit 27, pages 61-62; Exhibit 28, pages 101-102).

Petitioner, revealed and argued, counsel never moved for a mistrial or curative instructions to dissipate the prejudicial nature of the prosecutor's statement. Such, thereby, leaving the comment as the Court put before the jury, which were the last words the jury heard before the side bar [That's his comment] untouched. That as a result, such giving standing to the prosecutor's statement as legitimate argument, thus enhancing the prejudicial comment. Counsel, doing nothing to dispel the prejudicial statement (Exhibit 27, page 62; Exhibit 28, page 102).

Petitioner, revealed counsel allowed the prosecutor to substitute the phrasing from himself to the defense, with the same prejudicial comment being made again. Petitioner revealed the prosecutor did not stop there and made further errors with respect to the statement, all without objection. The prosecutor culminating his statement in readily acknowledging counsel being a more elegant speaker than him. Petitioner, arguing such statement being made to denigrate counsel. Leaving the impression counsel has a way with words, thereby, trying to deceive the jury. Such, casting suspicion on counsel's credibility on summation (Exhibit 27, pages 62-63; Exhibit 28, pages 102-103).

Petitioner, argued it is evident the absence of cure weighs heavily in favor of reversal. The prejudice infecting the jury's decision making process in determining petitioner's guilt beyond a reasonable doubt, such being evident, in that the jury requested a read back of Det. Breslin's testimony. That any defense that the Trial Court in its charge to the jury dissipating the taint being completely meritless. Such as a result, of the jury focusing exactly on the prosecutor's improper statement, evidenced by the fact of their request for Det. Breslin's testimony (Exhibit 27, page 64; Exhibit 28, page 104).

Petitioner, further revealed the prosecutor did not stop there. The Prosecutor, commenting that counsel's use of the word circumstantial evidence as kind of a buzz word before them. Suggesting to the jury that counsel's use of the buzz word counsel implying it being something that should override their ability to reason and think and something that should move them to leave their

common sense and good judgment aside and say, well, gee, it's circumstantial evidence (Exhibit 27 pages 64-65; Exhibit 28, pages 104-105).

Petitioner, argued the statement was denigrating to counsel. Such implying counsel was trying to flimflam the jury into thinking circumstantial evidence has no probative force. That the jury would have felt counsel was trying to flimflam them, in light of the prosecution stating the Court will state circumstantial evidence can be just as probative as direct evidence (Exhibit 27 page 65; Exhibit 28, page 105).

Petitioner, further revealed the prosecutor did not stop there. The prosecutor commenting, Mr. Cezar Rodriguez on February 4th, 1991, the Federal Express clerk, who, accepted the money order from the man who mailed the bomb to Puerto Rico, accepted a check dated April 4th. Commenting, Mr. Rodriguez, not paying attention to detail in accepting a money order dated April 4th, as the jury is right now. Commenting, the jury does not have to worry about whether or not a witness was being mindful of the description of who is sitting in the rows and that they do not have to be mindful of whether or not Mr. Rodriguez is looking, suggesting as the jury did to the color of the shirt, the height, the weight (Exhibit 27, page 65; Exhibit 28, page 105).

Petitioner revealed and argued, the statement referred to a matter not in record. That nowhere, was the fact brought out before the jury, that the check possessed the wrong date. Arguing, as a result, such denigrated the credibility of Mr. Rodriguez's description of the person who mailed the bomb. Such giving the impression it could of been petitioner who mailed the explosive.

Such being, highly prejudicial and inflammatory and the fact the prosecution commenting Mr. Rodriguez wasn't giving the attention to detail that the jury is "right now" (Exhibit 27, pages 65-67; Exhibit 28, pages 105-107).

Petitioner, further revealed, the prosecutor did not stop there. The prosecutor, commented, Mr. Julio Ortiz stated petitioner supplied the paper, which contained the indented writing, which contained personal information on Mr. Nelson Dacosta. Commenting, on counsel's statement on summation, in that who knows what circumstances they were made under, who knows what was meant when it was written. Commenting, there is one person who knows, the author and such being written for no innocent person. Asking the jury to compare the indented writing People's exhibit 35D with the word Dacosta on it to an envelope with the word Dacosta. Commenting Det. Breslin stated these strong similarities are one of the very many points showing petitioner wrote the personal information on Mr. Dacosta. Inviting the jury to look at the strong similarities and say they could match the writings (Exhibit 27, page 68; Exhibit 28, page 108).

Petitioner, revealed, nowhere in the record did defense witness Mr. Julio Ortiz state petitioner supplied the paper. Equally, nowhere in the record did Det. Breslin state there were strong similarities between the indented writing and the envelopes. Revealing, Det. Breslin, stating there were strong similarities between petitioner's handwriting and the envelopes only, People's exhibits 23 B,C,E, and 32 A,C, not 35D. Arguing, it being clear, the prosecutor substituted his own opinion, where such expert opinion was called for, thereby, making himself an unsworn witness, in referring to

matters not in the record or evidence. Asking the jury to say they could match the strong similarities. Arguing, the prosecutor, insinuated petitioner's guilt through speculation, thereby alluding to personal knowledge of guilt, as well, insinuating through his speculating statement the information being for no innocent person. The prosecution drawing conclusions not fairly inferable from the evidence. Such being an attempt to shift the burden of proof, infringing upon the jury's province to find a reasonable doubt. All without objection (Exhibit 27, pages 69-71; Exhibit 28, pages 109-111).

Petitioner, further revealed, the prosecutor did not stop there. The prosecutor commented, the landlord on the day of the shooting called petitioner and left a message for Mrs. Franza, to inform something happened to her Mother. Commenting, the neighbor to petitioner, Mrs. Francis saw petitioner, who told her he was going to the drug store and her seeing petitioner arrive back carrying something in his hand. Commenting, petitioner informed Det. Giorgio of this fact, in going to the drug store. Mrs. Francis, stating, petitioner came back out saying something, but could not remember, but was shocked. Commenting, Mr. Francis did remember, petitioner saying Mrs. Franza was shot and that he was going to his Mother-in-law's apartment to find out what happened (Exhibit 27 pages 71-72; Exhibit 28, pages 111-112).

Commenting, another thing that points to guilt being, petitioner saying to Det. Giorgio he left with a friend called Tracy Jenkins that night. The only eyewitness testimony as to what happened the night of the shooting coming from Mr. and Mrs. Francis, knowing

petitioner did not pick up Mr. Jenkins in the driveway, due to petitioner flying out to go to Manhattan, saying shot, been shot, Myra or my wife being shot (Exhibit 27, page 72; Exhibit 28, page 112).

Commenting, Mrs. Francis being placed in a very difficult position, insinuating, due to, her being petitioner's neighbor, hearing something and having to decide whether or not she heard, like Mr. Francis, or she didn't. Commenting, the best she will offer is whatever it was petitioner told her that night, "I was shocked by it". Commenting petitioner's statement was made on the day of the shooting (Exhibit 27, page 72; Exhibit 28, page 112).

Petitioner, argued, nowhere in the record did Mrs. Francis state she saw petitioner arrive back from the drug store with anything in his hands. That, the prosecutor attempted to show petitioner was seen coming back from the drug store with something, so that Mrs. Francis's alleged observation on the day of the shooting would be credited to such day, thereby, bolstering her husband's alleged observations. Arguing, most prejudicial, the prosecutor making their own witness out to possibly be lying as to what was said for petitioner. Arguing, the prosecution knew Mr. and Mrs. Francis's were wrong as to what they alleged to of heard and observed on the day of the shooting, intentionally allowing the jury to think otherwise (Exhibit 27, pages 72-73; Exhibit 28, pages 112-113).

Petitioner, revealed, Both Mr. and Mrs. Francis stated petitioner got into his car alone, a red mustang, and drove away, never seeing petitioner's friend at any time. Revealing, various Dets. and a Police officer seeing petitioner arrive at the shooting scene in a car with Jersey plates, petitioner getting out of the

passenger side. Det. Giorgio stating the black male with petitioner being Mr. Tracy Jenkins. That when petitioner was taken back home by Dets. petitioner's car being in the driveway, inbetween two buildings. Arguing, Mr. and Mrs. Francis had the wrong date. That, they were not questioned until 7 months later. The facts being mixed up. (Exhibit 27, page 73; Exhibit 28, page 113).

Petitioner, argued, viewing the prosecutor's summation as a whole, clearly reveals, an obdurate pattern of inflammatory remarks throughout. The prosecutor telling the jury to use their God given intelligence and words to the like throughout summation in viewing the evidence, while implying petitioner is guilty at the same time. Thereby, belittling the jury into thinking, should they think otherwise, such being wrong. That such flagrant inflammatory statements in an overwhelming vengeful tone, calculated to prejudice petitioner (Exhibit 27, page 73; Exhibit 28, page 113).

Petitioner, argued, the conduct was not in the accepted range of permissible argument in closing. Such having a deleterious effect on the jury in rendering a verdict. Such conduct not being harmless. The cumulative effect of the errors being to deny petitioner of a fair trial. As a result, of counsel's actions, petitioner receiving ineffective assistance of counsel (Exhibit 27, pages 74-76; Exhibit 28, pages 114-116).

The District Attorney's office in opposition to the above issue claimed the issue was unpreserved for Appellate review. The District Attorney's office claimed the prosecutor's summation was firmly based upon the evidence, thereby, being proper and it being proper for counsel not to object and proper for appellate counsel not to brief. Petitioner's claim being based upon a misunderstanding of

the law and not comprehending rhetorical devices or drawing inferences in final argument, or that jurors are chosen to exercise their common sense and view the evidence in light of their common sense. In response, petitioner, without needless need to make an expansive reply, claimed, the application makes clear the prosecutor is guilty of exceeding the bounds of proper argument. Counsel failing to protect petitioner's interest. The prosecutor's summation being based upon baseless rhetoric. That, their claim the issue being unpreserved, being baseless, in that when does one raising ineffective assistance of counsel have to preserve such (Exhibit 33, pages 20-21, 23-27; Exhibit 34, pages 6-7).

Petitioner argued, the fact that the Court found the evidence sufficient as a matter of law, the Court should have serious doubts that the jury was able to accord the evidence its proper weight, given the prejudicial nature of the errors. That, the Court should be unable to discount possibility that the statements made by the prosecutor indeed influenced the jury, in its verdict (Exhibit 27, page 76; Exhibit 28, page 116).

Petitioner asserted once again, he did not receive the quality of representation to which petitioner is entitled too. Appellate counsel not raising an obviously meritorious argument. Regarding counsel failing to raise the CPL §440.10 issue, in a proper form. It being counsel's duty to provide proper and adequate advocacy in the first instance. Petitioner basically revamped the pro-se brief argument, in a slightly different light (Exhibit 27, pages 76-86; Exhibit 28, 116-126).

The District Attorney's office in opposition to the above issue, revolved around the prior judicial decisions, denying the CPL §440.10 motion. That, as a result of the Court finding the motion to be without merit on appeal, the issue being barred, citing CPL §440.10 (2)(a). That appellate counsel, too, found the claim to be baseless, and properly refusing to raise it. That, counsel's decision should not be second guessed. In response, petitioner, revealed the District Attorney's office did not take issue with the substance of the argument, thereby conceding. Instead of addressing the issue, riding on the heels of the Courts decisions. That the District Attorney's office did not dare bring out the fact the Trial Court was incorrect in claiming sufficient facts appear in the record, as they conceded too. Bringing out the fact, as well, CPL §440.10 (2)(a), does not apply to the application at hand (Exhibit 33, pages 27-28; Exhibit 34, pages 7-8).

Petitioner, apprised the Court of prior motions, revolving around the CPL §440.10 motion exhibits. That on June 17, 1996, petitioner filing with the Court to allow petitioner to file the CPL §440.10 motion exhibits. That on July 25, 1996, the Court denying such motion, with leave to renew, with further papers identifying such papers. That on August 6, 1996, petitioner filed a renewal motion, with all the CPL §440.10 motion exhibits attached. Revealing the fact, the District Attorney's office taking no position to the filing of the exhibits. That the Court denied such filing and such being serious error and to allow such filing now. The Court denied such pleading (Exhibit 21; Exhibit 23; Exhibit 27 page 86-87; Exhibit 28, page 126-127; Exhibit 35; Exhibit 36;).

Petitioner, asserted once again, he did not receive the quality of representation to which petitioner is entitled too. Appellate counsel not raising an obviously meritorious issue. Regarding the conviction was void of evidentiary support to prove the elements of intent (Exhibit 27, pages 87-90; Exhibit 28, pages 127-130).

Petitioner, apprised the Court this issue has nothing to do with the concepts relating to weight or sufficiency of the evidence. Such, going to the most basis concepts of due process. Whether a conviction rest upon any evidence, which would support a finding of intent (Exhibit 27, page 88; Exhibit 28, page 128).

Petitioner, argued the Prosecutor's chain of proof did not establish petitioner's intentional involvement of a plan to kill Mrs. Mendez and Mrs. Franza. Equally, there being no evidence in the record from which an inference is permissible that petitioner sent anyone with the intent to kill Mrs. Mendez and Mrs. Franza (Exhibit 27, page 88; Exhibit 28, page 128).

Petitioner, revealed the fact, the Trial Court held [verbatim] [I think the view of the evidence would be the view serious injury as opposed to attempting to actually kill the victims here, Mrs. Mendez and Mrs. Franza.]. Petitioner, referred the Court to a passage of the United States Supreme Court, which stated the Court need not go any further than the Court's decision. That, such passage showing the prosecution failed to meet the burden of proof at trial on the elements of intent. That, the prosecution introduced no evidence to prove petitioner intentionally sought to have Mrs. Mendez and Mrs. Franza murdered (Exhibit 27, pages 88-89; Exhibit 28, pages 128-129).

Petitioner, further revealed the fact, with respect to the intent to kill with the explosive sent to Puerto Rico, there being no intent. That, the fuse was a three-thirty-second type. That Miss Lamboy could of fled the house by the time the explosive went off. Thereby, there being no indication this explosive was sent to kill, but, to create damage. Petitioner, argued, had there been intent to kill, the fuse would of had a shortened time for detonation. That, the prosecution never elicited testimony the explosive was made to detonate immediately upon opening (Exhibit 27, page 89; Exhibit 28, page 129).

Petitioner, revealed and argued, the above coupled with the fact, the perpetrator having access to Mrs. Franza, the opportunity to kill Mrs. Franza, did not do so. Mrs. Franza, playing dead, feeling the shooter 'hovering over her. That had petitioner sent the shooter to murder Mrs. Franza for leaving, then why wasn't she shot again or stabbed, as well, Mrs. Mendez. That, the perpetrator having ample time to do so, it only taking a second or two to accomplish the mission, that petitioner was alleged to of wanted. That, surely the shooter was not scared. Such being the predicate for the attempted murder of Miss Matos. As well, such coupled with the fact Mrs. Franza, never stated, petitioner said he would sent others, all clearly, revealing no intent on petitioner's part to commit murder (Exhibit 27, pages 89-90; Exhibit 28, pages 129-130).

Petitioner, revealed the fact, the prosecutor himself agreed, that if this person truly wanted to kill Mrs. Franza he could of slit her throat, as well, Mrs. Mendez (Exhibit 27 page 90; Exhibit 28, page 130).

Petitioner, argued as a result of the above, revealing the record was devoid of any relevant evidence as to the crucial element of the offenses charged. That reversal is mandated (Exhibit 27 page 90; Exhibit 28, page 130).

The District Attorney's office in opposition to the above issue, failed to take issue with such. In response, petitioner revealed they failed to take issue with such issue. Thereby, conceding to the Court's assessment of the view of the evidence, as well, to their agreement. Equally, conceding to the fact they never elicited testimony the explosive was made to detonate immediately upon opening. As a result, their failing to prove the elements of intent for the crimes convicted of. Petitioner further revealed they as well, failed to take issue with the same assertions in the reasonable doubt argument, thereby conceding as well (Exhibit 34, pages 1-3).

There was one issue left, that petitioner raised [VIII], petitioner will not argue such in this application (Exhibit 27 pages 90-92; Exhibit 28, pages 130-132).

Petitioner, throughout the application, claimed the arguments counsel failed to raise, were based upon Constitutional deprivations (Exhibit 27, pages 21, 46, 51, 54-55, 77, 87; Exhibit 28, pages 61, 86, 91, 94-95, 117, 127).

While the above writ of error coram nobis was pending decision of the Court, petitioner on January 20, 1998, filed a second writ of error coram nobis. Once again, claiming ineffective assistance of appellate counsel. Petitioner asked for consolidation of the two motions.

Petitioner asserted once again, he did not receive the quality of representation to which petitioner is entitled too. Appellate counsel not raising an obviously meritorious argument. Regarding

the Trial Court's error in submitting 2 counts of attempted murder to the jury, in which the jury convicted petitioner upon, and the Court upholding the verdict, when the Court found the evidence being insufficient for the counts, during a precharge conference (Exhibit 39, ¶¶1-21). 39

Petitioner, revealed the Prosecutor made argument before the Court in wanting Assault 1° charged, with respect to the Shooting of Mrs. Mendez and Mrs. Franza. Defense counsel not wanting such charged. After argument of both counsel, the Court finding the view of the evidence being serious injury (Assault 1°) not attempted murder. That, after the Court stated the view of the evidence being Assault 1°, the Court stated it would not charge Assault 1° (Exhibit 39, ¶10).

Petitioner, argued due to the Court's findings, the Assault 1° charges were the only charges required to be submitted to the jury, according to statutory law. That as a result of the Court's actions, the conviction being reached on legally insufficient evidence, being invalid, under statutory law. The attempted murder counts lacking any relevant evidence as to a crucial element of intent, which the Court found and allowing such to stand violating due process of law. That the Court's actions, violated due process of law, by denying petitioner's guilt to be proven beyond a reasonable doubt, based upon legally sufficient evidence (Exhibit 39, ¶¶11-13).

39- Attached as Exhibit 39 hereto Writ of Error.

Petitioner, further argued, it not being the jury's duty to decide what evidence is sufficient pursuant to statutory law. That as a result of the Court's actions in submitting counts, which were not supported by the evidence, such affecting the mode of procedure, in direct contravention of statutory law. That under the circumstances the Court must reverse, even though the question was not formally raised below (Exhibit 39, ¶¶13-14).

Petitioner, also argued, it not being for the Appellate Court in the first instance to determine what were the proper charges the jury should of received, pursuant to statutory law. It being the Trial Court's function. That the Trial Court's failure to submit the proper counts to the jury, the omission cannot be cured by the Court's prior affirmance or exercise of interest of justice, the error not being rendered academic, according to the New York Court of Appeals (Exhibit 39, ¶16).

Petitioner, also argued, to allow the Court or the prosecutor, to take a subsequent guess as to what would be in the minds of the jury as to the assault 1° charges, would deprive petitioner of a basis protection which the guaranty of a fair trial was designed to provide, It being the jury's province to decide not any Court, citing a United States Supreme Court decision, which is parallel to this issue, but, on a different score. Arguing, any contention this issue was waived by counsel in not wanting the assault 1° charges being meritless. That, tactical decisions do not supersede statutory law (Exhibit 39, ¶¶17-19).

The District Attorney's office in opposition to the above issue claimed petitioner misapprehended the record. That the prosecutor postulated that the lesser offenses were necessary should the jury conclude that the People failed to prove petitioner guilty of intent to kill, or that that there was a disparity between the intent of petitioner and that of the actual shooter. That defense counsel opposed the application (Exhibit 40, pages 3). ⁴⁰

The District Attorney's office, further claimed, the Court recalled his original inclination not to charge the assaults. The Court finding that the petitioner did not intend to kill his wife and her Mother representing a rather tortured view of the evidence, that as a result, denying the application (Exhibit 40, page 3).

They claimed, as well, Ignoring the plain reading of the Court's comments and acts, petitioner relying on a sentence which obviously contains a stenographic error. That petitioner erroneously assumes that the Trial Court had concluded that the evidence of the attempted murder was legally insufficient:

The Court: I think the view of the evidence would be the view serious injury as opposed to attempting to actually kill the victims here Mrs. Mendez and Mrs. Franza.

So, I'm going to retain that by not charging the assaults.

It should be noted this is how it appears in the transcripts, not as shown, running together by the District Attorney's office (Exhibit 4, page 1754).

They claimed, the first sentence does not accurately reflect the Court's view of the sufficiency of the People's proof. That common sense dictates that the Judge undoubtedly said, "I think the view of the evidence would [not be] serious injury as opposed
40- Attached as Exhibit 40 hereto Opposition.

to attempting to actually kill the victims here Mrs. Mendez and Mrs. Franza. That the Court found the evidence sufficient being reflected by its following sentence and subsequent conduct to submit the attempted murder counts. Relying on the Court's prior assessment of the evidence in the decision on petitioner's CPL §440.10 motion [the evidence of petitioner's guilt being overwhelming] and that the Appellate Division too found the evidence legally sufficient (Exhibit 40, page 4).

In response, petitioner argued the record does not contain a stenographic error and the Court did in fact hold the view of the evidence being assault 1°. That the People's interjection of [not be] as common sense, being nothing but a self serving declaration. That the presumption of regularity pertaining to the accuracy of the transcripts in question and as a whole being correct and conceded too by the People, according to the New York Court of Appeals. Revealing in the initial application of November 10, 1997, petitioner making the same mention and paraphrase of the Judge, appearing at pages 38, 83-84, that the People never claimed there was a stenographic error, that as a result the People surely cannot be heard now (Exhibit 41, pages 1-2). ⁴¹

Petitioner, as well, argued the People attempted to cloak in a shroud, the inescapable fact the Judge said the view of the evidence being assault 1°. Their supressing the and putting not be in its place, being distinct words not to be confused with. That the Court failing to charge the assault counts being nothing but statutory error (Exhibit 41, page 2).

41- Attached as Exhibit 41 hereto Response.

Petitioner, as well, argued that the Court should take notice of the fact the People did not acquire any affidavits from the Judge or stenographer to prove their assertions. Such assertions by them being conclusory without any probative force. Their revolvment around the Court's decision on the CPL §440.10 motion and the Appellate Division affirmance, being baseless and meritless in opposition (Exhibit 41, page 3).

Petitioner, further, argued the People's assessment of the record at page 3, ¶8 of their opposition being incorrect. There claiming, the trial Court recalled his original inclination not to charge the assaults. The Court finding that petitioner did not intend to kill Mrs. Mendez and Mrs. Franza, being a rather tortured view of the evidence, especially since Mrs. Mendez was shot 5 times (Exhibit 41, page 3).

Petitioner, revealed, the Court stated he was listening and was not doing anything as to the assault charges, until all was heard. That the Judge did not find a tortured view of the evidence, especially since Mrs. Mendez was shot 5 times. That the Judge found a rather tortured view of the evidence, before mention was made to the 5 shots. That the record makes it abundantly clear, after the People's argument, wanting the assault 1° charges, the Judge found the evidence was of the view assault 1°. That it being blatant error for the Judge to disregard the statutory law and do the opposite. Petitioner made further argument, on the People's opposition (Exhibit 41, pages 4-5).

Petitioner, claimed this argument counsel failed to raise, was based upon a Constitutional deprivation (Exhibit 39, ¶7).

The Appellate Division, First Department, reached a decision on petitioner applications on June 11, 1998. The Court denied the the applications in their entirety, citing People V. Bienvenido De La Hoz, in effect holding, petitioner has failed to establish that he was denied effective assistance of appellate counsel. That petitioner has not shown that had the issues been raised a greater likelihood would have existed that the judgment would have been reversed, or at least, modified (Exhibit 42). ⁴²

42- Attached as Exhibit 42 hereto Decision.

JUDGE KAPLAN

98CTV. 5484