

Ex. 5

BY Marcos Quintana
DEPUTY CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22

DOMINIC FRANZA,

Petitioner,

-against-

JAMES STINSON, Superintendent,
Great Meadow Correctional Facility,

Respondent.

AFFIRMATION IN OPPOSITION

98 Civ. 5484 (LAK)

pro se

ORIGINAL

CAROL A. REMER-SMITH, pursuant to 28 U.S.C. section 1746,
affirms to the best of my knowledge that:

1. I am an Assistant District Attorney of counsel to ROBERT
M. MORGENTHAU, District Attorney of New York County, and I am the
attorney assigned to this matter on behalf of Respondent. We would
oppose the motion for discovery.

2. On April 3, 1992, petitioner was convicted, after a jury
trial, of three counts of Attempted Murder in the Second Degree and
one count of Criminal Possession of a Weapon in the First Degree.
Petitioner was sentenced to three indeterminate prison terms of
from eight and one-third to twenty-five years for each homicide
count, and to an indeterminate term of from three to nine years for
weapons possession; each term was to run consecutively to the
others.

3. By a motion filed in the District Attorney's Office on
February 3, 1999, petitioner seeks discovery, which he alleges will
render an evidentiary hearing unnecessary and purportedly will show
that his confinement is illegal and his conviction was procured by
fraud.

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C.A.

NEW YORK COUNTY DISTRICT ATTORNEY

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4. To begin, petitioner concedes in the instant application that documentary evidence had been disclosed prior to trial by the prosecutor (Petitioner's Affirmation, at 1). In the numerous state motions he has filed, petitioner has never complained that he did not receive all relevant materials; the District Attorney's Office need only provide one copy. Of course, only those reports which relate to the subject matter of testimony given at trial must be given to the defense; the state need not turn over its entire file (Petitioner's Affirmation, at 5). In any event, defense counsel had ample opportunity to cross-examine the witnesses about any perceived discrepancies at trial, but on the whole chose not to do so unless it pertained to petitioner's complicity or motive for the crimes.

5. Indeed, using the discovery items as exhibits, petitioner repeatedly filed motions with the state courts (see Respondent's Affirmation, ¶¶16, 21, 23). In fact, with the instant habeas corpus petition, petitioner appended 42 exhibits in support of his petition, comprising at least ten volumes. Cf. Byrd v. Armontrout, 880 F.2d 1, 7 (8th Cir. 1989), cert. denied, 494 U.S. 1019, 110 S.Ct. 1326 (1990).

6. More importantly, petitioner has not established a need for the documents he now seeks. Apparently each document now sought would be used to attack the factual basis for his crimes (Petitioner's Affirmation at 2-4). But, at trial petitioner

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conceded that the crimes charged had occurred and merely contested that proof which established petitioner's complicity (Trial Colloquy: 318; see Respondent's Memorandum of Law, at 4-5, 12-13; Respondent's Affirmation, ¶13). The time to attack any alleged "physical impossibilities" of a crime was at trial, not in a later collateral proceeding. Simply put, petitioner's strategic decision at trial not to contest the factual underpinning of each crime places any belated speculation or inference about the circumstances of that crime beyond this Court's purview.

6. Nor would these documents, absent sworn testimony or other verification, establish that petitioner's conviction was based on "fraud." And, mere cooperation by officials of various law enforcement agencies does not signify the existence of "reports" which were not given to the defense. Similarly, any misstatement of details by an official not involved in the investigation of the shooting does not support the inference of non-discovered reports (Petitioner's Affirmation at 3, 4). Petitioner's self-serving say-so is insufficient to prove his unfounded allegations.

7. Discovery in an action for habeas corpus relief is not available as a matter of course, but only if the petitioner has shown "good cause" for the district court to order discovery. Put another way, Rule 6 which permits discovery for good cause shown, does not authorize a fishing expedition. See Harris v. Nelson, 394 U.S. 286, 300-01 (1969); Munoz v. Keane, 777 F.Supp 282, 287

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(S.D.N.Y. 1991), aff'd sub nom. Linares v. Senkowski, 964 F.2d 1295 (2d Cir.), cert. denied, 506 U.S. 986, 113 S.Ct. 494 (1992); cf. Bracy v. Gramley, ___ U.S. ___, 117 S.Ct. 1793 (1997), rev'g, 81 F.3d 684 (7th Cir. 1996).

8. Here, petitioner presents a laundry list of over 100 items, but he has not shown the relevance of any given item. Rather, he makes a blanket assertion that these documents will somehow prove his claim. As noted elsewhere, the judge who presided at the trial held that petitioner's post-conviction motion (the basis for his present claim), contained "completely unsubstantiated charges of fraud and collusion"; that the charge of conspiracy between the prosecutor and defense counsel was "nothing but self-serving wishful thinking"; that petitioner's re-analysis of the trial evidence was "byzantine"; and that his specific claims were "without merit" (Exh. 18: 2-4; see Respondent's Affirmation, ¶17).

9. Thus, petitioner's allegations are based on a fantasy of wrong-doing that simply cannot be substantiated by the record below. A fishing expedition, such as that sought here, which will result in no support for petitioner's spurious allegations, is a waste of this Court's time and the state's resources. In sum, petitioner has not shown "good cause" warranting an order for discovery.

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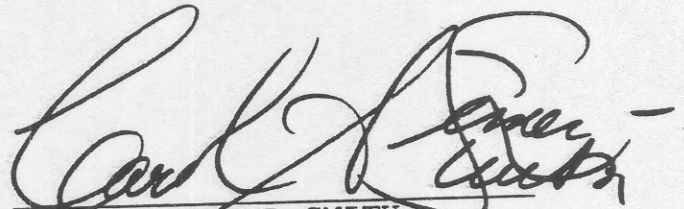
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WHEREFORE, Respondent urges this Court to deny the motion in all respects.

Dated: New York, New York
February 8, 1999



CAROL A. REMER-SMITH
Assistant District Attorney
Appeals Bureau

cc: Dominic M. Franza
92-A-3659
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 12821

Affidavit of Service

State of New York :
 : ss.
County of New York:

Keith A. Miller, being duly sworn,
deposes and says that:

I am not a party to the within action, and I
am over eighteen years of age.

On February 9, 1999, I served a copy of this

AFFIRMATION IN OPPOSITION

on parties and persons below at the addresses below, by mailing the
copy in the United States mails, in a first-class, postage-paid
wrapped, addressed to said persons

Dominic Franza
92-A-3659
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 12821

Keith Miller

Sworn to before me

Feb 9, 1999

Carol F. D'Elena

Notary Public

CAROL F. D'ELENA
Notary Public, State of New York
No. 01D 484147
Qualified in Kings County
Certificate Filed in New York County
Commission Expires 2/28/2000 1999

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SOUTHERN DISTRICT OF NEW YORK

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Respondent.

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AFFIRMATION IN OPPOSITION
TO MOTION FOR DISCOVERY

98 Civ. 5484 (LAK)

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