Ex. 6

A CERTIFIED COPY
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DOMINIC FRANZA,

Petitioner,

- against -

JAMES STINSON, Superintendent,
Great Meadow Correctional Facility,

Respondent.

-----------------------------------x

#12

ANSWERING AFFIRMATION

98 Civ. 5484 (LAK)
pro se

FILED DEC 1998 S.D. OF N.Y. DISTRICT COURT

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, New York County and I am the attorney assigned to this matter on behalf of Respondent.

2. This affirmation is filed in opposition to petitioner Dominic Franza's petition for a writ of habeas corpus to set aside an April 3, 1992 judgment of the Supreme Court, New York County (Bookson, J.), convicting him, after a jury trial, of three counts of Attempted Murder in the Second Degree (New York Penal Law §§ 110.00, 125.25[1]) and one count of Criminal Possession of a Weapon in the First Degree (New York Penal Law § 265.04). 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. Petitioner is incarcerated pursuant to that judgment.

3. This affirmation is accompanied by a Memorandum of Law and

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an Appendix, which includes copies of those documents not included in petitioner's appendix. See ¶¶27-28, infra. Unless otherwise indicated in this Affirmation or in the accompanying Memorandum, respondent does not concede any of the allegations set forth in the petition.

4. Petitioner's convictions stem from trial evidence that established a campaign of terror conducted against his estranged wife, Myra Franza, and her family. As more particularly described in the state's brief on direct appeal (Exhibit A at 18-47):

(a) at 7:15 p.m. on July 17, 1990, an unidentified man, carrying a note written by petitioner, pretended to deliver roses and gained entry to the Manhattan apartment of Myra's mother, Josephine Mendez. Once inside, the gunman shot Mendez five times, once in the face, and then shot Myra in the face. Both women survived.

(b) On August 11, 1990, a live pipe bomb was discovered outside the apartment of Nelson DaCosta, who was Mendez's son and Myra's brother. The police defused that explosive device.

(c) On February 6, 1991, two letters purportedly sent by a "Julio Ortiz," but actually written by petitioner, arrived at the Mendez home. One was addressed to both Mendez and Myra, and the second to DaCosta, threatened the lives of family members in New York and Puerto Rico, where Myra's grandmother Rosa Roman Lamboy lived until her death in November 1990. The letter to DaCosta promised that a "gift" would arrive for Rosa Lamboy on February 8, 1991.

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(d) On February 4, 1991, petitioner had another man send a package, purportedly containing a camera, but actually a live pipe bomb, by Federal Express to Mrs. Roman Lamboy's home in Puerto Rico. On February 8, 1991, the package was received by Evelyn Lamboy, a sister of Mendez, who cautiously peered inside, saw a pipe and wires, and called the police, who in turn disarmed the bomb. According to Federal Express documents, the package had been shipped from New York by a "Julio Ortiz" of "U.S.A. Electronic" in Manhattan, who had used an American Express money order.

5. The evidence led unalterably to petitioner's responsibility for these attacks. First, there was evidence of a stormy marriage, in which petitioner was verbally and physically abusive to Myra Franza. Following threats to kill her and family members, Myra fled the marriage in the spring of 1989. After an effort at reconciliation initiated by the delivery of red roses, a habitual peace-offering, the abuse began again. Myra left the marriage again after an incident on June 25, 1990, when petitioner physically beat Myra and threatened to kill her. After that time, Myra rebuffed numerous efforts by petitioner to obtain a reconciliation. As she waited for medical aid after the shooting, Myra concluded that petitioner had acted on his threats and had sent the gunman; she relayed that suspicion to the police. In addition, while a friend had left a vague taped message for Myra that "something had happened" to her mother, petitioner told his neighbors that "something had happened to his wife," who had been shot -- information the caller did not know and thus could not have

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stated on the tape.

6. Second, physical evidence showed petitioner's culpability. For example, petitioner furnished handwriting samples to the police. Comparing those exemplars to the evidence, an expert established that the note on the box of roses (shooting), and the Federal Express airbill and the American Express money order had been written and/or signed by petitioner. In fact, the note on the flowers instructed the gunman that if he did not find Myra in the Mendez apartment, that he should go to her brother's, where Myra spent the night during their estrangements.

7. In addition, a search, authorized by warrant, of petitioner's residence on February 12, 1991, resulted in the seizure of gunpowder, a roll of black electric tape, and a green magic marker. The tape and marker were similar to those used to package the bomb sent to Puerto Rico. The agents also took a paper with the name "Julio Ortiz" and two phone numbers; another with "Rio Piedras," "Levittown," and two area code "809" telephone numbers; and a card for U.S.A. Electronics. When petitioner was arrested, he had a piece of paper with the name "Rio Piedras" with an "809" area code number and three other "809" numbers written below the name "Levittown"; one was the number of Mendez's sister, Lamboy. Finally, when Myra had left him, petitioner had had a black case similar to that housing the bomb sent to Puerto Rico.

8. Moreover, petitioner was connected to mailed letter-threats to send a "gift" to Myra Franza's grandmother in Puerto Rico. For example, the printed addresses on the two envelopes bore

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"strong similarities" to petitioner's handwriting. In addition, an expert compared the two 3¢-stamps on each envelope with the sheet of 3¢-stamps found in petitioner's apartment, and concluded that the stamps on the envelopes had come from that sheet. And, Mendez noted that the message in bad Spanish had a syntax comparable to petitioner's "broken Spanish."

9. Petitioner was also connected to the pipe bomb left outside Myra Franza's brother's apartment. While searching petitioner's home, agents had noticed packages of firecrackers. Since a firecracker had been used to fuse the DaCosta pipe bomb, they secured another warrant and seized those firecrackers, which were similar to that in the bomb. And, during trial preparation, the handwriting expert enhanced indented writing on a sheet to raise the name "Nelson DaCosta"; the address "644 West 185th Street, apartment 1A"; and the phrases: "6'1" 210 lbs.," "wife -- Ruthie," "Wadsworth between Broadway and Fort Washington," and "shoot."

10. By New York County Indictment Number 1647/91, filed on February 22, 1991, petitioner was charged with two counts of attempted second degree murder and two counts of first degree assault (New York Penal Law §120.10[1]) for the July 17, 1990 shooting. It was superseded by New York County Indictment Number 11987/91, filed on November 1, 1991, which repeated those counts and charged petitioner with Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the First and Third Degrees for the pipe bomb sent to Puerto Rico.

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11. In motions filed on April 19, 1991 and November 19, 1991, petitioner moved to suppress exculpatory statements made to the police, papers seized from his person incident to arrest, and items seized pursuant to federal search warrants. Beginning on January 21, 1992, Justice Paul Bookson conducted an evidentiary hearing. Exhs. 1, 37; see Exh. A: 4-15. He denied the motions in all respects, fully crediting the testimony of the detectives and ATF agents. The judge found that there was "abundant evidence" to constitute probable cause to arrest petitioner, since the police "reliably" knew fourteen specific facts linking petitioner to the crimes, including relevant factors such as motive and opportunity. See Exh. A: 15-17. Turning to each search warrant, the judge found that the affiant presented highly detailed, accurate, and "hard" information to the federal court, which was "primarily firsthand," and constituted probable cause to search petitioner's residence. Finally, the judge determined that the search and the seizure did not exceed the scope of the warrant. See Exh. A: 17-18; see also 64-71.

12. On February 10, 1992, trial commenced before Justice Bookson and a jury. The state's evidence, as summarized in ¶¶4-9, included testimony of Myra Franza, Mendez, Mendez's neighbors, Evelyn Lamboy, petitioner's neighbors, a representative of Federal Express and various law enforcement officers (Exh. 4). The state also presented physical evidence, such as photographs of the Mendez apartment and the explosive devices; the note, flower box, and ribbon; ballistics evidence; answering machine tapes; the

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threatening letters and envelopes; petitioner's personal files, firecrackers, gunpowder, black tape, markers, and other evidence seized pursuant to the search warrants; handwriting exemplars; items taken from petitioner at arrest; and demonstrative exhibits used by the experts to show that petitioner was the author of the documents and to illustrate the jigsaw match of the 3¢-stamps. See Exh. A: 18-47.

13. Not contesting the specific facts surrounding the shooting or the pipe bombs (Colloquy: 318), defense counsel only disputed that evidence which connected petitioner to those crimes in his cross-examination of the state's witnesses. Petitioner did not testify; through defense witnesses, he proffered evidence that petitioner had no motive to strike at the family and that the crimes were aimed at DaCosta. For example, DaCosta, whom petitioner called as a defense witness, testified about frequent telephone calls where the caller was silent. In order to have those calls traced, DaCosta told a telephone representative and the police that someone had threatened to kill him.[1] Mendez had advised DaCosta that two men posing as police officers had come looking for him. See Exh. A: 47-48, 50.

14. In an effort to debunk proof of motive, petitioner called Rosemarie Gonzalez, with whom he had rekindled an old romance. She admitted seeing gunpowder and unopened packages of firecrackers in petitioner's bedroom. See Exh. A: 48-49. The defense called Julio

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[1] Apparently an Avon representative was trying to collect $200 which his wife owed the company.

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Ortiz, a former co-worker and electrician. Ortiz had accepted a ride from petitioner, who wrote down Ortiz's name and telephone numbers. See Exh. A: 49. Cesar Rodriguez, a customer service agent for Federal Express, had processed the package for Puerto Rico. He described the sender as a short, dark-skinned man with a hispanic accent, who obviously was not petitioner. The sender had presented a completed airbill signed "Julio Ortiz" and a money order. See Exh. A: 49. Finally, petitioner called an ATF tool mark expert, who testified that he could not conclusively match any tool from petitioner's basement to the marks on the Puerto Rico pipe bomb. Nor could he match wood or wire from either pipe bomb with samples from the basement. See Exh. A: 50. Counsel's summation arguments disparaged the police investigation, emphasized the lack of evidence connecting petitioner to these crimes, characterized the forensic evidence as unreliable, belittled the proof of motive, and theorized that the true instigator of this violence was an enemy of DaCosta (Defense Summation: 1759-1811).

15. On March 11, 1992, the jury convicted petitioner of three counts of attempted murder and one count of first degree possession of a weapon. On April 3, 1992, petitioner was sentenced as noted above.

16. In a pro se motion dated June 17, 1993, petitioner sought to set aside the verdict (Exh. 6). Petitioner referred to various police reports disclosed prior to trial and to photographs offered in evidence at trial. He argued his innocence based upon his personal evaluation of those materials, as bolstered by newspaper

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and weather reports which were not in evidence. Based upon nothing more than petitioner's personal evaluation of the discovery materials, he asserted that the police reports disclosed by the prosecutor were false, that the "true" reports had been concealed, and that the prosecutor knowingly presented false testimony to obtain an "unjust" verdict. Petitioner also alleged that his attorney was aware of these facts, failed to prevent this "frame," and conspired with the prosecutor and the police to defraud the court and jury. Petitioner concluded that he had been deprived of the effective assistance of trial counsel.

17. On October 19, 1993, Justice Bookson summarily denied that motion because "no grounds exist to necessitate a hearing to enlarge the record" (Exh. 18). The judge specifically held that petitioner's motion contained "completely unsubstantiated charges of fraud and collusion"; that the charge of conspiracy was "nothing but self-serving wishful thinking"; that defense counsel had done "exemplary work" at trial; that proof against petitioner was "overwhelming"; that petitioner's re-analysis of the evidence was "byzantine"; and that his specific claims were "without merit" (Exh. 18: 2-4). On December 16, 1993, a justice of the Appellate Division, First Department, of the New York Supreme Court granted a pro se motion to appeal that order, which was consolidated with his direct appeal (M-6302; Exh. B).

18. On the direct state appeal, petitioner argued, first, that there was legally insufficient evidence connecting petitioner to these crimes, and that the verdict was against the weight of the

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evidence. Second, he claimed that the judge wrongly denied his motion to controvert the search warrants. Third, petitioner challenged several evidentiary rulings at trial. Fourth, he contended that the circumstantial evidence charge did not apprise the jury of the proper standard for reviewing such proof. Fifth, petitioner complained that it was illegal to impose consecutive sentences, which were also excessive (Exh. 3). Finally, in a pro se supplemental brief, petitioner argued that the judge improperly denied his post-conviction motion (Exh. 2).

19. In its responsive brief (Exh. A), the state contended that petitioner's guilt was proven by overwhelming circumstantial evidence, which was legally sufficient to establish petitioner's identity as the instigator of these violent crimes beyond a reasonable doubt. Since the proof inexorably connected petitioner to these crimes, the verdict was in accord with the weight of the evidence (Exh. A: 50-64). Second, the state asserted that the judge properly found that the federal search warrants were supported by probable cause. The affidavits established a nexus between the evidence sought and both petitioner and his residence (Exh. A: 64-71). Third, the state contended that the judge's rulings to admit or exclude evidence were proper in all respects (Exh. A: 72-86). Moreover, the state argued that the charge on circumstantial evidence fully complied with state law (Exh. A: 86-89). Fourth, as to the consecutive sentences, the state argued that they were legally authorized under New York State law (Exh. A: 89-94). Fifth, the state asserted that the judge had properly

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denied petitioner's unsubstantiated post-conviction motion without a hearing; that the prosecutor had in fact controverted petitioner's allegations; and that petitioner had received effective assistance of trial counsel (Exh. A: 94-102).

20. On May 13, 1997, the New York Appellate Division unanimously affirmed petitioner's conviction and denial of his post-conviction motion. It found that the "circumstantial evidence of guilt, including several highly incriminating items of handwriting evidence, was legally sufficient, and the verdict was not against the weight of the evidence." People v. Franza, 239 A.D.2d 201, 202, 658 N.Y.S.2d 4, 5; Exhs. 23, C. Moreover, that court found the contention that there was no probable cause for issuance of a search warrant to be without merit; that the charge on circumstantial evidence conveyed the appropriate standards; and that there was no abuse of discretion in sentencing. Id. As to petitioner's other claims, including the denial of his motion to vacate judgment, the state appellate court held that they were "without merit." Id. The court declined to accept exhibits that petitioner sought to file in connection with the post-conviction motion. Id.

21. In a lengthy letter seeking leave to appeal (Exh. 26), petitioner pro se argued six of the claims presented to the intermediate court.[2] He emphasized the post-conviction motion claim, and faulted the appellate court's findings on the

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[2] Petitioner had instructed appellate counsel not to file a leave application, and sent a letter confirming that direction (Exh. F).

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sufficiency of the evidence, probable cause to search, and the circumstantial evidence charge. With respect to the evidentiary rulings, petitioner underscored the denial of his application to impeach his own witnesses. Finally, petitioner raised two new claims, one concerning the judge's response to a jury request for testimony of the handwriting expert and the other concerning petitioner's purported absence during a "secret pretrial hearing" (Exh. 26).

22. In response (Exh. D), the state noted that issues of legal sufficiency were beyond the purview of the Court of Appeals. In any event, the trial evidence was overwhelming; nor had petitioner controverted the specifics of each crime at trial. The state reiterated that the trial judge properly denied the unsubstantiated post-conviction motion without a hearing; since he did not abuse his authority, that denial was beyond the court's power of review. Likewise, the state noted, the mixed question of law and fact regarding the search warrant was beyond the court's review. The state argued that complained-of evidentiary rulings and the charge on circumstantial evidence were correct in all respects. Finally, the state avowed, the claims raised for the first time before the Court of Appeals had not been preserved at the trial level, were based upon a misapprehension of the facts, and were totally belied by the record (Exh. D). Leave to appeal to the Court of Appeals was denied by Judge Richard C. Wesley on August 25, 1997. People v. Franza, 90 N.Y.2d 904, 663 N.Y.S.2d 516; Exh. E.

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23. In his 1997 petition for coram nobis relief (Exhs. 27-28), petitioner contended that he had been denied the effective assistance of appellate counsel. He first faulted the claims presented by counsel as being neither thoughtful nor well-developed. In addition, petitioner protested that counsel had not advanced certain factual arguments in attacking the legal sufficiency of the trial evidence. Moreover, he complained that appellate counsel had not raised various issues presented in the pro se supplemental brief, especially the denial of the post-conviction motion[3] and the purportedly ineffective assistance of trial counsel, who had not objected to certain comments in the prosecutor's summation.[4] Further, petitioner claimed that it was ineffective for counsel not to raise issues of the insufficiency of the judge's response to a jury question about the handwriting expert's testimony, a pre-trial hearing held in petitioner's absence, and the refusal to submit first degree assault to the jury. Exhs. 27-28.

24. The state responded that appellate counsel had effectively presented those claims which he did raise, and cited viable strategic reasons for making or deciding not to make certain arguments. With respect to petitioner's four trial-error claims, the state noted that they were not preserved, were belied by the

[3] Petitioner ignores the fact that he had ordered appellate counsel not to argue that claim on the ground that he wanted to present it only in a pro se supplemental brief (Exh. 31).

[4] This failure was not mentioned in the section of the post-judgment motion attacking counsel's performance.

record below, and were utterly devoid of merit. Exh. 33. On June 11, 1998, the Appellate Division of the New York Supreme Court denied that petition (M-7387, M-425; Exh. 42).

25. In 1995 and 1996, petitioner apparently filed three state habeas corpus petitions in the county where he was incarcerated. According to petitioner, those applications related to his post-conviction motion, the re-opened hearing, and the response to the jury's request, noted above. Apparently each of those applications was denied; while he appealed to the Court of Appeals on the first two habeas applications, he did not do so on the last because it would have been "futile" since the "Court's (sic) were not giving any rhythm to defendant" (Pet: 8-9).

26. In his rambling application for federal habeas corpus relief, petitioner raises two claims. First, for the reasons stated in his 1993 post-conviction motion, petitioner complains that his conviction was the result of a deliberate denial of his constitutional rights. Second, for the reasons set forth in his 1997 state coram nobis application, petitioner alleges that he received the ineffective assistance of appellate counsel. For the reasons set forth in the accompanying Memorandum of Law, the petition should be denied and dismissed on the grounds that petitioner's claims are all without merit.

27. Submitted herewith is an Appendix containing these exhibits:

Exhibit A - A copy of the state brief on the direct state appeal

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Exhibit B - A copy of the order consolidating the appeal of the post-conviction motion with the direct appeal

Exhibit C - A copy of the order affirming petitioner's conviction on the direct state appeal and declining to accept his post-conviction motion exhibits (Petitioner's Exhibit 23)

Exhibit D - A copy of the state's opposition papers to the leave application to the Court of Appeals

Exhibit E - A copy of the order denying petitioner leave to appeal to the Court of Appeals

Exhibit F - A copy of petitioner's letter to the Court of Appeals indicating that assigned counsel had been directed not to prepare a leave application

28. Petitioner has already supplied 42 exhibits, including:

Exhibit 1 - A copy of the hearing minutes

Exhibit 37 - A copy of the continuation of the hearing during voir dire, pp. 110-33

Exhibit 2 - A copy of petitioner's pro se brief on his direct state appeal

Exhibit 3 - A copy of petitioner's counsel's brief on his direct state appeal

Exhibit 4 - A copy of the trial transcript

Exhibit 6 - A copy of petitioner's pro se post-conviction motion

Exhibit 14 - A copy of the state's response in opposition to the post-conviction motion

Exhibit 18 - A copy of the order denying petitioner's post-conviction motion

Exhibit 23 - A copy of the order affirming petitioner's conviction

Exhibit 26 - A copy of pro se leave application to the New York Court of Appeals

Exhibit 27 - A copy of the pro se coram nobis application

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Exhibit 28 - A copy of the pro se memorandum of law in support of the coram nobis application

Exhibit 33 - A copy of the state's memorandum of law in opposition to the coram nobis application

Exhibit 42 - A copy of the order denying petitioner's coram nobis application

29. Due to the rambling nature and shotgun approach of petitioner, as well as principles that require pro se habeas corpus applications to be read liberally, it may be that petitioner has alleged a claim not responded to by the state. We have tried to discern and respond to the claims presented, guided though by the principle that a petitioner is limited to those federal issues first fairly presented to the state courts. To the extent that we have missed a claim, we respectfully request a fair opportunity to address it in a supplemental filing.

WHEREFORE, it is respectfully requested that the writ of habeas corpus be denied and the petition dismissed without an evidentiary hearing pursuant to Rule 8(a) of the Rules Governing section 2254 Cases.

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I declare under penalty of perjury under the laws of the United States of America pursuant to 28 U.S. C. section 1746, that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York
December 16, 1998

Attorney of Record for Respondents

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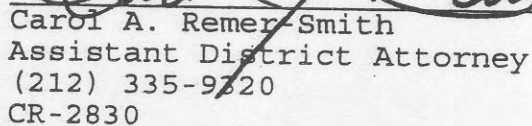

By: ______________________
Carol A. Remer-Smith
Assistant District Attorney
(212) 335-9320
CR-2830

Marc Frazier Scholl
Carol A. Remer-Smith
Assistant District Attorneys
Of Counsel

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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 December 16, 1998, I served a copy of this

AFFIRMATION, MEMORANDUM OF LAW AND APPENDIX 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 person(s):

Dominic Franza
92A3659
Great Meadow Correctional Facility
Comstock, New York 12821

Keith Miller

Sworn to before me

December 16, 1998

Notary Public

ALAN GADLIN
Notary Public, State of New York
No. 02GA4950172
Qualified in Kings County
Commission Expires December 18, 1999

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DKT. 98 Civ. 5484 (LAK)

Franza v. Stinson

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DOMINIC FRANZA,

Petitioner,

-against-

JAMES STINSON, Superintendent,
Great Meadow Correctional Facility,

Respondent.

ANSWERING AFFIRMATION

98 Civ. 5484 (LAK) pro se

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