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United States District Court

Southern District of New York

DOMINIC FRANZA,

Petitioner,

- against -

JAMES STINSON, Superintendent,
Great Meadow Correctional Facility,

Respondent.

98 Civ. 5484 (LAK)

MEMORANDUM OF LAW IN SUPPORT OF ANSWER OPPOSING PETITION FOR A WRIT OF HABEAS CORPUS

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OPPOSING PETITION FOR A WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Dominic Franza seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his imprisonment pursuant to a judgment of the Supreme Court, New York County (Bookson, J.), rendered on April 3, 1992. By that judgment, petitioner was convicted, 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). He 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 currently serving that sentence.

Petitioner's convictions stem from systematic attacks on his estranged wife, Myra Franza, and her family. First, at 7:15 p.m. on July 17, 1990, an unidentified man, purporting to deliver roses,

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gained entry to her parents' apartment at 485 West 187th Street in Manhattan. The gunman followed Myra's mother, Josephine Mendez, into the apartment and shot her five times, once in the face. When Myra opened the bathroom door, the gunman also shot her in the face and left her for dead. The shooter fled, abandoning the roses and a note written by petitioner. Because of prompt medical aid, both women survived their wounds. Myra told the police that petitioner had sent the gunman because he had threatened to kill her if she left him. And, on August 11, 1990, a live pipe bomb was left outside the apartment of Myra's brother, Nelson DaCosta.

Next, on February 6, 1991, two letters purportedly sent by a "Julio Ortiz," but actually written by petitioner, arrived at the Mendez home; each envelope bore two 3¢-stamps. In the letters -- one for Mendez and Myra Franza, and one for DaCosta -- petitioner threatened the lives of family members in New York and Puerto Rico, where Mendez's mother Rosa Roman Lamboy had lived. Further, on February 4, 1991, petitioner instructed another man to send a package by Federal Express to Myra's grandmother in Puerto Rico; all documents were written by petitioner. On February 8, 1991, Federal Express delivered a live pipe bomb for Mrs. Roman Lamboy, from a "Julio Ortiz" of "U.S.A. Electronics." Her daughter, Evelyn Lamboy, peered cautiously inside, saw a pipe and wires, and called the police, who disarmed the bomb.

On February 11, 1991, petitioner was arrested for the attempted murders of Mendez and Myra Franza. That night, a federal search warrant for petitioner's Bronx residence was executed, and

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the agents seized a marker and black tape similar to that used on the bomb's packaging; gunpowder; a sheet of 3¢-stamps; a list of books on explosive devices; and a file of handwritten personal papers. Based on their observations, the agents secured a second search warrant and seized packages of firecrackers and other items.

Based on a comparison with known samples of petitioner's handwriting, an expert witness concluded that petitioner had written the note left at the shooting scene, corroborating Myra Franza's suspicion that petitioner had hired the gunman based on his earlier threats to kill her and her family should she ever leave him. Similarly, the firecracker fuse in the DaCosta pipe bomb was consistent with a package of firecrackers seized from petitioner's residence. Indented writing found on petitioner's personal papers described DaCosta and gave particulars of his address and family, thus connecting petitioner to that crime.

Petitioner had also penned the letters promising a "gift" for Myra Franza's grandmother, and wrote and/or signed the Federal Express airbill and the money order used to ship the pipe bomb to Puerto Rico. Other physical evidence inexorably connected petitioner to that device. For example, 3¢-stamps on the envelopes containing the threats matched stamps taken from petitioner's residence; black tape and a green marker seized were consistent with that used to package the pipe bomb for shipment; and Myra recognized the black case housing that explosive device as similar to a case petitioner had owned. Petitioner also had the address and telephone number of Myra's grandmother both at his home and on

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his person on arrest. Paper bearing the name "Julio Ortiz" and a business card for "U.S.A. Electronics" -- the purported sender of the letters and the pipe bomb -- were also in his home. The only conclusion to be drawn from this overwhelming evidence was that petitioner had instigated these crimes.[1]

The procedural history of this case is described fully in the accompanying Affirmation. In his habeas corpus application, petitioner first claims that the trial court denied him due process and equal protection when it summarily denied his post-conviction motion. Second, petitioner alleges that he was denied the effective assistance of appellate counsel.

POINT I

THE TRIAL COURT'S SUMMARY DENIAL OF PETITIONER'S POST-CONVICTION MOTION TO VACATE JUDGMENT WAS ENTIRELY PROPER (Answering Ground A).

Petitioner's first ground is premised upon the arguments presented in his 1993 New York Criminal Procedure Law Section 440.10 motion to set aside the verdict (Pet: 5, 9-39; Memo: 64-67, 73-86).[2] To provide background, as a matter of trial strategy, the defense conceded that the crimes charged had occurred, but contested proof which established petitioner's complicity -- primarily handwritten items connecting petitioner to the crimes or

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[1] A fuller explication of the facts is in the accompanying Affirmation at ¶¶4-9, 12-15. See Exh. A: 18-47.

[2] Parenthetical references to "Pet" and "Memo" are to the instant petition and the memorandum of law. With minor exceptions, the memorandum tracks the petition (Memo: 1-73); it has an added "argument" section (Memo: 73-95).

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establishing his motive. The jury convicted petitioner of the attempted murders of Myra Franza and Josephine Mendez by the gunman, and of the attempted murder of Franza's grandmother in Puerto Rico by the live pipe bomb. See Exh. A: 18-50.

Pending the direct appeal, petitioner brought a motion seeking to vacate that judgment (Exh. 6). He fleetingly challenged the jurisdiction of the court and claimed that there was no probable cause to arrest him or to search his residence. In addition, petitioner claimed that the trial evidence was legally insufficient, that the verdict was against the weight of the evidence, that he was the subject of a fraudulent prosecution, that his conviction resulted from false evidence, and that the "true" evidence -- proof which exculpated him -- had been concealed from the court and the jury. Also, petitioner alleged, presumably because he was convicted, that his trial attorney conspired with the prosecutor to convict petitioner, and afforded him ineffective representation. In particular, petitioner protested that trial counsel had not used discovery materials to impeach the People's witnesses and thus to unmask the fraudulent state case. See Affirmation, ¶16. Nothing in that motion relied upon anything other than petitioner's speculation and self-interested evaluation of the evidence heard and credited by the jury.

For instance, petitioner compared crime scene photographs to public sources of weather information to "prove" that they had not been taken at the time the police photographer had specified. He next reasoned that a comparison of photographs of the crime scene,

ballistics evidence recovered, and the medical records refuted testimony of Mendez and Myra about where they were standing when the gunman shot them, the number of gunshot wounds, the severity of Mendez's injuries, and the caliber of the weapon. In like fashion, petitioner used the affidavit for the search warrant and various Federal Express documents to contest the veracity of certain factual testimony of Lamboy about when and how she received the pipe bomb in Puerto Rico. Finally, although he had not testified at trial, petitioner asserted his own purported recollection of events. He concluded that the trial evidence contained many "physical impossibilities" and that the police had "tampered" with the evidence.

As to the performance of trial counsel, petitioner complained that, while counsel had possessed the same discovery materials used as the basis for the motion, and could have used them to expose the state's "fraudulent" case or to impeach the state's witnesses, he did not do so. For example, petitioner argued that counsel was ineffective because he unsuccessfully controverted the search warrants. Presuming that federal agents had not timely complied with state provisions to transcribe and seal the first warrant, petitioner assumed that agents had not applied for one, that their testimony in that regard was "fabricated," and that his defense attorney had colluded with the prosecutor to conceal that fraud. Petitioner also complained that the state had not provided exculpatory evidence to counsel -- the "true" police reports.

The state opposed petitioner's motion, arguing that the issues he had set forth could be raised by direct appeal and that his allegations were "confusing, factually inaccurate and without merit" (Exh. 14: 1).[3] Denying petitioner's motion, the trial judge found that it contained "completely unsubstantiated charges of fraud and collusion." For example, the charge of a conspiracy between the prosecutor and defense counsel to convict petitioner was "nothing but self-serving, wishful thinking." Recalling the overwhelming evidence of petitioner's guilt, the judge found such a re-analysis of the state's evidence to be "byzantine" and the specific claims to be without merit. Moreover, the judge held, defense counsel had done "exemplary work at the trial" (Exh. 18: 2-4). Since the case was "on direct appeal and no grounds exist to necessitate a hearing to enlarge the record," the judge summarily denied the motion in accordance with state law. Id.; see N.Y. CPL §§ 440.10(2), 440.30(1); 440.30(4); People v. Satterfield, 66 N.Y.2d 796, 799, 497 N.Y.S.2d 903 (1985).

Appealing that denial, which was consolidated with his direct appeal (Exh. B), petitioner complained that, under New York law, he was entitled, in the alternative, to a finding that the state had conceded the merits of his claim, or a granting of his motion, or a hearing on the issues. As in his original motion, petitioner did not discuss federal precedent and made only fleeting reference to

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[3] Petitioner erroneously concludes that the state "conceded" his myriad claims of fraud (see Pet: 31-33, 35, 39; Memo: 23-26, 28, 31, 74, 85).

"due process" under the United States Constitution in the point headings.[4] Exh. 2.

Examining the sufficiency and the weight of the evidence on the direct appeal, the state appellate court rejected petitioner's claim that the jury's verdict was against the weight of the credible evidence and affirmed his conviction. People v. Franza, 239 A.D.2d 201, 202, 658 N.Y.S.2d 4, 5 (1st Dept.), Exhs. 23, C, appeal denied, 90 N.Y.2d 904, 663 N.Y.S.2d 516 (1997), Exh. E; see Exh. A: 50-64. The appellate court found the claims in the post-conviction motion to be "without merit," and affirmed the judge's decision. It declined to accept petitioner's exhibits pertaining to that post-conviction motion. 239 A.D.2d at 202, 658 N.Y.S.2d at 5, Exhs. 23, C; see Exh. A: 94-102.

In this application, petitioner seeks, in essence, to re-argue the denial of his post-judgment motion under New York Criminal Procedure Law Section 440.10. At the outset, to the extent that petitioner argues that the manner in which the motion was decided denied him a constitutional right, that argument is not cognizable. After all, a state's procedures in deciding collateral post-conviction motions may not be the basis for habeas corpus review. See Nichols v. Scott, 69 F.3d 1255, 1275 (5th Cir. 1995), cert. denied, 518 U.S. 1022, 116 S.Ct. 2559 (1996); Williams-Bey v.

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[4] Since petitioner did not present a viable constitutional issue in the state courts, he has forfeited federal habeas corpus review. See Levine v. Commissioner of Correctional Services, 44 F.3d 121 (2d Cir. 1995); see also Coleman v. Thompson, 501 U.S. 722, 732, 111 S.Ct. 2546, 2555 (1991); Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 2080 (1996).

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Trickey, 894 F.2d 314, 317 (8th Cir.), cert. denied, 495 U.S. 936, 110 S.Ct. 2183 (1990); Turner v. Sullivan, 661 F.Supp. 535, 540 (E.D.N.Y. 1987), aff'd, 842 F.2d 1288 (2d Cir.), cert. denied, 487 U.S. 1240, 108 S.Ct. 2913 (1988); Gerlaugh v. Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997), cert. denied, ___ U.S. ____, 119 S.Ct. 237 (1998); Delgado v. Walker, 798 F.Supp. 107, 116 (E.D.N.Y. 1992); 28 U.S.C. Section 2254; see Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994 (1987) (there is no constitutional requirement that a state provide post-conviction review of a criminal conviction); Bowman v. Gammon, 85 F.3d 1339, 1342 (8th Cir. 1996), cert. denied, 520 U.S. 1128, 117 S.Ct. 1273 (1997) (denial of a post-conviction motion does not raise a claim proper for federal habeas review). Beyond that, procedural forfeiture rules would bar consideration since, as Judge Bookson concluded, petitioner's claim was based only on his personal evaluation of the evidence and matters that were already part of the appellate record.

In any event, petitioner has failed to demonstrate anything meriting habeas corpus relief. Under 28 U.S.C. section 2254(d), as amended by the AEDPA, to obtain habeas relief, a prisoner must demonstrate that a claimed violation of a federal constitutional by the state court ,

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

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28 U.S.C. § 2254(d).

The Second Circuit, to our knowledge to date, has not provided gloss to section 2254(d). The Seventh Circuit has treated "contrary to" as relevant to questions of law, and "unreasonable application" as relevant to mixed questions of law and fact. Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), reversed on other grounds, 521 U.S. 320, 117 S.Ct. 2059 (1997). Moreover, the Seventh Circuit has concluded that "clearly established" acts to "limit the source of doctrine on which a federal court may rely in addressing the application for a writ," in that the petitioner "must be able to point to an authoritative decision of the Supreme Court." 96 F.3d at 869; see also Abrams v. Barnett, 100 F.3d 485, 489 (7th Cir. 1996) (AEDPA limits federal courts to jurisprudence of the Supreme Court), vacated on other grounds, ___ U.S. ___, 117 S.Ct. 2503 (1997). As a result, the Seventh Circuit has concluded that section 2254(d) requires that "greater deference be accorded state court determinations" than was the situation prior to the AEDPA, Ford v. Ahitow, 104 F.3d 926, 936 (7th Cir. 1997); Emerson v. Gramley, 91 F.3d 898, 900 (7th Cir. 1996), cert. denied, 520 U.S. 1122, 117 S.Ct. 1260 (1997), and that the core issue is whether the state determination "is at least minimally consistent with the facts and circumstances of the case." Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 72 (1997). The First, Fifth, and Eleventh Circuits have provided their own glosses which possess varying shades of differences. O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998);

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Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 520 U.S. 1107, 117 S.Ct. 1114 (1997); Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998).

None of the claims in the state post-conviction motion come close to meeting that standard. Whether the trial court had jurisdiction to try petitioner was, at best, a question of state law. See Pet: 17. Federal courts are not empowered to review determinations of state law. Lewis v. Jeffers, 497 U.S. 764, 780, 110 S.Ct. 3092, 3102 (1990); Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir. 1998). Where, as here, the attempted murders took place in Manhattan, the firecracker-fused pipe bomb was found in Manhattan, the threatening letters were sent to a Manhattan address, and the pipe bomb to Myra's grandmother was sent from Manhattan to Puerto Rico, there can be no question that there was jurisdiction to try petitioner for the attempted murders of Myra Franza, Mendez, and Roman Lamboy and for the possession of the explosive device.[5]

As to the issues concerning the credibility of the trial evidence, regardless of the various labels used by petitioner, the claim there was grounded in the defense view of the evidence, which a jury, after hearing the state and defense evidence, categorically rejected. There is no question that a conviction procured by fraud

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[5] To the extent petitioner argues that state court was without jurisdiction because the judge found that the evidence of attempted murder was legally insufficient, he is wrong. The judge refused to submit first degree assault, and found the prosecutor's argument that the jury might find that petitioner was guilty of assault, but not of attempted murder, to be a tortuous reading of the evidence (1746, 1754; see infra at 26).

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violates the United States Constitution; however, petitioner's "say-so" did not then, and does not now, establish fraud. Nor does petitioner's bald assertion, without more, present any legitimate issue of exculpatory evidence suppression or disclosure violations. Simply put, petitioner does nothing more than attempt to analyze and criticize the trial evidence. But his personal view of that proof does not overcome the expert testimony of the handwriting and jigsaw match forensic analysts, as well as the mountain of circumstantial evidence that led directly to petitioner's doorstep -- including the evidence of motive and opportunity to instigate these violent crimes.

As a matter of trial strategy, the defense conceded that the charged crimes had occurred (Colloquy: 318-19; see Pet: 16; Memo: 9). For example, trial counsel agreed that Myra Franza and Mendez had been shot and seriously injured, but argued that petitioner was not responsible. Under that strategy, the caliber of the weapon, the ballistics evidence recovered, where the women were standing when they were shot, the exact number of wounds, or the amount of blood lost, were simply not relevant. Nothing in the timing and content of the crime scene photographs could have advanced, and no examination of the victims' medical records could have furthered, the defense that someone else was responsible for such serious injuries (cf. Pet: 17-25; Memo: 1, 9-18, 75). Despite protracted discourse (Pet: 17-19; Memo: 9-12, 75-77), petitioner does not explain why the imagined discrepancies, even if true, are of significance to his defense.

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Similarly, the defense conceded that a dangerous pipe bomb had been sent to Myra Franza's grandmother in Puerto Rico, but denied that petitioner was culpable. Thus, the mechanics of the delivery or manner of receipt by Evelyn Lamboy were not relevant to that defense (cf. Pet: 25-30; Memo: 18-23, 78-79). Simply, petitioner's speculative factual inferences were placed beyond this Court's purview by his strategic decision not to contest the factual underpinning of the crimes. See Coleman v. Thompson, 501 U.S. 722, 732, 111 S.Ct. 2546, 2555 (1991); see also Reed v. Farley, 512 U.S. 339, 354, 114 S.Ct. 2291 (1994). As noted, the trial judge found the evidence of petitioner's guilt to be "overwhelming" (Exh. 18: 2-4); and, examining its sufficiency and weight, the state appellate court rejected petitioner's claim that the verdict was against the weight of the credible evidence. 239 A.D.2d at 202, 658 N.Y.S.2d at 5.

Finally, while a criminal defendant is certainly entitled to effective assistance of trial counsel, a claim that an attorney was unable to defeat such inexorable evidence does not demonstrate woefully inadequate representation. Petitioner's theory was that trial counsel was incompetent because he was unable to prove the evidence of guilt untrue. But, this complaint is nothing more than retroactive disagreement with trial strategy. In fact, there was a common sense reason why counsel failed in this endeavor -- the evidence compellingly established petitioner's guilt. This is not to say that trial counsel mustered no defense.

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Before trial, counsel assiduously sought discovery, moved for dismissal of the indictment on various procedural grounds, and urged suppression of petitioner's statements, items taken from him at arrest, and evidence seized during execution of the search warrants. At the lengthy pre-trial hearing, counsel alleged untimely disclosure of the witnesses' prior statements and of exculpatory evidence (Exh. 1: 2-31, 65-67, 105-23; Exh. 37: 4-15, 134-36), and queried the veracity of a copy of the search warrant (Exh. 1: 45-53). He vigorously cross-examined the witnesses to establish both a dearth of evidence connecting petitioner to the crimes and the unwarranted delay in arrest (Exh. 1: 254-58, 260-67, 279-84, 320-33, 413, 416-19, 423, 426-27, 461-66). Counsel zealously contended in oral argument and a 25-page memorandum of law that the evidence seized pursuant to the warrant should be suppressed.

At trial, defense counsel continued to afford petitioner meaningful representation. For example, he made several motions in limine (Exh. 4: 143-46, 198-206, 294-98), and voiced numerous objections on evidentiary or legal grounds (id. at 105, 121, 152, 155, 212, 215-16, 239, 245, 283-85, 291, 293-94, 305-06, 328-20, 332-33, 336-38, 343, 760-61, 1067, 1109, 1111-12, 1117, 1460-62). In this regard, counsel vehemently opposed the admission of certain evidence (id. at 2-9, 75, 317-21, 501-07, 563-64, 566-67), conducted effective voir dire of expert witnesses in an attempt to challenge their expertise (id. at 952-54, 1153-54, 1191-93), and moved for a mistrial when defense evidence was not admitted (id.

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161-73, 1523-24, 1537). Further, counsel conducted thorough cross-examination of the witnesses, and made strong arguments during colloquies, in an effort to make it seem that petitioner was not responsible for any of the vicious attacks, but that unspecified enemies of DaCosta may have been (Exh. 4: 251-53, 259-74, 276-78, 353-57, 380-86, 397-400, 425-26, 449-50, 531, 632-33, 639-42, 661-62, 666-67, 676-81, 683-91, 696-728, 734, 737-41, 792, 801-10, 909-11, 915-21, 937-38, 1328-33, 1339-40, 1345, 1351-53, 1357-58, 1368, 1376, 1383-85, 1414-21).

Trial counsel also presented a well-planned defense case to emphasize that petitioner was not responsible and to highlight the inadequacies of the state's proof. For instance, counsel called the assigned detective to testify that the note written by petitioner was not attached to the flower box when he arrived at the crime scene (Exh. 4: 1476-80, 1483). Second, counsel tried to diffuse the expert witnesses through an ATF toolmark expert to prove that neither pipe bomb could be connected to the multitude of tools, pipes, and common objects found in petitioner's two-family home (id. at 1652-89, 1702-03). Third, counsel attempted to sway the jury through his cross-examination of Mendez and his direct examination of DaCosta to show that an enemy of DaCosta was the actual instigator of the violence (id. at 257-64, 1609-26); he also unsuccessfully attempted to call other witnesses in that regard. Counsel next called Rosemarie Gonzalez, petitioner's new girlfriend, intimating that because petitioner was involved with another woman, he would not have had a motive to retaliate against

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his estranged wife and her family (id. at 1586-1602). He elicited from the Federal Express agent who accepted the package that the sender of the pipe bomb was not petitioner (id. at 1718-25).

Finally, petitioner's attorney submitted several requests to charge (Exh. 4: 1743-58), and later objected to the instructions given (id. at 1948-55), prompting a supplemental charge (id. at 1957-59). In summation, counsel strenuously argued that the state had not proved petitioner's guilt of the charged crimes and that the very absence of certain evidence connecting him to those crimes mandated a "not guilty" verdict. He also contended that the purported motive was disproven by petitioner's relationship with Gonzalez, and then urged the jury to find that DaCosta may have been the intended target of an assailant and thus was indirectly responsible for the attacks on his family. Finally, counsel argued that since forensic sciences were inexact and had a "margin of error," that the evidence which showed that petitioner had written the various documents and mailed the threatening letters was too inconclusive to establish his guilt (id. at 1759-1811).

That the jury rejected the defense theory of the evidence does not constitute ineffective assistance; rather, it underscores the formidable challenge counsel faced. Tellingly, petitioner has repeatedly used many of counsel's arguments, or the evidence elicited, to attack his conviction. Indeed, wholly familiar with this performance, the judge ruled that defense counsel had done "exemplary work at the trial" (Exh. 18: 2-4).

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In short, the trial judge had every right summarily to deny petitioner's "completely unsubstantiated" accusations of fraud and collusion or of ineffective representation by trial counsel. Moreover, his findings are presumed correct in a habeas corpus proceeding absent "clear and convincing evidence" that they are incorrect. Demosthenes v. Baal, 495 U.S. 731, 735, 110 S.Ct. 2223 (1990); West v. Seabold, 73 F.3d 81, 85 (6th Cir.), cert. denied, 518 U.S. 1027, 116 S.Ct. 2569 (1996); 28 U.S.C. §§ 2254(e)(1). Petitioner has not shown that those findings were inaccurate and has not presented any viable issues of fact which necessitate a hearing by this Court. Put simply, since these claims are utterly frivolous, there is no need for a hearing. See Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745 (1963); Vess v. LaVallee, 420 F.Supp. 964, 966 (E.D.N.Y. 1976).

In sum, there is no merit to petitioner's claim, which should be summarily rejected.

POINT II

PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL (Answering Ground B).

Petitioner's second ground is that he was denied effective assistance of appellate counsel (Pet: 5, 40-74; Memo: 39-73, 86-95). In essence, as he did in his 1997 coram nobis application (Exhs. 27-28), petitioner asserts that his attorney was incompetent, claiming that the issues presented were neither thoughtful nor well-developed, and protesting that he did not make certain factual arguments about the sufficiency of the proof or

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raise claims such as the erroneous denial of the post-conviction motion, the purportedly ineffective representation by trial counsel, the insufficiency of the judge's response to a jury question, the continued hearing in petitioner's absence, and the refusal by the trial judge to submit first degree assault to the jury.[6] The state opposed (Exh. 33); the appellate court denied petitioner's application (M-7387, M-425; Exh. 42).

Of course, petitioner was entitled to be represented on appeal by an attorney who functioned as an active and single-minded advocate on his behalf, made conscientious examination of the record and the applicable law, and marshalled arguments effectively in his defense. Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830 (1985); People v. Casiano, 67 N.Y.2d 906, 501 N.Y.S.2d 808 (1986); People v. Gonzalez, 47 N.Y.2d 606, 610-11, 419 N.Y.S.2d 913 (1979). That is exactly what petitioner received.

To begin, appellate counsel effectively presented the issues raised. Despite petitioner's complaint that the brief was "plagued with insufficiencies" (Memo. at 87), counsel presented a statement of the hearing and trial evidence in a manner favorable to petitioner (Exh. 3: 5-18), which set the stage for his substantive arguments. Counsel argued that the verdict was against the weight of the evidence; claimed that the hearing court wrongly denied the motion to controvert the search warrants; challenged several of the court's evidentiary rulings; and contended that the circumstantial evidence charge did not apprise the jury of the proper standard of

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[6] Petitioner has appended counsel's brief as Exhibit 3.

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review (Exh. 3: 20-43). These claims were well researched and intelligently presented. Also, in each claim raised, counsel applied the law to the facts in this case, focused on the gravamen of the alleged error, and eschewed extraneous sub-arguments which detracted from the point.

For example, counsel formulated a strategy to attack the legal sufficiency of the evidence and to focus on the argument that the verdict was against the weight of the evidence. Repeatedly noting that petitioner had not been firmly tied to the gunman or to the man who sent the pipe bomb, he emphasized the lack of proof of petitioner's complicity (Exh. 3: 8, 10, 12, 21-22; cf. Memo: 88), underscored petitioner's cooperation with the police (Exh. 3: 6-9, 16; cf. Memo: 88), and highlighted that the gun powder seized in petitioner's home did not match that found in either pipe bomb (Exh. 3: 18, 22; cf. Memo: 88). Further, counsel reiterated the main trial defenses and arguments: that proof of motive was discredited by petitioner's subsequent romantic involvement with Gonzalez and that unspecified enemies of DaCosta were responsible for the vicious attacks -- effectively exonerating petitioner (Exh. 3: 22-23). Since the state's circumstantial proof was equally consistent with petitioner's innocence, counsel concluded, it did not warrant affirmance (Exh. 3: 20, 23, 43). Under this strategy, counsel limited argument about motive and chose not to discuss intent -- after all, the state's proof connecting petitioner to the crimes was dispositive of his guilt and rendered extensive discussion of intent or motive to kill unnecessary.

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With respect to the search warrant, appellate counsel asserted that agents had not supplied the federal magistrate with a sufficient nexus between the purported crimes and petitioner's residence; nor did they establish that the evidence sought could be found there. Attacking the judge's evidentiary rulings, he posited that the judge had applied a lenient standard to admit the state's evidence, while demanding a more exacting standard of the defense. Counsel concluded that the court thereby eviscerated the defense and denied petitioner a fair trial. Finally, counsel urged that the imposition of consecutive sentences was inappropriate to petitioner's background and to the passionate motive behind these crimes; he sought modification of the terms imposed. Thus, it can hardly be said that appellate counsel filed a perfunctory brief. See Exh. 33: 8-17. Nonetheless, petitioner faults counsel's brief as being neither thoughtful nor well-developed. He errs.

To challenge successfully the effectiveness of appellate counsel, a defendant must establish, not mere losing tactics, but that such representation fell below the standard of reasonable competence, and that but for counsel's ineffectiveness, the result of the defendant's appeal would have been different. Strickland v. Washington, 466 U.S. 668, 696, 104 S.Ct. 2052 (1984); People v. Baldi, 54 N.Y.2d 137, 444 N.Y.S.2d 893 (1981). And, since it is part of an attorney's duty to winnow out weaker issues in support of what, in his discretion, is the best strategy, Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308 (1983), a criminal defendant shoulders a "significant burden" in attacking the "strong"

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presumption that counsel was effective. Strickland v. Washington, 466 U.S. at 689-90, 104 S.Ct. at 2052; People v. De La Hoz, 131 A.D.2d 154, 520 N.Y.S.2d 386 (1st Dept. 1987), appeal dismissed, 70 N.Y.2d 1005, 526 N.Y.S.2d 940 (1988). Thus, the mere existence of an unraised issue will not suffice to rebut the presumption that appellate counsel has been effective, Jones v. Barnes, 463 U.S. at 751, 103 S.Ct. at 3308, and counsel may omit even colorable claims if, in his judgment, they will not advance the defendant's cause and may in fact detract from the most promising points. Jones v. Barnes, 463 U.S. at 751-54, 103 S.Ct. at 3308; Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661 (1986); Mitchell v. Scully, 746 F.2d 951, 955 (2d Cir. 1984), cert. denied, 470 U.S. 1056, 105 S.Ct. 1765 (1985).

Here, none of petitioner's complaints demonstrates incompetence. Indeed, even the most cursory examination of the record reveals that petitioner's counsel rendered constitutionally effective assistance on appeal. Indeed, that petitioner cannot establish prejudice is evident from the fact that he presented several of these claims in a supplemental brief which the Supreme Court Appellate Division reviewed and, even after ignoring procedural impediments to their presentation, rejected.

First, petitioner complains that certain factual arguments were not advanced by counsel in attacking the trial proof. This criticism is frivolous. Omissions of this sort, without more, do not constitute ineffective assistance of appellate counsel. Rather, they are a conscious strategic decision to emphasize that

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which is weak about the state's case, while minimizing its strengths. Indeed, petitioner misapprehends the arguments made in complaining that his appellate attorney did not contest legal sufficiency or raise the most important factual issues.

For example, while counsel did not specifically contend that forensic science is "not exact" or admits to a "margin of error," he disparaged the handwriting evidence by noting that, even though an expert had concluded that petitioner had written the note, the police had obviously attached little value to that opinion since they did not arrest petitioner (Exh. 3: 9, 20-21; cf. Memo: 87-88). Thus, any recitation of the expert's conclusions to debunk them would add little. Similarly, it is hard to fathom what benefit would be gained by repeating the death threats petitioner had made to Myra Franza in order to argue that he had never said that he would hire an assassin. Such a claim would only undermine an argument that petitioner's motive had not been established (cf. Memo: 88, 91). Likewise, to attack the proof of intent by noting that the assailant did not ensure that all his victims died would simply underscore the cold-blooded brutality of these crimes; it would not establish petitioner's lack of complicity -- the theme of the defense appellate brief (cf. Memo: 88-89, 91-92).

Not only does petitioner ignore the negatives inherent in making the proposed arguments, he does not recognize the positive benefit of counsel's appellate strategy. Recognizing that the standard for legally sufficient evidence is whether, taken in a light most favorable to the state and drawing all permissible

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inferences in the state's favor, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979) (emphasis in original), counsel instead chose to craft an argument emphasizing the weight of the evidence. On a weight of the evidence review, the threshold for reversal under New York law is more liberal. After all, the appellate court had only to be convinced that a different verdict was not unreasonable and that the trier of fact failed to give the evidence the weight it should have been accorded. People v. Bleakley, 69 N.Y.2d 490, 493-95, 515 N.Y.S.2d 761 (1987).

As noted, appellate counsel emphasized the paucity of evidence proving petitioner's complicity and that only the handwriting expert's opinion connected petitioner to the crimes charged. To enhance that argument, counsel asserted that, misled by the judge's instructions on circumstantial evidence, the jury may have failed to determine that each circumstantial fact had been proven by direct evidence, that each inference flowed naturally from the facts proved, and that such inferences were inconsistent with innocence. In short, counsel was far from ineffective in concluding that he was more likely to be successful by pressing a weight of the evidence review, rather than its legal sufficiency.

Next, petitioner complains that appellate counsel was ineffective because he failed to advance various claims petitioner had raised in the pro se supplemental brief, leave application, and coram nobis petition. But, since trial counsel had not protested

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any of these trial errors, they were unpreserved for appellate review under state law. See People v. Lombardo, 61 N.Y.2d 97, 104, 472 N.Y.S.2d 589 (1984); CPL § 470.05(2). And, since, singly or in combination, those issues are devoid of merit, it is not surprising that appellate counsel rejected them as essentially worthless on appeal. See Jones v. Barnes, 463 U.S. at 751-54, 103 S.Ct. at 3308. Of course, counsel's determination to raise certain issues on appeal and not others is a matter of strategy, and does not ipso facto warrant a conclusion that ineffective representation has been provided. Id.

First, petitioner protests that his appellate attorney did not argue that the suppression hearing was continued in petitioner's absence on issues relating to petitioner's statements to the police and investigation of the DaCosta pipe bomb (Memo: 90). Notably, this claim would have been difficult for counsel to press, since it is both unpreserved and belied by the record (Exh. 37). Of course, a criminal defendant has an absolute right to be present with counsel, "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charges." People v. Ciaccio, 47 N.Y.2d 431, 436, 418 N.Y.S.2d 371 (1979), quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 (1934); Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658 (1987); see N.Y. C.P.L. § 260.20.

At the outset, experienced trial counsel did not object that petitioner was absent when the judge resumed the hearing. Surely, had petitioner been absent, defense counsel, the prosecutor, and

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the judge would not have countenanced a hearing. Indeed, there is every reason to believe that petitioner was present: the notice of appearances when the hearing began (Exh. 37: 110, 111), and the judge's introduction of petitioner when the jury panel returned to the courtroom (id. at 137-38). However, petitioner claims that these are insufficient given the absence of a notation on a court worksheet that the witness had testified on the day in question. This claim is frivolous.

Second, petitioner's suggestion that counsel should have challenged the trial judge's handling of a readback request presents no more a claim of federal constitutional error (Memo: 89-90). At the outset, there was no objection to the way the judge responded to the request or its oral addendum. Consequently, appellate counsel faced a high hurdle in trying to obtain reversal on an unpreserved claim. Moreover, as appellate counsel obviously recognized, there was little about the judge's response to criticize. Specifically, the jury requested a readback of the expert's testimony about the note left by the shooter. The jurors interrupted the readback, asked for an exhibit to be displayed, and then requested that the court reporter begin at a specified section so they could view the exhibit in conjunction with that testimony (1967-74, 1989-93). When the judge queried if the response was sufficient, the jury asked to resume deliberations (1993). The silence of the jurors, who interrupted readback to get what they needed, refutes any inference that the court's response was not pertinent to their concerns.

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Third, petitioner suggests that appellate counsel should have criticized the trial court's decision not to submit first degree assault to the jury. In support, he claims that the judge found that the evidence only supported a charge of assault, not attempted murder (Memo: 88). Petitioner is wrong. Ironically, it was the prosecutor who requested that assault be submitted alternatively to attempted murder (1746-49, 1751-52). Petitioner's own counsel opposed (1749-51), obviously recognizing that any doubt that the jury might have concerning intent inured to petitioner's benefit under the all-or-nothing defense strategy.[7] The judge found the state's position to be "a rather tortured view" of the evidence and was not inclined to give that count to the jury (1746); ultimately he denied the state's request to submit assault (1754).[8] Under these facts, counsel would have been hard-pressed on appeal to argue as error the ruling that trial counsel had successfully obtained.

Fourth, petitioner contends that appellate counsel was ineffective because he did not argue that petitioner had been

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[7] The risk in seeking a lesser included offense is obvious -- it might permit the jury to render a compromise verdict. See United States v. Natanel, 938 F.2d 302, 310 (1st Cir. 1991), cert. denied, 502 U.S. 1079, 112 S.Ct. 986 (1992) ("additional arguments could impair [a] client's seemingly secure position... In litigation, as in life, there is much to be said for such maxims as 'if it ain't broke, don't fix it' and 'quit while you're ahead'").

[8] The record reads, "I think the view of the evidence would [not] 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" (1754). That a negative was omitted from the first sentence is obvious from the decision not to charge assault.

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denied effective representation by trial counsel, who did not object to comments in the prosecutor's summation (Memo: 90-91). In his summation, trial counsel harped on the total absence of proof warranting a guilty verdict. For example, no eyewitness placed petitioner at the scene of the crimes or tied him to the shooter or the man who sent the bomb; nor was there any nexus between petitioner and the flowers, threatening letters, or the pipe bombs. Since only expert testimony specifically connected petitioner to the crimes charged, counsel urged that the forensic comparison of handwriting and the jigsaw match of stamps were not exact sciences, had a margin of error, and were thus too inconclusive to establish petitioner's complicity "beyond a reasonable doubt" (1759-1808). He concluded that any evidence of motive was refuted by petitioner's relationship with Gonzalez and that an unknown enemy of DaCosta, not petitioner, was responsible for these crimes (1791-93, 1808-11).

In response, inter alia, the prosecutor argued that the handwriting evidence inexorably tied petitioner to these crimes (1819-20); that the jurors' own common sense would confirm petitioner's identity as the author (1821-22, 1834-39); and that such circumstantial evidence was even more compelling than eyewitness evidence (1826-29, 1834-39). To refute the claim that no other evidence connected petitioner to the shooting, the prosecutor noted that petitioner had reported that his wife had been shot -- a fact which he should not have known if he were innocent of any complicity. He concluded that the jury could find

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that such a comment signified petitioner's consciousness of guilt (1868-73). Recognizing that each remark was grounded in the trial evidence or the inferences to be drawn from that proof, and that they were responsive to the defense arguments, experienced trial counsel did not object. Nonetheless, petitioner complains that this summation was improper.

Not only was this claim unpreserved at trial, but petitioner did not raise it when discussing his post-conviction motion claim regarding the ineffective representation of trial counsel on direct appeal. The state noted this failure to preserve in its response to petitioner's coram nobis petition. Under state law, petitioner cannot now present this claim in a state post-judgment motion, N.Y. CPL § 440.10(2); thus, it cannot now be presented to this Court. Wainwright v. Sykes, 433 U.S. 72, 81, 97 S.Ct. 2497 (1977); Grey v. Hoke, 933 F.2d 117, 120-21 (2d Cir. 1991); see Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 2080 (1996). Consequently, appellate counsel would have had little reason to believe that a challenge to unobjected-to remarks would be successful.

Nor could petitioner prevail on the merits. Of course, a prosecutor is entitled to comment vigorously on the evidence at trial, urge the jury to draw fair inferences from it, and respond to defense arguments. United States v. Pena, 793 F.2d 486, 490 (2d Cir. 1986); United States v. Smith, 778 F.2d 925, 929 (2d Cir. 1985). Indeed, only the most outrageous of prosecutorial summations raises a federal constitutional claim. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974); see also

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Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991); Garofolo v. Bentley v. Scully, 41 F.3d 818, 824 (2d Cir. 1994), cert. denied, 516 U.S. 1152, 116 S.Ct. 1029 (1996); Nichols v. Scott, 69 F.3d 1255, 1278 (5th Cir. 1995), cert. denied, 518 U.S. 1022, 116 S.Ct. 2559 (1996). United States ex rel. Conomos v. LaVallee, 363 F.Supp. 994, 1003 (S.D.N.Y. 1973).

Finally, in an aside, petitioner complains that appellate counsel did not pursue his post-conviction claim in the state appellate court on the direct appeal (Memo: 91; see Exh. B). Simply, petitioner's claim is defeated by his own Exhibit 31, a letter dated May 13, 1996, in which petitioner advised the appellate court that he had directed counsel not to present the 440 claim, and that petitioner would raise it in his own brief. In any event, as noted in Point I, supra, appellate counsel had every reason to conclude that there would be no probable success in pursuing the various unsubstantiated contentions from the post-conviction motion. In affirming the judge's order, the appellate court found them to be without merit. 239 A.D.2d at 202, 658 N.Y.S.2d at 5.

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In short, none of the additional issues that petitioner has identified has merit, legal or factual, even in hindsight. Instead the issues he presents only could have served to distract the state court's attention from the more generally viable appellate claims that counsel did in fact raise and fully brief. Thus, far from having been prejudiced by their omission from the brief, petitioner might have been prejudiced by their inclusion.

* * *

In sum, it is patently clear that petitioner was afforded the effective assistance of appellate counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus should be denied and dismissed without a hearing pursuant to Rule 8(a) of the Rules Governing 28 U.S.C. Section 2254 cases.

Respectfully submitted,

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