Ex. 9

Ct. copy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 48

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DOMINIC FRANZA,

Defendant-Petitioner.

AFFIRMATION AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO VACATE JUDGMEN (CPL §440.10)

AFFIRMATION

JOHN BRANCATO, an attorney duly admitted to practice before the courts of this State, affirms under penalty of perjury that:

I am an Assistant District Attorney, of counsel to ROBERT M. MORGENTHAU, District Attorney of New York County, and I submit this affirmation in response to defendant's latest motion to vacate his 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 (Penal Law §§ 110.00, 125.25[1]), and one count of Criminal Possession of a Weapon in the First Degree (Penal Law § 265.04).

I make this affirmation on information and belief, the sources of information being the District Attorney's files in this case, conversations with law enforcement personnel familiar with the facts of this case and the decision by Honorable Paul P.E. Bookson denying defendant's first motion to vacate his judgment of conviction as well as well as all other state and federal appellate court decisions denying defendant's repeated motions for relief.

In his latest, instant motion defendant reiterates his first post-judgment claim that the judgment against him was procured by misrepresentation and fraud on the part of the prosecution and relatedly that his trial counsel was ineffective for not discovering this miscarriage of justice. Defendant's claim is procedurally barred and, in any event, meritless.

INTRODUCTION

Dominic Franza petitions from 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 (Penal Law §§ 110.00, 125.25[1]), and one count of Criminal Possession of a Weapon in the First Degree (Penal Law § 265.04). Defendant was sentenced to three indeterminate prison terms of from eight and one-third to twenty-five years for each attempted murder count, and to an indeterminate prison term of from three to nine years for weapons possession; each term was to run consecutively to the others. He is currently serving that sentence.

Defendant's convictions stem from a campaign of terror conducted against his estranged wife, Myra Franza, and her family. At 7:15 p.m. on July 17, 1990, an unidentified man carrying a note written by defendant gained entry to the Manhattan apartment of Franza's mother Josephine Mendez by pretending to deliver roses. Mendez went to ask Franza, who was taking a shower, if she would accept the roses. The messenger followed Mendez, and as she tried to hold the bathroom door closed, he shot her five times -- in the face, chest, both arms, and wrist. When Franza opened the bathroom door, the man shot her in the face. The shooter fled, leaving the box of roses and the note, as Franza managed to

telephone 911. The women were taken to Harlem Hospital, and because of prompt medical aid, survived their wounds.

On August 11, 1990, a live pipe bomb was discovered outside the apartment of Nelson DaCosta, Mendez's son and Franza's brother; it was later defused. And, on February 6, 1991, two letters purportedly sent by "Julio Ortiz," but actually written by defendant, arrived at the Mendez home. In these letters -- one for Mendez and Franza, and one for DaCosta -- defendant threatened the lives of family members in New York and Puerto Rico, where Mendez's mother Rosa Roman Lamboy had lived. Mendez apprised her family of these threats, warning them to beware of any packages.

On February 4, 1991, defendant instructed another man to send a package by Federal Express to Roman in Puerto Rico. On February 8, 1991, Federal Express delivered what was purportedly a camera, but was actually a live pipe bomb, for Mrs. Roman Lamboy. Her daughter peeped cautiously inside the box, saw a pipe and wires, and called the police, who disarmed the bomb.

On February 11, 1991, defendant was arrested for the attempted murders of Mendez and Franza. That night, a federal magistrate authorized a search of defendant's Bronx residence for materials which could be used in the manufacture or shipment of an explosive device. The agents seized gunpowder and tape similar to that used in the bomb, as well as handwritten and typed personal papers. Based on their observations, the agents secured a second search warrant on February 13, 1991, which was executed the following day. A comparison of the handwriting on the gunman's note, threatening letters, Federal Express airbill, and money order with personal documents of and exemplars by defendant revealed that the documents connected to the crimes had been written by defendant.

By New York County Indictment Number 1647/91, filed on February 22, 1991, defendant was charged with two counts of attempted second degree murder and two counts of first degree assault (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, charging defendant two counts each of attempted murder and assault as to the shooting of Franza and Mendez; it also charge 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.

In omnibus motions filed on April 19, 1991 and November 19, 1991, defendant moved to suppress his statements 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 a hearing; after a review of the testimony and memoranda of law filed by the parties, he denied the motions in all respects in an undated opinion. On February 10, 1992, trial commenced before Justice Bookson and a jury. On March 11, 1992, the jury convicted defendant of the charges submitted -- three counts of attempted murder and one count of first degree possession of a weapon.[1] On April 3, 1992, defendant was sentenced as noted above.

PROCEDURAL HISTORY

In a pro se motion dated June 12, 1993, defendant sought to vacate his judgment of conviction on the ground that much if not all of the physical, documentary and photographic evidence offered against him at trial was fabricated and that his trial counsel was ineffective

[1] The court did not submit the assault or third degree weapons counts.

for not addressing this miscarriage of justice (Defendant's Exh. No. 1). The People responded to defendant's first motion to vacate the judgment on September 14, 1993, arguing that the motion was both untimely and without any merit (Defendant's Exh. No. 2). On October 19, 1993, Justice Bookson denied defendant's motion (Defendant's Exh. No. 7). And, because the pro se motion was unsupported, he found a hearing unwarranted (Id.).

On December 16, 1993, the Appellate Division, First Department granted defendant's pro se motion to appeal that order, along with defendant's direct appeal. On appeal, defendant argued, among other things, that that Justice Bookson improperly denied his original post-conviction motion. On May 13, 1997, the First Department unanimously affirmed defendant's conviction. People v. Franza, 239 A.D.2d 201.

Leave to appeal to the Court of Appeals was denied on August 25, 1997. People v. Franza, 90 N.Y.2d 904 (Wesley, J.). Simultaneous with his leave application to the Court of Appeals, defendant sought reargument before the First Department. On July 3, 1997, the First Department denied that motion.

On or about November 10, 1997, defendant filed a 224-page-long application for a writ of error coram nobis, in which he claimed that his appellate counsel was ineffective. See Franza v. Stinson, 58 F.Supp.2d 124 (S.D.N.Y. 1999). Meanwhile, in a motion filed on or about January 20, 1998, defendant moved in the First Department for an order to vacate the affirmance of his conviction. On June 11, 1998, the First Department denied both the coram nobis application and the motion for vacatur.

In July 1998, defendant filed an application for a writ of habeas corpus in the United States District Court, Southern District of New York. Franza v. Stinson, 58 F.Supp.2d at

150-51. In a decision and order dated July 1, 1999, the federal district court rejected defendant's petition as meritless in its entirety.

Defendant filed a second coram nobis application as well as subsequent reargument motions. The First Department, on September 17, 2002 and May 20, 2003, denied these applications.

Defendant has also filed a series of other motions and applications and requests for reargurments, including three state habeas corpus petitions. See Franza v. Stinson, 58 F.Supp.2d at 132, n.3. Defendant filed a third coram nobis application in 2003, which the First Department denied. In sum, no court has ever found defendant is entitled to any substantive relief.

THE EVIDENCE AT THE SUPPRESSION HEARING

The People's Case

In the evening of July 17, 1990, Josephine Mendez and her daughter Myra Franza were shot at 485 West 187th Street, in Manhattan. Investigating that shooting, Detectives GENNARO GIORGIO and John Bourges arrived while the victims, who were in critical condition, were being stabilized by medical personnel (Giorgio: H124-25, 213, 221, 284-85).[2] Another detective told Giorgio that earlier, when asked who had shot her, Franza said and wrote the words "husband" and "sent." In addition, she gave the police defendant's address -- 3320 Barker Avenue, the Bronx -- and described the shooter (Giorgio: H125-26, 221-23).[3]

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[2] Parenthetical references preceded by "H" and "2H" are to the hearing minutes of January 21-29 and of February 13, 1992, respectively.

[3] Giorgio later learned that Franza had left her husband three weeks earlier because he was physically abusive (Giorgio: H125-26, 174-75).

Giorgio briefly spoke to Mendez's daughter-in-law at 495 West 187th Street, then headed back to the scene of the shooting. On the street, Giorgio saw Nelson DaCosta -- Mendez's son and Franza's brother -- rush out of the crowd as defendant approached. DaCosta screamed that defendant was an "assassin" and a "killer," and struck him. Giorgio told officers who separated the men that DaCosta was a distraught family member, and briefly spoke to him (Giorgio: H126, 206, 284-85, 304). Giorgio also introduced himself to defendant, who claimed to have no knowledge of the shooting, but offered to help (Giorgio: H126-28).

At about 9:40 p.m. that night, Giorgio interviewed defendant at the 34th Precinct in the presence of Detective GILBERT ORTIZ. Defendant provided details about his three-year marriage to Franza and his relationship with Mendez. According to defendant, three months earlier Franza claimed to "need some space" and talked about moving out. And, three weeks earlier, as defendant competed at a gun meet, Franza moved out. Defendant called Mendez in an attempt to find Franza, and said that he was buying a used car for her. Defendant also beeped his wife fifty times a day; when she finally returned his call, defendant told her that he had cruise tickets. She refused to go, since he had planned the trip without asking her. Nonetheless, defendant intended to leave the cruise tickets and a dozen roses with Franza's supervisor the following day. Before he could do so, defendant heard a message left on his answering machine for Franza, in which Hilda, the superintendent of Mendez's building, stated that something had happened to Mendez. Giorgio wrote down these remarks, then read them to defendant (Giorgio: H126-27, 128-35, 218, 231, 233; G. Ortiz: H341; People's Exhibit 2).[4]

[4] Giorgio did not tell defendant what Franza had written about the shooting

The interview lasted about an hour, and during that time defendant was free to leave. However, he stayed at the precinct, hoping for news about his wife and permission to see her, but the hospital would allow no visitors (Giorgio: H135, 236, 230-31). As defendant waited, Giorgio asked a few more questions, recording the answers in a notebook. For example, when asked the surname of Franza's brother Nelson, defendant said it was "DaCosta" (Giorgio: 2H113, 115, 118-19). However, Mendez, as well as her sons Nelson and Carlos DaCosta, explained that only family members knew that Nelson used the name DaCosta (Giorgio: H184, 193-94; 2H116-18).[5]

Moreover, while defendant had beeped Franza fifty times a day in the week before the shooting, he stated that he did not call her on July 17th, a fact which Giorgio thought "significant" (Giorgio: 2H119). Further, defendant said that he thought that the shooting was a "hit on Josephine" (Mendez), not on Franza (Giorgio: 2H120-21). Defendant agreed to take a polygraph test, which Giorgio hoped would determine his truthfulness (Giorgio: H140, 237). He also agreed to give Giorgio the tape of Hilda's message. Thus, at 2:00 a.m. the next morning, July 18th, defendant gave Ortiz the tape after being driven home (Giorgio: H150, 172-74, 226-31, 338; People's Exhibit 9).

That same day, Detectives Giorgio and Ortiz interviewed Franza at Harlem Hospital for about half an hour. Her jaw was wired shut because of the gunshot wound to her face, and she wrote her answers. Explaining that defendant had threatened to kill her if she were

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(Giorgio: H130, 225).

[5] Thus, when, on the day before the shooting, two men claiming to be police officers had appeared at the Mendez apartment and asked for Nelson DaCosta, the brothers concluded that defendant had sent the men (Giorgio: 2H117-18).

to leave him, Franza told the police that she believed that defendant had sent someone to kill her. The detectives were unable to see Mendez (Giorgio: H136-38, 174-75, 214-16).

On the afternoon of July 23, 1990, Giorgio drove defendant to the Brooklyn District Attorney's Office for a polygraph test (Giorgio: H139-41, 239). The polygraph examiner told Giorgio that it was his opinion that defendant had been "deceptive," and Giorgio understood that defendant had lied on some questions[6] (Giorgio: H143, 218-19, 239-43, 274, 276; 2H126, 131-32). Returning to the 34th Precinct, Giorgio shared this opinion with defendant, and read defendant his Miranda warnings (Giorgio: H143-45, 147, 239-43, 274, 276; 2H125-26, 131-32; People's Exhibit 3 [Miranda form]). Defendant waived his rights, and agreed to answer questions (Giorgio: H145, 147).

About 6:20 p.m., Giorgio and defendant reviewed defendant's first statement, as Giorgio recorded the interview, which lasted half an hour (Giorgio: H145, 147; 2H122-23). Defendant stated that he and Franza had separated four times in the past two years, and confirmed that he sent flowers to Franza after each argument or separation. He added that on July 10, 1990, Franza had told him that she was getting a divorce, but he refused to sign any papers. Nonetheless, defendant repeated that he had intended to leave the cruise tickets and flowers with "Jenny." At the conclusion of the interview, Giorgio read his statement (People's Exhibit 4) to defendant, who signed it (Giorgio: H146-49, 153). Then, as before, defendant asked Giorgio to tell Franza that he was cooperating so that she would see him. Defendant then left the precinct (Giorgio: H153-54).

On July 25th, pursuant to defendant's requests, Detective Giorgio talked to Franza. She was fearful because defendant was still at liberty. The detective then informed

[6] Thus, Giorgio was "surprised" when, on July 3, 1991, he saw a report indicating that the polygraph results were "inclusive" (Giorgio: 2H126-27, 132).

defendant that Franza emphatically refused to see him (Giorgio: H155, 253). Two days later, on July 27th, defendant again called about seeing Franza, and added that he would take an independent polygraph test (Giorgio: H155). And, on August 8th, defendant came to the precinct of his own volition, and gave Giorgio a receipt from Ace Polygraph (Giorgio: H155-56, 273-78).

At some point, Giorgio learned that the shooter had used a ruse to get into the Mendez apartment on July 17th -- he had carried a flower box with a red bow. On the box was affixed a handwritten note. Purportedly from "R & R Florists," it contained a FTD number, Franza's name, Mendez's address and apartment number, and directions to deliver to "DaCosta" at a second location. It also required a signature to confirm delivery (Giorgio: H157-59, 200-02; 2H117; People's Exhibit 6). "R & R Florists" was not listed in FTD records (Giorgio: H202).[7]

On August 22nd, defendant called Giorgio for help on an unrelated matter in the Bronx. In the course of their conversation, Giorgio asked if defendant would provide handwriting samples. Defendant agreed, and Giorgio copied in his own hand the shooter's note, which he would have defendant copy (Giorgio: H160-64; People's Exhibit 6). When defendant appeared at the station house on August 24th, Giorgio first served him with an order of protection that had been issued by a Bronx Family Court after defendant was seen in Franza's neighborhood (Giorgio: H160-62, 253-54). When Giorgio asked defendant for hand-writing samples, defendant refused and left. Half an hour later, defendant returned and agreed to provide exemplars (Giorgio: H152).

[7] On August 11, 1990, a pipe bomb was discovered outside the apartment of Nelson DaCosta. The family and Giorgio suspected defendant (Giorgio: H261, 284; 2H132), although there was no forensic evidence connecting him to the bomb (Giorgio: H261, 267, 279-80).

Giorgio seated defendant at a desk in an interview room, and gave him the sample note, paper, and a pen. When he returned five minutes later, defendant was still writing the first sample. Giorgio remained and signed the bottom of each sample (Giorgio: H160, 162-66; People's Exhibits 8A-D), which Giorgio hand-carried to the Questioned Documents Section. On or about September 5, 1990, Giorgio received a report from Detective John Breslin, who concluded that defendant had written the delivery note (Giorgio: H202-06).

On February 7, 1991, Mendez told Giorgio that she had received threatening letters at her apartment. One was addressed to Franza and Mendez, and one to Nelson DaCosta. Written in Spanish, the letter to Mendez and Franza contained death threats against Mr. Mendez and other members of their family (Giorgio: H180-83, 186-87, 190-91; People's Exhibit 12). The letter addressed to Nelson DaCosta threatened to send a fatal gift to his maternal grandmother in Puerto Rico, and accused him of stealing drugs (Giorgio: H183, 190-91; People's Exhibit 13). Since defendant had used the last name "DaCosta" for Nelson, Mendez concluded that defendant had sent the letters (Giorgio: H184, 193-94).

Giorgio and Ortiz took the letters and envelopes from Mendez. The return address on both envelopes was for "Julio Ortiz," but Mendez did not know anyone by that name (G. Ortiz: H342). Mendez told Ortiz that the letters matched the manner in which defendant spoke Spanish -- "dramatically incorrect." Each envelope bore a 25¢- and two 3¢-stamps. Giorgio forwarded the letters and envelopes for analysis (Giorgio: H183-91, 194, 262-64, 267, 283, 299-303; G. Ortiz: H341-42, 345; People's Exhibit 11).

On February 10, 1991, Giorgio learned that a pipe bomb had recently been removed from the home of Mendez's mother Rosa Roman in Levittown, Puerto Rico, and recalled that the letter to DaCosta had promised a "gift" to his grandmother on February 8th

(Giorgio: H191-93, 196). Puerto Rican authorities confirmed that the package sent to the grandmother had contained a live bomb sent from Manhattan via Federal Express (Giorgio: H195-96, 265-67; G. Ortiz: H363). About 10:00 that morning, Giorgio contacted Special Agent GERALD RAFFA, of the Bureau of Alcohol, Tobacco and Firearms (ATF), and relayed the information about the pipe bomb (Raffa: H33, 59; Giorgio: H199, 278, 282).

Raffa contacted his counterpart in Puerto Rico, and learned that the pipe bomb had been shipped on a plane from New York to Puerto Rico via Federal Express (Raffa: H33, 326-27). Special Agent CHRIS BEHAN discovered that a man had asked an agent how much it would cost, left, returned later with the package, and paid for the shipment with $41 American Express money order. Both agents learned that the sender was purportedly "Julio Ortiz" of "U.S.A. Electronic" in Manhattan (Behan: H391, 393-94, 404-06), and Raffa received the documentation for that shipment (Raffa: H37-38, 313). Since the family of Mendez's mother had been advised about the shooting and warned about threats against Roman-Lamboy, a woman at the residence was suspicious of the unsolicited box, partially opened it, saw what could be a bomb, and called the police, who found a pipe bomb inside and diffused it (Raffa: H34-35, 60-61, 309, 315). Defendant was a suspect in this crime because of the threatening letters, his membership in a gun club, and his access to gunpowder and reloading equipment (Giorgio: H295-97).

During several conversations that day, Detective Giorgio advised Raffa about the July 17, 1990 shooting, the pipe bomb at DaCosta's home, and the threatening letters. Raffa, in turn, conferred throughout the day with Assistant United States Attorney Sharon Davies (Raffa: H57-58, 62-63, 322). About 5:30 or 6:00 p.m., Raffa arrived at Davies' office to review a draft for a search warrant of defendant's first-floor apartment at 3320 Barker

Avenue, the Bronx. Based on information from Puerto Rico, Detectives Giorgio and Ortiz, and the New York Bomb Squad, Raffa applied to search for and seize materials relating to the manufacture and shipping of an explosive device (Raffa: H41, 55, 57, 59-62, 64, 85-86, 308, 309, 311, 327-28, 330-31; Giorgio: H199, 278-81; People's Exhibit 1 [Warrant Application, XM1-13U]).[8]

Meanwhile, during the afternoon of February 11, 1991, at the request of detectives of the Arson and Explosives Squad, defendant took a polygraph test about the DaCosta pipe bomb. After it, the detectives brought defendant to the 34th Precinct. Detectives Giorgio and Ortiz met defendant there but did not restrain him, although earlier that day they had decided to arrest defendant (Giorgio: H175-77, 243-44; G. Ortiz: H358, 367-69). Giorgio escorted defendant into an interview room and began asking questions about the threatening letters (Giorgio: H177). First, defendant claimed not to know a Julio Ortiz, then recalled that a person of that name had been an apprentice-electrician working with defendant. Defendant refused to answer any more questions or give additional writing samples (Giorgio: 177-78, 180, 249-51, 267-68; G. Ortiz: H350-51, 362, 364-65).

Five minutes after his arrival, defendant was placed in a line-up for the Federal Express clerk, who made no identification (Giorgio: H246-48, 258-59; Behan: H403, 405). Defendant told Ortiz, "This has gone far enough, either arrest me or let me go." Defendant was then arrested for attempted murder of Mendez and Franza. It was then 5:15 p.m., within half an hour of defendant's arrival at the precinct (Giorgio: H179, 196-97, 249-50, 246; G. Ortiz: H349-50, 358, 361-62, 367).

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[8] References preceded by "XM_U" are to the transcription of the oral application.

In a search incident to arrest, defendant emptied his pockets. He was carrying a telephone book and a piece of paper on which was written "Levittown," "Rio Piedras," and several telephone numbers, including that of the Roman-Lamboy residence. Giorgio seized those papers, and returned the other items to defendant (Giorgio: H197-200, 270-71, 278; People's Exhibit 14).

In late evening of February 11, 1991, Raffa orally applied for a search warrant from the office of Assistant United States Attorney John McEnany, where a recording device had been attached to a speaker telephone. McEnany made a conference call to United States Magistrate Bernikow (Raffa: H33, 39-40, 54, 56, 59). At the outset, the magistrate administered an oath to Raffa. Also sworn, McEnany read the application prepared by Davies, which Raffa affirmed (Raffa: H40-41, 53; People's Exhibit 1 at XM2-4U, XM8U [search warrant]). Raffa told the magistrate that he was investigating a bomb which was related to New York Police investigations of attempted murder and attempted bombing. He explained that the police had information that defendant's family or friends were about to enter the subject premises, at defendant's request, and might destroy evidence, adding that officers safeguarding the premises could not deny entry. This created an exigency and required Raffa to apply for the warrant orally (XM2-3U, XM8U).

Next, McEnany read each paragraph of the application, which Raffa then affirmed. First, Raffa noted the marital problems of defendant and Franza. He added that defendant was a federally-licensed firearms dealer who operated from his residence, the premises sought to be searched (XM4-5U). Raffa gave a precis of the July 17, 1990 shooting of Franza and Mendez, noting that Franza's belief that defendant had sent the gunman had been confirmed by handwriting analysis (XM5U). Then, Raffa described the August 11, 1990

live pipe bomb found outside the apartment of Franza's brother Nelson DaCosta's apartment (XM5U).

Raffa also detailed threatening letters addressed to Franza, Mendez, and DaCosta, which they received on February 6, 1991, and noted that only family members used the DaCosta surname. Raffa explained that the sender of the letters, purportedly "Julio Ortiz," of 750 West 181st Street, NY, NY 10033, threatened to kill Franza and Mendez, as well as the entire Mendez family in the United States and Puerto Rico. The letter to DaCosta also said that a "present" had been sent to Franza's maternal grandmother in Puerto Rico (XM6U). Further, on February 8, 1991, a relative of Franza, Mendez, DaCosta, and the grandmother in Levittown, Puerto Rico, received a package addressed to the "Roman family" from Julio Ortiz of the address noted above. Inside the package was a case which contained a live bomb; the box, case, and bomb components were described at length (XM6-7U). In addition, at the time of his arrest, defendant possessed a piece of paper on which was written the word "Levittown" and the phone number of the grandmother (XM7U).

Based on the foregoing, McEnany argued that there was probable cause to believe that defendant was the maker of the Puerto Rico bomb and was guilty of the other offenses, and that there was probable cause to believe that at least some of the components of the Puerto Rico bomb and package would be found at defendant's address (XM7-8U). After confirming that the facts affirmed by Raffa were in fact in the application read to him, Magistrate Bernikow found that there was probable cause to search defendant's apartment for materials relating to the manufacture and shipping of an explosive device. He held that exigency had also been shown, and authorized the warrant (XM8U). Duplicate face sheets

for a search warrant on oral testimony were filled out simultaneously by McEnany and the magistrate, with verbal assurances of conformance (XM8-13U). McEnany promised to supply copies of the tape and a transcript for the magistrate (XM13U). The face sheet was then signed by Raffa and by McEnany, on behalf of the magistrate at 10:45 p.m. (Raffa: H55, 57; XM12U).

Special Agents Raffa, Behan, CARRIE DiPIRRO, and others executed the search warrant at approximately 2:00 a.m. on February 12, 1991. They seized a sheet of 3¢-stamps, gunpowder, a green magic marker, and a roll of black tape. They also seized various typewritten and handwritten documents, including a piece of paper on which was written the name "Julio Ortiz," another paper noting the names "Levittown" and "Rio Piedras," and a business card for U.S.A. Electronics (Behan: H373-78, 381-96, 406-07, 409-11, 416, 418, 423-31, 446, 454; Raffa: H43, 332-35; DiPirro: H456-57, 465-73). DiPirro and Raffa signed the return on the warrant, which DiPirro filed (Raffa: H44-49; DiPirro: H457).

On February 13, 1991, Agent DiPirro applied for a second search warrant (People's Exhibit 22A-B), attaching a copy of the first warrant and the return. She based this request upon observations made during the search pursuant to the first warrant, as well as additional information from detectives, particularly information from Behan that the DaCosta pipe bomb had contained a firecracker. DiPirro also sought an arrest warrant from United States Magistrate Barbara A. Lee. The magistrate signed both warrants (Behan: H432-33, 435, 447; DiPirro: H457-60; People's Exhibit 23A-D).

Executing the search warrant on February 14th, Behan and other agents seized a file of handwritten papers, a roll of tape, two pieces of duct tape, and four packages of

firecrackers (Behan: H431-42). On March 28th, with the consent of the landlord, ATF agents searched the basement of defendant's building and looked around the first floor, which had been vacated. They took used vacuum cleaner bags (Behan: H400-01, 423).

The Defendant's Case

Defendant presented no evidence.

The Court's Decision

After reviewing the testimony and the parties' memoranda, Justice Bookson issued an undated written decision denying the motions to suppress in all respects (Decision at 2, 3, 5). He found the testimony of the detectives and ATF agents to be wholly credible, credited it in its entirety, and adopted it as his findings of fact (Decision at 1).

With respect to defendant's claim that he had been arrested without probable cause, the court found that there was "abundant evidence" to constitute probable cause to arrest defendant because the police "reliably" knew fourteen specific facts linking defendant to the crimes charged (Order at 1). For example, police knew that on July 17, 1990, Mendez and Franza had been shot in an attempt to murder them; a card with defendant's handwriting was left by the shooter; defendant admitted sending flowers and a card to Mendez's apartment; and the florist was "bogus" (Order at 1-2). The police also knew that before the shooting defendant had threatened Franza and her family should she leave him; defendant admitted serious marital problems and wanted Franza to return after she in fact had left; defendant admitted "beeping" her fifty times a day after she left and prior to the shooting; and after the shooting, DaCosta publicly called defendant an "assassin" and punched him (Order at 2). Further, officers were aware that a live pipe bomb was left outside DaCosta's apartment on

August 11, 1990; that in early February, 1991 letters were received by Mendez threatening her family in New York and the grandmother in Puerto Rico; one letter was for DaCosta, a name known only by family members such as defendant; a few days later, a live pipe bomb was sent to the grandmother; the purported sender of the letters and the second bomb was Julio Ortiz, a name defendant initially denied knowing; and that defendant was admittedly a firearms expert with access to guns (Order at 2).

The court noted that the fact that the evidence was circumstantial did not automatically preclude a finding of probable cause. Rather, based on the "sheer volume" of evidence known to the detectives, including relevant factors such as motive and opportunity, Justice Bookson concluded that at the time of arrest "the police were justified in their assumption that the constellation of facts under investigation, more likely than not, had defendant at its center." He also rejected a claim that the police had acted based upon unreliable hearsay (Order at 2). Thus, seizure of the address slip from defendant's person properly followed a search incident to a lawful arrest, and suppression was unwarranted (id.).

Moreover, the court concluded that defendant was not in custody when he made his second statement on July 23, 1990. Although the detectives intended to arrest defendant, this was not dispositive, since they did not communicated their intent to defendant; now was a different result warranted by defendant's protest to arrest or release him (Order at 3). In addition, the court found that defendant freely took a polygraph test on July 23, 1990; that Giorgio had a good faith belief that defendant's responses during that test had been "deceptive"; and, thus, that the detective did not err in informing defendant of that opinion. Nor did those acts somehow browbeat defendant into changing his story. Moreover, this

statement was largely a recapitulation of the one he had given on July 17th. Thus, the court denied the motion to suppress defendant's statements (id. at 3).

Turning to the search warrants, the hearing court found that affiant Raffa presented highly detailed, accurate, and "hard" information to the federal court. "Primarily firsthand," those facts were gleaned from Detective Giorgio and an ATF agent in Puerto Rico. Thus, the court found that both prongs of the Aguilar-Spinelli test were met by the warrant application (Order at 4). And since defendant did not seriously challenge the reliability of that information, the court rejected a defense claim that the magistrate issued the warrant based solely on the Mendezes' belief that defendant was behind these deadly acts. In fact, the same fourteen events which established probable cause to arrest defendant, noted supra at 20-21, were supplied to the magistrate and constituted probable cause to search defendant's residence (id. at 3, 4).

Further, the fact that the warrant was applied for at 10:25 p.m., as well as a justifiable urgency, rendered a telephonic application appropriate (Order at 4). The court also found that the search and the seizure of miscellaneous papers, did not exceed the scope of the warrant. Not only were the papers in plain view, but the purpose of the warrant was to search for evidence of the manufacture and shipping of an explosive device. And, the clause in the warrant authorizing seizure of "other evidence" related to manufacture and shipping was limited, specifically tailored to the crime, and was constitutionally permissible (id.).

In addition, the court ruled that each item on the return was seized on a lawful and logical premise. For example, Behan knew that the letter threatening to send a "gift" to the grandmother in Puerto Rico had been posted with 3¢-stamps. Since a pipe bomb was

shipped to her within days, the seized stamps could connect defendant to the explosive device (Order at 5). Finally, given the caution exhibited by the ATF agents, the court found the discovery of the black tape was inadvertent and proper, despite the failure to list it in the application or recall where it was found (id. at 5).

THE EVIDENCE AT TRIAL

The People's Case

1987: Myra Franza meets and marries defendant. Their relationship is stormy.

In 1987, MYRA FRANZA lived with her parents, Cecilio and JOSEPHINE MENDEZ (nee Roman), in Apartment 1-D at 485 West 187th Street in Manhattan. Franza had three half-brothers: Carlos, Nelson, and Wilfredo DaCosta. Through a co-worker of Nelson's wife, Franza met defendant (Mendez: 220-23, 232, 235, 238, 249-50, 277; Franza: 287-88).[9] At the time, Franza was designing postal displays for the United States Postal Service in the Bronx; defendant was working as an electrician for Local #3, where he had a co-worker named Julio Ortiz (Franza: 335). (Mendez: 254; Franza: 289).

Franza and defendant married on May 12, 1987, and lived on the ground floor of a two-family house at 3320 Barker Avenue in the Bronx. The landlord, George Guzman, lived on the second floor (Mendez: 221, 223-24, 249, 251-52; Franza: 287-90, 333). TRACIE and GARY WAYNE FRANCIS lived next door, and defendant rented space in their garage for his car. The Francises socialized with defendant and Franza (T. Francis: 435-39, 457; W. Francis: 458-60).

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[9] Parenthetical references are to the trial testimony, which was supplemented by diagrams of the apartment (HARRY BEST: 72-77; People's Exhibits 1) and of the street (LAZARO BENITEZ: 82-83; People's Exhibit 2).

The marriage of Franza and defendant was stormy. In March or April of 1989, while Franza was on a leave of absence due to a back injury (Franza: 304), Franza picked up a used station wagon from the dealership where it was being repaired and drove it home. Defendant was furious, ordered her to slide into the passenger seat, and said, "Who the hell told you to get the car?" He then hit Franza in the arms and knees about ten times. Defendant also grabbed her neck and twisted it to one side. He then drove back to the dealership to argue about the cost of the repair (Franza: 292-93).

When they returned home, defendant berated Franza for making decisions without him and again hit her. As he was leaving, defendant warned, "You better be here when I get back because if not, I'm going to kill you and bury you in the park and then I'm going to take care of your parents" (Franza: 292-94, 298-99). In a panic, Franza spent the night in a Manhattan hotel. The next morning she went to a hospital and was given a hard cervical collar and medication. Next, Franza went to her home precinct and filed a complaint. Finally, she obtained an order of protection from the Bronx Family Court. For the next two or three weeks, Franza spent the night at the apartment of her brother Carlos at 495 West 187th Street. She ate meals and spent part of the evening with her parents (Mendez: 236-37; Franza: 299). In her absence, defendant sent Franza red roses, as he habitually did after an argument (Franza: 327, 343). He also repeatedly called Franza, promising never to strike her again and to go to counselling. Finally, in May, 1989, Franza decided to attempt a reconciliation, and defendant brought her belongings back to the Bronx. Defendant went to a counsellor seven or eight times before refusing to continue because the counsellor "did not know what she was taking about" (Franza: 301-04, 342, 380). In an attempt "to make up," defendant took Franza on two southern vacations (Franza: 381, 392, 394, 397). From the

time Franza secured the order of protection to the second vacation, defendant was both verbally and physically abusive, but was careful not to leave marks or cause injury requiring medical aid (Franza: 394-96).

In November, 1989, Wilfredo DaCosta died in Puerto Rico; Franza attended the funeral, while defendant stayed in New York. She left the addresses and telephone numbers of her grandmother Rosa Lamboy-Roman[10] in Levittown, and her maternal aunts in Levittown and Rio Piedras (Mendez: 245-46, 280-81; Franza: 288, 310, 334-36). In early 1990, Franza learned that her grandmother had cancer (Mendez: 245-46, 279-80; Franza: 366-67).

In early 1990, defendant joined a gun club. He stored his guns at the club, but made his own ammunition in the bedroom with a machine kept on a microwave cart, on which he also kept dies, gunpowder, and cartridge casings (Franza: 328-31, 343-44, 376-77). In February, 1990, defendant applied for a premises and target permit (Franza: 352-54, 357, 390-93).[11]

June, 1990: Franza leaves defendant.

About 4:30 p.m. on Monday, June 25, 1990, Franza was waiting for her father-in-law at a subway station at 149th Street in the Bronx. A male co-worker came over and talked with Franza for fifteen minutes. When defendant arrived, he angrily yelled that Franza had been disrespectful by talking to a man and not introducing defendant to him, and

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[10] According to Mendez, her mother Rosa Lamboy had not ordinarily used the name "Roman" (Mendez: 244-45; Franza: 310).

[11] When he did, defendant wrote out a statement for Franza to copy and notarize that the 1989 assault was a "misunderstanding" (Franza: 352-54, 357, 390-93). Franza signed this false statement because a refusal would have prompted defendant to "fight" her (Franza: 399-400).

"shoved" Franza into the passenger seat of the car. From behind the wheel, defendant suddenly punched Franza in the chest. As he drove, defendant continually swung at Franza, then restrained himself (Franza: 305-08, 359-61). He then warned, "If I ever catch you with someone, I'm going to kill you," and threatened, "If you ever ... leave me, I'm going to find you. Even if you go to Puerto Rico, I'm going to get you" (Franza: 308-10).

When she could, Franza called her mother, said that she was going to leave defendant, and asked that her father and brothers come to Barker Avenue on Thursday. Franza suggested they come at 5:00 p.m., when defendant would be practicing at the gun club range. Franza believed that had defendant been present, he would not let her leave or take her personal property. Arriving in a station wagon, Mendez and the DaCosta brothers helped Franza move her property to Carlos's apartment (Mendez: 231, 254; Franza: 309-312, 328, 331, 352-53, 372; see T. Francis: 444). Franza left behind sheets of 3¢-stamps, bought when the cost of postage rose from 22¢ to 25¢ (Franza: 375-76). She also left three travel bags, including a black suitcase, which was nine by twelve and secured by two locks (Franza: 344-45, 350-51).

After moving out, Franza requested that her mail be redelivered to a post office box (Franza: 362-63, 365, 387-88). As before, she slept at Carlos's apartment and ate with her parents (Mendez: 231, 254-56, 264; Franza: 312-13, 369-72, 385). When defendant realized that Franza had left, he called her at work. He said that he had bought her a car, and offered to take Franza on a cruise, although he was living on workman's compensation (Franza: 312).

July 16, 1990: A man, purporting to deliver flowers, shoots Mendez and Franza.

In July, 1990, LEONARDO DIAZ lived with his wife and infant daughter at 485 West 187th Street in apartment 1-B, two doors from the Mendez apartment (Diaz: 208-10). VICTORIA THEIS shared a basement apartment directly below the Mendez apartment with her husband and her mother, HILDA FERREIRA, who had been the superintendent of the building for over thirty years (Theis: 102, 106; Ferreira: 127-28, 138; Diaz: 210-11).

About 7:30 p.m. on July 16, 1990, two men claiming to be police officers came to the Mendez apartment and rang the bell.[12] Mendez looked through the peephole and asked what they wanted, and the men asked for Nelson DaCosta (Mendez: 257, 259, 262).[13] Although they displayed police identification, Mendez decided that it was "phony," refused to let them in, and told them that Nelson DaCosta did not live there. After they left, Mendez watched the men from a kitchen window as they walked through the park (Mendez: 261-63). Mendez told Franza and Nelson about this visit, but did call the police. Nelson did not know the men (Mendez: 263-64; Franza: 382-83).

Somewhere between 6:30 and 7:00 p.m. on July 17, 1990, Franza was showering in her parents' bathroom, Mendez was seated in the living room, Mr. Mendez was at work (Mendez: 222-23, 232, 257; Franza: 313), and Victoria Theis was in her bedroom below the Mendez apartment (Theis: 102; Ferreira: 127). From her window, Mendez saw a "young" delivery man, holding a box with a red ribbon, look at buildings as if checking for an

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[12] The front door to the building was kept locked. The door could be opened with a key or the internal buzzer system, although the intercom was not working (Diaz: 217-18; Mendez: 258-59, 265).

[13] The taller man was light-skinned, with acne and a chipped tooth, and had short, straight hair but no facial hair. The shorter man was dark-skinned, clean-shaven, had a husky build, and carried a knapsack on his back (Mendez: 259-60).

address, then walk away (Mendez: 271). At about 7:00 p.m., Leonardo Diaz parked his cab and went into his building (Diaz: 218). Meanwhile, LAZARO BENITEZ[14] was waiting for a friend on 187th Street between Laurel Hill Terrace and Amsterdam Avenue. Deciding to get a milk shake, Benitez walked toward an ice cream truck on Amsterdam Avenue (Benitez: 78-79, 92-93).

Fifteen minutes after Mendez had seen the delivery man, the bell to her apartment rang. She asked, "Who is it?" Peering through the peephole, Mendez saw the same man, dressed all in white, examining a white box with a red ribbon; his face was hidden by a white cap, and he never looked at Mendez, but she thought he had a mustache. The man replied, "Flowers for Myra Franza." Mendez opened the door, and the man pointed to the box and repeated, "Flowers for Myra Franza." Mendez asked him to wait and closed the apartment door, but did not lock it (Mendez: 224, 265-70, 272, 281-82, 285).

Mendez walked down a hallway, knocked on the bathroom door, and told Franza that there were flowers for her; Franza refused them (Mendez: 224; Franza: 313, 327). Suddenly, Mendez, still standing in front of the bathroom door, heard the front door slam, and saw the delivery man approaching her. He held a gun in his right hand and a "dagger" in his left hand (Mendez: 225-27, 233-34; People's Exhibit 14 [photograph of hall outside bathroom]).

The man then shot Mendez five times: in the left wrist, in both arms, in the upper right chest, and in the right cheek. The last bullet smashed her jaw and exited by her right earlobe. Mendez realized later that the man had also cut her on the left cheek and neck (Mendez: 225, 227-29, 231, 248). Meanwhile, in the bathroom, Franza heard sounds of a

[14] Benitez was a senior at Baruch College, and also worked as an administrative assistant-accountant at a public relations firm (Benitez: 78).

struggle and "pop noises," and called out, "Ma, what's happening?" Turning off the shower, with one leg in the tub and balancing on the sink with one hand, Franza tried to open the door with the other hand; however, Mendez, trying to protect Franza, held the door shut. Finally, Franza wrested the door open as Mendez fell against the door frame and slid to the floor (Franza: 313, 322-24; Mendez: 225, 228-29, 231).

For three seconds, Franza stared at the man in the foyer. The man then lifted his arm and shot Franza in the left side of the face. She felt the bullet exit the back of her head, lost her balance, and fell backwards onto the bathroom floor. As her mouth filled with blood, Franza sensed the man hovering over her and decided to play dead. Mendez saw the gunman run to the front door. When Franza heard no further sounds, she crawled to her mother, who was gagging on blood (Franza: 313-16, 321-25; Mendez: 228-31; People's Exhibits 14 and 15 [photographs of bathroom]). Franza assumed Mendez was choking on her dentures, put her fingers down her mother's throat to clear it, and eased Mendez onto her chest to facilitate breathing (Franza: 314, 325).

Meanwhile, in the apartment below, Theis heard a woman screaming, fast running, three or four loud, quick popping noises, silence; then a thump, as if someone had fallen. She presumed that Mendez, who was not well, had collapsed (Theis: 103-05). Theis described the sounds to Ferreira, who had heard nothing (Ferreira: 128-29).

Benitez, on 187th Street, also heard three loud bangs. Suddenly, two men ran out of 485 West 187th Street about forty feet from Benitez, raced side by side to Laurel Hill Terrace, turned the corner, and disappeared from view (Benitez: 79-85, 92). It was still light, and Benitez saw the faces of the men, who were dark hispanic or light black. The shorter man was 5'6" or 5'7" tall, and had black curly hair and a mustache. He wore a black

and white striped shirt, and clutched a canvas bag like a football. The taller man was about 6' tall, had a "skinny" build, appeared to be clean-shaven, and wore a fluorescent orange cap with a black bill (Benitez: 79-81, 85, 92, 94-96). Seeing the running men fifteen seconds after the "bangs," Benitez concluded that he had heard gunshots (Benitez: 86, 93).

Franza calls 911, and the police arrive.

Meanwhile, Franza crawled to the bedroom and dialed 911; Mendez lost consciousness after that call (Mendez: 229-30). Franza had difficulty speaking, since the bullet had "crushed" her jaw, which was swollen and painful. Franza told the operator that she and Mendez were shot and asked for help (Franza: 314-15, 325). Returning to her mother, Franza noticed that her eyes had rolled back into her head. Franza inched to the front door on her hands and knees (Franza: 314, 325).

Meanwhile, after Theis heard the "thump," she or her mother called the Mendez apartment, but got a busy signal (Theis: 104, 106; Ferreira: 129). They waited a few minutes, then Theis called Diaz's apartment to ask him to check on Mendez (Theis: 106-07; Ferreira: 129-30; Diaz: 211-12). About ten minutes after he entered the building, Diaz went to the Mendez apartment. Finding the door ajar, he repeatedly called out "Cecilio" and "Josephine." When no one responded, Diaz opened the door further and saw Franza, who was naked and bloody, crawling toward him. Franza pleaded, "Help me, please. I die. Somebody shoot me" (Diaz: 213-14, 218). As Franza struggled to stay conscious (Franza: 314), Diaz left, told his wife, and went outside to look for the police (Diaz: 215).

Police officers and ambulances arrived at the scene between five (Benitez: 86-87) and twenty minutes after the shots and the "thump" (Theis: 105-08, 125). Theis went up to

the first floor, saw the police, and, within ten minutes, learned that an old and a younger woman had been shot (Theis: 107-10, 111-12, 122-23; Ferreira: 131).

Meanwhile, about 7:20 p.m., Police Officers CARMEN APONTE and BRENDA ALEXANDER, stationed at posts on 186th Street and Amsterdam Avenue, heard a call from the dispatcher that a woman had been shot at 485 West 187th Street. Five minutes later, they arrived at Apartment 1-D (Aponte: 140-41; Alexander: 176-77). Franza, who was nude and had been shot in the face, was lying face up in the foyer just inside the front door (Aponte: 140, 150, 158; Alexander: 177-78; People's Exhibit 6 [photo of foyer]). While Alexander guarded the doorway, Aponte saw a second victim in the next room (Aponte: 142, 160-61; Alexander: 178, 188-89). A box tied with a red ribbon was on a chair (Aponte: 142, 158-59).

Franza recalled lying by the front door and pleading that the police help her mother. The officers asked Franza who had done this (Franza: 314-15). Unable to talk, Franza pantomimed writing on the wall, and the officers gave her a pen. With it, Franza wrote her father's work number, the word "call," and the letters "FATH" on the wall; Aponte asked if she was writing "father," and Franza nodded "yes." Franza next wrote the letters "SENT" on the wall, leaving traces of blood (Aponte: 153-57; Alexander: 178-79; Franza: 315; Bourges: 417; Photographs: People's Exhibits 5 and 6). Meanwhile, Detectives JOHN BOURGES and GENNARO GIORGIO arrived at the apartment (Bourges: 416-17; Giorgio: 561-62, 631, 634, 640; Aponte: 160; Bourges: 416-17).

A detective handed Officer Aponte a note pad, which she placed on the floor in front of Franza. Franza wrote "3320 BARKER," "HOUSE," and "SENT." Aponte asked, "Sent what?", and Franza wrote, "HUS." Aponte inquired, "Husband?", and Franza nodded.

When Aponte asked why her husband had sent the shooter, Franza wrote, "I left." Asked to describe the shooter, on a separate page Franza scrawled, "MUSTACH" and "WHITE." Asked to be more specific, Franza wrote, "AFRO," "WHITE SHIRT" and "TANK." She added "FLOWERS" to show how the shooter had gotten inside (Aponte: 147-50; Franza: 315; see Giorgio: 562). Detective Giorgio surveyed the apartment. Seeing the flower box, with its tied ribbon and note, he concluded that the shooter had gained access by posing as a floral delivery man (Giorgio: 563, 641, 660, 668-69; People's Exhibit 7).

Detective Giorgio also spoke to Nelson DaCosta, while Bourges interviewed Theis and Diaz. Both detectives then interviewed Carlos DaCosta's wife Debbie in her apartment in an adjoining building. She showed them defendant's picture in a photograph album (Bourges: 418-19, 427; Giorgio: 563-66, 600-01, 613-15). Meanwhile, Benitez went home, called his brother-in-law, a police officer, and asked for advice. He then returned to 187th Street to speak to the police (Benitez: 88-90, 96-97).

Both victims are seriously injured.

Within five minutes after Officers Aponte and Alexander got to the scene, medical technicians began to treat the victims (Alexander: 179-80), while Aponte unsuccessfully tried to telephone Franza's father (Aponte: 150-51). About nine minutes after the shots (Benitez: 87), medical personnel carried Mendez out of the building on a stretcher, then brought out Franza (Theis: 113-16; Diaz: 215-16; Ferreira: 132-34; Benitez: 85-88).

Both victims were taken to Harlem Hospital, where many doctors worked on Mendez in the emergency room, and doctors intubated Franza, who was gagging on her own blood (Franza: 315-16). Franza remained in Harlem Hospital for three days, then was transferred to Beth Israel Hospital, where reconstructive surgery was performed on her

shattered jaw. As a result of the shot to her head, Franza suffered permanent nerve damage which caused the loss of sensitivity in her face (Franza: 325-27; Stipulation: 1472).

Mendez was hospitalized for about seventeen days in both Harlem, then Beth Israel Hospitals. Doctor Qwiloh treated her five gunshot wounds: one to her face, which fractured her jaw; one to her upper chest; two to her right arm; and one to her left forearm. Had she not been promptly treated, Mendez would have died from her gunshot wounds (Stipulation: 1472-73). Mendez's jaw was wired shut, and she underwent two surgical procedures -- the second in November, 1990 -- to repair her fractured jaw (Mendez: 230-31, 234-35). Because of the gunshot wound to her left wrist, Mendez could not use her left hand; in addition, her right arm was periodically numb (Mendez: 247-48).

Defendant arrives at the scene.

Meanwhile, Tracie Francis, defendant's Bronx neighbor, came home from work at about 6:15 p.m. A short time later, from the kitchen, she noticed defendant in her backyard, went outside, and spoke to him. Defendant then drove off, purportedly en route to the drugstore (T. Francis: 440-42).

About 7:30 p.m., after Victoria Theis learned about the shooting in the Mendez apartment, she asked her mother Hilda Ferreira to call Franza and say that something had happened to Mendez; however, Theis did not tell Ferreira that Mendez had been shot (Theis: 111-13, 116; Ferreira: 131-32). Ferreira called Myra Franza's Bronx number, and left her own telephone number and a message for Franza to come to 187th Street as soon as possible because "something had happened" to Mendez (Ferreira: 131, 136-38; People's Exhibit 4).

And, between 6:30 and 7:00 p.m, Wayne Francis came home; two or three minutes later, defendant drove up, spoke to Wayne, jumped the fence between the houses, and went

into his apartment (T. Francis: 442-44; W. Francis: 460-62). Approximately ten minutes later, defendant came out and spoke to the Francises; Tracie thought he appeared "shook up." Defendant said that there was a message on his answering machine that "something had happened to his wife" (T. Francis: 444-48; W. Francis: 463-64); Wayne recalled that defendant added that his wife had been shot, but could give no details (W. Francis: 464, 467-68, 473). Defendant got into his car and drove away (T. Francis: 446-47; W. Francis: 466, 472, 474). It was shortly after 7:00 p.m. (T. Francis: 449-50).

Meanwhile, after speaking with Debbie DaCosta, Giorgio and Bourges were returning to the scene of the shooting (Bourges: 419), as Officer Aponte stood outside the building. A car with New Jersey plates drove up, and defendant and his friend Tracy Jenkins got out (Aponte: 152-53; Giorgio: 632-33; Bourges: 419, 425-26; see W. Francis: 474). Nelson DaCosta[15] stepped out of the crowd, walked up to defendant, who was wearing glasses, and punched him in the face (Aponte: 152-53; Bourges: 421, 426; Giorgio: 566-67, 615, 633).

Nelson ran into the lobby, screaming and yelling in Spanish. He raced upstairs and forced his way into his mother's apartment (Theis: 116-17; Diaz: 216; Giorgio: 567). Defendant, too, went into the building, but the police kept him and Nelson apart. After speaking with Nelson, Giorgio asked defendant to come to the 34th Precinct station house (Giorgio: 567-68, 633, 637). Defendant arrived there within minutes of Detectives Giorgio and Bourges (Bourges: 419, 421, 427-29; Giorgio: 568-70, 634, 637, 652, 661).

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[15] Nine days before, Aponte had spoken to DaCosta about threatening telephone calls to his home (Aponte: 152, 161-63, 173).

Physical evidence is recovered.

Twenty or thirty minutes after asking her mother to call Franza, Victoria Theis checked her answering machine. Defendant had left a message that he was on his way. Theis gave the tape to the police (Theis: 117-20, 123-24; People's Exhibits 3-A and 3-B).

Between 8:00 and 9:00 p.m., Crime Scene Unit Detectives GARY OSBORN and John Atkinson arrived. Osborn inspected the premises, then photographed the apartment and evidence which was seized (Osborn: 516, 524). Two deformed bullets were found in the rear hall and bathroom (Osborn: 516, 523, 525; People's Exhibits 8, 13 [photos], and 28 [bullets]).

A closed flower box, tied with a ribbon, was on a chair in the foyer, with a note affixed. According to the note, the flowers had come via FTD from "R & R Florist" (Giorgio: 669-72, 742-44). Wearing gloves and using tweezers, Osborn put the note in a plastic envelope. After removing the flowers, he put the ribbon inside the box, and put the box in a paper bag for processing at the Latent Print Unit (Osborn: 517-22, 532-36; People's Exhibits 26, 29 [note, box and ribbon] and 7, 27, 30 [photographs]). The Latent Fingerprint Unit found no prints of value on the flower box, ribbon, or note (Giorgio: 671). Moreover, Detective Giorgio discovered that FTD had no affiliate called "R & R Florist" in New York City, New York State, or the United States (Giorgio: 669-72, 742-44).

Osborn also dusted the apartment for fingerprints, focussing on the apartment's front door. He found one print of value near the know on the outside of the door, lifted it, and sent it to the laboratory (Osborn: 525-29, 531).

Defendant makes two statements to the police.

Meanwhile, after calling the hospital, Giorgio began to interview defendant at 8:40 p.m. on the night of the shooting. First, defendant called his mother, and Giorgio explained to her that defendant was helping the police. Defendant said he was willing to cooperate "to the fullest," but had no explanation for the shooting. As defendant talked, Giorgio recorded his comments (Giorgio: 639-40, 571-72).

Defendant said that he had been married to Franza for three years; that three months ago she had said she needed space; and that three weeks ago she had left their home while defendant was competing at a gun meet (Giorgio: 571, 641-42; People's Exhibit 31 [statement]). Defendant added that, since Franza had left, defendant had twice spoke to Mendez and told her that he had bought a car for Franza. He had also beeped Franza fifty times a day. Defendant said that when they finally spoke four or five days before the shooting, he told Franza that he had gotten tickets for a cruise. Although she refused to accompany him, defendant intended to drop off the tickets and a dozen roses at Franza's work place (Giorgio: 639, 642, 645-49; People's Exhibit 31).

Defendant also related that about 7:00 p.m., a friend, Tracy Jenkins came to visit. While Jenkins went to buy beer and a pizza, defendant went to the drugstore. When defendant returned, he heard the message left by Hilda Ferreira (People's Exhibit 31). Defendant also described his employment and financial status, and provided telephone numbers where he could be reached (Giorgio: 577-78, 639, 642; People's Exhibit 31). After an hour, defendant read the three-page summary written by Giorgio and signed the bottom of each page (Giorgio: 572-73, 579, 643-45, 653). While he was free to leave, defendant remained at the precinct in the hope of seeing his wife (Giorgio: 637-38).

At about 2:00 a.m., Detectives Bourges and Ortiz drove defendant to his home in the Bronx, and he invited them inside. Bourges noticed a device for packing ammunition and manufacturing cartridges, and defendant said something about target shooting (Bourges: 423, 432-33).[16] Defendant removed the tape from his answering machine, gave it to Bourges, and asked for a receipt, which Bourges wrote for him; Bourges later gave the tape to Giorgio. The detectives escorted defendant to his car, and he drove away (Bourges: 423-24, 431-32, 434; Giorgio: 579-80, 654-59; People's Exhibit 4 [tape]).

At 6:20 p.m. on July 23, 1990, Giorgio again spoke to defendant after reading his Miranda rights. After a review of his first statement, defendant showed Giorgio the cruise tickets he had purchased on July 12th; he said he still intended to go on the cruise with a friend of his wife's (Giorgio: 602-605; People's Exhibit 33 [statement]). Defendant told the detective that Franza had left him four times in their three-year marriage, including in April, 1989, and always stayed in Carlos' basement apartment. During her absences, defendant "always" sent flowers to Franza, often by FTD; once, he had a friend deliver them to the Mendezes' apartment. On July 10, 1990, Franza told defendant that she intended to file for divorce; he cried and refused to sign any papers. At the conclusion of the interview, defendant read, then signed, the two-page interview summary prepared by Giorgio (Giorgio: 605-607; People's Exhibit 33).

August 11, 1990: a pipe bomb is found outside Nelson DaCosta's apartment.

On the morning of August 11, 1990, a live pipe bomb was discovered outside Apartment 1-A at 644 West 185th Street, where Nelson DaCosta lived (Aponte: 161-63;

[16] At some point, Giorgio learned that defendant kept weapons at a gun club and had submitted an application to deal in firearms (Giorgio: 735-36).

Mendez: 238; Franza: 381-82; Giorgio: 601-02, 666-67, 731).[17] Police officers called the Bomb Squad; Detective DONALD SADOWY and his team, Detective Valdez of the 34th Precinct, and Detective MARYANN HERBERT of the Arson and Explosion Squad, responded (Giorgio: 666-67; Raymond: 772-74, 785-87, 789, 792, 806; Herbert: 824-25, 830).

Sadowy donned a Kevlar bomb suit and a helmet with a face plate, leaving his hands exposed (Sadowy: 1029-34, 1046). The bomb was made of a six-inch long pipe nipple, and was about one and a half inches in diameter. It was sealed with two end caps, and tape covered those joins. A hole was drilled into one end cap, and a fuse was protruding. The entire device was inside a sock (Sadowy: 1036, 1042-43; People's Exhibit 47 [photograph]).

Sadowy then carefully lifted the bomb to take an X-ray of both sides; there was no secondary fusing system or anti-disturbance device inside the pipe. Sadowy wrapped the device in a bomb blanket to protect from fragmentation should it explode, and carefully took it to the bomb carrier (Sadowy: 1036-38).[18] At an outdoor range, he secured the pipe bomb to a special table in a demolition area, took cover, and slowly unscrewed one end (Sadowy: 1038-39). Once the cap end was off, Sadowy noticed that the pipe was fully packed with powder, and that the fusing system was a firecracker -- not a common fusing mechanism in New York City pipe bombs. The fuse had not been ignited -- all that would have been necessary to arm the device (Sadowy: 1038, 1040-41, 1047-51, 1059-60).

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[17] In the spring of 1990, Nelson's wife and children had moved to Chicago (Mendez: 277-78; Franza: 385-86).

[18] In September, 1990, Detective SULMA RAYMOND was assigned to investigate this bomb (Raymond: 772-74, 785-87, 789, 792, 806). No prints of value were found on the bomb (Raymond: 779), even though Sadowy had touched it with his bare hands (Sadowy: 1044-46).

Sadowy ignited a pinch of the powder and a short length of fuse. The powder was explosive, and the fuse ignited (Sadowy: 1041-42). Once the device was rendered safe, Sadowy separated its components and vouchered them (Sadowy: 1043-45).

Defendant gives handwriting exemplars.

On August 24, 1990, Detective Giorgio served an order of protection, which Franza had secured, on defendant (Giorgio: 582, 734-35). The detective then asked defendant for a handwriting sample, explaining that he would compare it with the note left by the shooter. Defendant refused, and left the precinct. But, within thirty minutes, he returned to give exemplars (Giorgio: 580-81, 583-89, 676-78, 734).

Giorgio had earlier copied the note from the flower box (People's Exhibit 26). He read the copy, made certain that defendant understood what was needed, and let him examine the copy. Giorgio then gave defendant a pen and paper and left him in an interview room to make ten exemplars. Returning five or ten minutes later, Giorgio noticed that defendant was writing the first sample laboriously and very slowly, one letter at a time. Asked if there was a difficulty with the pen or the sample, defendant said that there was no problem. Giorgio remained, and defendant then wrote at normal speed (Giorgio: 580, 589-90, 592, 600, 678-80, 734; People's Exhibit 22). Giorgio delivered the samples to the Questioned Documents Unit (Giorgio: 591, 680-81, 734; Breslin: 1197-98).

February 7, 1991: Franza, Mendez, And DaCosta Receive Threatening Letters.

On February 7, 1991, Mendez received two letters at her West 187th Street apartment. One was addressed to Franza and Mendez, and the other was addressed to Nelson DaCosta. The sender of both letters was listed as "Julio Ortiz", but neither Mendez

nor Franza knew anyone by that name (Mendez: 237-39, 243, 274; Franza: 337-38; Herbert: 819-20, 826; People's Exhibit 10).

Suspicious, Mendez opened each envelope with a knife. Inside each was a single sheet of paper with a typed message in bad Spanish, whose syntax was difficult to understand. Defendant spoke "broken Spanish" -- he could not properly conjugate verbs, and his syntax was incorrect (Franza: 335). Mendez called Detective Giorgio (Mendez: 239-41, 242-43, 275; Giorgio: 610; People's Exhibits 11-12).[19]

The letter addressed to Mendez and Franza (People's Exhibit 11) began by telling "Josephine and Myra" that "the next time the two (of them)" would "die," and ordering them not to "tell anyone," apparently about the letter. The writer mentioned that he had seen Mendez's husband throwing out the trash at 1:00 a.m. a few nights earlier, and it would be easy to kill him. Then addressing Franza, the writer warned that, although he did not want to kill, it would be easy to do so. The writer told Franza that "your husband he is asking and investigating too much" and "I will to kill to him too." The writer also told Mendez to "talk with your son," because "YOUR SON LACKS RESPECT!!!!!!!!" (emphasis in original). He cautioned the women that, "The police can't to help. You are unprotected."

The letter addressed to DaCosta (People's Exhibit 11) began with the words, "I will to kill all your family here and Puerto Rico. I to send your grandmother a gift. I will know where all your family to live." He added that he hoped that DaCosta had "learned" because of "what happened with [his] family." The writer then accused DaCosta and his friends of having stolen some of the writer's things;[*20] he told DaCosta to go, alone, to 175th Street

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[19] Court interpreter Yolanda Kidd provided a literal translation of the letters (510-12).

[20] Mendez said that DaCosta was not a thief (Mendez: 276-77).

and Audubon Avenue at 4:00 a.m. on February 8th and put those things in the trash, adding that someone would be watching him. The writer went on to tell DaCosta that, "I will know everything of your life," since "your friends is friends mine." He threatened, "I have lots of money. Cannot hide. I to find to you where you go attempt with everything. Follow, concentrate and not all to die little by little." The writer warned that if DaCosta told the police, "Everything is going bad way for everybody." He concluded the letter with the words, "I have patience."

After reading the letters to Giorgio in translation, Mendez gave the detectives the letters and envelopes. The postage on each envelope included two 3¢-stamps (Mendez: 242-43; Giorgio: 607-08, 610-11). They were sent to the Police Department's Latent Prints Section, and then to Questioned Documents for analysis (Giorgio: 611-12).

February 5, 1991: a pipe bomb is sent to the address of Mendez's mother in Puerto Rico.

Until her death in November of 1990, Mendez's mother, Rosa Roman Lamboy Matos, lived with her daughter, EVELYN LAMBOY in Levittown, Puerto Rico. The telephone number, (809) 784-1630, was listed in Lamboy's name. Two other sisters of Mendez and Lamboy lived in Puerto Rico: Elba in Levittown and Angeles Roman Quinones in Rio Piedras [telephone number (809) 765-4792] (Lamboy: 754-58).

When Lamboy returned home from work on the evening of February 5, 1991, she saw a notice (People's Exhibit 34) attached to her gate that Federal Express had tried to deliver a valuable camera from U.S.A. Electronics in New York City, and that $45 was owing. Lamboy had not ordered a camera, and did not recognize the sender (Lamboy: 758-60, 769-70). The following day, Federal Express again tried to deliver the package. Lamboy called Angeles, who opposed accepting the package (Lamboy: 760-61). During

her lunch hour on Thursday, Lamboy called Federal Express, promising to leave a check with a neighbor and giving them delivery instructions (Lamboy: 762).

After Lamboy got home on Friday, February 8, 1991, her neighbor said that Federal Express had delivered the package. Lamboy picked it up and gingerly carried it into her kitchen. The package (People's Exhibit 17), was a cardboard box sealed with tape, inside of which was an attache case. Using the keys taped to one side, Lamboy cautiously unlocked the two locks, and lifted the top about one and a half inches. Through the crack Lamboy saw a very wide pipe, criss-crossed by orange and white cables, and closed the case (Lamboy: 762-65).

Leaving the box and paperwork on the table, Lamboy cautiously carried the case out of her house and put it on the grass. A neighbor heard her story, and suggested calling the police. About twenty-five minutes later, Police Agents JESUS GARCIA and Raul Haddock arrived, and briefly inspected the case, which they left on the grass. Lamboy told them she had opened the case (Lamboy: 765-66; Garcia: 1064-68; People's Exhibit 54 [photograph of bomb]). The officers evacuated the street (Lamboy: 765-67).

Garcia used an electronic stethoscope to listen for a clock or other sound-emitting device, but heard nothing. After attaching a hook and rope (People's Exhibit 55) from his bomb truck to the handle of the case, Garcia sheltered behind the truck and tugged upward to disengage any booby trap mechanism that might have been triggered by the case's being opened (Garcia: 1073-75). Then, with fabric adhesive strips stuck to the case, Garcia gingerly opened it a quarter-inch. Garcia saw a pipe nipple and a fuse extruding from the side of the pipe; a wire was attached to the fuse and then wrapped around a screw in the top

of the case. Thus, opening the case would trigger ignition. Inserting cutters, Garcia cut the wire (Garcia: 1075-78, 1095-96, 1099, 1101).

Garcia next cut the pyrotechnic fuse. The bomb was secured to the bottom of the case by blocks of wood (Garcia: 1077-78, 1094, 1096). Realizing that one end cap was loose, Garcia sheltered behind the truck and gently unscrewed the cap by remote control. There were eleven or thirteen ounces of powder in the pipe, some of which spilled out. Garcia put the powder in a plastic bag. A field test indicated that it was black powder, an explosive substance (Garcia: 1078-80, 1087-89, 1097-1100; People's Exhibits 48, 54A-G, 57).

On February 10, 1991, Mendez and Franza notified Giorgio that a bomb had been sent to Lamboy and gave him the numbers of Angeles and Elba Roman (Giorgio: 620-21, 682, 729). Given the family connection, Detective Raymond, who was assigned to investigate the DaCosta bomb, was assigned to investigate this new bomb jointly with the Federal Bureau of Alcohol, Tobacco, and Firearms, whose team included group supervisor Gerald Raffa, Special Agent CHRIS BEHAN, and Agents Carrie DiPirro and Alan Kashinsky (Behan: 840). Agent Behan began his investigation of the Puerto Rico bomb on February 11th, by speaking with Detective Giorgio (Raymond: 803, 809; Herbert: 831; Behan: 839-41, 896-97, 904).

<u>February 11, 1991: defendant is arrested.</u>

On February 11, 1991, defendant came to the office of Detectives Raymond and Herbert at One Police Plaza. They interviewed defendant for half an hour. At about 6:00 p.m, they drove defendant to the 34th Precinct to speak to Detectives Giorgio and Ortiz (Giorgio: 731-32; Raymond: 775-76, 783-84, 787, 813-15; Herbert: 817-18, 825).

Shortly thereafter, defendant participated in a line-up conducted for the Federal Express clerk, Cesar Rodriguez, who had accepted the package sent to Puerto Rico. Rodriguez did not identify defendant (Giorgio: 619, 688-89; Behan: 942).

Within thirty minutes of his appearance in the precinct, defendant was arrested for the shooting of Mendez and Franza (619-20, 730-32). Defendant was asked to empty his pockets. Their contents included a telephone book and a piece of paper (People's Exhibits 35A, 35B). On the paper was written the name "Rio Piedras," with an "809" area code telephone number underneath, and three other "809" numbers were written below the name "Levittown." Based on his conversations with Mendez, Giorgio recognized the Rio Piedras number as that of Angeles Roman (Giorgio: 622-24, 732-33; Behan: 842-45, 861).

Bomb equipment is found in defendant's apartment.

Meanwhile, ATF supervisor Gerald Raffa had been in contact with the Puerto Rico office, the 34th Precinct, and others with relevant information about the pipe bomb. He applied for, and a federal judge authorized, a search warrant for defendant's residence at 3320 Barker Avenue in the Bronx. Pursuant to that warrant, Detectives Raymond, Herbert, and Ortiz and ATF Agents Raffa, Behan, and DiPirro commenced their search at about 2:00 a.m. on February 12, 1991 (Raymond: 777-78, 792-93, 1133-34; Herbert: 820, 822, 827; Behan: 846-49).

First, bomb squad dogs sniffed for explosives (Herbert: 820, 834; Raymond: 1133-34). Then, Behan searched a living room wall unit, which contained papers and books. Herbert noticed and seized a small sheet of 3¢-stamps (Raymond: 778-79; Herbert: 822, 828; Behan: 847-50, 855). Also seized were Bullseye brand smokeless gunpowder, a roll of black electric tape, and a green magic marker. In addition, the agents took various

handwritten and typewritten papers. Among them was a list of books relating to guns and explosives; most of which the books on this list (People's Exhibit 38) were not available in public libraries (Lund: 1154-56, 1172-79). The agents also took a sheet with the name "Julio Ortiz" and two phone numbers; a sheet with "Rio Piedras" and "Levittown" and two phone numbers; and a card for U.S.A. Electronics (Raymond: 811-13, 815-16; Herbert: 827-28, 835; Behan: 850-55, 858-63, 865-67, 927-28; People's Exhibits 35C-D, 38, 40, 41A-E, 42, 43, 44). Pipes in the apartment were not seized (Raymond: 794-96).

In the course of their search, ATF agents had seen packages of firecrackers in the living room. Shortly thereafter, they learned that the DaCosta pipe bomb had contained a firecracker. Consequently, on February 13, 1991, DiPirro applied for a second warrant to search defendant's premises for firecrackers, grey duct tape, and papers in defendant's natural handwriting. A federal judge signed a warrant, and on February 14th, it was executed by the joint team (Raymond: 812-13; Behan: 869, 874-79, 881, 939, 941). The team seized four unopened packages of firecrackers, two pieces of duct tape, a roll of black tape, and a file in defendant's handwriting (Behan: 879-81, 939; People's Exhibit 45). They submitted the tape, firecrackers, and magic marker to the ATF laboratory for analysis (Behan: 879, 882-83, 898).

Meanwhile, on February 13, 1991, with the consent of the landlord, ATF agents searched the basement and took two pipe wrenches, a vise grip, and six drill bits; the tools were also sent to the ATF laboratory (Behan: 886-88). Detectives Raymond and Herbert searched the basement, and removed pipe end caps and nipples (Behan: 929-31; Raymond: 1136).

On March 28, 1991, Agent Behan returned to the premises, this time with ATF chemist GREGORY CZARNOPYS and ATF tool mark examiner Carlo Rosati. They received the permission of the landlord to search and to remove various tools, pieces of wood, insulated wire, drill bits, glue, and black tape. These were all sent to the ATF laboratory (Behan: 888-89, 898, 914; Czarnopys: 979-91, 988, 990), but could not be forensically matched to the pipe bombs (Czarnopys: 987-93).

Meanwhile, on either February 11 or 12, 1991, the ATF branch office in Puerto Rico faxed a copy of the Federal Express airbill that was attached to the Puerto Rico pipe bomb. The purported sender was Julio Ortiz, U.S.A. Electronics, 750 West 181st Street, New York City, at telephone number (212) 795-0011 (Behan: 890-91). The address was for a jewelry repair shop, whose proprietor was in his mid-seventies; and a check of the residential building next to the shop was unsuccessful. A call to the telephone number yielded a piercing note, similar to that of a FAX machine tone (Raymond: 805, 809-10; Behan: 891-94).

Federal Express learned from the tracking number on the international airbill, which was entered into a computer, that Cesar Rodriguez had accepted the package at 2:45 p.m. on February 4, 1991, at 600 West 116th Street in Manhattan. It was paid for with an American Express money order (THOMAS SULLIVAN: 1105-11, 1125-26; People's Exhibits 36 [money order], 39 [airbill], 59 [Federal Express tracking inquiry]). Blank airbills can be obtained for the asking at any Federal Express office. The number on this airbill revealed that it had been picked up from the office at One Fordham Plaza in the Bronx (Sullivan: 1114, 1117, 1120-24).

Agent Behan subpoenaed defendant's bank, telephone, employment, union, and criminal records, as well as those of Julio Ortiz. He sought the names of defendant's associates; checked the members of his gun club; and attempted to discover the origin of the bomb case (Behan: 909-20, 934-36, 942-47; Raymond: 1142-43).

Forensic Comparisons Of The Pipe Bombs.

The joint team had comparisons made of evidence removed from defendant's apartment and the basement of his building with that taken from the three crime scenes, and other forensic evidence (Behan: 882, 885-86, 897-98, 904, 944-45). Thus, the components of the bombs and the packaging of the Puerto Rico bomb were examined first by ATF chemist Czarnopys, then by Special Agent JOSEPH C. LUND, of the ATF Explosive Technology Branch.

The pipe in the Puerto Rico bomb was eleven and a half inches long, and one and a half inches in diameter; a Siam Fitting end cap, made in Thailand, was threaded onto each end of the pipe. Its ignition system was a small cardboard pull-wire tube and a commercial fuse lighter,[21] which would light a green pyrotechnic fuse. Inside the end caps was a residue of black powder -- a commercial-grade explosive. After the fuse burned down, it would explode in a few seconds, swell the weakest portion of the pipe, cause a fireball thermal effect, and immediately release all the blast pressure and fragment the device and its case. Equivalent in power to three hand grenades, the bomb would cause serious physical injury or death, as well as tremendous property damage. This bomb did not explode when Lamboy opened the case an inch and a half because the maker had provided a two-inch leeway

[21] A commercial fuse lighter could be obtained in a blasting supply house for about 20¢ (Lund: 1164-68).

before the device would be triggered (Czarnopys: 954-56, 958, 968, 989, 1008-10; Lund: 11649-70; People's Exhibits 48-50 [photographs and x-ray of bomb]).

The brown cardboard container in which this bomb had been shipped had green markings. Czarnopys compared them with the green marker seized from defendant's home with the naked eye and a microscope, then did a chemical analysis of the dyes, paint type, and binding medium. He concluded that the markings on the box were consistent with the marker from defendant's home (Czarnopys: 959-60, 968, 974-76, 1000-05, 1016; People's Exhibits 44 [marker], 51, 52 [photographs of box]).

Czarnopys also compared the black tape used in construction of the Puerto Rico pipe bomb with black electrical tape from defendant's apartment. The tape had stretched from use, and so could not be measured. After visual, microscopic, and infrared examinations of the two samples and their chemical composition, Czarnopys concluded that they were made by the same manufacturer and were consistent with each other (Czarnopys: 976-78, 1011, 1013-20; People's Exhibit 43 [tape]).

The pipe in the DaCosta pipe bomb was approximately six inches long, with a diameter of one and a half inches; its end caps were made by Grinnell. The fuse was a red firecracker, surrounded by an explosive identified as flattened ball, double-based smokeless powder (Czarnopys: 956-59, 1008-10; People's Exhibits 25, 47 [photographs of bomb]). This powder expended more energy and made for a better bomb than black powder in the Puerto Rico bomb. Had the DaCosta bomb functioned, tremendous heat would have been generated (thermal effect), the resulting blast pressure would have caused the pipe to burst, and the energy created would have sent fragmented bits of pipe in all directions with the

velocity and effect of unaimed rifle bullets. Anyone in close proximity to the explosion would have suffered serious physical injury or death (Lund: 1160-63, 1180-81).

Czarnopys compared the firecracker in the DaCosta bomb and one of the firecrackers seized from defendant's apartment (People's Exhibit 53). They were similar in measurement, red color, and flower design on the paper. Although the fuse of the firecracker from the apartment was one-eighth of an inch longer than that from the pipe bomb, such a variance is not uncommon (Czarnopys: 984, 994-95, 997-98, 1018).

Comparing the two explosive devices, Czarnopys could not determine the manufacturer(s) of the pipes, and their end caps were different. The black powders from the bombs and defendant's apartment, while all explosives with basically the same chemical composition, had been manufactured differently and thus had different shapes and uses; the Bullseye powder from defendant's apartment and the flattened ball powder from the DaCosta bomb were primarily used to reload or manufacture ammunition. In contrast, because it was much more corrosive, the black powder in the Puerto Rico bomb was not used for ammunition, but was ordinarily tamped into a muzzle loader (Czarnopys: 960-667).

Defendant's handwriting connects him to the crimes.

All relevant written and documentary evidence was submitted to the Police Questioned Document Section for comparison (Behan: 882, 885-86, 897-98, 904, 944-45). Included in the "known" samples were "collected writings" from defendant's apartment, such as his checks, business documents, and applications, and handwriting samples given by defendant (Breslin: 1196-98).

Detective JOHN BRESLIN examined all the samples. Breslin placed the known and questioned samples of either printing or cursive writing side by side, and examined them with the naked eye and through various magnifying devices or instruments to enhance the writing (Breslin: 1194-96). He looked for similarities in the form, size, and shape of each letter, as well as the relative positioning of letter combinations. He also looked for the apparent speed of writing, introductory strokes or ticks, and pen stops or pen twists (Breslin: 1202-07, 1378-83, 1390-1410, 1458).

Specifically, Breslin compared the note found on the flower box (People's Exhibit 26), with defendants handwriting exemplars (People's Exhibit 22) and documents in his personal file (People's Exhibit 45). He concluded that defendant had written the note on the flowers (Breslin: 1200-11, 1236, 1376-77, 1441-44; People's Exhibit 62 [photographic comparison]).

Breslin also compared material relating to the Puerto Rico pipe bomb, in particular a copy of the Federal Express airbill (People's Exhibit 39) and the original American Express money order used to pay for shipping the bomb (People's Exhibit 36). He saw sufficient identifying factors to conclude that there was a "strong" similarity between those unknown documents and the known samples. However, since there was not enough proof to enable him to give an "absolute, definite opinion" of authorship, Breslin asked that Detective Giorgio secure from defendant twenty samples of specific letters and letter combinations, including the signature "Julio Ortiz" (Breslin: 1349-50, 1352-53, 1355-56, 1421, 1451-55).

In November, 1991, Giorgio had defendant write specific words and sign the name "Julio Ortiz" (Giorgio: 616-17; stipulation: 1085; Breslin: 1453-55; People's Exhibits 61, 61B). Breslin then compared those exemplars to the Federal Express airbill, and concluded

that defendant had signed the airbill (Breslin: 1211-26, 1236, 1346-48, 1383-85; People's Exhibit 64 [photographic comparison]). Breslin also concluded that defendant had written the American Express money order (Breslin: 1226-36, 1348, 1419, 1445; People's Exhibits Exhibit 23F [exemplar], 63 [photographic comparison]).

Breslin also examined the stamps and the printed addresses on the two envelopes mailed to Mendez. Breslin was able to make a jigsaw comparison between the two 3¢-stamps on each envelope and the sheet of 3¢-stamps found in defendant's apartment. He concluded that all four stamps on the envelopes had come from that sheet, based on distinctive tears, fiber matches, and a "shaved" tear which left a portion of the glue from one questioned stamp attached to the sheet (Breslin: 1264-1302, 1431-40; People's Exhibits 37 [stamps], 67-73 [photographic comparisons]). Since he did not have a known sample of 25¢-stamps, Breslin made no comparison of the 25¢-stamps on the envelopes (Breslin: 1426-30).

While Breslin found "strong similarities" between the handwriting on the envelopes (People's Exhibits 32A, 32C) with defendant's exemplars (People's Exhibits 23B, 23C, 23E), he could not identify the author because so many individual letters on the envelopes had been retraced or overwritten, obscuring distinctive characteristics (Breslin: 1304-06, 1427-29, 1446, 1450-52). Further, while the typeface on the airbill and the threatening letters was consistent. Breslin could not state that they had been made by a any given typewriter without known samples from it. However, the typeface was not consistent with that on fourteen typed pages found among defendant's papers (Breslin: 1329-31, 1333-40, 1345), or with exemplars that Raymond and Behan had made from two manual typewriters belonging to defendant's landlord (Behan: 931-34; Raymond: 1134-35, 1137-41; Breslin: 1332).

In the course of trial preparation, Breslin was examining handwritten items seized from defendant's apartment in the sunlight. He noticed indented writing on a sheet which seemed to read "Nelson DaCosta." He took those documents back to the laboratory and used an electrostatic detection apparatus to enhance indentations on the paper. With that apparatus, Breslin raised 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" (Breslin: 1194-95, 1237-41, 1248-53, 1256-63, 1424, 1426; People's Exhibits 35D, 65- 66).

The Defendant's Case

NELSON DaCOSTA was the son of Josephine Mendez and the brother of Myra Franza and of Carlos and Wilfredo DaCosta. By 1990, he had been living at 644 West 185th Street, between Broadway and Wadsworth Avenue, for about twelve years (DaCosta: 1608-10, 1622-23, 1625).[22] In June, his wife Ruthie left and took their two children to Chicago. Suddenly, there were frequent calls for Ruthie, but the caller would not say anything. DaCosta called the telephone company to report harassment, but was told it would only intervene if he were threatened. When the calls continued, DaCosta told a telephone representative, and a police officer that someone had threatened to kill him, so that the calls would be traced. Finally, an Avon representative called, apologized, and said that Ruthie owed the company $200 (DaCosta: 1609-10, 1616-20).

On July 16, 1990, Mendez told DaCosta that two men posing as police officers had come to her apartment looking for him (DaCosta: 1610, 1615). The following day, DaCosta

[22] In early 1990, DaCosta abused cocaine and heroin he had purchased on the street (DaCosta: 1612, 1622).

heard that Mendez and Franza had been shot and went to 485 West 187th Street. Seeing defendant outside the building, DaCosta "punch[ed] that punk right in his face" (DaCosta: 1615, 1623).[23]

That evening, Detective GILBERT ORTIZ was assigned to investigate the shooting, and visited the crime scene around 9:00 p.m. Ortiz did not see the flower box at the scene, and when he did examine it, the delivery note was not attached to the box (G. Ortiz: 1476-80, 1483; People's Exhibits 26, 29).

Sometime that summer, after defendant had separated from Franza, ROSEMARIE GONZALEZ met him on the street. By October, 1990, they had rekindled an old romance,"[24] and Gonzalez spent the weekends in defendant's apartment (Gonzalez: 1586-88, 1598-99, 1602). Defendant was not working as an electrician during that time; rather, he got checks from the union. He and Gonzalez spent the weekend before his February, 1991 arrest entertaining friends (Gonzalez: 1590-92, 1599-1602). Gonzalez saw firearm reloading equipment -- powder, shells, and a machine -- on a rolling table in defendant's bedroom, and saw him use the reloader once. Gonzalez also recalled seeing unopened packages of firecrackers in a bedroom drawer (Gonzalez: 1589, 1600, 1602-04).

Also in the summer of 1990, JULIO ORTIZ was doing field work as a social worker at 103rd Street and Second Avenue. Defendant drove by, called to Ortiz, and offered him a ride home. When they got there, defendant wrote down Ortiz's name and telephone

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[23] Shortly after the shooting, DaCosta "got real bad," and spent three weeks in a psychiatric hospital. During that time, a pipe bomb was delivered to his apartment (DaCosta: 1614, 1623).

[24] Gonzalez first met defendant in July, 1982; she lived with him from October, 1983 through March, 1987 at his Barker Avenue apartment (Gonzalez: 1584-86, 1593, 1596, 1598).

numbers, and gave Ortiz his own number (J. Ortiz: 1735, 1739-42; People's Exhibit 35-D). In 1988 or 1989, Ortiz had been an electrical apprentice, and had worked with defendant at a construction site on Roosevelt Island. They worked on outlets and threaded wires for electric lighting through pipes, which they sometimes cut or capped (J. Ortiz: 1734-35, 1736-38).

On February 4, 1991, CESAR RODRIGUEZ was working as a customer service agent for Federal Express at 600 West 116th Street. About 11:30 a.m., a short, dark-skinned man with a hispanic accent entered the office with a package for Puerto Rico. The airbill was already filled out and signed "Julio Ortiz," but the weight on the airbill was wrong. Rodriguez asked how the man wanted to pay, and he replied "cash." Rodriguez explained that he could only accept a money order, check, or credit card, and added that the man could buy a money order at College Stationary at the corner (Rodriguez: 1718-21, 1723-25). The man left, taking the package. He returned about two hours later, with the same package and airbill (People's Exhibit 39), as well as a money order that had been purchased at College Stationary (Behan: 1703-04; People's Exhibit 36). Rodriguez re-weighed the package, wrote the airbill number on the money order, and processed the package, giving the man a copy of the airbill (Rodriguez: 1721-22, 1724-25; Behan: 1703-04).

Shortly after its arrival in February, 1991, DaCosta learned that a threatening letter had been sent to him at the Mendez apartment. He never received threatening letters at his own address (DaCosta: 1613-14, 1625-26; People's Exhibit 32).

About 5:30 p.m. on February 11, 1991, Detective Ortiz arrested defendant (G. Ortiz: 1476, 1480-81, 1483-85). Also in February or early March, Special Agent CARLO ROSATI, a tool mark expert for ATF, examined the Puerto Rico pipe bomb for tool marks.

He noticed that the pipe nipple had tool marks made by a gripping tool such as a vice, wrench, or pliers, and one end cap had a 9/64-inch drill hole. The aluminum bands housing the locking mechanism of the case also had tool marks (Rosati: 1652, 1663-67, 1683; People's Exhibits 54A-J).

Because Rosati had an idea which type of tools could have made these marks, in March, 1991, he accompanied ATF agent CHRISTOPHER BEHAN to examine tools in the basement of 3320 Barker Avenue in the Bronx. Rosati could not conclusively affirm that any tool seized from the basement matched those marks, although some were of the correct size (Rosati: 1654, 1660-61, 1668-73, 1675-81, 1686-89; Behan: 1702-03). Nor could Rosati match common wood or wire from the pipe bombs with samples in the basement (Rosati: 1673-75, 1685).

POINT

DEFENDANT'S MOTION TO VACATE JUDGMENT IS PROCEDURALLY BARRED AND ENTIRELY MERITLESS

In his latest motion to vacate his judgment of conviction, defendant contends that Justice Bookson improperly denied his original motion, pursuant to Criminal Procedure Law Section 440.10 (Defendant's September 29, 2005 Motion to Vacate Judgment). Specifically, defendant argues that the trial court was unaware that defendant's first motion to vacate his judgment of conviction was based on fabricated evidence obtained from the People themselves and had the court been aware of this, the court would have granted his motion rather than characterize it as "factually inaccurate" and "completely unsubstantiated"

(Defendant's September 29, 2005 Motion to Vacate Judgment, p. 9, para. 22). Defendant's instant claim is procedurally barred and entirely meritless.

According to Criminal Procedure Law Section 440.10(2)(a), a "court must deny a motion to vacate a judgment when [] [t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue." Id. Since defendant raised this precise claim on his direct appeal to the First Department and since there has been no retroactive change in the law controlling fabricated evidence this Court must deny defendant's claim. And according to Criminal Procedure Law Section 440.10(3)(b), a "court may deny a motion to vacate a judgment when [] [t]he ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other that an appeal from the judgment. or upon a motion or proceeding in federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue." Id. Since, defendant raised this precise claim in his original motion to vacate his judgment of conviction and since there has been no retroactive change in the law controlling fabricated evidence this Court should deny defendant's claim.

In any event, defendant's current claim is entirely without merit. In support of defendant's most recent contention, defendant once again provides a litany of self-serving, unsubstantiated and, often times, incomprehensible or bizarre claims in which he insists that his conviction had been obtained by fraud.

In particular, defendant makes the accusation that nearly all of the People's evidence at the trial was a "fabrication," that the prosecutor blatantly committed Rosario and Brady

violations by supposedly hiding the true police reports and instead providing a second set of reports purposely manufactured to establish his guilt, and that the prosecutor deliberately elicited perjured testimony from all of the People's principal witnesses to comport with the goal of framing him. Defendant further asserts that his own trial attorney conspired with the prosecutor and the police to defraud the court and jury, thus depriving him of the effective assistance of counsel. Moreover, defendant contends that because the People failed to "controvert" these allegations below, his motion should have been summarily granted. Defendant's claims are utterly meritless and supported only by his fanciful conspiracy theories. Thus, Justice Bookson properly denied defendant's original motion to vacate the judgment of conviction and this Court should deny defendant's newest motion to vacate the judgment of conviction.

To begin, defendant claims that his 440.10 motion should have been granted by the trial court because the People purportedly failed to refute any of his myriad claims of fraud. Defendant is wrong. First, it is clear that a 440.10 motion may be summarily denied by a trial court for several reasons even if the People never submit a response to the motion. See CPL §§440.10(2), 440.30(4). For example, Section 440.10(2)(b) authorizes summary denial whenever an appeal is pending and the record is adequate to permit review of the claims on direct appeal. Since this was true of nearly all of defendant's claims in this case, Justice Bookson correctly determined that the statute authorized summary denial of defendant's motion (Decision of October 19, 1993 at 3).

Furthermore, Justice Bookson, who noted that he was "wholly familiar" with the evidence that had been adduced at trial and with the performance of the prosecutor and defense counsel, held that defendant's motion to vacate was based on "completely

unsubstantiated charges of fraud and collusion" leveled against both attorneys, and that those accusations were nothing more than "self-serving, wishful thinking" (Decision of October 19, 1993 at 2-4). Indeed, Justice Bookson's decision was completely sound in this regard in view of the compelling and solid proof of defendant's guilt, which was fully supported by the trial evidence. Thus, because defendant's 440.10 moving papers simply did not support his request for relief, the trial court had every right to summarily deny the motion, irrespective of whether or not the People submitted a written response in opposition. See CPL §§ 440.30(1); 440.30(4); see also People v. Satterfield, 66 N.Y.2d 796, 799 (1985).

But, the People did, in fact, submit papers opposing defendant's 440.10 motion on the grounds that the issues he had set forth could be raised by direct appeal, and that his allegations were "confusing, factually inaccurate and without merit" (People's Affirmation Dated September 14, 1994 at 1). Given this unmistakable denial of the factual allegations in his motion, it is ludicrous for defendant to suggest that the People had "conceded" the truth of his claims. The People were under no obligation to respond to his motion, much less refute individually each one of his numerous allegations which were unsupported by the trial record. The trial court properly denied defendant's motion without a hearing.

Next, defendant attacks the representation afforded him by his trial attorney. The thrust of his complaint is that counsel failed to expose the fraud and fabricated evidence that allegedly permeated the trial and resulted in his conviction (PS46-55). Of course, while there is no dispute that a defendant has a right to the effective assistance of counsel, "what constitutes effective assistance cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation." People v. Baldi, 54 N.Y.2d 137, 146 (1981). An attorney is effective so long as the evidence, the law, and the circumstances of a

particular case, viewed in totality and as of the time of the representation, reveal that he provided meaningful representation. People v. Flores, 84 N.Y.2d 184, 187 (1994); People v. Ellis, 81 N.Y.2d 854, 856 (1993); People v. Rivera, 71 N.Y.2d 705, 708 (1988); People v. Baldi, 54 N.Y.2d at 147.

The Court of Appeals has stressed that an attorney's "trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness," and that reviewing courts should therefore "avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis." People v. Rivera, 71 N.Y.2d at 708; People v. Baldi, 54 N.Y.2d at 146; see People v. Lane, 60 N.Y.2d 748, 749 (1983). Since "[i]t is always easy with the advantage of hindsight to point out where trial counsel went awry in strategy," id., a court should not should not "second-guess whether a course chosen by defendant's counsel was the best trial strategy or even a good one, so long as defendant was afforded meaningful representation." People v. Satterfield, 66 N.Y.2d at 799-800.

Moreover, "it will be presumed that counsel acted in a competent manner and exercised professional judgment." People v. Rivera, 71 N.Y.2d at 708-09; People v. Benn, 68 N.Y.2d 941, 942 (1986). Thus, to succeed on a claim of ineffective assistance of counsel, a defendant must overcome the presumption that his attorney's conduct falls within the wide range of reasonable professional competence. Strickland v. Washington, 466 U.S. 668, 688-89 (1984); see People v. Alexander, 162 A.D.2d 164 (1st Dept. 1990); see also People v. Bell, 160 A.D.2d 477, 477-78 (1st Dept. 1990). Even a defendant who overcomes these hurdles, however, cannot succeed without also demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 690, 692 (1984); People v.

Castellano, 203 A.D.2d 116 (1st Dept. 1994); People v. Mackey, 155 A.D.2d 297 (1st Dept. 1989); People v. De La Hoz, 131 A.D.2d 154, 156-57 (1st Dept. 1987).

Here, defendant has utterly failed to meet his burden of overcoming "the strong presumption of competent representation." People v. Diaz, 157 A.D.2d 569 (1st Dept. 1990); see Strickland v. Washington, 466 U.S. at 689. Indeed, it is plain from the record that defendant was very ably represented at trial. To place counsel's performance in perspective, it must first be recalled that trial counsel was presented with limited options for advancing a defense. After all, the evidence powerfully established defendant's culpability in the shooting of Myra Franza and Josephine Mendez, and in sending the pipe bomb to Puerto Rico. In spite of this formidable challenge, defense counsel did what he could.

Prior to trial, defense counsel filed an omnibus motion seeking to suppress defendant's statements to the police, evidence seized from his person, and items seized from his residence pursuant to federal search warrants (Omnibus Motion Dated November 19, 1991). Thereafter, counsel made a motion to dismiss the indictment on the grounds that Franza's filing of a Family Court petition for an order of protection against defendant operated as a "bar" against the criminal action (Order to Show Cause Dated January 21, 1992).

Defense counsel's able representation of defendant continued during the course of the lengthy pre-trial hearing. For example, counsel made several motions in limine alleging, among other things, his untimely receipt of Rosario materials and Brady violations (H2-31, 105-23; 2H4, H134-36). He thoroughly cross-examined the People's witnesses, in an effort to elicit the dearth of evidence connecting defendant to the shootings and the Puerto Rico pipe bomb (H261-67, 279-84, 320-33, 413, 416-19, 423, 426-27, 461-66), as well as the

delay in defendant's arrest (254-58, 260-61). Defense counsel also conducted a thorough voir dire regarding the copy of the search warrant that the People sought to introduce as evidence (H42-53). He even persuaded the court to allow him to discontinue cross-examination of Raffa until Raffa brought his ATF files to court (H65-67), and successfully moved to reopen the Huntley hearing because of the need for additional Rosario material (2H4-15). Although he ultimately did not prevail at the hearing, counsel made cogent arguments in support of the motions in the twenty-five page memorandum of law which he filed with the court after the hearing (Defense Memorandum of Law [undated]).

At trial, defense counsel continued to afford his client meaningful representation. He voiced numerous objections on evidentiary or other legal grounds (105, 121, 152, 155, 212, 215-16, 239, 245, 283-85, 291, 293, 294, 305-06, 328-30, 332-33, 336, 337-38, 343, 760-61, 1067, 1109, 1111, 1112, 1117, 1460-62), protested against the admission of various pieces of evidence (2-9, 75, 317-21, 501-07, 563-64, 566, 567), made several motions in limine (143-46, 198-206, 294-98), and moved for a mistrial after he was precluded from eliciting testimony regarding threatening calls that Nelson DaCosta had received, which counsel argued was relevant in advancing the defense case (161-73). Indeed, many of those objections underlie defendant's appellate claims.

Furthermore, defense counsel conducted thorough cross-examination of the witnesses, and made strong arguments during colloquies, in an effort to make it seem that defendant was not responsible for any of the vicious attacks, but that unspecified enemies of DaCosta may have been (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, 696-30, 727-28, 734, 737-41, 792, 801-07, 806-10, 909-11, 915-21, 937-38, 1328-33, 1339-40, 1345, 1351-53, 1357-38,

1368, 1376, 1383-85, 1414-21). Counsel also conducted effective voir dire of several prosecution expert witnesses in an attempt to challenge their levels of expertise (952-54, 1153-54, 1191-93).

Moreover, defendant's attorney presented a case by calling four witnesses. Through his defense, counsel not only suggested that unspecified enemies of DaCosta may have been responsible for the attacks (1608-17), but also intimated that because defendant was involved with another woman at the time of the crimes, he would not have had a motive to retaliate against his estranged wife and her family (1582-92, 1604). In addition, counsel made three mistrial motions (172-73, 1523-24, 1537).

In addition, defendant's attorney submitted several written requests to charge, and elicited a ruling on the scope of discussing the law in his final remarks. Then, counsel delivered an effective summation in which he strenuously argued that the People had not met their burden of proving his guilt of the charged crimes and that their proof of motive was disproven by his relationship with Gonzalez; he urged the jurors to believe that DaCosta may have been the target of the assailant, and thus was responsible for the attacks (1773, 1781-82, 1790, 1803-04, 1808-09, 1811). And, after the court's charge to the jury, counsel made several objections to the instructions, prompting the judge to supplement his charge on accessorial liability (1948-55).

Finally, at the sentencing, defense counsel asked the court to consider that defendant did not have a prior criminal record, had an employment and military history, and purportedly did not pose a threat to the community (S10-11). Thus, it is eminently clear that counsel's performance amounted to nothing short of competent and vigorous representation.

Despite all this, defendant reiterates his complaint that his attorney's representation was inadequate. He does so essentially by faulting his attorney for not advancing a theory of fraud, fabrication and conspiracy below. For example, defendant criticizes his attorney for not challenging the crime scene photographs and the medical records of the shooting victims' injuries. In particular, over the course of about sixty pages in his 440.10 motion, defendant employed various principles of meteorology and photography to conclude that the photographs were not taken when they "should have" been. Defendant, however, does not explain why these imagined discrepancies, even if true, are of any significance.

As noted, the defense strategy at trial was to admit that Myra Franza and Josephine Mendez had been shot by a hired assassin inside the Mendez apartment, but that defendant had not been the one responsible for these acts. Nothing in the timing and content of the crime scene photographs could have advanced that defense, and no examination about the victims' medical records could have furthered the defense that someone else had been responsible for the injuries they catalogued.

Nevertheless, building upon this fantastic notion that all of the evidence against him was fabricated or manufactured, defendant also argues that the prosecutor and his attorney participated in a conspiracy to hide the real police reports in the case and to substitute reports framing him for the crimes. In addition, he argues that his attorney colluded with the prosecutor to introduce a copy of the search warrant, rather than the original itself, at the hearing. He claims that in doing so, his attorney and the prosecutor conspired to hide the fact that the investigators had never actually obtained a warrant. Since these claims were not supported by the record, or by even the farthest reaches of common sense, they were properly rejected.

Indeed, Justice Bookson, who presided at the trial, concluded that such claims were "nothing but self-serving, wishful thinking," and noted that both defense counsel and the prosecutor had done "exemplary work at the trial" (Decision of October 19, 1993 at 2-4). None of defendant's fanciful claims undermine that conclusion.

In sum, Justice Bookson correctly determined that defendant's unsubstantiated claims offered no basis for vacating his conviction in 1993. Nothing in defendant's newest 2005 motion to vacate his conviction lends itself to a differenct result. Accordingly, the original denial of defendant's 440.10 motion should not be disturbed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Dated: New York, New York
February 9, 2006