ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CRIMINAL TERM : PART 32

- -x

THE PEOPLE OF THE STATE OF NEW YORK : Indictment No. 11987/91

- against - :

DOMINIC M. FRANZA, : Att Murder 2

Defendant. :

- -x

February 14, 1992
111 Centre Street
New York, NY 10013

B e f o r e:

HONORABLE PAUL P. E. BOOKSON,
Justice, and a Jury.

A p p e a r a n c e s:

ROBERT M. MORGANTHAU
DISTRICT ATTORNEY, NEW YORK COUNTY
For the People
BY: JOHN BRANCATO, ESQ., and
GREGORY SHEINDLIN, ESQ.,
Assistant District Attorneys

ALLAN BRENNER, ESQ.
Attorney for Defendant
260 Madison Avenue
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MINUTES OF JURY TRIAL

Reported by:
William L. Kutsch
Senior Court Reporter

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THE CLERK: Case on trial.

MR. BRENNER: Judge, regarding the notes that Mr. Franza wrote at the time that the first officer responded to the scene, I'm not sure, but I expect that the People intend to elicit testimony as to their contents from the first officer who was present at the time she wrote the note.

I also suspect that the theory of their admissibility will lie somewhere along the lines of a spontaneous utterance, excited utterance or maybe indeed a dying declaration.

THE COURT: Dying declaration? That's where the person actually dies.

MR. BRENNER: She was injured, I imagine, fairly severely. With regard to the description of the actual perpetrator that she saw, the flowers that she saw, anything that she may have heard at the time, if this otherwise fits in the hearsay exception, I certainly couldn't take issue with it.

With regard to the notion that she believed at that time and indeed knew from that point on that Mr. Franza had sent this, I do not believe

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that her belief, her opinion would fall within the ambit of admissibility of statements regarding what she saw and what she heard.

And I'm moving the Court in limine to preclude the People from eliciting testimony as to whether or not she believed had happened, not what she saw or heard.

THE COURT: Mr. Brancato.

MR. BRANCATO: Judge, I haven't planned on opening on this matter today, however, one of the things that I thought of and I believe even Mr. Sheindlin considered is that one of the things that her statements to the police do is that they allow the police to focus in on the Defendant. So perhaps these statements would not be offered for the truth of what is asserted because Mrs. Franza cannot say that she saw or heard the husband send this man, but rather they do allow the police to focus in on the Defendant. So our position would be that they should be admissible as much as the police now start to focus on the Defendant. And certainly a limiting instruction by the Court should apply.

THE COURT: I think the difficulty that you

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tend to address yourself to, Mr. Brenner, is the fact that this case by its very nature, by its very nature, does not fall precisely within the general parameters. Therefore, this Court must, taking in effect what the People's position is, what they intend to prove, I cannot apply the same precise rules as we would like. We raised the question yesterday, was it under a Molineaux, things like that, and once again, I have to disagree.

In a case of this nature, her statement, her statement if it's admitted, assuming it's being used and is admitted, will not be admitted for the purpose of proof, just that the utterance was made as to what she believed and which lead the police to their activities or either encouraged it or focused their activities.

MR. BRENNER: In that event, is every statement by every member of that family along the same lines that they believe Mr. Franza did that and that and the other?

THE COURT: It depends on what context it's coming in.

MR. BRENNER: Your Honor, you know the

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context. You have had a preview of this.

THE COURT: From what I know, it's not that much, but I believe Dacosta made some statement.

MR. BRENNER: They all made statements with regard to the shooting.

THE COURT: I don't think the People intend to just introduce everyone's statement.

MR. BRANCATO: That's correct.

THE COURT: I didn't have that impression. If I'm wrong I'll rule at that time. But a statement of this nature, talking now about Mrs. Franza's statement at the hospital, or how she communicated the statement, is not being admitted for the truth of the statement. It's merely being admitted as to her belief, and which incidentally leads the police on this trail. It doesn't in and of itself convey anything convincing. But the People will have that opportunity and, of course, you will have the corresponding opportunity to not challenge it as to its admissibility, but challenge it as to the content or what it's meant or the background. But that's a decision for you to decide.

MR. BRENNER: Without conceding the validity

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of its admissibility, I'm going to request that the Court at the time the evidence, the testimony is solicited, not in closing instructions, or at some later time, but at the time that the evidence is solicited, to give a limiting instruction to the jury that they are not to consider the substance of that statement for its truth but for the very purpose of - -

THE COURT: That it was her state of mind and her belief. Just so that without having to alert me in that form, when that statement or that line is going to be offered, should it be offered, you will raise an objection, and I will make a ruling accordingly. So you know what it is.

However, with respect to the opening statement, that's what he says, "We intend to prove," not for the truth, but it would tend to prove that's what she said in an interview, there, that's just a statement of proof. It's not evidence of anything what he says. So there, I do not anticipate going through this, what I just discussed with you.

Mr. Brancato.

MR. BRANCATO: Since we do have some time

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before the remaining juror comes - -

THE COURT: What happened to that juror?

THE COURT OFFICER: She doesn't have a New York City phone number that's working. Her phone was disconnected. She gave me a number for - - I think it's her mother or sister's house in Jersey. I called there and I got an answering machine and that was it.

THE COURT: All jurors were directed to be here at ten, I believe.

THE COURT OFFICER: Yes. She was here yesterday.

THE COURT: Was she from the original group?

THE COURT OFFICER: She was number seven, I believe.

MR. BRANCATO: At one time Mr. Brenner asked me to state what bad acts I might be aware of that I would cross-examine the Defendant on.

THE COURT: Should the Defendant take the stand.

MR. BRANCATO: Should he take the stand. At one point I made a statement that any acts that the Defendant took respective to his first wife, if I may, it seems that there was a previous

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marriage on the part of the Defendant.

THE COURT: I wasn't aware of that.

MR. BRANCATO: It ended in a rather messy divorce. From what I was told, the woman lead the Defendant to believe that he was the father of her child.

THE COURT: Then the woman told him it was not true.

MR. BRANCATO: Yes. And she claims that the Defendant took certain violent acts with respect to that. And I don't intend to offer it.

THE COURT: Nor would I allow it.

MR. BRANCATO: I don't. However, should the Defendant take the stand, and I just want to make myself clear, although I don't want to introduce what the Defendant may or may not have done with respect to the woman, I would like to question the Defendant as to what she said to him.

THE COURT: Mr. Brancato, what I don't allow by direction I won't allow you to do by indirection. If you are going to ask him what she said to him, what does that mean?

MR. BRANCATO: Well - -

THE COURT: Do you want half the story?

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MR. BRANCATO: No. I think one of the things that a jury could conclude at the conclusion of this case is that the Defendant had a previous marriage where he was done dirty by his wife, that he developed marital problems with his second wife, that he reached the point, a boiling point, and then took very rash action as a result of that. I don't want to ask him what his first wife alleges he did. What I want to do is ask him about their first marriage to see - - I believe it has some probative value.

THE COURT: I don't find it.

MR. BRANCATO: Well, one of the things - -

THE COURT: Unless Mr. Brenner will concede. Maybe even then I wouldn't allow it.

MR. BRENNER: Concede? Hardly.

THE COURT: I don't see any basis for that.

MR. BRANCATO: Certainly.

THE COURT: It would be, first of all, absent even the probative aspect, it would be so highly prejudicial, so extremely prejudicial.

MR. BRANCATO: Not actions on his part, actions by his first wife.

THE COURT: Let's not belabor it. The answer

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is no. Are there any other preliminary rulings that we seek?

MR. BRANCATO: Not at this point.

MR. BRENNER: No, Judge.

THE COURT: Bring in the jury.

(At this time the jury filed into the Courtroom.)

THE COURT: Members of the jury, we are about to start the trial of this case which you have been selected. Before the trial begins however, there are certain instructions you should have in order to better understand what will be presented before you and how you should conduct yourself during the trial.

When I finish these opening instructions the assistant district attorney on behalf of the People will make an opening statement to you in which he will outline to you the charges and what he expects to prove.

The attorney for the Defendant may follow with an opening statement.

Now, the purpose of the opening statement is to give you the various claims so that you will better understand the evidence as it is

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introduced. What is said in these statements is not itself evidence, however. The testimony upon which you will base your decision will come to you from the witness box up here or in the form of photographs or other documents or exhibits introduced during the trial.

The People will open first and may be followed by the Defendant.

When the openings are completed the People will proceed with the introduction of evidence.

Now, the People must produce all their witnesses to complete the entire case before the Defendant has an opportunity to introduce any evidence. The Defendant is not obligated to present any evidence or to call any witnesses.

When the People have completed the introduction of all their evidence, the Defendant may present witnesses and exhibits. Should the Defendant do so, the district attorney is then permitted if he so desires to offer additional evidence for the purpose of rebutting the Defendant's evidence.

Each witness by whichever side calls them is first examined by the party that calls them and

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then the opposing side has an opportunity to cross-examine.

Now, at times during the trial objections may be made to the introduction of evidence or motions may be made. The arguments in connection with such objections or motions are sometimes made out of your presence. Any ruling upon such objections or motions will be based solely upon the law and you must not infer from any such ruling or from anything I say during the course of the trial that I hold any views for or against either party to this case.

Upon the completion of the introduction of evidence the attorneys will again have an opportunity to address you in a closing statement or summation, and in summing up the attorneys will point out to you what they contend the evidence has shown, what inferences you should draw from the evidence, and what conclusions you should reach as your verdict. What is said by the attorneys in summation like what is said by them in their opening statements or the making of objections, that's not evidence. Closing statements are made in order to present to you the

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arguments of each side based on the evidence introduced. Under our system the Defendant sums up first, so that it is the prosecutor who has the last word of argument to you.

When the summations are concluded I will instruct you on the rules of law applicable to the case and you then retire for your deliberations.

Your function as jurors is to determine what the facts are and apply the rules of law that I give to you to the facts as you determine them to be. The conclusion thus reached will be your verdict.

You will determine what the facts are from all the testimony that you hear and the exhibits that are submitted. You are the sole and exclusive judges of the facts, and in that field neither I nor anyone else may invade your province, any views of mine on the facts would in any event be totally irrelevant.

On the other hand, I instruct you that you are bound to accept the rules of law that I give you whether you agree with them or not.

As the sole judges of the facts you must determine which of the witnesses you believe, what

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portions of their testimony you accept, and what weight you attach to it.

At times during the trial I shall sustain objections to questions asked without permitting the witness to answer, or where the answer has been made, I shall instruct that it be stricken from the record and that you disregard it and dismiss it from your minds. You may not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I exclude from your consideration will be excluded because they are not legally admissible.

The law does not, however, require you to accept all the evidence I shall admit even though it be competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses, and determine the degree of weight you choose to give to such testimony.

You may find that the testimony of a witness fails to conform to the facts as they occurred

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because the witness is intentionally telling a falsehood, or because the witness did not accurately see or hear that about which the witness is testifying, or because the witness' recollection of the event is faulty. There are no magical formulas by which one may evaluate testimony. You bring with you to this Courtroom all the experience and the background of your lives, and in your everyday affairs you determine for yourselves the reliability or unreliability of statements made to you by others, the same tests that you use in your everyday dealings are the tests which you use and apply in your deliberations. The interest, lack of interest of any witness in the outcome of the case, the bias, the prejudice of a witness if there be any, the appearance, the manner in which the witness testifies on the stand, the opportunity that the witness had to observe the facts concerning which the witness is testifying, the probability or improbability of the witness' testimony when viewed in light of all of the other evidence in the case, these are all items to be taken into your consideration in determining the weight if

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any you will assign to that witness' testimony. If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together.

If, however, that is not possible, you will then have to determine which of the conflicting versions you do accept.

The purpose of the rules and procedures and the principles of evaluation I have just outlined is to assure that you shall reach a just determination of this case. For the same purpose there are several rulings governing your own conduct during any recess which you should keep in mind.

You will hear testimony that this case involves an incident alleged to have occurred at several locations and you may be tempted to visit these locations. You may not do so. In view of the time that elapses before a case comes to trial, substantial changes may have occurred at the location of the alleged incident.

Do not discuss this case either among yourselves or with anyone else during the course of the trial.

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In fairness to the parties to this lawsuit you should keep an open mind throughout the trial, reaching your conclusion only during your final deliberations when all the evidence is in, you have heard the attorney's summation and my instructions to you on the law, and then only after an interchange of views with the other members of the jury.

Do not permit any third person to discuss the case in your presence. If anyone does so, report that fact to the Court as soon as you are able.

You must also promptly report to the Court any incident within your knowledge involving an attempt by any person to improperly influence any member of the jury.

You should not, however, discuss with your fellow jurors either that fact or any other fact that you feel necessary to bring to the attention of the Court.

I do not expect this case to attract media coverage. However, if the case is reported in the media you may not read or listen to any accounts of this case reported in the newspapers or any other news media.

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I recognize it's a normal human tendency to converse with people with whom one is put in contact with on a daily basis. Please do not, however, during the time you serve on this jury converse in or out of the Courtroom with any of the parties, their attorneys or any witness. By this, I mean don't only discuss this case but do not converse at all. Don't even exchange a pleasantry or make a comment about the weather. The attorneys are professionals and they understand the reason for this rule. But if you were to extend some greeting and it was not returned, I don't want you to think they are being discourteous. It's because they understand the reason for the rule. For no other way can all the parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

I do not permit jurors to take notes or ask questions during the trial. During your deliberations if you have a question with respect to the testimony, you can have that read back to you. Likewise, with regard to the Court's charge, it could be read back to you, clarified, or amplified.

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You may request any exhibits other than contraband be given to you for your examination. Contraband or weapons may be exhibited only in the Courtroom.

I ask you to keep an open mind, not to form any opinions or conclusions with respect to the guilt or non guilt of the Defendant except to continue to presume him innocent.

You are about to hear the People make an opening statement and the defense may open as well. Again, I must remind you that what counsel say in their opening that is not evidence in the case.

Now, ladies and gentlemen, I just also want to alert you, when we fix a time, in addition to the members of the jury, which are 15, if any one member is not here, that delays us. But there are times when because of other matters before the Court you may be delayed. There are other matters before the Court. We do not have a precise schedule that we start at a particular time. Hopefully we'll be able to arrange that, or work to a particular time. I alert you to that because I don't want you to think that we are not mindful

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of the inconvenience this may cause to the individual members of the jury. But I ask everybody to cooperate in getting here at the time that we assign so that we can get underway. But no disrespect is of meant if there is a delay because other matters which you need not speculate upon, whether they refer to this case or other cases before the Court, are before the Court. Do not, do not, try to understand or speculate upon any delays. We hope we will have a minimum of delays.

Now, ladies and gentlemen, the description of trial procedure, the rules governing your conduct and the few legal principles that I have discussed with you I believe will make it easier for you to understand the trial as it goes on and to reach a just result at its conclusion. Thank you for your attention.

We'll begin now with the assistant district attorney, Mr. Brancato.

MR. BRANCATO: Good morning, ladies and gentlemen. In May of 1987 Dominic Franza and Myra Mendez exchanged wedding vows in the presence of their family and friends. Their marriage which

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started with vows to respect and love each other devolved to the point that in June of 1990, this Defendant set in motion events trying to cause her death, as well as her mother and her grandmother.

I'm going to take this opportunity at this point to tell you which charges were lodged by the Grand Jury against this Defendant. I'm going to take this opportunity to tell you some of the events which brought us all here today, where you now sit on this case of the People of the State of New York against Dominic Franza.

The Grand Jury has handed up seven counts against this Defendant. And the best point would be to start by reading the indictment to you. It's entitled the People of the State of New York against Dominic Franza, the Defendant. The Grand Jury of the County of New York by this indictment accuse the Defendant of the crime of an attempt to commit the crime of Murder in the Second Degree in violation of Penal Law Section 110/125.25 subdivision one, committed as follows:

The Defendant in the County of New York, on or about July 17, 1990, with the intent to cause the death of Josephine Mendez, attempted to cause

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the death of Josephine Mendez by shooting her.

The second count reads, the Defendant in the County of New York on or about July 17, 1990, with the intent to cause the death of Myra Franza, attempted to cause the death of Myra Franza by shooting her. Those two counts are under the same subdivision, an attempt to commit the crime of Murder in the Second Degree.

The third and fourth counts are under a similar section, in that it states, the Grand Jury aforesaid by this indictment further accuse the Defendant of the crime of assault in the first degree in violation of Penal Law Section 120.10 subdivision one, an armed felony, committed as follows:

The Defendant in the County of New York on or about July 17, 1990, with the intent to cause serious physical injury to Josephine Mendez, caused such injury to Josephine Mendez by means of a deadly weapon.

You will learn that that weapon is a gun.

The fourth count deals with assault in the first degree, but this is a corresponding count for Myra Franza and it reads as follows: The

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Defendant in the County of New York, on or about July 17, 1990, with the intent to cause serious physical injury to Myra Franza, attempted to - - caused such injury to Myra Franza by means of a deadly weapon. Those four counts concern the events of July 17, 1990.

The indictment goes on to deal with counts committed in February of 1991. The fifth count reads as follows: The Grand Jury aforesaid by this indictment further accuse the Defendant of the crime of an attempt to commit the crime of Murder in the Second Degree in violation of Penal Law Section 110/125.25, subdivision one, committed as follows:

The Defendant in the County of New York, and elsewhere, on or about February 4, 1991, with intent to cause the death of Rosa Roman, attempted to cause the death of Rosa Roman.

The sixth count reads as follows: The Grand Jury aforesaid by this indictment further accuse the Defendant of the crime of criminal possession of a dangerous weapon in the first degree in violation of Penal Law Section 265.04, committed as follows:

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The Defendant in the County of New York on or about February 4, 1991, possessed an explosive substance with the intent to use that substance unlawfully against the person and property of another.

And the seventh count of this indictment reads: The Grand Jury aforesaid by this indictment further accuse the Defendant of the crime of criminal possession of a weapon in the third degree in violation of Penal Law Section 265.02, committed as follows:

The Defendant in the County of New York, on or about February 4, 1991, possessed an explosive.

The indictment is signed Robert Morganthau, District Attorney, New York County.

Four counts, ladies and gentlemen, dealing with the events of July 17, 1990. An attempt to kill Josephine Mendez, the Defendant's mother-in-law, an attempt to kill Myra Franza, his wife; causing serious physical injury to Josephine Mendez by means of a deadly weapon, a gun; causing serious physical injury to Myra Franza, his wife by means of a deadly weapon, a gun.

The last three counts deal with events in

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February of 1991, in which this Defendant attempted to kill a woman by the name of Rosa Roman, Myra Franza's grandmother, Mrs. Mendez' mother, a woman living in Puerto Rico, or a woman that the Defendant thought was living in Puerto Rico at the time, because what happened, ladies and gentlemen, from the time that Myra and her mother were shot, to the time that this Defendant caused that bomb to be sent to Puerto Rico, Rosa Roman had died, but this Defendant did not know that. And he did not know because he was no longer living with his wife. They were living apart.

So believing that the events were the same as when they had initially split up, this Defendant sent that bomb to Puerto Rico with the target of killing Myra's grandmother.

After the Defendant and Myra Franza were married back in 1987, they went to live in the Bronx at 3320 Barker Avenue. The Defendant sometimes was employed as an electrician, while Myra Franza, his wife, worked for the Post Office as an artist doing displays. What got them to the point that these events transpired in 1990 and

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1991, you'll soon hear.

But first what I would like to do along with you is go over some of the events that took place in their marriage back in mid 1988, 1989, sort of to set the groundwork to help you go through the remainder of my opening and to assist you so that when you start hearing the live testimony from the witnesses in this case, you will have some idea of where you are and where you are going.

In 1989 Myra Franza began experiencing abuse in her marriage. That abuse took the form of verbal threats, mental abuse, and indeed, culminated in physical abuse by this Defendant against Mrs. Franza. The abuse reached the point so that in mid 1989, Mrs. Franza, who periodically had moved out from this Defendant in mid 1989, she went to Court in the Bronx in order to get an order of protection, a judicial decree ordering this Defendant to stay away from her. You will hear that the events that drove her to go seek and obtain that decree involved an argument in which this Defendant both physically abused her and threatened her, and that this Defendant back in 1989 in a fit of rage told her that if she ever

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left him again, he was going to kill her, he was going to kill her and he threatened it by bragging, "Not only will I kill you, but I'll bury you in the park." It was that threat, it was that abuse coupled with the physical abuse that drove Miss Franza to seek that judicial decree.

In an equally sick manner, in - -

MR. BRENNER: Objection, your Honor. That's not argument.

THE COURT: That's his characterization.

MR. BRENNER: Exactly so, your Honor.

THE COURT: Continue.

MR. BRANCATO: In an equal manner, this Defendant threatened Miss Franza's parents to Miss Franza by saying to her that he would take care of her parents if she left him.

Based upon that, those threats, based upon the physical abuse, she left him, she got that order and she left the Defendant, and she went to live with her family up on 187th Street in New York County. She went to live with her parents, Cecilio and Josephine Mendez at 485 West 187th Street. She went to live with her brother, Carlos, and his wife at that location.

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You see, Carlos and his wife lived in an adjacent building, Cecilio and Josephine lived in the next building. So during the day, she would have her meals with her parents; during the night she would go stay and sleep at her brother's. This was the living arrangement for about three weeks.

And you are going to hear witnesses will testify in this case that what happened at that point after the three weeks, Josephine Mendez - - Josephine Franza, excuse me. Mrs. Franza, Myra, that's how I'll refer to them from this point, Josephine and Myra, but Myra did something at this point which many women do in such a circumstance. After three weeks Myra went back to live with the Defendant. After three weeks she thought that it could be different. So in an attempt to reconcile and attempt to save her marriage, she went back and lived with the Defendant, which you'll hear is that she went back because the Defendant promised her, "It will be different." The Defendant promised her, "I won't hit you again." He promised her, "I won't threaten you again." He promised her that he would go for counseling with

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her. "It's going to be different. It's not going to be like it was. It will change." That was the promise.

You will hear through Mrs. Franza's testimony, Myra, you will hear that in this situation in an attempt to save what she thought could be saved, her marriage, she went back to live with this Defendant at Barker Avenue, and that they lived together until mid 1990. She went back to live with him and with the hope that it would change.

But it wasn't all that long after that event happened where it finally hit home to her, it's not going to change. It's not different. We're back where we were before. And what you will hear is that in 1990, somewhere around the middle of June to the end of June, I believe June 25, you'll hear that this Defendant once again beat his wife. He beat her, and she realized that it was no different than before. The promises to keep his hands off of her were trampled upon. The promises to respect her were gone. And the promises that it's going to be different went out the door.

With that stark realization, Myra Franza

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decided for the final time, "I'm going to leave him." The evidence will show that this time she was serious, and realized the only chance she had was to get away from him.

So what she did at this point was she called her family and she called them and said, "I'm coming home, I'm moving out." And so they arranged a time where her brother and her father went to help her move from the location at Barker Avenue.

There came a point that the Defendant was not there, and she now moved out for good from the Defendant's apartment at Barker Avenue, and in somewhat of a very similar living relationship she was back on 187th Street with her brother, his wife, her mother and her father.

Ladies and gentlemen, there sits the man who on June 25 drove his wife from their apartment at Barker Avenue, and that is the same man that on July 17 sent someone to shoot his wife and her mother. The person who sits no more than 25 feet from you is the person who set into motion the events that we'll soon be discussing.

It's against this backdrop of the

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relationship between the Defendant and Myra Franza that you have this case brought before you.

Four counts concerning the events of July 17, attempted murder of his wife, attempted murder of her mother, assaultive behavior resulting in serious physical injury. It's against this backdrop that you are being informed of the events of February, 1991, where this Defendant had someone send a pipebomb to Myra's Grandmother in Puerto Rico.

Let's go over the events of July 17, 1990. Let me start off by saying that in some openings someone may get up and is going to speak for five or ten minutes, then sit down. I believe I'm going to be a little longer than that. Bear with me. I'll try to take into consideration how much time I'm using.

But I first wanted to start by going over this by giving you somewhat of a history between the Defendant and his wife.

Now, I want to go on with you and go over the events of July 17. Finally, I want to go through what happened in February of 1991. So we are about a third of the way through here.

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In July of 1990, approximately July 17, 1990, about 7:20 in the evening, 485 West 187th Street in this county, apartment 1-D, Myra Franza was taking a shower while her mother was in the front of the apartment. Myra is in the shower, and her mother is the only other person in the apartment, when all of a sudden there is a rap at the door. And at this point Josephine Mendez, the mother, goes to the door. And she sees a man there standing holding a box of roses. And the man says that he has a delivery of flowers for Myra Franza.

At this point, Mrs. Mendez tell us the delivery man, "Wait here," and she goes in the back, and she goes to ask her daughter Myra, "Do you want to accept the flowers?" And one of the things that will become clear after all the evidence in this case is over, "Do you want to accept them?" Well, that was because the Defendant in the past when he attempted to reconcile with his wife, would send her roses, would send her flowers, Mrs. Mendez, knowing that her daughter had left her husband because of what had happened, now is giving her daughter the opportunity. "Do you want to accept this from

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your husband. Do you want to accept it?"

So she goes to knock on the door of the bathroom and to talk to her daughter and say, "Do you want it," when all of a sudden, she is in her apartment, and she hears her front door close. And at this point she could feel the presence of someone behind her. And she turns around and she is standing up against the bathroom door in this hallway, and there is a man now standing about ten to 15 feet away, no longer holding the flowers in his hand, but now holding a gun with his arm poised and extended toward her.

And at this point, he starts letting loose with several blasts that hit her body. At this point he fires about five shots at her. She gets hit in the arms. She gets hit in the chest. She gets hit in the face, that the bullet riddles her jaw. And what you are going to hear, ladies and gentlemen, is something that makes TV drama pale by comparison. You are going to hear, because at the point that her body is being riddled by these bullets, Mrs. Mendez is holding onto the bathroom door, trying to keep the door shut so that her daughter, who is on the other side and wanting to

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open the door, cannot get out. Because this mother, in what she thought might be her last breath of life, wanted to save her daughter from coming out and meeting a similar fate.

So that's what you have, she is standing there pulling on this door as she being shot, and her daughter is trying to get out on the other side to see what is happening to her mother. She was shot approximately five times. Ladies and gentlemen, you are going to hear that she was shot in her arms, you are going to hear she was shot in her chest. You are going to hear she was shot through the jaw. This case is about as close as you can get to a murder without someone dying.

But whether you believe in providence or whether you believe in nature, or whether you believe in God, someone moved that man's hand, that shooter's hand just enough so that those five shots did not hit her through the heart or through the brain and miraculously she did not die that night.

As she is being shot these five times, her daughter finally succeeds in opening the door. And as she comes out, she is standing no greater

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distance than that gentleman is against the wall to where I am here. And he looks up at her and he clicks off that last shot to her as she stands there looking at her mother in a pool of blood, and standing there with no clothes and being wet from jumping out of the shower. And she is hit one time in the face. She is hit with a .38 slug, a rather big weapon, a rather big piece of ammunition. And the bullet enters left side of her cheek and exits the backside of her head. And, ladies and gentlemen, I submit to you, miraculously, she was not killed in this event.

The shooter blasted six times in that apartment. The assassin fired every bullet he had and two women laid dying on the floor. This Defendant, ladies and gentlemen, the man who sits 20 feet away from you is the one - -

MR. BRENNER: Objection, your Honor, is that what he's going prove, that Mr. Franza sits 20 feet away? Objection.

THE COURT: Overruled.

MR. BRENNER: Thank you, your Honor.

MR. BRANCATO: That person over there is the one who sent the messenger of death that night.

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That person over there is the one who contracted to kill his wife and his mother-in-law.

One of the things I should tell you is that after being shot, after being able to crawl into next room, Myra Franza succeeded in calling 911, and the police and an ambulance soon came upon the scene.

The shooter, ladies and gentlemen, the person who committed this heinous act, fled into the early evening hours. But he left behind at the scene two women for death, he left behind at the scene .38 caliber slugs, and he left behind at the scene a dozen roses in a box, and on top of the box was a note. It was a handwritten note. It wasn't a printed note that comes when someone might go to a store and order, there was nothing printed on it by a machine. It was approximately six inches in length, eight inches in width, it was lined paper, and the top of the note was printed in someone's handwriting R & R Florist, FTD, order number 3792. The next line said Person: Myra Franza. The next line said Address: 485 West 187th Street, apartment 1-D, or, basement apartment in rear. Ring bell apartment to left.

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And the last line said, Confirm Delivery with a line for someone to sign their name, the ruse to get in, it has to be signed. The address gave the name of Myra, the person who sent - - the person who authored that note knew that Myra could be reached at that location. The person who authored that note included not only the mother's apartment on the first floor, but the brother's apartment in the rear, Carlos.

What you will hear is that the previous year in 1989 after Myra left her husband for about three weeks, and I told you that she reconciled, remember that? I told you that she moved back with her husband. This Defendant helped his wife move back. This Defendant came to her parents' apartment and to his brother's apartment. This Defendant knew not only where the mother lived, but the brother-in-law, in the adjacent building. That's the note on the box.

What you will hear, ladies and gentlemen, that as doctors in neighboring hospitals were working to save the life of Josephine Mendez and her daughter Myra Franza, police at the scene were working in a similar fashion to collect evidence

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in this case. And you are going to hear about some of the evidence that was collected at the scene. You are going to hear about some of the work that they did that night. But I'm not going to detail everything for you here. I'm just going to give you some of the highlights.

Let me first start by saying that the landlady is going to testify in this case. The landlady's name is Hilda Ferreira, and Hilda Ferreira back in July of 1990 was unaware that Myra had moved back to live with her mother here in Manhattan. She was unaware that between June 28 and the night of the shooting that Myra had left the Defendant and was living with the mother. So on that night, and this is some what eerie, but on that night in an apartment directly below Mrs. Mendez' apartment, in the basement apartment which sits right below apartment 1-D, Hilda Ferreira was in the bathroom, a bathroom right below where Myra was at the time of the shooting. Her daughter, whose name is Vicky Theis, was likewise in that basement apartment, and they could hear some noise going on upstairs. They could hear some banging. She could hear a thud.

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But what happened, Hilda Ferreira told her daughter, Mrs. Theis, she said, "Something is wrong upstairs. Go up and check what's going on."

And at that point having heard this commotion for some time, Mrs. Theis went upstairs. When she got there, she found police and other people running in and out of the apartment. When she got there, she learned that Mrs. Mendez was bleeding with several bullet wounds, and at the point, Mrs. Theis had heard from someone there is another woman in the back. Miss Theis likewise did not know that Myra had moved back into Manhattan. Miss Theis believed this must be Mrs. Mendez' daughter-in-law who lives down the hall a bit in 490 West 187th Street.

So she called down to her mother, and at the time she called down she used her words very carefully because her mother had just gotten out of the hospital, and she didn't want to startle her. She didn't want to give her a heart attack. She called her and she said, "Mommy, something happened to Mrs. Mendez. Something happened to Josephine. Call Myra."

At the point that Mrs. Theis is telling her

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mother, "call Myra," she does not know that Myra is in the back room of the apartment with a bullet hole in her cheek. She believed again it's the sister-in-law, it's the other woman.

At this point Mrs. Ferreira then called the apartment at 3320 Barker Avenue, and at that point, she got an answering machine. And she talked into the answering machine saying, "Myra, this is Hilda. Something happened to your mother. Come over," words to that effect. "Myra, this is Hilda. Something happened to your mother. Come over." She didn't say anything about the injuries because she was unaware of the injuries. Her daughter had kept them from her.

About this time the Defendant comes onto the street in the Bronx. The Defendant stops and he talks at the same time that his messenger is shooting his wife and his mother-in-law, very smartly he stops to talk to the nextdoor neighbors. He stops to talk to them, makes small talk, "Hi, how are you? I got to go now." He's talking to Tracie and Wayne Francis, the people next door.

He goes into the apartment, waiting for official word of what had happened to his wife.

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And so now, when he gets in, he can see that there is a message on the machine. So he plays it, and whether he didn't listen to it or whether he rushed, no one will really know. But you know this. At this point he comes running out of the building, comes running out of the apartment, and he stops by Tracie and Wayne Francis and he said words to the effect, "I got to go, Myra's been shot. I got to go." He let his guard down. He let his guard down. He knew. Myra's been shot.

Now, Mrs. Francis will testify to remembering the Defendant sailing those words, "Myra's been shot." Mrs. Francis will testify and you'll hear that this neighbor, who is in a situation of coming to testify against the person that she has known for a while, she will testify that what exactly it is he said that day she can't now recall. But whatever it was he said, she was shocked by it. Shocked by it. And her husband will testify. He'll say what came out, "Myra's been shot." You'll hear that tape with that message from Hilda. You'll hear because the police received it later that night. In fact, the Defendant gave it to the police that night,

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showing how he had learned of his wife's being shot along with her mother, how he had learned that something had happened. But I submit to you at that point he was aware of what he had said.

You'll hear that some of the evidence recovered at the scene were .38 caliber slugs. They are called semi-wide cutter bullets. You will hear testimony that semi-wide cutter bullets are bullets that are used in target practice. You will hear that this Defendant is a gun buff. He belongs to a gun club. He goes for target practice, another thing left at the scene.

And you'll hear about the box with the note on it detailing the information that I have just given you. What you will hear, ladies and gentlemen, is that very shortly thereafter, in fact that night, the Defendant in an attempt to cooperate with the police, went back to the precinct and spoke with Detective Jerry Giorgio and he told him about where he had been about that time. He told him that how he had learned that something happened, yet you'll have the testimony of him saying, "Myra's been shot. Myra's been shot," and that the Defendant that night gave the

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tape to police officials.

And what will be clear, ladies and gentlemen, is that this Defendant rather carefully drafted these events so that the actual shooter was unknown. And what was done here was done with intent and was done with some careful planning.

I don't intend to call anyone here who is going to tell you that they were present at a club that night when the Defendant went over to a table full of people and told some guy, "I'll pay you a couple of hundred dollars to kill my wife." And I don't intend to call anyone to say that this Defendant moved large sums of money during that period of time to pay someone to shoot his wife. It was done with greater thinking than a careless person might. There was a lot of criminal energy being extended by this Defendant to kill his wife and mother-in-law and to leave a cold trail. And I submit to you that one of the things that perhaps was not anticipated was that this dummy who went there to shoot her would leave that box with that note and flowers, but that the assassin would not leave that note that was written detailing the address and the name of the party on

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it. But the person did.

And so that there came a point, there came a point that Detective Giorgio in August of 1990 told this Defendant that he wanted writing samples from him. He wanted writing samples so that they could be compared against the box with the flowers. And initially this Defendant said, "No, I'm not giving any writing samples." But the Defendant left, and I submit to you, came back and in an attempt to deflect attention from himself reluctantly agreed to give those samples.

And you'll hear testimony that the manner in which he was told to do that, Detective Giorgio kept the note from him, would not let him see the note that was on the flowers. So what he did, he prepared a model for him to write. And he put him in a room with about ten pieces of paper and a pen, and asked him to give him about ten copies of the note. And that when Detective Giorgio left, the Defendant he was writing, and that when Detective Giorgio returned several minutes later, the Defendant was writing in a slow fashion the first note.

So the detective, being versed with the fact

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that one should write these things quickly in order not to disguise their writing, said, "What's wrong? Is there something the matter? Why don't you write them a little faster?" And that he sat there so that the Defendant could not hide his true hand. He sat there so that the Defendant could not deliberately distort his writing, and that the Defendant then gave him approximately ten samples of that note.

The detective got that material, placed it into an evidence envelope, and that note together with the note found on the box of flowers was the sent to the police laboratory, cryptgraphics for comparison by Detective John Breslin, a detective of some 20 years, and many years of working in cryptography, a person who has training in handwriting comparisons, a person who has highly developed skill in matching writing from one person that we know where it came from, against who wrote this piece of evidence.

After examining those ten copies, in comparison with this Defendant's writing, Detective Breslin concluded that that writing that was on that box of flowers was the work of this

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Defendant's hand.

You are going to see the note that was affixed to the box of flowers that the killer brought into the apartment. You are going to see the ten samples of this Defendant's handwriting. We're going to put it of up for you in big charts. We are going to show it to you. We are going to pass it from one person to another. You are going to have the opportunity to look at this Defendant's writing against the writing that appeared on that box. You are going to have the opportunity not only to compare the Defendant's writing from that occasion when he was asked to submit to writing at the precinct, but you are going also to get an opportunity to compare this Defendant's writing to writings that he had made on previous occasions, long before these events happened, long before he knew that anyone would look at that writing, the best writing possible, writing done when one is unaware that it would be looked at at a later point, and you are going to see, ladies and gentlemen, that the name Franza is as it appears on that note, and the way this Defendant has written that name in the past, line

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up so beautifully, they line up so well that even the untrained eye can look at it and can conclude without any problem that is the Defendant's hand, that is the Defendant's writing. Those handwriting exemplars, that handwriting comparison, as well as the Defendant's previous threats that he was going to kill his wife, bury her in the park, get her family, that along with other threats that he made to her during the time that they were living together on and off, will be some of the evidence that we will present to you, will be some of what shows that this Defendant is the one who sent that shooter.

There will be other evidence, but right now I want to hit on some of the highlights of this because I'm not going to detail every piece of evidence now. Now is not the time. I will come back at a future time to tell you about all the evidence in this case, but now I want to give you some of the highlights.

That evidence that I have just relayed to you is offered on those first four counts of attempted murder of his wife and his mother-in-law, and the serious assault. You will hear, ladies and

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gentlemen, and I said earlier that Mrs. Mendez narrowly escaped death in this case. Indeed, if my recollection serves correctly, you will hear that she was in a coma for about two tweaks after this case. By the grace of God or by luck she survived. But at the conclusion of this case one of the things that you will have no doubt about in your mind is that the person who did that shooting intended to kill these people.

Likewise, at a future point I will go over the evidence. But at this point the evidence points that this Defendant is the one that sent that shooter.

The fifth, sixth and seventh count of this indictment concern the events of February, 1991, and it concerns sending that pipebomb to Puerto Rico. I want to detail for you some of the evidence that we will offer on behalf of those counts. Just give me a minute.

I told you before that one of the things that happened in this case from the time of the shooting to February of 1991, Mrs. Mendez' mother, whose name was Rosa Roman, she died in Puerto Rico. At the time that she died, I believe it was

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sometime in November, Myra was still living apart from the Defendant. What you will hear throughout is that from the point that Myra made the conscious decision to leave the Defendant in June of 1990 she did not move back with this Defendant. And she shunned contact with him.

And what you will hear is that when Rosa Roman died, Myra in no way shape or form communicated that to the Defendant. Contact had been cut off. So that this Defendant in February of 1991 had not been informed by any family member concerning that death.

And so in February of 1991 he carried through on a threat, and that was the threat that he issued to his wife when he beat her in June of 1990. It was the second in a series of threats where he said, "If you leave me like you did before, I'll get you, and you can't hide here because I know where you'll be. And if you go to Puerto Rico, I'll know where you'll be. But I'll get you, either here or in Puerto Rico."

And you'll hear, ladies and gentlemen, that in February of 1991 this Defendant acting with another person, now whether that other person was

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aware of what he was sending or not, one will never know. But a person acting at this Defendant's direction, took a box with a Federal Express label on it. I'm going to read that label to you. You will hear that the evidence on that label said the following.

Under the party of the one sending the package, under the sender on the left side it said, USA Electronics. It was addressed 750 West 181st Street, New York City, New York. Country, USA, and it gave a zip code, 10035. The bottom of the label was signed Julio Ortiz, Julio Ortiz. It was sent under the name of the Roman family, and it gave the address of Paso Aquila, 2629 Sece, Levittown, Pecanio, Puerto Rico, and it gave a telephone number on the right side of that bill, the telephone number for the Roman family, and it was 1-809-684-1630. You'll hear that there is a family of the Romans who live at Pasa Aquila 2926 Sece. And you will hear that the telephone number to that address is 1-809-784-1630. So the person who sent this had correct knowledge of the family, of the town, of the telephone number. And the person came in and presented a package about the

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size of this podium here in Manhattan to Federal Express. The person came in and sent in a gun-carrying case, in a case used by people who fire at ranges, in gun clubs, the person sent an instrument of death that took the form of a pipe bomb, about 12 to 14 inches long. And this pipe bomb very carefully was held into this gun-carrying case with some pieces of wood so that it wouldn't shift and shake all along. It was bolted in. The wood was bolted into the frame of the box, and the pipe was laid very carefully across. There was a fuse that was placed into the pipe bomb. And the fuse at the end had a piece of wire that ran out the end of the fuse, and there was a hole in the box so that the fuse could be pulled up, and there was a screw put in the top of the box. This almost sounds like a Robert Ludlam novel, but it concerns a real event that happened, a serious event, and that what happened, the person who constructed this device had that fuse rigged with that wire so that once a person opened the box, the wire from the top would create tension on the fuse, would pull the fuse out from the center, striking a flame, which would then go

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into the gun powder in the bomb, in the casing of the pipe, creating a great deal of pressure, and that this pressure had the capability of about two or three hand grenades, that once the pressure builds up because of the burning of the powder, the pressure would be so great that the pipe would burst and fragment into thousand of small pieces, shooting out and hitting anyone who was near it. That is the weapon that the Defendant sent to Puerto Rico. That is the weapon that the Defendant sent to Myra's grandmother, which you will hear, ladies and gentlemen, is that when that package was delivered, family in Puerto Rico saw on the bill of lading that it had to do with some camera equipment. And the family, being a little suspicious because they had not ordered any camera equipment, Myra's aunt very carefully opened the box just a little bit, and opened the suitcase, the gun-carrying case just enough to see that there was something silvery like a pipe, and there was this wiring in it. The greatest move she did not make, she did not open that box. And she left it intact and she called the police. And members of the Puerto Rican explosive unit, the one which

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is charged with the duty of the dismembering and rendering safe the bomb, responded. And they took that bomb apart so that luckily no one was killed. This happened February of 1991.

If you recall, back in February of 1991, the U.S. and Iraq were having a conflict in the Middle East. And during this time members of the federal government, a branch very similar to the FBI, the bureau of alcohol, tobacco and firearms, were on high alert to track and make sure that there was no terrorist activity. Once they learned that a pipe bomb had been sent through the mail, once they learned that a pipe bomb had been put into the hands of Federal Express, put in the belly of a plane, carried over cities and to another part of the United States, they jumped on this event on all fours. And at that point they became part of the investigation in this case. At that point, they became one of the principal participants in finding evidence linking who sent this bomb, where did it come from, who sent it, and where was it going.

There is a lot for me to talk about at this point. One of the things I wanted to do is just

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stop at this point and I want to go over some things with you.

The first is when we started out I told you I said we are going to say where we are, where we are going and where we have been. But we started out thus as far going over the relationship between this Defendant and his wife, and we went over what happened in July of 1990.

Now we're discussing something that happened in 1991. I told you before once Myra moved out from the Defendant she did not go back to Barker Avenue. Once she moved out in June, it was over. She was shot. Her mother was shot. They were both in the hospital. The mother was in a coma for several weeks.

We are now dealing from July to February, about six to seven months later. Myra is now living in a different apartment. Her mother is living at the same location. She was living in the same apartment where someone came in July of 1990 and almost took her life and her daughter's life. She is in the same location.

In February, about February the sixth, February 6, February seven, she receives two

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letters, I'm going to go over these letters with you. These letters come in separate envelopes, one envelope has the printed name Myra Franza on the first line. The second line has Josephine Mendez.

MR. BRENNER: Objection, your Honor. Mr. Brancato is reading from documents.

THE COURT: That is sustained.

MR. BRENNER: Thank you.

MR. BRANCATO: You will hear that there were letters sent. And you will hear that these letters are addressed to Myra Franza and to Josephine Mendez. And you will hear that these letters are addressed to 485 West 187th Street here in New York. You will hear that they have the zip code of 10033. That's one of the letters.

The second letter you will hear is addressed to Nelson Dacosta. And what you will hear is that Nelson Dacosta is Myra's brother, not the one who lived in the adjacent building. That's Carlos. Nelson is another brother she has that lives in a different location.

But this other letter was addressed to Nelson, care of his mother at the same address,

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485 West 187th Street. What you will hear is that these letters, that are postmarked I believe on February 6, 1991, have a return address. There is a name for the return address.

I told you earlier that on the previous occasion the Defendant worked very carefully to conceal his identity in the shooting. The name of the return sender said Julio Ortiz. The name that appeared as the sender of the pipe bomb to Puerto Rico was signed Julio Ortiz. You will hear that the address that was placed on these letters as the return address 750 West 181st Street, you will hear that the address on the bill for the pipe bomb had a return address of 750 West 181st Street, the same. These letters were written - - I take that back. These letters were typed. They weren't handwritten. The only thing that was handwritten you will hear is the information on the envelopes. The only thing that was handwritten on the bill sent to Puerto Rico was the signature on the bottom of the alleged author, Julio Ortiz.

But what you will hear is that these letters were written in rather crude and rudimentary type

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Spanish. They were letters that were not properly written, not properly written in the sense that they were written in Spanish, but the verbs were not properly conjugated. They were one so that you might have a singular subject and plural verb. I'll give you an example.

You will hear that there was one that had to do with sending a gift, a gift to her grandmother in Puerto Rico, that it was one of the things that was in one of those letters that were postmarked the sixth. The letters spoke about one for Josephine and her mother saying that your brother, your son, Nelson, does not deal with respect.

Your brother, your son, Nelson, took a package that belonged to me. The letters were written under a ruse of making it sound like Nelson Dacosta had ripped someone off of something, some package, some drugs, a ruse. The letters spoke of being able to kill the family Mendez. The letters spoke of knowing when your husband takes out the garbage where you live. The letters, and what will be clear from the testimony of the witnesses, is that the person who sent these letters knew that Nelson Dacosta could be

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reached through Josephine Mendez. The person who sent these letters knew that Myra Franza could be reached through Josephine Mendez. The person who sent the letters knew the address of the family.

Ladies and gentlemen, the letters spoke in very crude Spanish of sending a gift to the grandmother in Puerto Rico. The gift, ladies and gentlemen, was the box with the bomb. That was the Defendant's way of telling the family, "I'm still here. I still can get you." We can prove, ladies and gentlemen, that this Defendant sent those letters. I'm going to tell you how we can prove it and you are going for see it in the charts. You are going to see it in exhibits about half the size of this wall.

I told you earlier, I told you that because of the events in the Middle East Alcohol, Tobacco and Firearms were on alert during this time to deal with any terrorist activity, any sending of an explosive through the mail. And what happened about February 11 this Defendant was apprehended in this case.

MR. BRENNER: Objection.

THE COURT: Sustained.

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MR. BRANCATO: This Defendant went into custody on February 11, his pockets were emptied. At that point he was told to empty his pockets. And at that point that he emptied his pockets, he had a piece of paper in his wallet. The piece of paper had telephone numbers on it. One of the telephone numbers that was in his wallet was the number for the grandmother in Puerto Rico the 1-809 number that I gave you before, the number that the Defendant had on him that day, 1-809-784-1630. The Defendant had a piece of paper in his wallet that had the telephone number to the grandmother in Puerto Rico.

That night, agents of the federal authorities acting with permission from a judge, searched this Defendant's apartment on Barker Avenue. That night officers with a search warrant went to that apartment and retrieved several key pieces of evidence. I am not going to go over every piece of evidence with you right now. I am going to do like I did when I discussed the previous occasion, I'm going to highlight some things for you.

Let me go over some of the things that were retrieved from the Defendant's apartment that

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night. You will hear, ladies and gentlemen, that some of the things that the men from Alcohol Tobacco and firearms recovered from this Defendant's apartment was a list of books which what you are going to hear is that those books included but were not limited to information that dealt with bombs and bombing by Brody. They dealt with booby-traps. They dealt with - -

MR. BRENNER: Objection to the reading of the list.

MR. BRANCATO: They dealt with CIS field manuals on incendiary devices. They dealt with explosives and demunitions, among other things. It dealt with how to make a bomb from material that was readily available. That comprises just a small portion of that list that the Defendant had in his apartment.

It's curious that in this case where a bomb was sent to family members in Puerto Rico, this Defendant had a list of material, a list of books. I'm not telling you that he had the books in his apartment. I'm telling you that what was there very curiously enough had to do with making a bomb from things that are readily available, had to do

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with making bombs and bombings by Brody, had to do with explosives and propellants, propellants, things that fire out upon being blasted, a rather curious list, I must say.

MR. BRENNER: Objection. This is summation.

THE COURT: Sustained.

MR. BRANCATO: That was one of the things that they recovered from the Defendant's apartment.

They recovered other items that night. They recovered a piece of paper with a name Julio Ortiz. What you'll hear, ladies and gentlemen, Julio Ortiz used to be this Defendant's apprentice when the Defendant worked as a member of Local Three, the electrician's union. But curiously enough the name of Julio Ortiz is found on a piece of paper in the Defendant's apartment, the book list. A card was found in the Defendant's apartment and that card strangely enough said USA Electronics. And you'll hear that there is indeed a USA Electronics.

And you will hear from one of the people in that company, I believe his name is Richard Ingrassia, that just a few days before this bomb

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was sent to Puerto Rico, this Defendant dropped off some VCR's for repairs at USA Electronics.

So you will hear that the name affixed on the bill was found on a card in the Defendant's apartment. The name that is signed on the bottom of the bill is found on a piece of paper in the Defendant's apartment.

You will hear testimony from Detective Breslin. I believe he will testify that there are strong similarities, strong similarities, between the writing of Julio Ortiz on the bottom of that bomb that was sent to Puerto Rico, the bill, and this Defendant's writing. Strong similarities. But you will be given the opportunity to see what this Defendant's writing looks like, and what was affixed to the box.

And let me just say at this point keep in mind the Js. Watch the J on Julio. It's a written J. And there's something very peculiar you will see about the way this Defendant writes a J. It's almost like when it goes to the top, it's almost like there is a very unique way of making the turn around the top of the J. When you look at it, when you see that writing on that box, and

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when you look at what Detective Breslin has prepared for you which he said there's very strong similarities, look at the J, look at the uniqueness of it, look at the almost personalized manner in which - -

MR. BRENNER: Your Honor, again I object. This directive to a jury to investigate the evidence is close to summation.

THE COURT: I'll allow it to that extent.

MR. BRANCATO: I told you that you are going to hear about the evidence that was taken from the Defendant's apartment that night. I made reference before to letters that were sent to the family. In executing the search warrant that night at the Defendant's apartment, an apartment which he was the sole occupant, officers recovered a sheet of three-cent stamps. And what you will hear is that when some of the officers went into the apartment, they were aware, they were aware that the two letters that were sent to Josephine Franza, one that was sent to the daughter and to the mother, and one that was sent to Nelson care of the mother, remember the ones I spoke about a couple of minutes earlier, the ones on February 6,

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they were aware that postage on those envelopes included three-cent stamps.

And what you will hear, I believe you will hear that there were approximately 12 stamps or 15 stamps on this letter. What you will hear is that it's a sheet that when one goes to a Post Office and buys a regular sheet of stamps for a couple of dollars, it was the same design on the stamps. It bore the name of a doctor. His name escapes me right now. But it was the name of a doctor and there was his face on it. And all the stamps in the sheet were similar.

And what you will hear is that these stamps had the name of Paul Dudley White, M.D.

When they took that sheet of stamps, they then took it into police custody and they then went back and they got the envelopes which had been sent to the family telling about sending this gift to the grandmother in Puerto Rico, and Detective Breslin, if you are jumping ahead, Detective Breslin put those envelopes in like a humidity tank. He put it in a special machine that you would place it on top of a screen, the envelope with the stamps, and you would then fill

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the chamber with humidity so that you now moisten the glue on the stamp. The stamps very carefully and expertly were taken off of the envelopes, which you might be imagining at this point, the names on the stamps sent on the envelopes Paul Dudley White, M.D., just like the stamps found in the Defendant's apartment.

But there is more than just the fact that of all the possible stamps that you could have, that there were three-cent stamps, there is more than just the fact that these were the same name to the stamp.

MR. BRENNER: Objection. Your Honor, this is argument.

THE COURT: Yes.

MR. BRANCATO: These stamps were then placed under microscope, against the remaining stamps that were found in the Defendant's apartment. And what happened, the officers noticed, and you will see that one of the stamps taken from the envelope addressed to Nelson Dacosta that spoke about this gift to the grandmother in Puerto Rico, one of the stamps had a border to it. When you buy a sheet, you'll see the sheet of stamps there is a border

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around the outside of the stamps. One of those stamps had a border to the bottom. It wasn't totally ripped where the holes and perforations were. And you will see that when you get that stamp with the border, and place it against the bottom of the stamps recovered from the Defendant's apartment, almost like a jigsaw, when that is amplified dozens of times, you can see that the perforations fit in there almost as hand in glove.

But there is more than just the one stamp which has this great jigsaw cut, there is a second stamp with Paul Dudley White that was taken off of the envelope to Dacosta. And this second stamp has all but one of the holes broken, all but one you will see as you look across the stamp on the top as it fits against the remaining stamps taken from the Defendant's apartment, all of the holes save one are broken. On that stamp this like indentation, like a triangle, there is an opening, and when you put it against the other stamp you will see that the corresponding stamp on the sheet found in the Defendant's apartment had all the holes broken except in this one place where it had

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the entire hole. That stamp had the missing hole from the one taken off of the envelope that the Defendant sent. That one fits the same as the other, hand in glove. That's the corresponding stamp.

Ladies and gentlemen, we can prove in this case that this Defendant sent that letter which told of sending the gift to the grandmother in Puerto Rico. You will hear through the testimony that this gift was no more a gift than the messenger was bringing to Myra Franza. It was an instrument of death.

We can prove that this Defendant took something from his past association, didn't pull a name just out of the air, but used the name of someone that was aware of Julio Ortiz, took a place USA Electronics and incorporated that into the bill that he sent with that pipe bomb to Puerto Rico. And we can prove he sent those letters because we have those stamps which we'll show to you.

This was all part, and I submit that you will hear evidence in this case that what happened was that this Defendant, whether it was to get back at

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the wife, whether it was to in a show of frustration or anger, but that this Defendant was making good on the threat that he had given to his wife on previous occasions before she moved out on June 25. He made good on a threat that "I can get you. I can get your family. I can get you here. I can get you in Puerto Rico."

I told you before when I went over the first counts, we are not going to go over all the evidence in this case in our opening. And I know that I'm going on longer than most people normally do. But this case involves thinking, and this case involves looking at what you have in front of you.

We'll have testimony in this case as to the capabilities of that instrument this Defendant sent to Puerto Rico. We'll have testimony in this case to the capability it had like two to three hand grenades.

You'll hear the testimony from members of the Alcohol, Tobacco and Firearms.

You'll hear from expert witnesses. You'll hear from witnesses who were there that night and took evidence from the Defendant's apartment.

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You will hear, when the stamps are proffered you will see how they were compared. We'll throw it up on a big chart now so you will have the opportunity to count the holes one by one and see whether it's the 12th or the 13th, whatever hole, you will be able to count across and see that that hole is missing on one and fits like a glove on the other. And you will have a chance not only to look at that, but you'll have an opportunity to see how a jigsaw cuts with the border at the bottom.

And at the conclusion of this case, ladies and gentlemen, we will have proven to you that this Defendant in some twisted manner, tried to kill his wife on July 17, 1990. And that when she didn't die and her mother didn't die, he then had someone send a pipe bomb to her grandmother, the one that he thought was still alive in Puerto Rico.

But at the conclusion of this case, ladies and gentlemen, you will have the complete picture that shows that this Defendant is guilty of attempted murder on his wife and his mother-in-law resulting in serious physical injury to them, and

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that he's likewise guilty of attempted murder. Because the Judge will charge you if the situation is such that the Defendant believed it was so, if he believed that the grandmother was alive, and he tried to kill her, he can be convicted of that if the evidence supports it, and you will have that evidence. You will have that he sent those threatening letters. You'll have that he sent that bomb to Puerto Rico.

And so in that regard I'm going to come back at the end and review all the evidence which shows this Defendant is guilty of these crimes charged.

THE COURT: Ladies and gentlemen of the jury, we'll take a short recess now and then we'll return immediately, and you will hear the opening statement by defense counsel, if they wish to make an opening.

Do not discuss this case among yourselves. Draw no conclusions. Take the jury out.

(At this time the jury filed out of the Courtroom.)

(At this time a brief recess was taken.)

THE COURT: Okay. Bring in the jury.

(At this time the jury filed into the

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Courtroom.)

THE CLERK: Case on trial. The Defendant, his counsel and the assistant district attorney are present.

THE COURT: Ladies and gentlemen, we'll resume now. If the defense so desires, they may open.

MR. BRENNER: Your Honor, the Defendant asserts his constitutional right not to address the jury at this time.

THE COURT: Very well. So noted.

Ladies and gentlemen, that concludes the opening. And when we resume at approximately 2:30, we'll hear the beginning of the testimony. So enjoy your lunch. Do not discuss the case among yourselves nor allow any third person to discuss the case with you. Do not speculate about anything about this case and just return here at 2:30. Take the jury out.

(At this time the jury filed out of the Courtroom.)

(At this time a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

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THE CLERK: Case on trial. The Defendant, his counsel and the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Very well. Mr. Brancato, call your first witness.

MR. BRANCATO: Your Honor, the People will call Harry Best.

H A R R Y B E S T, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

COURT OFFICER: State your name and current employment.

THE WITNESS: Harry Best, employed with the New York County District Attorney's office.

THE COURT: You may inquire.

Q Mr. Best, how long have you been employed by the New York County District Attorney's office?

A It's almost 15 years now.

Q In what capacity are you employed by the DA's office?

A Associate engineering technician, level two, with a drafting specialty.

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Q Could you please tell the Court and the jury what your background and qualifications are in the engineering field?

A I attended Pratt Institute School of Engineering where I received 35 credits towards an engineering degree.

And I have been working in the engineering field now for over 30 years doing design, drafting and administrative work related to engineering.

I have worked for Allied Chemical, American Machine and Foundry, Grumman Aerospace Corporation and the Board of Water Supply, City of New York.

Q In connection with this case the People of the State of New York against Dominic Franza did you have occasion last week to go to 485 West 187th Street here in New York County?

A Yes, I did.

Q At that location did you perform a survey at apartment 1-D pursuant to my request?

A Yes.

Q Who did you go with to that location?

A I went with Detective Ortiz from the 34th Squad.

Q At that time that you went with Detective

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Ortiz to 485 West 187th Street, did you see a lady named Josephine Mendez?

A Yes.

Q During your time at her apartment did you prepare a scaled diagram of her apartment, that is, a layout of her apartment?

A Yes, I did.

Q Mr. Best, this has been previously marked as People's Exhibit Number 1 for identification. Did you prepare that diagram?

THE COURT: Is that People's 1?

MR. BRANCATO: For identification.

A Yes, I did.

Q In preparing that chart what instruments if any did you use?

A Well, at the location I used a Stanley tape measure where I took the dimensions of the entrance door, the hallways, various rooms within the apartment, and I put them on my freehand sketch, and at a later date in my office I prepared them with my architect scale to draw the exhibit to three quarters of an inch equals one foot.

Q So is it fair to say that that chart not only reflects the relationship of one room to the other but also the dimensions of each room?

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A Yes, actually the dimensions of the rooms that are depicted on the diagram.

MR. BRANCATO: I would offer People's Exhibit 1 for identification at this time.

THE COURT: Mr. Brenner.

MR. BRENNER: Your Honor, I would object because it hasn't been established that this represents anything having to do with the apartment as it appeared in 1990. As a matter of fact, I withdraw my objection except subject to the connection that someone will say this is how it appeared.

MR. BRANCATO: I'll connect it at a later point.

THE COURT: All right. Subject to connection People's 1 for identification. Let's mark it. We'll deem it marked.

(Document referred to above as a diagram was received and marked as People's Exhibit 1, in Evidence.)

MR. BRANCATO: Can we put it on the tripod at this point, Judge?

THE COURT: Yes.

Q Mr. Best, could you please stand beside that

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exhibit and could you please explain the layout of the apartment as you found it last Thursday when you went to that address?

A Well, at the bottom left-hand corner we have the entrance into the apartment. Then within the diagram itself I have these heavy black lines which indicate the walls of the apartment, of course.

Stepping into the first hallway we have a closet on the lefthand side, a large area, and to the right with the livingroom which I didn't take all the dimensions in that particular room.

Proceeding a little further was a closet on the left.

Off to the right was the area into the kitchen, down the hallway to the top of the diagram there were two doors indicated off the hallway, a closet and the bathroom.

In the bathroom I indicated the water closet, and the tub and wash basin.

At the extreme righthand side of the diagram is a series of parallel lines with a W. That indicates a window. There was a window in the bathroom and there was a window in the kitchen area.

Q As you look up then from the bottom of the

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chart and you work your way up, on the righthand side could you please point to the livingroom?

A The livingroom is a portion, actually, of the bottom right-hand corner of the exhibit.

Q And the kitchen, could you point to that location?

A The kitchen is to the righthand side.

Q And the bathroom itself?

A And the bathroom itself is just above the kitchen on the righthand side.

Q Did you prepare that chart pursuant to my request?

A Yes.

MR. BRANCATO: I have no further questions.

MR. BRENNER: I have no questions.

THE COURT: You may step down, Mr. Best. You are excused.

(At this time the witness was excused by the Court.)

THE COURT: Call your next witness.

MR. SHEINDLIN: Your Honor, the People call Lazaro Benitez.

L A Z A R O B E N I T E Z, called as a witness by the People, having been first duly sworn by the Clerk

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of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

THE COURT OFFICER: State your name and employment.

THE WITNESS: Lazaro Benitez, Daniel J. Edelman Public Relations.

MR. SHEINDLIN: May I inquire?

THE COURT: Yes.

Q Mr. Benitez, how old are you?

A I'm 21 years of age.

Q Would you please tell the members of the jury what your educational background is?

A I'm currently in my senior year of college at Baruch College.

Q Are you also working currently?

A Yes, I am.

Q And you have previously stated where you work. How long have you been working there?

A I have been working there five years.

Q What do your duties include?

A Administrative assistant, and I do some accounting work for the company.

Q I would like to draw your attention now to

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July 17, 1990, at approximately 7:20 p.m. On that date and at that approximate time what location were you at?

A I was on 187th, between Laurel Hill Avenue and Amsterdam Avenue.

Q Do you recall whether it was light or dark out at that time?

A It was light.

Q And what was the reason why you were at that location?

A I was waiting for a friend. We were going to go to the movies. And I went to his apartment and I was waiting for him outside.

Q What is the name of the that friend?

A Johnny Lantigua.

Q Please tell the members of the Grand Jury what occurred at this particular time, date and place?

A As I was waiting I saw an ice cream truck pass by Amsterdam Avenue, and I wanted to get a milkshake. So I started walking up to see if I could catch it. I was walking diagonal up to Amsterdam Avenue. Behind me I heard three loud bangs like an aluminum baseball bat hitting metal. I didn't think anything of it.

When I saw that the ice cream truck had passed, I

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came I around and I started walking back down to the location where I was before, and I saw two gentlemen running out of the building, and they disappeared into Laurel Hill avenue, around the corner.

Q The building that these two men ran out of, do you know the address of that specific building?

A 485 West 187th Street.

Q These two men that I you saw running out, were you able to see their faces?

A Yes. One of the gentleman had a mustache and the other one had - - he was a bit clean shaven, and he had a baseball cap on.

Q Could you describe any height differences that may have existed between these two men?

A Yes. The lanky skinny gentleman was about six feet tall. The other gentleman was about 5' 6", 5' 7" in stature.

Q The taller gentleman that was approximately six feet tall, what was he wearing?

A I don't remember his clothes. He was wearing a baseball cap, a floresent orange baseball cap with a black bill.

Q Do you recall if he had any facial hair?

A No, I don't remember.

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Q Do you recall the color of his skin?

A He was light black or dark Hispanic.

Q The shorter male that was with him, do you recall what kind of clothing that person was wearing?

A I remember him wearing a black and white striped shirt.

Q Do you recall if he had any facial hair?

A Yes, he did. He had a mustache.

Q Could you tell his skin color?

A He was the same. He was light black or dark Hispanic.

Q These two men that you observed, to your knowledge had you ever seen them prior to this particular time, date and place?

A No, I had not.

Q When you saw them, what were they doing?

A They were running towards Laurel Hill Avenue.

Q Did either of them have anything in their hands?

A The smaller gentleman had a canvass bag that he was clutching like a football.

Q Where did you see these two individuals run to?

A They ran to Laurel Hill Avenue around the

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corner.

Q Did you see them again after this time?

A No, I have not.

Q Since this particular date July 17, 1990, have you seen either of these two men?

A No, I have not.

MR. SHEINDLIN: I would ask the Court that the witness be able to view People's Exhibit 2 for identification.

THE COURT: People's 2.

(Document referred to above as a diagram was received and marked as People's Exhibit 2, for Identification.)

Q I ask you to look at People's 2 marked for identification. Do you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A It is the area in question between Amsterdam and Laurel Hill Avenue.

Q It's a diagram; is that correct?

A Yes, it is.

Q Do you see the streets that it depicts?

A Yes.

Q What are those streets?

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A 187th Street, 186th Street and 188th Street.

Q Does it depict any avenues?

A Amsterdam Avenue, Laurel Hill Terrace and Audubon Avenue.

Q Looking at People's 2 marked for identification, does it fairly and accurately represent how those streets and avenues at that location in general appeared to you on July 17, 1990?

A Yes, it does.

MR. SHEINDLIN: At this time I'm offering it into evidence as People's Exhibit Number 2.

THE COURT: Mr. Brenner?

MR. BRENNER: I don't know whether this purports to be drawn to scale or not.

MR. SHEINDLIN: I'm not offering it as an exhibit that has been drawn to scale.

MR. BRENNER: Then I have no objection.

THE COURT: All right. Without objection People's 2 received.

(Document referred to above as a diagram was received and marked as People's Exhibit 2, in Evidence.)

MR. SHEINDLIN: With the Court's permission I would like to hand the witness a pen.

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Q Would you please without writing on the diagram, you can leave the pen capped, would you show the members of the jury where you were standing prior to walking towards the ice cream truck?

A I was standing right here (indicating).

Q When you saw the ice cream truck that you were walking after, would you show the members of the jury what direction you walked in when you were going after that ice cream truck?

A I walked diagonally up the street.

Q Would you show the members of the jury what location - - well, let me stop you for a moment.

Would you please point out on the diagram the approximate location of 485 West 187th Street on People's Exhibit 2?

A Right here (indicating).

Q Now, could you show the members of the jury where you were located when you heard the sounds that you thought was a bat being struck into an object?

A I was right here (indicating).

Q What location were the two men that you described running? Would you please show the members of the jury on the diagram, pointing to it with the pen I gave you, the direction that the two men ran?

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A They ran in this direction around this corner (indicating).

Q So it would be fair to say it was away from the direction in which you were standing?

A Yes, it was.

MR. SHEINDLIN: With the Court's permission, the witness can have a seat.

Q After you saw these two men running, what did you think about the sounds that you thought was a baseball bat strike another object?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q What happened next?

A I then went back to the location where I was before, and about five minutes later, no more, sirens came, an ambulance and policemen.

Q When you went back to the location that you were at before, what did you do then?

A I asked a couple of my friends that were hanging out there, I asked them did you hear anything? One of them said - -

MR. BRENNER: Objection.

THE COURT: Sustained.

Q Why did you ask them if they heard anything?

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A Because I suspected something was wrong.

Q Why was that?

A Because - -

MR. BRENNER: Objection.

THE COURT: I'll allow it.

A Because I heard two sounds that sounded like shots, and I saw two people running from the direction of where I heard the shots.

Q Now, when you heard the shots - -

MR. BRENNER: Objection.

MR. SHEINDLIN: I'll rephrase the question. Withdrawn.

Q When you heard the sounds that you thought were shots, from what direction did they come?

A They came from down the street towards Laurel Hill Avenue, somewhere down in that direction.

Q After you had a conversation with your friends what did you do next?

A I then went to where the people were being brought out of the building by the EMS.

Q Let me stop you for a moment. What occurred prior to the time that you observed - - what occurred prior to the time that you went over to your friend until the time that you saw people being brought out of the

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building by EMS?

A There were - - three police officers entered the building, and a detective entered the building.

Q What specific building?

A 485 West 187th Street.

Q Approximately how long was that after you heard the sounds that you thought were gunshots?

A Four, approximately four to five minutes.

Q And how long was it before you saw EMS taking people out of the building?

A Approximately nine minutes.

Q The people, could you please describe what you saw with respect to people being brought out of the building by EMS?

A They brought out a woman and her eyes were - - there was blood all over her and her eyes were wide open and they weren't moving.

Q Could you approximate the age of this woman?

A I would say about 40 to 50.

Q What occurred next?

A And then they brought the another woman out of the building.

Q What did you observe about her?

A I didn't. I didn't observe her.

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Q Why was that?

A I didn't like what I saw the first time.

Q What occurred after this?

A They took them away, and I went home.

Q What was the reason that you went home?

MR. BRENNER: Objection. Relevancy.

THE COURT: If he knows.

MR. BRENNER: He may well know.

MR. SHEINDLIN: It will explain his further actions subsequent to this.

A I called my brother-in-law who is a New York City policeman and I asked him, I told him that I saw something and what should I do. And he told me - -

MR. BRENNER: Objection.

THE COURT: Sustained. I don't want any conversations.

Q Without telling us what your brother-in-law told you to do, what did you do subsequent to speaking to your brother-in-law?

A I went to a police officer who was still at 187th, and I told him that I had seen something, and he gave me a card to call a detective at the 34 Precinct.

Q And what did you do subsequent to this?

A I went to the 34 Precinct.

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Q Did you go by yourself?

A I went with my friend John Lantigua.

Q Where is the 34 Precinct located?

A It's Broadway and about 186th. Excuse me. 183rd.

Q Did you walk there?

A Yes, I did.

Q What occurred as you were walking to the 34 Precinct?

A My friend recognized a family member of the people who were shot and - -

MR. BRENNER: Objection, move to strike as to anything else.

THE COURT: Sustained. Don't tell us what somebody else was able to do.

A My friend saw a family member.

THE COURT: No. You see, you can tell us what you saw, what you observed. Don't tell us the operation of your friend's mind or the conclusions he reached.

A Excuse me. I saw one of the family members of the people involved.

Q Do you know that person's name today?

A No, I don't.

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Q Did you know his name back on July 17, 1990?

A No, I didn't.

Q What occurred after you saw this person?

A He was told to go home.

Q Who told him that?

A John Lantigua.

Q Do you know this person's relationship to the people that you saw being brought out of 485 West 187th Street?

A Respectively he's the son and brother.

Q And subsequent to this time what occurred next?

A I went to the 34 Precinct.

Q Did you speak to anyone at the 34 Precinct?

A I spoke to a detective.

Q Do you know his name?

A Not offhand.

MR. SHEINDLIN: Your Honor, the People have no further questions at this time.

THE COURT: The witness is yielded.

CROSS EXAMINATION

BY MR. BRENNER:

Q Mr. Benitez, I'm going to ask you a series of questions. If there is any question you don't

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understand, please tell me and I'll ask it differently; all right?

A Yes.

MR. SHEINDLIN: May he step back please?

MR. BRENNER: I would like to approach the witness, your Honor, or give the officer something to give to the witness.

THE COURT: Why don't you just have the officer stand there. There is no reason for you to be in proximity.

MR. BRENNER: I need to see the diagram and I can't do it from back there.

THE COURT: All right. When you need it, we'll make reference to it.

MR. BRENNER: I need it now.

THE COURT: Post yourself where the officer is on the other side of the diagram.

MR. BRENNER: Thank you, sir.

Q Mr. Benitez, could you step down. Unlike Mr. Sheindlin, I'm going ask you to mark the diagram with the pen that you have.

MR. SHEINDLIN: I object to this. May we approach?

THE COURT: Yes.

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(At this time a discussion was held off the record among Court and counsel.)

Q Mr. Benitez, if you could mark on the diagram what you have previously identified as 485 West 187th Street?

A In ink?

Q With ink, please. Using the numbers 485 in the approximate location.

(Witness complies.)

Q Now if you could put LB-1 where you were first standing when all of these events began?

A Okay (indicating).

Q Now, could up put LB-2 where you were when you heard the sounds?

A Okay (indicating).

Q And could you put a number two with a circle where you saw the two men for the first time where they were when you saw them.

(Witness complies.)

Q If you could resume your seat.

Now, Mr. Benitez, on direct examination you said you heard three sounds like an aluminum bat hitting - - what did it sound like it was hitting?

A Metal.

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Q And you didn't think twice about. I think that's what you said. It didn't give you pause; is that correct?

A Correct.

Q You walked and you were going to get a milkshake?

A Yes.

Q So at least at that point in time prior to seeing two people running, those didn't sound like shots; did they?

A Correct.

Q Now, just so that I'm clear, did you hear other sounds that did sound like shots?

A No, I did not.

Q So what changed the character of the sounds was the fact that the men were running?

A Yes.

Q That changed what had been otherwise innocuous sounds into sounds that raised your suspicion; right?

A Yes.

Q Now, how soon after you heard those sounds did you see the two people running?

A About 15 seconds.

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Q At the point that you heard the sounds you were where with relation to this ice cream truck?

A The ice cream truck had already passed by, and I was walking towards the ice cream truck.

Q Now, when you saw the men running how far were they from you?

A Approximately 40 feet.

Q Using the back of the Courtroom as a guide, was it about the same distance? Was it longer? Was it closer?

A It was a tad longer.

Q A little bit longer than the back of the Courtroom?

A Yes.

Q They were running away from you?

A Yes, they were.

Q And you were able to get a pretty good look at them though; right?

A Yes.

Q One of them had a knapsack?

A Canvas bag, yes.

Q Were they running together?

A Yes, they were.

Q No distance apart from each of them?

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A Not more than two or three inches.

Q Were they side by side or one behind the other?

A Side by side.

Q Now, you don't know whether the taller skinnier of the two had facial hair or not; is that right?

A No.

Q But you do know about the shorter one?

A A-hum, yes, I do.

Q He had a mustache. And what color was his hair?

A It was black.

Q Straight or curly?

A Curly.

Q And the taller man, he had a hat on but aside from the hat, were you able to see his hair?

A No.

Q So you don't know what color hair he had or what texture it was; is that right?

A Correct.

Q And aside from the hat how was he dressed?

A I didn't notice how he was dressed.

Q You didn't notice his clothes but you noticed

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the hat?

A Yes.

Q The hat was prominent; is that right?

A Yes, it was.

Q He was not carrying anything?

A No, he was not.

Q Did he have anything on like a knapsack or any piece of portable luggage that you could see?

A No.

Q Were they running fast?

A Yes, they were.

Q Away from you?

A Yes, they were.

Q Now, at the time that you went to speak to the police, you gave them a description similar to this one; did you not?

A Yes, I did.

Q Was that Detective Giorgio or Detective Ortiz?

A I believe it was Detective Giorgio.

Q Detective Giorgio. And you gave him the description of the two men; is that right?

A Yes, I did.

Q Incidentally, when you went to see Detective

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Giorgio did he ask you if you knew Dominic Franza?

A No, he did not.

Q Has he asked you at any time subsequent to that?

MR. SHEINDLIN: Objection to what he may have asked, Judge.

THE COURT: Sustained.

Q At any time did Detective Giorgio or Detective Ortiz or any other detective have occasion to show you one or more photographs?

A Yes, he did.

Q Were you able to make any kind of identification?

A No, I did not.

Q How many photographs were you shown?

A I was shown four books, countess photographs in each book.

Q How soon after the incident was that?

A Hour and a half.

Q Sometime after that first day, July 17 when you were shown photographs, did you see any other photographs?

A No, I did not.

Q Have you ever heard of anyone by the name of

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Joseph DeJesus?

A No, I have not.

Q Do you know Dominic Franza?

A No, I do not.

MR. BRENNER: Thank you. I have nothing further, your Honor.

THE COURT: Any redirect?

MR. SHEINDLIN: No redirect.

THE COURT: You may step down, Mr. Benitez.

(At this time the witness was excused by the Court.)

THE COURT: Mr. Brancato?

MR. BRANCATO: Your Honor, we have no additional witnesses for today.

THE COURT: All right. Ladies and gentlemen of the jury, just so you understand because of scheduling, there are times when we may complete the session early. There are days when we'll complete the session late depending on other factors. As I say, there may not be anything consistent except the inconsistencies of the hours. In any event, you enjoy a wonderful weekend, including Monday, which is a national holiday Presidents Day, and you will return here

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on Tuesday at 11 o'clock.

Now, the Court has a calendar of some 20 some-odd cases before this case starts, but hopefully we will have done most of it by the time we go into session. I do want to alert you occasionally you see attorneys coming in here and side conferences at the bench. Again, it's not meant as any discourtesy. It's merely an effort to expedite other matters as well.

But once again, do not discuss this case amongst yourselves nor allow any third party to discuss the case with you, and if anyone attempts to do so, do not engage in that conversation and bring that fact to the attention of the Court, not to the attention of your fellow jurors.

Do not speculate or reach any conclusions. Have a very good weekend. Please return here. And once again, I ask each of you to be here timely Tuesday at 11 o'clock. Have a good weekend. Take the jury out.

(The jury filed out of the Courtroom.)

(At this time the proceedings were adjourned to February 18, 1992.)

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CRIMINAL TERM : PART 32

THE PEOPLE OF THE STATE OF NEW YORK : Indictment No. 11987/91

- against - :

DOMINIC M. FRANZA, : Att Murder 2

Defendant. :

February 18, 1992
111 Centre Street
New York, NY 10013

B e f o r e:

HONORABLE PAUL P. E. BOOKSON,
Justice, and a Jury.

A p p e a r a n c e s:

Same as previously noted.)

MINUTES OF JURY TRIAL

Reported by:
William L. Kutsch
Senior Court Reporter

-oOo-

THE CLERK: Case on trial. The Defendant, his attorney and the assistant district attorney are present.

THE COURT: Ready? Get the jury.

(At this time the jury filed into the Courtroom.)

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THE COURT: Good day, ladies and gentlemen. We'll continue now.

Mr. Brancato, call your next witness.

MR. BRANCATO: People call Victoria Theis.

V I C T O R I A T H E I S, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name and county of residence.

THE WITNESS: Victoria Theis and I live in Manhattan.

THE COURT: You may inquire.

MR. BRANCATO: Thank you, your Honor.

Q Miss Theis, what is your occupation?

A Secretary/bookkeeper.

Q How long have you worked as a secretary/bookkeeper?

A Four years.

Q Where do you presently live?

A 485 West 187th Street.

Q Here in New York County?

A Yes.

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Q Were you living there back in July of 1990?
A Yes.
Q Who lives with you at that address?
A My mother and my husband.
Q Could you please tell us your mother's name?
A Hilda Ferreira.
Q And your husband?
A Edward Theis.
Q Where is your apartment located at 485 West 187th Street?
A In the basement, super's apartment.
Q In relation to apartment 1-D, where is the apartment in which you reside?
A A portion of the apartment is located directly beneath 1-D.
Q Could you please tell us what portions of apartment 1-D are directly above your apartment?
A The kitchen, the bathroom and two bedrooms, and a portion of the hallway.
Q Who presently lives in apartment 1-D?
A Mr. and Mrs. Mendez.
Q And were they the occupants back in July of 1990?
A Yes.

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Q Now, let me direct your attention to July 17, 1990, between 6:30 and 7:30 that evening at your apartment located at 485 West 187th Street. Were you in your apartment that night?

A Yes, I was.

Q Who aside from yourself was there?

A My mother.

Q Where was she between 6:30 and seven o'clock?

A She was in the shower.

Q Where were you?

A I was in my bedroom.

Q At about that time did you hear anything unusual coming from the apartment directly above?

A Yes.

Q Could you please tell us what you heard?

A I heard some fast running.

Q Could you please tell us, could you tell me one more time what you heard at about that time?

A I heard some fast running, screaming, and then some loud banging pop noises, and then silence.

Q Where were you when you heard these noises coming from above?

A In my bedroom.

Q You said you heard some running. Could you

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please tell us in relation to hearing the running, did you hear the screaming before or after the running?

A I don't remember. I think the screaming was first and then the running.

Q Could you make out the person who was screaming? Was the person a man or a woman?

A It was a woman's voice that I heard.

Q Could you hear what she was screaming?

A She wasn't screaming words. She was just merely screaming.

Q You indicated that you heard some banging noises. Could you please describe them for us?

A They sounded like somebody with a lot of power hitting a sledge hammer against a piece of furniture or something to that effect.

Q About how many times did you hear those noises?

A Three to four very quick and rapid, like real fast.

Q Could you please tell us what happened then after you heard the running, the screaming, and the three or four noises?

A We didn't hear anything after that. It was completely silence. I heard a thump which sounded like

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somebody fell, and I thought she had fallen, the wife because I know she was not well.

Q Who was not well?

A Mrs. Mendez from time to time has problems medically. And we called the apartment.

Q When you say we called, who called the apartment?

A Well, my mother and - - I called. My mother made the call. Excuse me. My mother made the first call and the line was busy.

Q Is it fair to say that sometime after these noises that you heard from above your mother came out of the bathroom?

A She had come out of the shower at approximately the same time that we heard the popping sound, and she heard the running and the screaming as well.

MR. BRENNER: Objection to what - -

THE COURT: What someone else heard, yes.

Just tell us what you heard or observed.

Q So when your mother came out, did there come some point that either you or your mother called upstairs?

A Yes.

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Q Who called upstairs?

A I think she did.

Q Were you present when she called upstairs?

A Yes.

Q Did you hear her speaking with anyone on the other end the line?

A The phone was busy. No one answered the phone.

Q So what happened at this point?

A Well, we waited a few minutes. We thought that maybe that someone was up there, maybe calling for assistance or something. We didn't know what had gone on upstairs. We had no idea.

And then I thought maybe the phone was knocked off the hook or something when she fell. We had gone up there before in the past.

Q What happened after waiting a few minutes after your mother called?

A After waiting a few minutes I called one of the neighbors on the first floor.

Q Who was the person that you called on the first floor?

A His first name is Leo. I don't remember his last name. Sorry.

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Q Where is Leo's apartment - - listen to my question. Where is Leo's apartment in relation to Mrs. Mendez' apartment?

A He's two apartments away.

Q When you called up to Leo's apartment, did anyone answer the phone?

A Yes, his wife did.

Q Did you make any request of her?

A I asked her if her husband was home, and if she could possibly have him go check next door to see his wife, because I heard some weird noises and I didn't get any answer, and maybe something had happened.

Q What happened after you got off the phone with Leo's wife?

A She put him on the phone, and I asked him to go and to call me back. So I hung up and I didn't get a call back.

Q So about how long did you wait?

A I was in my kitchen, in the kitchen waiting, and I heard sirens coming from all directions. I looked out my kitchen window and I could see that the lights were flashing from approximately the front of my building.

So at that point I went upstairs and asked my

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mother to stay downstairs.

Q Now, when you went up, how did you get to the first floor? Did you take the stairs or elevator?

A There is no stairs. I took the elevator.

Q Could you please tell us what, if anything, you noticed when you got off on the first floor?

A First thing, it was just a lot of activity between police and EMS people coming in and out of the main lobby doors. That's the first thing you see when you come out.

Q Did you look in the direction of Mrs. Mendez' apartment, apartment 1-D?

A When - - I had to go around the door because the door opens in that direction, which is on my lefthand side.

Q Try to keep your voice up so we can hear you in the last row.

So what happened after you got out of the elevator and noticed police and EMS technicians?

A Then I you knew something terrible must have happened.

Q What did you do?

A I went over where the stairs are to go up toward where the apartment is, and I noticed that they

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had seemed to have been talking vigorously with Leo. And I had been nervous about that because when I heard the sirens, I just thought, what did I send this poor guy into.

Q So what happened then?

A I talked to the policemen. They were asking him questions. And I had stated to them that I had - - I was the super, and I had asked him to come up because I lived directly below and heard some strange noises and was worried.

Q What did you learn when you got to the apartment where Mrs. Mendez and her husband lived?

A Well, I never had gone into the apartment. We went to Leo's apartment, and we found out that they had been shot - - well, no. Excuse me. That they - - that something happened. I didn't know at that point who they were yet.

Q Did there come some point that you heard that someone had been shot in the apartment?

A Not until much later we knew it was a shooting.

Q So tell us what, when you learned that something had happened to someone in the apartment, at what point was that?

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A We knew when we got upstairs that something had - - when I got upstairs, that something had happened. But to what extent and how and in what way, I didn't know at that point.

Q So what happened then?

A We were inside the apartment.

Q Who is we?

A Leo, his wife, because he had his apartment door opened.

Q So you went into Leo's apartment?

A Right.

Q And did there come some point that you heard that someone had been shot inside of apartment 1-D?

A Yes, I did.

Q When was that?

A When exactly? I really couldn't say. It was after I had been up there for awhile.

Q And did you hear how many people had been shot inside the apartment?

MR. BRENNER: At this point I'm going to object because Mr. Brancato is furnishing hearsay to the witness.

THE COURT: Rephrase that. It's direct.

Q Did there come a time that you have learned

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what happened in the apartment?

A Yes.

Q When was that?

A It was while I was still upstairs being questioned by detectives.

Q And did there come a time that you called your mother?

A Yes.

Q When was that?

A The second time I went into Leo's apartment, I called my mother and asked her to call Myra because at the time I had no idea except for Josephine, who the other party was, just that someone had mentioned there was a young female.

So I had called my mother and asked her to call Myra and just tell her that, I didn't even tell my mother that Josephine or anybody had been shot at that point.

Q Now, you indicated that at some point you learned that a young female and someone else had been shot inside the apartment?

A Right.

Q At what point was that that you learned this?

A What point?

Q How many minutes after going upstairs?

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A I would say maybe about ten.

Q After hearing that information how long was it before you called your mother?

A Maybe about another ten minutes. I'm pretty sure I was concerned when I heard it was a young female. I had gone to one of the apartments because one of the daughter-in-laws was pregnant.

Q Who?

A Debbie, Carlos' wife. And I was concerned, that she goes in and out of the apartment quite often. And since I didn't know who it was, I was concerned it might be one of the daughter-in-laws.

Q At that point you indicated that you called your mother?

A Yes.

Q Could you please tell us as best as you could recall what you told your mother?

A To the best of my knowledge I remember asking her to call Myra, and just tell her that she better get over here as quickly as possible because something happened to her mother.

Q Did you say anything when you called your mother from Leo's apartment concerning a shooting in the apartment?

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A No, I didn't even really want my mother to know.

Q So after you told your mother to call Myra, what happened then?

A With me I just stayed upstairs, because they were still questioning people and they were bringing the bodies out, and - -

Q Now, you say they were bringing the bodies out. Did there come a time that ambulance attendants, EMS attendants, started to bring people from the apartment out on a stretcher?

A Yes.

Q Where were you when this was happening?

A I was in the hallway at the time.

Q And at the time that the first body was taken from the apartment, could you tell us, were you still in the same position?

A Yes, I was still out in the hallway, yes.

Q And did you see the first person who was taken out on a stretcher?

A Yes, but I couldn't tell who it was.

Q Why is that that you couldn't tell who the first person was?

A There was a lot of blood, and there was tubes

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and people back and forth in front of me, so I really couldn't tell very well.

Q How close were you when the first body was taken out on a stretcher?

A I would say about from here to where that desk is.

THE COURT: Eight feet, nine feet?

MR. BRANCATO: Yes, Judge.

Q It's from the witness stand to the table?

A More or less.

Q After the first body was taken out, what happened?

A They were basically just trying to keep people out of the way so that EMS could go back for the second body and bring the second person out.

Q And what were you doing at this time?

A Well, we were talking.

Q You say we. Who is we?

A There were a lot of people out there, and a lot of people had come down by now that were in the building. Mostly police officers were in that area.

Q What were you doing at this time?

A I was talking to a police officer and Leo was out there.

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Q Did there come a time that your mother came onto the first floor?

A Yes.

Q Now, about what time was that when your mother came onto the first floor?

A I could relate to it only at the time that they were taking Mrs. Mendez down the steps on the stretcher, because the next one I saw the elevator door open and I saw my mother.

Q Is that Josephine Mendez?

A Yes.

Q Did you recognize the second person to be brought out as Josephine Mendez?

A Yes. Mostly I recognized her hair. I mean only knowing that she was the older woman in the apartment, body size, hair.

Q Could you please - -

A I couldn't really see her face very well either.

Q Why is that?

A Again, there were a lot of masks and people working on them.

Q So what happened at the point that the second person that you believed to be Josephine Mendez was taken

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from the apartment? What happened then?

A Well, my mother came out of the elevator, and she turned white. She just happened to be right there. And that's one reason why I didn't want my mother up there because she's not a well person either and - -

Q Could you keep your voice up, please?

A I didn't want my mother to really see anything because she is not well either, and I didn't want her to be up there.

Q So what happened at this point that Mrs. Mendez was being taken from the building?

A It was mostly just asking questions of the people, policemen, detectives asking questions, trying to find out who knew what.

Q At this point had you learned the name of the other person who had been in the apartment, the first one to be wheeled out?

A No, I still didn't know.

Q At this point what was your impression as to the identity of the first person?

MR. BRENNER: Objection. Irrelevant.

THE COURT: Sustained.

Q So what happened at this point that both bodies had been taken from the apartment?

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A Well, shortly after, I think it was the son Nelson had come into the lobby and started screaming and yelling. He wanted to get into the apartment, and they wouldn't let him, and he just broke his way through and went in anyway.

MR. BRENNER: I didn't hear the end.

A I said that the son Nelson had come in through the lobby screaming and yelling that he wanted to go into the apartment, and they didn't want him to, and they tried to keep him out but he went in any way.

Q At this point where were you?

A Again, at first we were in 1-B and we heard all the yelling, and from 1-B to the top of the staircase you could see the top of the stairs and you saw Nelson.

Q Was this after both bodies had been removed?

A They had been removed already from the premises.

Q Did you go out front in front of 485?

A I never went out of the building.

Q So what happened then?

A Shortly after that I left. I took my mother downstairs because she wasn't well.

Q You indicated that earlier in your testimony that you called your mother from Leo's apartment?

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A Yes.

Q Did you call her any other time that day, aside from the initial call that you referred to earlier?

A No.

Q When you went down into your apartment what happened?

A Well, my mother was gasping for air and she was not doing well, and I called a neighbor from upstairs to come down. She is familiar with my mother. And we had to put cold compresses on my mother, and I noticed that my tape machine was flashing that there had been messages.

Q You have an answering machine?

A Yes, I didn't pay any attention because I was more concerned about my mother.

Q Did there come some point later that night that you played your answering machine?

A Yes. Later on I checked the messages that we had.

Q When was that?

A I would say approximately 20 minutes to half an hour after we were downstairs.

Q At this point that you played the answering machine, did you learn the identity of the second woman

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who had been taken from the apartment?

A No, I hadn't spoken to anybody yet. I hadn't been out of the apartment again.

Q Did there come a time that night that you learned the name of the other woman who had been shot in the apartment?

A Much later on, yes.

Q About what time of the night was it when you learned this?

A What time? I really couldn't pinpoint a time. I'm sorry.

Q Could you approximate how long after having gone upstairs?

A I would say that most of the police officers, most everybody was gone at this point.

THE COURT: Keep your voice up, Miss Theis.

Q Let me hand you what has previously been marked for identification as People's Exhibit 3-A and 3-B.

What is marked for identification as Exhibit 3-A, do you recognize that?

A Yes. That's the tape that was in my machine.

Q Was that the tape that was in the machine when you noticed the light flickering?

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A Yes.

Q And did you play the tape that night after you had gone back to your apartment?

A Not right away. But later - - oh, yes, that's the tape that was in the machine at the time that I played it back.

Q And did that tape contain a return telephone call from - -

MR. BRENNER: Objection as to leading, your Honor.

THE COURT: Sustained.

Q After listening to that tape did you later give it to Detective Ortiz of the 34 Precinct?

A Yes.

Q Now, looking at what's been marked for identification as Exhibit 3-B, did you have an opportunity to listen to that cassette this morning in my office?

A Yes, I did.

Q Does that cassette contain the messages that are on Exhibit 3-A?

A Yes, it does.

MR. BRANCATO: I would offer them into evidence at this time subject to connection.

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THE COURT: Mr. Brenner.

MR. BRENNER: Subject to chain of custody your Honor, I have no objection.

THE COURT: As to 3-A and 3-B, without objection, they are received.

MR. BRENNER: Your Honor, may we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

(Items referred to above as audiotapes were received and marked People's Exhibits 3-A and 3-B In Evidence.)

Q Miss Theis, you indicated earlier in your testimony that you told your mom to call Myra?

A Yes.

Q Had you seen Mrs. Franza, Myra Franza, in the building a few days before?

MR. BRENNER: Objection. Leading, your Honor.

THE COURT: To that extent I'll allow it.

A Yes, I had.

Q Did you see her the day of the shooting?

A No.

MR. BRANCATO: I have no further questions

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for Miss Theis.

THE COURT: The witness is yielded, Mr. Brenner

CROSS EXAMINATION

BY MR. BRENNER:

Q Is it Miss or Mrs.?

A Mrs.

Q Mrs. Theis, you have recounted that you had several conversations with the police officers; is that correct?

A Yes.

Q Some were at the actual scene at the apartment?

A No, I never entered the apartment.

Q No, but they were in the general vicinity of the apartment?

A Yes, okay.

Q Do you recall which officers those were?

A Not particularly, no. There were two detectives that were upstairs in Leo's apartment, and to tell you the truth, I don't remember their names.

Q If I said Montori or Resnick?

A Resnick was one.

Q Detective Resnick spoke to you that night?

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A I remember speaking to him, yes.

Q And do you recall whether he was writing down what you were saying?

A I think so, yes.

Q Were you ever asked to look at anything that had been written down which reflected information which you had given to the police?

A No.

Q Now, at some point in time you provided this cassette to Detective Ortiz?

A Yes.

Q How much later was that?

A It was that evening.

Q The same night?

A Yes.

Q Did you go to Detective Ortiz or did he come to you?

A What had happened is that I had gone upstairs and told him that we had gotten a message from the son-in-law and that he was on his way. Then they came down and asked us if we still had the tape. That was later on in the evening.

Q Approximately how many hours after 7:30? Was it before midnight?

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A Oh, yes.

Q Was it within an hour?

A I think it was later.

Q So sometime between one hour and five hours later?

A I would say maybe two to two and a half hours.

Q At the time that you provided that tape to Detective Ortiz did he ask you any questions?

A Yes, but I don't remember specifics.

Q I understand. But while he was asking you those questions and whatever answers you were giving, was he writing them down?

A I'm sorry. I think so, yes.

MR. BRENNER: Your Honor, may we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

Q Mrs. Theis, immediately, within 15 minutes of hearing those sounds which sounded liked someone slamming something down on furniture, had you seen anyone enter the building?

A I'm not - - from where I am, I can't.

Q Would it be fair to say that your apartment

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doesn't have any visual access to the front of the building?

A Right.

Q And would it be further fair to say when you heard the running and the screaming you didn't see anyone leaving?

A Right. I did not.

Q How much time passed between the time that you heard this sound - - the sounds and the time you actually went upstairs, total time?

A I would say approximately 15 minutes to 20.

Q Thank you.

MR. BRENNER: I have no further questions.

MR. BRANCATO: No redirect.

THE COURT: You may step down.

(At this time the witness was excused by the Court.)

THE COURT: Ladies and gentlemen of the jury, we'll break now for lunch. Do not discuss this case, with the usual admonitions. Have a very pleasant lunch. Return back here at 2:30 today. Take the jury out.

(At this time the jury filed out of the Courtroom.)

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(At this time a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

THE CLERK: Case on trial.

THE COURT: Bring in the panel.

(At this time the jury filed into the Courtroom.)

THE COURT: Call your next witness.

MR. BRANCATO: Your Honor, the People call Mrs. Hilda Ferreira.

H I L D A F E R R E I R A, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name and county of residence.

THE WITNESS: Hilda Ferreira, and I live in Manhattan.

THE COURT: People.

Q Mrs. Ferreira, where do you live?

A In Manhattan.

Q Could you tell us the address?

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A 485 West 187th Street.

Q Does anyone else live with you at that location?

A Yes, my daughter and my son-in-law.

Q Is your daughter Mrs. Vicky Theis?

A That's right.

Q And your son-in-law, what is his name?

A Edward Theis.

Q Where do you live in the building?

A I live in the basement on the - - I'm the superintendent.

Q In relation to apartment 1-D, where is your apartment?

A Right under, under the apartment 1-D.

Q Is your entire apartment underneath?

A No.

Q What parts then of your apartment are underneath apartment 1-D?

A The two bedrooms, the bathroom, and the kitchen.

Q They line up one above the other?

A Right, a-hum.

Q How long have you been the super at that address?

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A It will be 36 years in March.

Q Do you know Cecilio and Josephine Mendez?

A Yes.

Q How long have you known them?

A I don't know. Quite a few years. I can't remember how long.

Q About how long have they lived there?

A About maybe six years, seven years I might know them.

Q Let me direct your attention back to July 17, 1990, at about 6:30 to seven o'clock in the evening at your apartment at 485 West 187th Street. Were you in your apartment that night?

A Yes.

Q Between 6:30 and 7:00 o'clock specifically where in the apartment were you?

A I was in the bathroom taking a shower.

Q Was anyone else in the apartment with you at this time?

A Yes, my daughter.

Q At about this time did you hear any noise coming from upstairs?

A Not at that time, no, I didn't hear anything.

Q Did there come some point that you heard some

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noise coming from upstairs?

A No.

Q Did there come some point that night that you attempted to call Mrs. Josephine Mendez?

A My daughter did.

Q And about when was that?

A After I came out of the shower, my daughter said she heard a lot of noise upstairs, and then we decided to call up. So she tried a few times but couldn't get through because the line was busy.

Q So is it fair to say that while you were in the shower you didn't hear any noise coming from upstairs?

A No.

Q Did you call or did your daughter call upstairs?

A My daughter.

Q And did you notice if she got through when she called?

A No, she didn't get through.

Q So at some point did your daughter make another telephone call?

A Yes, she called a neighbor from apartment 1-B.

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Q Who is that?

A That's Leonardo Diaz.

Q In relation to Mrs. Mendez' apartment, where is Leonardo Diaz' apartment?

A It's just two apartments away, it just goes like A, B and C. And he's in apartment B, 1-B.

Q Did she speak with Mr. Diaz on the telephone?

MR. BRENNER: Your Honor, I'm most respectfully going to object. Perhaps we could have the witness' account.

THE COURT: The point is well taken.

Q Could you please tell us, did your daughter talk into the telephone after making the second call?

A Yes, she tried a few times to call Mrs. Mendez and couldn't get through. That's when she called up Leonardo's house.

Q And were you there while she was calling?

A Yes.

Q Did she speak into the telephone after calling Mr. Diaz' telephone number?

A Yes.

Q After that, after speaking into the telephone, did there come some point that your daughter then went out of the apartment?

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MR. BRENNER: Objection, your Honor. I believe that the appropriate questions are, "What happened? What did you see?" Not "did there come a point." This is leading.

THE COURT: I don't need to hear argument. To that extent, though, the question having been asked, I'll allow it. However, Mr. Brancato is cautioned, it is direct examination.

Q So what happened then after your daughter went out of the apartment?

A I stayed downstairs. She told me to wait downstairs. And she went up.

And then a little while later she called me downstairs, told me not to go up, something happened to Josephine, don't come up. I said why. She said, "No, just call Myra. Tell her something happened to her mother and tell her to come as soon as possible," and that's what I did. I did call up Myra's house in the Bronx.

Q Did she say anything to you as to what happened to Josephine?

A No.

Q Did she say what injury if any Josephine sustained?

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A No.

Q So what did you do after your daughter told you to call Myra in the Bronx?

A I had her telephone number. And I called her up. There was an answering machine and I left a message, "Myra, please, Myra this is Hilda, the super from the house you lived in. Something happened to your mother. Please come as soon as possible," and I even left my number there just in case she didn't know it. She did, but in case she didn't have it handy.

Q When you called, did you say anything other than what you just related to us?

A No.

Q Did you say what happened to Josephine?

A No, I didn't know myself.

Q Now, you indicated that when you called you got an answering machine.

A Yes.

Q Did anyone pick up the telephone during the time that you were leaving this message?

A No.

Q So after leaving the message what did you do?

A I went upstairs and I took the elevator up.

Q Did you go immediately upstairs or did you

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remain in the apartment for awhile?

A I just can't remember but I think as soon as I called I think I locked the apartment and went upstairs.

Q Prior to going upstairs and after leaving the message, did anyone call back to your apartment?

MR. BRENNER: Objection. Leading.

THE COURT: Sustained.

Q After you left the message what happened next?

A Then I went upstairs. And as I opened the elevator door, they are bringing Mrs. Mendez, Josephine, right past me. And I assumed then what happened, and then right away then my daughter saw me and she took me into Leonardo's apartment, then I knew what had happened to her but I didn't know anything much because then I got very upset. I had been ill myself previously, and they just took me into the apartment and just kept me away from everything.

Q What apartment is that?

A Apartment 1-B, Leonardo's.

Q Now, you indicated when you got out of the elevator they were taking Mrs. Mendez past?

A Right.

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Q Did you recognize her face when she came by? Tell us what you observed.

A I saw she had a lot of blood her. And she had tubes and things all around her. And I got very upset. I knew it was her.

Q How did you know it was her?

A I knew her. I know her. I have known her for a few years.

Q Did you recognize her face?

MR. BRENNER: Objection. Asked and answered, your Honor.

THE COURT: Overruled.

Q So what happened then?

A As I said, then my daughter saw me and they came. In fact, a few of the other people there, they came and took me into Leonardo's apartment.

Q How long did you stay there?

A I stayed there for a while, and then I went downstairs.

Q Let me hand you what has already been marked as Exhibit 4 for identification. Do you recognize that tape?

A Yes.

Q Did you see that tape earlier in my office?

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A Yes.

Q Did you have an opportunity to listen to that tape in my office?

A Yes.

Q Could you please tell us, did you recognize the contents that's on that tape?

A Yes.

Q What did you recognize it to be?

A I recognized the message I left, and there was a message because when we came downstairs later - -

Q Okay. Let me slow you down. When you say you recognized the message - -

A The message that I had left.

Q At which?

A On this tape.

Q The message on that tape, where did you leave that message?

A That message was on my tape, but somebody had come later that evening and had taken the tape, our tape. It was a cassette.

THE COURT: I'm not certain I'm clear now.

MR. BRANCATO: May we approach?

THE COURT: Yes.

(At this time a discussion was held off the

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record among Court and counsel.)

Q Mrs. Ferreira, today when you came to my office you came with your daughter; am I correct?

A Yes.

Q And when you came to my office I had a tape recorder in the office?

A Yes.

Q Did I play a tape with the message that you left on Myra Franza's number back on July 17, 1990?

A Yes.

Q Does that tape contained the message that you left on Myra Franza's telephone number in the Bronx that you called on July 17, 1990?

A Yes.

MR. BRANCATO: I would offer it into evidence at this point.

THE COURT: As People's 4.

MR. BRENNER: No objection.

THE COURT: Without objection, People's 4 received.

(Item referred to above as an audiocassette was received and marked as People's Exhibit 4, in Evidence.)

THE COURT: Counsel approach.

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(At this time a discussion was held off the record among Court and counsel.)

MR. BRANCATO: Your Honor, if we can put off playing the tape for the jury at this time.

THE COURT: Very well.

MR. BRANCATO: We'll play it after Detective Bourges testifies.

THE COURT: Very well.

Q Mrs. Ferreira, did there come some point that night that you learned that Mrs. Franza had been one of the persons shot in the apartment?

A Yes.

Q About what time of the night was it that you learned this?

A It was later on. It was when I was downstairs already in my apartment. It was later on in the day - - in the evening.

Q Once again, how many calls did you make to Myra Franza's number in the Bronx on July 17, 1990?

A One.

MR. BRANCATO: I have no further questions.

THE COURT: The witness is yielded, Mr. Brenner.

CROSS EXAMINATION

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BY MR. BRENNER:

Q Mrs. Ferreira, how long did you know Myra Franza? How long did you know her?

A I have known her for a few years just before they moved into the building, and as I said six, seven years.

Q So the period of time in which you knew Mrs. Mendez is also the period of time of which you knew Mrs. Franza?

A Right.

Q As a matter of fact, you were present at Mrs. Franza's wedding; is that correct?

A That's correct.

Q To Mr. Franza?

A Yes.

Q Do you know Nelson Dacosta?

A Yes.

Q Did you see Nelson Dacosta on the night of July 17?

A No.

Q When was the last time before that evening that you had seen Nelson Dacosta, if you recall?

A I can't remember. I'm sorry. I can't remember.

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Q It's okay. Thank you very much.

MR. BRENNER: I have no further questions.

MR. BRANCATO: One or two.

REDIRECT EXAMINATION

BY MR. BRANCATO:

Q The person that counsel mentioned, Nelson Dacosta, what is his relationship?

A He's Myra's stepbrother.

Q Did you know his name back in July of 1990?

A Not really.

Q What did you know him by?

A I knew him by Nelson.

Q Did you know what his last name was back then?

A No.

MR. BRANCATO: I have no further questions.

THE COURT: You may step down, ma'am.

(At this time the witness was excused by the Court.)

THE COURT: Call your next witness.

MR. SHEINDLIN: People call Police Officer Carmen Aponte.

P. O. C A R M E N A P O N T E, called as a witness by the People, having been first duly sworn by the

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Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

THE COURT OFFICER: State your name, shield and assignment.

THE COURT: Police Officer Carmen Aponte-Loperena, Shield 23136; present assignment, the Legal Bureau.

MR. SHEINDLIN: May I inquire?

THE COURT: Yes.

Q Back on July 17, 1990, were you known as Officer Carmen Aponte?

A Yes.

Q How long have you been a police officer?

A Four and a half years.

Q Where have you worked over those four and a half years?

A Three and a half years in the 34 Precinct.

Q Where do you currently work?

A In the legal bureau.

Q How long have you worked in the legal bureau?

A Two months.

Q I'd like to draw your attention to

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approximately 7:20 in the evening on July 17, 1990. On this date and at this approximate time would you please tell the members of the jury what occurred?

A We heard over the radio a radio run of a female shot at 485 West 187th Street.

Q When you say we, who is we?

A Me and the other officer that was with me at the present time.

Q Do you recall that officer's name?

A Yes.

Q What is the officer's name?

A Brenda Alexander. It came from apartment one David. We responded.

When I entered the apartment I saw a lady naked, bleeding from the face, apparently shot in the face.

Q What exactly did you see with respect to her face?

A She had blood on her face.

Q You said that she was apparently shot. Why do you say that?

A Because the call came over as shot.

Q Did you observe any specific wounds?

A She had a facial wound but I couldn't determine exactly where.

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Q What occurred at this point?

A I proceeded to go past her to the other room where apparently there was another victim. And my supervisor, Lieutenant Lynch, told me not to go into the room, to stay there.

I then went back to the aided that was lying on the foyer floor and I stood by her, and at which point she started to make motions on the wall. Apparently she wanted to write something.

Q What position was this person in at this time?

A She was on her side, more like on her back, face up, but a little bit twisted to the side.

Q Do you know that person's name as you sit on the witness stand here?

A The person's name?

Q Who was lying on the floor.

A I only recall the first name, Myra.

Q This person named Myra, what occurred at this point?

A So somebody gave her something to write on the wall. And she proceeded to write a telephone number, and she proceeded to write the letters F-A-T-H, which I asked her, is that your father? And she motioned her

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head as of yes.

She then wrote the word "Sent."

MR. BRENNER: Objection.

THE COURT: All right. Take the witness out.

(At this time the witness was excused by the Court.)

(At this time the following took place at sidebar, among Court and counsel, out of the hearing of the jury:)

THE COURT: The nature of your objection.

MR. BRENNER: I had previously moved in limine, however off the record, to preclude the People from eliciting the utterances of Myra Franza at the scene of the shooting on July 17, 1990, to the extent that she gave her opinion that her husband had sent someone to shoot her. My position is that in a case in which the Defendant is charged with precisely that, it is impossible for the People to be offering it for anything other than its truth.

As such, your Honor, since it is not something that she saw, or that she heard but rather was an operation of her mind, I believe it's inadmissible and I'm objecting to its offer

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at this point.

THE COURT: Mr. Brancato.

MR. BRANCATO: Your Honor, we have stated on the previous occasions that was off the record that this has not been offered for the truth of the matter asserted, but it shows why the police officers took the action that they did, and it's the wife saying this to the police.

THE COURT: Let me understand. This is not a probable cause hearing. Are we concerned with what the police actions are?

MR. BRANCATO: At some point.

THE COURT: Why is it pertinent to the trial? You will recall in our informal discussion on this very issue, I indicated to you that I would allow it not for the truth. It does not relate to the question of the issue of the guilt or non guilt of the Defendant, but solely this was her state of mind, this is her belief, nothing more. You tell me it's a question on the basis of this is what the police acted upon that would indicate something further, that it's a probable cause issue. Why is that relevant?

MR. SHEINDLIN: Because this is basically,

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she just testified that the other word written was "sent." It's the last word that was written. And it's the segue into the notebook, because what happens now is that the officer said, "We got to get her a pad because she's writing on the wall." It's hard for her because she is lying on the floor, and this is the last word, and then we go into the memobook. It's not a long story.

MR. BRENNER: It's the same objection.

THE COURT: Forget the objection. It's not probable cause reasons. Why do we have to demonstrate as to how the police acted?

MR. SHEINDLIN: It's just the purpose of overseeing the investigation.

MR. BRENNER: Who cares?

MR. BRANCATO: To allow it in. Not to allow it in would not raise - -

THE COURT: I didn't say I'm not going to allow it, but for the limited purpose. There is a distinction. I'm going to instruct them that it's being admitted just as to what her belief was, not as to guilt or non guilt.

MR. BRENNER: So you're saying her belief is relevant?

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THE COURT: This is just the statement as to what she believed.

MR. BRENNER: Why is that relevant?

THE COURT: Just that she uttered the statement. It's her belief, but I'm also counter-balancing by saying it's not saying something that they are taking on the question of guilt or non guilt. So that balances it. That's how he can put it in.

(At this time the following occurred in open Court:)

THE COURT: Members of the jury, the testimony that the witness was about to testify to about some writings as to her thoughts, I'm admitting this testimony only to demonstrate the belief of the person who uttered it. In this case it's Myra Franza. It is not being offered as proof of the Defendant's guilt, merely as to the fact that the statement was made and it's the belief of the person that claimed it.

Q After the letters F-A-T-H were written on the wall by Myra, did she write anything after that?

A She wrote the word Sent.

Q Where did she write that?

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A On the wall.

Q And what occurred at this time?

A Then we - - there was a detective there which handed me a pad, which she continued to write on the pad.

Q The pad instead of the wall?

A Correct.

Q Please tell the members the jury what occurred at this time.

A She wrote an address and she wrote the word House. Then I changed the page to give her more. She wanted to keep on writing.

Q Where was Myra while she was writing this?

A She was lying on the floor in the same position. She wrote the words Sent. And I told her, "Sent what?" And she wrote the letters H-U-S. I said, "Husband?" She shook her head.

Q How did she shake her head?

A In saying, in agreeing with me, saying yes.

Q Up and down?

A Up and down.

MR. BRENNER: Objection as to agreeing with her. That's a conclusion.

THE COURT: True.

MR. BRENNER: Move to strike it from the

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record.

THE COURT: Did she indicate an affirmative answer or a negative answer to your question?

THE WITNESS: Affirmative answer.

THE COURT: All right.

Q Let me stop you for a moment. You said Myra wrote an address. What address did Myra write?

A I don't recall the address.

MR. SHEINDLIN: I ask at this time that this be marked as People's Exhibit 9-A through D for identification and be shown to the witness.

(Documents referred to above as notes were received and marked as People's Exhibit 9-A through D, for Identification.)

Q Looking at People's Exhibit 9-A for identification, which should be the top page, does that refresh your recollection as to - - do you recognize it?

A Yes.

Q What do you recognize it to be?

A The writing that she wrote on the pad.

Q Looking at People's Exhibit 9-A marked for identification, do you recall what address that Myra wrote when she first wrote an address?

A Yes. It says 3320 Barker.

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Q That is B-A-R-K-E-R?

A Yes.

Q You then stated that she wrote the letters H-U-S-B; correct?

A Yes.

Q What happened after this point?

A Then I kept on turning the page to give her more room to write, since she motioned to write and she wrote the word Sent. And she wrote the letters H-U-S, and I said husband? And she shook her head as affirmative, saying yes.

And then I asked her to give me a description of the person who had come to the house. And she proceeded to write mustache, M-U-S-T-A-C-H. And I told her mustache? She shook her head.

And then she wrote the color of his skin, which was White.

I then turned the page again and asked her to try to give me more of a description. She proceeded to write Afro.

She then proceeded to write White, which she didn't complete. I said white? And she shook her head. She also proceeded to write Shirt. I asked her what kind of shirt? And she wrote Tank.

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I later asked her why did she think her husband sent, and she said, she wrote, she proceeded to write, "I left."

Q What was Myra's condition while she was writing this?

A She was bleeding at the time and the paramedics had still not arrived.

Q What position was she in?

A She was lying on the floor in the same position. I just put the pad in front of her hands so she could be able to write, continue to write.

Q After Myra wrote this, what did you do next?

A She then wrote Flowers. So I said the guy that brought the flowers, that's the description? And she said yes, that that was the guy, an affirmative.

Q Then what occurred?

A The paramedics then entered the apartment, and they proceeded to aid her.

Q Just so it's clear, where was Myra in the apartment at this time?

A She was still in the foyer lying on the floor.

Q Is that the same place that you observed her when you first entered the apartment?

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A Yes.

Q As the medical technicians were working on Myra, what did you do?

A I then proceeded to go to the kitchen to try and call the phone number that she had written on the wall, to get a hold of her father, but I was unable to get any answer or reach him at all at that number.

Q So then what did you do?

A I then left the apartment and I waited outside in the street.

Q Outside of 485 West 187th Street?

A Exactly, until my supervisor came outside.

Q How long was it from the time that you first entered 485 West 187th Street until the time that you left the building at 485 West 187th Street?

A Approximately 30 minutes.

Q What occurred when you went outside of 485 West 187th Street after the 30 minutes?

A I had seen a car arrived, and two men got out. There was one male black, and the car had Jersey plates. Somebody in the crowd had said that - -

MR. BRENNER: Objection as to what somebody said.

THE COURT: Sustained.

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A I was standing outside. And then this other fellow came by. And I had recognized him from a previous job I had.

Q What do you mean a previous job?

A We had gotten a call a couple of days ago, somebody wanted to make a report that somebody was making threatening phone calls at his residence. So I recognized this guy.

Q What is his name?

A Nelson.

Q Do you know his last name?

A Dacosta, something like that. I think it's D-A-C-O-S-T-A. And somebody in the crowd said that that was her brother.

MR. BRENNER: Objection.

THE COURT: Don't tell us what somebody else said.

Q Tell us what you observed.

A I later found out that that was the victim's brother, and he was - - he then came.

Q Who is he, if you can use the names and not a pronoun?

A The victim's brother, Nelson, approached a fellow with glasses and punched him in the face.

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Q Then what happened?

A At that time there was detectives and officers on the scene, other officers and they broke them up, separated them. At which time my supervisor later came and I went back to the stationhouse.

Q The person with glasses, was he the one that was punched?

A Yes.

Q Do you see that person in the Courtroom here today?

A Yes.

Q Would you please identify that person?

A He's wearing a gray and white sweater with glasses.

THE COURT: Indicating Mr. Franza.

Q After this, where did you go?

A I went to the stationhouse.

MR. BRANCATO: At this time I would ask that the witness be shown People's Exhibit 6 which has been previously marked for identification.

(Document handed to witness.)

A Okay.

Q I ask you to look at the exhibit. Do you recognize it?

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A Yes.

Q What do you recognize it to be?

A This is the foyer where Myra was lying down when I first entered the apartment.

Q Does that fairly and accurately depict how that foyer looked and Myra was lying down on July 17, 1990?

A Yes.

Q Is that inside of apartment 1-D at 485 West 187th Street?

A Yes.

MR. SHEINDLIN: Your Honor, at this time I offer the exhibit marked for identification into evidence.

THE COURT: Show it to counsel.

(Document handed to counsel.)

MR. BRENNER: No objection.

THE COURT: Without objection.

(Document referred to above as a photograph was received and marked as People's Exhibit 6, in Evidence.)

Q I ask you to look at the same exhibit. Can you see the section of wall that Myra was writing on?

A Yes.

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Q Would you please, with the Court's permission, have the witness hold it up and point out to the jury the section of wall that Myra had written on?

MR. SHEINDLIN: With the Court's permission I ask the that witness point to the place in the exhibit where Myra was lying when Officer Aponte first entered apartment 1-D.

A Her head was over here, her legs were on this side (indicating).

MR. BRENNER: The record is barren of anything with regard to what the witness is testifying to.

THE COURT: Do you want the witness to mark these spots? Or is there a problem with marking?

MR. SHEINDLIN: No, there is no problem with marking it.

Q Would you please mark on the exhibit with a line going from the top of the exhibit to the bottom with an arrow pointing down the spot on the wall where Myra wrote. If you want, you can put it down on the witness stand.

A You want me to make an arrow?

Q I want the bottom of the arrow to point to the spot on the wall where Myra had written.

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(Witness complies.)

Q Can you also draw a circle around the portion of the floor where Myra was lying when you first entered the apartment, and please put inside of those circles the initials MF.

(Witness complies.)

MR. SHEINDLIN: I ask that the witness be shown People's Exhibit Number 5 marked for identification which has been previously marked.

(Document handed to witness.)

Q Do you recognize it?

A Yes.

Q What do you recognize it to be?

A The wall where Myra did the writing.

Q Does that fairly and accurately represent that portion of the wall - -

A Yes.

Q Give me a moment - - how it looked on July 17, 1990, after Myra had written on the wall?

A Yes.

MR. SHEINDLIN: Your Honor, I'm offering People's Exhibit Number 5 marked for identification into evidence.

THE COURT: Show it to counsel.

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MR. BRENNER: I've seen it. No objection.

THE COURT: Without objection, 5 received.

(Document referred to above as a photograph was received and marked as People's Exhibit 5, in Evidence.)

Q Looking at Exhibit Number 5, do you observe any red marks on the wall?

A Yes, there was blood from Myra on her hands, from the bleeding.

Q When did that blood get on the wall?

A When Myra did the writing.

MR. SHEINDLIN: Your Honor, at this time I have no further questions of this witness and I ask that both exhibits be published to the jury.

MR. BRENNER: Your Honor, before they are published I would like to see them as marked.

THE COURT: Well, only one has actually been marked.

MR. BRENNER: The one that is marked.

THE COURT: That's Number 6 I believe.

MR. SHEINDLIN: Yes, it is.

THE COURT: Show it to counsel.

(Document handed to counsel.)

THE COURT: Publish them.

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(At this time Exhibits 5 and 6 were published to the jury.)

THE COURT: You may inquire, Mr. Brenner.

CROSS EXAMINATION

BY MR. BRENNER:

Q Officer Aponte, can you tell me on which page the word Husband appears?

A Right here (indicating).

Q What else is written on that page?

MR. SHEINDLIN: For the record the witness is looking at Exhibit 9-B for identification.

A The word Sent. The letters M-U-S-T-A-C-H. The word White. That's also written on this page.

Q It's your testimony that H-U-S-B appears on there?

A H-U-S.

Q Officer Aponte, when you first arrived at the scene, you went through the front door of the apartment?

A Yes.

Q And you saw Mrs. Franza, Myra, lying on the floor; is that right?

A Yes.

Q Did you proceed further into the apartment? I think you said you did.

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A Yes.

Q You were instructed not to go any further but to return to Mrs. Franza?

A Yes.

Q Did you see any flowers in the apartment at the time you entered?

A I had seen when I went in further and came back I saw a box with a red ribbon.

Q Where was that?

A It was on a chair.

Q Was there anything on top of the box with the ribbon?

A I don't recall. I didn't stop to look at it.

Q Now, how long did you wait at the scene?

A Approximately 30 minutes.

Q Detectives arrived at the scene; did they not?

A Yes.

Q Did Detective Ortiz arrive at the scene Gilbert Ortiz - - withdrawn.

Do you know Detective Ortiz from the 34 Precinct?

A Yes.

Q Do you know Detective Gennaro Giorgio?

A Yes.

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Q Also from the 34 Precinct?

A Yes.

Q Did either of them arrive at the scene while you were there?

A I remember Detective Giorgio.

Q At the scene or just during the course of the night's events?

A During the course of the night's events.

Q So it's possible that you saw him back at the 34 that night; is that right?

A I don't recall.

Q Did you give a statement to either Detective Giorgio or Detective Ortiz as the first officer on the scene?

MR. SHEINDLIN: Objection.

A I was not the first officer.

MR. BRENNER: I'll withdraw it.

Q Were you and Police Officer Alexander the first officers on the scene?

A No.

Q Who was?

A There was a supervisor and his operator.

Q They had arrived prior?

A Yes.

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Q That was Lieutenant Lynch?

A Yes.

Q Do you know the name of the operator?

A No.

Q Now, when you stepped outside of the apartment in front of the building you saw an individual that you recognized; is that right?

A Yes.

Q And would it be fair to say that approximately nine days earlier you had responded to his residence?

A Yes.

Q And that residence is 644 West 185th Street?

A Let me refer to my memobook. 644 West 185th Street.

Q Now, officer, what is a UF-61?

A It's a formal complaint report.

Q When somebody makes a criminal complaint, you are required by police procedure to fill out such a report?

A Yes.

Q And that report is called a complaint report?

A Yes.

Q But in police jargon it's a UF-61?

A Yes.

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Q And the case, the complaint is given a particular number; is that right?

A Yes.

Q And you are required to fill out the name of the person making the complaint?

A Yes.

Q The address?

A Yes.

Q Their telephone number?

A Yes.

Q And what other information they impart to you about the particular crime that they are reporting?

A Yes.

Q In connection with your responding to 644 West 185th Street on July 8 you did that; did you not?

A Yes.

Q You filled out a complaint report?

A Yes.

Q And the name on the complaint report of the person reporting the crime was Nelson Dacosta; is that right?

A Yes.

Q And you reported that on your report?

A Yes.

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Q And you listed his address as 644 West 185th Street?

A Yes.

Q Now, would it be fair to say that when you are investigating a report of a crime you attempt to get as much information you can from the person reporting it?

A Yes.

Q If they claim they were victimized, somehow it's important for you to try and find out who victimized them?

A Yes.

Q And I assume, would it be fair to say that you did that in connection with Mr. Dacosta's complaint?

A Yes.

Q You filled out a complaint report in which he had reported to you that someone called him up on the telephone; correct?

A Yes.

Q And threatened - -

MR. SHEINDLIN: Objection. It's hearsay.

MR. BRENNER: Your Honor, I am certainly not offering it for its truth.

MR. SHEINDLIN: Then it shouldn't come in at all. It's not relevant at this point.

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Step down.

(At this time the witness was excused by the Court.)

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Members of the jury, we'll take a short recess. Do not discuss this case among yourselves. Take the jury out.

(At this time the jury filed out of the Courtroom.)

THE COURT: All right. Go ahead, Mr. Brenner.

MR. BRENNER: Mr. Brancato opened in this case, to no surprise, that in addition to the actual events alleged, shipping of the pipe bombs to Puerto Rico, and the quote contract killing, attempted killing on July 17, that threatening letters were sent to Josephine Mendez, Myra Franza and Nelson Dacosta, threatening everybody alive, and it's the People's theories that Dominic Franza was responsible for that.

In addition, there are all sorts of allegations of threats that Mr. Franza made to Mrs. Franza. So the overall picture here is that

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Mr. Franza is alleged to have engaged in attempted homicide and menacing conduct. I am attempting to elicit it not for the truth that someone was going to kill. I'm attempting to elicit that at a time prior to the shooting, that Nelson Dacosta's life was threatened, and that he made no mention of Mr. Franza at that time.

Mr. Brancato has stated on numerous occasions that it would come as no surprise to him that the defense here is that somebody other than Mr. Franza was responsible for this. I agree. Without divulging any more of my defense, it's going to be the defense here that these crimes in fact did occur, and that someone other than Mr. Franza was responsible.

To that end, other conduct directed towards Mr. Dacosta or Mrs. Franza or Mrs. Mendez which Mr. Franza has no involvement in is relevant. How could threats against Mr. Dacosta's life at any point within a six-month period prior to the shooting not be relevant when the People are saying all these threats are being generated by Mr. Franza? I don't believe it's premature.

I can, however, if it pleases the Court, I

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can ask this officer to return on the defense case. I just thought since the People brought out that there was a prior contact between Mr. Dacosta and the officer, that I would explore it at this juncture. If the Court feels it's premature, I will ask that the officer return on the defense case three and a half weeks from now and pursue it then. I thought this was the opportunity time to do it.

THE COURT: How did you calculate three and a half weeks from now. This case will be over, that is, the prosecution case will be over March 2. My calculation is that's less than two weeks from now.

MR. BRENNER: Judge - -

THE COURT: You just throw these gratuitous remarks as to when the People's case will be concluded, because you indicated three and a half weeks from now on the defense case. That would presuppose that the defense case would start after some three weeks.

MR. BRENNER: Judge, I apologize. If the only thing that the Court can glean from my statement is the chronology - -

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THE COURT: That is the most egregious aspect of your statement.

Now we'll deal with the prosecutor's response.

MR. BRANCATO: Your Honor, at this point what he's trying to elicit from Officer Aponte is what Mr. Dacosta told Officer Aponte. And in that regard it's naked hearsay.

THE COURT: When?

MR. BRANCATO: When she took a report from him.

THE COURT: At some prior date?

MR. BRANCATO: Eight or nine days prior to the shooting. That in and of itself is naked hearsay and inadmissible.

THE COURT: He's not offering it for the truth of it.

MR. BRENNER: Certainly not.

THE COURT: This is the information he imparted to a police officer.

MR. BRENNER: I don't know, Judge, but what's good for the goose is good for the gander, to borrow from the vernacular. The Court has instructed the jury that it's not offered for its

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truth. I'm not certainly offering Mr. Dacosta's statement for its truth.

MR. BRANCATO: We are going to call Mrs. Franza to testify in this case. And if the Defendant wishes to place before this jury what Mr. Dacosta may have told this officer, then the Defendant can call her.

THE COURT: They may very well.

MR. BRENNER: He can call Mr. Dacosta to testify to it. Admissibility of this evidence has nothing to do whether Mr. Dacosta testifies or not.

MR. BRANCATO: Let me just say this: He has squawked - - well, that's a bad choice of words, but he has argued at the bench that he wanted you to tell the jury at the time they heard what Mrs. Franza wrote to the police, and he went at length the other day of saying that he was going to come up with a limiting instruction that he believed you should give the jury. I might indicate Mr. Brenner did submit something.

MR. BRENNER: That's correct, your Honor.

MR. BRANCATO: It seems he went to great length to have the jury believe that.

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THE COURT: He fulfilled that promise.

MR. BRANCATO: That it was not offered for the truth of what was asserted.

In that regard then it seems to me that in - - I could jump ahead, he's going to say Mr. Dacosta told the police that someone was threatening his life over the telephone, a letter was sent to Mrs. Mendez at a future date, and he is going to ask that jury to believe that he was in fact getting telephone calls, he's going to ask this jury to believe that someone had threatened him over the phone, and I may point out to the Court at this point that whether or not Mr. Dacosta got any telephone calls during that time is irrelevant to this case unless he can somehow connect it and show that it was someone other than the Defendant.

THE COURT: I didn't follow that last part. It ran right by me.

MR. BRANCATO: If Mr. Dacosta had been threatened by anyone weeks before or months before, it would be irrelevant to the proposition before the jury as to whether or not this Defendant sent someone to shoot his wife and his

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mother-in-law.

THE COURT: That would be very good, but for the fact that it's the People's position that consistent with the conduct vis-a-vis the mother-in-law and the wife, likewise the same person who perpetrated those acts in effect perpetrated whatever the threats or the acts against Mr. Dacosta.

MR. BRANCATO: Can the Defendant truly say at this point he's not offering what Mr. Dacosta told the officer for the truth of the matter asserted?

MR. BRENNER: Absolutely. I am offering it for the fact that nine days before this shooting Nelson Dacosta made a complaint and did not mention Mr. Franza's name.

THE COURT: For what purpose is it being offered?

MR. BRENNER: Fixing the point in time, Judge, because most of these complaints - -

THE COURT: To fix the point in time, we could fix that there was a conversation.

MR. BRENNER: No, Judge. Specifically the complaint was of a threat. Offering it for the truth, your Honor, would be that someone in fact

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was going to kill Mr. Dacosta.

THE COURT: The objection is sustained. It is not being offered merely for the truth at this point because if it's to fix the time, it can be done in many a ways without eliciting the substance of the complaint to the officer.

MR. BRENNER: Your Honor - -

THE COURT: It serves no other purpose.

MR. BRENNER: Your Honor, you have just - -

THE COURT: Don't argue back and say with respect to the statements by Mrs. Franza that the Court ruled were being admitted solely for her belief and her state of mind. The jury was cautioned not to accept it as the truth or its relevancy as to the guilt or non guilty of the Defendant in this case. But that is not the equal of the Dacosta complaint. What purpose does it serve? What purpose are you offering that for?

MR. BRENNER: I'm offering it for relevance for the defense theory of the case. Relevance is not determined solely - -

THE COURT: You're offering it for the truth.

MR. BRENNER: May I finish?

THE COURT: All right.

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MR. BRENNER: No. I beg to differ. The fact of an utterance is still relevance to the defense theory of the case. Relevancy is not determined upon whether it has something to do with what the prosecution is alleging, pure and simple. That's not what governs.

THE COURT: I didn't make that assertion.

MR. BRENNER: How could the fact that Nelson Dacosta who was a player in these events by the virtue of the People's opening was threatened nine days earlier before a shooting.

THE COURT: Just so that you are in no way prejudiced, if it should develop as we see the People's case unfold with respect to Nelson Dacosta, it may or may not change the situation. And you may have that opportunity, and Officer Aponte will be available to you for the defense case.

But at this point, at this point, to allow you to pursue that line of questioning to elicit that information I believe is improper, and accordingly, the objection is sustained.

MR. BRENNER: Move for a mistrial, your Honor.

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THE COURT: On what basis?

MR. BRENNER: On the basis that the Court's evidentiary rulings to this point have been slanted to the prosecution.

THE COURT: Denied. Bring in the panel.

MR. BRENNER: Exception, your Honor.

THE COURT: You know that's unnecessary.

MR. BRENNER: Well - -

(At this time the jury filed into the Courtroom.)

THE COURT: Have the witness take the stand.

(At this time the witness, P. O. Carmen Aponte, resumed the witness stand.)

BY MR. BRENNER:

Q Officer, during the course of the night of July 17 up until the time you left the 34 Precinct at the end of your tour, did you relate to Detective George or Detective Ortiz your prior contact with Mr. Dacosta?

A I recall mentioning, but who exactly which of the detectives, I don't remember.

Q You mentioned it to a detective but you don't know who it was?

A No.

Q Did any detective ever contact you

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subsequently for additional information?

A No.

Q Did any detective ever ask you for your reports in connection with that matter?

A No.

Q Did you prepare any reports in connection with this matter?

A I might have done the complaint reports, as far as the information and details, name, address.

Q Anything further?

A No.

Q The person with the glasses who you saw struck at the scene?

A Yes.

Q Had you ever seen him before?

A No.

MR. BRENNER: Thank you. I have nothing further.

MR. SHEINDLIN: No redirect.

THE COURT: You are excused.

(At this time the witness was excused by the Court.)

THE COURT: Call your next witness.

MR. BRENNER: May we approach?

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THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

MR. BRANCATO: People call Police Officer Brenda Alexander.

P. O. B R E N D A A L E X A N D E R, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

THE COURT OFFICER: State your name, shield and assignment.

THE WITNESS: Police Officer Brenda Alexander, Shield 3375, 34 Precinct.

Q How long have you been a police officer?

A Five and a half years.

Q Where have you worked during the course of those five and a half years?

A Well, I worked the last five in the 34, and the first year in the Bronx.

Q So the jury knows, could you tell them what the geographical boundaries are of the 34 Precinct?

A It starts at West 155th Street and it goes to

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218th Street, river to river.

Q On July 17, 1990, were you working?

A Yes, I was.

Q What were your duties?

A I was assigned to a fixed post on 186th and Amsterdam, at Yeshiva University.

Q What is a fixed post?

A It's a booth.

Q Did you have a partner?

A Not exactly, but there is another booth on the other side, so I guess you can say we were partners for the evening.

Q Who worked in the other booth?

A Officer Aponte.

Q Were you and Officer Aponte in uniform on July 17, 1990?

A Yes, we were.

Q Drawing your attention to approximately 7:20 p.m. on July 17, 1990, can you tell the members of the jury what occurred?

THE COURT: What tour of duty were you working on this day, July 17, 1990?

THE WITNESS: 4:00 to 12:00.

THE COURT: Go ahead, Mr. Sheindlin.

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Q What occurred at this time and date?

A A call came over from the dispatcher that someone had been shot and at 485 187th Street.

Q What did you do?

A We responded over there.

Q When you say we, who is we?

A Myself and Officer Aponte.

Q Approximately how much time passed between the time that you received the call over the radio and the time that you got to the address?

A About five minutes.

Q What did you do? Did you go into an apartment?

A Yes.

Q What apartment specifically?

A Apartment 1-D.

Q Tell the members of the jury what you observed when you entered apartment 1-D?

A When we responded to apartment 1-D and arrived and walked into the apartment, there was a young woman in the nude lying on the floor in the hallway. She was shot in the face and she was bleeding.

Q When you say shot in the face what exactly did you observe with respect to her face?

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A There appeared to be a hole in her face with blood coming out.

Q What did you then do?

A I just stood at the door in the hallway.

Q What position was this person in who was on the floor?

A They were lying face up.

Q One person was lying face up; correct?

A Yes.

Q Then what occurred?

A Officer Aponte proceeded past the victim lying on the ground, towards the livingroom. She was going towards the bedroom, but our supervisor told her not to enter.

Q Did you actually go into the apartment at all, pass through the hallway?

A Not at that point.

Q What occurred next?

A Next the victim appeared to be motioning towards the wall. Well, Officer Aponte came, walked back towards the victim that was on the floor, and she appeared to be motioning on the wall as if she wanted to write something.

Q The victim; correct?

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A Yes. And then one of the officers gave her something to write with?

Q What did you observe the victim then do?

A She wrote something on the wall.

Q Could you observe from where you were standing what she was writing on the wall?

A Not from where I was standing. Later on I was able to see what was written but not at that particular point from where I was standing?

Q For approximately how long did the victim write on the wall?

A I would say - - well, on the wall maybe a couple of seconds. And then she was given some sort of pad or whatever where she further wrote other words.

Q What position was the victim in while she was writing words on the pad?

A She was still lying down.

Q And for how long did the victim write words on the pad?

A Approximately three to five minutes.

Q Could you read what the victim was writing on the pad as she was writing on the pad?

A No, I could not.

Q Where were you located while the victim was

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writing on the pad?

A I was still pretty much close to the door, the entrance of the doorway.

Q After the victim had finished writing on the pad what occurred next?

A The paramedics arrived.

Q What did you do?

A I pretty much stood outside - - well, still in the doorway or whatever. They aided her or whatever and then she was removed from the apartment.

Q What were your duties while all this was going on? You said you were in the hallway?

A Basically my duties were to remain outside and make sure that nobody else entered.

Q After the paramedics had arrived what occurred?

A I guess they aided her, put her on the stretcher and then she was removed from the apartment.

Q Then what did you do?

A Okay. I still had to remain at the scene until detectives, crime scene took a look at the apartment. And after that, I was given some property to voucher.

Q How many people did you observe taken out of

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the apartment?

A Two.

Q Did you know where the - - withdrawn.

You said you were given property to voucher; is that correct?

A Yes.

Q What property were you given to voucher?

A Okay. I was given two spent bullets that was found in the apartment, and a box of flowers with a note on it.

Q The two spent bullets that were handed to you, who handed them to you?

A Detective Osborn.

Q After Detective Osborn handed those bullets to you what did you do then?

A I went back to the precinct and I vouchered them.

Q Those two bullets, were they in your care, custody and control from the time that Detective Osborn handed them to you until the time that you vouchered them?

A Yes, they were.

Q Do you recall what voucher number you assigned to those two bullets?

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A If I can refer to my memobook?

Q Please.

A Okay. 877028.

Q Was there a letter before that?

A D as in David.

Q What was the other property that was given to you to voucher?

A A box that the flowers came in and there was a letter attached to the box, which was also vouchered.

Q From the time that that box with the letter attached was handed to you until the time that you vouchered it, was it in your care custody and control the entire time?

A Yes, it was.

Q What is the voucher number that you assigned to the box and the letter that was attached to it?

A David 877027.

Q Both of them have the same voucher number; is that correct?

A Well, it was two separate - - yes, the box and the letter.

Q From the time that you first entered 485 West 187th Street until the time that you exited 485 West 187th Street how much time passed?

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A About an hour and a half to an hour and 45 minutes.

Q When you first left 485 West 187th Street what did you do?

A I returned back to the precinct.

Q Immediately?

A Yes.

MR. SHEINDLIN: I ask that the witness be shown what has previously been marked has Plaintiff's Exhibit 8 for identification.

(Document handed to witness.)

Q I ask you to look inside People's 8 marked for Identification and inside any other envelopes that are inside of it. Did you have time to look at it?

A Yes.

Q Looking at People Exhibit 8 marked for identification do you recognize it?

A Yes, I do.

Q And what do you recognize it to be?

A The property that I vouchered on July 17.

Q Specifically what property?

A Oh, the spent bullets that I was given by Detective Osborn.

Q Is there also a piece of plastic contained

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within People's Exhibit 8 marked for identification?

A Yes, that's also the envelope that I put the spent rounds in that they were vouchered with.

Q When you first vouchered the contents which are in People Exhibit 8, which you are holding at this time, explain how you voucher them, what you did.

A I put the spent rounds - - this used to be an envelope, and it was sealed, and then there was also a voucher that was attached to it, and it was entered into the property office at the 34 Precinct.

Q The piece of plastic that you are holding in your hand right now from People Exhibit Number 8, do you recognize that?

A Yes.

Q What is it?

A This is the envelope that the property was entered into and my handwriting is on it, the date, the precinct and the voucher number.

Q Are those the same exact markings that were put on it back on July 17, 1990?

A Yes, it is.

MR. SHEINDLIN: I offer People's Exhibit 8 into evidence, your Honor.

MR. BRENNER: No objection.

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THE COURT: Without objection People's 8 received.

(Document referred to above as an envelope containing spent rounds was received and marked as People's Exhibit 8, in Evidence.)

MR. SHEINDLIN: I also ask that the witness be shown People Exhibit Number 7 marked for identification.

(Document handed to witness.)

Q Do you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A The box and the letter that was attached to the box that the floors were in.

Q It's a photograph of them; is that correct?

A Yes.

Q Does the photograph which you are holding fairly and accurately depict how that box and the letter that was attached to it appeared on July 17, 1990, when it was handed to you?

A Yes, it does.

MR. SHEINDLIN: Your Honor, at this time I'm offering People's Exhibit Number 7 into evidence.

MR. BRENNER: Objection. May I have a voir

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dire?

THE COURT: Voir dire.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q Officer Alexander, where is the box?

A That is the box.

Q No. This is a picture of the box.

A I imagine it's still at the property clerk.

Q Well, the bullets are here; is that right?

A A-hum.

Q You vouchered the bullets?

A Yes.

Q And then somebody asked to you bring them to Court; is that correct?

A Right.

Q And you got?

A I didn't pick them up.

Q But they were given to you?

A Right.

Q The box was not?

A No.

MR. BRENNER: Your Honor, I don't know what the offer of this picture is, but if it's in lieu of the box, I object.

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MR. BRANCATO: It's not in lieu of the box.

MR. BRENNER: Then no objection.

THE COURT: Without objection, People's 7 received.

(Document referred to above as a photograph was received and marked as People's Exhibit 7, in Evidence.)

MR. SHEINDLIN: People have no further questions at this time.

We ask that the exhibits just entered into evidence be published to the jury.

MR. BRENNER: Your Honor, I have an objection. If I may proceed with cross, and then the exhibits can be published before the witness leaves the stand.

THE COURT: We like to get the exhibits, and then we will have the cross following.

MR. BRANCATO: The one thing we ask is that there are two bullets in two separate envelopes, that the envelopes be passed around separately to make sure that no bullet gets switched.

THE COURT: All right.

(Exhibit 8 was published to the jury.)

THE COURT: Mr. Brenner.

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CROSS EXAMINATION

BY MR. BRENNER:

Q Officer, you were at the scene for approximately two hours; is that right?

A Yes.

Q Would it be fair to say that your duty vis a vis your position outside the door was to preserve the scene?

A Yes.

Q When you say preserve the scene, you told us it was to prevent others from coming into the apartment?

A Right.

Q And would that be in part so that evidence would not be disturbed?

A Yes.

Q And possibly clues with regard to what had happened and who was involved would not be disturbed?

A Yes.

Q Were you present when the Crime Scene Unit arrived?

A Yes, I was.

Q The Crime Scene Unit, so we're clear, is the unit that comes and investigates the scene of the crime looking for evidence and for clues; is that right?

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A Yes.

Q They are specially trained in that, those officers?

A Yes.

Q And again, your job was to protect the scene until they could come and do what they do?

A Yes.

Q Now, were you present during their examination of the scene?

A I was not in the apartment, I was on the outside.

Q Part of their examination of the scene included the outside; did it not?

A Yes, it did.

Q They dusted for fingerprints?

A Yes.

Q And again, just so we're clear, that involves the leaving of dust on surfaces to determine whether any fingerprints are present?

A Yes.

Q Were you aware whether they recovered any fingerprints?

A Were they covering?

Q Recovered any? Were they able to lift any?

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THE COURT: Did they find any fingerprints?

THE WITNESS: I don't know.

Q With regard to the box, the flower box that you have identified as, I believe it's People's 7, did you observe that prior to the crime scene unit arriving?

A Yes.

Q Where was it when you observed it?

A I think it was on - - as far as I can remember, it was on the kitchen table, the box.

Q Well, you've identified People's 7 as fairly and accurately representing what?

A The box that was delivered to the victim's apartment that day and the property that I vouchered at the end.

Q Well, the fact that this box was delivered is secondhand information to you.

A Okay.

Q I mean, well, if it isn't, tell me it isn't.

A Yes.

Q You were told that that's how the box came to be in the apartment?

A Yes.

Q When you said this box fairly and accurately represents something, was it the way the box appeared in

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the apartment? Was it the way the box appeared when it was handed to you to voucher? What did you identify it as fairly and accurately representing?

A I'm not sure I understand what you mean.

Q Well, would it be fair to say that this box shows the flower box on the chair?

A Yes.

Q And it's a leather chair or whatever kind of finish that is; right?

A A-hum.

Q And there is a blue garment hanging over the chair as well?

A Yes.

Q Did you observe that box on that chair at the scene at 485 West 187th Street on that day?

A When I arrived?

Q Yes.

A No.

Q Where was it?

A I believe it was on the kitchen table from what I can remember.

Q And at any time during your stay at the apartment did you see flowers?

A Yes.

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Q Where were they?

A They were in the box.

MR. BRENNER: I'm going onto ask that this be Defendant's Exhibit A for identification.

(Document referred to above as a photograph was received and marked as Defendant's Exhibit A, for Identification.)

Q Officer, you do you recognize that?

A It looks like the flowers that were there.

Q Does that picture fairly and accurately represent the flowers as you observed them on the night of July 17, 1990, sometime between 7:30 and 9:30?

A Well, I know they were roses. That's all I can tell you.

Q So to that extent that picture represents those flowers?

A Yes.

Q How about where they were, does that represent where you saw them?

A I don't recall. I don't recall.

Q Do you not recall where you saw them or you don't recall where they were in that picture?

A In that picture.

Q You saw them in the box?

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A Right.

Q And when was that?

A When I arrived.

Q The box was opened?

A Well, the top wasn't completely off but it was sort of open, yes.

Q Showing you again People's 7, which the People moved into evidence and which you said fairly and accurately represents the box that you vouchered, that's not the condition that you just attested to of the box; is it? That box is completely closed; is it not?

A When I vouchered it, it was closed, yes.

Q In that picture it's closed and wrapped?

A Yes.

Q So would it be further fair to say that that picture is not a true and accurate picture of the way the flowers were and the box when you arrived on the scene?

MR. BRANCATO: Judge, it's not being offered for that purpose.

MR. BRENNER: I don't care what purpose it's being offered for. I'm asking the question.

A I don't recall exactly how the flowers were.

Q Let's direct your attention to the note on top of the box.

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A Okay.

Q Did you voucher the note and the box separately, officer?

A No. I vouchered them on the same voucher.

Q Actually what I mean was physically were they together or did you have two separate items when you walked into the property clerk's room, a note and a box?

A They were still attached.

Q How?

A I don't recall. I know the note was still on top of the box. Exactly whether they were stapled or taped, I don't know.

Q In any event, your recollection is that the note was not loose and separate from the box?

A Right.

Q Either at the scene; correct?

A A-hum.

Q Or when you vouchered it.

MR. BRANCATO: She didn't answer yes or no.

THE COURT: I take it a-hum means yes?

THE WITNESS: Yes.

THE COURT: Try to give us a yes, where it's indicated.

Q Either at the scene or back at the property

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room, they were together?

A Yes.

Q Now, would it be further fair to say that that note is in a carbon copy condition or something that looks like a carbon copy?

A According to this picture.

Q There is a top sheet, a carbon underneath and what looks like another piece of paper underneath that?

A Yes.

Q And that both of - - all of those sheets are somehow attached to the box?

A Yes.

Q Now, officer, did you go into the apartment at any time during your two-hour stay at the scene?

A Yeah. I went in as far as the living room.

Q When was that?

A After the bodies, the two victims were removed.

Q You went in and were you instructed to resume your position at the door?

A Yes.

Q Did you have anything to do with the finding of the spent shells?

A No.

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Q Or anything to do with the finding of the flowers?

A No.

Q Or the box?

A No.

Q Or anything to do with the photographing of them?

A No.

Q So your function was at that point to secure the scene and to voucher the evidence?

A Yes.

MR. BRENNER: Thank you. I have nothing further.

THE COURT: Any redirect?

MR. SHEINDLIN: No redirect.

THE COURT: You may step down. You are excused.

(At this time the witness was excused by the Court.)

THE COURT: Mr. Brancato, if memory serves me correct, you don't have another witness.

MR. BRANCATO: That's correct, your Honor. For today.

THE COURT: Obviously. In that case, ladies

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and gentlemen, we will recess at this time until tomorrow morning at 10:30.

You'll have your witness here 10:30?

MR. BRANCATO: Yes, your Honor.

THE COURT: At 10:30. Do not discuss this case amongst yourselves nor allow any third party to discuss the case with you. Have a good evening we'll see you tomorrow morning at 10:30.

Take the jury out.

(At this time the jury filed out of the Courtroom.)

THE COURT: Mr. Franza, what is it?

THE DEFENDANT: Basically your conversation with Mr. Heller, I don't know if what he told you was basically what he had told me. If it was pertaining to him purchasing the minutes of my behalf.

THE COURT: All I told Mr. Heller was that he had an agreement with you, and that if he felt by virtue of your agreement you were entitled to some restitution of fee or some adjustment, that he should work that out with you . He had several conversations with you during the course of that day and he informed me that he could not resolve

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it with you. I do not intend - - there's other forums and other places. It's not my function to get involved in that.

THE DEFENDANT: I understand. I'll talk with him personally. That's what I wanted to know.

THE COURT: All right.

MR. BRENNER: I have a further ex parte application.

THE COURT: All right. Put the Defendant in.

(At this time the Defendant was remanded.)

THE COURT: Mr. Brenner.

MR. BRENNER: Your Honor - -

THE COURT: This is sealed.

MR. BRENNER: Earlier this morning, your Honor, I submitted some subpoenas for the Court's signature.

THE COURT: Some of which have been signed.

MR. BRENNER: The off-the-record discussions I have had with the Court lead me to believe that the concern of the Court is for those subpoenas that deal procedurally with Mr. Nelson Dacosta.

THE COURT: Let me just do it - - let me break it up so you can streamline your argument. With respect to those broadshots as to the task

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force investigating Dominicans, those I decline to sign. There are two of those.

Then you have a series I believe of three, which refer to telephone calls. I don't know if they do keep such a record by the way of local calls.

MR. BRENNER: Yes, they do, because the prosecution got them for my client.

THE COURT: You call the telephone company and they will give you a list of calls you have made? Is that areas or something?

MR. BRENNER: No, it's by the actual outgoing call.

THE COURT: Then you have the one with respect to the neurological psychiatric record of Nelson Dacosta's, and the third one is with - - this one I did sign. This is for the records, which I did sign so that you have.

Let me see what else you got. So the one in issue, these I'm going to sign for you. This is with respect to Mr. Reyes and Mr. Rivera. Those I'm signing for you.

So basically you are getting everything except that's why I tell you to address yourself,

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if you wish to address yourself on the question of the task force and the one with the personal information of Mr. Dacosta. The others you need not go ahead.

MR. BRENNER: Your Honor, with regard to Mr. Dacosta, my offer of proof is the following: The theory of the prosecution in this case is that Dominic Franza was a one man gang of vengeance against the entire Dacosta-Mendez family. My defense in this case is that it was not Mr. Franza, that it was someone else, and the someone else was pursuing the family Dacosta Mendez because of Nelson Dacosta.

My offer of proof along those lines is I am informed in good faith that Mr. Dacosta was a drug addict and a drug dealer. With regard to the drug addiction, he was in Columbia Presbyterian Hospital in a drug rehab center. That is in police reports.

In addition, Mrs. Franza testified in the Grand Jury and made some oblique reference to the fact that he was on drugs and that he was cleaning himself up.

I have information from my client that on

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numerous occasions he paid out sums of money in cash to cover Nelson Dacosta's drug-related debts.

I am further informed that his wife Miss Rubles fled from Manhattan, relocated in Chicago because she was afraid for her life from drug dealers who were trying to collect money from Nelson Dacosta.

Along those lines, there is gleaned from the police reports, in which the prosecution tends to offer as proof of my client's involvement, a telephone threat reported by Nelson Dacosta on July 8, 1990, a visit by two gentlemen described as police officers to the Mendez house, looking not for Myra Franza, but for Nelson Dacosta on July 16, 1990, and then of course July 17, 1990.

THE COURT: Looking for who on the 17th?

MR. BRENNER: Nelson Dacosta, at Mrs. Mendez' home. She reported that to the police.

Then of course there is the shooting itself and the various letters and threats made again to all members, including Mr. Dacosta, and a certification made in those letters of property taken by Mr. Dacosta belonging to the author.

The prosecution's theory is that this was a

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ruse by Mr. Franza and that's well and fine.

The defense theory is this was indeed not a ruse, that the evidence here is consistent with the defense theory as with the prosecution theory, and we'll attempt to prove that to the satisfaction of the jury.

Along those lines if Mr. Dacosta was to take the stand and deny any drug involvement, I would need the medical records to establish his condition and whatever statements he may have made therein. I'm not adverse to the Court reviewing those records.

THE COURT: In camera. Let me just put this to you. At this point, and I'm not using your estimate of three and a half weeks, but we are some two weeks away from the defense case. Now, I recall that in open Court Mr. Brancato represented that he had no intention of calling Mr. Dacosta.

MR. BRENNER: He's on the witness list.

THE COURT: He's there but I believe he said he would not, but that's of course his prerogative. I would prefer, before I pass on your application, to have the time now, if it's determined that Mr. Dacosta is going to be a

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witness of the prosecution, that will accelerate my response to you.

MR. BRENNER: I can appreciate the Court's position.

THE COURT: If Mr. Brancato represents he's not going to call him and he's going to be a defense witness, then I will have that time to determine. In any event, you will not be prejudiced time-wise.

MR. BRENNER: My own reservation is that if those subpoenas turn up materials that were easily obtainable to an investigating detective, I would want to cross-examine both detectives Giorgio and Ortiz along those lines.

THE COURT: That raises another question, because I have already considered that possibility.

From what I've learned, again, anything can change, Dacosta is not an event witness where he says, "So-and-so did it because I saw him, I observed him or he discussed the plan." Whatever his feelings are, he has feelings about how this comes about, or these are what his feelings are, therefore the information that the detectives got,

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they did not rely on just Dacosta because he made a statement to them somewhere along the line, "I know who it is or I think I know," or the fact that he got into an altercation with the Defendant or something, all that is not the basis or the foundation of the police activity in apprehending your client.

MR. BRENNER: That's not what I mean.

THE COURT: What purpose does it serve if you were to ask the detectives they were aware of Dacosta's background at the time they elicited information?

MR. BRENNER: Because Detective Ortiz for whatever reasons let slip that Mr. Franza told them that he thought that this was drug related, that this was related to Dacosta through drug dealers. If there was information that could have substantiated that if there was another half of this investigation to consider, and that they were intent upon Mr. Franza as the prime and only suspect, isn't the jury to know that? And I'm entitled to have the jury know that.

THE COURT: Obviously this event takes place in July and your client is arrested in February

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the following year. It doesn't seem like somebody took some precipitous action just to apprehend your client.

MR. BRENNER: What I want to know is whether they took action any other direction at all.

THE COURT: Well, I think - -

MR. BRENNER: A pipe bomb shows up at Nelson Dacosta's house. Now, I'll be candid with you, at the Defendant's own peril, I'm going to open the door on that, because I believe the only way to resolve this is to bring it before the jury.

THE COURT: It's a dual-edged sword. It may inure to your benefit or it may not.

MR. BRENNER: But if at that point in time they had information from whatever source or it was learned that Nelson Dacosta was in big trouble with drug dealers, I want the jury to know that all they looked - - they didn't look any further than 3320 Barker Avenue. I want the jury to know that. And I think I have a right to argue that to the jury and present facts along those lines.

Now, this officer already testified that she told some detective that seven days, nine days before, that Dacosta had got a threat, and again,

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the record is barren on this at this point.

THE COURT: Rather than belabor the point now, what I will do tomorrow, not intending to tip your hand, I will go over the witness list with Mr. Brancato and you, and I want some representation from him as to which witnesses are or definitely not being called. And the reason I'm doing it that way, as opposed to asking you, "Are you calling so and so," I won't do that. So I will make inquiry as to the witnesses.

Once we get that list, if he says definitely he's calling that witness, that's dispositive of the problem. If he's definitely not calling him, then I have to deal with that. But I think we can - - these subpoenas you have in there, they are signed. The remainder, the ones that I'm rejecting are rejected unless you persuade me to the contrary. Dacosta is still in limbo.

MR. BRENNER: Dacosta's criminal record, I don't think that requires any great nexus.

THE COURT: I don't think so.

(At this time the proceedings were concluded and adjourned to February 19, 1992, at 10:30 a.m.)

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CRIMINAL TERM : PART 32

- -x

THE PEOPLE OF THE STATE OF NEW YORK : Indictment No. 11987/91

- against - :

DOMINIC M. FRANZA, : Att Murder 2

Defendant. :

- -x

February 19, 1992
111 Centre Street
New York, NY 10013

B e f o r e:

HONORABLE PAUL P. E. BOOKSON,
Justice, and a Jury.

A p p e a r a n c e s:

(Same as previously noted.)

MINUTES OF JURY TRIAL

Reported by:
William L. Kutsch
Senior Court Reporter

-oOo-

THE CLERK: Case on trial.

THE COURT: Get the jury.

(At this time the jury filed into the Courtroom.)

THE CLERK: Case on trial, People versus Dominic Franza. The Defendant, his counsel and

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the assistant district attorney are present.

THE COURT: Very well. Good day, ladies and gentlemen. We'll proceed now.

Mr. Brancato, call your next witness.

MR. SHEINDLIN: Your Honor, the People are calling Leonardo Diaz.

L E O N A R D O D I A Z, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

THE COURT OFFICER: State your name and county of residence.

THE WITNESS: Leonardo Diaz, Manhattan.

MR. SHEINDLIN: May I inquire?

THE COURT: Yes.

Q Where specifically do you live?

A 485 West 187th Street, Apartment 1-B.

Q Did you live there on July 17, 1990?

A Yes.

Q How long have you lived at 485 West 187th Street?

A More than two years.

Q So you live in 1-B as in boy; is that

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correct?

A Yes, sir.

Q Do you work?

A Yes, I do.

Q What is your job?

A I work as a taxi driver.

Q How long have you been working as a taxi driver?

A More than three years.

Q Are you married?

A Yes, I do.

Q What's the name of your wife?

A Giovani Romero.

Q Do you have any children?

A Yes, one daughter.

Q How old is she?

A She is going to be two now.

Q Do you know somebody by the name of Josephine Mendez?

A Yes.

Q Do you know where Josephine Mendez lives?

A Yes.

Q Where?

A 485 West 187th Street, Apartment 1-D as in

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David.

Q Does she have a husband?

A Yes.

Q What is his name?

A Cecilio Mendez.

Q Are you friendly with the Mendezes?

A Yes.

Q Do you know if they have any children?

A Yes.

Q How many children?

A What I know is three.

Q What are their names?

A Nelson, Carlos and Myra.

Q Back on July 17, 1990, did you know Myra?

A Yes.

Q You have met her prior to July 17, 1990?

A Yes.

Q Do you know someone by the name of Hilda Ferreira?

A Yes.

Q Who is she?

A She is the super of the building.

Q The building you live in; correct?

A Right correct.

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Q Where does Hilda Ferreira live?

A She live right in the basement.

Q Do you know if she has a daughter?

A Yes.

Q What is her daughter's name?

A The daughter name is Vicky.

Q Do you know Vicky's last name?

A No, I don't.

Q I would like to draw your attention to July 17, 1990, to the approximate time of seven o'clock in the evening. Would you please tell the members of the jury what occurred at this time and on this date?

A Okay. I was working the full day that time as a driver, and I went to park my car approximately seven o'clock that day. And finally when I find a spot, I park my car, and I went back to my apartment.

And when I was getting into my apartment, I find my wife talking by the phone, and she was calling me and saying that Vicky - -

MR. BRENNER: Objection.

THE COURT: Don't tell us what someone else told you.

MR. SHEINDLIN: This will explain why he did what he did next. It's not for the truth.

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MR. BRENNER: Objection.

THE COURT: Let's not argue. Just tell us what you did.

A So my wife told me - -

MR. BRENNER: Objection.

THE COURT: Don't tell us what someone else told you.

Q Did you have a conversation with your wife?

A Yes.

Q Immediately after having a conversation with your wife - -

A The conversation was - -

Q No. I'm not asking you what the conversation was. I'm asking you immediately after the conversation with your wife did you go anywhere?

A Yes. I went to find because the super called my wife to tell her that - -

MR. BRENNER: Objection. Move to strike.

THE COURT: Don't tell us what happened with somebody else, just what you saw, what you heard, what you did; do you understand?

THE WITNESS: Correct. And - -

Q Let me ask you a question. Was your wife on the telephone when you entered the apartment?

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A Yes.

Q Immediately after you had a conversation with your wife, without telling us what she said, where did you go?

A I went next to the door to the family, to the Mendez family to find out what's going on, what was happening at that time.

Q What apartment was that?

A Apartment 1-D as in David.

Q What did you observe about the Mendez door at the time?

A The door was a little open, a little bit open.

Q Could you see inside the apartment from the hallway?

A Well, I start calling Cecilio because I know him, and I was thinking there was something happened, because the door was opened.

And when I went there, I start screaming Cecilio, Cecilio, Cecilio. Nobody answered me.

And I started calling Josephine, Josephine, Josephine. Nobody answered.

So then I started calling again and again, and I said something might have happened here. So I pushed the

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door a little bit more, and I started to scream a lot, Cecilio, Cecilio. Again, nobody answered.

Finally I found the body totally naked full of blood, bleeding, and I cannot even recognize. She was crying for help, "Help me, please. I die. Somebody shoot me." That's the only thing I saw.

Q Did you observe what she was doing when you first saw this person?

A Well, I saw her like walking like a baby on the floor full of - - bleeding a lot, and I cannot recognize her. I not even know if it was Josephine or Myra, but she was total unrecognizing.

Q What part of the apartment was this?

A Right up to the door on the right side, the hall, the right side. When you get into the apartment she was lying down on the floor walking like a baby, naked.

THE COURT: When you say walking like a baby, like on her hands and knees?

THE WITNESS: Right. Hands and knees.

Q What did you then do?

A I surprised and I get nervous because I never saw a body like that, totally unrecognizable. She was almost dying, very bad condition.

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So I went back to tell my wife what I saw. And we get nervous right away. And we not even know what to do. And then the police came at that time.

Q Where were you when the police came?

A I was outside the building, outside the door. Then I try to went back to my wife to tell her what I saw.

Q After the police came where did you go?

A I not even - - I stay in my apartment and she was asking me, you know, questions, report.

Q So you were speaking to police officers?

A Yes.

Q Did you ever that evening go back into apartment 1-D?

A That evening? No, I didn't.

Q Did there come a time when you saw emergency medical technicians enter your building?

A Yes. I saw only Josephine body when they take her out.

Q Did you see the other person taken out?

A No.

Q What exactly did you see when you observed Josephine's body being taken out?

A She was very bad, and one of her ambulance

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people saying she is not going to make it.

MR. BRENNER: Objection.

THE COURT: Sustained. Don't tell us what somebody else said.

THE WITNESS: But what I heard, he said - -

MR. BRENNER: Objection.

THE COURT: Don't tell us what somebody said.

Q Just tell us what you saw, not what you heard.

A Okay. And I saw them lay down the little thing they put on the body and with the mask, oxygen mask, and I look her very bad, like dying, a-ha, a-ha, almost dying.

Q Did you see the person that you observed in the hallway when you entered 1-D, did you see that person taken out of the apartment?

A The people with the ambulance, yes.

Q So you saw two people taken out of the apartment or one?

A Two.

MR. SHEINDLIN: Your Honor, at this time I have no further questions.

THE COURT: Mr. Brenner, the witness is yielded.

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MR. BRENNER: Thank you, your Honor.

CROSS EXAMINATION

BY MR. BRENNER:

Q Mr. Diaz, immediately before you entered the building - - withdrawn.

Did you go in through the front entrance to the building?

A Well, yeah, where the hall start, right there, when I saw the body.

Q No. What I mean is, does the building have a front entrance that you enter from the street?

A Yes.

Q And is there a little lobby area there?

A Yes.

Q Do you have to use a key to get into that door?

A Yes.

Q It's not open to the general public. You have to use your key to get into the front door of the building; correct?

A Correct.

Q Or are there buzzers as well?

A Yes, there were.

Q So somebody can buzz you into the building?

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A Yes.

THE COURT: Is there an intercom where you can speak?

THE WITNESS: No, you cannot speak. But when you ring the bell, without talk they open the door like that.

Q Somebody will come down and see who it is, or you look out the window, but you can't just walk into the lobby; can you?

A No, not really. It never works. In that building you cannot talk in it. You cannot listen to nobody.

Q Now, before you went to the door, after you parked your car and you were on the street, did you see anybody coming out of the building 485?

A I didn't.

Q You did not. Did you see anybody running from the general vicinity of the building?

A I didn't.

Q How much time passed between when you first came into the building from the street and you went to the apartment 1-D, how much time was it?

A Seven minutes, no more than ten.

Q And you had not seen anybody?

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A I don't see nobody. I don't hear nothing.

MR. BRENNER: Thank you. I have nothing further.

MR. SHEINDLIN: Nothing further.

THE COURT: You are excused, Mr. Diaz. You may step down.

(At this time the witness was excused by the Court.)

THE COURT: Call your next witness.

MR. BRANCATO: If I may have a moment in place, I'll see if my witness is outside.

THE COURT: Very well.

(Pause in the proceedings.)

MR. BRANCATO: Your Honor, may we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Members of the jury, at this time we'll take a very short recess. Do not discuss this case among yourselves.

Take the jury out.

(At this time the jury filed out of the Courtroom.)

(At this time a brief recess was taken.)

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THE COURT: All right. Get the jury.

(At this time the jury filed into the Courtroom.)

THE CLERK: Case on trial. The Defendant, his counsel and the assistant district attorney are present, and all the jurors are present.

THE COURT: Mr. Brancato.

MR. BRANCATO: Your Honor, the People call Josephine Mendez.

J O S E P H I N E M E N D E Z, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name and county of residence.

THE WITNESS: My name is Josephine Mendez. I live at 485 West 187th Street, New York City, in Manhattan.

THE COURT: You may inquire.

Q Mrs. Mendez, I'm going to ask you to keep your voice up so that they can hear you in the last row. This way everybody in the box will be able to hear you.

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Mrs. Mendez, do you know the Defendant, Dominic Franza?

A Yes, sir.

Q What is your relationship to the Defendant, Dominic Franza?

A He used to be my daughter's husband.

Q Could you tell us where he is in Court today?

A Right there (indicating).

MR. BRENNER: Indicating Mr. Franza, your Honor.

THE COURT: All right. Let the record so reflect.

Q How old are you, Mrs. Mendez?

A Sixty-one.

Q And are you married?

A Yes, sir.

Q Who are you married to?

A Cecilio Mendez.

Q Do you have any children?

A Yes, sir.

Q What are your children's names?

A Carlos Dacosta, Nelson Dacosta, and Myra Mendez.

THE COURT: Is that three or four?

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THE WITNESS: Well, one died.

THE COURT: How many children do you have alive now?

THE WITNESS: Alive now, three.

THE COURT: Would you please repeat the names?

THE WITNESS: Carlos Dacosta, Nelson Dacosta, Myra Mendez-Franza.

THE COURT: Very well.

Q Your children Nelson and Carlos Dacosta, who are their father?

A Carlos Dacosta. He's dead.

Q And so is it fair to say that Mr. Mendez is your second husband?

A Correct.

Q Let me direct your attention to July 17, 1990, at your apartment at 485 West 187th Street here in New York County. Were you in your apartment that night?

A Yes, sir.

Q Is that apartment 1-D?

A 1-D as in David.

Q Was anyone in the apartment with you that night?

A My daughter Myra was with me at that time.

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Q And your husband, what is your husband's name?

A Cecilio Mendez.

Q Where was Mr. Mendez at that time?

A He was working at the time.

Q Where did he work?

A 60 Water - - 55, excuse me. 55 Water Street, in Chemical Bank.

Q What does he do at Chemical Bank?

A He's in maintenance.

Q What time does he normally work?

A From 4:30 to 12 o'clock.

Q 4:30 in the afternoon?

A Yes, until 12 o'clock at night.

Q Now, at your apartment at about seven o'clock, 6:30, seven o'clock, where were you in the apartment?

A I was in the livingroom at the time.

Q And where was your daughter Myra?

A She was taking a shower in the bathroom.

Q Where did Myra live back in 1988, 1989?

A She was living with her husband.

Q And where was that?

A 12 - - the address correctly I don't know,

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but it was in Barker Street with her husband in the Bronx.

Q In the Bronx. This night, July 17, you indicated that she was in the bathroom taking a shower?

A Correct.

Q Did there come some point at about seven o'clock, 7:15, that someone came to the door?

A Yes, sir. Somebody, a delivery boy or man rang the bell. And then I looked through the peephole, and I saw the box, a white box with a red ribbon. And then I opened the door.

Q Did the man speak to you?

A He says only two words, "Flowers for Myra Franza."

Q At this point what did you do?

A I did close the door, but I didn't put the lock on it. I just shut it.

And then I went to look for my daughter. And I knocked on her bathroom door, and I asked her if she wants the flowers.

Q What did you say to her?

A "Myra, do you want the flowers?" Then she opened the door and says, "Mommy, what flowers? I didn't order no flowers."

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Q So what happened then?

A I heard a big noise on the front door. Because it was summertime every door was opened, every window. And then the door slam itself. Then I knew then that something was wrong.

Q Where were you at this point?

A In front of the bathroom door.

Q So what happened then?

A This guy came inside. I didn't move. I just stay there.

Q Was this the same person that you had seen earlier?

A The same person that was in the front door. Then he came over, and right away he start shooting.

But then when I saw - - when I saw this guy, I knew Myra was naked because I saw her. Then I was concerned that he's going to rape her or kill her, so I start closing the door, maybe so many times. I don't know how many. I close the bathroom door. Then she open again. I close it. She open again.

And then he shot like that until I fell. I received five shots.

Q Where were you shot, Mrs. Mendez?

A In the left hand, in the wrist.

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Q Point to it and show the jurors where you were shot?

A Over here in the wrist (indicating).

THE COURT: Indicating the left wrist.

A The left wrist, in the face. And the bullet came out in the back of the head (indicating).

THE COURT: Indicating the right cheek exiting behind the right earlobe.

A One stays in my chest. One bullet stays in my chest (indicating).

THE COURT: Indicating the upper-right chest or almost the shoulder.

A And two in the arms. One here and one here (indicating).

Q Now, you indicated that at some point you heard the door slam?

A Right.

Q When you turned around, where was this man, the one who had the box in his hand when you seen him at the door? Where was he now?

A He was in the hallway against the wall in the foyer that goes in the bathroom.

Q And about how far were you from him when you turned around and saw him in this hallway?

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A Not far. Like he was here and I was here (indicating).

Q Where the first juror is?

A Yes, from where the wall is.

Q Where the side is?

A Yes.

Q The side of the jury box?

A Yes. I was standing right there holding the door so my daughter wouldn't get hurt.

Q When you turned around and saw the man standing in the hallway, did he have the box of flowers in his hand?

A No, he didn't.

Q At this point what did you say?

A He didn't say one word, just took - - he took the gun and shot me.

Beside, he had like a dagger, beside the gun he had a dagger with him, like a bayonet.

Q Let's first start. When he had the gun, did he have the gun in his right hand or in the left?

A The right hand. And then he had a dagger. With a dagger he cut me twice. One here and over here on the neck (indicating).

Q What I first want to start with, at the point

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that you were first shot, where were you standing?

A Like the bathroom, the bathroom is there, say, I was on the side holding the door by the knob. And then he was standing, you know, across in this foyer but, you know, shooting at me.

Q And you indicated that you were shot five times?

A Correct.

Q Now, did there come some point that you fell on the floor?

A Yes, I did. The last five shots and then I fell.

Q What happened at that point?

A Then Myra came out, my daughter, opened the door widely and she took a look. Then he shot her, too. He shot her, too, and then he ran away.

Q Now, you indicated that the man had a dagger, and at what point was it that you noticed that the man had a dagger?

A Well, I saw - - with the other hand I saw the dagger and he cut me with the dagger twice.

Q Where did he cut you?

A On the face, there was a hole here and a hole here (indicating).

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Q You are indicating on your left cheek?

A Left cheek and then the neck.

Q And at what point was it that the man cut you with the dagger?

A It was in the struggle I believe.

Because after that, they said I was cut. I saw the dagger, but I don't know whether he cut me.

Q Where did you fall, Mrs. Mendez, in the apartment?

A Right between the bathroom and the bedroom door on the foyer.

Q And at that point when you fell, was it at that point that your daughter opened the bathroom door?

A Right, she opened the door widely, and then he shot her in the face, and then he run. But Myra fell when he hit her.

Q All together - -

A She fell on the floor.

Q All together, how many shots were fired in the apartment?

A Six.

Q What happened after the man ran from the apartment?

A So Myra crawled to the bedroom and called

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911.

Q Now, the bedroom, where is that located from the bathroom?

A Right near the foyer.

Q Is that to the right?

A To the left.

Q Okay. As you are looking at the bathroom it's to the left?

A Yes.

Q What happened then?

A Well, I believe the police came or the paramedic came. Then I didn't know what else happened, because they took me unconscious.

Q What's the next thing you remember, Mrs. Mendez?

A The next I remembered was that Myra crawling to the floor to pick up the phone, and that's it, naked.

Q How long were you in the hospital?

A Seventeen days in Harlem Hospital in trauma center.

Q All together, from the day that you were shot to the day, Mrs. Mendez, what day was it that you finally got out of the hospital?

A I entered the 17th of July, and 17 days later

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I came out. I don't know what date. Because I was in bad shape. I had a second operation later on.

Q How many operations did you have all together?

A Two operations.

Q You indicated that Myra was in the bathroom taking a shower?

A Correct.

Q Where was Myra living in July of 1990?

A She moved out from her husband house and she stayed with my son in the basement. But in the daytime, she come and stay with me. And after her job, she eat and then she take a bath there, and by nighttime she go to her brother because I have no bed available there.

Q Which brother was she staying with?

A Carlos.

Q Who was living with Carlos at that time?

A Carlos, his wife and his son. She was pregnant by the time.

Q When did she move from the Bronx to Manhattan?

A Sometime in June, 1990. The day exactly I don't remember.

Q Carlos' apartment, where is that located?

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A In 495 but in the basement.

Q In relation to your building, where is Carlos' building?

A In relation to my building?

Q Yes. You live in 485?

A 485.

Q And Carlos lives?

A The next building beside mine, which my husband is the super in there.

Q Your husband is the super of 495?

A Yes.

Q You indicated that he also worked at a bank in the afternoon?

A He keep two jobs. He works as a super part time, and in the nighttime he works as a maintenance for 15 years.

Q Mrs. Mendez, for the record, this is already been marked as Exhibit Number 13 for identification.

A This is the foyer where I was when I got shot. And there is the bathroom. And this is the bedroom over here where the rug is or the sheet is on the floor.

Q Is that the bedroom where your daughter went into?

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A That's the bedroom where the phone was.

Q Does it fairly and accurately depict your apartment as it appeared on the day that you were shot?

A Correct, exactly the way it was.

MR. BRANCATO: I would offer it into evidence at this time.

THE COURT: Mr. Brenner?

MR. BRENNER: No objection.

THE COURT: Without objection, People's 13 received.

(Document referred to above as a photograph was received and marked as People's Exhibit 13, in Evidence.)

MR. BRANCATO: Please give it to the witness.

(Document handed to witness.)

Q Mrs. Mendez, if you turn it around so that the jurors can see it. I want you to hold this pen and turn the photo so that I can see it over here. Turn it to me. Does there appear in that photo the position where the shooter was when you turned around and saw him now holding the gun?

A This is the wall on the foyer.

Q On the right side of the photo as you look at it.

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A He was standing about here (indicating).

Q There is a blue rag at the bottom of it and there is the baseboard of the wall.

Q Where were you standing at that point that you turned around and saw him there?

A Where the white rug is.

Q Now, you indicated that you fell in front of the bathroom; am I correct?

A In front where the sheet is, right here on the foyer, in front of the bedroom, in between the bathroom and the bedroom.

Q If you put the photo down, please.

When you got out of the hospital, Mrs. Mendez, where did you go to live?

A I went to stay with my stepdaughter Carmen at 25 - - in Ballentine Avenue in the Bronx because I have nobody to take care of me at that time.

Q And how long did you live with your stepdaughter in the Bronx?

A Well, I stayed there, I believe it was two weeks in there.

Then I moved back where I am right now. But then later in November I got operation again.

Q And you went back to the hospital in

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November?

A In November I went to different hospital.

Q What hospital did you go to?

A Beth Israel on 14th Street.

Q And how long were you in the hospital that time?

A Two days, because they have to remove the braces because the jaw was broken three times.

Q Where was your jaw broken?

A Three times over here, and they put braces over here, so they have to take them out.

Q How long were you in the hospital that time?

A Two days while they removed the braces. The first time 17 days, and the second time two days.

Q Now, how long have you lived at 485?

A Almost ten years.

Q And the apartment today, is the apartment arranged the same way as it was back on the night that you were shot?

A It's the same. It's about the same.

MR. BRANCATO: Your Honor, at this time I'm going to renew my application and offer into evidence the floor diagram of 485 West 187th Street, Apartment 1-D, which is marked as People's

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Exhibit Number 1.

THE COURT: Mr. Brenner?

MR. BRENNER: No objection.

THE COURT: Without objection.

MR. BRENNER: Your Honor, I believe it was already received subject to a later connection. I think it's in evidence already.

THE COURT: It was received.

Q After July of 1990, did Myra come back to stay in the apartment at West 187th Street?

A She did stay with my son in the basement again during the night.

But when she went to work, she come back, she eats in my house and then go back with my son there.

Q You indicated that she came to live on 187th Street back somewhere in June up to the time that you were shot. Prior to that, in 1989, did Myra ever stay on 187th Street?

A She did the same thing, when she - - she separated from her husband before, and she stay with Carlos. Then she do the same thing. She stays for awhile then goes back to sleep there.

Q How long in 1989 did she stay with Carlos at night and eat her meals with you and your husband?

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A I would say about three weeks.

Q And after the three weeks where did she go to live after the three weeks?

A She went back to her husband.

Q Do you know Detective Giorgio of the 34 Precinct?

A Yes, I do.

Q Do you know Detective Ortiz, Gil Ortiz?

A Yes, I do.

Q Did you meet them in connection with this case?

A Yes, sir.

Q Did you speak with them on previous occasions?

A Correct.

Q In February of 1991 where was Myra living? Just tell us the borough. Don't tell us the address.

A February of?

Q February of 1991.

A In the Bronx.

Q And at that time did you receive, specifically about February 7, did you receive some letters in the mail?

A Yes, I did.

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Q These letters, could up please tell us who were they addressed to?

A One was addressed to Myra Franza in care of myself, and the other was to Nelson Dacosta in care of myself.

Q And what address were these letters addressed to?

A 485 West 187th Street, Apartment 1-D, New York, New York.

Q Now, your son Nelson Dacosta, where did he live back in 1990 and 1991?

A In 183rd Street and Broadway.

Q What was his address?

A 644 West 185th Street.

Q Was he married?

A Yes.

Q What is his wife's name?

A Ruthie Dacosta.

Q These two envelopes, the one that was addressed to Myra and you in your name, and the one that was addressed to Nelson care of you, what did you do with the letters? What did you do with the envelopes?

A I did open with a knife, I did open both of them, because I didn't know - - there are people that

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send the letters, I didn't know who it was. But then I have suspicion, I did open it right away.

Q The name that was on the envelope as the sender, what was the name as the sender?

A Julio Ortiz.

Q Do you know Julio Ortiz?

A I have no idea.

Q The address that was on the return address - -

A I find out it was a jewelry store.

Q Did you know anyone at that address?

MR. BRENNER: Objection, your Honor, move to strike as to what the witness found out about the address as opposed to what the address was.

THE COURT: We could do it another way.

Q This has already been marked as People's Exhibit Number 10 for identification. Please look at it. Do you recognize what is on that exhibit?

A Yes. Those are the two envelopes that I received the same day.

Q How did you open the envelopes?

A I took a knife and I opened it in there and I read it.

Q Did you run the knife across the top of the

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envelope?

A Yes, I did.

Q Did you look inside the envelopes?

A Yes, I did. I found two papers in each envelope, and they were written in typewriting, not manuscript.

MR. BRANCATO: At this time I would offer Exhibit Number 10 for identification into evidence.

THE COURT: Do you have that, Mr. Brenner?

MR. BRENNER: Yes.

MR. BRANCATO: May we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Without objection, Number 10 is received.

MR. BRENNER: Subject to the production of the original and chain of custody.

THE COURT: Yes. I'm aware of that.

MR. BRENNER: The record wasn't clear.

THE COURT: Now the record is clear.

(Documents referred to above as envelopes were received and marked People's Exhibit 10 In

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Evidence.)

THE COURT: You may continue.

Q Now, you indicated that when you looked inside the envelopes that you saw letters. How many letters were in each envelope?

A One letter in each envelope.

Q This has already been marked People's Exhibit Number 11. Look at that. Read the first line or two to yourself. Just to yourself. Do you recognize that exhibit?

A Yes, I do.

Q What do you recognize that exhibit to be?

A This is the letter that was sent to my son Nelson.

Q That's the letter that was in the envelope to your son Nelson?

A That's correct.

MR. BRANCATO: I would offer it into evidence.

MR. BRENNER: I have no objection with the same condition.

THE COURT: Same conditions as number 10. 11 is received with the same conditions.

(Document referred to above as a letter was

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received and marked People's 11 In Evidence.)

Q I'm showing you now People's 12 marked in evidence. Read the first couple of lines to yourself.

A Okay.

Q Do you recognize that letter?

A Yes, sir. This was sent to Myra and myself.

Q That was the letter and the envelope?

A For Myra and myself.

MR. BRANCATO: I would offer it into evidence.

MR. BRENNER: No objection, same conditions.

THE COURT: Same conditions, same ruling. It's received.

(Document referred to above as a letter was received and marked as People's Exhibit 12, in Evidence.)

Q Now, Mrs. Mendez, the day that you received those letters, were you by yourself or was anyone else home with you?

A My husband was with me because it was about one o'clock.

Q So what did you do when you received the mail that day?

A I called Giorgio, Detective Giorgio, and

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Ortiz, and they come over and pick them up.

Q Did you turn over to them both the letters and the envelopes in which the letters arrived?

A Correct.

Q Did you speak with them at that time?

A Yes, I did.

Q Did you read those letters to Detective Giorgio and to Detective Ortiz when they came over to your apartment?

A I did.

Q Look at the exhibit that has the two envelopes. That's number 10. Do you see the name on the return address?

A Yes.

Q Could you please tell us what's the name on the return address?

A Julio Ortiz, 750 West 181st Street, New York, New York 10033.

Q Do you know anyone named Julio Ortiz?

A Never.

Q Do you know anyone who lives at that address?

A No, sir.

Q You indicated that your name is Mendez?

A Correct.

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Q What was your maiden name?
A Roman.
Q Could spell it for us?
A R-O-M-A-N.
Q And what is your mother's name?
A Rosa, Rosa Lamboy. She never carried Roman.
Q And Mr. Roman, he was your father?
A He was my father.
Q Did your mother marry your father?
A No.
Q Did you ever tell your daughter that your mother never married your father?
MR. BRENNER: Objection, leading, your Honor.
THE COURT: I'm going to allow it.
Q Did you ever tell your daughter that your mother did not marry your father?
A No, never.
Q Do you remember when I came to your apartment last Monday?
A Yes, sir.
Q And I spoke with you and your daughter at your diningroom table?
A Yes, sir.
Q Did you tell your daughter at that point that

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your parents were not married?

MR. BRENNER: Objection, your Honor, as to this conversation at which Mr. Brancato has made himself a witness.

MR. BRANCATO: I will make an offer of proof at the side, Judge.

THE COURT: I take it that you have some - -

MR. BRANCATO: There is a reason for it.

THE COURT: I'll allow it at this point.

A Yes. In that time I told my daughter. That's the first time she knew.

Q Where did your mother live?

THE COURT: At what period?

Q Where did your mother live in 1989?

Well, is your mother presently living?

A No, she is not.

Q When did your mother die?

A Two years ago in November.

Q November of what?

A 1990.

Q Where was she living up to the point that she died?

A In Puerto Rico, in Levittown, 1829 Pacio Aguilar, Puerto Rico.

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Q Who did she live with?

A My sister Evelyn. She live with her daughter.

Q Your sister Evelyn, what is her last name?

A She is Figueroa. Evelyn Norris-Figueroa.

Q Is it fair to say that she was born of a different father?

A She is the one of a different father. She's the youngest now.

Q Now, you indicated that she died in November of 1990?

A Yes.

THE COURT: Referring now to her mother?

MR. BRANCATO: Her mother.

Q Where was Myra living at the point that your mother in Puerto Rico died?

A She already was living in different - - she wasn't living with her husband at that time. She was living by herself.

Q You speak Spanish; am I correct?

A Yes.

Q When you grew up you spoke Spanish?

A I did.

Q Can you read Spanish for me?

A Of course.

Q Let me hand you this. It is already in evidence as Exhibit Number 11. Could you please read the second sentence, the one that starts with Yo. Can you translate that for us?

MR. BRENNER: I object. May we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Objection sustained. You may continue.

MR. BRANCATO: Just one moment, Judge.

MR. BRENNER: Your Honor, on reconsideration, at the risk of confusing the issues, I withdraw my previous objection. If the People wish to proceed along those lines, I have no objection.

THE COURT: For reasons I will elucidate at the bench, the ruling stands.

Q Mrs. Mendez, as a result of being shot on July 17, 1990, could up please tell us what lasting injuries, if any, you sustained?

A Can you please repeat that question for me?

Q As a result of being shot in July of 1990, what lasting injuries did you sustain?

A What injuries?

Q Okay. You told us that you were shot five times and one of the times was in your wrist?

A My wrist, my face and my chest, and the arm, the right arm.

Q Do you have full use of your right arm, the one that was shot twice?

A That, yes. Sometime it gets numb. But the left, the left hand is not used anymore.

Q What happened to the left hand as a result of being shot?

A I can't hold everything. Everything falls in there.

MR. BRANCATO: I have no further questions.

THE COURT: The witness is yielded.

MR. BRENNER: May we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

CROSS EXAMINATION

BY MR. BRENNER:

Q Good afternoon, Mrs. Mendez. Mrs. Mendez, I'm going to ask you a series of questions. If there is a question that you do not understand, please tell me and

I'll try to ask it another way; all right?

A Okay.

Q Mrs. Mendez, you have testified that you know this man; is that right?

A Yes.

Q That's Dominic Franza?

A Dominic Franza.

Q Now, this is 1992. How long do you know him for?

A Well, since he married my daughter.

Q When was that?

A They were married three years' period.

Q Mrs. Mendez, if it helps, would it be approximately 1987?

A Yes.

Q That's approximately when you met Mr. Franza, back in 1987?

A Correct.

Q They were married several months after they met; is that correct?

A Yes.

Q Do you know Mirabel Matos?

A Yes - - well, she was introduced to me through Ruthie, my daughter-in-law.

Q So she was a friend of - -

A Of my daughter-in-law. They worked together in the bank.

Q She became a friend of Myra's; did she not?

A Yes.

Q She was also a friend of Mr. Franza?

A Yes.

Q As a matter of fact, Miss Matos introduced Myra and Dominic?

A Yes.

Q They met through her?

A Yes.

Q Now, prior to being married to Mr. Franza, your daughter lived with you; is that right?

A Correct.

Q For her whole life?

A Yes.

Q And would it be fair to say that you always looked out for her best interests?

A Yes.

Q You cared for her?

A Yes.

Q You would do nothing to harm her; is that right?

A No.

Q And you would advise her to do nothing that would not be in her interests; is that correct?

A A-hum.

Q Mrs. Mendez, in 1987 isn't it a fact that you encouraged her to marry Mr. Franza?

A What do you mean by encouraged her?

Q Just that.

THE COURT: Well, she doesn't understand the word. You are going to have to rephrase it.

Q Isn't it a fact that you wanted her to marry Mr. Franza, that you thought that was good for her?

A At the time? Yes.

Q In 1987.

A Yes.

Q As a matter of fact, they were married. Who paid for the wedding, if you know?

A He did.

Q Do you know how much that was?

A No.

Q Was it a large wedding?

A Yes. I believe so.

Q Where was it?

A It was in a hall, you know. They call it

Astoria Manner.

Q And it was a fancy affair, people were dressed up, wore tuxedos?

A Yes.

Q Your husband wore a tux; is that correct?

A Yes.

Q A tux for which Mr. Franza paid; is that correct?

MR. BRANCATO: Objection. Irrelevant.

THE COURT: Overruled.

Q Is that correct, Mrs. Mendez?

A It was.

Q Now, during the course of the period of time that your daughter was married to Mr. Franza they paid for certain things for you and your husband; did they not?

A They finish to pay the station wagon.

Q Your station wagon?

A A-huh, and the loan that I have too, because I couldn't pay for the rent by myself.

Q So they helped you out?

A Yes.

Q That was money that Myra was making as well as money that Mr. Franza was making?

A Yes, both.

Q And they paid for your medical insurance; is that right?

A Medical insurance?

Q Yes. With National Home Insurance Company?

A That is life insurance.

Q They paid for that?

A Yes.

Q Every month?

A Yes, my daughter did.

Q Your daughter did?

A Yes.

Q Well, Mr. Franza and Mrs. Franza had a joint checking account; did they not?

A Yes. Before she was married she had that life insurance.

Q And the Franzas continued to pay for that after she got married; is that correct?

A Yes.

Q They also bought you a washing machine?

A A-huh.

Q So would it be fair to say that there was an exchange of gifts and monies between the two households?

A A-huh.

Q Now, directing your attention to July of 1990, you've told us that in June prior to that, Myra came to stay with your son and sometimes stayed with you. She stayed with you in the sense that she came to eat with you; is that right?

A Yes.

Q Myra was working at that time?

A At that time? Yes.

Q She worked for the Post Office?

A A-hum.

Q In the Bronx?

A In the Bronx.

Q On the Grand Concourse?

A That's correct.

Q How would she get from where you were living to the Post Office. What means of transportation?

A She had a car.

Q So she drove?

A Yes.

Q Every day?

A Yes.

Q So she would go out to her car, drive, go to the Post Office, come back and try and park the car?

A A-huh.

Q Now, if she had to park a block or two away she would then walk to your house to have dinner?

A Yes.

Q So it was in the summertime?

A Summertime.

Q And approximately when in the afternoon or the evening would she arrive home from work?

A Approximately?

Q As best you can recollect, Mrs. Mendez.

A About 4:30 or 5:00.

Q So would it be fair to say that in June and July of 1990 at about that time it was light out?

A Yes.

Q It was the summertime; it wasn't yet dark?

A Correct.

Q So Myra would come and go at about 4:30 or five o'clock in the summertime in your neighborhood?

A A-hum.

Q In the sunlight or in the light; is that right?

A A-hum.

Q What time in the morning would she leave?

A Seven o'clock.

Q Would it be fair to say that in the summer-

time it was light at that time as well?

A Yes.

Q For how long was she doing that?

A She goes five days a week to work.

Q So from whenever she moved to the Bronx until the time of the shooting she was doing that five days a week, coming and going; is that right?

A Yes.

Q Now, the shooting occurred on July 17?

A Yes.

Q Do you remember what day of the week that was?

A That day, Tuesday.

Q And would it be fair to say that she had followed the same routine on that day?

A A-hum.

Q Yes?

A Yes.

Q She had arrived at your home at approximately 4:30 or five o'clock?

A A-hum.

Q Did you eat dinner?

A Yes, she did.

Q Then she took a shower?

A A-hum.

MR. BRANCATO: Judge, we don't have answers. We have, "A-hum."

THE COURT: Mrs. Mendez, when you want to answer yes, say, "Yes." If it's no, say, "No," instead of, "A-hum."

THE WITNESS: Okay. Yes.

Q And then she was preparing to go back down to the basement to stay?

A Correct.

Q And to do that could she do that from inside the building?

A No, sir.

Q So in order to go to her destination each night, she would have to go back outside the building, walk around the building to the basement apartment?

A Correct.

Q And in the morning would she leave from their apartment or would she come and have breakfast with you?

A No, she would leave from their apartment.

Q Now, on July 16, 1990, the day before this, were you home on that day?

A Yes, sir.

Q Were you home in the nighttime?

A Yes.

Q Was Myra at your house on July 16?

A No, she wasn't.

Q Where was she?

A In my son's house.

Q At approximately seven, 7:30 on that night, July 16, your daughter wasn't there?

A No.

Q And on July 16, 1990, did someone come to your door?

A Yes.

Q Now, before we proceed, getting into the building, can anybody come in or do you need a key?

A Well, you need a key, but anybody could come because they could go behind somebody else.

Q Okay. But if they weren't trying to sneak in behind someone else, normally to come into 485 West 187th Street you need a key to get into the lobby?

A You need a key.

Q Is there another way instead of walking behind somebody else?

A Yes, through the basement.

Q Can you buzz your way into the building? In other words, can you ring someone's buzzer and they buzz

back and the door will release?

A No. Usually that door is opened, the basement apartment. Then you could go to the elevator.

Q So you go in through the elevator?

THE COURT: I don't think the witness - - at least I didn't understand.

Is there a buzzer in the lobby, a bell?

THE WITNESS: A bell, yes, there is.

THE COURT: So if you ring a particular apartment, they have the ability to buzz it back?

THE WITNESS: Yes, there is an intercom.

Q Now, on July 16, 1990, did anyone ring your bell from outside from the lobby?

A Not from the lobby. They ring the bell on my door.

Q Your door has a peephole?

A A peephole.

Q You went to the peephole?

A Yes.

Q You looked through the peephole and there were two men there; is that right?

A Correct.

Q Were those men, to the best of your recollection, were they Hispanic men?

A I beg your pardon?
Q Hispanic.
A Not Hispanic. They didn't look like Hispanic to me.
Q The two men that showed up on July 16, 1990.
A One was dark and one was light, taller than the other. But they don't look Spanish to me.
Q Which one was taller than the other?
A The lighter one was taller.
Q So one of them was a light-skinned tall person?
A Yes, sir.
Q Did he have any hair on his face?
A No hair. He has acne, and one of his tooth was cracked, like a piece was missing.
Q So he had a cracked tooth?
A Yes.
Q Was he wearing anything on his head?
A Nothing.
Q And what kind of hair did he have? Was it straight?
A Straight hair.
Q Was it short or long?
A Short.

Q Now, the other man, he was the darker one?
A Yes.
Q And shorter?
A Shorter than the first one, and husky.
Q Heavier?
A Heavier.
Q Did he have any hair on his face?
A No.
Q So they were both clean-shaven?
A Yes.
Q Was he wearing anything on his head?
A Nothing.
Q Now, was one of them carrying a knapsack? Do you know what I mean by a knapsack?
A No. I cannot understand that.
Q A bag with sort of a strap?
A Oh, yes, in the back.
Q Which one was that?
A The husky one.
Q The shorter?
A The heavier one.
Q Had a knapsack on his back?
A Yes.
Q Did you ever open the door for these two

gentlemen?

A No. They show me a phony police badge, and I didn't open the door for them.

Q They attempted to identify themselves as police officers?

A Yes.

Q Did they ask for anyone or anything?

A They asked for my son, Nelson Dacosta.

Q Was Nelson there?

A No, he doesn't live in my house.

Q So they came to your house looking for Nelson Dacosta?

A Yes.

Q Who wasn't there because he didn't live there?

A He didn't live there.

Q Did they say anything else to you?

MR. BRANCATO: Objection. It's hearsay.

THE COURT: Sustained.

Q Did they leave?

A They left. Then I opened the kitchen window and I wanted to take a good look at them before they left.

Q Did you?

A Yes. I didn't let them in the house, but they went downstairs.

Q Did you get a good look at them as they left?

A Yes.

Q How did they leave? Did they walk? Did they get into a car?

A They walked through the park.

Q They walked away from where you were?

A Yes.

Q Did you ever see those two men again?

A Never.

Q Now, that was approximately at the same time that the person that had the flower box came to your door the following day, about seven, 7:15?

A Yes.

Q And on each occasion, seven or 7:15 was a point in time after your daughter had already come home from work; isn't that right?

A Correct.

Q Now, on July 17, 1990 - - withdrawn.

Did you report that incident on July 16 to the police?

A Yes, I did.

Q When did you report that?

A The following day, I believe. Let me see. Not that day, excuse me. I didn't report it because I didn't make nothing of it.

And the next day I don't report it because I was almost dead.

Q Mrs. Mendez, I appreciate that. You didn't make anything out of the fact that two men pretending to be police officers were looking for your son?

A I didn't make anything because nothing happened at that time. I reported to my husband, and I asked my son why somebody was asking for him. And he told me that he doesn't know any men like that, and he swear to me that he had nothing to do with those men.

Q When did you speak to him about it?

A The same day. I called him up.

Q You called him up?

A Yes.

Q And did you tell Myra?

A No, I didn't.

Q Did you tell Debbie Dacosta?

Debbie Dacosta is Carlos' wife?

A Carlos' wife.

Q She lives in the basement?

A Yes.

Q You never told her.

A I don't recall. I told my husband, though. I tell my husband.

Q Now, on July 17 at approximately the same time a man came to the door. Did he ring the bell?

A He rang the bell in my door again. He never rang outside.

Q So he was at the door and he rang the bell and you went to the peephole again?

A Yes.

Q And you saw a man holding a box of flowers.

A It was a young man, not an old man, and it looks like a delivery man, so I did open.

Q When you say he looked like a delivery man, how did he appear other than he was holding a box?

A He had like a cap.

Q Was he wearing it forward or backward?

A You know, like covering his face.

Q A what color was it, if you remember?

A White.

Q And the way he was dressed?

A White.

Q All white?

A A-hum.

Q And he was - - and his face?

A His face, he looked at the box that he was holding, he never looked face to face with me.

Q Did you ever see him during the course of the events of July 17? Were you able to see his face?

A Never.

Q Do you know whether he had a mustache or a beard?

A I think, I'm not sure, that he had a mustache.

Q Now, when you looked through the peephole he didn't look up at you. He said, "Flowers for Myra Franza"?

A Yes, he point his hand to the box he was holding. He never looked to me face to face.

Q Did you open the door?

A I did open.

MR. BRENNER: May I have a moment, your Honor?

THE COURT: Yes.

Q Mrs. Mendez, when you opened the door, he was standing there looking down; correct?

A Correct.

Q Wasn't he writing at the time?

A Writing? No. He just look at the box like this.

Q Didn't he write on the box in front of you?

A No, nothing.

Q Ma'am, you have to let me finish my question. I'm sorry. Didn't he write, "Flowers for Myra Franza"?

A He said that, but he never write anything in front of me.

MR. BRANCATO: Judge, may I approach with counsel?

THE COURT: Yes.

(At this time the following took place at sidebar, among Court and counsel, out of the hearing of the jury:)

THE COURT: There appears in the second presentation in the Grand Jury when asked at page four, line one, "Where was he looking as you were speaking to him?

"Answer: He was looking at the box and he wrote flowers for Myra Franza."

Mr. Brancato who was present at both presentations has a distinct memory and he represents to the Court that whereas in the first presentation the response was that he said,

"Flowers for Myra."

In the second presentation she also said that he said, "Flowers for Myra," but the transmission or the translation of the minutes would appear to say "he wrote." It's an error and he's prepared to call the stenographer who took the Grand Jury minutes.

Mr. Brenner represents if the answer from the witness is that she recalls only saying "said" and did not say "write," then he will not pursue that matter.

MR. BRENNER: I will confront her with the question and answer.

THE COURT: If she denies it?

MR. BRENNER: Then I'll let it go.

THE COURT: Unless there's something else, so we'll proceed on that basis.

(At this time the following occurred in open Court:)

Q Mrs. Mendez, do you remember coming twice to testify before the Grand Jury?

A Yes.

Q That was a procedure sort of like this where you swore an oath and then you testified. Mr. Brancato

asked some questions and you gave some answers; is that right?

A I remember.

Q Now, I'm going to ask you with regard to the second time you appeared, which I believe was in October or November of 1991 - -

MR. BRENNER: Is that correct, counsel? I don't have a date.

MR. BRANCATO: October of 1991.

Q October of 1991. Which was the second time you came, I want you to listen. I'm going to ask you whether you recall being asked this question by Mr. Brancato and giving this answer.

A All right.

Q "Question: Where was he looking as you were speaking to him?" That's Mr. Brancato's question.

"Answer: He was looking at the box, and he wrote, 'Flowers for Myra Franza.'"

Do you recall being asked that question by Mr. Brancato in the Grand Jury and giving that answer?

A But I don't remember that I said wrote.

Q So you do not recall?

A But he wasn't writing.

Q The question is whether you recall being

asked that question and giving that answer?

A No.

THE COURT: When you say no, you don't recall or that's not the answer you made?

THE WITNESS: That's not the answer. Probably I didn't understand that at the time. But I didn't see him writing on the box. He was looking at the box, probably I didn't understood the answer at that time. But that I saw him writing on the box? No.

Q Mrs. Mendez, have you had any difficulty understanding any of my questions today?

A Today?

Q Yes.

A No.

Q Did you have any difficulty understanding any of Mr. Brancato's questions when he stood up before?

A No.

Q Now, it was after that after you opened the door you closed it again but didn't lock it?

A I didn't lock it.

Q You didn't. Then you went back to where Myra was?

A That's correct.

Q And then this terrible thing happened; right?

A Yes.

MR. BRENNER: I would ask that this be marked for Identification as Defendant's B.

THE COURT: Defendant's B.

(Document referred to above as a photograph was received and marked as Defendant's Exhibit B, for Identification.)

Q Mrs. Mendez, I'm going to ask you to look at Defendant's B for identification. Do you recognize the picture of the person in that photograph?

A I did look at him, but he was with a cap up to here, up to this way (indicating), and I saw him when he looked through the window with the box under his arm. Before he came up I saw him.

Q Let's talk about that; all right?

A Okay.

Q Your apartment is on the first floor?

A Yes.

Q And I assume by what you have said is that there are windows that look out onto the street?

A Sure. I look through the window and I saw him looking for the address.

Q You?

A With the box with a red ribbon under his arm and he was looking through the numbers.

Q He was looking up at the building?

A I think I said, "Those are flowers for Myra." I thought but I didn't say anything to my daughter then. But then he didn't come up right away.

Q He was looking at the numbers?

A Yes, and then he went back to the sidewalk. That's why I didn't mention anything.

Q He had the box of flowers tucked under his arm?

A Yes.

Q Before he came to the door, could you see his whole body?

A Yes.

Q From the window?

A Yes.

Q Was he carrying anything or did he have any kind of sack or bag?

A He had like a large jacket, like a suit. It wasn't like a butcher jacket. I would say a white one, very white.

Q And?

A He had sneakers and white pants.

Q Were they shorts or long pants?

A Long pants.

Q Is that the man?

A I would say that's him.

Q That's the man who you saw first on the street with the flower box tucked under his arm?

A A-hum.

Q And then at the peephole; yes?

A Yes.

Q And then in your apartment?

A In my apartment.

Q And that picture fairly and accurately represents the way he appeared or close to the way he appeared on that day?

A Yes.

MR. BRENNER: I would offer it into evidence, your Honor.

MR. BRANCATO: I have no objection.

THE COURT: Without objection, Defendant's B in evidence.

(Document referred to above as a photograph was received and marked Defendant's Exhibit B, in Evidence.)

MR. BRENNER: I would like it published to

the jury.

THE COURT: Just a moment. Let me have it.

(Document handed to Court.)

THE COURT: Publish it.

(At this time Defendant's Exhibit B was published to the jury.)

THE COURT: You may continue.

Q Mrs. Mendez, have you ever seen that man before that day?

A Never.

Q Have you ever seen him since?

A No.

Q Now, Mr. Brancato asked you some questions about some letters; is that right, letters that came in February?

A Yes.

Q And one of the letters was addressed to Nelson Dacosta at your address; is that right?

A Correct.

Q And you told us that Mr. Dacosta didn't live at that address?

A Yes.

Q He lived somewhere else?

A A-hum, yes, sir.

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Q Both at the time back in July when two men came looking for him at your apartment, and in February; right?

A Yes.

Q And you opened the letters?

A I did.

Q And you read them?

A Correct.

Q And they made certain references to your son; did they not? To Nelson?

A Yes.

Q They made certain references to things that he had or had not done?

MR. BRANCATO: Well, I object, Judge.

THE COURT: The letters are not in evidence.

MR. BRENNER: Yes, they are. They are in evidence.

MR. BRANCATO: The letters speak for themselves, Judge.

MR. BRENNER: Without arguing, if you want to approach?

THE COURT: We don't have to approach.

Do you recall the contents of the letters, Mrs. Mendez?

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THE WITNESS: I do.

THE COURT: All right.

MR. BRENNER: May I pursue it?

THE COURT: Yes.

Q They made references to things that your son had or had not done; correct?

A Yes.

Q They made references to things that your son had stolen, yes?

A Yes.

Q Things that he was supposed to bring back to the author of the letters, whoever that was; right?

A Yes.

Q That was in February of 1991?

A Yes.

Q In July of 1990 two men who you didn't know came to the apartment pretending they were police looking for Nelson Dacosta?

A Correct.

Q Now, when the letters came in February, did you speak to Nelson about what they said, what the letters said?

A No. I didn't even show to him.

Q You did not show them to him?

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A No. He didn't see those letters. My daughter didn't see those letters.

Q Your daughter didn't see them?

A No.

Q Myra did not see them?

A My son didn't see it. I didn't show it to them because I know that it was a fabrication.

Q You knew that?

A Yes.

Q You knew that the references to Mr. Dacosta, to Nelson, were false?

MR. BRANCATO: Judge, I object.

A You know what I think?

THE COURT: Just a moment. Read that back.

(At this time the requested portion was read back by the Reporter.)

MR. BRENNER: I'll withdraw the question, your Honor.

Q Mrs. Mendez, you told Mr. Brancato that Ruthie is Nelson's wife?

A Correct.

Q Were they living together in February of 1991?

A February, 1991, no.

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Q She had left New York State; isn't that right?

A Correct.

Q She went to Chicago?

A Yes.

Q In June of 1990?

A I really don't know when she left. I'm very bad with dates.

Q Was it sometime in the summertime?

A Yes.

Q This unfortunate thing happened to you in the summertime?

A Yes.

Q Was that also in the summertime?

A Yes.

Q So in the summertime when two men came to your door pretending to be policemen looking for Nelson, it was during that same period of time that Ruthie left Nelson and went to Chicago?

A Ruthie left a year before that, one year before I was hurt, in the summer of 1989.

Q Are you sure, Mrs. Mendez?

A Yes, because they gave me the news by phone. My husband called Ruthie by phone and she told him the

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bad news. She was already working in Chicago.

Q So she had left before the incident occurred?

A Yes, a long time ago.

Q So at this point in time during any of these events was Ruthie living with Nelson?

A No.

Q Now, you also told us about your mother, Mrs. Lamboy?

A Yes.

Q And that she died in November of 1990?

A Correct.

Q And at that time Myra was living away from Dominic Franza and also not with you, she was living by herself; is that correct?

A Yes.

Q When did Mrs. Lamboy take ill? When did she become sick?

A She was ill for a long time. She had cancer.

Q And the cancer was terminal; was it not?

A Yes.

Q And prior to November of '90 she had been in the hospital; isn't that right?

A She was in the hospital at the time. My sister took care of her.

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Q And as a matter of fact, she had been diagnosed as having terminal cancer back even before Myra left Mr. Franza and came to live with you; isn't that right?

A Yes.

Q So at the time that the Franzas were actually living together, Myra knew, did she not, that your mother had a disease which was killing her?

MR. BRANCATO: I object as to what she knew.

THE COURT: Sustained.

Q Did you tell Myra that?

A No. Myra - - I didn't tell Myra that my mother was ill with cancer because nobody told me either. I was very ill. When the accident happened, that something happened to me, they didn't tell my mother because my mother was ill. So I didn't tell Myra either.

Q You didn't tell your mother because your mother was ill?

A They didn't tell my mother that something happened to me.

Q Well, there came a time in I think it was 1989 when Myra went to Puerto Rico; is that right?

A Yes.

Q And she went there for your son Wilfred's

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funeral; is that correct?

A Yes.

Q Approximately when was that? You don't have to be exact as to the date, the month in 1989?

A It was like in November, something like that.

Q November of 1989?

A Yes.

Q Was your mother ill at that time?

A No.

Q She had not been diagnosed as having cancer?

A No, not yet.

Q It was in 1990?

A Yes.

MR. BRENNER: I have nothing further of this witness. Thank you.

THE COURT: Any redirect?

MR. BRANCATO: Yes, a few questions.

REDIRECT EXAMINATION

BY MR. BRANCATO:

Q Mrs. Mendez, at the point that the man came to the door, you indicated that he rang the bell. When you went to the door, what did you see the man doing?

A When he rang the bell, he was looking. I ask him who is it, and then he through the door he told me,

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"Flowers for Myra Franza."

Q At this point what was the man holding in his hands?

A A box of flowers.

Q This is in evidence as Exhibit Number 7. Look at it.

A This is the box.

Q And the note that's affixed to the top of the box, did you see the man holding the box with that note on it when you went to the door?

A Correct.

Q Now, Mrs. Mendez, these exhibits, the two envelopes which are marked 11, 12 - - I'm sorry, the two letters that are marked 11 and 12, along with the two envelopes, did you receive any letters like this prior to the day you gave these to Detective Giorgio?

A No, sir.

Q Did you - -

A That's the only mail.

Q Did you receive any letters like this after the day you gave these to Detective Giorgio?

A No, sir.

MR. BRENNER: Objection. Outside the scope of redirect.

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THE COURT: I'm going to allow it.

A No, sir.

MR. BRANCATO: I have no further questions. Oh, I'm sorry.

Q You indicated that when you saw the man outside, you thought that the man had flowers for Myra?

A Correct.

Q Why did you think that?

MR. BRENNER: Objection. Improper redirect, your Honor.

MR. BRANCATO: I believe she testified on cross about that.

MR. BRENNER: Improper redirect, your Honor. My objection stands.

THE COURT: It's not on that basis but the objection is sustained. Not on the basis that you raised, but it's sustained.

Q Are you aware if your son-in-law ever sent your daughter flowers on previous occasions?

MR. BRENNER: Objection to the leading.

THE COURT: Yes. You have to rephrase that.

THE WITNESS: You want me to answer?

THE COURT: No. He'll ask you another question.

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Q Do you know if your daughter received flowers on previous occasions during her marriage to the Defendant?

MR. BRENNER: Objection. Improper redirect, your Honor.

THE COURT: Overruled.

A You want me to answer?

Q You can answer now.

A Okay. Not that I noticed.

Q But when you saw the man outside you indicated that you - - you indicated that you thought he had flowers for Myra?

MR. BRENNER: Objection. Asked and answered.

THE COURT: Overruled.

Q When you saw the man, you thought that he had flowers for your daughter?

MR. BRENNER: Objection. Leading.

A Yes, I did. I saw the box.

MR. BRENNER: Objection. Leading, your Honor. Mr. Brancato told the witness what she thought.

THE COURT: Overruled.

MR. BRANCATO: Judge - -

THE COURT: Just a moment. We won't argue

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the point. The objection is overruled. The witness had so testified to that precise language.

MR. BRENNER: Then it's asked and answered, your Honor.

THE COURT: All right. You may complete your answer.

A I knew that the guy that was at the door was the same one that I saw 15 minutes before through the window. That's why I opened it. When he says, "Flowers for Myra Franza," I didn't hesitate. I opened.

Q Did he use your daughter's first and married name?

A First and married name?

MR. BRENNER: Objection. Improper redirect.

THE COURT: Objection overruled.

Q You can answer.

A First and last name, Franza. Myra Franza.

MR. BRANCATO: I have no further questions.

MR. BRENNER: I have no questions.

THE COURT: You may step down. You are excused.

(At this time the witness was excused by the Court.)

THE COURT: Ladies and gentlemen of the jury,

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at this time we'll break for lunch until 2:20. Do not discuss this case among yourselves.

Take the jury out.

(At this time the jury filed out of the Courtroom.)

(At this time a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

THE COURT: Okay. Bring in the panel.

(At this time the jury filed into the Courtroom.)

THE COURT: Mr. Brancato, are you ready with your next witness?

MR. BRANCATO: Yes. The People call Myra Franza to the stand.

M Y R A F R A N Z A, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name and county of residence.

THE WITNESS: My name is Myra Franza,

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F-R-A-N-Z-A. I reside in New York City.

Q Mrs. Franza, are you married to the Defendant in this case, Dominic Franza?

A Yes.

Q Where is he sitting in Court today?

A Right there (indicating).

MR. BRENNER: Indicating Mr. Franza for the record.

THE COURT: Let the record so reflect.

Q When did you marry the Defendant?

A May 12, 1987.

Q How old were you when you got married?

A Twenty-three.

Q How old are you now?

A Twenty-seven - - I mean 28.

Q How old was the Defendant when you married him?

A I believe 31.

Q About how many years are there separating your age from his?

A Seven.

Q Where were you living prior to getting married?

A With my parents, 485 West 187th Street.

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Q Are they Josephine and Cecilio Mendez?

A Yes.

Q How long did you live at that address?

A Since the age of three.

Q Now, back in 1987 - - withdrawn.

How many brothers and sisters do you have?

A I have three brothers one passed away.

Q And your brothers, tell us their names?

A Nelson Dacosta, Carlos Dacosta, and Wilfred Dacosta who passed away.

Q When did he pass away?

A November 4, 1989, I believe. Sometime in November.

Q After marrying the Defendant where did you live?

A 3320 Barker, Bronx, New York.

Q Is that Barker Avenue?

A Barker, B-A-R-K-E-R.

Q Could you please tell us, did you have an apartment there or did you have a house?

A We rented the first floor in a two-family house.

Q Did anyone else live in the building at Barker Avenue?

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A Yes, the landlord.
Q What's the landlord's name?
A George Guzman.
Q And where did Mr. Guzman live?
A He lived above us.
Q What do you do for a living?
A I work for the United States Postal Service.
Q What do you do at the U.S. Postal Service?
A I'm an artist. I do displays and I draw and promote postal products.
Q How long have you worked for the Post Office?
A February 14, 1987, I started. About four years.
Q What does the Defendant do for a living?
A He's an electrician.
Q And after marrying him did he work as an electrician?
A Yes.
Q Where did he work?
A He worked for Local 3 who assigned him to different contracting companies, the last one I recall is called Kleinig Electrical Corporation.
Q Do you have any children?
A No.

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Q Mrs. Franza, could you please tell the jurors, back in 1988, 1989, where were you living?

A I was living with the Defendant at 3320 Barker Avenue.

Q And did there come some point in 1989 that you moved from your home at 3320 Barker Avenue?

A Yes.

Q When was that?

A Sometime in April or March, I'm not too sure of the date, in '89.

Q And where did you go when you moved back in March or April of 1989?

A I went to live with my brother Carlos, and my parents. I sort of lived - -

Q Did you sleep at Carlos Dacosta's apartment?

A Yes.

Q Would you have your meals at your mother's apartment?

A Yes.

Q Why did you go live with your brother and his wife back in 1989?

A My husband had beaten me. We had a big argument. And he injured me. I had to go to the hospital.

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I then had to get an order of protection. He got arrested.

The argument was over me making a decision on picking up the station wagon. He was at work. I decided to get the station wagon so that he wouldn't rush from the house to the dealer. And that way I wouldn't be nervous driving back with him in the car. So I went. I got the station wagon and he was waiting for me in front of the house. And he told me, "Who the hell told you to get the car?"

MR. BRENNER: Objection, your Honor.

THE COURT: Sustained. Strike it.

Q Did he hit you at that time?

MR. BRENNER: Objection, leading.

THE COURT: Just a moment. I'm going to allow it in view of the prior testimony that she was injured by him. You may continue.

Q Could you please tell us?

A Well, he was furious that I made - - took a decision upon myself to get the car.

MR. BRENNER: Objection to the working of the Defendant's mind.

THE COURT: Yes. Tell us what you know, not somebody else's mind.

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Q Could you please tell us what was his demeanor at the time that you saw and how was he acting when you came home with the station wagon?

A He was angry, furious.

Q And how did he speak to you?

A He cursed and he started to hit me.

Q Where did he hit you?

A He grabbed me by the hair and he swung my neck sideways. He hit me in the arms. He hit me in the knees about ten times. He was hitting me from within the car, in the station wagon. He was just angry that I got the car without his permission.

Q Did he threaten you in any way at this time?

A Well, no. At that time, no. Later on during the day, yes.

Q Where were you when your husband hit you like this? You said you were in the car?

A First I was in the driver's seat. Then he told me, "Move over." And then I was in the passenger seat.

Q And where were you? What borough were you?

A In the Bronx, in front of our residence, 3320 Barker Avenue.

Q So what happened after he hit you? Where did

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you go? Did you go inside or did you go someplace else?

A We drove off to the dealer. He wanted to go back to the dealer.

THE COURT: Was this a new car you had just purchased?

THE WITNESS: No.

Q Where did you go?

A We went to the dealer. And he was angry because the price to change the muffler was $197. And he wanted to go and make sure - -

MR. BRENNER: Objection, your Honor.

THE COURT: Don't tell us what he wanted. Just what you did or what you actually did.

Q Did you go back to the dealer?

A We went back to the dealer and I sat in the car.

Q How long did you stay at the dealer?

A About 10, 15 minutes.

Q What happened after that?

A We drove back to our residence.

Q At Barker Avenue?

A Yes.

Q What happened then?

A He continued to argue with me, and he started

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again to hit me. Why did I make decisions without him?

MR. BRENNER: Objection. May we approach, your Honor?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

MR. BRANCATO: May I continue?

THE COURT: Yes.

Q Could you please tell us what happened when you and your husband went inside the night that you picked up the station wagon?

A We continued to argue. He was mad. Then he told me - -

MR. BRENNER: Objection.

THE COURT: Don't tell us what he told you. Just tell us what happened.

A Okay. He left.

MR. BRANCATO: Judge, may we approach?

THE COURT: Yes.

(At this time the following took place at sidebar, among Court and counsel, out of the hearing of the jury:)

THE COURT: I want the record to reflect, if I don't summarize it correctly, you expand on it,

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Mr. Brenner objects to any testimony with reference to any activities by the Defendant at a prior time either in words or acts with respect to the complainant.

MR. BRENNER: In addition, it's my understanding that the terms of the prosecution theory are that there is going to be evidence that prior threats were made, that Myra Franza left Mr. Franza, that he would kill her and her family. And at least facially it had some relevancy to charges contained in this indictment.

The instance to which the witness is now attesting is an uncharged crime, which is not related to any subject matter in relation to this indictment.

THE COURT: When you say uncharged crime, I haven't yet determined that it has approached the level that it's a crime.

MR. BRENNER: The witness will testify that she was assaulted. Whether the Court makes a Dell determination - -

THE COURT: There is no Dell determination nor are words a crime between husband and wife.

MR. BRENNER: No question about it. The

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witness has now testified that twice she was struck. That makes this at least facially a crime for which the Defendant is not charged in the indictment. And my concern in limine was that this testimony is prejudicial and would far outweigh any probative value.

I move to preclude it now. I'm entering a continuing objection to anything - -

THE COURT: You will have such a continuing objection, but I want to hear from Mr. Brancato.

MR. BRANCATO: Your Honor, she is going to testify that the Defendant at that time threatened her by saying that if she left him he would kill her and bury her in the park, and then he would take care of her parents. It was on the basis of that, also of being struck that she left him.

THE COURT: What is your legal theory that comes under?

MR. BRANCATO: First of all, a threat by this Defendant to his wife has probative value as to the events that happened after that.

MR. BRENNER: My question has been all along why wasn't the prosecution able to elicit the testimony of the threats out the embellishment of

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the argument and the assault? What probative value?

THE COURT: How would they elicit it?

MR. BRENNER: "In 1989 did you have occasion to leave Mr. Franza? Yes, I did. What was it the result of? It was an argument. And did Mr. Franza have occasion to say anything? Yes, if he told him if I left him," et cetera, et cetera. It has no bearing in this case.

THE COURT: It happens to be what occurred here and also it sets a state as to what she believes in her mind.

MR. BRENNER: What she believes is not relevant.

THE COURT: No. Well, it's relevant to the extent when she testified as to why she left him, if that was in a sterile setting so sanitized of any of the background. I'm not saying go into dotting every "i" and crossing every "t" as to what the beating consisted of, but as much as is in on that score, you can object.

Now, as far as the threat, I'm allowing the threat. What else is coming in?

MR. BRANCATO: She will testify that he

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threatened her and that she left him, got an order of protection, went to live with her family in the Bronx. He called her up, "Let's get back together again. I'm not going to hit you. I'm going to counseling. We'll work it out." Based on that she went back to him. She stayed with him until June of 1990.

At that point, the Defendant once more threatened her, and at that point she moved out and went to live with her parents in Manhattan. I'm not going into every instance where this guy hit his wife, but I'm going into those two instances because of the threat that he posed to her.

MR. BRENNER: Over my objection.

THE COURT: Okay.

(At this time the following occurred in open Court:)

Q Before your husband went out the door that night, the night that you picked up the station wagon, did he threaten you in any way?

A Yes.

Q Tell the jurors and tell the Court what he said to you.

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A He said, "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."

Q After that, what did your husband do?

A He left.

Q What did you do after that?

A I panicked and I left.

Q Where did you go?

A I went to a hotel. I didn't want to go to my parents' house.

Q What hotel did you go to?

A Grammercy Park in lower Manhattan.

Q How long did you stay there?

A One night, until I could get myself together.

Q Where did you go then?

A Bellevue Hospital, 28th Street and First Avenue.

Q How long did you stay there?

A Hours. They treated me for the injuries I had received, medication, a cervical hard collar, and then I went to the precinct.

Q Which precinct was that?

A The one in our neighborhood. I believe it's 47.

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Q That's in the Bronx?

A Yes,

Q Let me ask you this question: Did you later go and get an order of protection so that your husband would not come near you?

A Yes.

Q Where did you go for that?

A The Family Court in the Bronx.

Q Was that the same day that you went to the precinct?

A I believe so.

Q Where did you go that night? Where did you spend that night?

A That night I returned with my - - to my - - I went to my parents' house.

Q Was that on 187th Street?

A Yes.

Q How long did you stay there?

A Two, three weeks I believe.

Q Tell us when you stayed with your family what was the living arrangement?

A I would sleep with my brother Carlos at his house, that's one building over, in the basement. I would sleep there. And then after work, I would go and

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eat at my parents' house.

Q And about how long did this arrangement last?

A About two weeks. I'm not sure.

Q Did there come a point about two to three weeks later that you moved back with the Defendant at Barker Avenue?

A Yes.

Q Could you please tell the jurors the circumstances as to how you moved back to Barker Avenue?

A Well, he kept calling and he promised that - -

MR. BRENNER: Objection.

THE COURT: Well, without giving us the details, just tell us what the ultimate fact was, did he agree with you, and you went back, that you would go back, just the ultimate fact, not the details.

THE WITNESS: As to why I went back?

THE COURT: Yes.

A Yes, I went back.

Q Did you speak with your husband?

A Yes.

Q Did you have a conversation with him over the telephone?

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A Yes.

Q Based upon your conversation with him did you decide to go back and live with your husband?

A Yes.

Q Did you go back the same day you had the conversation with him?

A We had conversations several times. There was an interim of about two weeks. The last time I spoke I guess that's when I went back with him.

Q And when you went back to live with your husband at Barker Avenue how did you move back? Tell us how you went back to Barker Avenue.

A He came to pick me up.

Q Your husband?

A Yes, he came to get my things.

Q And where were your things?

A My brother's house.

Q Now, you took things from your apartment at Barker Avenue before you moved into Manhattan?

A Yes. My files, my jewelry.

Q When did you take your personal effects from Barker Avenue?

A That same day. I just grabbed what I could and I left.

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Q That was the night that you went to Gramercy Hotel?

A Yes.

Q When your husband came to pick you up, which apartment were you in when he came to pick you up? Were you in your mother's apartment or were you in your brother's apartment when he came to pick you up?

A I was in my parents' house. We all spoke. Then he accompanied me to go get my things.

Q Your husband accompanied you?

A Yes.

Q And from your mother's apartment to your brother's apartment, tell us how you got there.

A Walking distance. Around the corner.

Q Your brother's apartment is around the corner?

A Yes.

Q Where is it located around the corner?

A It's halfway up the block. Then there is a courtyard and you have to walk up straight and it's there.

Q His apartment, which floor is it on in the building?

A The basement.

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Q When you went back with your husband to your brother's apartment, did you take your personal effects that you described earlier, your jewelry, your personal files?

A Yes. My husband - - the Defendant was waiting for me with his car outside. I went back, got my things and put them in the car.

Q And when you got back with your husband and you had your goods, where did you go, back to Barker Avenue?

A Yes.

Q Were you still working at this time for the Post Office?

A I was on a leave of absence.

Q When did you take the leave of absence?

A On February 29, 1989, because I was involved in a car accident.

Q Did you sustain any injuries in that accident?

A I had reinjured a herniated disk that I have.

Q Where was that?

A The base of my neck, shoulder level.

Q Now, when you went back to live with your husband at Barker Avenue, did you continue to live with

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him at Barker Avenue from the time that he helped you move back to the time to about June of 1990?

A Yes.

Q Could you please tell the jury what, if anything, happened about June 25, 1990?

A Well, that was the last straw for me.

MR. BRENNER: Objection, your Honor.

THE COURT: Sustained.

Q Just tell us what happened in June of 1990.

A We had another fight and he beat me.

Q This is what day now?

A June 25, 1990, a Monday, I believe.

Q Could you please tell the jurors what happened on June 25, 1990?

A I had gotten out of work, and he had directed me to wait for his father at the subway station at the steps, and I stood there. A co-worker approached me and started to speak to me for about 15 minutes.

And the Defendant later on called me over and started to yell and scream at me, and told me what was I doing.

MR. BRENNER: Objection.

THE COURT: Don't give us that conversation. Just give us the facts of what happened.

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MR. BRENNER: Objection to the line of questioning.

THE COURT: You have your objection.

MR. BRENNER: Yes, thank you.

Q Did he speak with you at that time, your husband, did he speak with you?

A Yes.

Q Describe the tone in which he spoke with you at that time?

A He was yelling. He was angry.

Q What happened as he was yelling? What, if anything, happened?

A He opened the car door and shoved me into the car.

Q And what happened then?

A He got into the driver's seat. He took his fist and punched me right in the chest.

Q And what happened then?

A And he kept on - - kept on trying to hit me again while he was driving.

Q You brought your arm around and stopped short just a moment ago.

A Because he would hit me and then try it again, like he was angry trying to control himself. You

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can't drive and hit at the same time.

MR. BRENNER: Objection. Move to strike.

THE COURT: Yes.

Q Where did this happen?

A On 149th in the Bronx.

Q Where did you go that night?

A I drove back home.

Q Did your husband threaten you in any way that night?

A Yes.

Q Could you please tell us what he said?

A He said that I was disrespectful for talking to that person.

MR. BRENNER: Objection. Move to strike. Not responsive.

MR. BRANCATO: Well, for purposes of completeness, this is all part of one sequence.

THE COURT: I'm going to allow it in view of of the ruling earlier. At the appropriate time you may be subject to a charge. Go ahead.

Q What did he say?

A He said that I had been disrespectful to him for speaking to that man and not introducing him to him. He went on and on.

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And then he said, "If I ever catch you with someone, I'm going to kill you."

Q Where was this that this happened?

A In the house.

Q Did he say anything else at this point?

A No.

Q About what time of day was this that this happened?

A Later in the evening, around five, six.

Q Did you stay home that night, the night that you were hit?

A Yes.

Q Could you tell us, did you have any injuries at all from that event?

A I was sore from the handling and pushing around, the slapping, but I wasn't bleeding.

Q Now, did you and your husband spend the night that this event happened, did you both spend it at Barker Avenue?

A Yes.

Q And did there come some point a few days later that you left your residence at Barker Avenue in the Bronx?

A Yes.

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Q When was that?

A The Thursday of that same week, June 28, 1990.

Q What caused you to leave your residence at Barker Avenue in the Bronx?

MR. BRENNER: Objection.

THE COURT: I'll allow it.

A The fact that he again had beaten me.

Q Did he threaten you or your family in any way on that event in June of 1990?

A Well - -

MR. BRENNER: Your Honor, if I may interrupt. I object because I'm now confused. I don't know whether there are separate - -

MR. BRANCATO: Judge, he can lodge an objection, but I don't want the colloquy in front of the jury.

MR. BRENNER: Then I object. I object to the reference to the event of June of 1990.

THE COURT: Just tighten it up.

Q June 25, 1990, did your husband threaten you or your family in any way on June 25, 1990?

A Yes.

Q Tell us what he said.

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A He said, "If you ever leave, if you leave me I'm going to find you. Even if you go to Puerto Rico, I'm going to get you."

Q Did you have family in Puerto Rico in June of 1990?

A Yes.

Q Specifically June 25?

A Yes.

Q Who lived in Puerto Rico that you were related to?

A My grandmother and my aunts.

Q What was your grandmother's name?

A Rosa Lamboy.

Q And at that time were you aware if she was married, Miss Lamboy?

A At that time, I believed - - in my mind I believed that my grandmother's name was Rosa Lamboy Roman.

Q Why Roman?

A Because that's my mother's maiden name, Josephine Roman.

Q There came some point a few days later that you moved from your apartment in the Bronx. Where did you go this time?

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A I went back with my parents.

Q Could you tell the jurors how it is that you moved from the Bronx where you lived with your husband to your parents' apartment?

A I called my mother, and I told her to have both my brothers and my father come pick me up, that I no longer wanted to be with the Defendant. He wouldn't let me take my things and leave.

Q Did you tell them what time of day to come and pick you up?

A Yes.

Q What time of day did you tell them to come?

A Around five o'clock.

Q Any special reason why you picked that time of day?

A Because he would be at the range.

Q What range are you referring to?

A It's a gun range, Olinville, on White Plains Road in the Bronx.

Q Did your husband belong to a gun club?

A Yes.

Q And did there come a point that your father and your brothers came to pick you up?

A Yes, that day, June 28, 1990. It was my

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brother and - - my two brothers, Nelson and Carlos and my mother. They came in a station wagon to pick me up.

Q Did you take your personal effects with you?

A Everything that belonged to me.

Q Where did you go after you took those items from the apartment at Barker Avenue?

A I went to my brother's house. We unloaded it into my brother's house in the basement, 490 West 187th.

Q This is Carlos; am I correct?

A Yes.

Q Did you speak with your husband after you moved out on June 28, 1990?

A He called my office once asking me to come back, that he had bought me a car, and he wanted to go on a cruise, even if it was the last cruise we would have together, and I told him no.

Q Where were you working during this time?

A Post Office.

Q The same job?

A Yes.

Q Was your husband working during this time?

A No, he was still out on compensation.

Q And was the living arrangement in June of 1990 the same it was when you lived with your family the

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preceding year? By that, I mean did you sleep at your brother's and eat meals at your mother's?

A Yes.

Q Mrs. Franza, on July 17, 1990, about seven o'clock in the evening at your mother's apartment at 485 West 187th Street, where were you?

A I was taking a shower.

Q Was that in your mother's apartment?

A Yes.

Q At about that time would you please tell us what, if anything, happened as you were in the shower?

A Well, I was in the shower. And my mother knocked on the door and told me, "Myra, open the door. There's flowers for you."

Then I heard her struggle. I heard some pop noises. I turned off the water. And I tried opening the door. But she would yank it towards her. And I would yank it, and I said "Ma, what's happening?"

After for about a minute struggle or so, I finally opened the door, and she is like, her body is falling on the door frame, and there is a man standing there. And for like about three seconds or so I looked at him, and he just lifted his hand and shot me in the face. I fell. Backwards. And instinctively I played dead. And I felt

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him like hover over me. And then I waited until I heard nothing.

And then I turned, crawled to my mother. And my mother was gagging with blood, her dentures were choking her, and I'm telling my mother, "Mommy, please don't die, don't leave me." And I stuck my fingers in her throat and I tried clearing her, and I placed her on her chest and more blood would gush out.

I crawled to the phone which was in the bedroom, and I dialed 911 and as best I could, I told them, you know, "I have been shot. My mother has been shot. Send someone."

Then I crawled back to her, and by that time her eyes were white, and I crawled to the door entrance, and I was asking for help.

And then my neighbor came, and he said, "Oh, my God," and he closed the door. I was like I started to pass out.

Q What happened then?

A Then the police came, and I told them, "Please, my mother, my mother. Forget me, go to my mother."

Q Where was your mother?

A I had left her in the bathroom area, in the

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foyer. And they just stood there and looked at me. They didn't want to touch me and they didn't want to touch my mother. And I told them, "We don't have AIDS. Help my mother."

Then the police started saying, "Who did this to you? Who did this to you?" And I couldn't talk no more because of the pain, and I felt a swelling. My jaw was just hanging. The bullet had crushed all my jaw, and I had almost no control over it.

Q Where were you shot?

A On my left side of my face here, and the bullet went out the back of my head. And I couldn't stop the blood coming out of my mouth.

So I'm laying there and the officer said, "Who did this to you?" And I wrote on the wall. They gave me a pen and I started to write on the wall, "My father, call my father." I put my father's work number.

And then the officer said, "Who did this to you?" And I said, "My husband. He sent someone."

And then they took me away on the stretcher. And in the emergency room they put my mother next to me, and she had like nine doctors trying to make her come back to life and telling her, "Yes, Mrs. Mendez, come on. You can do it. You can do it."

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And then they were working on me. And I'm here gagging on my own, vomiting the blood. They are trying to get some tubes here in my throat, up my nose, and all I kept hearing was wanting to make sure that my mother was going to pull through all this. I didn't care for myself.

THE COURT: Do you want a break, Mrs. Franza? Do you want to take a few minutes?

THE WITNESS: I want this to be over.

THE COURT: Do you want to go on?

THE WITNESS: I want to go on.

THE COURT: Proceed.

MR. BRANCATO: The record will reflect the witness is being handed what has previously been marked for identification as People's 15.

(Document handed to witness.)

Q Mrs. Franza, look at that photo. Do you recognize the area depicted in that photo?

A Yes.

Q What area does that show?

A The bathroom where I was taking a bath.

Q And does that photo fairly and accurately depict the bathroom on the day of July 17, 1990?

A Yes.

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MR. BRANCATO: I move it into evidence.

MR. BRENNER: Objection. May we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

(At this time the following occurred at sidebar among Court and counsel:)

THE COURT: The People are moving to introduce previously marked Exhibits 14 and 15?

MR. BRANCATO: That's correct.

THE COURT: Which portrays the bathroom leading out into the foyer of where the shooting takes place and includes some blood which will be testified to by the witness.

Mr. Brenner objects that these photographs are highly inflammatory and prejudicial.

MR. BRENNER: My objection is that the minimal probative value, when I say minimal, I mean not only on their face but in light of the fact that the facts which the prosecution intends to adduce can be proven in a myriad of other less inflammatory ways by virtue of testimony itself, use of a diagram which the People have put into evidence, make the probative value of these photo-

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graphs diminimus.

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

It is clear from the injuries sustained by the victims and the range at which they were sustained, all of which can be established by medical evidence, that the intent of the person in that apartment was to do serious physical injury or to kill the victims. It should be noted that in one of the photographs it is just replete with smeared and streaked blood.

THE COURT: Which one is that?

MR. BRENNER: This one (indicating).

THE COURT: That hasn't yet been identified as to what that is.

MR. BRENNER: I assume the People intend to offer that.

THE COURT: That comes as it comes, but so far it's not before us.

MR. BRENNER: I don't want to repeat this argument again. The photograph showed a blood-

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stained bath mat and blood dripping down the side and drops of blood on the tile. I submit that the jury, which has already heard extremely dramatic testimony, would be further inflamed by these photographs which depict the large amount of blood, and that that inflammatory prejudice far outweighs any probative value that these photographs might have.

THE COURT: Mr. Brancato, do you want to explain?

MR. BRANCATO: Your Honor, I believe that the photographs I stated before, off the record, one of the things I wanted to do is that the photographs help explain where her mother's position was in relation to her, and they also show the position that the shooter was at the time that he fired the shot at her.

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

MR. BRENNER: A shooting.

THE COURT: Not only that, but there was

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quite a bit of blood which came from both Mrs. Franza and Mrs. Mendez.

Now, since this aids the jury in understanding the setting, I don't find it prejudicial under the circumstances nor inflammatory, inasmuch as all the other testimony both before and the testimony to come with respect to the bleeding and blood gushing and so forth, I think you are taking this out of context that this graphic portrayal is something totally different than what the testimony is in terms of its sensitive nature. None of this is offered, as I hear it, to connect the Defendant to this. This does not in any way connect the Defendant to the scene of the crime.

MR. BRENNER: That's the Court's opinion. I believe the prosecution's theory is that every piece of evidence in this case connects the Defendant.

THE COURT: Mr. Brenner - -

MR. BRENNER: Now, if I may respond. It's one matter to hear about blood, and it's another matter to see it depicted.

THE COURT: I think you should also take note that these photographs are not that gruesome as

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you portray them. Particularly People's 15. There's merely some streaks along the edge of the bathroom and some spots on the tile floor.

With respect to number 14, you are probably correct, but that represents that there was blood there that was wiped and smeared on the floor. But it is not gruesome in its appearance. And this is not so repugnant to the eye or so horrendous to the eye.

In any event, under all the circumstances I believe the exhibit will be admitted over your objection. I'll return the exhibits to you.

(At this time the following occurred in open Court:)

THE COURT: You may continue, Mr. Brancato.

MR. BRANCATO: Your Honor, I renew my offer at this point.

THE COURT: Over objection, People's 14 and 15 - - I'm sorry. You offered 15?

MR. BRANCATO: Yes.

THE COURT: Why don't we now go through it and then we'll do it jointly.

Q Mrs. Franza, please look at this photo.

(Document handed to witness.)

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Q What area is depicted in that photo?

A The foyer that leads to the bathroom and the bedroom.

Q Does there appear in that photo the position where your mother was when you opened up the bathroom door?

A Yes. She was lying on the floor in front of the doors.

Q Does it fairly and accurately depict the apartment on the day in which you were shot?

A Yes.

MR. BRANCATO: At this time I would offer both photographs.

THE COURT: Over objection both People's Exhibits 14 and 15 are received.

(Documents referred to above as photographs were received and marked as People's Exhibits 14 and 15, in Evidence.)

Q Mrs. Franza, at the point that you got out of the tub to open the door, could you please tell us how you were positioned?

A I had my left leg in the tub, and my right leg holding my body weight, and I was - - with my right hand I was turning the door knob and with my left holding

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onto the sink.

Q Could you please hold up the photo that showed the bathtub and turn it to the jury, please?

THE COURT: Do you want to take a moment, having been admitted, do you want that published to the jury?

MR. BRANCATO: Yes.

THE COURT: Why don't we do it, both 14 and 15.

(At this time Exhibits 14 and 15 were published to the jury.)

Q Mrs. Franza, you indicated that you had one foot in the bathtub and one foot out as you opened the door. About how far is the door from the tub?

A Three feet.

Q And were you in that position at the point that you were shot in the face?

A No. But that time being that my mother kept yanking, when she finally let go, I had both feet out and I opened, so I wasn't - -

Q At the point that you were shot in the face, could you please tell us what happened to you?

A Everything was like slow motion. And I lost my balance, and I turned and somehow I fell on my left

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side of my face up towards the toilet.

Q The toilet bowl?

A Yes.

Q And your mother at this point, where was your mother?

A She was still on the floor with her head up.

THE COURT: When you say her head up, she was facing the ceiling?

THE WITNESS: Yes.

Q At the point that the man shot you, I'm now holding Exhibit 14, is there a position in this photo that shows where the man was standing at the point he fired at you?

A Exactly in front of the bedroom.

Q Would you please hold it up and just point to it?

A Right here (indicating).

Q That's the doorway to the left of the bathroom as you face it; am I correct?

A Yes.

Q Yes or no?

A Yes.

Q After you fell down - - you can put the photo down.

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After you fell down, what did you notice?

MR. BRENNER: Objection as to leading, your Honor.

THE COURT: Overruled.

Q What happened after you fell down?

A I tried reacting. Then I said to myself, well, after I figured it out, I said to myself, let me play dead, and I just laid there until I couldn't hear any noises. I had felt for one moment like as if somebody was hovering over me, like maybe the gunman wanted to see if I was dead or not.

Q Did there come a point that you got off the floor and went to assist your mother?

A Yes.

Q Was it at that point that you put your hands in her mouth?

A Yes.

Q Were you taken to the hospital that night?

A Yes.

Q What hospital did you go to?

A Harlem Hospital.

Q Were you admitted into the hospital? By that, I mean did you stay at the hospital for several days?

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A Yes.

Q How many days did you stay at the hospital?

A About three.

Q Three days. And after a short period of time, those three days, were you released from the hospital?

A I was transferred to another hospital.

Q What hospital were you transferred to?

A Beth Israel.

Q And how long did you remain at Beth Israel Hospital?

A Until August 2nd of 1990.

Q Were you released at that time?

A Yes.

Q Who was your doctor?

A Dr. Gary Ruth.

Q What injuries did you sustain as a result of being shot in the face?

A My whole jaw was like in pieces. So I had lost sensitivity in that area.

Q Was your jaw wired?

A Yes, they had to wire me.

Q Were you operated on at the hospital?

THE COURT: Which hospital?

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Q The first hospital that you went to.

A No. Those three days I was sedated but they didn't operate on me.

Q So you were under sedation?

A Yes.

Q You were under Dr. Ruth's treatment; am I correct?

A Yes.

Q Now, you indicated earlier that when your mother came to the door she said something to you. What did she say?

A She said, "Myra, open up. There's flowers for you," in Spanish.

Q Did you respond to her in any way when she told you there were flowers for you?

A I said, "I don't want no flowers."

Q How long were you married to the Defendant before you were shot?

A About three and a half years.

Q Did he ever send flowers to you before?

MR. BRENNER: Objection.

A Yes.

THE COURT: I'll allow it.

MR. BRENNER: Objection to the form of the

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question. Presumes a fact in issue, your Honor.

THE COURT: I wouldn't say it's the most artfully drawn, but I'll allow it.

Q Did he ever send you flowers?

A Yes.

Q What kind of flowers?

A Roses.

Q What kind of roses?

A Red roses.

Q You indicated earlier that your husband belonged to a gun club. What was the name of the gun club?

A Olinville.

Q Where is it located, which borough is it located in?

A In the Bronx.

Q Have you ever gone with your husband to the gun club?

A Yes.

Q Did your husband keep any weapons at home?

A No.

Q Did he keep any at the club?

A Yes.

Q Did he keep any ammunition at home?

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A Yes, he used to make it at home.

Q When you say he used to make the ammunition, what do you mean?

A He got so involved that he went out of his way to buy the machine.

MR. BRENNER: Objection.

THE COURT: Sustained. Strike that about going out of his way.

Q Did he have a machine?

A Yes.

Q What kind of a machine was that?

A A bullet-making machine.

Q How would - - did you ever see him prepare the bullets?

A Yes.

Q How would he do that?

A The machine worked by pouring gunpowder in I think they called dies, and the what holds the gun powder, the casings. And he would place them in this disk. And by bringing down a lever, it would load a bullet and it would make a bullet.

Q Would it push the bullet into the casing when he pulled it down?

MR. BRENNER: Objection to Mr. Brancato's

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testifying, your Honor.

MR. BRANCATO: I'll withdraw the question.

Q Did he keep gunpowder in the home at Barker Avenue?

MR. BRENNER: Objection. Leading.

THE COURT: Sustained. This is direct.

MR. BRANCATO: Judge, I don't know any other way to ask her that without saying how many things did you keep in the home.

THE COURT: Just a moment. Let's not - -

MR. BRENNER: Something about colloquy before the jury, your Honor.

THE COURT: Yes. I guess everyone now has an equal opportunity. Rephrase it.

Q Mrs. Franza, the components that he used, the ingredients that he used to make the bullets, could you tell us what you observed?

A There was gunpowder, there were dies, casings, and the lead.

Q Where would the gunpowder be?

A We had like a microwave cart.

MR. BRENNER: I object. Are we going to have some type of time frame?

Q During the time that you lived with the

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Defendant. During the time that you lived with your husband, where would he keep the gunpowder?

A In the house.

Q Tell us where.

A In a cart. It's a microwave cart. We removed the microwave and put that machine on it. And we would store it, all the stuff under the cart.

Q When did your husband - - was your husband a member of the gun club at the point that you married him?

A Excuse me?

Q When you married your husband, was he a member of the gun club?

A No.

Q When did he join the club?

A Sometime in '89 or '90. I'm not too sure.

Q In relation to the event that you told us before, at the time that you moved out back in March and April of 1989, at that point do you remember if your husband was a member of the gun club?

A No, he wasn't.

Q At the point that you left him in June of '90, was he a member of the club at that point?

A Yes.

MR. BRANCATO: I would like to have this

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marked People's Exhibit 17 for identification.

(Document referred to above as a photograph was received and marked as People's Exhibit 17, for Identification.)

Q Could you please look at that photo. The case that's in that photo, have you ever seen one like that before?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q Does it look familiar?

MR. BRENNER: Objection.

THE COURT: Step up.

(At this time a discussion was held off the record among Court and counsel.)

Q Looking at that exhibit, do you recognize what's in that exhibit?

A It's a suitcase. It looks familiar.

MR. BRENNER: Objection.

THE COURT: Sustained.

MR. BRENNER: Move to strike.

THE COURT: Strike that last response.

Q Have you seen one like that on previous occasions?

MR. BRENNER: Objection.

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THE COURT: Sustained. Step up.

(At this time a discussion was held off the record among Court and counsel.)

Q Where did your husband live at the point that you married him back in 1987?

A 3320 Barker Avenue in the Bronx.

Q Your husband's parents, are they still living?

A Yes.

Q Where do they live?

A 225 East 106th Street in Manhattan.

Q And did the Defendant ever tell you where he lived when he was growing up?

MR. BRENNER: Objection.

THE COURT: Read it back.

(At this time the requested portion was read back by the Reporter.)

THE COURT: Well, I take it, is there some relevancy to this?

MR. BRANCATO: Yes.

THE COURT: I would rather know it beforehand.

(At this time a discussion was held off the record among Court and counsel.)

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THE COURT: Objection sustained.

Q Mrs. Franza, you indicated that your brother died in 1989?

A Yes.

Q When did your brother die?

A Sometime in November. I'm not sure if it was November 4 or 16th.

Q And did you go to Puerto Rico in November of 1989?

A Yes, for his funeral.

Q Did your husband accompany you to Puerto Rico back in November of 1989?

A No, he stayed home.

Q Did you and your husband ever go to Puerto Rico together?

A No.

Q When you went to Puerto Rico in November of 1989 did you supply your husband with any information as to where you could be reached?

MR. BRENNER: Objection, leading, your Honor.

THE COURT: I'll allow it.

A Yes.

Q Could you please tell us what information you provided him?

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A My grandmother's phone number, I believe my aunt, the address, 2629 Pacio Aguilar, Levittown, Catana, Puerto Rico.

Q Who did your aunt live with - - did your grandmother live with back in 1989 when you went to Puerto Rico?

A With an aunt, Anjeles Evelyn. Evelyn Norris. She has two names.

Q You had two aunts in Puerto Rico?

A Yes.

Q Did your husband speak Spanish to you on previous occasions?

A He speaks a broken Spanish.

Q What do you mean by he speaks a broken Spanish?

A He doesn't know how to speak it well.

Q Could you tell us specifically what you mean by that?

A He uses verbs and nouns in the wrong tense when he tries to say a sentence.

Q Do you know anyone by the name of Julio Ortiz?

A It sounds like an apprentice that used to work with him.

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MR. BRENNER: Objection.

THE COURT: Well, let's try to see if we can tighten up the answer.

Do you know anybody by that name?

THE WITNESS: Personally, no.

Q Did your husband ever mention that name to you?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q You indicated that when you went to Puerto Rico for your brother's funeral that you gave your husband your grandmother's telephone number. Did you give him any other telephone numbers?

A I may have given him my other aunt's number.

Q Where did your other aunt live?

A Rio Piedras.

Q And your grandmother, where did she live?

A Levittown.

Q You indicated that you gave him the address. What address is that?

A The one in Levittown for my grandmother, 2629 Pacio Aguilar, Levittown, Puerto Rico.

Q This is in evidence. It's Exhibit Number 10. Please look at the return address in the upper left-hand

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portion of each envelope.

Back in February of 1990 did you know anyone who lived at 750 West 181st Street in New York?

A No. But I know the area.

Q How far is that address from your mother's apartment?

A About seven blocks; six, seven blocks.

Q Did you know anyone by the name of Julio Ortiz?

MR. BRENNER: Objection. Asked and answered, your Honor.

THE COURT: The question hasn't been completed.

MR. BRENNER: Objection, your Honor.

Q Who lived at that address?

MR. BRENNER: Objection.

THE COURT: Overruled.

A Personally, no.

Q When you say personally, do you know anyone by the name of Julio Ortiz at that address?

A No, I never met that person.

Q Did you ever hear of anyone who lived at that address?

MR. BRENNER: Objection as to "hear of."

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THE COURT: Sustained.

A No.

Q Mrs. Franza, did you when you lived with your husband at Barker Avenue in the Bronx, did you have any VCRs.

MR. BRENNER: Objection. Leading.

MR. BRANCATO: Judge, can we approach?

THE COURT: Overruled.

Q Did you have any VCRs?

A Yes.

Q Did you ever have those VCRs repaired?

A Yes.

Q When was that, that you remember?

A Perhaps around '89, late '89, early 1990.

Q And where did you take them to be repaired?

A USA Electronics on Boston Road.

Q Did you take them by yourself or with someone else?

A I took it with the Defendant.

Q Your husband?

A Yes.

Q Did you take it with your husband?

A Yes.

Q Whose idea was it to go to that address, USA

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Electronics on Boston Road to have them repaired?

MR. BRENNER: Objection.

THE COURT: I'll allow it.

A The Defendant's.

Q This has been marked collectively as People's Exhibit Number 16. Please look through those pages.

(Document handed to witness.)

Q Did I show you that exhibit in my office on a previous occasion located across the street on the ninth floor?

A Yes.

Q Do you recognize the writing that's in that exhibit?

A Yes.

Q Whose writing do you recognize it to be?

A That's my husband's handwriting.

MR. BRANCATO: I would offer it into evidence at this time.

THE COURT: Do you have a copy?

MR. BRENNER: Yes, I do.

THE COURT: Did you want to see that one?

MR. BRENNER: No.

THE COURT: The application is pending.

MR. BRENNER: I have an objection. Even

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subject to connection, I don't know what foundation has been laid for this at all.

THE COURT: You do have an objection?

MR. BRENNER: Yes.

THE COURT: Over objection People's 16 - - how many in that collective exhibit are there?

MR. BRANCATO: Approximately 38.

THE COURT: It's received.

(Document referred to above as handwritten notes was received and marked as People's Exhibit 16, in Evidence.)

THE COURT: Counsel approach.

(At this time a discussion was held off the record among Court and counsel.)

MR. BRANCATO: Your Honor, it's been offered at this point.

THE COURT: All right. Over objection it's been received. People's 16 consisting of the exhibits attached.

MR. BRANCATO: Just one moment, Judge, please.

Q This is already in evidence as Defendant's Exhibit B. Look at that photo.

(Document handed to witness.)

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Q Does that person look familiar to you? Have you seen that person before?

A He looks like the man that shot my mother and I. I picked that out over at the police precinct.

MR. BRANCATO: I have no further questions.

THE COURT: The witness is yielded. You may inquire.

MR. BRENNER: May we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: All right, ladies and gentlemen of the jury, at this time we'll take approximately seven minutes. Do not discuss this case amongst yourselves and all the usual admonitions.

Take the jury out.

(At this time the jury filed out of the Courtroom.)

(At this time a brief recess was taken.)

THE COURT: Okay. Bring in the jury

(At this time the jury filed into the Courtroom.)

THE COURT: Have the witness resume.

(At this time the witness, Myra Franza,

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resumed the witness stand and was reminded she was still under oath)

MR. BRANCATO: I have a few additional questions for Mrs. Franza.

THE COURT: Yes, Mr. Brancato.

Q Mrs. Franza, I have some additional questions for you. You indicated that there came a point in 1989 that you moved out from your apartment at Barker Avenue to your parents, and that a few weeks later you moved back with the Defendant.

A Yes.

Q What was it that caused you to move back to the Defendant back in 1989?

A He promised that he wasn't ever going to hit me again, and that we were going to go to counseling.

Q Did you go to counseling with him?

A Yes.

Q How long did you go for?

A Maybe seven, eight visits.

Q What was the reason that you stopped going after seven or eight visits?

A He said the counselor didn't know what she was talking about.

Q You indicated on your direct testimony that

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there were occasions that the Defendant sent you red roses. When would he send you red roses?

A Usually when we broke up, that I went to my parents' house, he would send me flowers.

Q You indicated earlier that you had a microwave cart on which some items were kept, a machine to reload, as well as gunpowder and other items. Were any of the items to reload the bullets kept at any other location in the apartment?

A No, not that I can remember.

Q Did your husband keep any gun equipment in the pantry?

MR. BRENNER: Objection, leading.

THE COURT: Sustained.

Q Did your husband - - where if any place else in the apartment did your husband keep gun equipment?

A It would probably be in the pantry.

MR. BRENNER: Objection.

THE COURT: "Probably." Objection sustained. Strike the answer.

Do you know if, in fact, he kept any equipment other than what you've testified to?

THE WITNESS: Excuse me, your Honor?

THE COURT: Do you know if he, in fact, kept

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any other gun-related equipment in any other part of your home?

THE WITNESS: I'm not too sure about it, no.

THE COURT: All right.

Q What was kept in the pantry?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q Did you have an attache case in the apartment?

MR. BRENNER: Objection.

THE COURT: Sustained. Leading.

Q What cases if any were in the apartment at Barker Avenue?

MR. BRENNER: Objection.

THE COURT: Did you have travel bags at home?

THE WITNESS: Yes.

THE COURT: How many travel bags did you have at home?

THE WITNESS: About three.

THE COURT: Any other type bags, anything else?

THE WITNESS: A black suitcase.

Q The black suitcase, where was it kept?

MR. BRENNER: Objection.

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THE COURT: Overruled.

Q Where was it kept?

A The pantry.

Q Could you describe it for us?

MR. BRENNER: Objection.

THE COURT: Overruled.

A Describe what?

Q Describe what it looked like.

A The suitcase?

Q The black one that you just mentioned.

A It looked like that picture you showed.

MR. BRENNER: Objection. Move to strike. May we approach on the record?

THE COURT: Yes. Jury disregard that last comment.

(At this time the following occurred at sidebar among Court and counsel:)

THE COURT: Mr. Brenner.

MR. BRENNER: Through the series of questions which were otherwise objectionable and sustained, Mr. Brancato has succeeded in proceeding through the back door with material which the Court ruled he could not proceed through the front door. Now the jury has heard that the suitcase which was in

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the pantry, and parenthetically I should note that the clue as to the location of the suitcase which Mr. Brancato is seeking to elicit is in the form of improper leading questions which the Court sustained and struck, nonetheless the witness heard it, was significantly clued in as to what Mr. Brancato is looking for. Hence, "it looks like the one in the photo."

THE COURT: The photo has not been admitted; is that correct?

MR. BRENNER: I'm sorry?

THE COURT: That photo is not in evidence.

MR. BRENNER: It's pre-marked for identification.

THE COURT: But it's not marked and it's not in evidence.

MR. BRENNER: That's correct.

THE COURT: So that photo is not before the jury. So the fact is that the witness has made reference to it.

MR. BRENNER: But the photo will be in evidence because it is part of the property recovered by the Alcohol, Tobacco and Firearms.

THE COURT: At this point, I agree with you.

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MR. BRENNER: So that, I can get on my own. It behooves me to move for a mistrial based on the fact that the jury has now heard through indirection of the prosecutor that which the Court ruled it could not hear through direction.

THE COURT: Mr. Brancato.

MR. BRANCATO: Judge, I believe the Defendant's motion for a mistrial is inappropriately placed at this point. My position all along has been - -

THE COURT: Don't work backwards.

MR. BRANCATO: We weren't on the record, and I allowed him to say - - I just want to say one thing. I want to say that since this is a circumstantial case, and since she can say that "this looks like the case that was kept in our apartment," that's a circumstance that should be given to the jury so that they can deal with it in any manner they deem appropriate.

Counsel can only ask a witness whether or not she can identify this case, and I'm sure he's going to go into how common a case this is or how unique it is, but I'll leave that for him.

And I believe that in a circumstance that a

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case like this was in their apartment when she left has some probative value. I don't see the prejudicial value that the Court claimed in the off-the-record session before.

MR. BRENNER: Let me state that in the off-the-record session the Court articulated what would be referred to in Federal Court as a 404B argument, and that is regardless of the weight argument, the Court must make a determination as a threshold matter that probative value of evidence outweighs the prejudice that the admission of such evidence would have before the jury.

In this case, the Alcohol, Tobacco and Firearm agents, as Mr. Brancato knows, traced the make, manufacture, origin, type of gun case it was.

The retailers in Mr. Franza's neighborhood, and that went for every single one of them, could establish no connection between that case and Mr. Franza.

Having that as a factual premises with which to work, Mr. Brancato has now elicited that a suitcase was in the pantry without a fixed point of time, without a fixed point of function,

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without a fixed point of control, after the Court had ruled that he could not do so, and he did it through misdirection and indirection.

MR. BRANCATO: So you see, Judge, he has given you the evidence that he intends to cross-examine these ATF agents on, what I have speculated on before, that he will take the line of attack on this piece of evidence he has just furnished for you, he's going to turn around and say that you tried to connect this to him, and he's going to say there is no way that we sold it to him, and he's going to say we are going to use that in summation. That's what he's going to say.

THE COURT: I'm not going backwards. And I cannot attribute fault to Mr. Brancato by the response that the witness made which was not responsive to what his question was when she said it looked like the photograph. That was not responsive to his question and I struck that answer.

Now, I'll allow you to ask if she had in it the house. She testified that there was a black case. She can describe the case. She can describe its function and she can describe the

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time that she last saw it in that house, and that's it.

(At this time the following occurred in open Court:)

THE COURT: So the record is clear the motion made at the sidebar is denied. The record will reflect what that motion is.

Q The black case that you referred to a few moments earlier, where was it when you left in June of 1990?

A The pantry.

Q Could you please describe what it looked like?

THE COURT: Without reference to anything else, just describe what you recall of this case.

A Black, two locks, about 12 inches by nine.

Q Could you hold your hands at how long it was?

THE COURT: Would it assist counsel - -

Q Why don't you hold your hands at about how long it was?

(Witness complies.)

Q Now, what I'm going to do is I'm going to put this ruler down and I want you to bring your hands right down.

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THE COURT: This is an 18-inch ruler?

MR. BRANCATO: Yes, Judge.

Q That was the length?

A Yes.

Q What was the width of it? By that, I mean from the front of the box to the back - - from the front of the case to the back.

A (Indicating.)

Q Could you put your hands down on the table at about the size it was from the front to the back. And just leave them there?

(Witness complies.)

THE COURT: Twelve inches.

Q Where were the two locks on this case?

A The front, where it meets, next to the handles.

Q And what kind of body did it have on it? Could you tell us the color itself? What was the color?

A Black.

Q Was there any writing on it?

A I don't remember.

Q You don't remember if it had any, or you don't remember any writing?

A I don't remember any writing.

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MR. BRANCATO: I have no further questions.

THE COURT: Mr. Brenner.

CROSS EXAMINATION

BY MR. BRENNER:

Q Mrs. Franza, you have made reference to the Olinville Gun Club of which Mr. Franza was a member; is that right?

A Yes.

Q Mr. Franza was also a licensed firearms dealer; was he not?

A Excuse me?

Q A licensed firearms dealer.

A Who?

Q Mr. Franza.

A Not when I was with him.

Q Did he have a business by the name of Nick's Gun Store?

A Not when I was with him.

Q Were you named as a co-proprietor in such a business?

A I know nothing of it.

Q Now, he would go to the gun range and you went there on occasion?

A Yes.

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Q He competed; did he not?
A Yes.
Q In gun meets?
A Yes.
Q Did he also bring you down there to learn to shoot?
A On one occasion, yes.
Q And you went?
A Yes.
Q Now, were you aware that Mr. Franza was applying for a firearms license?
A A target license, yes.
Q When approximately was that?
A 1990.
Q How were you aware of that? He told you; is that right?
A Yes.
Q Did you take any steps towards him achieving that end of getting a target license?
A He had asked me to - - that he needed a notarized letter in order for the application to go through.
Q Did you provide such a letter?
A Yes.

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Q By virtue of the notary, it was a letter that was under oath; isn't that right?

A Yes.

Q Not dissimilar to the oath that you've taken here; is that right?

A It's similar.

Q It's an oath?

A It's an oath.

Q You understood that it was an oath; is that right?

A Yes.

Q In that letter you informed the authority to whom the letter was addressed that the 1989 incident was a big misunderstanding?

A Yes, that's what he told me to say.

Q That's what you wrote?

A Yes.

Q And that's the statement to which you put your name before a notary?

A Yes.

Q Is that right?

A A-hum.

Q You also added that the incident had been blown out of proportion.

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MR. BRANCATO: Well, Judge - -

THE COURT: Is that a quote?

MR. BRENNER: Yes.

MR. BRANCATO: Can I see a copy of the letter since he's now cross-examining on a statement that she made that he has a copy of? I believe at this point I'm entitled to any Damien material.

MR. BRENNER: It's not my witness.

MR. BRANCATO: I am still entitled to it.

THE COURT: There is no need to argue it.

MR. BRANCATO: Judge, I'm making my request.

MR. BRENNER: May we do this outside the presence of the jury?

THE COURT: Yes.

(At this time the following took place at sidebar, among Court and counsel, out of the hearing of the jury:)

MR. BRANCATO: My request at this time is for all Damien material the Defendant has in his possession concerning the events that happened in March and April of 1989 to which the witness testified on direct, as well as any Damien material the Defendant has concerning the event in June 25 and the days following.

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THE COURT: Of June 25.

MR. BRANCATO: Of June 25 of 1990, that the Defendant has in his possession.

On the way up here, Mr. Brenner outside of your earshot, I asked whether there was any other material and he said, "I don't know yet." I'm entitled to it right now.

MR. BRENNER: Please define Damien material.

MR. BRANCATO: Wait a minute.

MR. BRENNER: Your quote, Mr. Brancato.

MR. BRANCATO: You know what Damien material is and that's all that I have to say about it. I'm not quoting federal rules here. This is a well adopted position in state Court that we are entitled to this, and I want it now.

THE COURT: Do you have any other statements?

MR. BRENNER: Yes. This is my only copy.

THE COURT: Is that an original?

MR. BRENNER: Yes.

MR. BRANCATO: What is the relevancy of this statement?

MR. BRENNER: At this point it's the date in the top right-hand corner.

THE COURT: Is there anything else?

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MR. BRENNER: No.

THE COURT: Let's go on. That's been complied with.

(At this time the following occurred in open Court:)

Q Mrs. Franza, did you also include in that letter to the authority that you were back within a week after the incident occurred and that the marriage was great?

MR. BRANCATO: I object to the compound question, Judge.

Q Did you inform them that you had returned within a week after the incident occurred?

A I believe so.

Q Did you also inform them that you were back together and the marriage was great?

A Yes.

Q That letter, do you recall when that letter was signed?

A No.

Q You originally testified you believed it was February of 1990. Mrs. Franza, you have also referred to an incident which occurred on June 25, 1990?

A Yes.

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Q At approximately what time?

A 4:30 in the afternoon.

Q What day of the week was June 25?

A I believe it was a Monday.

Q And correct me if I'm wrong, but you have twice testified in the Grand Jury in this case?

A Yes.

Q In addition, you have provided numerous statements to numerous police officers and other law enforcement officials; is that right?

MR. BRANCATO: Judge, I object to the form of the question.

THE COURT: Overruled.

Q Do you understand my question?

A Could you repeat it?

Q Just to make it more simple, you have spoken to Detective Giorgio?

A Yes.

Q You have spoken to Detective Ortiz?

A Yes.

Q You spoke to detectives Raymond and Herbert of the New York City Police Department, the Bomb and Explosion Squad, two women?

A Two women?

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Q Two women detectives.

A I believe so. I'm not sure.

Q And you have spoken to federal agents, Agent Behan and Agent Raffa?

A Oh, yes.

Q And throughout all of those statements would it be fair to say that you have always said that June 25 was the occasion on which this altercation between you and Mr. Franza occurred when he struck you?

A Yes.

THE COURT: Please keep your voice up, ma'am.

Q Mrs. Franza, isn't it a fact that the Defendant's mother, my client's mother, Gladys Franza, went to the hospital on June 25, 1990, for treatment?

A I don't remember.

Q You don't remember. Do you remember an occasion in June when Mrs. Franza, Mrs. Gladys Franza, went to the hospital?

A Yes, I believe once.

Q And do you, in fact, remember that on that occasion Dominic Franza was at the hospital for the entire day and the entire night with his mother?

A Yes.

MR. BRENNER: I'm going to ask that this be

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marked for identification as Defendant's C.

(Document referred to above as a hospital record was received and marked as Defendant's Exhibit C, for Identification.)

Q Again, so I'm clear, you do recollect that Mrs. Franza was in the hospital sometime in June?

A Yes.

Q You do recollect that on that occasion Mr. Franza was with her the entire day.

A Yes. We took her.

Q And the entire night?

A The entire night? I don't recall if it was the entire night.

Q I would like you to look at Defendant's C marked for identification. I would like you to read it to yourself, and I would like you to tell me if it refreshes your recollection as to the date that Mrs. Franza, Gladys Franza, went to the hospital. Does it?

A It says the date.

Q Does that refresh your recollection as to when that event occurred?

A I know the event occurred, but I can't put it with that date.

Q Well, let me ask you more directly. Isn't it

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a fact that Gladys Franza was admitted to the hospital June 25, 1990?

A It says it on this paper.

MR. BRANCATO: I object.

MR. BRENNER: I would move to strike the answer as not being responsive.

Q Do you know?

A I don't know if it was on the 25th.

Q But you have told us and you have now testified that you have always said that the beating and the threats which impelled you to leave on June 28, 1990, were on June 25.

A On Monday, yes.

THE COURT: Did you say June 28?

MR. BRENNER: My understanding is that the witness testified she left on the 28th because of an incident which occurred on the 25th.

Q Is that correct? Was that your testimony?

A Yes.

Q Now, you have also told us that you left on June 28; is that right?

A Yes.

MR. BRENNER: I would ask that this be marked for identification Defendant's D.

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(Document referred to above as a letter was received and marked as Defendant's Exhibit D, for Identification.)

MR. BRENNER: Please show it to the witness.

(Document handed to witness.)

Q Mrs. Franza, is that document in your writing?

A Yes.

Q Did you, in fact, write that?

A Yes.

MR. BRENNER: I offer it in evidence, your Honor.

MR. BRANCATO: Can I read it?

THE COURT: Show it to Mr. Brancato.

(Document handed to counsel.)

MR. BRANCATO: May we approach?

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Objection overruled. D is received.

(Document referred to above as a letter was received and marked as Defendant's Exhibit D, in Evidence.)

Q Mrs. Franza, Defendant's Exhibit D in

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evidence is a letter in which you instructed someone to forward your mail to a Post Office box; is that right?

A Yes.

Q You make a request for certain documents in that letter; do you not?

A Yes.

Q You even direct the manner in which those things should be sent?

A Yes.

Q The post office box listed - - there is a post office box at the General Post Office on the Grand Concourse; is that correct?

A Yes.

Q That's where you were employed at the time; is that right?

A Yes.

Q To whom was that letter addressed?

A It's addressed to Dominic.

Q That's Mr. Franza?

A Yes.

Q What is the date of that letter?

A It says 6/9/90 on it.

Q June 9 of 1990?

A Yes.

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Q Would it be fair to say that that letter shows your intent to be somewhere other than 3320 Barker Avenue on June - - at least on June 9, 1990?

MR. BRANCATO: I object to the question.

THE COURT: Sustained as to form.

Q The instructions on the letter are to have your belongings, certain of your belongings forwarded to a Post Office box; correct?

A Yes.

Q And the purpose of which was for you to get them?

A Yes.

Q According to your testimony, as of June 9, 1990, you were living at 3320 Barker Avenue; is that right?

A As of June?

Q As of June 9, 1990, according to your testimony to Mr. Brancato's questions, as of that date, you were still living at 3320 Barker Avenue; is that right?

A Yes.

Q And it wasn't until these events of June 25 and June 28 that you left the apartment?

A Yes.

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Q This letter which is dated June 9 asks for materials which were at 3320 to be forward to you at a post office box?

A Yes.

Q Had you taken a post office box?

A I always had one.

Q Why would you write to Mr. Franza?

A When, first of all, the date of that, it says June, but I meant July 7, '90, which means I was out of the house that time period from June 28 to the time I got shot, 7/17. So I meant 7/9/90. I got shot 7/17/90. So I made a mistake with the number of the month.

Q So the date on the letter is wrong?

A The date on that letter is wrong, yes.

Q Would the date on the envelope in which the letter was contained also be wrong?

A Maybe. I don't know.

Q Your brother Wilfred died in November of 1989; is that right?

A Yes.

Q And you went - -

MR. BRANCATO: Judge, I have a request at this time. I would like to make it at the sidebar.

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(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Read the last question put by Mr. Brenner to the witness with respect to an envelope.

(At this time the requested portion was read back by the Reporter.)

THE COURT: Ladies and gentlemen of the jury, the parties have stipulated there is no envelope in existence to the knowledge of either counsel or anyone connected with this case.

Now we'll proceed.

Q Mrs. Franza, you went to Puerto Rico in November of 1989?

A Yes.

Q In January of 1990 did you learn that your maternal grandmother, who has been referred to variably as Rosa Roman and Rosa Lamboy, had cancer of the colon?

A Yes.

Q Cancer of the colon?

A I don't know if it was colon. Just cancer.

Q It was cancer. You learned that. Did you, in fact, learn that when you were in Puerto Rico or at some time thereafter?

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A After.

Q That was at a point in time when you were still living with Mr. Franza; correct?

A Yes.

Q Also in January of 1990 is it not a fact that you and he shipped a walker, an orthopedic walker, to your maternal grandmother in Puerto Rico?

A Yes.

Q Now, would it also be fair to say that Mrs. Roman or Mrs. Lamboy's condition did not improve from January of 1990, on?

MR. BRANCATO: I object.

THE COURT: Unless the witness was familiar with the condition as if it deteriorated or improved.

MR. BRENNER: It's based on any familiarity. I'll ask the question another way.

Q Given that your maternal grandmother was diagnosed as having cancer, were you informed periodically as to her condition?

A Yes.

Q Would it be fair to say that her condition did not improve but rather deteriorated from the time that she was diagnosed as having cancer?

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MR. BRANCATO: I object. It calls for hearsay.

MR. BRENNER: May we approach?

THE COURT: There is no need to approach. I'll allow it.

MR. BRENNER: Thank you.

A Could you repeat the question?

Q Well, let me ask you this, Mrs. Franza: When did your maternal grandmother pass away?

A I believe it was in November of '90.

THE COURT: Please keep your voice up, ma'am.

Q November of 1990, approximately ten months after you first learned that she had had cancer; is that right?

A Yes.

Q And you've already told us that during that period of time you were informed you had information as to her condition between January of 1990 and November of 1990; is that right?

THE COURT: Do you understand the question?

THE WITNESS: Yes.

A Yes.

Q Would it be fair to say that in that ten-month period, your maternal grandmother's physical

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condition got progressively worse?

MR. BRANCATO: Objection.

THE COURT: I have to sustain that for a variety of reasons. The objection is sustained.

Q Were you informed as to her condition?

A Yes.

MR. BRANCATO: I object.

THE COURT: That's overruled. She was informed of her condition and the answer is yes. The Court allowed the answer to stand. Next question.

Q And you resided with Mr. Franza from the period in time of January through June of 1990?

A Yes.

Q In June of 1990, when you moved to Carlos' apartment, you were sleeping there and you were dining with your mother; is that fair?

A Yes, sometime in June.

Q Sometime in June. From whenever you moved there until the shooting, you were staying with Carlos and dining with your mother?

A Yes.

Q Would it be fair to say that your routine would be that you would come home from work, go to your

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mother's house, eat, spend some time and then go back to Carlos' apartment to go to sleep?

A It varied.

Q Did you ever stay at your mother's apartment overnight?

A No. Sometimes I would come from work, go to my brother's, shower and then go to my mother's or vice versa.

Q But I guess sort of bottom line is you would sleep at Carlos' house?

A Yes.

Q There were times when you would go there first or second but that was generally the routine?

A Yes.

Q This was the summertime of 1990; right? This was June and July of 1990?

A Yes.

Q What were your hours at work during those two months?

A Eight to 4:30.

Q So you would arrive at the Post Office at approximately 8:00 a.m.; yes?

A Around there.

Q And leave at approximately 4:30 p.m.?

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A Yes.

Q How did you get to and from?

A The train.

Q Where is the train that takes you to the Grand Concourse in relation to 485 West 187th Street? How many blocks away from your mother's home?

A It's far away.

Q You can approximate. The exact number is not important but approximately, was it ten blocks? Was it 15 blocks?

A It's about 25 blocks.

Q Did you take a bus?

A It depended. I could either take the train and make certain transfers or take a bus or take a taxi.

I think at the time that I was having the problem when I moved out, I took a taxi to be on the safe side.

Q Did you take a taxi every day?

A Whenever I could afford it. I can't remember.

Q Would it be fair to say that there were days you could not afford it?

A Yes.

Q On those days you would take the train?

A Or my mother would pick me up.

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Q Did you have a car?

A No.

Q Would it be fair to say that you did not drive a car to and from work every day?

A Yes.

Q The hours that you went back and forth from the Mendez apartment, those were light hours, those were daytime hours during the summer, the sun was out, there were people on the street; is that right?

A Yes.

Q When you moved out of 3320 Barker Avenue - - are you okay, Mrs. Franza?

A Yeah.

Q When you moved out of 3320 Barker Avenue, what did you take with you?

A Everything that belonged to me, clothing, my bike, pictures, all my pictures, family pictures.

Q You took records as well; did you not?

A And files, yes.

Q You took cancelled checks; did you not?

A Yes, they were in the files.

THE COURT: When you say records, you're not referring to phonograph records?

MR. BRENNER: No, I'm not.

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THE COURT: All right.

Q Banking records, financial records, tax records?

A Yes.

Q You took cancelled checks from a joint account; did you not?

A Yes.

Q What about a typewriter?

A Yes, I had an IBM Selectric typewriter.

Q You took that from the apartment as well?

A Yes.

Q Now, during the course of the months from January of 1990 to June of 1990, the first half of the year before you left, would it be fair to say that you paid half the bills, the majority of the bills that the two of you were responsible for paying the day-to-day bills?

A I gave all my money to him. Everything was paid.

Q You wrote checks; did you not?

A Yeah.

Q And you signed checks?

A Yeah.

Q You wrote checks to Con Ed, to the phone

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company; yes?

A Yes.

Q To credit card companies?

A Yes.

Q And you would send those bills off; would you not?

A Yes.

Q The postage for those bills, where would it come from?

A Postage?

Q Stamps.

A We would order through the mail to send 100, you know, a roll, a hundred stamps.

Q You wouldn't get them from the Post Office where you worked?

A Well, on some occasions. Not all the time.

Q As a matter of interest - -

MR. BRANCATO: Judge, I object.

MR. BRENNER: I withdraw the preliminary remark.

Q Do postal workers pay the standard fee for stamps?

A Yes.

Q Do you get them for free or anything?

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A No.

Q Would you buy them at the Post Office?

A You can buy them.

Q Would you?

A Yes.

Q In rolls, sheets?

A Sometimes roles, sometimes sheets.

Q Well, did you ever have occasion to use three-cent stamps? You.

In the months between January of 1990 and June of 1990 did you ever have occasion to use three-cent stamps?

A No.

Q Did you have three-cent stamps?

A I knew we had some, yes.

Q When had those been obtained?

A When the stamps were 22 cents and it had been risen to 25 cents, we had some rolls that we threw away. So I bought the sheet of three-cent stamps, and we tried using them.

Q When was that? When did the rates between 22 cents and 25 cents change?

A I don't remember.

Q Approximately.

MR. BRANCATO: Judge, she answered.

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A I can't tell.

THE COURT: She doesn't recall.

Q When did you buy them, approximately?

A Whenever the rate went up I bought the three-cent sheet.

Q What did it look like?

A It was a sheet and it had three cents on it. And you want to know what the stamps looked like?

Q Yes.

A It had a bald man with glasses on it.

Q How many of them did you use, if you remember?

A I don't remember.

Q You used them in conjunction with 22 cent stamps?

A Yes.

Q And that's what, to send mail, bills, et cetera?

A Yes.

Q You don't know how many you used or when they were used?

A Right.

Q With regard to the reloading equipment in the apartment, you saw Mr. Franza use that equipment; is that

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right?

A Yes.

Q And what he would do is he would make his own bullets?

A Yes.

Q And he would then go to the range and use them?

A Yes.

Q And did you ever understand or was it ever explained to you that the making of one's own bullets was cheaper than buying them retail?

MR. BRANCATO: Objection to what she may have been told. I object to what she may have been told.

THE COURT: If you tighten it up somewhat. I'm going to allow it.

MR. BRENNER: Thank you, your Honor.

Q Were you aware that the making of one's bullets, one's own bullets in the manner in which you described Mr. Franza used, was cheaper, cost less, was less expensive than buying them retail?

A According to him, yes.

Q He told you that. And did you have any reason to think differently?

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MR. BRANCATO: I object.

THE COURT: I never argue the Defendant's point.

Q That is a no?

A That's a no.

Q Did you ever fill out a form in connection with the Crime Victim's Board?

A Yes.

Q When was that?

A Sometime after I got out of the hospital.

Q Approximately when, if you know?

A I don't remember the date.

THE COURT: Is the question the date she got out of the hospital or when she filled out the form?

MR. BRENNER: The date she filled out the form.

Q That form included questions about what had happened to you; is that right?

A Yes.

Q The purpose of filling out that form was in an effort to receive some compensation for what had happened to you; is that right? Was that your understanding?

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A Yes.

Q And there was an agency that was designed to do this, to get compensation from the person responsible; is that right?

A Yes.

THE COURT: Just a moment. An agency was designed to get compensation from the person responsible?

MR. BRENNER: Yes, your Honor.

MR. BRANCATO: I object.

THE COURT: Just a moment. Step up.

(At this time a discussion was held off the record among Court and counsel.)

MR. BRENNER: Your Honor, I stand corrected. I withdraw the question and move that the question and answer be stricken from the record.

THE COURT: So ordered.

Q Mrs. Franza, were there questions on that form about the identity of the perpetrator of the crime of which you were a victim?

A There were questions, yes.

Q Was there a question as to whether you knew the identity of the perpetrator?

A I believe so, yes.

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Q And whether that individual was a member of your household or your immediate family?

A Yes.

Q Do you recall how you answered those questions?

A Yes.

Q You said no; is that right?

A Right, correct.

Q To both those questions?

A Yes.

Q Mrs. Franza, when you came back to Mr. Franza in approximately the end of April, the beginning of May of 1989, is it fair to say that you came back at the end of April, the beginning of May of 1989 - - Mrs. Franza, would you like a break?

A I'm trying. It's hard to remember dates.

Q I understand. I do, too.

MR. BRANCATO: Judge, I would ask that he step back and - -

MR. BRENNER: Am I badgering the witness?

THE COURT: Shall we now all engage in this macabre dance? Let's keep going.

Q Mrs. Franza, you returned within a week or two weeks of the Family Court petition; is that right?

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A Yes.

Q Whenever that was. Shortly thereafter you and Mr. Franza went away; did you not?

A Yes.

Q You went to Orlando?

A Yes.

Q On a vacation?

A Yes.

Q The year before, you had gone on a vacation to Virginia Beach; is that right?

A Yes.

Q Mrs. Franza, did your husband know where Nelson Dacosta lived, if you know? Had he been there?

A Yes.

Q And the address of Nelson Dacosta's apartment was what?

A 644 West 185th Street.

Q Mr. Franza had actually been to that apartment?

A Yes, and dropped me off several times.

Q And picked you up?

A Yes.

Q The letters that you've looked at, Mr. Brancato has shown you the photographs, that has an

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address for Nelson Dacosta at your mother's home; is that right?

A Yes.

Q That's not where Mr. Dacosta lives?

A No.

Q And to the best of what you've already expressed, Mr. Franza was aware of where Mr. Dacosta actually lived?

A Yes.

Q Now, Mrs. Franza, did you ever have a conversation with your mother regarding the events of July 16, 1990, the day before the shooting?

A Yes.

Q Did she, in fact, inform you that two men had come to her house looking for Nelson Dacosta?

MR. BRANCATO: I object.

THE COURT: Overruled.

A Yes.

Q And that those two men were pretending to be policemen?

MR. BRANCATO: Judge, I object to what the mother told her.

THE COURT: Well - -

MR. BRENNER: There is a dual purpose for

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this.

THE COURT: Let's not get into the purpose. Let's get into the proper posing of the question. You may ask her what information she had but not what the mother said and what the mother gave over to her. Let's deal with it from her end, not from the mother's end.

Q When was that information imparted to you? When did you receive that information?

A On July 17, the day I got shot.

Q That was of course before the shooting that you got that information; is that right?

A Yes.

Q And again, Nelson Dacosta in July of 1990 did not reside at that address; correct?

A No.

Q And as you've already described to us, Mr. Franza knew that?

A Yes.

Q Did you have information from Mr. Dacosta, Nelson Dacosta, your brother, relative to a telephone call he had received on July 8, 1990?

MR. BRANCATO: I object.

THE COURT: To that question it's overruled.

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MR. BRANCATO: As to what Mr. Dacosta told her?

THE COURT: No. No. Just whether she received a telephone call.

MR. BRANCATO: Whether she received a phone call, that's not his question.

THE COURT: What is his question? Let's have the question re-read.

(At this time the requested portion was read back by the Reporter.)

THE COURT: Again, if she had the telephone call, she can testify that she had a telephone call.

MR. BRANCATO: That's not his question.

THE COURT: I understand, but you hear what I'm saying.

Q Between the dates of July 8, 1990, and July 17, 1990, did you have occasion to see or speak with your brother Nelson?

A Yes.

Q How many times?

A I don't know. Several.

Q Did Mr. Dacosta ever warn you of anything?

MR. BRANCATO: I object.

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THE COURT: Sustained.

Q Did he relate to you at any time that he had received a telephone call?

MR. BRANCATO: Judge, I object.

THE COURT: Sustained.

MR. BRENNER: I must be permitted to finish the question. It's the same luxury you granted the district attorney.

THE COURT: Very well. Complete the question.

MR. BRENNER: Thank you.

Q Did he at any time inform you that he had received a telephone call threatening his life and that of his entire family?

MR. BRANCATO: And I object.

THE COURT: Sustained.

Q Mrs. Franza, do you know Ruthie Bless?

A Yes.

Q Who is Ruthie Bless?

A My sister-in-law.

Q Well, you have two brothers; do you not?

A Yes.

Q Carlos' wife is Debbie, Debbie Dacosta; is that right?

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A Yes.

Q So Ruthie Bless was or is Nelson Dacosta's wife; is that right?

A Yes.

Q And where is Ruthie Bless now, if you know?

A She is in Chicago.

Q And when did she come to be in Chicago, if you know?

A She moved to Chicago about two months or three months before I got shot.

Q So the shooting occurred on July 17, 1990. Would it be fair to say that approximately April or May of 1990 Carlos' wife left New York and went to Chicago?

THE COURT: Carlos' wife?

MR. BRENNER: Thank you, your Honor.

Q Nelson's wife left New York and went to Chicago?

A Yes.

MR. BRENNER: I have nothing further for this witness, your Honor.

THE COURT: Any redirect?

MR. BRANCATO: Yes.

REDIRECT EXAMINATION

BY MR. BRANCATO:

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Q Mrs. Franza, Mr. Brenner asked you about some forms that you filled out with the Crime Victim's Compensation Bureau.

A Yes.

Q And he asked you some specific questions as to certain blocks of that form that dealt with whether or not you knew who the perpetrator of the crime was. What did you take that language to mean, the perpetrator of the crime?

A The perpetrator to me was the guy who shot me.

Q Did you know who that person was the day that you were shot?

A No.

Q Do you know what his name is today?

A No.

Q Now, Mr. Brenner asked you about two letters, one letter concerns Exhibit D in evidence. That's the one that up in the upper left-hand portion says 6/9/90, the one in which there is a stipulation that there is not an envelope to. When did you write that letter?

A After June 28, 1990, after I left the house, I wrote that letter.

Q When did you take the postal box on the Grand

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Concourse that's referred to in that letter?

A It must have been around that period of time when I - -

Q Let me tighten it up.

Was it before or was it after the Defendant struck you and threatened you in June?

A It was after.

Q Mr. Brenner referred to a letter that you wrote to the New York City Police Department, the Firearms Bureau, in February of 1990. Have you had a chance to look at that letter?

A May I see it?

Q Let me show it to you.

MR. BRANCATO: I will adopt that as People's Exhibit Number 18 for identification.

MR. BRENNER: Your Honor, it's marked as a defense exhibit.

THE COURT: It's a defense exhibit. It's marked as Defendant's D?

MR. BRENNER: That's correct.

THE COURT: Do you have the original because that's a copy?

(Document handed to Court.)

THE COURT: Now, the other letter, the other

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letter, is that E? The one you just referred to that's on the table, which is that?

MR. BRANCATO: This is D.

THE COURT: Let me see it.

(Document handed to Court.)

THE COURT: What is this one marked?

MR. BRENNER: That should be C, your Honor.

MR. BRANCATO: Do you have the original?

MR. BRENNER: The original was sent to the licensing.

MR. BRANCATO: Do you have the one that you showed her that you marked?

MR. BRENNER: That's it.

MR. BRANCATO: This has no marking on it. Why don't we just mark it?

THE COURT: You know what caused the confusion, did you show a hospital admission?

MR. BRENNER: Yes.

THE COURT: I think that was it. Do you have it? I think that was marked C.

MR. BRENNER: Yes, that was C.

THE COURT: This is going to be E. This will be People's 18. This will be People's Exhibit 18.

(Document referred to above as a letter was

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received and marked as People's Exhibit 18, in Evidence.)

Q Mrs. Franza, look at that letter and read it to yourself.

Mrs. Franza, when did you write that letter?

A According to this, 2/21, February 21 of 1990.

Q What is your purpose in writing that letter?

A The Defendant wanted me to write this letter so that the application to the firearms for a target license would go through.

Q Did he tell you where to write the letter?

A He told me what to write and who to write it to.

Q What did he tell you to write?

A What it says on the letter.

Q Mr. Brenner asked you earlier whether or not you stated on February 21, 1990, he asked you did you write to the New York City Police Department Firearms Bureau and state that there was a big misunderstanding between you and your husband concerning events which happened on April 26, 1989. Who told you to write that it was a big misunderstanding?

A The Defendant.

Q Mr. Brenner asked you whether or not you

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stated back then that you presently were still together and that the marriage is great. Who told you to write that?

A The Defendant.

Q Where was the letter notarized?

A I believe someplace on Barker Avenue. I'm not sure.

Q Did the Defendant tell you it had to be notarized?

MR. BRENNER: Objection. Leading.

THE COURT: Sustained.

Q Why did you go to a notary and have it signed?

A Because the Defendant told me to.

Q Did he tell you where to go to get it notarized?

MR. BRENNER: Objection. Leading, your Honor.

THE COURT: Sustained.

Q You indicated that he told you it had to be notarized. The person who notarized the letter, did you know him?

A No.

Q How was it that you went to that person to

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have it notarized?

A I don't remember if I went there myself or the Defendant took me by car. I don't remember.

Q How is it that you found that person to notarize the letter?

A You mean how did I know of the person?

Q Yes.

A I didn't. The Defendant knew of the person.

Q Mrs. Franza, back in 1990, in February of 1990, you were living with your husband; am I correct?

A Yes.

Q At that time were you attempting to reconcile the differences of the past that you had with him?

A Yes, I was trying to keep the marriage together.

Q So that the jury is clear - -

MR. BRENNER: Objection.

Q Was there any big misunderstanding?

MR. BRENNER: Motion to strike the first part of the question.

THE COURT: It would be more interesting if I knew the latter half of the question.

Q Was there any big misunderstanding between you and your husband concerning what happened to you in

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April of 1989?

A Excuse me. Can you repeat your question?

Q This language that you used, a big misunderstanding, are those your words?

MR. BRENNER: Objection. This is asked and answered, your Honor.

THE COURT: Overruled.

A That's what I wrote on that paper and that's what I was told to write.

Q Mrs. Franza, you told us earlier about two events, one that happened in March and April of 1989, and another that happened in June of 1990 when you moved out. Mr. Brenner asked you about going to Florida, to Disney World. When was that?

THE COURT: I don't recall Disney World. I recall Orlando.

MR. BRANCATO: I'm sorry, Judge.

A That was after I had gotten the order of protection, it was his way of making up.

MR. BRENNER: Objection, your Honor. The question was when.

Q When did you go to Orlando?

A Sometime after that incident, after I got the order of protection.

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Q Whose idea was it to go to Orlando, Florida?

A The Defendant's.

Q Do you know when that was in 1989?

A I don't remember the dates.

Q He asked you about going to Virginia Beach. Do you remember when you went to Virginia Beach?

A I don't remember.

Q You indicated earlier that you did go to Virginia Beach; am I correct?

A Yes.

Q Was this after you had gone to Florida?

A I'm not certain. I believe it was before.

Q Before going to Florida?

A Yes.

Q From the time that you got the order of protection up to and including the time that you took the second trip, did you and the Defendant have any other arguments?

A Yes.

Q What kind of arguments were they? Were they verbal or were they more than verbal?

A They varied. Some were verbal and some turned physical.

Q When they turned physical, could you please

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tell us how they turned physical?

MR. BRENNER: Your Honor, without a point of time and place, I object.

MR. BRANCATO: I said from the time she got the order of protection.

MR. BRENNER: I understand that.

MR. BRANCATO: Up to and including the time that she took a second vacation trip.

THE COURT: If you can give us a reference or if you can approximate the time.

THE WITNESS: I cannot give a date.

THE COURT: Can you approximate the month, the season or can you tie it into a particular time?

THE WITNESS: We were always having arguments and fighting. I can't remember.

Q You said that you took two trips after you went back to him in 1989; is that correct?

A Yes.

Q Up to the point when you went back to the time you took the second trip, that period, did he hit you again?

MR. BRENNER: Objection, leading, your Honor.

THE COURT: Well, the witness has already

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testified that some of those altercations were not only verbal, they became physical. In view of that response, I'll allow this question which normally would be considered leading, but under the circumstances you may inquire.

You may answer, ma'am.

A He became physical but not like - - not as physical as the time when I had to go to the hospital. He didn't leave no marks.

MR. BRANCATO: I have no further questions.

THE COURT: Recross?

MR. BRENNER: Yes.

RECROSS EXAMINATION

BY MR. BRENNER:

Q Mr. Brancato elicited from you it was the Defendant's idea to go to Orlando?

A Yes.

Q He didn't force you; you were attempting to reconcile?

A He didn't force me, no.

Q So it was his idea to go and try and have a good time and to restore some stability to your marriage; is that right?

A Yes.

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Q And the same is true about the trip to Virginia Beach?

A Yes.

Q Now, Mrs. Franza, the letter that you wrote was to the New York City Police to attempt them to grant him a license for a gun; isn't that right?

A For a target license.

Q Actually, was it not, in fact, a target and premises license?

A I don't remember.

Q But in any event, it was to be able to carry around a gun; yes?

A Not to carry it.

Q To take it for target practice?

A Yes.

Q And perhaps if it was a premises license - - do you recall?

MR. BRANCATO: I object. That assumes a fact that's not in evidence.

MR. BRENNER: "Do you recall?"

THE COURT: Sustained.

MR. BRANCATO: I object.

MR. BRENNER: "Do you recall?"

THE COURT: Sustained.

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MR. BRENNER: I'm asking if she recalls.

THE COURT: Before you can ask her if she recalls, first you have to determine if the witness knows what you're talking about.

Q Do you know what a premises license is?

A Yes.

THE COURT: All right.

Q That's a license to have a firearm on the premises?

A Yes.

Q In your house?

A Yes.

Q Was it not in fact what this application was for, both a target license and a premises license?

A Yes.

Q So in effect, the Defendant was applying to the New York City Police to bring a firearm into your home?

MR. BRANCATO: Judge, I object on the basis that it's outside the scope of the redirect. He brought out what she said in the letter. I went over that with her and now he's trying to rehash it.

THE COURT: Overruled.

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Q A premises license is to bring a firearm into your home?

A Premises.

Q Premises. Your house was the premises?

A Yes.

Q And your testimony to Mr. Brancato is that he made you say those things which you then put in the letter so he could get a gun and bring it home?

A Not made me. He wrote it out. I copied it and it was signed.

Q You agreed to it?

A Yes.

Q You wouldn't put your name to anything that was untrue; would you?

MR. BRANCATO: I object.

MR. BRENNER: This was the redirect.

THE COURT: You may answer.

A Excuse me. The question was?

Q You wouldn't put your name to anything that was untrue; would you?

A Not if my life is threatened, no.

Q I'm sorry?

A If my life was threatened or I felt that I was going to cause a fight between us, I'd sign it in a

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second.

Q You thought the failure to sign it would cause a fight between you two?

A Of course, yes.

Q So you didn't agree to it in a sense?

A I didn't agree to it in my heart, but signed it anyway to avoid arguments.

Q So Mr. Franza could bring a gun to the house?

A His target, yes.

MR. BRENNER: I have nothing further.

THE COURT: Step down. The witness is excused.

(At this time the witness was excused by the Court.)

THE COURT: Gentlemen, to the bench before we break.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Members of the jury, at this time we'll recess until 10:30 tomorrow morning. Please be timely. Do not discuss this case among yourselves nor allow any third party to discuss the case with you. Have a very good evening.

Take the jury out.

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(At this time the jury filed out of the Courtroom.)

MR. BRANCATO: Judge, I want to state one thing while we are on the record.

Judge, what happened this afternoon when I requested all Damien material, I requested anything that this woman may have written in relation to that letter that my opponent says was sent in June of '90, and Mrs. Franza claims was sent in July of '90. I stated at the bench and I think it might have been off the record, that one of the basis for turning over the Damien material after the witness is on direct is that it allowed the opposing party a chance to make sure that what's being asked by the opponent is with some basis in fact. And at that point, he told me that he had turned over that material.

And I want to say without equivocation, I consider that we were struck a blow below the belt when my opponent went back and asked Mrs. Franza whether or not that envelope would show that it was sent in June rather than in July, when he was asking a question in trying to raise the inference in front of the jury that somewhere in this

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labyrinth of paperwork and in these myriad of reports there is an envelope that shows it happened in June. And he was unable to provide that. And I consider that a low blow.

And I consider it now at this point, I am going to make a request now, and I don't want to have to make it again, but if he has any statements by any of these witnesses that the People bring on direct that he's going to cross-examine them about, I want them turned over once he begins the cross-examination. And if I don't receive those, and I find that he's got that, I am going to scream in front of this jury because I feel that I was kicked below the belt here today.

MR. BRENNER: May I respond?

THE COURT: Let Mr. Brenner respond before the Court makes some comment.

MR. BRENNER: Paying full deference to what Mr. Brancato says, I should note for the record that today, when Mr. Brancato walked in today he handed me Rosario material. Yesterday he walked in and he handed me Rosario material on other witnesses. And on the day before I got Rosario material. The rule on Rosario material is that

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after the jury is sworn and before opening all Rosario material is to be tendered to defense counsel. And the Rosario material has trickled in here in bits and pieces and, your Honor, the prosecutor should be able to say that he has followed the full letter of the law before he starts threatening to scream.

THE COURT: First of all, nobody is going to threaten and nobody is going to invade the integrity or the comportment that this Court will demand. That's a given for both sides.

MR. BRENNER: May I finish? My transgression, I conceded was such, came on the heels of the prosecutor tip-toeing and tap dancing around the Court's ruling on the now-in-evidence, before-the-jury suitcase in the pantry.

THE COURT: I think once again - -

MR. BRENNER: May I finish?

THE COURT: Let me caution you that the photograph that he sought to introduce in connection with that, to have the witness identify, that was not permitted despite what you say was tap dancing and soft-shoeing.

MR. BRENNER: Your Honor, the record will

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reflect that the question was asked by Mr. Brancato what did he keep in the pantry, and if that wasn't a way to clue the witness in on what it was he was looking for, then I don't know what is.

THE COURT: I'm not here to measure the gravity of which counsel acted more egregious in violating the rule. Let me say that so we need not go this route again.

With respect to the Rosario material, I have the distinguished impression, and again if I'm wrong, correct me, that the materials that were not supplied by the district attorney initially were materials that were not either available or not acknowledged that they existed, but as they became aware of it, they made it available to the Defendant. I recall in fact we had to reopen the hearing because of some material with respect to Giorgio that was misfiled.

MR. BRENNER: Your Honor - -

THE COURT: Do you recall that?

MR. BRENNER: The day before yesterday Mr. Brancato walked in here with a barely legible UF-61 from Police Officer Aponte regarding the

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complaint made to her by Nelson Dacosta clearly after the jury was sworn. So I saw it for the first time. I never heard of it. I did not bring it to the Court's attention. I did not scream and shout and say that I had been dealt a low blow, one below the belt, or that dirty fighting was going on, because I assumed that if a mistake was made, perhaps it was made in good faith.

Nonetheless, this was Rosario material. As far as Police Officer Aponte was concerned, it wasn't furnished in a timely fashion.

Today I got a Victim Complaint Board report signed by Myra Franza as she's walking into the Courtroom, also not timely furnished. And I didn't scream, didn't shout and say Mr. Brancato keeps hitting me below the proverbial belt.

Judge, I think that you have to be in a position in which you have complied with the letter of the law.

THE COURT: I don't think it's a case where he who seeks equity must first demonstrate non equity.

MR. BRANCATO: Let me say this.

MR. BRENNER: Mr. Brancato raised his voice.

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THE COURT: But I think both of you are professional to know, and I do not wish to allow this to deteriorate to the point that it calls for the Court to consider sanctions against anyone here. I wish this would just terminate now and we conduct ourselves as ladies and gentlemen in a professional manner. Each of us knows our respective responsibilities and obligations.

MR. BRENNER: Your Honor, but when any party to a criminal action says on the record that if such and such happens "I'm going to scream and shout in the presence of the jury - -"

THE COURT: And when somebody suggests that there is some evidentiary documentary, evidence available implying that the witness then would be contradicted by something which is an official record, namely a postal mark, I'm sure Mr. Brancato feels he has his obligation to scream.

MR. BRENNER: Absolutely.

MR. BRANCATO: I just want to say this in response. We have a continuing obligation to turn over Rosario material. If we don't have it at the time that we open, we have an obligation under the law to turn it over to counsel. I mean, it would

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be foolish to believe that what we should do is just rip it up and toss it in the garbage - - and I want to say this.

THE COURT: I don't think there was any - -

MR. BRANCATO: Let me say this. What I turned over to him from Officer Aponte, when you are aware of what I turned over to him, there can be no doubt that we are acting in good faith. What I turned over to him is a DD5 that Officer Aponte took from Mr. Dacosta on a previous occasion. And I dare say - -

THE COURT: Nobody is questioning the good faith.

MR. BRANCATO: Let me finish this because - -

THE COURT: This deteriorates and you complain about something. Now Mr. Brenner is delighted, perhaps I should put it in quotes, to point the finger at you for some conduct which he didn't think was proper on your part, and that somehow two wrongs make a right.

MR. BRANCATO: I want to say this: I know it's late, but I'm saying that if we were acting in bad faith we would not have turned over that DD5 to him.

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THE COURT: He's not questioning your good faith. He's not questioning your good faith.

MR. BRANCATO: It sounded like that to me.

MR. BRENNER: I question the timeliness of the furnishment.

THE COURT: I don't think it was good faith that was in issue.

MR. BRENNER: I didn't say those words.

THE COURT: All right. That's what I gleaned from everything. All I'm saying, let me conclude this with this: This trial will take yet some days and I would expect everybody not to create situations which require the Court to intervene and put the directions before the jury. I don't want this atmosphere to be poisoned.

(At this time the proceedings were concluded and adjourned to February 20, 1992, at 10:30 a.m.)

-oOo-

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CRIMINAL TERM : PART 32

- -x

THE PEOPLE OF THE STATE OF NEW YORK : Indictment No. 11987/91

- against - :

DOMINIC M. FRANZA, : Att Murder 2

Defendant. :

- -x

February 20, 1992
111 Centre Street
New York, NY 10013

B e f o r e:

HONORABLE PAUL P. E. BOOKSON,
Justice, and a Jury.

A p p e a r a n c e s:

(Same as previously noted.)

MINUTES OF JURY TRIAL

Reported by:
William L. Kutsch
Senior Court Reporter

-oOo-

THE CLERK: Case on trial.

MR. BRENNER: Your Honor, this morning I was handed - -

THE COURT: All right. On the record.

MR. BRENNER: This morning I was handed about 20 pages of material, xeroxed material.

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THE COURT: Is this Rosario material?

MR. BRENNER: I don't know because it wasn't identified to me, anything at all.

THE COURT: Just to move things, Mr. Brancato, will you tell us what this is?

MR. BRANCATO: Your Honor, what I turned over to Mr. Brenner this morning, I will start from the top sheet and work my way down.

One is a copy of an exhibit already before the Court that was handed to an interpreter to translate.

The next page likewise is an exhibit that's before the Court that was given to a translator to interpret. There are interpretations of those two letters that I referred to in typed form.

There is likewise written interpretations that she prepared at my request when she brought them to my office and then typed them out.

As we work our way down - - so that is a portion of what I gave Mr. Brenner today.

As we work our way down, there is a movement log from the 34 Precinct book, and also a page of a memobook that is from Detective Bourges indicating that he went to Mr. Franza's house that

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night where he received the tape.

And then there are some spiral pad notes, seven pages, that are from Detective Bourges' steno note pad.

Last week I called Detective Bourges and asked him if he had any notes on this case. At that time he indicated to me that he did not have any.

When he came down today he brought down his book for that day, and he provided me with those notes and I turned them over to counsel.

THE COURT: The thrust of Detective Bourges' testimony is on the custody and control of these tapes from the time he received them?

MR. BRANCATO: That's correct.

MR. BRENNER: Your Honor, my concern is not so much as to the Rosario material vis-a-vis Detective Bourges, but as to what these memobook pages contain.

On the first page, the first page is unintelligible to me.

The second page, first line, it's 1940 and the second line is Victoria Theis. What follows is what I assume is a recitation of a statement

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given to Detective Bourges by Miss Theis, Rosario material as to Miss Theis.

Then there are more on the next page. There are more notations. Then the name Romero Giovani, a statement of a female Hispanic, 27 years old.

MR. BRANCATO: That's Mrs. Diaz.

MR. BRENNER: Then there are a number of statements that it's not clear to me that they are attributed to anyone.

We get to the next-to-last page, two pages from the last, there is a notation, "Franza. Arrested. Husband. 3320 Barker Avenue. Three months. Six months in Bronx. First floor. Walks in. Assaulted. Had guns. Applied for permits. Staying - -" and I can't read the rest. I don't know who made this statement. To me it sounds like Mrs. Franza or Mrs. Mendez. I don't know. It has been furnished to me. If it is a statement that's attributable at all to Mrs. Franza, it was Rosario material as to Mrs. Franza. It certainly has to do with Mr. Franza and it is certainly not an insignificant recitation of information.

Rosario material in the possession of the police is imputed knowledge-wise to the possession

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of the district attorney. The cut-off for Rosario material in this case, as in all other cases, is after the jury has been sworn and prior to opening.

And I stated yesterday in a different context that I had been furnished every day with additional Rosario material. This day apparently is no different than the others. I don't know what this is, Judge.

THE COURT: Well, there are two levels here. The question first is we have to determine what it is and who the statements are attributed to.

And the second is we cannot tolerate a situation, through no fault the prosecutor, but the fact is we have had a reputation where Rosario material is suddenly popping up. There are a long list of witnesses yet to come, many of them police officers or government agents. And I think it behooves the prosecution to make a very thorough search or inquiry of those prospective people to make certain that there are no additional - - I mean, I recognize that the amount of paperwork and other material turned over to the defense in this case is voluminous. However, that does not excuse

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the obligation of the People to make certain that all that material or any material is available to the defense.

Now, I don't want a situation to continue where all these agents will be testifying and they'll keep finding the notes or records or memorandum. Then I'll have to deal with this on another level and I prefer not to.

MR. BRENNER: Your Honor, I suggest that inasmuch as my singular concern is that with Detective Giorgio's notes, that outside the presence of the jury the Court conduct a brief inquiry as to what this is and whose statement it purports to be.

THE COURT: I'll do better than that. I'll allow you with Mr. Brancato to informally speak with Detective Bourges to identify this material.

Let the record reflect counsel are now retiring to consult with Detective Bourges.

(Pause in the proceedings.)

THE COURT: Bring in the panel.

(At this time the jury filed into the Courtroom.)

THE CLERK: Case on trial, the Defendant, his

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counsel, the assistant district attorney and the sworn jurors are present.

THE COURT: Call your next witness.

MR. BRANCATO: Your Honor, the People call Detective John Bourges.

D E T. J O H N B O U R G E S, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name, shield and assignment.

THE WITNESS: Detective John Bourges, Shield 3113, Command 34 Precinct Detective Squad.

Q Detective Bourges, you are presently assigned to the 34 Police Detective Unit; am I correct?

A That is correct.

Q How long have you been a member of the 34 PDU?

A Approximately five years.

Q How long have you a police officer?

A A little over ten years.

Q Of those ten years how long have you held the

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grade of detective?

A Five years.

Q Very briefly, what are your duties as a member of the 34 PDU?

A We conduct investigations that are assigned to the precinct by geographical area for crimes that were committed inside that geographical area.

Q Does your precinct encompass the area of 485 West 187th Street here in New York County?

A Yes, it does.

Q Directing your attention to July 17, 1990, were you working at the 34 PDU?

A Yes, I was.

Q What time did you start work that day?

A I believe I was doing a 4:00 to 1:00 patrol.

Q By 4:00 to 1:00, that is 4:00 in the afternoon on the 17th to 1:00 the following morning on the 18th?

A That is correct.

Q Did there come a point that you along with other detectives went to investigate a shooting that occurred at 485 West 187th Street?

A Yes, I did.

Q About what time did you get there?

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A Approximately 1920 hours.

Q And could you please tell us who you went with to the location?

A Detective Giorgio.

Q Is that Gennaro Giorgio?

A Yes, it is.

Q When you got there could you please tell us what you observed?

A I entered an apartment building, that I believe is between Amsterdam Avenue and Laurel Hill Terrace.

At that time I was directed to an apartment I believe on the righthand side as you entered on the first floor.

As I was entering the building, an elderly woman was being wheeled out of the apartment building by members of the emergency medical service and placed into an ambulance.

I entered the apartment which had a door open where other uniformed officers and detectives were, and at that time I saw a second female who was younger than the first receiving medical treatment from EMS personnel. And at the time I saw her she was writing on the wall.

Q Is that the wall on the inside of the apart-

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ment?

A Yes, it was.

Q What did you do then?

A I was directed to the lieutenant who was the commanding officer of the 34 Precinct Detective Squad and at that time I had a conversation with him.

Q Who is that lieutenant?

A Lieutenant Joseph Resnick.

Q What did you do after that?

A I was directed to an address outside the building - - excuse me.

Before that, I believe I conducted two interviews of persons on the first floor.

Q Who did you speak with?

A The occupants of 1-B and 1-D.

Q When you say the occupants of 1-B, was there more than one person you spoke with in 1-B?

A If I can refer to my notes, I believe I made a note.

Q Sure.

A Yes.

Q Could you please tell us, do you remember their names?

A Giovani Romero and the husband, Leonardo.

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Q After speaking with the occupants of 1-B where did you go?

A To a basement apartment to an adjoining building.

Q And did you meet anyone at that location?

A Yes, I did.

Q Who did you meet?

A Again, if I may refer to my notes?

Q Sure.

A A Miss Dacosta, Debbie Dacosta.

Q Are you aware what Miss Dacosta's relationship was to the people in 1-D?

A I believe that they were in-laws in some manner. I was not exactly sure.

Q Did there come a point that day that you spoke with a Vicky Theis?

A Yes.

Q Was that before or after you spoke to the people who were in 1-B?

A I believe before.

Q How long did you stay at the scene that day?

A Maybe an hour.

Q What did you do then?

A After speaking to the occupants of the

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basement apartment I exited the apartment building and returned to the crime scene.

Q Prior to returning to the crime scene did you see the Defendant in this case, Dominic Franza?

A Yes, I did.

Q Where was it that you first saw Mr. Franza?

A In photographs in the apartment building.

Q Who showed you these photographs?

A Miss Dacosta.

Q Is that Debbie Dacosta?

A Yes.

Q When after seeing those photographs did you see Mr. Franza in the flesh?

A Yes, I did.

Q And where was that?

A In front of the building.

Q Could you please describe that for us when you first saw Mr. Franza in front of the building?

A I was walking from Amsterdam Avenue towards the building location, which is halfway down the block closer towards Laurel Hill Terrace. At that time I saw a person exit an auto and approach the building entrance. At that time I observed his face and I recognized him to be Dominic Franza.

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Q Could you please tell us what else you observed at this time?

A I observed a second male come out of the crowd and punch him in the face.

Q Did you later learn the name of that person?

A Nelson.

Q And are you aware what Nelson's relationship was to the people in 1-D?

A I believe the brother.

Q Did the two men have to be separated in any way?

A Yes.

Q Who separated them?

A Uniformed officers and myself.

Q What did you do then?

A At that time I had another conversation with the lieutenant.

Q Lieutenant Resnick?

A That's correct. And at that time I returned to the command.

Q Where is your command located?

A The 34 Precinct is located at 4295 Broadway, which is at 183rd Street and Broadway.

Q Did there come a point later that night that

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you saw the Defendant in this case, Dominic Franza?

A Yes.

Q Where was that?

A At his residence.

Q Did you see him earlier at the precinct that night?

A I don't recall.

Q Could you please tell us where the Defendant in this case lives?

A On Barker Avenue in the Bronx.

Q Did you go to that address at Barker Avenue?

A Yes, I did.

Q Who did you go with?

A Detective Gilbert Ortiz.

Q And did you take the Defendant to that location that night?

A I believe so, yes.

Q And did you take him from the 34 back to his home?

A As I recall he was in the auto when we got to the location. If we met him someplace else, I don't recall, or if he came with us from the precinct. I don't recall.

Q You went to his apartment on Barker Avenue?

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A Yes.

Q Do you see the Defendant here in Court today?

A Yes, I do.

Q Where is he and what is he wearing?

A He's the white-skinned male wearing the glasses with the pink shirt with the open collar.

MR. BRENNER: Indicating Mr. Franza.

Q Did you go into the Defendant's apartment with Detective Ortiz?

A Yes, I did.

Q When you got into his apartment could you please tell us what you observed?

A As I entered the apartment, as I recall there was a livingroom area, there was a device which is used for the packing of ammunition and manufacturing cartridges for weapons, guns, and then there was a bedroom, as I recall, farther back.

Q Did you get any property from the Defendant that night?

A Yes, I did.

Q What did he give you?

A A cassette tape to an answering machine.

Q And who took the tape from the machine?

A I believe Mr. Franza did.

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Q What did he do with it once he took it from the machine?

A Handed it to me.

Q And did you give him anything in return once he gave you that tape?

A I believe Mr. Franza requested a receipt which I complied with and gave to him.

Q Did he ask you for a receipt at that point?

A I recall, yes.

Q Did you write out a receipt for him?

A I recall writing a receipt indicating my name and that I took custody of an object.

Q And that object was what?

A The cassette tape.

Q What did you do with the cassette tape?

A I gave it to Detective Gilbert Ortiz.

Q What did you and Detective Ortiz do after you received the tape from the Defendant?

A We exited the apartment with Mr. Franza and escorted him to an auto which was parked in the back of the building.

Q What happened then?

A He got in his auto and drove away.

MR. BRANCATO: I have no further questions.

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Your Honor, at this time I would like to play the tape that is already in evidence as People's Exhibit Number 4.

MR. BRENNER: Your Honor, I don't have that in evidence myself.

THE COURT: That's what I'm looking for. I think it was 3-A and 3-B.

MR. BRANCATO: This is number four.

MR. BRENNER: It's marked for identification. I don't believe it's in evidence.

THE COURT: I don't think it's been admitted. It was received without objection. People's 4 was received without objection. All right.

Is this going to be audible to everyone?

MR. BRANCATO: Yes.

(At this time an audiotape was played.)

THE COURT: Mr. Brenner.

CROSS EXAMINATION

BY MR. BRENNER:

Q Detective Bourges, you've told us that you saw Mr. Franza at the scene, you saw him emerge from a vehicle; is that right?

A Correct.

Q Was he alone?

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A I recall seeing another male in the street next to the auto. I don't recall if I came with him or not.

Q Was it a male black?

A To the best of my memory, yes.

Q Did you take note of the kind of car or whether it was a New York plate or a New Jersey plate?

A No. At that time my direction - - my attention was directed to the male stepping out of the crowd towards Mr. Franza.

Q But you did see another male at the driver's side of the car; is that right?

THE COURT: Wait a minute. Are we talking in the car, at the car, near the car?

Q You told us that you saw another male near the car?

A Yes.

Q Was that the driver's side or the passenger's side?

A I don't recall.

Q Do you remember what side Mr. Franza emerged from?

A The curb side, that would be I believe the passenger side.

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Q Had you seen the car pull up?

A I don't have visual memory of the car pulling up to the scene. I believe that there was a car there.

Q The pictures that you saw of Mr. Franza, were they around the apartment?

A They were in a photograph album in the apartment.

Q And Mrs. Dacosta showed them to you?

A Yes.

Q By the time Mrs. Dacosta showed you the pictures, Mrs. Franza and Mrs. Mendez had been removed by EMS; is that correct?

A As I entered the apartment, one female was being removed already by EMS out of the apartment, and as I entered the apartment, the second female was in the process of being removed from the apartment.

Q Perhaps you didn't understand, Detective Bourges. As Mrs. Dacosta was showing you the photographs, at that point in time, not when you entered but at the time that you were shown photographs of Mr. Franza from the photograph album, were Mrs. Mendez and Mrs. Franza, had they already been removed?

A To the best of my knowledge, yes, they had.

Q Now, Mr. Franza got from the scene to the 34

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Precinct to the best of your knowledge; isn't that right?

A Yes.

Q And isn't it a fact that you took him?

A I may have. I don't remember if I did.

Q You didn't make a notation in your memobook that you accompanied Mr. Franza to the 34 Precinct?

A No.

Q In any event, Mr. Franza arrived at the 34 Precinct?

A Yes.

Q Do you know whether he was asked or do you know how it came to be that he was directed to the 34?

A No, I do not.

Q Were you with Detective Giorgio at the time that this was going on?

A Yes.

Q And do you know whether Detective Giorgio asked Mr. Franza to accompany him?

A I don't remember if he did so.

Q Did you?

A I don't recall making that statement, no, sir.

Q How long was Mr. Franza in the 34 Precinct before you saw him again at the apartment; do you know?

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A No, I do not.

Q What time did you see him at the apartment?

A That was approximately 0200 hours or 2:00 a.m. in the morning on the 18th.

Q So it was 2:00 the following day?

A 2:00 a.m. of the next morning.

Q You were at the scene for approximately an hour, give or take a few moments; right?

A As I recall, yes, sir.

Q So from the time that you saw Mr. Franza at the 34 Precinct until the time that you arrived at his apartment, would it be fair to say approximately five and a half hours?

A If he remained in the precinct during that period of time, yes, sir.

Q Well, Detective Bourges, isn't it a fact that you drove him from the 34 Precinct to 3320 Barker Avenue?

A Yes, sir.

Q Well, so that if at two o'clock, approximately two o'clock in the morning you and Mr. Franza left the 34 Precinct and he was there at 8:30 when you arrived, would it be fair to say that he was there between 8:30 and two o'clock in the morning?

A I have no knowledge as to whether or not he

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had left the precinct in that period of time. But that is the time span between when he arrived with me and when we left for his address.

Q What were you doing during the period between 8:30 and two o'clock in the morning?

A As I recall, I assisted in another interview and I possibly made other notifications which is consistent with a detective investigation.

Q Well, the other interview having to do with this investigation - -

A Yes.

Q Could you tell me who that was of?

A I don't recall. I know that I prepared a DD5.

Q Would you have made an indication in your memobook as to who the interview was with?

A Not necessarily.

Q Have you ever had occasion to look through the case file before you testified here today?

A Briefly yes.

Q Did you recognize a DD5 that had your signature or name on it?

A Yes.

Q Do you remember the number?

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A No. I wish I did.

Q You don't know the individual that you spoke to?

A No, it was a witness on the street, as I recall.

Q Now, at that time, two o'clock in the morning, you arrived at 3320 Barker Avenue?

A Approximately two o'clock in the morning.

Q And you entered Mr. Franza's apartment with him?

A Yes, sir.

Q The purpose of your trip was what?

A I don't recall.

Q At two o'clock in the morning you went to Mr. Franza house and you don't know why?

A I went with Mr. Franza to his residence with Detective Ortiz who was the case officer. Whether or not at that particular time it was to retrieve a specific item which I did, whether it was the cassette which I did, or whether it was to escort Mr. Franza to his residence, whether it was a combination of both, I don't recall.

Q But you received the tape?

A Yes.

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Q He handed it to you?

A Yes.

Q Had you asked him for it?

A I don't remember specifically asking him for it.

Q Had Detective Ortiz asked him for it?

A I don't recall.

Q And you noticed gun reloading equipment?

A That is correct.

Q In what room?

A As I recall, to the best of my memory it appeared to have been the livingroom area. I recall a television set also in the same room.

Q Was it on any kind of a microwave cart or television cart to the best of your recollection?

A It was about waist high and, as I recall, to the right as I entered the room.

Q I'm sorry?

A As I recall, it was about waist high and to the right as I entered the room.

Q Did you make a notation of that in your memobook or inform anyone at the precinct of what you had observed?

A I made no written notation that I observed

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the items in the apartment, but I'm certain that I made a verbal communication of observing the items in the apartment to other detectives.

Q To whom?

A Detective Ortiz specifically who was with me.

Q And in your presence did Detective Ortiz ask Mr. Franza what that was about?

A He may have. I don't recall the conversation.

Q Did you?

A I may have. I don't recall the conversation if he gave me an answer. I recall something with target shooting, but I don't recall whether or not he had given me that answer in response to my question or Detective Ortiz.

Q So you remember something about target shooting?

A Yes, sir.

Q And at that time neither you nor Detective Ortiz asked Mr. Franza if you could take that material, the gun reloading equipment?

A No, sir, I don't recall asking him.

Q Or any of the paraphernalia that go along with that, you made no request at that time?

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A I don't recall if I did, sir, or whether or not he denied. I don't recall having a conversation concerning that.

Q Now, after that, you accompanied Mr. Franza to his car?

A That is correct.

Q Where was that?

A In between the buildings there appears to be a driveway which leads to a garaged area in the rear of the two buildings, and there was an automobile parked there.

Q And is it not a fact, sir, that Mr. Franza, prior to your escorting him, took clothes from his apartment to go to the car?

MR. BRANCATO: I didn't hear it.

MR. BRENNER: Took clothing.

A He may have, sir. I don't recall.

Q You don't recall?

A No, sir.

MR. BRENNER: Thank you, detective. No further questions.

THE COURT: Any redirect?

MR. BRANCATO: No.

THE COURT: You are excused, detective.

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(At this time the witness was excused by the Court.)

THE COURT: Call your next witness.

MR. SHEINDLIN: People call Tracie Francis.

T R A C I E F R A N C I S, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

THE COURT OFFICER: State your name and your county of residence.

THE WITNESS: Tracie Francis. I live in the Bronx.

THE COURT: You may inquire, Mr. Sheindlin.

MR. SHEINDLIN: Thank you.

Q Are you married?

A Yes, I am.

Q What is the name of your husband?

A Wayne.

Q Do you have any children?

A Yes, I do.

Q How many children do you have?

A One.

Q How old is your child?

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A She is two.

Q Would you please tell the members of the jury what your specific address is in the Bronx?

A 3324 Barker Avenue.

Q Were you living at that address on July 17, 1990?

A Yes, I was.

Q On July 17, 1990, how long had you been living at that address for?

A About a year.

Q Were you married at that particular time?

A Yes, I was.

Q Do you work?

A Yes, I do.

Q Where do you work?

A Citibank, 399 Park Avenue.

Q What do your duties entail at Citibank?

A I am an administrative assistant and I support senior bankers within the bank. And I'm just a basic - - I'm a step above a secretary.

Q Do you live in a house?

A Yes.

Q Do you know someone by the name of Dominic Franza?

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A Yes, I do.

Q On July 17, 1990, did you know where Dominic Franza lived?

A Yes, I did.

Q Where did Dominic Franza live?

A Right next door. He's in the house - - I don't know the exact building numbers, probably 3326 or something.

Q I'm going to ask that you keep your voice up.

A I'm sorry. He lives in the house right next to us.

Q On July 17, 1990, do you know if Dominic Franza was married?

A Yes, he was.

Q What was the name of his wife?

A Myra.

Q Do you know if they had any children at that time?

A No, they didn't.

Q How far was Dominic Franza's house from the house that you lived in?

A Right next door. We were just separated by a driveway.

Q Did Dominic and Myra Franza, did they live in

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the house alone?

A Well, in the apartment. It's like a two-family house, so they lived in the apartment.

Q Where did they live in that particular apartment?

A First floor.

Q And do you know the people who lived on the second floor?

A Just hello. We don't really socialize with them. Just casual hello.

Q Were you and your husband friendly with the Franzas?

A Yes.

Q Prior to July 17, 1990, had you gone out on social occasions with the Franzas?

A We went out once with them and we went over for dinner once that I remember.

Q When you say went over, for dinner?

A We went to their house for dinner.

Q Had Dominic Franza ever been inside of your house?

A Yes.

Q Had Myra Franza been inside of your house?

A A-hum.

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Q Do you know if your husband was friendly with Dominic Franza?

A Yeah, they are friendly. They spoke.

Q Do you know if Dominic Franza owns a car?

A He did. I don't know about now.

Q Let me be specific. On July 17, 1990, do you know if Dominic Franza owned a car?

A Yes, he did.

Q Do you know what type of car that was?

A A red Mustang.

Q Do you know where Dominic Franza parked that car?

A In our garage.

Q Why would he park it in your garage?

A He had an arrangement. Before we bought the house, he had an arrangement with the guy that owned the house prior to us, and he kept the same arrangement with my husband when we moved in.

Q Can you be a little more specific as to the type arrangement?

A The arrangement was he would - - he rented a portion. First it was our driveway. He rented it. And then as my husband got to know him, we started renting him the garage.

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Q Now, I would like to draw your attention to the approximate date - - well, withdrawn for the moment.

When is your husband's birthday?

A July 14, 1963.

Q I would like to draw your attention to the approximate date of July 17, 1990. On this date were you working?

A Yes, I was.

Q At the same job which you testified to to the jury?

A Yes.

MR. BRENNER: I object as to questions about an approximate date. I'm not sure. I object.

THE COURT: All right. The objection is overruled. Go ahead.

Q What hours did you work on July 17, 1990?

A Nine to five.

Q And after five o'clock how did you get home?

A Public transportation, the train.

Q Is that how you usually travel to and from work?

A Yes.

Q Do you know approximately what time you got home on July 17, 1990?

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A Probably after six o'clock.

Q What did you do?

A Ten after six or so.

Q What did you do after you got home?

A Went inside, you know, got settled. I was in the kitchen washing dishes or something like that.

Q After you got home from work on July 17, 1990, did you have occasion to see Dominic Franza?

A Yes, I saw him in the yard, the backyard.

Q Whose backyard?

A Ours, mine.

Q Did you notice anything unusual about Dominic Franza at that time?

A No.

Q Did you have a conversation with him at that time?

A Yeah. I went outside. We were just talking. We talked for a while.

Q Do you recall the - - to the best of your recollection, do you recall the specifics of that conversation?

A No, I don't, you know, how you doing? How was your day? Nothing important.

Q In your mind was there anything unusual about

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the conversation at that specific time?

A No, nothing at all.

Q For approximately how long did you speak to Dominic Franza at that time?

A About 15 minutes, ten or 15 minutes.

Q And at that time why did you end your conversation with Dominic Franza?

A He was leaving. He had an errand to run.

Q Did he tell you what he was going to do?

A I believe he went to the drugstore.

Q Did you know how he got to the drugstore?

A He drove.

Q What did he drive?

A His car, the red Mustang.

Q Where was the car that he drove off from?

A I believe it was in the garage.

Q Did your husband come home after Dominic Franza had left?

A Yes. Not long after Dominic left, he came home.

Q And after your husband had come home did you then again see Dominic Franza?

A Yes. Dominic came back.

Q Approximately how long after your husband

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came home did Dominic Franza return?

A Two minutes or so, not long.

Q Can you approximate the amount of time from the time when Dominic Franza drove off in his car until the time when you next saw Dominic Franza?

A Five to ten minutes.

Q When you next saw Dominic Franza did he drive back up in his car?

A Yes.

Q Where was your husband when Dominic Franza arrived?

A In the backyard.

Q And what occurred at this time?

A They spoke. They were having a conversation.

Q Did you observe anything unusual about this conversation at this time?

A No.

Q For how long did your husband enter into this conversation with Dominic Franza?

A I'm not sure.

Q Approximately.

A Fifteen, 20 minutes. It was - - I'm not sure. I can't say.

Q After the conclusion of this conversation did

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you observe where Dominic Franza went?

A He went inside.

Q Did you observe anything unusual about Dominic Franza at this time?

A No.

Q When he went inside where exactly did Dominic Franza go inside of?

A The back door.

Q Do you know if - -

A He went through the back door.

Q Do you know if on July 17, 1990, do you know if Myra Franza was living with Dominic Franza?

A No, she wasn't.

Q Do you know for how long she had not been living with Dominic Franza for?

A It would have been a couple of weeks. I think she left in June of the same year, but probably two, three weeks.

Q After Dominic Franza went inside of his house, did you see him again?

A Yes, he came back out not long after he went in.

Q Can you approximate the amount of time?

A No more than ten minutes.

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Q Do you know if Dominic Franza has an answering machine inside of his house?

A Yes, he does.

Q Can you please tell the members of the jury what you observed when Dominic Franza exited his house this time?

A Okay. I'm not sure. I think I was in the backyard. And he came, he hopped over the wall as usual, and I believe, I'm not sure, oh, God.

Q Take your time if you need to.

A He came out of the house, and he was kind of not really disoriented, he was a little shook up, not badly, but I can tell that something was wrong. And he went on to say that something happened to his wife.

Q Did he tell you what means of communication he received this message by?

A The answering machine.

Q When you say Dominic Franza said something happened to his wife, can you be - - do you recall the specific words that he used?

A No, I don't.

Q To the best of your recollection what are the words that he used?

A I'm not sure of his exact words. I know

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whatever it was that he said, it had something to do with Myra.

Q What did he say specifically? What did he say that it had to do with Myra?

MR. BRENNER: Objection, your Honor.

THE COURT: Overruled.

MR. BRENNER: Asked and answered.

THE COURT: Overruled.

Q To the best of your recollection what did he say with reference to Myra?

A What I heard, something happened to her.

Q Now, when the Defendant said something happened to her, how far were you standing the from him?

A Not far.

Q Can you approximate in distance the amount of feet?

A Probably about where this gentleman is sitting.

MR. SHEINDLIN: Let the record reflect approximately three to four feet, the distance from the witness to where the Court Reporter is seated.

THE COURT: Yes.

Q After the Defendant said something happened

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to her - -

MR. BRENNER: Objection.

THE COURT: Rephrase it.

Q After you heard the Defendant make this statement, where did he go?

A To his car.

Q And where was his car parked?

A Behind my husband's.

Q What did he do then after he got in his car?

A Got in and started it up and drove off.

Q How far is the Franzas' house from the house that you live in?

A The width of a driveway.

Q Point to an object in the Courtroom that is a similar distance, if you can.

A Probably a little wider than this, from here to there (indicating).

Q You are pointing to the beginning of the jury box?

A Yes, enough for a car to get out.

MR. SHEINDLIN: Would the record reflect approximately ten feet.

Q And when Dominic exited his house in which door did he exit from his house?

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A I believe it was the back door.

Q Did he say anything immediately - - withdrawn.

At the time he exited from the back door of his house did he say anything at that moment?

A No. I wasn't paying any attention to it, no.

Q Prior to Dominic jumping over the wall did he say anything?

A No.

Q How many statements do you recall Dominic Franza making at that time?

MR. BRENNER: At which time?

Q From the time that Dominic Franza exited his house to the time that Dominic Franza drove off in his car how many statements do you remember him making?

A I just heard that one.

Q And what was going through your mind after you heard that statement?

A What happened? I just wanted to know what happened.

Q What was your reaction to that statement?

MR. BRENNER: Objection, your Honor. Objection as to relevancy.

THE COURT: I'll allow it.

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Q What was your reaction to that statement?

A I was shocked.

Q When Dominic made the statement, where was your husband located?

A I believe he was right next to me.

Q Where were you at that time specifically?

A I'm not sure. I was somewhere in the yard I believe. I think I was next to the kitchen door.

Q And your husband was near you?

A Yes.

Q I ask you to look around this Courtroom. Do you see the person known as Dominic Franza in this Courtroom?

A Yes.

Q Would you please point to Dominic Franza and identify an article of clothing that he's wearing?

MR. BRENNER: I'll stipulate that she will identify Mr. Franza.

THE COURT: The record will so reflect.

MR. BRANCATO: No further questions.

THE COURT: Mr. Brenner.

CROSS EXAMINATION

BY MR. BRENNER:

Q Mrs. Francis, the day that this occurred, Mr.

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Franza drove off in his car; is that right?

A Yes.

Q Approximately what time was that?

A Probably - - it was probably about seven o'clock by that time.

Q It was still light out?

A Yes.

Q And did you remain home for the rest of the night?

A A-hum.

Q You didn't go out?

A No.

Q Approximately what time do you and your husband on any given day in the summertime of 1990, what time did you retire?

A Probably 11 o'clock.

Q Did you see Dominic Franza again that night?

A No, I didn't.

Q Did you see him come back and drive his red car back into the driveway that night?

A No, I didn't.

Q So on the day that you say this that happened, Mr. Franza left at about seven o'clock in his car and to the best of your knowledge up until 11 did not

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return in his car?

A I don't believe so.

Q Now, do you know Tracie Jenkins?

A I was introduced to him once.

Q I don't mean do you know him intimately. You know of him?

A I know of him.

Q He's a male?

A Yes.

Q Black male?

A Yes.

Q And would it be fair to say that he's an acquaintance of Mr. Franza as well?

A A-hum.

Q Now, when Mr. Franza left the approximate vicinity of 3320 Barker Avenue, was Mr. Jenkins with him?

A No, I didn't see him.

Q Had you seen him at all in the 45 minutes preceding Mr. Franza's departure?

A No.

Q So on the day this happened, you did not see Tracie Jenkins from six o'clock to about seven; is that right?

A No.

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Q Did you see him later during the course of that night?

A No, I didn't.

Q Now, Mr. Sheindlin asked you about the operations of your mind, and what was running through your mind, what happened; is that right?

A Yes.

Q Prior to your retiring at 11 o'clock that night what, if anything, did you do to find out what had happened?

A What did I do to find out what happened? There was nothing I could do.

Q When was the next time that you received information about what had happened?

A Probably the next day.

Q Did your husband do anything?

A No, not that I know of.

Q You spoke to the police, Detective Giorgio and Detective Ortiz in February of 1991; is that right?

A Yes.

Q And this was in July of 1990; is that right?

A Yes.

Q Correct me if I'm wrong, but that's about a seven-month gap there; is that right?

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A That's right.

Q Had anybody asked you about what you had seen or heard that day prior to February 15, 1991?

A No.

Q Had you written down anywhere what you had seen or you had heard in July of 1990?

A Yes.

Q So between the time that this occurred, July of 1990, and February of 1991, no one had questioned you; is that right?

A Right.

Q Now, at the time that Detective Giorgio and Detective Ortiz came to see you, do you know where Mr. Franza was at the time that they came to see you?

MR. SHEINDLIN: Objection as to the time frame.

THE COURT: He's giving a specific time.

MR. BRENNER: I'll put it another way.

Q Would it be fair to say that they came sometime in February of 1991?

A The end of February 1991.

Q After Valentine's Day?

A Yes.

Q Did you know where Mr. Franza was at the time

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that the detectives actually came to speak to you?

A I believe he was in custody.

Q He had been arrested?

A Yes.

Q So at the time that Detective Giorgio and Detective Ortiz came to speak to you, you knew then that Mr. Franza had been arrested; is that right?

A A-hum.

Q And that the arrest had something to do with the events regarding Mrs. Franza, Myra Franza and her mother?

A Right.

Q Did you get that information from Detective George and Detective Ortiz?

MR. SHEINDLIN: Objection.

THE COURT: I'll allow him to answer.

A I'm not sure.

Q Now, in addition to Detective Giorgio and Detective Ortiz, there were federal agents as well, do you recall?

A Well, I've seen so many. Who are they? There was some guys some from tobacco and the fire, I'm not sure who is who anymore.

Q An agent from Alcohol Tobacco and Firearms by

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the name of Behan?

A Two guys.

Q And another by the name of Raffa?

A Okay.

Q Do those names ring a bell?

A A-hum.

Q At the time that detectives Giorgio and Ortiz came to see you, those two guys were with them. If they weren't, tell me they weren't. I'm not telling you, I'm asking you.

A The first time I saw Giorgio there was a lady with him and another gentleman. And then a couple months later some other guys came.

Q In February detectives Giorgio and Ortiz - - and do the names Detective Raymond and Detective Herbert, two women detectives, do those names ring a bell?

A No, not to me.

Q How many times were you spoken to by law enforcement people?

A I can't remember.

Q As a matter of fact, Detective Giorgio and Detective Ortiz revisited you not three weeks ago, about that?

A Yeah, about three weeks ago.

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Q And that is now almost a year and a half since July of 1990; is that right?

A That's right.

Q The federal agents, did they ask you about what you had seen and heard?

A Yes, I think so. They spoke to my husband really. I wasn't really into it. I couldn't be bothered.

Q You weren't what?

A I couldn't be bothered. I had things to do so I didn't speak to them.

Q You knew what they were investigating?

A Yeah.

Q Now, Mrs. Francis, did you have a subsequent conversation with Mr. Franza after that day, about what had happened?

A After which day?

Q You've testified to a day when Mr. Franza was in your backyard and after he said certain things, he got in his car and he drove away and you did not see him again that day?

A Right.

Q Did there come a time after that day when you saw him again?

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A Of course.

Q When was that?

A I believe it was the next day when I really got all the information about what happened.

Q Would it be fair to say that Mr. Franza lived next door to you?

A Yes.

Q And that he came and went as you came and went as anyone who lives in a particular building comes and goes; correct?

A Right.

Q With frequency; yes?

A A-hum.

Q And would it be fair to say that you probably saw him the next day?

A It would be fair to say.

Q And would it also be fair to say that at some point Mr. Franza came to you and said - -

MR. SHEINDLIN: Objection.

THE COURT: Sustained.

Q Did Mr. Franza have a discussion with you about what had occurred?

A Yeah.

Q Numerous discussions; is that right?

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A Yes.

MR. BRENNER: Thank you, Mrs. Francis. I have nothing further.

THE COURT: Any redirect?

MR. SHEINDLIN: No redirect.

THE COURT: You are excused.

(At this time the witness was excused by the Court.)

THE COURT: Call your next witness.

MR. BRANCATO: People call Wayne Francis to the stand.

THE COURT: Wayne Francis.

W A Y N E F R A N C I S, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name and county of residence.

THE WITNESS: Gary Wayne Francis, Bronx, New York.

Q Mr. Francis, back in July of 1990 did you live with your wife and your child at Barker Avenue in the Bronx, County of New York?

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A Yes.

Q Your house, was it next door to the house in which Dominic and Myra Franza lived?

A Yes.

Q How long did you know Mr. Franza?

A Since we moved into the house in July of '89.

Q Would you socialize with Mr. Franza and his wife along with your wife?

A Yes.

Q Were there occasions that you went to their home?

A Yes.

Q And were there occasions that they came to your home?

A Yes.

Q Were there any occasions that you met them and went out to eat with them?

A Yes.

Q Could you please tell us, did the Defendant have a car back in 1990?

A Yes.

Q Where was this car normally kept?

A It was parked in my garage.

Q The width of your driveway, could you tell us

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about how big it is?

A Approximately ten to 13 feet.

Q Now, let me direct your attention back to July 17, 1990. Did you work that day?

A Yes.

Q And what time do you normally return from work?

A It varies. Between four and six depending where I work.

Q Did there come a point on July 17, 1990, that you returned to your apartment on Barker Avenue in the early evening?

A Yes.

Q Do you remember about what time it was that you got back?

A Somewhere between six and seven.

Q And when you got back home did you see your wife?

A Yes.

Q Where was it that you first saw your wife?

A I think outside in the driveway.

Q Did you see they were outside?

A No. When I pulled up she was there.

Q And did you go out and speak with her?

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A Yeah.

Q Did there come a point that you saw the Defendant in this case, Dominic Franza?

A Yes.

Q When was that that you first saw him?

A I think he came shortly after I pulled up.

Q Was your wife still with you at this point?

A Yes.

Q Was it still in the driveway?

A Yes.

Q Did you speak with Mr. Franza?

A Yes.

Q Was it at the same location in the yard that you spoke with him?

A Yes.

Q About how long did you speak with him that night?

A I don't recall exactly.

Q Did there come some point that he went away from you and your wife?

A Yes.

Q And where did he go?

A He went into his apartment.

Q And how did he do that? Did he go through

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the front door, side door, rear door?

A There is a back door and there is a wall dividing the driveway and his house, he climbed over the wall.

Q About how big is this wall that he climbed over?

A From my side it's about five, six feet.

Q And would he normally climb over the wall after parking the car on your property?

A Yes.

Q So when he went back over the wall and into the back of his building, where did you and your wife go?

A I think we went inside.

Q And what happened then?

A Mr. Franza came back over.

Q Was he walking at this point or describe how he was coming back over.

A I don't recall if we saw him exactly when he came over or we were in the house or by the door or what.

Q Could you please describe for us when you saw Dominic Franza again where was he?

A I think I was at the door of the apartment and he was sort of proceeding to his car.

Q Did you see him jump over the wall?

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A I don't recall that part.

MR. BRANCATO: May we have this marked for identification as People's Exhibit Number 19?

(Document referred to above as a handwritten document was received and marked as People's Exhibit 19, for Identification.)

Q I'm going to ask you to read the second paragraph to yourself.

Having read the second paragraph to yourself, do you recall where the Defendant was when you first saw him, after he had - - withdrawn. I'll withdraw the question. I'll try to state it with greater particularity.

You said you saw Dominic Franza go into the back door of his building; is that correct?

A Yes.

Q There came a point that you saw him again. What point was that that you saw him again?

MR. BRENNER: Objection, your Honor, as to what point. Objection to the form of the question.

THE COURT: Rephrase it.

Q You indicated that you saw the Defendant after he had gone into his building?

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A Yes.

Q When was that?

A I recall that was a point when he came back out and he told us that something had happened to his wife.

Q And could you please tell us when he came back out and said something had happened to his wife, what did he say?

A I recall it being that his wife I think was shot. I don't remember whether he said his wife or he called her by name.

Q You don't recall if he said his wife or her name. What is his wife's name?

A Myra.

Q At this point you don't remember whether he said Myra or my wife?

A Correct.

Q What did he say after he had made mention to Mrs. Franza? What did he say?

A I can recall it being that she had been shot.

Q Where was the Defendant standing at the point that he told you she had been shot?

A No more than maybe five feet away.

Q Is it as close as I am to you right now or is

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it closer or further back?

A Probably a little closer.

Q A little closer?

A Yes, about five feet.

MR. BRANCATO: I'm standing, your Honor, about two to three feet back from the edge of the witness box.

THE COURT: The total area should be about five feet.

Q When the Defendant said either Myra or my wife had been shot, where was your wife standing at that point?

A I don't remember.

Q Where were you standing?

A I remember I was at the door.

Q And at the point that the Defendant was standing no more than five feet away from you and said that - -

MR. BRENNER: Objection to the form of the question.

THE COURT: He hasn't finished it.

Q At the point that the Defendant was standing no more than five feet from you and said either my wife or Myra had been shot, what did you - - what, if

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anything, did you say to him?

MR. BRENNER: Objection to the form of the question. The two predicates, your Honor.

THE COURT: Yes, I agree.

Q After the Defendant said this to you, what did you do?

A I was shocked.

Q Did you say anything?

A I said, what happened?

Q What, if anything, did he say?

A He said he didn't know.

Q Did you ask him what had happened?

A Yes, I did.

MR. BRENNER: Objection. Asked and answered.

THE COURT: Overruled.

Q What did he say?

A He didn't know.

Q Did you say the word "shot" back to him after he said it to you?

MR. BRENNER: Objection, your Honor, leading.

THE COURT: Sustained.

Q How many times did the Defendant say the word "shot" to you?

A I can't recall.

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Q Was it once or more than once?

A Can't recall.

Q Mr. Francis, at the point that the Defendant had said either my wife or Myra has been shot, what, if anything, did you say to him?

MR. BRENNER: Your Honor, I'm going to object to the continued use of the predicate form of the question.

THE COURT: Yes.

Q What, if anything, did you say to the Defendant?

A Only thing I remember asking was what happened?

Q What, if anything, did he respond to you?

A That he wasn't sure, he didn't know what happened.

Q Did he say anything about his mother-in-law at this point?

MR. BRENNER: Objection, leading, your Honor.

THE COURT: Sustained.

Q When he first came back out of the building did he make reference to any other family members?

MR. BRENNER: Objection, leading.

THE COURT: Sustained.

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Q Did you ask the Defendant how his wife got shot?

A No.

Q Did he say to you how she got shot?

A No.

MR. BRENNER: Objection, your Honor. If I may just say that this is the fourth time that the man has been asked the same question about what Mr. Franza said after he asked what happened. It's been asked and answered.

THE COURT: Let's move on.

MR. BRANCATO: Judge, may we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

Q Mr. Francis, after the Defendant told you that either his wife or Myra had been shot, did you ask him how she had been shot?

MR. BRENNER: Objection, leading.

THE COURT: I'll allow that.

A No.

Q What did you say to him?

MR. BRENNER: Objection. Asked and answered.

THE COURT: I'm allowing it.

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A I just asked what happened.

Q And how many times did he say the word "shot" to you before he got into his car and drove out of the driveway?

MR. BRENNER: Objection. Asked and answered.

THE COURT: It may have been asked and answered, but not in that form. I'll allow it that one time.

You may answer, Mr. Francis.

A I can't recall how many times.

THE COURT: Let's move on.

Q The initial statement by the Defendant to you was at the distance that I'm standing to where you are right now?

MR. BRENNER: Objection. Leading.

THE COURT: He's already testified to that.

MR. BRENNER: Then it was asked and answered.

MR. BRANCATO: I have no further questions.

THE COURT: You may inquire.

CROSS EXAMINATION

BY MR. BRENNER:

Q Mr. Francis, were you spoken to by detectives Giorgio and Ortiz of the New York City Police Department in February of 1991?

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A Yes.

Q Without reference to a particular date, do you recall that sometime in that month some police officers from the 34 Precinct came to see you?

A Yes.

Q How many were there?

A I think there was three.

Q Was there a woman?

A Yes.

Q Do you remember her name?

A No.

Q Detective Herbert or Detective Raymond, does that ring a bell?

A Raymond.

Q In addition, were there representatives of a federal agency known as the bureau of Alcohol, Tobacco and Firearms?

A Not at the same time.

Q Now, at the time that the police officers from the 34 Precinct came to speak to you, you were aware, were you not, that Mr. Franza had already been arrested?

A Yes.

Q And that the arrest was in connection with

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the events regarding Myra Franza and her mother?

A Yes.

Q Now, between July of 1980 and February - - July of 1990, I'm sorry, and February of 1991, how many times would you say, approximately, that you saw Dominic Franza?

A Between February, '90?

Q Going backward from the time that the detectives saw you, back in time to July, some seven months earlier. It's about a seven-month period.

A Almost daily.

Q A lot of times?

A Yes.

Q And you were on a friendly basis; were you not?

A Yes.

Q So it would not be unusual for you to stop and talk?

A No.

Q Exchange pleasantries?

A Anything.

Q And certainly Mr. Franza between July of 1990 and February of 1991 exchanged information with you about the events regarding his wife?

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MR. BRANCATO: I object.

MR. BRENNER: Your Honor, may we approach? I'll make an offer of proof.

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Objection sustained.

Q Mr. Francis, on this particular day, Mr. Franza got in his car - -

THE COURT: Which particular day?

Q The particular day you referred to in response to questions by Mr. Brancato. Mr. Franza got in his car and drove away?

A Correct.

Q Would it be fair to say that for the remainder of that night you stayed home?

A Yes.

Q Would it be additionally fair to say that you and your wife were tired at about 11 o'clock on that night, somewhere in the neighborhood of 11?

A Yes.

Q It could have been later?

A Could have.

Q It could have been earlier?

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A Could have.

Q Mr. Francis, did you see Mr. Franza again that night?

A I don't recall.

Q Did he drive his car back and park it in the driveway?

A I don't recall.

Q Well, that night after you saw Mr. Franza leave, did you have occasion to go over to 3320, knock on the door and try and speak to Mr. Franza?

A No.

Q You had been told that his wife had been shot; is that right? That's what you have told us?

A Right.

Q And that was all the information that you received?

A Right.

Q And it's your testimony that at no point on that night did you go over to 3320 and try and speak to Dominic?

A No.

Q And you don't recall whether Dominic drove back that night or not?

A No.

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Q Do you know Tracie Jenkins?

A Yes. I don't know his last name but I know Tracie.

Q Tracie is a male?

A Right.

Q And he's a black man?

A Yes.

Q And is he an acquaintance of Mr. Franza, if you know?

A Yes.

Q Did you see him that night?

A No.

Q Have you ever seen his car?

A No.

Q It's not a red Mustang; is it? Withdrawn. What color car does Mr. Franza have?

A Mr. Franza has a red Mustang.

Q That's Mr. Franza's car?

A Yes.

Q That's the car that you say he drove away in after having this conversation with you?

A Right.

Q Now, between July of 1990 and February did anybody from the police speak to you in that seven-month

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period between July of 1990 and February when Detective Giorgio and Detective Ortiz came to the house?

A Before that, no, I don't think so.

Q And Mr. Francis, did you make any notes of what had happened on the day that you've talked about with Mr. Brancato?

A No.

Q Did your wife to the best of your knowledge?

A No.

Q During that seven-month period, the period during which you saw Mr. Franza almost every day; is that right?

A Yes.

Q No police officers had questioned you about what you had seen or heard?

A No.

Q On that day in July, did you do anything to find - - to get more information?

A No.

Q Do you know whether you spoke to Mr. Franza the following day about it?

A I don't recall if it was the following day or not.

Q But there came a point where you did speak to

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him about it?

A Yes.

MR. BRANCATO: I object.

MR. BRENNER: Just to the point, not to what was said.

THE COURT: It also presupposes that there was a conversation. Objection sustained.

MR. BRENNER: Thank you. I have nothing further.

THE COURT: Any redirect?

MR. BRANCATO: No.

THE COURT: Step down, sir. You are excused.

(At this time the witness was excused by the Court.)

THE COURT: Counsel to the bench.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: Ladies and gentlemen of the jury, at this time we will recess and resume at approximately 2:10 today. Do not discuss this case among yourselves nor allow any third person to discuss the case with you. Have a good lunch. We'll see you back here at 2:10.

Take the jury out.

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(At this time the jury filed out of the Courtroom.)

(At this time a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

THE COURT: Okay. Bring in the jury.

(At this time the jury filed into the Courtroom.)

THE CLERK: Case on trial. The Defendant, his counsel and the assistant district attorney, and all sworn jurors are present.

THE COURT: Mr. Brancato, call your next witness.

MR. BRANCATO: People call Solange Blumenfeld.

S O L A N G E B L U M E N F E L D, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT: You may inquire.

Q Miss Blumenfeld, what is your profession?

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A I'm a translator for the DA's office in Manhattan and for the Supreme Court in New York, and I also do temporary work bilingual in legal.

Q How long have you served as a translator for the district attorney's office?

A About six months.

Q And for the Supreme courts of this state, how long?

A Same, six months.

Q Could you please tell us what your qualifications are that enable you to serve as a translator?

A I have a Master's Degree in French and secondary language Spanish. And I have 56 credits towards my Master's in both languages.

And I worked as a teacher in college, teaching in New York and Manhattan and in Brooklyn in two different languages French and Spanish.

Q How many languages do you speak?

A Seven.

Q Could you please tell us what they are?

A Fluently Spanish, French, Rumanian and Hebrew. And not so fluent but good Italian, some Russian and Latin.

Q Now, you indicated that you have a Master's

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Degree in French and 56 credits post graduate in Spanish; is that true?

A That's true.

Q Have you taught courses in Spanish?

A Yes, I taught beginners courses in New York Technical College in Brooklyn, and borough of Manhattan Community College in Manhattan.

Q When you say that you taught Spanish, you taught at the college level?

A Yes.

Q Have you served as a translator from the English language into Spanish and from the Spanish language into English in Courts here before in New York?

A Yes, about 24 times in DA's office and one time in the Supreme Court.

MR. BRANCATO: Your Honor, at this time I would offer Miss Blumenfeld as an expert witness to translate from English into Spanish and from Spanish into English.

MR. BRENNER: Miss Blumenfeld, have you ever testified before?

THE WITNESS: Yes.

MR. BRENNER: On whose behalf?

THE WITNESS: On behalf of the district

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attorney's office.

MR. BRENNER: How many times?

THE WITNESS: In the Court, once in the Supreme Court and about 24 times in DA's office and sometimes in front of the Grand Jury if the case required.

MR. BRENNER: But in front of a petit jury like this jury, how many times have you testified?

THE WITNESS: About twice.

MR. BRENNER: I have no objection.

THE COURT: You may proceed.

Q Miss Blumenfeld, when Mr. Brenner asked you have you testified before, have you sat in the witness stand before and testified to a jury?

A Yes, and I swore, and I have been sworn and I have been qualified.

Q On those occasions did someone else say something and you then translated it for the jury?

A Yes. There was a case where I translated in front of a Grand Jury, and it was - - the person was cab driver who was held at gunpoint.

THE COURT: Don't tell us the details.

Q If I may, in those instances was it your job to say what another witness speaking in a foreign

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language was saying to the jury?

A Yes.

Q Did you then listen to a question from someone and translate that into another language for the witness?

A Yes. Like you're asking me in English, and the guy was talking in Spanish or in French.

MR. BRENNER: May I reopen my voir dire? I misunderstood the witness' answer.

THE COURT: Yes.

MR. BRENNER: If you don't mind.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q So your services in Court have been to turn the words of somebody else on the stand into another language for the jury and the Court to understand?

A It's called simultaneous translation. Also if the DA ask me questions, I will translate them to the person who I'm sitting next to and who didn't know English.

Q You are not here for purposes of simultaneous translation today?

A No.

Q Have you ever testified in any Court - -

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A Yes.

THE COURT: Let him finish the question.

Q - - in the capacity in which you are testifying today?

A Yes.

Q What Court was that?

A In Supreme Court, in a special referee. Case was personal injury.

Q That wasn't simultaneous translation?

A No.

Q That was in the capacity like this?

A Yes.

Q Were you qualified by the special referee?

A Yes.

Q You have to let me finish the question.

Q Were you qualified by the special referee as an expert in the Spanish language?

A Yes.

Q That was Spanish?

A Yes.

MR. BRENNER: Your Honor, I have no objection.

THE COURT: Let's move on.

MR. BRANCATO: Thank you.

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BY MR. BRANCATO:

Q In connection with this case, did my office contact you about a week ago and ask you to translate some letters?

A That is correct.

Q These are already marked as People's Exhibits 11 and 12. Could you please look at those?

A Yes. Those are the letters.

Q In connection with this did you translate those letters to a literal translation from Spanish into English?

A Yes, this is correct.

MR. BRANCATO: Your Honor, I'm holding what's been previously marked as People's Exhibit Number 20 for identification.

Q Does that chart depict the writing that is on People's Exhibit Number 12?

A Yes.

Q And was that chart prepared by my office?

A Yes.

MR. BRANCATO: Can we please put it on the tripod? And I would ask Miss Blumenfeld to please get up and to stand by the chart.

Your Honor, may I approach?

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THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

Q Miss Blumenfeld, you indicated that what's on that chart is the same Spanish wording that appears on Exhibit Number 12; am I correct?

A Yes.

Q Now, can you please use this pen, merely for pointing, don't make any markings on the chart. Could you please tell us, could you translate the literal meaning of the first sentence in that chart?

A Okay. "Josephine and Myra, no talk with nobody. Talk with your son. Next time both will die." Up to here.

Q Now, that first sentence, is that first sentence written in proper Spanish?

A No.

Q By that, I mean is it proper grammar?

A No, it's not proper grammar, and it's not proper syntax. And also one word is not from the Spanish language.

Q That is the E that stands between the Josephine and the Myra?

A Yes. It's supposed to be - -

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THE COURT: Is that in another language?

THE WITNESS: Yes.

THE COURT: What language?

THE WITNESS: Probably Italian. It's supposed to be a Y in Spanish.

MR. BRENNER: Your Honor, I'm going to object as to what it's supposed to be. The witness can say what it is.

THE WITNESS: In Spanish it's Josephine and Myra.

THE COURT: The point is well taken. Don't give us an opinion as to what it should or it could be.

THE WITNESS: It's Italian.

MR. BRENNER: I'm going to ask that the opinion that it's in Italian be stricken. This witness has not been qualified as such.

THE COURT: The witness testified while she was not fluent as in the other four languages, she does speak Italian.

MR. BRENNER: But she hasn't been qualified as such, and I would object to any such qualification.

THE COURT: For a singular word if she

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believes it's Italian, that's her opinion as to the weight of it. That's something I'll allow the jury to speculate upon. Weight.

Q The second sentence, the one that starts with the capital E, could you please give us the literal translation as it appears on that chart?

A Yes. "And your husband."

MR. BRENNER: Your Honor, I'm sorry. I don't mean - - the witness is reading from something I don't know what it is.

THE WITNESS: It's my translation.

MR. BRENNER: I object.

THE COURT: Do it from the chart.

A "And your husband. I can kill him. Anybody is looking at your husband. When he is doing the garbage in the street. Tuesday at one in the morning."

Q Now, that sentence, is that sentence and the grammar, is it in proper Spanish?

A It's incorrect. The grammar, and then in the sense that the syntax is also incorrect, because you don't have two infinitives. You could not have two infinitives.

Q Let's slow down because he has to type this. You say that there are two infinitives. One of

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the words that you mentioned is Q-U-E-R-E-R. And the next word is M-A-T-A-R. What does the word Q-U-E-R-E-R translate to?

A Translates to desire.

Q To desire. And the word M-A-T-A-R, what does that translate to?

A To kill.

Q So the literal translation of that part, is it to desire to kill?

A Yes. It says, "I no to desire to kill."

Q If at any point during the translation you need to refer to your notes, please let us know so that you can put it down.

The next sentence, the third sentence, could you please tell us how that translates?

A Yes. It says, "The police will not be able to help you."

Q Is that sentence in proper Spanish?

A No.

Q What mistakes if any are there in that sentence?

A Well, there are many mistakes. The first mistake is everything ending in A, like Policia - -

Q Hold on. When you say something in Spanish,

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give me a chance to spell it. P-O-L-I-C-I-A.

A It's feminine. Everything that is singular it's supposed to be L-A, la casa, la policia.

Q By la, you mean L-A?

A L-A.

Q How would that be in proper Spanish if it was proper gender? How would you say it?

A If it would be plural, it would be an S at the end of the policia, which would mean the police stations. But if it's singular it would be la policia. As it is it's wrong. And also it's wrong two infinitives next to the other. Poder and ayudar.

Q Now, the next sentence that starts with tu, could you please tell us how that translates, the literal translation?

A Yes. This is, "you is helpless," which it's in correct.

Q "You is helpless"?

A Yes.

Q If that were written in proper Spanish, how would it read?

A It would read with an A at the end because it's feminine. He's talking to a woman.

MR. BRENNER: Objection.

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THE COURT: Who is this letter addressed to?

THE WITNESS: A woman.

MR. BRENNER: Not to whom the letter is addressed, gender of the person who - -

MR. BRANCATO: Judge, if we approach we can resolve this.

(At this time a discussion was held off the record among Court and counsel.)

Q Mrs. Blumenfeld, rather than say who is speaking, could you just say, "the person is speaking?"

A Yes. The person is speaking about Josephine and Myra. And the person is addressing Josephine and Myra was either only Josephine or only Myra because he's using a singular tu, which means you. "You is." Here it's supposed to be an R because it's a feminine that he's talking to. There is no masculines in the whole letter, so I suppose - -

Q Without telling us what you suppose, could you tell us when you start with the word al guna, that sentence, could you please tell us how that sentence translates into English?

A Yes. "Anything else, Myra, your husband, he is asking and investigating much. I will kill him too."

Q Now, that sentence, the name in that

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sentence, what name is that?

A El - -

Q Don't start speaking Spanish because this man can't get it down.

So, the proper name in that last sentence, that M-Y-R-A, is that a Spanish name?

A Myra, yes.

Q And what does it say to Myra?

A He says to Myra that her husband is asking and investigating too much, and the person who is writing this letter is going to kill him, too.

Q Now, the next sentence, could you please tell us what the next sentence says, the one that is in capitals?

A "Your son lacks respect," with exclamation signs.

Q Is that sentence written in proper Spanish?

A Yes.

Q Could you tell us how the next sentence translates into English?

A This or the next?

Q The next one.

A "Your husband does the garbage Wednesday at one in the morning. The other day is incorrect."

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Q Now, what is the verb in that sentence?

A It's incorrectly used. The verb is "does the garbage."

Q Te E-C-H-A-R, what is the literal translation of E-C-H-A-R?

A To do.

MR. BRENNER: Your Honor, I'm going to object. May we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among Court and counsel.)

Q Miss Blumenfeld, what we want you to do, we want you to go one word by one word, translate word by word from Spanish into English. We want you to translate it, not what you think someone is trying to communicate, but what is on that page. Start from the top and go slowly.

A "Josephine and Myra. No speak with nobody. Speak with your son. The next time both will die."

Q The next sentence, word by word.

A "And your husband, I can kill him. Anybody who is looking at your husband when he is doing the garbage in the street Tuesday at one in the morning."

Q Go slowly now.

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A "I no desire kill. The police cannot help you. You are helpless. Everything Myra, your husband, he is asking and investigating much. I will kill him too. Your son lacks respect. Your husband to do the garbage Wednesday at one in the morning. The other day is incorrect. In order for you - -"

Q Slow down.

A "To know that I, I am not a toy."

Q Where is a toy?

A "Un huego," a toy. I will prove. Probar, to prove; right?

Q Slow down. P-R-O-B-A-R.

A To prove.

Q What does that mean?

A That's infinitive to prove. "I to do to kill your husband in two minutes."

Q This is marked at Exhibit 21 for identification.

(Document handed to witness.)

Q Is what's marked as 21 for identification the same as what is on number 11 in evidence?

A Yes.

Q We would like to you to go the same way you did before. Give us how it translates rather than what

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you think someone is trying to communicate.

A Sure.

Q Start with the first sentence. Word by word.

A "I will kill all your family here is Puerto Rico."

Q Now, you said, "here is Puerto Rico."

A It's supposed to be one word. Aqui, here. It's not in one word.

Q Is that language in proper Spanish?

A Yes.

Q The next sentence.

A "I will bring your grandmother a present."

Q That sentence, what is the verb in that sentence?

A To bring.

Q Is that in the present tense, the future tense?

A It's not conjugated. The person who wrote the letter left it in the infinitive.

Q So the infinitive then is what?

A It's improper Spanish.

Q What does M-A-N-D-A-R - -

A To bring.

Q Let me finish. M-A-N-D-A-R, what does that

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translate to in English?

A To bring.

Q To bring. Yo, what is that?

A I.

Q I to bring?

A I to bring.

Q To abuela?

A Your grandmother.

Q Thank you. A-B-U-E-L-A.

A Your grandmother.

Q U-N-A. Next word R-E-G-A-L-O.

A Una is not correct.

Q Why is that?

A Because it's feminine and this is masculine. Ending in O it's masculine.

Q If that were correct Spanish, what would it say?

A It will have an O or un regalo.

Q U-N or U-N-O?

A Un regalo.

Q The next sentence, what does it say, word by word?

A "I know where all your family lives."

Q The next sentence?

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A "I will leave you alone because I wish or I desire that you suffer."

Q D-E-S-E-A-R, what does that translate to?

A To desire.

Q I to desire?

A To desire.

Q The next sentence?

A "You feel what happened with your family. You will know or you knew." Anyhow, it's incorrect.

Q What is incorrect, spell the word.

A The way he phrases the whole sentence is incorrect. And then he puts the past for aprendir.

Q The next sentence, tell us word by word slowly.

A "I know that you and your friends rob a place of mine."

Q The next sentence slowly.

A "The friends will bring my things." That's incorrect.

Q The next sentence.

A "I do not have a thing. Your friends safe. This is the next that you have that I necessitate."

Q What does N-E-C-E-S-I-T-A-R translate to in English?

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A That I have in my possession.

Q I have?

A In my possession, right.

Q Is that an infinitive?

A Yes, it's another infinitive. And it's also incorrect.

Q Mrs. Blumenfeld, the infinitive, tell us what is the infinitive?

A To necessitate.

Q The literal translation of those three words, the literal translation, what is it?

A "That I necessitate, to necessitate."

Q The next sentence.

A "I know everything about your life."

Q What is an infinitive?

A The infinitive is the verbal not conjugated like to be, to leave, to eat, to know. When you speak at the first person, second or third person, you have to conjugate the verb, but he didn't.

Q The person didn't?

A No.

Q The next sentence.

A "You produce what I expect, to expect. You to produce what I to expect."

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Q "I to expect?"

A Yes.

Q The next sentence.

A "You bring the to be or the thing at 175th Street and Audubon at four o'clock a.m. in the morning. Only you."

Q Now, solo, what does that mean, S-O-L-O?

A Alone.

Q And S-O-L-I-T-A-R-I-A-M-E-N-T-E?

A It's solitarily. If you say solo, you don't have to say soliamento because they mean the same thing. Either you say solely or soliamento both together.

Q The next sentence that starts P-O-N-E-R?

A "To put the thing in the garbage. Anybody is looking." That's the sentence. It's incorrect also.

Q What is incorrect in that sentence? Don't speak in Spanish, but tell us in English.

A To put. It's infinitive. And estar is an infinitive to be, to be, to look out, to be looking.

Q What would the proper conjugation of E-S-T-A-R be in that sentence?

A Esta.

Q E-S-T-A?

A Yes.

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Q Now, the next sentence.

A "I have a lot of money."

Q M-U-C-H-O, what is the literal translation?

A Much.

MR. BRENNER: Your Honor, I'm going to object. May we approach?

(At this time a discussion was held off the record among Court and counsel.)

Q Miss Blumenfeld, the next sentence.

A I did not finish this one.

Q Okay. Go word by word.

A "I have much money."

Q Miss Blumenfeld, stop right there. T-I-E-N-E?

A Incorrect.

Q What is that part of?

A This is supposed to be the second person or the first person will say, yo tango.

Q Spell it for us.

A T-A-N-G-O.

Q Now, go word by word.

A "I have much money. Not to be able to hide. I to find you wherever you go."

Q The next sentence, word by word.

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A "Threat for all."

Q The next sentence?

A "To observe to work together and not all die little by little."

Q The next sentence.

A "You no speak with police, with nobody and your family will to say no speak with the police."

Q Is that sentence in proper Spanish?

A No.

Q What is wrong in that sentence?

A First of all, it's la policia.

Q L-A. The person put L-O-S?

A Yes. "Et tu de familia." It's an infinitive.

Q Help me out please. You can't speak Spanish on the record.

A To say. It's in the infinitive. He's supposed to conjugate the verb. Et tu de familia, instead of your family, to say.

Q The next sentence. What is T-O-D-O? Okay, that sentence. S-E-P-A.

A "I know everything you is talking. You is talking."

Q The next sentence.

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A "That the police finds out everything is going in a bad way all over the world. Your friends is friends of mine."

Q Is that last sentence the verb, is that in the proper tense?

A No.

Q To the subject?

A No.

Q What is the proper tense?

A S-O-N.

Q And the next sentence?

A "Your friends say is not correct to say the truth to write a letter."

Q The next sentence?

A "I will verify no lies, not to lie."

Q What is the verb in the last sentence that you just read to us?

A There are two verbs, to verify and to lie. And they both are in the infinitive which it cannot be.

Q The next sentence?

A I have patience.

Q The next?

A "You will bring it at eight of February at - - the day of eight of February in the morning."

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MR. BRANCATO: I have no further questions.

THE COURT: Your witness.

MR. BRANCATO: One last thing, Judge. Can we have that marked as 24 and 25?

(Documents referred to above as translated letters were received and marked as People's Exhibits 24 and 25, in Evidence.)

Q Please look at what is marked as Exhibit number 24. Do you recognize it?

A Yes.

Q What do you recognize that to be?

A Letter number one.

Q Is that the letter in Spanish or the translation?

A It's a translation.

Q Who prepared that translation?

A I did.

Q And when did you prepare that?

A I prepared it yesterday on the Word Perfect in the District Attorney's office.

Q Does that letter fairly and accurately depict the translation?

A It's word by word.

MR. BRANCATO: I would offer it into

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evidence.

MR. BRENNER: I'm going to object and conduct at this point a fairly lengthy voir dire.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q I don't know what the numbers are, but there is a shorter letter and a longer letter?

A Josephine and Myra.

MR. BRANCATO: Is that voir dire?

MR. BRENNER: This is voir dire on your offer.

Q When you testified not moments ago, in your translation you used - - I think it's the 25th line down, where the word is "something" else?

A Yes.

Q Correct?

A Yes.

Q That's what it says?

A Yes.

Q When you stood up here and you looked at the board you used the word "anything" else.

A They have the same meaning.

Q But in English - -

A Anything else and something else.

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Q Ma'am, you have to let me ask the questions, or else we won't be able to conduct the proceedings.

A I know what you're saying, but in my opinion they have the same meaning, so I can say anything else or something else.

Q So a Spanish word is capable of having more than one meaning?

A Yes.

Q In any given context, ma'am, as an expert, how would you know which one to use if they all mean the same thing? In other words - - withdrawn.

If algo means something or anything, if that word means the same thing, and you are translating like you did here, you used a different word each time you were asked to translate what it meant.

A But they are words all synonymous. Synonymous means they have the same meaning so you can say something else or anything else and it's going to give you the same meaning.

Q In your opinion as an expert, does the word something and the word anything in English have the same meaning?

MR. BRANCATO: Judge, I object.

MR. BRENNER: Your Honor - -

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THE COURT: Overruled.

A I'm translating from Spanish, and in my opinion, yes, I gave an accurate translation no matter what I'm saying, if it's anything else or something else. I understand that he meant that, just continuing what he was telling her, continuing the sentence.

Q When you testified five minutes ago, again on the short one, on the third paragraph, you have, "your husband to do the garbage at one clock in the morning."

A Yes.

Q When you stood up in the front of the board and answered Mr. Brancato's questions you said, "your husband does the garbage Wednesday at one o'clock in the morning."

And if you don't recall, we can read back what you did say when Mr. Brancato asked you the question.

A Yes. He's using the infinitive which is incorrect.

Q Well, you have been asked as an expert to come here and give us a literal translation.

A I did. I said, "to do the garbage."

Q Actually when you stood up, you said, "does the garbage." That's not a literal translation; is it?

A I said does. It's to do. Echar is to do.

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Q When you answered the question before as to what it meant in front of the jury - -

A So you're saying that I did not do a literal translation. Are you trying to say that? I mean, come on. Be serious.

THE COURT: Madam, just calm down.

THE WITNESS: I don't want to be accused of things.

THE COURT: Just calm down and answer the questions. You're not being accused.

A I don't remember if I said to do or does.

Q Is there a difference?

A Yes. To do is the infinitive and does is the present.

Q You said "Wednesday" when you stood up in front of the jury and translated what was on that card. What does manana mean in Spanish?

A Tomorrow.

Q In your translations that the district attorney is attempting to put in evidence, which you did, "your husband to do the garbage at one o'clock in the morning," is the word manana translated either literally, figuratively or in any other way?

A Yes, "at one in the morning."

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Q You just told us that the literal translation of manana is tomorrow. Isn't that what you said?

A Yes.

Q I'm not accusing you, I'm just - -

MR. BRANCATO: Judge - -

A At one. At one; no? It's not at one in the morning?

Q Is it your testimony that, "one in the morning," the words, "one in the morning" and the word "tomorrow" have the same meaning?

A No. I figured that at one in the morning. It's not 1:00 p.m. It's not one a.m. It's p.m. Because it doesn't say a.m. or p.m. That's why - -

Q Ma'am, you stood up in front of the jury, and when you read - - when you were asked to translate literally those same words, you stood there, you looked at the word and you said the word Wednesday; did you not?

A Yes, Miercoles is Wednesday. Miercoles is there. It's Wednesday. The word Miercoles means Wednesday.

Q I understand, ma'am. But in the piece of paper which the district attorney is attempting to offer into evidence - - which is your literal translation done yesterday, you say?

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A Yes.

Q Does the word Wednesday appear?

A No. Probably I skipped it by mistake.

MR. BRENNER: I have no further questions, your Honor. I object. May we step up on the record?

THE COURT: Yes.

(At this time the following took place at sidebar, among Court and counsel, out of the hearing of the jury:)

THE COURT: Mr. Brenner.

MR. BRENNER: I object to the People's proffer because I do not believe that fairly and accurately represents anything that the witness has testified to in Court today.

Second of all, I have an application and I am going to proceed further along this line with further cross-examination to strike this witness' testimony from the record in its entirety. We have a witness who now just says she probably skipped something. This is an expert, Judge.

THE COURT: She said it was an error in effect that she left out the word.

MR. BRENNER: I'm prepared to proceed with

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further errors. I have a preliminary application. At this point I believe that her testimony is so inherently unreliable vis-a-vis translation that it should be stricken from the record, but I will proceed further.

MR. BRANCATO: You know, I'm inclined to join his application. I'm asking that we use the Court interpreter for us to interpret these letters.

MR. BRENNER: I have no problem with that. Give her the letters and let her read them.

MR. BRANCATO: I'm going to join in that.

I would ask that the Court interpreter come down to interpret these letters now. And we can strike it.

(At this time the following occurred in open Court:)

THE COURT: Miss Blumenfeld, you are excused.

(At this time the witness was excused by the Court.)

THE COURT: We'll take a short recess. Do not discuss the case.

Take the jury out.

(At this time the jury filed out of the Courtroom.)

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THE COURT: The application pending before the Court to strike in the entirety the direct examination of this witness and voir dire which followed, there has been no cross, is joined in by the prosecution. Accordingly, this witness' testimony will be stricken.

When the jury returns they'll be advised that all that testimony is not to be considered by them and they are to dismiss it from their minds.

Off the record.

(At this time a discussion was held off the record among Court and counsel.)

MR. BRENNER: In fairness to the People, possibly the Defendant, I would make an additional request that they are to draw no inference whatsoever from the striking of the testimony.

THE COURT: Very well.

(At this time a brief recess was taken.)

THE COURT: Bring in the panel.

(Yolanda Kidd, the Official Spanish interpreter, is now present in the Courtroom.)

THE CLERK: Case on trial. The Defendant, his counsel, the assistant district attorney and sworn jurors are present.

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THE COURT: Members of the jury, the previous witness that you heard, Miss Blumenfeld, I direct that you dismiss from your minds any of that testimony. Just dismiss it. Do not consider it. Do not deliberate over it. Do not speculate upon it. Do not read anything into it. Just wipe it out as though it does not exist. It will have no bearing on your deliberations or your considerations with the issues in this case. Is that understood?

Now, the Official Court Interpreter, Miss Yolanda Kidd, is here.

Miss Kidd, you've had People's Exhibits - - is that 11 and 12?

MR. BRANCATO: Yes, Judge.

THE COURT: For the record, would you give your translation of those exhibits.

THE INTERPRETER: "Josephine and Myra, don't talk with nobody. Talk with your son. The next time the two will to die. And your husband, I could to kill to him. Somebody is look your husband when he throw the trash to the street Tuesday at one to the morning. I don't to want to kill. The police can't to help. You are

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unprotected. Something Myra your husband he is asking and investigating too much. I will to kill to him too. Your son lacks respect. Your husband to throw the trash Wednesday at one to the morning. The next day is incorrect. For you know I don't is a game. I to prove to kill your husband two times. 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. I you to leave alone because I to wish that you have. You I felt that happened with your family you learned. I will know that you and your friends to steal a place mine. The friends to return my things. I don't have one thing your friends say you have I to need. I will know everything of your life. You to produce the I to wait. You deliver the object 175th Street Audubon at 4:00 a.m. to the morning only solitarily. To put the thing in the trash. Somebody will be at look. 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. You don't talk to the police with nobody and your family. To say don't with the police.

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Know everything I am to speaking. That the police to find. Everything is going bad way for everybody. Your friends is friends mine. Your friends said is not correct to say the truth. To write a letter I will to verify not to lie. I have patience. You deliver on February 8 in the morning."

THE COURT: That's it?

THE INTERPRETER: That's it.

THE COURT: All right, ladies and gentlemen, that is the translation. Is that People's 11 and 12.

MR. BRANCATO: Yes, your Honor.

THE COURT: That is the translation by the Official Court interpreter.

Members of the jury, at this time we do appreciate that you have spent considerable time in your private chamber. We will recess until tomorrow morning at ten o'clock. Do not discuss this case among yourselves or allow any third person to discuss the case with you. If, in fact, that should develop bring that fact to the attention of the Court but not to the attention of your fellow jurors.

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CRIMINAL TERM : PART 32

- -x

THE PEOPLE OF THE STATE OF NEW YORK : Indictment No. 11987/91

- against - :

DOMINIC M. FRANZA, : Att Murder 2

Defendant. :

- -x

February 21, 1992
111 Centre Street
New York, NY 10013

B e f o r e:

HONORABLE PAUL P. E. BOOKSON,
Justice, and a Jury.

A p p e a r a n c e s:

(Same as previously noted.)

MINUTES OF JURY TRIAL

Reported by:
William L. Kutsch
Senior Court Reporter

-oOo-

THE COURT: Bring in the panel.

(At this time the jury filed into the Courtroom.)

THE COURT: Good morning, ladies and gentlemen.

THE CLERK: Case on trial, the Defendant, his

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I would appreciate it if we can get under way tomorrow morning at ten o'clock. Have a very good evening.

Take the jury out.

(At this time the jury filed out of the Courtroom.)

(At this time the proceedings were concluded and adjourned to February 21, 1992, at 10:00 a.m.)

-oOo-

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counsel and the assistant district attorney and the sworn jurors are present.

MR. BRANCATO: Your Honor, the People call Detective Gary Osborn.

D E T. G A R Y O S B O R N, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name, shield and assignment.

THE WITNESS: Detective Gary W. Osborn, 518, New York City Police Department, Crime Scene Unit.

THE COURT: Mr. Brancato.

Q Can you tell us how long have you been a police officer?

A Ten years.

Q Of those ten years how long have you held the grade of detective?

A Three years.

Q You indicated your present assignment is crime scene. How long have you been a member of the Crime Scene Unit?

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A For three years and three months.

Q And what are your duties as a member of the Crime Scene Unit?

A My duties involve responding to homicides and other crimes for the purpose of recording the crime scene using photographs, notes and sketches, and for the identification, marking and packaging of any physical evidence of a crime.

Q Back on July 17, 1990, at about eight to nine o'clock in the evening here in New York County were you working?

A Yes, I was.

Q And on that date on that evening did you have occasion to go to 485 West 187th Street here in New York County?

A Yes, I did.

Q Once you got there were you directed to apartment 1-D like in David?

A Yes, I was.

Q Could you please tell us what you observed?

A I entered apartment 1-D at 485 West 187th Street, and as I entered the apartment I had to make a right turn because the hallway turns into the right. As I walked down the hallway and entered the foyer area of

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the apartment I observed a box of flowers on a chair in the foyer area.

I also observed blood on the floor in that area and in the rear hallway, and in the rear bedroom.

And I also observed two deformed lead bullets on the floor, one on the rear hallway and one in the bathroom.

I also observed on top of this box of flowers was a handwritten I'll say delivery slip or note.

Q When you went in, who was your partner that night?

A Detective John Atkinson.

Q Is he likewise assigned to crime scene?

A Yes, he is.

Q Did you set about to perform your duties to collect and preserve evidence that night?

A Yes, I did.

Q Could you please tell us what you did?

A After making a visual inspection of the apartment, and having a conversation with Detective Montoya who was at the scene and Police Officer Alexander who was the safeguarding officer, I proceeded to photograph the apartment and different pieces of evidence, for instance the flowers, and the bullets.

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Q Now, Detective Montoya, what precinct is he assigned to?

A He's assigned to the 34 Precinct Detective Squad.

Q And Detective Alexander, you indicated was the safeguarding officer, what is the safeguarding officer?

A Police Officer Alexander was assigned to safeguard that apartment to make sure no unauthorized persons go inside the apartment to disturb any evidence or disturb the scene.

Q Now, did there come a point that night that you took photographs of the apartment?

A Yes, there did.

MR. BRANCATO: May we have this marked as People's Exhibit number 30 for identification?

(Document referred to above as a photograph was received and marked as People's Exhibit 30, for Identification.)

Q Could you please look at that photo. Do you recognize that photo?

A Yes, I do.

Q What do you recognize that photo to be?

A This is a photograph that I took. It's an

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overall view from the front hallway towards the foyer area towards the back livingroom, and a box of flowers on the chair.

Q Does that photo fairly and accurately depict the condition of the apartment when you first entered that night on July 17, 1990?

A Yes, it does.

MR. BRANCATO: I would offer it into evidence at this time.

MR. BRENNER: No objection.

THE COURT: Without objection, People's 30 is received.

(Document referred to above as a photograph was received and marked as People's Exhibit 30, in Evidence.)

Q Could you please hold the photo up to the jury? Give it to the officer, please.

Could you please point to the position where you first observed the box of roses with the note when you first went into the apartment?

A Right on the chair here (indicating).

Q If you put it down, please.

This is already in evidence. It's Exhibit Number 7. Please look at it. Did you take that photo?

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A Yes, I did.

Q Could you please describe that photo for us?

A This is a close-up view of a box of flowers with a handwritten delivery slip on top of it. And it's sitting on a chair in the foyer area.

Q Is that the same chair which is referred to in Exhibit Number 30?

A Yes, it is.

Q If you put them down, please. What did you do with the note that was on top of the box of flowers?

A I put my initial G in the lower right-hand corner of the note, with a circle around it.

Q What are your initials?

A My initials are G.O. My first name is Gary. I don't use O because it may be misconstrued as a number. I picked it up with a tweezer, and I packaged it in a zip-lock-type plastic bag, and I gave it to Police Officer Alexander to send to the latent print unit for testing for possible fingerprints.

Q This has already been marked as People's Exhibit 26 for identification.

THE COURT: It was never referred to previously.

MR. BRANCATO: Not as an exhibit.

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THE COURT: People's 26.

Q Could you please look at it and tell us if you recognize the contents of that envelope?

A Yes, I do.

Q What do you recognize it to be?

A I recognize it to be the same handwritten note or delivery slip that was on top of the flowers in apartment 1-D.

Q How did you recognize that to be the same one that was on top of the box of flowers that night?

A I have my initial G with a circle around it.

Q When did you put your initial G inside on the circle?

A When I packaged it on July 17, 1990.

Q What did you do after you put your initial G with the circle around it and packaged it? What did you do with it?

A I gave it to Police Officer Alexander for vouchering.

MR. BRANCATO: I would offer it into evidence at this time.

MR. BRENNER: No objection.

THE COURT: Without objection, 26 is received.

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(Document referred to above as a photograph was received and marked as People's Exhibit 26, in Evidence.)

MR. BRANCATO: Your Honor, at this time, this has been previously been marked People's Exhibit Number 29 for identification.

THE COURT: Is it two parts to that 29?

MR. BRANCATO: Yes. It's all one.

THE COURT: 29 A and B?

MR. BRANCATO: Yes.

Q Do you recognize the white box?

A Yes.

Q What do you recognize it to be?

A The box that contained a dozen roses and had a red ribbon around it, that was in apartment 1-D.

Q Could you please open the box?

A Yes.

Q Is that the ribbon that was around it then?

A Yes, it is.

Q What did you do with that box along with the ribbon?

A After I had packaged the note, I opened up the box carefully and I removed the flowers that were inside it because they are perishable and they would rot

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or mold.

I took the flowers, put them in the kitchen the kitchen sink, and then I put the ribbon inside of the box, and I packaged the box inside of this paper bag, being careful not to handle it too much. I just handled it on the corners and I gave it to Police Officer Alexander to send it to the lab to be processed for possible fingerprints.

Q And there appears an evidence tag that is affixed to the top of the bag. Whose writing is on there?

A This is my partner's, Detective Atkinson's handwriting. He filled this out under my direction and observation.

Q What happened to the bag along with the box and the ribbon after it was packaged?

A I gave it to Police Officer Alexander for vouchering and sending it to the lab.

MR. BRANCATO: I would offer it into evidence at this time.

MR. BRENNER: No objection.

THE COURT: Without objection 29 A and B received.

(Items referred to above as a box and bag

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were received and marked as People's Exhibits 29 A and B, in Evidence.)

Q This has been previously been marked for identification as Exhibit Number 27. Look at it please. Did you take that photo?

A Yes, I did.

Q What does that note depict?

A This is a view of the flowers that I took out of the box and I placed them in the kitchen by the kitchen sink in apartment 1-David.

Q Does the photo fairly and accurately depict how the flowers appeared when you took them out of the box?

A Yes, it does.

MR. BRANCATO: I would offer it into evidence.

MR. BRENNER: No objection.

THE COURT: Without objection.

(Document referred to above as a photograph was received and marked as People's Exhibit 27, in Evidence.)

Q This has previously been marked for identification as Exhibit Number 28. Look at it please and tell us if you recognize it.

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A Yes, I do.

Q What do you recognize it to be?

A This is a photograph that I took and it's a view of a deformed lead bullet on the floor of the bathroom in apartment 1-D.

Q Was that bullet at that position when you first noticed it?

A Yes, it was.

Q Does it fairly and accurately depict the view as you saw it that night?

A Yes, it does.

MR. BRANCATO: I would offer it into evidence.

MR. BRENNER: No objection.

THE COURT: Without objection, 28 is received.

(Document referred to above as a photograph was received and marked as People's Exhibit 28, in Evidence.)

Q Detective Osborn, did there come some point that - - withdrawn. I'll withdraw the question.

Approximately how many photographs of the apartment did you take that night?

A Twenty.

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Q Aside from the note, as well as the box and the ribbon in the box, did you give any other items to Police Officer Alexander to voucher that night?

A Yes, I did. I gave her two deformed lead bullets that I recovered from inside the apartment.

Q Did one of those bullets - - is that the bullet that is depicted in the photo that you identified a moment ago?

A Yes, it is.

Q Where was the other bullet recovered from?

A From the area of the rear hallway in the apartment. That's the hallway that leads to this bathroom at the end of the hall, and the bedroom on the left side.

Q And where was it when you found it?

A In that same position on the floor.

Q Aside from those two bullets did you recover any other bullets at the scene?

A No, I did not.

Q Now, did there come a time after these items had been vouchered and the photographs had been taken that you dusted for fingerprints?

A Yes, I did.

Q Where in the apartment did you dust for

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prints?

A I dusted just the front entrance door to the apartment. I dusted the outside apartment door with white fingerprint powder because the door was black or dark in color, and conversely I dusted the interior door and molding with black fingerprint powder because it was a light color.

Q Did you dust the doorknob of the door?

A Yes, I did.

Q On the inside and the outside?

A That's correct.

Q Did you recover any fingerprints that night?

A I just recovered one lift from the exterior of the apartment door.

Q Where in the apartment door was that one lift?

A Approximately somewhere in the vicinity of the doorknob. I can't be exactly sure.

Q Were any recovered from the doorknob itself on the outside?

A No.

Q Were any prints recovered from the inside of the door on the doorknob?

A No.

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Q Did you dust the surface of the door itself?

A Yes.

Q And on the outside did you - - you indicated that you recovered one print on the outside. Did you dust the inside of the doorknob?

A Inside of - -

Q I'm sorry. Did you dust the inside of the door?

A Yes.

Q And on the surface of the inside of the door were any prints recovered?

A None of value, no.

Q So what did you do with the one print that you recovered from the outside surface of the door?

A What I did, I took it back to the crime scene unit and I put it on a fingerprint card, and I sent it down to the latent print unit.

Q For the benefit of all of us here, how do you go about dusting?

A Depending on the object being dusted and the color, I either use white powder or black powder. I use fingerprint powder known as fingerprint dust. I put it on some sort of object like in a dish, and I put - - I take a feather duster or brush and I dip it into the

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powder, and I use a stroking motion over whatever I'm dusting.

And the waste products that are left there which actually leave the fingerprints are reproductions of your skin, friction ridges of your skin upon an object when you touch it. If the person is excreting different waste products, and leaves an impression or fingerprint on an object, the powder will enhance it. And then after a fingerprint is brought out, I can lift it with fingerprint tape.

Q What do you do afterwards? You put the tape over it?

A I tape over it and I lift the tape up, and depending on whether I'm using black powder or white powder, it depends on what card I put it on. If it's white powder, I put it on a clear lifter. It's an acetate clear plastic card. And if it's black powder, I put it on a white-backed card. It just shows contrast so the person making the identification can make that contrast.

Q Did you do that in connection with this case with the one lift?

A Yes, I did.

Q What did you do with that one lift?

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A I sent it to the fingerprint unit.

Q Did you put any identifying marks on the lift itself?

A Yes. The lift is attached to a card which has all the information of where it was lifted from, my name, shield number and what case number it was.

MR. BRANCATO: I have no further questions.

CROSS EXAMINATION

BY MR. BRENNER:

Q Detective Osborn, when you are physically finished with what you are doing there, doe your role in the investigation end?

A Sometimes it does; sometimes it doesn't. In this case I went to Harlem Hospital just to speak with one of the physicians to find out the wounds of the complainants.

After that, my investigatory part ends and I type up my report on everything that I have done at the scene.

Q So for instance, any investigation which would involve attempting to determine the origin of this particular box, that's outside your ken; isn't that right?

A That's correct.

Q Are there parts of the Police Department or

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officers or detectives who are trained in such an analysis?

A Finding the origin of where the box was made? Detectives do that, yes, in detective squads.

Q Do you know whether any such investigation was done with regard to this?

MR. BRANCATO: I object, Judge.

THE COURT: If he knows.

A Not to my knowledge.

Q As far as something like this is concerned, the Crime Scene Unit would or would not have the responsibility for attempting to determine where something like this originated?

A No, we don't have the responsibility.

Q Are there parts to the Police Department that do have responsibility?

A I guess it can happen in the course of an investigation that maybe a detective would try to find the origin of, say, the ribbon or the box. Otherwise I'm unfamiliar with that.

Q Where it was bought and where it was made, who bought it, who made it?

A Correct.

Q Do you have any knowledge firsthand, of

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course tell us if you don't, as to whether any investigation was done along those lines in this case?

A With the box and the ribbon I have no knowledge of it.

Q You told Mr. Brancato that you dusted the front of the door and the inside of the door for prints?

A That's correct.

Q And correct me if I'm wrong, the purpose was to attempt to assess the identity of a person who had handled the door; is that right?

A That's correct.

Q And aside from the inhabitants of the apartment, that was in an effort to attempt to assess the identity of a perpetrator; is that right?

A Possibly, yes.

Q And you lifted a print?

A That's correct.

Q Do you have any knowledge of what happened after you sent it to the latent fingerprint lab?

A I don't have any independent knowledge of whether it was of value or whether a comparison was made.

Q So they don't report back to you?

A Sometimes they do. Sometimes I'll get what's known as a DD5 detective report, informational report,

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saying that there was a comparison made or an identification made.

Other times, I'll just get a report whether it was of value or not of value. I might have gotten a report back in this case, but I can't recall.

Q Now, the photograph, the two photographs that the People introduced, one is a picture of flowers in the sink; is that right?

A Yes.

Q One is a picture of the flower box sitting on a chair?

A Right.

Q In that picture the flower box is wrapped in the ribbon which is now inside of it?

A Yes.

Q The box was closed and kept closed by that ribbon; is that right?

A That's correct.

Q So in order to open the box to get what is inside, you had to remove the ribbon?

A That's correct.

Q Do you wear gloves at the crime scene?

A Yes.

Q Were you wearing them on that occasion?

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A Yes.

Q You removed the ribbon, opened the box, took out the flowers, put them in the sink and photographed them there?

A That's correct.

Q And then disposed of them?

A I didn't dispose of them, no, I don't know what happened to the flowers. That's where I left them.

Q You left them in the sink?

A That's correct.

Q And you don't know what happened to them. Were you the last people to leave the crime scene?

A No.

Q Was Detective Giorgio there when you left?

A No.

Q Was Detective Ortiz?

A I believe Detective Ortiz was there.

Q But you don't have any knowledge of what happened to those flowers?

A Not independent knowledge, no.

Q If for instance there was a way to determine where particular flowers had come from, would that be outside of the ken of the crime scene unit's function?

MR. BRANCATO: I object. It's a hypothetical

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question.

THE COURT: Let's move on.

MR. BRENNER: Can he answer it?

THE COURT: It's been answered.

Q Now, detective, you did not dust the box at the scene; did you?

A No.

Q The surface of the box?

A No.

Q Did you have a reason for that?

A Yes.

Q Could you tell us?

A Yes. Documents and cardboard are better processed in the lab setting. In other words, they can iodine fume it or use a magnum brush and get better results than I could at the scene.

Q Would dusting it at the scene preclude a second test back at the latent lab?

A Yes, it would.

Q So that was a reason for not doing it?

A That's correct.

Q Do you know how many people handled the box from the time it left your control until the time it was ultimately vouchered?

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A No.

Q And in this instance do you know whether it was tested for latent prints?

A Apparently it was. It looks like it was dusted, so it was processed in some way.

Q Do you know what the results were?

A No.

Q You weren't sent any report?

A No, not on the box, no.

Q Do you know whether the ribbon was also tested?

A I don't believe it was. It's not a surface that's really conducive for fingerprints.

Q Along those lines, would it be fair to say that a surface such as cardboard or paper is conducive?

A Only at times. Cardboard and paper are really porous and can absorb moisture and waste products. Just because they are touched doesn't always mean you are going to get a fingerprint of value.

Q If a person's hand had left a print?

A A print or a mark.

Q And then you would have to determine whether that print or mark was of value?

A That's correct.

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Q Did you visually observe any marks on the note itself?

A No.

Q What do you mean by finger marks?

A Anything that looked like a smudge for instance, or a stain, or anything other than the writing itself.

Q Incidentally, do you have the exhibit?

A Yes.

Q Did you visually observe any marks?

A No.

Q Not at that time?

A No.

Q And do you know whether that was tested by the latent fingerprint lab?

A Yes, I do.

Q Do you know what the results were?

A The results, I don't know. I know that these stains that you are referring to are the result of the processing for possible latent fingerprints.

Q But you don't have the results of that either?

A No.

Q Would it be fair to say that the case that

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the assigned detective who was running the investigation would get the results if they were sent to anyone?

A That's correct.

Q And do you know who the assigned detective in charge of the investigation was in this particular case?

A Initially it was Detective Ortiz. Now it's Detective - -

Q The guy outside?

A That's correct.

Q Giorgio?

A Giorgio.

Q Do you know when the transition of authority took place?

A No.

MR. BRENNER: Thank you, detective. I have no further questions.

MR. BRANCATO: No redirect.

THE COURT: You are excused.

(At this time the witness was excused by the Court.)

THE COURT: Ladies and gentlemen of the jury, we are going to take a short recess. Don't discuss the case.

Take the jury out.

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(At this time the jury filed out of the Courtroom.)

THE COURT: Yes, Mr. Brancato.

MR. BRANCATO: Judge, Detective Giorgio is the next witness. And one of the things that I am concerned with is that there was a point in this investigation that the Defendant - -

THE COURT: Submitted to a polygraph.

MR. BRANCATO: Once.

THE COURT: And at a subsequent point the Defendant arranged to have one taken on his own account.

MR. BRANCATO: That's correct.

THE COURT: What's the problem since both counsel represent there will be no reference made to it nor could there be? What else?

MR. BRANCATO: I don't think we are all on the same wavelength in that regard. Mr. Brenner indicates that he doesn't wish to go into the results of the polygraph. I believe that's what he said at the bench.

THE COURT: When you start with the words "results," I'm talking about totality, not in one aspect.

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MR. BRENNER: Perhaps I should be heard.

THE COURT: Let me hear his concerns first.

MR. BRANCATO: My concern is that at some point during the questioning of Detective Giorgio the defense is going to ask him about setting up an appointment with the Defendant to go for a polygraph, and then the Defendant coming down and making himself available for that polygraph.

And I know that I have been stating at the bench not only what I wish to argue in summation but what I anticipate counsel may argue. And I just wish to state that if that type of information comes out, then it's going to be that this is a man who wanted to take a polygraph test to prove his innocence, and no one who is innocent would want to take a polygraph test because the machine - -

THE COURT: Now you are speculating as to his argument.

Let me hear from Mr. Brenner.

MR. BRENNER: Judge, I'll be absolutely candid with the Court in this instance. I hadn't thought of that.

THE COURT: But having now been told - -

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MR. BRENNER: I still haven't thought of it. But I will say that under Article 60 of the CPL, questioning Mr. Franza's voluntariness at the time that he makes statements to the police is a question that needs to be litigated in front of the jury regardless of the Court's determination in a pretrial hearing. I had considered and would have brought to the Court's attention prior to raising it the notion that Detective Giorgio lied to my client, which I explored at the time when we reopened the hearing in order to induce him to speak to him.

A question which is for the jury to determine as a matter of fact in its determination of how to assess Mr. Franza's statements, is the complete scenario.

THE COURT: I don't recall any confession or inculpatory statements.

MR. BRENNER: The People intend to offer evidence not so much for its inculpatory value but for its circumstantial value tying it to different occurrences in the modus operandi of the case. I understand that and I can appreciate their strategy in so doing.

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With regard those statements, the jury needs to determine whether each of the statements made by Mr. Franza were voluntarily made. And if part of the investigative technique, which is what Detective Giorgio has described as the polygraph, was to lie to my client in order to get him to talk, the jury is entitled to hear that.

There is case law and it's limited case law on this subject. It's unquestioned except for a Supreme Court, County Court Judge in Westchester who held that polygraph results were admissible in certain instances. That's not a credible argument. The Appellate Division and Court of Appeals have said otherwise.

I would not attempt to offer either the results of Mr. Franza's own polygraphs, two of them, or the results, the actual results of the Brooklyn DA's for the truth but rather for the fact that certain things were said to Mr. Franza that were not true. I don't know how to extract from that scenario the events of July 23. I just don't.

THE COURT: If you are merely concerned - - I have to go back to your argument, if you are

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concerned that the absence of the discussion or any interrogation with respect to the polygraph will result in Mr. Brenner commenting in his closing argument, that's one situation which we can cover very easily.

If it's a situation that you intend to test the voluntariness now, first off, it would be to the statements taken subsequent to Detective Giorgio informing your client I believe that he failed.

MR. BRENNER: That he was lying. He told him he was lying.

THE COURT: Well, he told him that he had failed the polygraph.

MR. BRENNER: That he was lying, Judge. I have reviewed Detective Giorgio's testimony at the hearing.

THE COURT: First of all, you have concluded that he was lying to him. As I recall the testimony of Detective Giorgio, he said something to the effect when he had gotten the information from the technician, or whoever administered the test, he believed he told him that, in fact, Mr. Franza did fail.

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Subsequent, when he got the written report, which indicated it was inconclusive, he said it if not shocked him, at least didn't square.

MR. BRENNER: At which point I attempted - - wait a minute, your Honor, may I interject because the record that you are making is not a complete one.

THE COURT: Go ahead.

MR. BRENNER: He testified at the reopened hearing that he learned and was shocked within two to three weeks prior to his testimony here when Mr. Brancato showed it to him for the very first time. That was his testimony at the reopened hearing.

I then confronted him with a report from August of 1990 where he had - -

THE COURT: Wasn't there some question as to whether he was aware of it or had seen it?

MR. BRENNER: He said he had not. And in August of '90 I confronted him with a report prepared by Detective Raymond of the arson and explosive squad in which she recounted that he told her back before he said he even knew that the test was inconclusive.

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It's my position, your Honor, that he knew it was inconclusive from day one, and that he lied to Mr. Franza in order to get him to talk to him.

MR. BRANCATO: Judge, let's take the Defendant's argument at the best light for the Defendant.

Assume Detective Giorgio told Mr. Franza a whopper, and that it was, in fact, a lie. That it was a lie is of no consequence, but rather what the Defendant said when being confronted by that statement, I anticipate that what he wants to do, and I might try to do the same thing, but I don't believe the law allows it, is to get up and say, "You told my client that he failed the polygraph?" And he will probably say, "Yeah." And, "You knew when you told him that that that was a lie."

THE COURT: But that's not the case.

MR. BRANCATO: I believe that we are headed in this direction. First of all, that's not the fact, let alone what Mr. Franza then responds in view of that. But the fact is that my recollection of the testimony is not that at the time it was a lie, now even if I take your scenario.

MR. BRENNER: That is the scenario. That's

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the state of the record.

THE COURT: Even if I take that scenario, when, in fact, in relation to when the statement is obtained, does Detective Giorgio come into contact or at least it would appear to be that he was aware that the report is inconclusive.

MR. BRENNER: He told us under oath that he learned it was inconclusive as part of this litigation.

THE COURT: Then you said on further inquiry he develops that from Detective Raymond.

MR. BRENNER: He denied saying that to Detective Raymond.

THE COURT: How are you concluding when he learned of this?

MR. BRENNER: Judge, there is a report from Detective Raymond dated August of 1990.

THE COURT: That Raymond refers to this?

MR. BRENNER: Refers to him having told her that the report was inconclusive.

THE COURT: What is the date of that?

MR. BRENNER: August of 1990, Judge.

THE COURT: You see, there are two aspects that the Court must be satisfied with before I

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would allow it. One, that he was, in fact, lied to, and two, based on that what did the Defendant react.

MR. BRENNER: Judge, I beg to differ. As a matter of law you would have to determine at a hearing whether that was, in fact, the case. These are questions of fact and - -

THE COURT: But you - -

MR. BRENNER: Your Honor, may I finish?

THE COURT: Yes, go on.

MR. BRENNER: I would like to be able to finish my statement. As long as I can establish relevancy to the proceedings, the jury is the finder of fact. The Court is really not in a position to find facts here.

THE COURT: What are the statements subsequent to August of '90 that we are talking about? I want to see those statements.

MR. BRANCATO: The second and the third statement.

THE COURT: Let me see those statements.

MR. BRENNER: Your Honor, I'm not talking about the statement - - just to streamline, I'm not referring to the February statements. I'm not

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referring to those as having been voluntarily made. These are statements taken on July 23, referring to flowers, and sending his wife roses and how he did it once before, and where he got them, et cetera, et cetera. That's the substance of the statement. That's the statement that comes immediately after the polygraph when he takes him back to the 34, Mirandizes him after telling him that he has failed, and the test shows that he's lying, and Mr. Franza then makes a statement after being Mirandized.

The Court held as a matter of law Mr. Franza made those statements voluntarily and he was not in custody. Well, the law allows for a second bite for the Defendant.

And I should add parenthetically that, Judge, to deny the jury as finders of fact, facts which the Court had in making its initial determination, is unfair to the Defendant.

THE COURT: Well, you may want to end up opening the entire subject. You may get it.

Let me see if you both are really agreeing. If, in fact, Mr. Brenner wants to elicit this information on testing the question of the volun-

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tariness, then I have the other alternative of opening the subject up entirely, which means the polygraph that was administered, the fact that Giorgio was under the belief that he had failed it, and then moving to the one he may have taken. But you are going to get into the entire subject. This is a subject I would prefer to stay away from.

MR. BRENNER: Your Honor, I did not set up the factual scenario.

THE COURT: Nor did I.

MR. BRANCATO: Judge, what the jury has to consider is whether or not this Defendant voluntarily made statements to the detective. By that, they have to consider whether or not after the statement was made to Mr. Franza, whether his will was so overborne that at this point he made a statement that he would not have made.

THE COURT: That's their determination.

MR. BRANCATO: But for being told that statement. All they have to hear then is that the statement was made and what the Defendant's response was to that statement. He wants to bring out from Giorgio, "Well, you lied to him when you

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told him that." And whether or not Giorgio lied to the Defendant when he told him that has no bearing on the Defendant's mind and whether or not he's voluntarily making the statement. He wants to reduce the trial to a contest between which machine reads better. And he wants to walk down the road of the polygraph results. That's clear.

MR. BRENNER: If I wanted to walk down the path of the polygraph results I would go petitioning the Court to allow it in as evidence in chief in the first instance.

THE COURT: You see, what you said, Mr. Brancato, what you just said though, you would be depriving the jury of that opportunity to make those determinations.

MR. BRANCATO: As to what the Defendant did?

THE COURT: Well, you can't do this in a vacuum. And I'm not going to reach the point that the only way for the Defendant to testify is to compel the Defendant to testify if he seeks to challenge the voluntariness,

MR. BRANCATO: He very well may have to testify, but that's a decision he has to make in confronting the evidence.

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THE COURT: I'm not going to put the Defendant in the possession of compelling him in effect to raise this defense.

MR. BRANCATO: Nor should you make it easy for him, Judge.

THE COURT: If you're saying he's going to quiz Detective Giorgio as to what he said, what the Defendant said, and therefore what?

MR. BRANCATO: Judge, maybe I am blind to this, but I could see a whole series of questions from the defense getting in that polygraph results by saying, "You lied to him. When you told him that, you knew that he had passed the exam." He wants to get the substance of the exam before the jury.

THE COURT: He didn't pass the examine.

MR. BRANCATO: He's going to turn around and say.

THE COURT: What do you mean he's going to say?

MR. BRANCATO: Judge, he will turn around and say, "Didn't you tell Detective Raymond on such and such a date that it was inconclusive?"

THE COURT: There is a difference between

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inconclusive and passing.

MR. BRENNER: I should say so.

MR. BRANCATO: But he wants to get the results of the exam before the jury. And the results of that exam before the jury have no bearing on whether or not when confronted with that statement, the Defendant voluntarily said something.

Now you, Judge, have found as a matter of law that there was no custody in this case, that the Defendant was not in custody at that point.

THE COURT: But that's a different standard.

MR. BRENNER: Which affects only the admissibility of the statement.

THE COURT: It's a different standard.

Let me understand something else here because it's not clear what you people are seeking.

If Mr. Brenner wants to go into the issue of the polygraph or what representations were made by Detective Giorgio, that's one aspect of the polygraph. What happens with the second polygraph?

MR. BRENNER: I'm sorry? Judge, I was following the Court's reasoning. If the door swings open on that particular issue by necessity,

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it swings open all the way. That's not - - regardless of what Mr. Brancato imputes to me as my motive, that is not my motive. I have no interest in this becoming a battle of the forensic experts as far as polygraph is concerned.

THE COURT: If we got into that, it will require all these polygraph people to come in.

MR. BRENNER: There were two separate exams by different agencies.

THE COURT: Whatever.

MR. BRENNER: I'm just informing the Court.

THE COURT: Whatever.

MR. BRANCATO: Judge, obviously this is a door that I want to skirt my way through, and this is one that he wants to slam open so the cavalry can come through.

MR. BRENNER: Wait a minute.

MR. BRANCATO: You wait until I finish.

MR. BRENNER: Enough of this argument about what I want to do.

MR. BRANCATO: Judge, there can be no doubt to anybody who is listening now that the only reason why he wants to bring in the fact that Detective Giorgio might have lied was that the

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listener to that statement would hear that he passed, that he passed the test.

THE COURT: How will he get to passed if he never passed?

MR. BRANCATO: Judge, he's going to ask Giorgio, "You told him that he was deceptive," and he's going to say that means that he wasn't telling the truth. And Giorgio is going to say - -

THE COURT: We are all forgetting one thing, that Detective Giorgio initially testified that that was his impression at the time. This is not something that he claims to have made up at the time. The only thing that contradicts that is subsequently what he learned. Now, that's the issue in my mind, you see.

If Detective Giorgio, if he believed at the time that the information he was imparting to Mr. Franza was, in fact, factual or truthful, then he didn't lie to him. Now subsequently he learned not that what he said was an out-and-out untrue statement, but it was inconclusive.

Now the query is, I want to get this straight.

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MR. BRANCATO: Is how limited the inquiry is going to be on that.

THE COURT: I want to get some time schedules in here. The polygraph administered in the Brooklyn DA's office was when?

MR. BRENNER: July 23, 1990.

THE COURT: July 23, 1990. And the statements that you seek now?

MR. BRENNER: Are made the same day.

THE COURT: Sometime in August of '90, not based on Detective Giorgio's testimony, but based on the notes, the report from Detective Raymond. It would appear that Detective Giorgio conveyed the information that he was surprised, shocked or however he characterized it.

MR. BRENNER: No, that's not right. The information - -

THE COURT: Was that this was inconclusive.

MR. BRENNER: Because it was in the context of her request to give Franza a polygraph.

THE COURT: Now, how does the fact, if, in fact you are testing the statements of 7/23, how does the fact that Detective Giorgio learned - - at least we know at some subsequent date, sometime

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in August - -

MR. BRENNER: No, his testimony was he was shocked when he sees the piece of paper.

THE COURT: When?

MR. BRENNER: In February of 1992, January of 1992. That was his testimony that he never knew that before, because that's why he was shocked.

THE COURT: Then you have a report from Raymond in August of '90 that it was inconclusive. But when was the statement taken?

MR. BRENNER: What statement?

THE COURT: The statements that are involved here that you are seeking to test the voluntariness.

MR. BRENNER: July of '90,

THE COURT: Do you follow me? Just follow me. Assuming arguendo that on 7/23 he believed that his statement was factual. When I say "his," Detective Giorgio. And based on that or that part of the equation Mr. Franza makes statements sometime later, we know at least by August of 1990, that Detective Giorgio or at least based on Raymond's statement was aware that the tests were inconclusive, despite the fact that he learned

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some six or eight months later - -

MR. BRENNER: Two years, Judge.

THE COURT: The question is that the time he got those statements, is there any testimony or evidence that Giorgio knew that those statements were false?

MR. BRENNER: Judge, his testimony at the hearing was that after the test he didn't speak to anyone from the Brooklyn DA's office unless he knew from the beginning it was inconclusive.

THE COURT: But he testified specifically at that point he was convinced.

MR. BRENNER: Judge, my position is that he's lying. You are right. The state of the record based on his - - if I may be heard.

MR. BRANCATO: Judge, this is where - -

THE COURT: Wait a minute. Let him complete it.

MR. BRENNER: The state of the record, if it's based solely on Detective Giorgio's testimony and nothing else, his account, you are absolutely right.

What I've raised, however, based on questions to him and the proffer of a statement taken pur-

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portedly for him by another detective, is that his statements are untruthful and that he is lying because he told Mr. Franza a falsehood to get him to speak. That's the point. If we take nothing but Detective Giorgio's testimony on its face you are absolutely right, there is no evidence he was lying. He says he believed it and he said he didn't learn about it until Brancato shook him up.

THE COURT: But there is another element here. When was the first report rendered of the polygraph held? Was it on the 23rd? When was the report rendered?

MR. BRENNER: There is no date on the report.

THE COURT: That was Giorgio's testimony on that date when it was taken, the polygraph, he got an informal report from the technician or whoever administered the test, which said or he told him he believes he was evasive or he failed the test.

MR. BRENNER: That's what he said.

THE COURT: Now there is nothing. There is absolutely nothing to demonstrate that that statement is false unless we say the statement in August about it being inconclusive which was related means that he knew it at least as of

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August. And what you're saying is not only did he know it in August, he knew it on July 23.

MR. BRENNER: That's what I'm saying.

THE COURT: Isn't that basically it?

MR. BRENNER: Essentially.

THE COURT: Now I'll hear Mr. Brancato.

MR. BRANCATO: I haven't strayed much from my original position. He wants to ask him were you lying so that he can - -

THE COURT: Let's stop dealing with what he wants. Let's deal with what we have to deal with.

MR. BRANCATO: The only thing that is important is what statement was made to the Defendant and at what point did the Defendant say something, not whether the statement was true or false. "What did you say to him? And what did he respond?"

MR. BRENNER: Judge, that's not even the state of the law. If we were doing this as a hearing, and we did it as a hearing, and I reopened the hearing, the Court would say let's change the polygraph so we can stay away from the inflammatory nature.

Assume the scenario was that Mr. Franza had

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an alleged accomplice, and the police came in and says, "We got the partner. He made a statement. He's on videotape. He gave you up in 15 seconds." Now, no such statement exists. The guy isn't in custody. He's a suspect.

Now, the state of the law is probably such that the Court would allow the statement in as a matter of constitutional propriety. But certainly the notion that the detective had lied to the suspect would be one for the Court to consider in making its determination. No less so as a matter of jury determination pursuant to Article 60 is it for the jury to determine whether the detective lied and whether his lie - -

THE COURT: Let me see Raymond's report, the one that refers to - -

MR. BRENNER: He's referred to it. I'm sure he has it accessible. I don't have it.

(Pause in the proceedings.)

(At this time the jury filed into the Courtroom.)

THE COURT: Members of the jury, before we proceed with the next witness, let me just assure you each of these recesses are not so we can all

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go to play golf. I know you are not playing golf, certainly not within the confines of that room. But it requires the attention of the Court. So please don't feel we are being discourteous.

Call your next witness.

MR. BRANCATO: People call Detective Gennaro Giorgio.

D E T. G E N N A R O G I O R G I O, called as a witness by the People, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

THE COURT OFFICER: State your name, shield and assignment.

THE WITNESS: Detective Gennaro Giorgio, 1335, 34 Squad, homicide team.

Q Detective, how long have you been a police officer?

A I'm in my 33rd year.

Q Of those 33 years how long have you held the grade of detective?

A Since 1967.

Q Where are you presently assigned?

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A In the 34 Squad as part of the homicide team.

Q How long have you been a member of the 34 Precinct?

A Since - - I have been at the 34 since '83. I was on temporary assignment there on the Homicide Task Force and then became permanently assigned there about three or four years ago.

Q Directing your attention to July 17, 1990, were you working at the 34 Precinct?

A I was.

Q What tour of duty were you working that day?

A I believe it was 9:45 a.m. to 6:00 p.m. in the evening.

Q Did there come a time that afternoon that you went to 485 West 187th Street?

A Yes, it was in the evening. Around seven o'clock we received a notification by phone that two women had been shot at that location, and myself and other members of the squad including the commanding officer proceeded to the scene.

Q About two questions ago you said you worked 9:45 to six o'clock, and that you got the call around seven.

A Then I misspoke. I'll have to check when I

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worked then.

Okay. That day I was doing a 12:00 noon to 8:15 p.m. tour.

Q And at about seven o'clock did you and other officers go to 485 West 187th Street?

A Yes.

Q Could you please tell us what you observed when you got there?

A When I arrived, a woman I later found out to be Mrs. Josephine Mendez was on a stretcher being removed from the apartment, apartment 1-D as in David. I just briefly spoke with the EMS personnel inquiring as to her condition. They then continued removing her from the building into the ambulance for removal to the hospital.

I then entered the apartment. And I saw a woman that I later found out to be Mrs. Myra Franza on the floor of the apartment. I observed Detective Montoya and a uniformed police officer who I believe was later identified as Police Officer Aponte, I'm not sure, leaning over her. They were speaking to her. I couldn't determine exactly what they were saying to her.

Detective Montoya had a steno pad in his hand. The victim, Mrs. Franza, was scribbling, making some notations in the steno pad I believe at that time.

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Q What did you do then?

A I looked at the crime scene, or what there was of the crime scene at that time. I conferred with Lieutenant Resnick who was at the scene, our commanding officer, as to what he needed done or specifically what he may have wanted me to do.

Shortly thereafter I left the apartment. I was met by the brother of Myra Franza, Nelson, had a conversation with him.

Shortly thereafter with myself and Detective John Bourges went to the next building. There had been at the crime scene a flower box with a piece of paper with some directions and an address on it with Mrs. Franza's name on it, and an indication of another location other than that address, if there was no answer, that the person who delivered the flowers, I can assume, was to go to the second apartment, which was a basement apartment in the next building. And I proceeded there.

Q This is Exhibit 7 in evidence.

A Yes.

Q Is that the box of flowers and the note that you referred to just a moment ago?

A Yes, it is.

Q Now, you indicated that you went to the other

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apartment, the basement apartment. Which apartment was that or whose apartment was that?

A It was Mrs. Franza's brother and sister-in-law at the time. I believe she was pregnant. There was a small child present when we went there, myself and Detective Bourges. The woman identified - - I think her name was Debbie Dacosta was there. We spoke with her, explained to her what had happened. She had photographs. I believe she showed us photographs of the Defendant. We did a brief interview with her. Detective Bourges did most of the notetaking or all of the note-taking.

MR. BRENNER: I object to the showing of photographs. Move to strike from the record as hearsay, your Honor.

THE COURT: You object to what?

MR. BRENNER: The testimony of the showing of photographs by a person not in this Court as hearsay.

THE COURT: Sustained.

MR. BRENNER: Move to strike.

THE COURT: Let's go back.

Q You said you saw someone, prior to going to this basement apartment, a person that you learned his name was Nelson?

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A Yes.

Q Did you learn his last name?

A Nelson Dacosta Mendez.

Q What is his relationship if any to the people in apartment 1-D?

A Mrs. Josephine Mendez is his mother and Myra Franza is his sister.

Q You went to a basement apartment and met Debbie Dacosta?

A Correct.

Q What is the relationship between Debbie Dacosta and Nelson?

A She is his sister-in-law. She is married to his brother.

Q When you went to Debbie's Dacosta's apartment in the basement did you see any photographs at that point?

MR. BRENNER: Objection, leading.

THE COURT: I'll allow it.

A Yes.

Q And what notes were these?

MR. BRENNER: Objection. Hearsay.

THE COURT: I haven't heard how he's going to answer.

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When you say photographs, what were they?

MR. BRANCATO: I'll tighten it up.

Q Did you look at some photographs?

A Yes.

Q Who showed you - - who gave you these photographs?

A Mrs. Dacosta. Debbie. I believe it's Debbie.

Q Approximately how many photographs did she show you?

A I don't recall. It was more than one, as I remember.

Q Did you later learn the names of any of the people in the photographs?

MR. BRENNER: Objection. Calls for hearsay.

THE COURT: I'll allow it.

A Yes. The Defendant was pointed out in the photo.

MR. BRENNER: Objection. Move to strike.

THE COURT: Sustained.

Q After looking at the photographs, what did you do?

A Returned to the scene with Detective Bourges.

Q Could you please tell us what, if anything,

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happened as - - what, if anything, happened at this point?

A As Detective Bourges and I were walking - - it would be in an easterly direction on 187th Street, I saw Nelson Dacosta. There was a large crowd, I would say 50, 100 people on the street at that time. I saw Nelson Dacosta rush from this crowd to an individual who was walking in a westerly direction towards the entrance to the building. I saw Nelson raise his hand. There was a scuffle. He blocked my view. But I then hastened my step. When I arrived there the Defendant was lying on the ground.

Q You stated the Defendant. Identify him by name please.

A Dominic Franza.

Q Where was Mr. Dacosta at this point?

A Myself and other uniformed police officers were restraining him. He was yelling and screaming at the top of his voice, both in English and in Spanish calling him - -

MR. BRENNER: Objection.

THE COURT: Sustained.

Q What happened then?

A Mr. Franza entered the building, telling us

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that he had been struck in the mouth. We separated he and Nelson Dacosta, and Nelson Dacosta, as I said, was speaking to us and talking about his brother-in-law.

MR. BRENNER: Objection. Move to strike.

THE COURT: Yes. Sustained.

Q What happened then?

A I briefly spoke with Mr. Dacosta.

Q How long did this take?

A Maybe five or ten minutes, with having him kept away from the Defendant.

I then spoke with the Defendant who I recognized as the person in the picture. And he identified himself as the husband of Myra Franza, told me that he had received a telephone call on his machine.

Q At this point did you speak with him at 485 West 187th Street?

A Briefly, yes.

Q After speaking with him what happened?

A There came a time I asked him if he would go to the 34 Precinct so we could interview him regarding the incident.

Q And about what time was this that you went back to the 34 Precinct?

A I know there is a movement log. It might

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have been around eight o'clock.

Q When you got back could you please tell us what, if anything, happened?

A I interviewed the Defendant.

Q And where was this?

A In one of the two interview rooms in the 34 Squad.

Q Do you know how the Defendant got from 485 West 187th Street to the 34 Precinct?

A It was my understanding that he was driven there by a friend of his.

Q Where is your office located?

A It's right on 183rd Street and Broadway.

Q Once you entered the precinct where in the precinct is the PDU?

A It's one flight up. We share the floor with several other offices.

Q When you got back to the precinct was the Defendant Dominic Franza already there?

A I don't think so.

Q Did there come a time that you saw him on the second floor where the PDU is located?

A Yes, he might have followed us there.

MR. BRENNER: Objection as to what he might

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have done.

THE COURT: Yes. Let's not speculate.

Q Just tell us what you do remember.

A Yes. I remember him being in the 34 squad office.

Q And did you speak with him at this time?

A I did.

Q And where was this that you spoke with him on the second floor?

A In the larger of the two interview rooms that we have in the office.

Q Where is that located?

A To the rear of the office, of the squad office. It's rectangular more than square. It's a rectangular-shaped office. The lieutenant's office is directly in front. There is a waiting area with a bench. As you look into the office there are desks on both walls, approximately seven or eight desks. There are some clerical personnel to the right when you enter. And then if you look to the far end of the office there are two rooms, both interview rooms. The larger one is to the left.

Q Did you speak with the Defendant at that point?

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A Yes.

Q Who was in the room at this point?

A I believe I spoke to him alone, if I might just check the statement.

Yes. I spoke with him alone.

Q At about what time was this?

A My notes indicate that the interview commenced at 20:40 hours which is 8:40 p.m.

Q Could you please tell us how this conversation with the Defendant went?

A I may have reintroduced myself. I had given him my name at the scene, and told him when he came to the precinct, he would ask for detectives, but he could ask for me specifically.

I reintroduced myself, told him I would like to discuss with him whatever information that he could give us, volunteer as to who might have wanted to shoot both his wife and his mother-in-law.

Q And about how long did this conversation with the Defendant take?

A An hour or more.

Q Did you memorialize that conversation? By memorialize, I mean did you reduce it to writing?

A Yes, I have it here in writing.

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Q How many pages is that?

A There are three pages.

Q Who wrote out the statement?

A I did.

Q When did you write it?

A As we spoke, statements that Mr. Franza made I wrote on the paper. And then my questions or whatever I may have asked him are not written down. But what I have written down are his responses, or information that he volunteered. In other words, it was not necessarily a question and answer situation.

Q After writing this three-page statement did you give it to the Defendant to read?

A Yes, I asked him to look at the statement, read it and sign it.

Q Did he look at it?

A Yes.

Q Did he sign it?

A He did.

Q And where did he sign it?

A He signed at the bottom of page one and at the bottom of page two and the third page, the statement doesn't go all the way to the bottom, he skipped a line after the last thing that I wrote down and he signed it.

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Q Could you please give us the original statement that you took at that point so that we could have it marked as an exhibit?

THE COURT: I have to remove it. It's stapled to a DD5.

MR. BRANCATO: May we have that marked collectively as People's 31?

(Document referred to above as a statement was received and marked People's 31 For Identification.)

Q Would you please look at it. Could you please tell us at this point, those three pages that are marked People's Exhibit Number 31, do they represent the statement that the Defendant signed that night at the precinct?

A Yes.

Q Could you please tell the jurors how this interview with the Defendant went?

A When I had - - when I asked him that we were going to attempt to find out what may have caused someone to shoot his mother-in-law and his wife, his first statement was that he would cooperate to the fullest to assist us in this investigation.

And then we proceeded there regarding his marital

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status, whether they were living together, whether they were contemplating divorce, things of that nature. And he volunteered information, gave me information which I then wrote down.

Q Could you tell us what he told you?

A Okay. He stated that he had been married for three years, stated that for approximately three months his wife had wanted to move out of the apartment, and here I have indicated that she needed some space.

He went on to state that approximately three weeks ago, he recalled it was on a Thursday, that he had spoken to Mrs. Franza on the phone, and that she later met him at his gun club or the gun club where he was a member, and that he was competing in a meet, a shooting meet that night.

Q Did he tell you the name of the gun club?

A Yes, Olinville Gun Club. His wife left the club.

He went on to say that when he arrived home later that evening that he found that she was not at home, that her belongings had been removed, and that some of his papers, income tax papers and check stubs were missing.

Do you want me to continue with the statement?

Q Please.

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A He went on and said that he had contacted his mother-in-law, Josephina or Josephine, that on two occasions that he was attempting to locate his wife, and that he had told his mother-in-law that he was buying his wife a car, he described it as a 1988 Buick, told me where he was buying the car, at Liberty Buick, which is on East Tremont in the Bronx.

His mother-in-law told him that she - - meaning herself - - the mother-in-law was not interested in the car, and that if he was buying it for her, apparently it was her understanding he was buying the mother-in-law the car, at least that's the way it was told to him, and that she then hung up on the Defendant.

He went on to say that during this three-week period of separation that he had beeped his wife. He said it was 50 times a day.

And I then did some fast calculations and I said, "Well, would that be, you're saying approximately a thousand times?" And he said, "Yes." And I wrote down a thousand times since she had left him in that three-week period.

He said that he finally received a call from his wife, and that at that time he had told her that he had purchased some cruise tickets for both himself and his

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wife, and that she had said that, words to the effect, "You planned a trip. Again, you planned a trip," without consulting her. And that she then got very emotional on the phone and that she hung up on him.

And he said the best that he could recollect was that that occurred on last Thursday, which would have made it July 12 or Friday, July 13.

That he went on to say that when he had gotten home there was a message on his machine from his wife and she said in the message that she did not want to go on the cruise, and that he should get his money back. He told me that he was going to pick up the cruise tickets on the 18th of July, he said tomorrow, which was the 18th, and that he was going to drop the tickets and a dozed roses with his wife or her super - - I'm sorry. He was going to drop a dozen roses with his wife's supervisor at work and hope that his wife would then come out of work and speak with him.

He then went on to say that he was also going to buy a hundred roses from a wholesaler.

Q Did he give you an address?

A He said it was on Jerome and Gun Hill, also two locations in the Bronx.

He went on at length discussing difficulties he

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had had with his mother-in-law, he did not get along with her, she didn't like him. They just did not get along. That she was interfering in his marriage, he felt. He said that.

And then he went to say that that day being the 17th, he received a message from Hilda, and I put in parentheses that basement apartment at 485 West 187th Street. Hilda, in fact, is the super of the building.

Q Did the Defendant tell you who Hilda was?

A I didn't put down super, so apparently he didn't tell me it was the super at that time. I later found out who Hilda was, but the message was from Hilda. And he, putting it in parentheses, would possibly just indicate that Hilda was in the basement in that particular location, and that Hilda was asking for Myra, and that the message was stating, "Myra, something happened to your mother. Get here quick."

I then asked him as to his movements on that day being the 17th of July. He said he was at home, and that his friend Tracy Jenkins, who he described as - - I asked for a description. He said male black, about 34, had been to his home again in the Bronx at about 7:00 p.m. that evening and that Tracy had left to go and get beer and pizza.

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He went on to say that he left while Tracy had gone for the beer and pizza, that he left and that he went to the drugstore to buy some condoms. And I asked him, "What type of condoms?" He said, "Gold Trojans." I asked him where the drugstore was, and in parentheses I have drugstore Burke in White Plains, which means Burke Avenue and White Plains Road. He said the store didn't have any, and that he returned home, and that's when he found the message regarding for Myra from Hilda.

I asked him where he was from, what neighborhood he was from originally, where he was raised, and he said 106th Street on the East Side in Manhattan.

He went on to state that he was unemployed since September of '89 when he broke his leg, that he was an electrician, that he broke his leg on the job, was working for a company by the name of Wadecheck (phonetic) which he said was located in Queens, and that he had been collecting compensation checks due to the injury he had sustained.

I asked him about any savings accounts or monies. And he went on to say that he had a checking account with Chemical Bank in Manhattan on 90th Street and Third Avenue, and that he had - - I'm sorry. He had a savings and checking account and that the combined amounts in

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those accounts were approximately $2,500. He then added that there was a lot less now because he had to pay a lot of bills.

I asked him where he could being contacted, be it at his home later on that evening or the next day, and he told me that he might be staying with a person by the name of Edwin Diaz and he gave me his number. Do you want the number? 718-591-3794, which is in Queens, or a John Velazquez, 212-379-0033 in the Bronx, and then he added his mother's telephone number, 369-4459.

Then again on all of these papers it's his signature and my signature appear on the bottom of each page.

Q Did there come a time that the Defendant left the precinct to go back to his home?

A Yes. I left prior to - - I'm pretty sure I left prior to his leaving the precinct.

Q And did you work the next day?

A Yes. Let me check my books.

I have that on the 17th I left at 1:15 a.m. of the 18th, 1:15 in the morning, came in the next day at 9:45, was scheduled to work until 6:00 p.m. but in fact worked until 12:00.

MR. BRENNER: Objection to the relevance of

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how late he worked on those dates.

THE COURT: I'll allow it.

Q This is in evidence as Exhibit 4. Do you recognize that tape?

A Yes.

Q How did you recognize it?

A It was a tape that was given to me by Detective Ortiz on the 18th.

Q And how did you recognize it?

A My initials are scratched, GG are scratched here on the lower left-hand corner looking at it from the top.

Q Detective Giorgio, this is in evidence as Exhibit 26. Do you recognize it?

A Yes.

Q What do you recognize that to be?

A This is the receipt, note, that was with the box of roses in the apartment, the place of the occurrence, 485 West 187th, apartment 1-D.

Q Did you receive a Xerox copy of that note for your files?

A Yes. On the 17th I had that copy.

Q Did there come a time that you asked the Defendant in this case, Dominic Franza, to give you hand-

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writing samples for comparison of those samples against the note that was found on the box?

A Yes.

Q This has been marked for identification as Exhibit 22.

THE COURT: This has not been previously marked.

MR. BRANCATO: Marked for identification.

THE COURT: But not referred to previously.

MR. BRANCATO: Not by that number.

Q Looking at that, do you recognize the voucher that is affixed to the top of that exhibit?

A Yes. It's a voucher that I prepared on August 24 of 1990. I typed it and my signature is on the bottom.

Q What did you voucher under that number?

A Under the remarks I have, "One piece of paper with writing by Detective Giorgio. I have four pieces of paper with the writing of Dominic Franza."

Q And the one piece of paper that's written by Detective Giorgio, your writing, what did you write on that piece of paper?

A I rewrote this receipt note in my own handwriting, gave it to Mr. Franza, and asked him if he

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would then proceed to write this out. I believe it was ten times. I will count them when we open it up.

Q When did you ask him to give you those handwriting samples?

A It was on August 24 of 1990.

Q About what time on August 24, 1990, did you see the Defendant?

A It was midday, early afternoon.

Q Could you please describe what transpired when you saw him on that day?

A As I have on my typewritten report is that on that day I had given the Defendant an order of protection, which had been obtained by his wife. I then asked him if he would voluntarily give samples of his handwriting.

Q Where was this that you handed the Defendant the order of protection that had been obtained by his wife?

A It's at a desk that I would normally be seated at in the front part of the 34 Squad. And he was sitting in the chair which was next to the desk.

Q This is on the second floor of the precinct?

A Yes.

Q And were you aware prior to seeing the

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Defendant that day that he was coming to your office?

A If I can check my notes?

If my memory serves me correctly, I had spoken with the Defendant prior to this and we may have discussed this. My indication is that present at the 34 Squad was Nick Franza. I believe we had discussed - - we had talked on the phone at least once, maybe twice with regard - - he was inquiring as to different aspects of the investigation.

And I asked him if he would be coming in, and he just showed up. The way I have it written down, I don't think we had an appointment for that day. We may have.

MR. BRENNER: Objection. Move to strike all of this, your Honor. The witness doesn't remember. Move to strike specifically what Mr. Franza may or may not have done.

THE COURT: It's stricken.

Q You referred to Nick Franza. Who is Nick Franza?

A Dominic Franza.

Q And is he known by Dominic or Nick?

MR. BRENNER: Objection as to how he's known.

THE COURT: Unless the witness is prepared to say.

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A He had in one of our conversations, whether in person or by phone, said that I could refer to him as Nick or I could call him Nick.

Q Now, at the point that the Defendant came up to the second floor of the precinct tell us what happened.

A Yes. As I previously stated, I gave him a copy of an order of protection which had been obtained by his wife Myra Franza, again asked him if he would voluntarily give me ten handwriting samples.

MR. BRENNER: Objection. May we approach?

THE COURT: Yes.

(At this time the following took place at sidebar, among Court and counsel, out of the hearing of the jury:)

THE COURT: Mr. Brenner.

MR. BRENNER: My objection, I assume that's what's being elicited is that Mr. Franza initially was asked to furnish handwriting exemplars. And my objection is both in light of the fact that he ultimately provided samples on the same day and the same place. And in the abstract, what is the relevancy of the failure to provide handwriting exemplars? I should note first that he's under no

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obligation to either speak to the police, to cooperate with the police, to furnish anything to the police until he is detained for that purpose.

THE COURT: Even if he was detained, why would he be under an obligation? He never has an obligation.

MR. BRENNER: To cooperate, yes, he does.

THE COURT: At what point does that obligation end?

MR. BRENNER: When he's detained, if they want to put him in a line-up, he's got to go. I'm talking about cooperating with the police generically.

In any event, the People have proffered, off the record, that this is evidence of the Defendant's consciousness of his guilt. I beg to differ. Since the Defendant is under no obligation to cooperate, this is not analogous to flight, for conduct which is obstructionistic in any way. He was merely exercising whatever a citizen's right is not to cooperate. And I object to the proffer.

THE COURT: Mr. Brancato.

MR. BRANCATO: Judge, we seek to introduce

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this evidence because initial consciousness of guilty, as the Court as directly indicated, it has some bearing on the Defendant's enthusiasm that he exhibited at the first interview to cooperate in the full extent in this case.

MR. BRENNER: I should note having heard Mr. Brancato, first that he gives the handwriting exemplars, but aside from the fact that the statement, "I want to cooperate to the police" is part of a product in which the People would offer their other more incriminating statements, his inclination or lack of inclination to cooperate, I don't see the relevance. I didn't see it back on July 17 or 18th.

THE COURT: It interesting. Did you object when he introduced the first statement?

MR. BRENNER: Yes, Judge. I objected to a portion of it.

THE COURT: Did you object to that portion of it?

MR. BRENNER: No.

THE COURT: That he said he would cooperate?

MR. BRENNER: No.

THE COURT: Did you object to that?

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MR. BRENNER: No. There is no proper objection to the statement in its entirety.

THE COURT: Then why is there an objection now?

MR. BRENNER: Because this is only on the issue of cooperation.

THE COURT: It's not only that, as I have already stated to you. Within a short span an investigation concerning the attempted murder of his wife and his mother-in-law, the Defendant voluntarily in his first meeting with the detective makes himself available and he seeks to cooperate fully with the police.

And now, at the first question of doing something, he declines.

MR. BRENNER: I'm going to ask for the record that the Court give the jury an instruction to the extent that Mr. Franza on August 23, 1990, was under no obligation to provide handwriting exemplars.

THE COURT: He was not under an obligation.

MR. BRENNER: I want the jury to know that.

THE COURT: But then I'm going to have to also - - and that's why I'm debating. If I give

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that, then I also have to remind the jurors that on July 17 Mr. Franza represented to the police that he would cooperate fully.

MR. BRENNER: That's marshaling the evidence. This is a matter of law. Two different things.

THE COURT: I'm not going to give that limiting instruction. Whether I will in terms of the final end of this case, if I find something, yes. But at this point I would be in effect stifling the fact pattern here and that's unfair then to the prosecution. I will be fair to both sides.

The fact remains the Defendant made that representation to the police. He represented how enthusiastic he was to cooperate. And the prosecution has a right to solicit that testimony when he subsequently refused. The fact that he ultimately did render it, that will be before the jury as well. You have my ruling.

(At this time the following occurred in open Court:)

Q Detective Giorgio, after you asked the Defendant to give you handwriting samples, what, if anything, did he respond to you?

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A At that time he refused, and he got up and he left the squad office.

Q And what did you do?

A Continued my work, whatever I was doing.

Q Now, did there come some point that day that the Defendant came back to the precinct?

A Yes.

Q And could you tell us how that happened?

A It was maybe anywhere from 15 minutes to a half hour. He returned to the squad office and stated that he would give me the handwriting samples.

Q So what did you do at this point?

A At that point, as I stated earlier, I had - - I wrote out a sample copy of this receipt or note. I gave the Defendant Dominic Franza several sheets of paper, a pen, asked him to sit again in one of the interview rooms, and left him in that room with the paper, with the sample copy and with this pen.

Q Now, where was the Defendant at the point that you made your sample copy?

A He may have been seated in the interview room already, or I may have gone in there and wrote it out and asked him to come in. But he was within the office, within the confines of the 34 Squad.

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Q And after giving him this sample copy along with writing equipment, what did you do?

A I left him. I left him in the room and I went back to my desk.

Q And could you please tell us how long you were at your desk?

A I stayed at my desk for maybe five minutes or so, returned to the room to see how far along, if he had finished with the samples, and noticed that he was still writing the first sample copy. He was still on the first. He hadn't even completed one. I asked him if there was a problem, if there was a problem with the pen or if he didn't understand what I had written out. And he said. No, everything was fine.

I said then, why don't you just proceed to write it out? And I sat there and he then wrote out all the samples.

Q Did you remain in the room with him from this point to the point that he finished?

A I think I did.

Q What did you do with the samples that the Defendant furnished to you?

A These are the ones I referred to earlier. I vouchered them.

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Q Was that along with your sample note?

A Yes.

Q And where did you send them?

A If my memory serves me correctly, I hand-delivered them to the document section of the police lab which is at the Police Academy.

Q And who did you give them to?

A Detective Breslin, John Breslin.

Q And what request if any did you make from Detective Breslin concerning those samples that you took from the Defendant?

A I asked him to compare the handwritten samples that were furnished by the Defendant to the actual note that was with the flowers.

Q When was the next time that you saw that voucher attached to that envelope?

A I think it was yesterday when Detective Breslin brought it down to your office.

Q And when Detective Breslin came down did he have that document along with other papers?

A Yes, he had quite a bit of material with him.

MR. BRANCATO: Your Honor, at this time if we can open what has been previously marked for identification?

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THE COURT: Okay. Is this 22?

MR. BRANCATO: Yes.

A Yes.

Q Can you open that, please?

A Sure.

Q By the way, Detective Giorgio, could you please compare - - when you went into the room, could you please describe the speed in which the Defendant was writing?

A Oh, wow. When I first entered the room?

Q Yes.

A He was writing very slow, almost one letter at a time. Extremely slow.

Q And could you please describe how he wrote after you sat down, compared to when you first asked him?

A I guess I would describe it as I normally would write, or I would expect someone to normally write out something like that.

MR. BRANCATO: Your Honor, this is all part of 22.

THE COURT: Yes.

Q Can you please look at that and tell us if you recognize it?

A Yes.

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Q What do you recognize that to be?

A This is the sample copy that I gave to Dominic Franza with a notation on the bottom that the above was written by the undersigned, that's me, and used as an example from which he was to copy from. And I have the date 8/24/90, and my signature and my shield number 1335.

Q Could you please look at these four pieces of paper and tell us if you recognize them.

A Yes.

Q What do you recognize those four pieces of paper to be?

A These are the samples that I obtained from the Defendant on that date. I have my signature on the bottom of each page. My signature, the date, and 8/24/90, my signature and my shield number. There are ten samples.

MR. BRANCATO: I would offer those five pieces of paper together with the voucher into evidence at this time.

MR. BRENNER: May I see them? I have never seen them.

(Document handed to counsel.)

MR. BRENNER: I have no objection, your

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Honor.

THE COURT: Without objection 22 and its components are received.

(Documents referred to above as handwriting exemplars were received and marked as People's Exhibit 22, in Evidence.)

MR. BRANCATO: Your Honor, at this time I would offer into evidence what has been previously marked as Exhibit Number 31 for identification which is the Defendant's statement of July 17, 1990.

MR. BRENNER: No objection.

THE COURT: Without objection, it's received.

(Document referred to above as a statement was received and marked People's 31 In Evidence.)

THE COURT: You want that published to the jury?

MR. BRANCATO: The statement itself.

MR. BRENNER: I have an objection to that.

THE COURT: What were you just saying?

MR. BRANCATO: I'll hold any publication at this time.

THE COURT: Let's move on.

MR. BRANCATO: Your Honor, at this time I

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have no other questions for Detective Giorgio concerning those handwriting samples that he took at that point.

As we discussed at the bench, do you want to break at this point?

THE COURT: Did you want to do any publishing to the jury?

MR. BRANCATO: Not at this point. I'll withdraw that application at this point.

THE COURT: Step up.

(At this time a discussion was held off the record among Court and counsel.)

THE COURT: You want which exhibit now? Is that 22 and it's component parts? And what else to be published?

MR. BRENNER: I believe it's 26.

THE COURT: That's under that other voucher. Publish it - - two separate categories. Publish it to the jury.

Numbers 26, let's make certain, and 22. Now, 22 has several parts to it. It's all one exhibit.

(Exhibits 22 & 26 were published to the jury.)

THE COURT: Ladies and gentlemen, we should

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normally recess at this time for the lunch break. We'll recess for the day. And we'll resume on Monday at 11 o'clock.

Once again, do not reach any conclusion and do not discuss this case among yourselves or with any third person nor allow any third person to discuss the case with you.

Have a very good weekend. We'll look forward to seeing you back here Monday morning at 11 o'clock. Take the jury out.

(The jury filed out of the Courtroom.)

THE COURT: Detective Giorgio, you are excused until Monday at 11 o'clock.

(At this time the witness was excused.)

(At this time the proceedings were concluded and adjourned to February 25, 1992, at 11:00 a.m.)

-oOo-

CERTIFICATION:

This is to certify that the foregoing is a true and accurate transcript of the proceedings as reported by me.

William L. Kutsch
Senior Court Reporter

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SUPREME COURT OF THE STATE OF NEW YORK:
COUNTY OF NEW YORK: CRIMINAL TERM: PART 52

THE PEOPLE OF THE STATE OF NEW YORK	INDICTMENT NO: 11987-91
-AGAINST-	
DOMINIC FRANZA, Defendant.	TRIAL

111 Centre Street
New York, N.Y. 10013
February 24, 1992

B E F O R E:

HONORABLE PAUL BOOKSON, J.S.C.
and a Jury

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ANGELA LANT,
Senior Court Reporter

THE COURT: Bring in the panel.

COURT OFFICER: Jury entering.

(Jury enters the courtroom)

COURT CLERK: Case on trial. The defendant, his counsel and the assistant district attorney and the sworn jurors are present, your honor.

THE COURT: Welcome back.

Ladies and gentlemen, good day. Before we start the proceedings, I just wanted to make certain of something.

You'll recall about an aspect which I discussed with you when you were selected as jurors, and that is not to discuss this case amongst yourselves nor allow any third party to discuss the case in your presence.

I should elaborate lightly and not to allowed any third party to discuss the case in your presence and if you heard anybody discussing any matter with respect to this case, that you should immediately remove yourself from that position so that you are not exposed to any such discussion.

Now, having said that much, and I'll

Just ask for a show of a hand or hands if that be the case, has anyone during the time you've been serving in this case been exposed to a situation where you were in a position to hear others, third parties, not yourselves but other people discussing this case, any witnesses or the participants in the case, so forth? Has anybody heard any discussion?

Seeing no hands, I take it nobody has been exposed to that and we'll proceed now.

Mr. Brancato.

MR. BRANCATO: Your Honor, we would ask that Detective Giorgio be recalled for continued direct examination.

THE COURT: Very well.

(Det. Gennaro Giorgio resumes witness stand.)

THE COURT: Detective Georgio, you've previously been sworn and we'll continue now your direct examination.

Mr. Brancato.

DIRECT EXAMINATION: (con't.)

BY MR. BRANCATO:

Q. Detective Giorgio, when we broke Friday afternoon, you indicated that you took handwriting samples from the defendant.

A. Yes.

Q. And what did you do with those handwriting samples?

A. I delivered them to the document section of the New York City Police Laboratory.

Q. And where is that laboratory located?

A. It's on East 20th Street. It's part of the Police Academy complex.

Q. And who did you give those documents to at the police laboratory?

A. To Detective John Bresin.

Q. What is Detective Bresin's job at the police laboratory?

A. He's a document expert. He does handwriting analysis. He also does comparisons on pieces of paper. I believe if a portion of a paper is torn or in two pieces, he will match them up, see if they, in fact, come from the same piece of paper.

Q. Now, let's go back to July 17, 1990. You indicated that at some point you saw someone, that you learned his name was Nelson?

A. Yes.

Q. Did you later learn Nelson's full name?

A. Yes.

Q. What is his name?

MR. BREMNER: Objection.

THE COURT: Read it.

(Reporter read the requested testimony.)

MR. BREMNER: Objection. Being offered for its truth, your Honor.

THE COURT: Sustained as to the form.

Q. Did there come a point during the course of this investigation that you went over to Nelson's apartment?

A. I went to his residence. I don't think I ever went into his apartment.

Q. And where is his residence?

A. 644-50 West 168th Street. He lives in apartment 1-A.

Q. And when was that that you went there?

A. Subsequent to receiving information.

Q. Okay. Give us the month that you went there.

A. That would have been in August of that

year, 1990.

Q. Now, the other day you told us that there came a point on the night of July 17, 1990, that you took a written statement from the defendant in this case, Dominic Franzo.

A. Yes.

Q. Did there come a point about six days later, specifically July 23, 1990, that you took a second written statement from the defendant?

A. Yes.

Q. And where was this statement taken?

A. Again, at the 34th Squad in one of the interview rooms.

Q. And do you have a copy of that statement here with you?

A. Yes.

Q. Could you please take it from the folder and we'll have it marked.

THE COURT: Has it been previously marked?

MR. BRANCATO: No, Judge.

THE COURT: This will be what?

MR. BRANCATO: This one is going to be 55.

THE COURT: Do we have a 52?

MR. BRANCATO: Yes, Judge. We took care of that this morning.

THE COURT: Previously marked but not referred?

MR. BRANCATO: Yes.

THE COURT: Okay, this is 55.

(Said document marked People's Exhibit 55 for identification.)

MR. BRANCATO: Please show it to the witness.

Q. Do you recognize that two-page document that's marked as Exhibit 55?

A. Yes.

Q. What do you recognize it to be?

A. It's the interview I conducted of the defendant, Dominic Frunzo, on July 23rd of 1990. It's two pages. It has his signature and my signature on the bottom of page one, and his signature and my signature at the bottom of where the statement ends on page two.

Q. And when did you sign that document?

A. Upon its completion.

Q. When did the defendant in this case,

Dominic Fronzo, sign that statement?

A. Also after it was completed.

Q. What time of day was this statement taken from the defendant?

A. I have 1820 hours, which is 6:20 p.m., is when the statement was started.

Q. Could you please tell us in this second interview with the defendant, could you please tell us what the defendant told you?

A. He told me that he had tickets for a cruise on the Carnival cruise lines that was to sail on the 20th of July. He told me where he had purchased them, at the Olinville Travel. He gave me the address of 3356 White Plains Road in The Bronx. He told --

MR. BRANCATO: Judge, there's some noise outside. I can't hear the witness.

Q. Okay, Detective Giorgio, the last thing I remember you saying, saying something about some tickets that were purchased. Where were they purchased?

A. In The Bronx at Olinville Travel, 3356 White Plains Road in The Bronx.

He then went on to say that on the 17th when he

had told me that he had, in fact, gone to the drugstore to buy the Golden Trojans. He said he did not purchase any Golden Trojans. He said he had entered and then he left.

He told me that he had purchased the tickets, the cruise tickets, on the 12th of July and again that he had spoken to Myra, his wife, on the phone. He stated that he got emotional on that day, that he started crying and -- I'm sorry, he states on 7-10, which would have been a Tuesday, July the 10th, that he had started crying during a conversation with his wife when she told him that she was filing for divorce. He told her that -- he told his wife Myra that he would not sign the papers and he suggested a separation of a couple of months.

I asked him about the cruise tickets and the flowers that he had mentioned earlier that he had bought and he was going to drop off at the post office with Myra's friend Jenny. He said that he always sent flowers to Myra. He said he often sent them by FTD, but that he recalled that once he had actually sent flowers with a friend of his. I asked what his friend's name was. He said Negro. He said he had purchased the flowers on East 106th Street

previously and that about two years ago is when he had sent his friend to Josephina's house, his mother-in-law's house on West 187th Street so that Negro could leave the flowers for Myra.

At that time, which was about two years ago, he fixed it as about April of 1989, he stated that his wife Myra had left him after an argument.

He then went on to describe Myra's brother's apartment in the basement of the next building, and that Myra had stayed at that apartment on another occasion that she had left him. This was in response to a question I put to him regarding where she would stay when she did leave him. He mentioned she had left him several times and he answered that -- when asked how many times they actually had separated he said they had separated four times in this three-year period, their marriage rather, the three-year period of their marriage.

Q. Now, the text -- by that I mean the handwriting on that statement --

A. Yes.

Q. -- whose handwriting is that on the statement?

A. It's mine.

Q. And after writing it, did you give the defendant an opportunity to look at it?

A. Yes. I handed him the statement, asked him to read it to be sure that everything that was contained in it was correct. He did not --

Q. Did he look at it at that point?

A. He did. He did not make any corrections. If he had, it would be crossed out and my initials or his initials would be next to the correction. And after he had read it, he signed both pages.

MR. BRANCATO: At this point, I would offer what's previously been marked as Exhibit 33 into evidence.

MR. BRENNER: No objection.

THE COURT: Without objection, 33 received.

(People's Exhibit 33, previously marked for identification, is received and marked into evidence.)

Q. Detective Giorgio, did there come a point in February of 1991 that you, along with Detective Ortiz, went to Josephine Mendez' apartment at 485 West 167th Street?

A. Yes.

Q. And when was that?

A. That was on the 7th of February of 1991.

Q. And who did you go with to that location?

A. With Detective Ortiz.

Q. And when you got there, did you see Mrs. Mendez?

A. I did.

Q. And did she show anything to you at that time?

A. Yes.

Q. Could you please tell us what she showed to you.

A. She showed me two letters that had been received at her home, one addressed to Myra Franza and herself. I believe was on one envelope, and the other one was to Nelson Bacosta, I believe, care of Josephina Mendez. Two envelopes and two letters.

Q. Could you please look at this. This has been previously marked for identification -- I'm sorry, it's previously been moved into evidence as Exhibit 11. Do you recognize it?

(Handed to witness)

A. Yes.

Q. And please look at this. This is in

evidence as Exhibit 12. Do you recognize that?

A. Yes.

Q. What do you recognize them to be?

A. As copies of the two letters that she showed me that day.

Q. Let me hand you what's already been marked as Exhibit 10 for identification.

(Handed to witness)

Q. Do you recognize that?

A. Yes.

Q. What do you recognize that to be?

A. As the two envelopes that she showed me that day.

MR. BRANCATO: I would offer them -- offer number 10 into evidence at this time, Judge.

MR. BRENNER: Judge, I have it as in evidence.

THE COURT: 10 is already in.

MR. BRANCATO: I'm sorry. I'm sorry, Judge.

Q. This has been previously marked for identification as Exhibit 32. Could you please look at it.

(Handed to witness)

MR. BRANCATO: I would ask that the detective be allowed to open it to inspect the contents of Exhibit 32.

THE COURT: All right.

Q. What do you recognize the contents of that exhibit to contain?

A. The two envelopes and the two letters that I saw and later received from Mrs. Mendez.

MR. BRANCATO: May I approach the witness, your Honor?

Q. Could you please describe the circumstances under which Mrs. Mendez gave those envelopes and letters to you and Detective Ortiz.

A. Yes. She had contacted us by phone or the office by phone in which we responded. She told us that she had received these letters containing threats to her and Myra. One of the letters -- I believe she had safeguarded them or I asked if she had touched them and I believe she had them in plastic.

Q. Did she translate the letters for you and Detective Ortiz?

A. To some degree. I don't think it was a

more for more translation, but told us in some -- to some degree what it said.

Q. After that conversation between you, Detective Ortiz and Mrs. Mendez, what happened to the letters and to the envelopes?

A. Yes. Detective Ortiz took them into his custody. As I see from the voucher, he vouchered them at the 34th Precinct, and the evidence was then forwarded to the lab to Detective Saroone at the Document Unit. I believe Detective Saroone did some work with regard to fingerprints, attempting to obtain fingerprints from the papers.

MR. BRANCATO: I would offer the two envelopes and the two letters into evidence at this time.

MR. BRENNER: May I see them, your Honor?

(Handed to defense attorney)

MR. BRENNER: May I have a brief voir dire, your Honor?

THE COURT: Voir dire.

VOIR DIRE EXAMINATION:

BY MR. BRENNER:

Q. Detective Giorgio, on the two letters, part

of People's 52, there are green pen marks or something that appears to be green pen marks on the paper.

A. Yes.

Q. When you first observed those documents some time in February at the home of Josephine Mendez, were those pen marks on there?

A. I don't remember.

Q. You don't remember?

A. No.

Q. And at a time subsequent to you removing them from Mrs. Mendez' apartment, they went into the custody of some other police unit; is that right?

A. To the police lab, yes.

Q. You don't know precisely what was done by those --

A. I know --

Q. -- units?

A. I know they were examined for fingerprints, and I believe the envelopes were -- at a future date there was a handwriting comparison done.

Q. So, in fact, you don't know whether the letters that are before you now marked as People's 52 fairly and accurately represent the way they appeared

back in February of 1991 because you don't know whether those pen marks were there or not; is that right?

A. I can't remember the pen marks being there, no.

MR. BRENNER: I object.

MR. BRANCATO: I renew my offer.

THE COURT: 32 is admitted over objection.

MR. BRENNER: Your Honor, may we have them 32-A and B?

THE COURT: All right.

(Said documents are received and marked People's Exhibit 32-A, B, C and D in evidence.)

DIRECT EXAMINATION: (con't.)

BY MR. BRANCATO:

Q. Detective Giorgio, you indicated on Friday that there came some point after exiting the Dacosta's residence in the basement of the adjoining building that you saw someone, you learned his name was Nelson.

A. Yes.

Q. And what was Nelson's relation to the

people who were shot in apartment --
485 West 187th Street, 1-D?

A. It was Josephina Nenaez' son and Myra Franzo's brother.

Q. When was it that you first saw Nelson that night?

A. When I first responded to the scene. When I saw Mrs. Menaez being removed from the apartment and Myra Franzo within the apartment, I met him. He was quite upset, emotional. And then from there, after leaving 485 where the shooting had happened, we went to 495, but I met him initially at the location where the shooting had occurred.

Q. Did you see him at some point later that night after you had initially met him?

A. Yes.

Q. In the manner you just described?

A. Yes, at the time he had the confrontation with the defendant, Dominic Franzo.

MR. BRENNER: Objection. Move to strike the word "confrontation".

Q. Tell us what you saw.

MR. BRENNER: Objection. Asked and answered.

THE COURT: Let's eliminate the characterization. Go ahead.

Q. Could you please tell us what you observed at that point.

A. When I heard yelling, I saw Nelson running from, as I had testified previously, a large crowd of people in the direction of the defendant raising his hand. I didn't actually see the blow struck, but later found out when I was -- when I got to where Nelson was, Mr. Franzo, the defendant, was lying on the ground, had his hand up to his mouth, stated that Nelson had punched him in the mouth.

Q. Could you please describe Nelson's height and weight.

A. Nelson is about six foot one. I'd say about 220 pounds.

MR. BRANCATO: Your Honor, the contents of this envelope has been collectively marked as People's Exhibit Number 23 for identification. I'm handing it to the witness and ask that he look at it.

(Handed to witness)

A. Yes, I recognize it.

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Q. What do you recognize the top sheet on that exhibit to be?

A. This is a property clerk invoice or voucher which I prepared on November the 6th of 1991.

Q. And what was your purpose in preparing that voucher?

A. I vouchered envelopes with a quantity of handwriting samples.

Q. And who supplied the samples for you?

A. The defendant, Dominic Fronzo.

Q. And where was this done?

A. I believe it was in the rear of this courtroom in one of the jury rooms.

Q. And who was present at the time that you took those handwriting samples from the defendant?

A. I was present. The defendant, Dominic Fronzo, his attorney, Mr. Brenner, and I believe a court officer was also present.

Q. Were those samples taken pursuant --

MR. BRENNER: Objection. Objection as to relevancy, your Honor.

MR. BRANCATO: Can I finish the question, Judge?

MR. BRENNER: Objection. I'm going to

ask that we approach, your honor.

(Witness leaves witness stand)

(Whereupon, an off-the-record discussion is held at the bench.)

THE COURT: Have the detective resume.

(Witness resumes witness stand)

Q. What did you do with the samples that the defendant provided for you that day when you took them in the rear room?

A. I don't remember if I personally delivered them. I may have. I'll just check.

(Pause)

A.(con't.) I don't have a notation that I personally delivered them, but I know eventually they went to the document section again at the police lab.

Q. And did you make a request concerning those exhibits?

A. Yes.

Q. And what request was that?

A. That they be compared to papers, the envelopes, the two envelopes I referred to earlier. I believe it was to a money order and to a Federal Express receipt or a face sheet.

Q. And to whom did you make this request?

A. To the lab one, I believe -- no, I know it went back to Detective Breslin.

Q. Now, could you please open that envelope.

(Pause)

MR. BRANCATO: Your Honor, if it's okay with you, at the break today we can individually mark each exhibit in there.

THE COURT: All right.

Q. Detective Giorgio, what you have now taken out of that evidence envelope, do you recognize those pieces of paper before you with handwriting on them?

A. Yes.

Q. What do you recognize them to be?

A. These are handwriting samples that I received from the defendant Dominic Fronzo on -- what date again? -- November 6th of 1991.

MR. BRANCATO: I would offer them into evidence at this time.

THE COURT: Mr. Brenner?

MR. BRENNER: No objection.

THE COURT: Without objection, this is collectively that report which we'll break down. 23 previously identified without objection is now received.

(People's Exhibit 23, previously marked for identification, is received and marked into evidence.)

Q. Okay, Detective Giorgio, did you have an opportunity on February 11, 1991, to see the defendant in this case, Dominic Franzo?

A. Yes.

Q. And where was it that you saw him that day?

A. At the 34th Squad Office.

Q. Did there come a point that day that the defendant was placed into a lineup that was conducted at the 34th Precinct?

A. Yes.

Q. And did Mr. Cesar Rodriguez have an opportunity to view the defendant in the lineup?

A. Yes.

Q. Did there come a point that day that you placed the -- that you apprehended the defendant in this case?

MR. BRENNER: Objection as to form.

THE COURT: Form.

Q. Did there come a point that day that you placed the defendant under arrest?

A. He was placed under arrest that day, yes.

Q. After placing the defendant under arrest, did you ask him to empty the contents of his pockets?

A. Yes.

Q. Did you retain any of the items that was taken from his pockets?

A. There were two items that were retained.

Q. And what two items are they?

A. A piece of paper practically square with some writing with four telephone numbers and writing on it and his personal telephone book.

Q. Now, the four telephone numbers, had you seen any of those numbers on a previous occasion?

A. Yes.

Q. And when was that?

A. I had been informed on Sunday, the 10th of February, in a conversation I had with both Mrs. Franzo and Mrs. Mendez regarding a package, a bomb that was sent to Puerto Rico. And at that time they gave me the telephone number of -- I don't remember which one it was. Yes, they gave me a telephone number of an aunt. It was either Angeles -- I have two names, Angeles and an Elba in Puerto Rico that I could contact regarding -- in an effort to obtain additional information about the

bomb. One of those numbers I have in my steno pad which I wrote down on the 10th of February; and when I saw it on the 11th, I recognized it as the number I had.

Q. Which number is that?

A. That's the one to Rio, R-I-O -- the way it's spelled here P-E-D-R-A-S.

MR. BRENNER: Objection. Move to strike as to what it refers to. I believe the witness can testify to what the number is, your Honor, not -- numerically what it is, but not to where it goes.

THE COURT: Read that back.

(Reporter read back the requested testimony.)

THE COURT: As to the number?

MR. BRENNER: No, your Honor. My objection is that the number corresponding to a particular location is hearsay. The witness can testify to what the number physically is.

THE COURT: Then your objection obviously is not timed to where you're objecting to, but at this point all I'm

hearing is a number. What else is he saying that you're objecting at this point?

MR. BRENNER: Your Honor, Mr. Brancato asked what number is that. I presumed the response would be digit, digit, digit, digit. That's not what we got.

THE COURT: Didn't he read off a number?

MR. BRENNER: No. He said that's the one to Rio Piedras. That's what I objected.

THE COURT: What is Rio Piedras?

THE WITNESS: On the piece of paper I obtained, your Honor, there is the name of a town with a telephone number and there's the name of a second town in Puerto Rico, and beneath that there are three numbers. I know that Rio Piedras is in Puerto Rico, has an 809 exchange, and what I testified to is that the number was to Rio Piedras, and I was about to testify to the number when Mr. Brenner objected.

THE COURT: Overruled.

Q. What number did you receive?

A. The number I had received again from Mrs. Franzo, Mrs. Mendez was 609-765-4792.

Q. Did you receive any other numbers that day from Mrs. Franzo and her mother?

A. I did not.

Q. Now, you indicated that on February 11, that you asked the defendant in this case, Dominic Franzo, to empty the contents of his pockets?

A. Yes.

Q. What, if anything, did you recover from his pockets?

A. We recovered the -- from his wallet he had numerous identification cards, I believe some credit cards. He had a Workmen's Compensation check. We Xeroxed all of the material that was returned to him and kept, as I indicated earlier, kept the little piece of paper with the four phone numbers and his personal telephone book.

Q. Those four phone numbers that -- were they on the same piece of paper?

A. Yes.

Q. And what numbers were they?

A. 609-764-1630. The number I stated earlier, 609-765-4792; 525-8771. The loose one is -- looks

like 655-5515.

Q. And was there any writing on that piece of paper aside from those numbers?

A. Yes. Above the 609-784-1650, there is the word Levittown. Again, above the 609-765-4792 is the word Rio Picoras that I had spelled earlier.

Q. What did you do with that piece of paper?

A. That piece of paper and Mr. Franzo's telephone book were vouchered.

Q. And who vouchered them?

A. I do not remember. I'd have to look at the voucher. Oh, I know who it was. I think it was someone from -- someone from Alcohol, Tobacco and Firearms, a Federal agency.

MR. BRANCATO: I have no further questions at this time.

THE COURT: Before we begin the cross-examination, we do have some exhibits to mark. I think it would be an appropriate time to call a recess, ladies and gentlemen, for your lunch.

We will resume at 2 o'clock.

Do not discuss this case amongst yourselves nor allow any third party to

discuss the case with you. Have a good lunch.

Take the jury out.

(Jury leaves the courtroom)

THE COURT: All the jurors out.

Now, before we begin, this is on addendum to our previously conversations and the ruling of the Court with respect to the polygraph exam.

On Friday, Mr. Brenner raised the issue of voluntariness as to the statements taken subsequent to -- what is the date of the polygraph, July what?

MR. BRENNER: 23rd.

THE COURT: -- July 23.

After due consideration and the law supplied by both counsel, which I might say was not on point, the Court concluded that Mr. Brenner will have, in effect, unlimited cross-examination within the confines of what's appropriate.

But with respect to the July 23 incident, I set out the parameters and, in effect, he has no restraints with the

exception, with the exception of the use or utilization of the word "polygraph". Other than that, he can inquire.

Mr. Brenner takes exception to that and would like to put on the record a series of questions that he would have asked but for the Court's ruling.

MR. BRENNER: Your Honor, I intend to proceed as if the jury were present except that I was aware of the Court's ruling and I did not believe it was good faith to attempt to ask those questions merely for having the jury hearing them and having Mr. Brancato object.

THE COURT: Or to beg contumaciously.

You may proceed.

(Whereupon, the following examination of Det. Giorgio is held outside the presence and hearing of the jury:)

CROSS-EXAMINATION:

BY MR. BRENNER:

Q. Detective Giorgio, on July 17, 1990, as part of your discussion with Mr. Franzo, did you make reference to a subsequent taking of a polygraph

examination?

MR. BRANCATO: I would object to that question.

THE COURT: Sustained.

Q. On July 23, 1990, when you met with Mr. Franzo, that was at the 94th Precinct or somewhere else?

A. No, I met him on the east side.

Q. From there did you proceed to the County of Kings --

A. Yes.

Q. -- Brooklyn's DA's Office?

A. Correct.

Q. Was that not, in fact, for the purpose of conducting a polygraph examination?

MR. BRANCATO: I would object.

THE COURT: Sustained.

Q. Did, in fact, Mr. Franzo take a polygraph examination?

MR. BRANCATO: Objection.

THE COURT: Sustained.

MR. BRENNER: There would be no point to this at all if I can't finish the questions.

THE COURT: You asked him, in fact, did he take a polygraph examination.

MR. BRENNER: I didn't finish.

MR. BRANCATO: I'm sorry.

THE COURT: That sounded like a complete sentence. Go ahead.

Q. Were you --

THE COURT: Incidentally, do you want to indicate the punctuations so we'll know. Go ahead.

Q. Were you informed of the results of that examination?

MR. BRANCATO: I would object to that.

THE COURT: Sustained.

Q. Did you inform Mr. Franzo that he had failed a polygraph exam?

MR. BRANCATO: I would object to that.

THE COURT: Sustained.

Q. Did you inform Mr. Franzo that the test results showed that he was lying?

MR. BRANCATO: I would object to that.

THE COURT: Sustained.

Q. Did you inform Mr. Franzo that the test results showed that he was being deceitful?

MR. BRANCATO: Objection.

THE COURT: Sustained.

Q. Did you inform that the test results were, in fact, inconclusive?

MR. BRANCATO: I object.

THE COURT: Sustained. Why don't you take a continuing objection. We'll save time to this entire line.

MR. BRANCATO: All right.

Q. Did you indicate to Mr. Franzo that the test results were inconclusive?

THE COURT: Sustained.

Q. When for the first time did you learn the polygraph tests were inconclusive?

THE COURT: Sustained.

Q. Did you communicate -- did you communicate to a brother officer or sister officer, excuse me, Detective Ramond and Detective Herbert of the Arson and Explosive Squad that Mr. Franzo's polygraph results were, in fact, inconclusive?

THE COURT: Sustained.

Q. After you come back from Brooklyn, did you question Mr. Franzo?

THE COURT: You may answer.

A. Yes.

Q. And prior to questioning him, did you advise him of his Miranda warnings?

A. Yes.

Q. Prior to advising him of his Miranda warnings, did you have a conversation with him relative to what had transpired in Brooklyn?

A. Yes.

MR. BRENNER: I have nothing further along this --

THE COURT: Yes, along this particular line. Then we will recess this trial now until 2 o'clock, gentlemen.

(Luncheon Recess)

A F T E R N O O N S E S S I O N.

COURT CLERK: Case on trial. The defendant, his attorney, the assistant district attorney are present.

THE COURT: Very well, witness has yielded.

CROSS-EXAMINATION:

MR. BRENNER:

Q. Good afternoon, Detective Giorgio.

A. Good afternoon.

Q. Detective, were you the investigating detective assigned to this case?

A. I was the assisting detective.

Q. Was Detective Ortiz the investigating detective?

A. Yes. It was his case.

Q. Apart from the way the papers may have been signed, was there any distinction in terms of what each of you performed in the investigation?

A. Well, oftentimes because I made senior investigator, I might do more work than the actual assigned detective.

Q. Was that so in this case?

A. I would say so, yes.

Q. So you went off and you did parts of this investigation by yourself and he went off and did parts of investigation by himself and sometimes you worked together; is that right?

A. That would be correct.

Q. Now, you responded to the scene, 485 West 187th about 7, 7:30; is that your recollection?

A. Yes.

Q. Did you see Mr. Frenzo when you first

arrived there?

A. No.

Q. How long were you there until you saw Mr. Franzo?

A. It could have been a half hour or more.

Q. Did you see Mr. Franzo actually arrive?

A. Yes.

Q. Would it be fair to say, Detective, that he arrived with another person?

A. Yes.

Q. And that person was a male black?

A. Yes.

Q. And you later ascertained through your investigation, or whatever other means, that that person's name was Tracy Jenkins?

A. That's correct.

Q. Were you also able to observe that Mr. Franzo was the passenger in the vehicle in which they arrived and Mr. Jenkins was the driver?

A. When I first saw Mr. Franzo, he was walking toward the building. I saw a black man standing next to a car on the driver's side. I never saw him physically in the car.

Q. Did you remember seeing him leave the scene

of 485 West 167th, Mr. Jenkins that is?

A. No.

Q. Now, were you able to make any observations of the car itself?

A. No.

Q. Kind of plates it had, what kind of car it was?

A. No.

Q. Now, Mr. Franza introduced himself to you. He told you that he was Myra Franza's husband; is that right?

A. Yes.

Q. In case you wanted to go into the building; is that right?

MR. BRANCATO: I object to what he wanted to do.

Q. He was headed towards the building; is that right?

A. He was.

Q. As far as you were able to observe, did he get into the building?

A. He got into the lobby of the building, and then within a short period of time I think went into the second -- into the actual foyer.

Q. Then there came a time that you went back to the 34th and somehow he went back to the 34th; is that right?

A. Yes.

Q. Do you know for a fact how he got back there?

A. I have a recollection. I think he said that his friend had driven him there.

Q. Do you recall Detective Bourges being at the scene?

A. Yes.

Q. Detective Bourges accompanied you to the scene, did he not?

A. We went there together, yes.

Q. And did you leave together?

A. I'm not sure. We may have.

Q. Do you know, in fact, whether Detective Bourges drove Mr. Franzo back to the 34th or not?

A. I don't think it was that way. I don't remember that.

Q. And you didn't make any notation of how Mr. Franzo came to be at the 34th? You're relying solely on your memory at this point, are you not?

A. Yes, and if I were to look at a movement log - we may have it here in the case - it would indicate who I returned to the precinct with.

Q. Do you have it?

A. I know it's part of the case folder.

Q. The case folder are the documents that are prepared by you and other detectives in the course of your investigation of a particular case; is that right?

A. Yes.

Q. Now, a case folder has a case number, isn't that right?

A. Yes.

Q. This case has a case number?

A. It does.

Q. And what was that case number?

A. 1877 and 78. It had two case numbers.

Q. And just so that -- withdrawn.

In your preparation both for your testimony, your investigation and your cooperation with Mr. Brancato, parts of that case folder or all of it were turned over to him?

MR. BRANCATO: I object to the form of this question.

MR. BRENNER: Judge, there's nothing subversive in the question.

MR. BRANCATO: I just made an objection.

THE COURT: Put it another way and I'll allow it.

Q. When you say part of it may be in the case folder and you gesture over to Mr. Brancato's direction, would it be fair to say that you mean he might have it?

A. If I may just go back. When I say that the movement log sheet might be part of the case folder, I don't mean this investigative case folder. I mean Mr. Brancato's case folder because the movement log is not part of the investigation.

Q. Okay. In any event, everyone converged on the 34th Precinct; is that correct?

A. At some point, yes.

Q. Approximately what time was it?

A. Within 10 or 15 minutes of the statement that I obtained. I think the statement was at 2030 or 2040 hours, the first statement I got from Mr. Franzc. I would say I arrived there within 15 minutes of starting that interview. In fact, it's

probably been presented as part of the evidence here and it's not in the folder, in this folder now.

Q. Assume approximately 8:30, 8:40 --

A. Correct.

Q. -- he arrived?

You all arrived at approximately 8:20, 8:15?

A. That's possible.

Q. Previous to your arrival at the 34th, you had ascertained Mr. Franzo's address, had you not?

A. I don't think I knew his address at that time.

Q. Did you ask him where he lived?

A. When I started the interview I did.

Q. Now, you asked him to come back to the 34th?

A. I did.

Q. You didn't suggest to him that you go visit him at his house and speak to him there?

A. No.

Q. He wanted to go to the hospital, did he not?

MR. BRANCATO: Object as to what he wanted to do.

Q.(con't.) He asked you whether he could go to the hospital? He stated to you he wanted to go to the hospital at that time?

MR. BRANCATO: I object.

THE COURT: I'll allow it.

A. I don't know what time you're referring to, Mr. Brenner.

Q. At the time he was at the scene.

A. I don't recall him asking me if he wanted to go to the hospital at that time. I know he asked it later.

Q. You don't recall? You don't remember him saying that?

A. I don't have any recollection. I don't think he asked me at that time. He may have.

Q. He may have?

A. But I don't think so.

Q. Okay. And once you were at the precinct, your first order of business was to speak to Mr. Franzo -- Withdrawn.

You arrived at the precinct and 10 minutes later you spoke to Mr. Franzo?

A. Yes.

Q. Did you do anything else in the 10-minute

period of time?

A. I think I called the hospital, but I'm not sure.

Q. Apart from calling the hospital 10 minutes after leaving the scene of the shooting, the very first thing you did was interview Mr. Franzo?

A. That's correct.

Q. And your statement says that he expressed his willingness to cooperate to the fullest with your investigation?

A. Yes.

Q. Now, did you ask him whether he would cooperate to the fullest or did he say he wanted to cooperate to the fullest?

A. The way I worded it it would be his words.

Q. So Mr. Franzo stated - that's the way you worded it - that he would cooperate to the fullest in the investigation?

A. That's correct.

Q. And your statement then goes on to say that he called his mother; is that right?

A. Yes.

Q. And you got on the phone and explained the situation to her at that time?

A. Yes.

Q. What was the situation at that time?

A. That his -- the defendant, Mr. Franzo's wife had been shot, that his mother-in-law had been shot and that we had an ongoing investigation at that time and that her son was there to cooperate in the investigation.

Q. Actually, Detective Giorgio, at that time he wasn't the defendant. So you didn't say "the defendant," did you?

A. No.

Q. You said Dominic or Dominic Franzo or --

A. Your son. I probably said your son.

Q. Now, with regard to your investigation at that point, were you -- you were aware there had been a shooting; right?

A. Yes.

Q. Of two females?

A. Right.

Q. And that there was a suspected perpetrator; is that right?

A. Yes.

Q. And you had a partial description of that person, did you not?

A. Yes.

Q. You also were aware that there had been a flower box with a ribbon around it recovered at the scene?

A. Yes.

Q. You saw it; right?

A. Yes.

Q. And that there was a note attached to the box? You saw that as well?

A. I don't know if it was attached. There was a note with the box.

Q. Would it be fair to say you concluded as an experienced detective at that point that the shooter had gained access somehow by posing as a floral delivery person?

A. Yes.

Q. Now, the statement that you took from Mr. Franzo, the very first thing in that statement is a discussion of his marital problems; is that right?

A. If I could just look at the statement. It probably was.

Q. Before you do, I would like you to tell me whether you remember the first thing that was discussed.

A. I remember I discussed with him what his marital status was at that time, and he volunteered that he had been married three years and that he was -- that his wife had left him three weeks prior.

Q. My question to you was wasn't it in fact the first thing you discussed with him?

A. That's -- that sounds right.

Q. Now, you didn't ask him what he knew about the shooting and you didn't ask him whether he knew anything about flowers. You asked him up front first thing about his marital problems, isn't that right?

A. Not about his problems, his marital status. When I asked him is there anything he could tell me with regard to the shooting of his wife Myra and his mother-in-law, his response was he wanted to cooperate to the fullest, and at that time he gave me no indication that he knew of any reason why they were shot.

Q. Did you write that down?

A. No.

Q. Why not?

A. I didn't write it down.

Q. Well, you wrote down about when Myra left and how many times a day he called her or beeped her

and about the car and about the cruise. You wrote all that stuff down?

A. Yes.

Q. But you now have just told us that Mr. Franzo said to you I don't have any information about why anybody would shoot her, and you didn't write that down?

A. Correct.

Q. And you don't know why?

A. I know why.

Q. Tell me why.

A. It -- there was nothing positive forthcoming. Nothing of any value that he told me that I could utilize in the investigation. What he said was he didn't know why she was shot.

Q. So would it be fair to say that you wrote down only those items that you felt would help you in your investigation?

A. That would be a fair statement.

Q. Was that true of statements taken from Mr. Franzo throughout your investigation?

A. I would have to look at the other statements. That would probably be true.

Q. Would it be true about information that

would be given to you by any other witnesses or anyone else in the course of this investigation, you would write down what was helpful for your investigation?

MR. BRANCATO: I object.

THE COURT: As to form.

Q.(Con't.) Well, did you just tell us you didn't write down Mr. Franzo's statements that he didn't know who could possibly have been involved in the shooting or who would have reason to shoot Myra because it wasn't positive in terms of helping your investigation? That's what you said?

A. Yes.

Q. Were those similar guidelines the ones you followed in taking statements from other witnesses?

A. If you're asking me, Mr. Brenner, that if a person -- another person came in and stated to me I do not know or I don't have any information regarding this shooting or regarding this investigation and that was the extent of their interview, I would put that down and say that's the extent of the interview.

So, again, it would be something that was not useful or productive or that would assist in the investigation. But if it was -- if a person told me

something useful or productive. I would say in most instances I would put it down. Have I not put it down at times, it's possible.

Q. Mr. Franzo proceeded to tell you that he had bought a car?

A. Yes.

Q. And at least on July 17, 1990, you believed that that was positive information and it was helpful in your investigation; isn't that right?

A. It was something I might check out.

Q. Well, to use your words, you wrote down that Mr. Franzo told you that he had bought a 1986 Buick for Myra and told his mother-in-law about it. You wrote that down?

A. Yes.

Q. And to use your words, you wrote down from Mr. Franzo that which was positive towards the end of helping in your investigation?

A. Well, if I remember that statement in its context, I think he said within that same statement that his mother-in-law would not accept that information or would accept what he had done or words along those lines which showed to me that he was having some problem not only with his wife but with

his mother-in-law.

Q. The statement says that he called up his mother-in-law and told her that he had bought Myra a car; correct?

A. Correct.

Q. There seemed to have been a misunderstanding between Dominic and the mother-in-law because she thought the car was for her?

A. That's what she told me.

Q. She indicated she wasn't interested in any 1988 Buick from Dominic?

A. Again, if I could look at the statement if in its entirety that's what it said.

Q. You recorded that?

A. Yes.

Q. You then checked it out?

A. No.

Q. You said it was something you might want to check it out?

A. Yes.

Q. But you didn't?

A. I did not.

Q. At some point Mr. Franzo provided you with

documentation that he had, indeed, bought a 1968 Buick from Liberty Buick in The Bronx?

A. He had some papers, I believe, relative to -- regarding a car.

MR. BRENNER: Can I have this marked for identification, your Honor.

COURT CLERK: Defendant's Exhibit E.

(Said document marked Defendant's Exhibit E for identification)

(Shown to district attorney)

(Handed to witness)

Q. Detective Giorgio, have you ever seen that or -- I know that's a yellow one. Have you ever seen a Xeroxed copy of that?

A. I don't know. I don't remember having seen it. I may have.

Q. And if you may have, where would you have seen it from?

MR. BRANCATO: I object. I object to that question if you may have then where --

Q. Detective Giorgio, isn't it a fact Mr. Franzo showed it to you to convince you he had bought this car for Myra Franzo?

A. I'd have to ask you when that was.

Mr. Brenner. He certainly didn't show it to me the night I interviewed him.

Q. Certainly not. Did there come a point thereafter that he did?

A. I have no recollection of having seen that.

Q. So, would it be fair to say that the initial statement regarding this Buick you felt was important because you wrote it down at the time; is that right?

A. Yes.

Q. And thereafter from July 17 on until February 11, 1991, when you arrested Mr. Franzo, there's no other mention of this in any statement or report?

A. Mr. Brenner --

Q. Sir, I believe that is susceptible to a yes or no answer.

A. I can't answer it yes or no.

Q. Did you make any other mention of a 1988 Buick in any other report?

A. No.

Q. After July 17 --

THE COURT: You already have the answer.

MR. BRENNER: Thank you.

Q. Now, Detective, you also wrote down in your report that Mr. Franzo said he was going to take Myra on a cruise and he had bought cruise tickets; is that right?

A. Yes.

Q. You wrote that down?

A. Uh-hum.

Q. At that time, would it be fair to say that you considered that positive information that would help in your investigation?

A. It was also something that we might check out in the future.

Q. Did you, in fact, check it out?

A. I don't think I had a need to because Mr. Franzo did show me cruise tickets.

Q. Did the cruise tickets confirm what he had told you?

A. I believe so, yes.

Q. Now, Detective, are you familiar with the expression Miranda rights -- withdrawn.

I know that you're familiar with it. Can you tell us what you understand Miranda rights to be?

A. We refer to them as Miranda rights or

Miranda warnings which we sometimes will -- we will always give to a person who's being arrested. Sometimes give them to people who we're interviewing.

Q. Now, just so that everyone is clear, the Miranda warnings include an admonition that a person has the right to remain silent?

A. Yes.

Q. And they have the right to an attorney if they so wish?

A. That's correct.

Q. And, among others, "If they can't afford an attorney at the time, one will be provided for them without cost"?

A. Also correct.

Q. Then there's a question: "Now that I advised you of your constitutional rights, do you wish to speak to me in any event?" Is that right?

A. Yes.

Q. And a yes answer to that question is usually followed by some questioning by a detective or another officer; is that right?

A. Yes.

Q. Now, Detective, in your experience under what circumstances do you give a person their

constitutional rights?

MR. BRANCATO: I'm sorry, I didn't hear the question.

Q.(con't.) Under what circumstances do you feel it appropriate to advise a person that you're talking to of their Miranda rights or their Miranda warnings?

MR. BRANCATO: I object.

THE COURT: Unless there is a short answer to it.

MR. BRENNER: I didn't realize it --

THE COURT: Procedure would require the witness to go into so many illustrations.

Q. Can you answer that in relatively brief form, Detective?

A. I think I'd have to give some illustrations.

Q. Would it be fair that you would advise someone under arrest of their constitutional rights if you wanted to speak to them?

A. Yes.

Q. Would you consider it fair to say someone who you were detaining for investigative purposes and you wanted to speak to them you would advise them of

their constitutional warnings as well?

A. True.

Q. On July 17, 1990, Mr. Franzo arrived at the precinct sometime between 8 and 8:30; is that right?

A. Yes.

Q. And escorted from the 34th Precinct by Detective Bourges and Ortiz approximately 2 o'clock in the morning; is that right?

A. Yes.

Q. Your calculation of that time is approximately how many hours? Your best estimate, detective, between 8:20 and 2 o'clock in the morning.

A. 5-and-a-half, 6 hours.

Q. Mr. Franzo was there for that time, was he not?

A. Yes.

Q. On July 17, 1990, did you advise Mr. Franzo of his Miranda rights or the Miranda warnings as you referred to them?

A. No.

Q. You did not advise him that he had a right not to speak to you?

A. No.

Q. You did not advise him that whatever he

said could be used against him later?

A. I did not.

Q. Or that he had a right to an attorney?

A. That's correct.

Q. And you prepared his statement in your writing?

A. Yes.

Q. And asked him to sign it?

A. Yes.

Q. Now, you are, as you told us, an experienced detective and a homicide investigator; is that right?

A. Yes.

Q. Have you ever tape recorded a statement of a witness or an individual whose statement you wished to record, to perpetuate?

A. Have I ever?

Q. Yes, have you ever?

A. Maybe once.

Q. Have you had a statement videotaped?

A. With the assistant district attorney? Many times.

Q. And was Mr. Franzo a ever audio taped or videotaped during any of your dialogs with him?

A. No.

Q. Now, on July 23 -- withdrawn.

You've already told us that Detective Bourges and Detective Ortiz drove Mr. Frunzo back to his home.

A. I so learned, yes.

Q. And that they went there for the purpose of taking him back home and also for obtaining an audio tape which he had referred to; is that right?

A. That's my understanding, yes.

Q. Now, he told you that he got this message -- and you wrote that down, did you not?

A. Yes.

Q. In the statement?

A. I believe it's in that statement, yes.

MR. BRENNER: Can we have the statement, Mr. Brancato?

MR. BRANCATO: Sure. We have a copy.

MR. BRENNER: No, the original.

MR. BRANCATO: The first or the second?

MR. BRENNER: The first.

Q. Detective, the discussion about the cassette tape, about -- withdrawn.

You wanted to see it, did you not? Or hear it would be a better way to put it.

A. I wanted to hear it, yes, that would be a fair statement.

Q. You asked Mr. Franzo for it?

A. I asked Mr. Franzo if the tape was available, and he said yes.

Q. Did you include that in the statement that you took from him?

A. I don't think so.

Q. Did you write down anywhere that he was willing to provide the cassette tape?

A. Did I write it down anywhere?

Q. Yes.

A. No.

Q. Would it be fair to say that that was not a positive piece of information that aided you in your investigation?

A. It was.

Q. It was?

A. Yes.

Q. So not every positive information that aided you in your investigation that came out of his mouth on July 17 was written down?

A. I think I stated earlier it didn't always mean that I put down every positive statement.

Q. That one you didn't put down?

A. I did not.

Q. In any event, Detective Bourges and Detective Ortiz took him home to get the tape?

A. Yes.

Q. Did Mr. Franzo tell you that he wanted to go home by himself?

A. I don't understand.

Q. Did he tell you that he did not wish to go home by himself?

A. No. I don't recall that. I wasn't there when they took him home.

Q. Well, when he left your presence physically at approximately 2 o'clock in the morning, how was your impression that he was going to get home?

A. I wasn't there at 2 o'clock in the morning.

Q. When did you leave that night?

A. About 1:15.

Q. When you left at 1:15, what was your impression of how Mr. Franzo was going to leave the 34th Precinct?

A. It was my impression he was going to get --

be driven home.

Q. Did he ask you if he could be driven home?

A. My recollection is that he had told his friend to leave because some amount of time had gone by. So he didn't have a way of getting home. When he said he had told his friend to leave, I or one of the others -- I think I told him that we would provide transportation for him.

Q. He didn't have his car?

MR. BRANCATO: I object to whether he had or had not.

Q.(con't.) To the best of your recollection, did he have his car parked outside the 34th Precinct?

A. I have no such knowledge.

Q. You do know he was driven home by brother detectives?

A. Yes.

Q. Now, when Detective Ortiz next saw you did he mention to you or did Detective Bourges mention to you that they had seen reloading equipment in Mr. Franzo's apartment?

MR. BRANCATO: Judge, I object to what was told to him by others.

MR. BRENNER: Your Honor, may we

approach?

THE COURT: Yes.

(Whereupon, an off-the-record discussion was held at the bench.)

Q. Detective, did Detective Bourges tell you that he had observed reloading equipment in Dominic Frenzo's apartment at 3320 Barker Avenue?

A. He did.

Q. And, Detective, what's a search warrant?

A. Search warrant is something that you apply before a judge, give that judge certain information; and in most instances a judge will issue a search warrant to search a particular premises to obtain --

Q. I'm sorry?

A. -- to obtain certain articles that may be mentioned in the search warrant.

Q. So if you go before a judge and you put forth certain facts and you convince the judge of certain things, the judge allows you to search a person's apartment or car or some premises; is that right?

A. Yes.

Q. Now, between July of 1990 and February 11th of 1991, did you or Detective Ortiz or anyone

connected with your investigation seek or obtain a search warrant for Mr. Franzo's premises at 3520 Barker Avenue?

A. No.

Q. On July 23, 1990, you again had occasion to speak to Mr. Franzo?

A. Yes.

Q. Again, this was at the 34th Precinct?

A. Yes.

Q. And, again, you wrote down what he said?

A. Yes.

Q. However, this time you advised Mr. Franzo of his Miranda warnings, did you not?

A. I did.

Q. That's a week -- a week had passed since the first time you spoke to him and the second time you spoke to him?

A. Yes.

Q. And he agreed to speak to you?

A. Yes.

Q. And he understood everything you were saying; correct?

A. Yes.

Q. And in spite of you advising him of his

rights, he had no reluctance in speaking to you?

A. Yes.

Q. And then you proceeded to record what he had said?

A. Yes.

Q. Now, Detective, your investigation concerned the shooting of two women at 45 West 187th Street; is that right?

A. 485?

Q. Yes.

A. Yes.

Q. And it was a situation in which an individual unknown to you had pretended to be a floral delivery man -- impersonated a floral delivery man to gain access to that apartment?

A. That's correct.

Q. Did you receive information from Josephine Nendez that the day before two men had come to her house impersonating a police officer -- police officers in looking for Nelson Bacosta?

A. I learned that at a letter time, yes.

Q. How much later?

A. Probably within a week.

Q. So within a week of July 17, 1990, you

learned that on July 16, 1990, two men had come to the door looking for Nelson Dacosta posing as police officers?

A. Yes.

Q. Two Hispanic men; is that right?

A. It may be correct. I know there was a report made, but -- it may well have been two Hispanic men.

Q. Did the report become part of the file?

A. Of a separate case. It was handled, I think, as a separate case. We may have taken a copy of it and incorporated it somewhere.

Q. And did you speak to Lazaro Benitez in connection with this case?

A. No, I think that was Detective Bourges.

Q. Did you review the DD-5, the complaint follow-up of Mr. Benitez?

A. Yes.

Q. And Mr. Benitez reported, did he not, that two men had been running from the scene of the shooting?

MR. BRANCATO: I object to the hearsay, Judge.

MR. BRENNER: Your Honor, it's part --

I'm sorry.

THE COURT: Overruled.

A. I'd have to review his five or --

Q. Please do.

(Pause)

A. Yes, in Detective Bourges' five it states two men were fleeing from the building.

Q. And Mr. Benitez described them as Hispanic; is that right?

A. Two male Hispanics, that's correct.

Q. Just so we're straight, on July 16, 1990, two Hispanic males come to 485 West 187th Street. They knock on the door and they impersonate police officers and they're looking for Nelson Bacosta; is that right?

A. Yes.

MR. BRANCATO: Some objection, Judge.

Q. That's the information you had --

MR. BRANCATO: That's my objection.

THE COURT: Just a minute. The objection is sustained to the extent that he can testify as to what information they imparted.

Did they say they were looking for or

asking?

Q. I'm sorry. That they asked for Nelson Dacosta?

A. That was my understanding.

Q. On July 17 -- withdrawn.

And that was at approximately 7, 7:30 in the evening; is that correct?

A. What was at 7, 7:30? On the 16th?

Q. Yes.

A. Oh, I'm not sure of the time.

MR. BRENNER: May I have this marked for identification, your Honor?

THE COURT: Defendant's F.

(Said document marked Defendant's Exhibit F for identification.)

(Handed to witness)

THE COURT: Do you want that shown to the witness?

MR. BRENNER: Please, your Honor.

(Handed to witness)

Q. Do you recognize that, Detective?

A. Yes, yes. It's a complaint form.

Q. And Detective Monterroy was part of the initial investigation of this incident, the shooting;

is that right?

A. Yes.

Q. This report was prepared after the shooting had actually occurred?

A. That's correct.

Q. And Detective Monterroy -- withdrawn.

Detective Monterroy, as you said, was part of the initial investigative team of the shooting?

A. Yes.

Q. Does that refresh your recollection as to what time the incident allegedly occurred on July 16, 1990?

A. It states 1930, which is 7:30 p.m. on the 16th.

Q. And the shooting that occurred on July 17 is approximately the same time; is that right?

A. Yes.

Q. So on July 16, 1990, at approximately 7:30, it is reported that two male Hispanics came to 485 West 187th Street; is that right?

A. Yes.

MR. BRANCATO: Judge, I object. May we approach?

(Whereupon, an off-the-record

discussion is held at the bench.)

THE COURT: For the record, the objection is overruled.

Q. It was reported that on July 16, 1990, at about 7:30, two male Hispanics came to 485 West 187th Street; is that right?

A. Yes.

Q. They were looking for Nelson Dacosta?

A. Yes.

Q. And they were impersonating police officers?

A. Yes.

Q. And then the following day on July 17, 1990, correct, at least one came impersonating a floral delivery man; is that right?

A. One of the two that were --

Q. Yes.

A. It's my understanding that it was not one in the same person.

Q. I didn't ask you that.

A. You said at least one. I understood to mean one of the two.

Q. On July 18, 1990, there were two male Hispanics seen leaving the scene of

485 West 187th Street.

A. On the 17th?

Q. Yes.

THE COURT: You said 18th.

MR. BRENNER: I'm sorry, 17th.

Q. And one of them had impersonated a floral delivery man to gain access to this apartment?

MR. BRANCATO: I object.

THE COURT: Sustained.

Q. Detective, on August 11, 1990, anything unusual happen?

Before you refresh your recollection, do you have any independent recollection of anything unusual happening on August 11, 1990?

A. May have been the day that a pipe bomb was found behind Nelson Bocosta's apartment door.

Q. A pipe bomb?

A. That's my understanding.

Q. Where does Nelson Bocosta live?

A. 644 West 185th Street.

Q. Now, did you investigate that incident?

A. No.

Q. Is there an arson and explosive squad in the police department?

A. Yes.

Q. And is it their responsibility to investigate incidents of such a character?

A. The initial investigation is conducted by the squad which would be the 34th Squad. They, in turn, would notify the Arson Explosion Unit.

Q. And who are the assigned detectives from the Arson and Explosive Squad?

A. I know of two that I had contact with was Detective Ramond and Detective Herbert.

Q. The initial detective initially assigned was Detective Valdez. Does that ring a bell?

A. I -- if you say so, I will accept that.

Q. Now, on February -- in the beginning of February, you've testified that Mrs. Mendez turned over letters to you; is that right?

A. Yes.

Q. And one of those letters was written to Nelson Dacosta; is that right?

A. Yes.

Q. So there was a pipe bomb at Nelson Dacosta's house, is that right?

A. Correct.

Q. There was a threatened letter written to

Nelson Bacosta?

A. Yes.

Q. On July 16, 1990, two Hispanic men impersonating police officers came looking for Nelson?

A. Yes.

Q. In regards to the shooting, this box was recovered from the scene; is that right?

A. Yes.

Q. And inside had a ribbon?

A. No, the ribbon was on the outside.

Q. This is the way it ended up. That's not the way it was at the scene?

A. Yes.

Q. And inside -- were there roses inside?

A. Yes.

Q. What happened to the roses?

A. I would think they were discarded.

Q. Well, you were at the crime scene?

A. Yes.

Q. And SKU -- crime scene was also there?

A. They came after, I believe, I left.

Q. Now, you already had information that the person who had done the shooting had been there to

deliver flowers; is that right?

A. Yes.

Q. Did you order that the flowers be preserved somehow?

A. That's the responsibility of the Crime Scene Unit. Whether the flowers were of any value as far as evidence is concerned, that would be their determination.

Q. Well, did you ever take this particular box with this particular ribbon and go to any local florists in the 187th Street area?

A. I never took the box nor the ribbon, but I did make inquiries of florists -- of at least one florist.

Q. One florist?

A. (Nods).

Q. How many are there in the 187th Street area, if you know, within a 10 to 15 block radius?

A. I don't know. Half a dozen maybe.

Q. And you did not take this box with the ribbon wrapped around it and go and say hey fellows, do you recognize this, did you sell this to anybody in the last 48 hours?

A. The box was safeguarded and taken to the

lab.

Q. And 3320 Barker Avenue, did you ever ascertain how many florists were in a 10, 15 block radius of that area?

A. That's the florist I went to.

Q. One?

A. One.

Q. Was that because there was only one?

A. No.

Q. But that's the only one you went to?

A. As far as my inquiry was concerned.

Q. So that as far as the box and the ribbon are concerned, there was never any identification of them by any florists in the 187th Street area or the Barker Avenue area?

A. There was nothing on the box or the ribbon that would in any way help us to identify where that box came from.

Q. Well, actually, the question is not so much whether it would help you identify it but whether it would help a florist or a person working in a flower shop identify that he had indeed or she had indeed made a purchase, a sale of that within the last 24 hours. Was that done?

A. The florist in The Bronx it was done with.

Q. Now, this was submitted to the latent lab, fingerprint lab for fingerprints?

A. To the lab, yes.

Q. And did you receive the report of that examination?

A. I did not. I -- I was made or I learned that there weren't any fingerprints or legible fingerprints on the box.

Q. What about on the note?

A. None.

Q. The document section of the police department, you said that they determine handwriting; is that right?

A. Yes.

Q. They do handwriting comparisons. They also do documents that are torn? They try to put them back together?

A. Yes.

Q. Is there any section of the police department that does analysis of, say, where a particular item was manufactured or sold or where it came from?

A. I don't -- again, with regard to what? To

this box?

Q. No, to any item. Let's say the note. For instance the note. Is there any particular section of the police department that could examine the note and say this is on such and such paper and these are the number of manufacturers and retailers in the given area for that kind of paper and etc.? Is there a section in the police department that does that?

A. We, as a detective unit, might do that.

Q. Did you?

A. Only if there was something unique. No, we did not.

Q. Not with the note?

A. There was nothing unique about the paper, we were told, or the ribbon.

Q. There's nothing unique about this?

A. No.

Q. And the box?

A. Nothing.

Q. Detective, during the course of your investigation in this case, you subpoenaed telephone records of Mr. Franzo?

A. I can't know if I did. It may well have been done.

Q. It may well have been done.

What are MUDS, M-U-D-S?

A. I think they changed that. It used to be MUDS and LUDS, L-U-D-S, used to be local and long distance units, telephone calls.

Q. Were Mr. Franzo's telephone records subpoenaed?

A. I say they may well have. I don't have a distinct recollection.

Q. Was that at your request or your direction?

A. May have.

Q. Would the purpose of that be to determine whether any unusual or extraordinary calls had been made over a given period of time?

A. I don't understand by unusual or --

Q. What would be the purpose of subpoenaing telephone records?

A. To determine what calls may have been made within a certain period of time.

Q. Because why in this particular instance?

A. To find out who he may have been in contact with.

Q. If he contacted any killers?

MR. BRANCATO: I object.

MR. BREMER: That's what this case is about, your Honor.

THE COURT: Not that question. The objection is sustained.

Q. People who might be suspected of having actually shot Myra Franza and Josephine Mendez, yes?

A. That.

Q. Whether any calls would have been made in connection with pipe bomb investigation for supplies, equipment, pieces that would go into making such an instrument, yes?

A. That part of the investigation would not have been done by me but by the Arson, Explosion and the ATF people. That's the Alcohol, Tobacco and Firearm.

Q. Now, you also subpoenaed Mr. Franza's bank account records, did you not?

A. No. I -- I think we were supposed to or were going to, but I don't remember doing that specifically.

Q. You don't remember?

A. No.

Q. What was the purpose in going to do it? What was your purpose in wanting to do it?

A. His --

MR. BRANCATO: I object. Calls for speculation as to what he might have done with them.

Q. Well, Detective, you prepared a work sheet, did you not, in connection with this case?

A. If you'll let me see it, I'll let you know if it's my work sheet.

MR. BRENNER: I ask it be marked for identification.

THE COURT: "G" as in George.

(Said document marked Defendant's Exhibit G for identification.)

(Handed to witness)

Q. Do you recognize that?

A. I know it's a work sheet. I didn't prepare it.

Q. But do you recognize it?

A. Yes.

Q. Does it bear this case number?

A. It does.

Q. Was it intended for the subpoenaing of Dominic Frenzo's bank records?

MR. BRANCATO: I object.

THE COURT: Sustained.

Q. Did you actually subpoena Dominic Franzo's bank records?

A. As I said, I have no recollection of having done that, no. I don't think it was -- his bank records? I'm almost positive it was not done.

Q. Detective, on -- withdrawn.

What date did Mr. Franzo give you the first set of handwriting exemplars?

A. That was in August. Appears to be the 24th. Let me check it. On August 24th of 1990.

Q. Now, did you ask him to submit to those?

A. I asked him if he would give me --

THE COURT: Submit to them?

Q. To submit handwriting exemplars.

A. Yes.

Q. Did you tell him why?

A. I believe I did.

Q. What did you tell him?

A. That they would be compared to items that we had written.

Q. Well, did you tell him that there was a note that was recovered at the scene?

A. Yes.

Q. Attached to the box of flowers?

A. As I said earlier, I don't think it was attached. I think it came with the box. I think it was loose.

Q. Did he know at the time based on what you were telling him that floral delivery was somehow involved in this investigation?

MR. BRANCATO: I object to what he knew, Judge.

THE COURT: Sustained.

MR. BRENNER: Your Honor, I said based on what Detective Bourges told him.

Q. Did you tell him that there was an investigation involving someone having delivered flowers to 485 West 187th Street?

A. I told him, yes.

Q. And that the flower box had been left at the scene?

A. I told him there had been a delivery of flowers.

Q. And that there was a note?

A. Yes.

Q. And after that, you asked him to submit his handwriting for comparison?

A. Correct.

Q. And he did?

A. Yes.

Q. And you testified in response to Mr. Brancato's questions that you went away -- withdrawn.

Did he have to?

MR. BRANCATO: I object.

THE COURT: Sustained.

Q. Did you tell him that he had to?

A. No. I told him it was voluntary.

Q. You told him he didn't have to?

A. I don't know if I told him he didn't have to. I told him it was voluntary. I probably told him he didn't have to.

Q. And he did?

A. He did.

Q. You told Mr. Brancato at first he refused and then he came back and he did.

A. He left and then he returned, yes.

Q. And that you put him in a room, you went away for a while, you came back and he was still writing on the first one?

A. Yes.

Q. And you had been gone 5 to 10 minutes?

A. Yes.

Q. Do you know what went on during that 5 to 10 minutes time?

A. I assume he was writing out the samples.

Q. Is it possible, Detective, in the period of time you were gone he was reading the note you had given him to see what it said, to see what he was writing?

MR. BRANCATO: I object.

THE COURT: You want him to speculate? Sustained.

Q. Detective, you weren't in the room, were you?

A. I was in the room initially when I gave him the sample and when I gave him the blank papers and the pen. I read him the sample to be sure that he understood, asked him if he understood what it was I needed or I wanted. He looked at it, and I asked him to write it out and I left the room.

Q. And then you come back and he was still writing?

A. And he was still on the first exemplar of the first sample he was doing for me.

Q. And then you --

A. I first asked him if there was any problem, if the pen malfunctioned, if there was anything wrong. He said no. I said, "What's the difficulty?"

He said, "Nothing."

I said, "Could you please write out the samples," and I sat there.

Q. What was your purpose in sitting there?

A. To see what problem he may have been having writing it.

Q. He told you he didn't have any problem, didn't he?

A. I wanted to justify in my mind if he was telling me the truth.

Q. About whether he had a problem?

A. Yes.

Q. And did he as you sat there?

A. No. He wrote it out within minutes.

Q. And gave it to you?

A. Yes.

Q. And then he left?

A. Yes.

Q. Now, you got results from the submission of the handwriting with the note to Detective Breslin,

did you not? There was a report made to you?

A. Yes.

Q. When was it?

A. I don't have a copy of that report before me. I would say it was within -- within two weeks.

Q. So roughly beginning of September of 1990?

A. Roughly, yes.

Q. After you received that report, did you arrest Mr. Franzo?

A. I did not.

Q. After you received information that a pipe bomb had been placed at Nelson Dacosta's house, did you arrest Mr. Franzo?

A. No.

Q. In February, Mrs. Mendez gave to you --

THE COURT: February of what year?

Q. February, 1991, Mrs. Mendez gave to you certain letters?

A. That's correct.

Q. On the day that you received those letters, did you arrest Mr. Franzo?

A. No.

Q. At any time after those occurrences, did you apply for, seek -- withdrawn.

Up until February 11, 1991, after each of these occurrences that I alluded to, did you seek for or obtain a search warrant for Mr. Franzo's premises?

A. Did not.

Q. Now, you received information some time in the first week of February of 1991 that there was a second pipe bomb and that it had been tendered to Puerto Rico; is that right?

A. I believe that was on the 10th of February. That was on the 10th.

Q. Now, that was two pipe bombs in the course of this investigation; is that right?

A. Yes. Well, I didn't know it was a pipe bomb on that day. I was informed it was a bomb.

Q. Did you believe that they were related?

A. Yes.

Q. Pipe bombs, have you come across them before in your experience as a detective?

A. Rarely, but I have.

Q. Have you had experience with narcotic investigations, detective?

A. Only in connection with series shootings or homicides.

Q. Based on your answer, detective, would it

be fair to say that however unfortunate there is a connection between narcotics and violent crimes in the area in which you investigate?

MR. BRANCATO: I object.

THE COURT: Sustained.

Q. During the course of your investigation, did you ever suspect that either of the two pipe bombs or the shootings were related to narcotics?

MR. BRANCATO: I object.

THE COURT: Sustained.

MR. BRENNER: Your Honor, may we approach?

THE COURT: Yes.

(Whereupon, the following is held at the side bar, out of the presence and hearing of the jury:)

THE COURT: Here's the record. Mr. Brenner.

MR. BRENNER: I am requesting that I be permitted to go on the record outside the physical presence of the jury. The Court deems it inappropriate at this time. I am attempting -- I am attempting to elicit information from this detective in

good faith regarding the defense theory of this case that there was an alternate explanation for the crimes attributed to my client in this indictment. Every corner where I have attempted to elicit information about Mr. Bacosta, the Court has sustained the objections. It is now --

THE COURT: Incidentally, that is not a correct characterization, but go on.

MR. BRENNER: It is now a part of this record that Mr. Bacosta was sought after by two people impersonating police officers.

THE COURT: Go ahead.

MR. BRENNER: Your Honor, I think this kind of record making is -- is counterproductive.

THE COURT: Let's stop complaining. Let's move on.

MR. BRENNER: I'm not complaining.

THE COURT: That's all you're doing.

Do you want to be heard, Mr. Brancato, on this issue?

MR. BRANCATO: I'm objecting.

MR. BRENNER: Then I'm going to complete the record --

THE COURT: Go ahead.

MR. BRENNER: -- this part of the record that threatening letters, at least one was sent to Nelson Bacosta, that a pipe bomb was left at Nelson Bacosta's door.

Prior to the shooting of Myra Franza and Josephine Menoez, someone impersonating a cop came looking for Nelson Bacosta.

Impersonation, pipe bombings, ruses are all part - my offer of proof - are all part of the modus operandi of narcotics gangs, particularly narcotics gangs operating in that area at the time, and that is the defense theory of this case to the degree that I'm willing to spell it out. I should be allowed to inquire of this detective.

THE COURT: I'm going to respond very briefly because I don't think it requires more than a brief response.

You are not -- when I say "you", I'm referring to you, Mr. Brenner -- you are

not precluded in your cross-examination of putting any appropriate questions before a witness.

However, where you have now, in effect, testified - and that's what your objection amounts to - to allow your line of questioning, I would first have to accede to your expert testimony that there is a nexus between assassinations, pipe bombs, narcotics, threats, impersonations, that is some unique scenario attributable to that type of criminal activity.

That may be your theory and you may prove that, but I'm not going to allow you to go through a detective who merely elicit answers is there a connection between narcotics, do not narcotic people carry guns, do not people who engage in narcotic activities use threats, ruses, impersonations.

MR. BRENNER: The reason for that is? The reason for that, that you're not going to allow me to do it?

THE COURT: There is no basis here to

2 so that.
3 Now, if you have testimony, you may
4 bring it in. If you want to cross-examine
5 about existing testimony, you may do it,
6 but I will not allow you to make what you
7 tell me now is that you're the expert --
8 MR. BRENNER: I never said any such
9 thing.
10 THE COURT: Without characterizing.
11 MR. BRENNER: I never said --
12 THE COURT: You said, and the record
13 is here now, you said it's a fact that in
14 narcotics traffic there is a connection
15 between such ruses, impersonations, pipe
16 bombs, shootings. That's what you said.
17 MR. BRENNER: That was not the
18 question that was asked and objected to.
19 The question --
20 THE COURT: That's what you said. You
21 prefaced it.
22 MR. BRENNER: The question was asked
23 and objected to was there not a connection
24 between narcotics and violent crime.
25 Objection sustained. That was the

Continue.

Q. Detective, during the course of your investigation between July of 1990 and February of 1991, did you come across a person by the name of Salvadore Reyes?

A. Name sounds familiar.

Q. Do you have an independent recollection?

A. It may have been an incident that occurred in The Bronx. Mr. Franza's home; is that correct?

Q. Tell me.

A. Well, I think that may be the name. I have to --

Q. Can you elaborate?

MR. BRANCATO: Judge, may we approach? We don't have to go on the record, but can we approach?

THE COURT: All right.

(Whereupon, an off-the-record discussion is held at the bench.)

(Whereupon, the following discussion is held at the side bar, out of the presence and hearing of the jury:)

THE COURT: Mr. Brenner.

MR. BRENNER: In August of 1990, I

believe it was August of 1990, detective Giorgio had occasion to meet a person by the the name of Salvadore Reyes.

It was at the complaint of Mr. Franzo who reported that he had been accosted by two Hispanic men, one of whom was carrying a sawed-off shotgun at the time he was arrested.

I have now established a pattern that two Hispanic males repeat themselves during the course of this investigation, to the degree I can, and this plays part of it as well.

This is in the course of investigation. This is the detective who spoke to him. It is during the time period covered by the investigation. He took notes of his meeting with him. It apparently had some bearing on the identification.

The People have now put into evidence a letter which they purport is written by my client here. In that letter, in Spanish, there is a reference made to

someone proving that they would kill her husband --

THE COURT: Proving?

MR. BRENNER: The translation varies, but there is matar, which is murder, M-A-T-A-R, which means to kill or to murder. There is the word husband in Spanish, and then there are the words D-O-S T-I-E-M-P-O-S, two times.

I think I'm allowed within the confines in the cross-examination of Detective Giorgio to show there is some credibility in this notation that someone is trying to do harm to Mr. Franzo himself and that it's two Hispanic males with a gun at the time.

MR. BRANCATO: Judge, my objection is that it's hearsay and it's inadmissible hearsay.

Before when I made my objection to you at the bench outside the presence of the reporter, I objected to counsel introducing through Detective Giorgio what Josephine Mendez told Detective Monterroy

because I lacked any ability to confront the maker of that statement.

Now, now, the defendant is seeking to introduce -- he's trying to introduce that the defendant told a police officer or this detective that the defendant said that threats have been made on his life, and there's absolutely no way on the face of the earth that I can effectively confront the maker of this statement.

Counsel is seeking to introduce through this detective --

MR. BRENNER: Which statement?

THE COURT: Your client was threatened by a gunman.

MR. BRANCATO: Judge, can we please give them a break?

(Whereupon, the following is held in open court, in the presence and hearing of the jury:)

THE COURT: Ladies and gentlemen of the jury, at this time we'll take a short recess.

Do not discuss this case amongst

yourself.

Take the jury out.

(Jury leaves the courtroom)

THE COURT: Now, we're on the record again.

MR. BRENNER: Judge, let me say at the outset that the People have put into evidence in this case letters from some as yet unknown source for whom the declarant is unknown. The People allege that it is Mr. Franzo. That is their burden of proof. It is in evidence before the jury. The theory is that these were threats made against Nelson Docosta, Myra Franzo and Josephine Mendez.

As far as Miss Mendez and Mrs. Franzo are concerned, the hearsay nature of those statements doesn't really apply. I had the opportunity to cross-examine both of them.

As far as Mr. Docosta is concerned, I probably won't seek him on the People's case, but the letter is in evidence. The People's theory --

THE COURT: I don't believe the People

are introducing Dacosta. I think you spent more time introducing --

MR. BRENNER: The letter is in evidence.

THE COURT: -- the letter.

MR. BRENNER: The letter to Mr. Dacosta is in evidence.

Now, however I choose to address that aspect, as long as it's in proper form - and we had some discussion about that as well - that's my choice.

However, the People feel threats to those three members of the family are relevant. They have argued that to this Court.

This Court has ruled not only that threats then are relevant but threats as far back as 1989 were relevant. Fine and well.

Your Honor, I am hard-pressed to understand how other threats made to, for instance, Mr. Dacosta even closer in time to that - also in hearsay because Mr. Dacosta isn't here for the threat in

the letter - is also not relevant. I can't understand how to rebut that.

The accusation is that it was my client who made those threats, threats within that period of time, perhaps similar in form from facially similar individuals to my client, is also not relevant. I just -- threats for the prosecution are okay, but if the defendant attempts to elicit information that is similar in nature it's not okay, it's hearsay.

THE COURT: Let me ask you. You seek in the situation here, you seek to introduce statements that were initially, you claim, made by your client to the police with respect to threats.

Now, forgetting the self-serving aspect of it, whether they were uttered or not, but even if they were, they can be self-serving statements, those are rank hearsay.

Defendant cannot be compelled to testify.

On the other hand, the defense cannot use the statements of the defendant and insulate the defendant, meaning if you were putting on a case - and I'm not saying in any way you're compelled nor am I suggesting it - where the defendant were to testify and he testified to a whole series of threats and identified people, there is no way that the people could object to that obviously.

On the other hand, if the defense seeks to introduce statements made by the defendant without the defendant actually taking this stand nor subjected to any cross-examination, why wouldn't that be hearsay and what exception would allow it to be received?

MR. BRENNER: Whatever exception allowed the threatened letter to Nelson Dacosta to come into evidence.

THE COURT: Let's see, where is the written letter?

MR. BRENNER: That was now read to the jury and translated for them, to

Nelson Dacosta, care of Josephine Mendez.

It's a threat, no more, no less. He's not on the stand. It was put in. All I want to do is the exact same thing the People did.

MR. BRANCATO: Judge --

THE COURT: Is this a --

MR. BRANCATO: Judge, I have the document in original form.

THE COURT: Is that Spanish?

MR. BRANCATO: This is in Spanish. The translation was provided through the interpreter.

MR. BRENNER: Judge, the problem I'm having, the People have offered it as a false letter. They put it in and said look what Franzo did. He wrote down you stole something from me, and he's making it look like it's narcotics related, it's drug related. That's nice. It's their theory. The letter is in evidence. Why can't I argue through cross-examination its truth?

THE COURT: I have a distinction, but there's a problem in my mind. You see the

letters inherently by themselves or any other material are physical evidence and they have a different rule.

Now, from that does this mean you would argue if there's a police report, does that make it physical evidence? I think not.

MR. BRENNER: I wouldn't argue that. The distinction --

THE COURT: There is a distinction between the utterances that he makes and the physical evidence he has of letters.

MR. BRENNER: Then, your Honor, the contents of the letter should never have been read to the jury and never offered to the jury. If what we're talking about is the letter itself, the physical property of the letter itself, none of what was in the letter should have been translated, presented to the jury or has any relevance to this case. I don't think the People would buy into that. They didn't when they offered it, and they're not now. They put it in to be able to say that Franzo, what

question.

THE COURT: This is not an editorial we're running here. That's it. The objection is now sustained.

MR. BRENNER: Your Honor, while we're here, motion for a mistrial. The grounds are already articulated.

THE COURT: I don't know what those grounds are. There's no basis, and it's denied.

(Whereupon, the following takes place in open court, in the presence and hearing of the jury:)

THE COURT: You may continue, sir.

Q. Detective, on February 11, 1991 -- withdrawn.

Mr. Brancato elicited from you on February 11 Mr. Franza appeared in a lineup; is that right?

A. Yes.

Q. Caesar Rodriguez was the person who viewed the lineup?

A. Yes.

Q. And he was, in fact, the Federal Express

clerk at the office where the -- this alleged bond was tendered?

A. Yes.

Q. He was the person who received it from the sender and sent it on to Puerto Rico; is that correct?

A. That's correct.

Q. The purpose of him appearing before the lineup was to determine whether anyone within the lineup looked like the person who had done that; is that right?

A. Yes.

Q. Was Mr. Franzo identified?

A. No.

MR. BRANCATO: I object.

THE COURT: There was a question and answer. What is your objection?

MR. BRANCATO: My objection is he's asking him what someone else said, what Mr. Rodriguez said.

THE COURT: He had Rodriguez in there. The question is was he identified, was Mr. Franzo identified. I believe the answer is no.

a cunning guy.

THE COURT: This is -- once again you're telling me what Mr. Brancato is going to do. Mr. Brancato is going to tell me you're going to do.

MR. BRANCATO: I stopped doing that.

MR. BRENNER: I'm not saying what Mr. Brancato was saying. The letters themselves make reference to Nelson Dacosta himself, threats that are inferential because Nelson Dacosta himself did something to the writer of the letter.

In keeping with that, I don't know why I'm not being able to inquire along those lines. Because the People don't believe that's what the truth of the letter is? So what? The letter is in evidence.

THE COURT: We're not discussing the letter now.

MR. BRENNER: Your Honor, I tried --

THE COURT: You're analogizing the letter to this.

MR. BRENNER: I was intending to explore Nelson Dacosta here with this

detective, Nelson Bacosta's connection to narcotics, his own drug history because of that letter, because of what the People put into evidence, and the Court said I couldn't.

MR. BRANCATO: Our theory is that that letter could comprise the res gestae of this case.

Our theory is by sending the letter threatening to send something to the grandmother in Puerto Rico, that something being sent to the grandmother in Puerto Rico and proving that it came from the defendant in the case that we can prove that the defendant is the one who caused this bomb to be sent to the grandmother in Puerto Ricco.

Now, what he is attempting to introduce through this witness is put in statements made by Dominic Franza, and if Mr. Franza -- and I have absolutely no opportunity to cross-examine the maker of those statements at this point. Whether or not the defendant may probably at some

point take the stand is immaterial because at this point he's seeking to get in front of the jury what Mr. Franzo told Detective Giorgio. And I might point out that it's the People and not the defense who determines what an admission is in a case in order to present to a jury. Any self-serving declaration on the part of the defendant prior to trial if -- any self-serving declaration based -- made by the defendant, it is up to the People's election as to whether or not they had wished to place it before the jury, and we do not wish to place that before the jury.

If the defendant wishes to testify to it, fine; but at this point, the defendant --

THE COURT: Well, there's no question. It's not something you're conceding or being gracious about. If the defendant wants to testify, that's his prerogative and he can testify to anything.

MR. BRANCATO: I would welcome his testimony.

THE COURT: If you welcome it or not is not germane to our discussion. The fact is I already indicated to Mr. Brenner that the defense has that right. It's their choice. The question now before the Court is can the defense get this in, these statements in --

MR. BRANCATO: This statement --

THE COURT: -- without testifying. Now, self-serving as it is --

MR. BRANCATO: I know of no exception to the hearsay rule that enables the defense in this case --

THE COURT: Just a minute. Let's not -- see, I don't like to go off.

Mr. Brenner, if I understand correctly, is not arguing on the basis of a hearsay exception or some special rule of evidence. Merely that inasmuch as the Boccato letter came in, if that letter was admitted, then the interrogation of this detective with respect to statements made to him by Mr. Franzo should be admitted on equal footing.

MR. BRANCATO: No, it shouldn't be.

THE COURT: Is that the -- did I say basically what you're arguing?

MR. BRENNER: That's right. This detective can testify --

THE COURT: I don't have to use your precise words, but I just wanted to incorporate. He's not arguing for a hearsay exception.

MR. BRANCATO: Our theory is the defendant is the cause of this letter going to Josephine Mendez' house and that in light of the evidence that I told you before, this forms part of the crime and the People's proof of that crime.

MR. BRENNER: And, Judge, but the letter doesn't say: I, Dominic Franzo, am threatening to kill you and your family.

The letter which says -- I think the term res gestae is in evidence, has really been discarded. So I'm not quite clear on what --

THE COURT: Let's not go off on these tangents.

MR. BRENNER: In any event, this letter doesn't say Dominic Franza did this and did the shooting and did the various pipe bombs. It says somebody else or at least purports to be somebody else who has connection to Dacosta and who was victimized by Dacosta, has a grudge against him.

The People put this into evidence. They don't buy what it says. That's their prerogative.

Now, why I can't explore whether there's some valid explanation to such a letter being tendered to Nelson Dacosta that is consistent with my client's innocence in this circumstantial case in front of this jury, I don't understand.

This letter appears to be from someone who Nelson Dacosta owes something to.

Now, why wouldn't it be relevant that Nelson Dacosta might well owe something because he used drugs and because he bought drugs on the street and checked into a rehab center, etc., ad nauseam? I don't

know why that wouldn't be relevant --

THE COURT: Now, you're getting into something else again.

MR. BRENNER: You curtailed me on that.

THE COURT: You see, the character, the character of Nelson Dacosta -- this letter, this letter nor -- this letter nor the facts behind it nor is there any charges in this indictment that your client attempted either to assault or to murder Mr. Dacosta. There is no charge. There's no charge even with respect to that pipe bomb. Nothing with Dacosta insofar as perpetrating a criminal act.

MR. BRENNER: Correct.

THE COURT: With respect, however, to the case of Myra Franza and Josephine Mendez, the People seek to introduce whatever they believe they have, circumstantially as it may be, in an effort to demonstrate this link in this chain.

MR. BRENNER: Absolutely.

THE COURT: Now, what you're trying to

do is to demonstrate through the complaints of Franzo to the police that there may be another theory, another theory, that there was somebody else who was motivated to do harm either to Bucosta or anybody else here.

There's a wide gulf of a difference because you are entitled to prove any theory you wish.

However, you're not going to be able to prove it through the People's case or by injecting or introducing things which are not before the Court.

Now, to have Franzo testify in effect without testifying, that I will not allow. That's what it basically boils down to. It has little probative value, very little probative value.

Here's a man that complained other people were coming after him and, therefore, those are the actual perpetrators because Mr. Franzo himself complained to the police.

Now, that takes you back to the letter

of Bocosta. With that, there's another distinction there because Bocosta is not claimed to be one of the victims here.

MR. BRENNER: Judge, I said that from the beginning of the trial. You told me - and correct me if I'm wrong - that this all -- we couldn't separate out anything here.

THE COURT: Yes, but I do separate the distinction as to victims.

Now, if you recall, we had another pre-trial, one of these absent the jury, discussions on the question of the -- I think it was before the jury selection, on this question of the pipe bomb left at Bocosta's home, and the People represented they have no intention of introducing any such. It was the defense that brought that in about Bocosta.

MR. BRENNER: Correct.

THE COURT: Am I correct?

MR. BRENNER: Correct. I didn't hear any objections to that, by the way.

THE COURT: They don't have to object.

MR. BRENNER: That's right, they don't have to object and they didn't. So now --

THE COURT: They cannot be faulted for not objecting.

MR. BRENNER: So now, your Honor, Nelson Bacosta as an uncharged victim is in front of the jury.

THE COURT: No.

MR. BRENNER: Yes.

MR. BRANCATO: Judge, my contention is at this point he put that pipe bomb before the jury, the one that was found at Mr. Bacosta's apartment and at this point we can, if we so desire, show what differences or similarities there are to other evidence recovered from the defendant's apartment.

MR. BRENNER: Unquestionably --

MR. BRANCATO: But up to the point that counsel --

THE COURT: I'm -- I cannot hold the People for charging an uncharged crime because the defense sought to introduce it knowing full well the prosecution

represented they would not introduce it.

MR. BRENNER: As a matter of fact, Mr. Brancato wanted me to tell you ahead of him whether I was going to go into it.

THE COURT: And you said you need not telegraph it.

MR. BRENNER: The People put this in evidence. If I cannot meet the thrust of this on the People's own case, the fact that it's his theory in and of itself does not preclude questioning during People's witnesses.

THE COURT: You see, in questioning the People's witnesses -- as I said, you can always put questions.

However, I'm not going to allow you to use People's witnesses for the -- as a basis to have the defendant testify not being subject to cross.

MR. BRENNER: Judge, but I'm not talking about that now. I'm not talking about the complaints that Mr. Franzo may have made or what Detective Giorgio did about it. I am talking about proving to

the jury through the testimony of detective --

THE COURT: I think the response has to be very simple. This letter, this letter, among other things when we finalize this, when the jury is charged they're going to have to understand that certain evidence was admitted only for certain purposes. It's not just an opened door. We may very well fashion the charge that with respect to certain matters that were allowed, that were not allowed, once again to prove, disprove as to the guilt or nonguilt or the involvement of but for other reasons.

MR. BRENNER: Judge, this isn't admitted for the purposes of guilt or non-guilt.

MR. BRANCATO: It is completely irrelevant and it's immaterial to the issues in this case.

THE COURT: No --

MR. BRENNER: What -- if it's not admitted on the question --

THE COURT: -- I don't agree with you. My recollection of the letter is such that it contains material which the People seek to address to the jury by saying this -- this together with "X", "Y" and "Z" put together, the totality you're going to get is the picture of a guilty defendant.

MR. BRENNER: That's right, and I am entitled to meet that.

THE COURT: In and of itself, in the context that it's being admitted, doesn't necessarily mean the letter itself - hold it off for a moment -- is not being admitted for that, for the -- to determine guilt or non-guilt. The jury has to consider all the evidence.

MR. BRENNER: Judge, I'm sorry?

THE COURT: The jury has to consider all the evidence.

MR. BRENNER: The definition of relevancy, as I understand it, is that it makes a material fact in issue more or less likely. Correct? The material fact in issue here --

THE COURT: But you see, the simplistic definition of relevancy does not, does not encompass every conceivable situation. It encompasses very few, as a matter of fact. In broad terms, yes. But not in specific terms.

Did you want to say something, Mr. Brancato? I don't want to extend this any longer.

MR. BRENNER: Judge, I don't understand the ruling of the Court. The Court is -- in effect, the prosecutor gets the benefit of their own bargain. They throw this out as a red herring and say this is baloney.

THE COURT: All those statements and characterizations and conclusions are yours.

Did you want to add anything, Mr. Brancato?

MR. BRANCATO: Only I have my objection.

MR. BRENNER: To what?

THE COURT: To this line of

questioning to the statements made to Detective Giorgio involving Mr. Franzo.

I take it that's your objection?

MR. BRANCATO: Yes.

THE COURT: I just want to make certain because at this point we can lose sight --

MR. BRENNER: And, Judge, questioning about this, about Giorgio's knowledge of Nelson Dacosta or who he might know or who he was with or who --

MR. BRANCATO: All of this calls for hearsay on the part of Detective Giorgio as to --

THE COURT: Supposing Giorgio made an independent investigation in learning this about Dacosta. Why could he not testify?

MR. BRANCATO: In what regard, Judge, if he made an independent investigation as to where he lived, as to what his relationship was?

THE COURT: No, that Mr. Dacosta -- he learned that Mr. Dacosta was arrested on a previous occasion or he was --

MR. BRANCATO: At this point, it is irrelevant whether Mr. Dacosta was arrested on 40 previous occasions. There's no relevancy in asking about Nelson Dacosta's record at this point.

THE COURT: You have certain elements here. It is the defense theory that people who are interested in the welfare or unwelfare of Mr. Dacosta, out to get Mr. Dacosta may have perpetrated these crimes, some or all of these crimes.

MR. BRANCATO: I believe I understand that.

THE COURT: That's the first basis.

Now, the prosecution has introduced a letter which Mr. Dacosta claims to have received --

MR. BRANCATO: No, Mr. Dacosta -- the testimony is that the mother received it, that the mother opened the envelope and that the mother turned it over.

THE COURT: It's addressed to Mr. Dacosta.

MR. BRANCATO: Fine, along with the

other two.

THE COURT: But the information in there refers to Mr. Bacosto.

MR. BRANCATO: That's correct.

THE COURT: Now, what's to prevent the defense, on the cross of the People's case, of going into the background of Mr. Bacosto?

MR. BRANCATO: Your Honor, in presenting background information, whether or not someone had a previous conviction, whether or not someone may have used or may not have used drugs --

THE COURT: Normally, this is all collateral, but in this case while Bacosto may be collateral, still it is part of the People's case to the extent, to the extent that it's an element, and the defense is directed towards that very one element.

MR. BRENNER: Let me make a further --

MR. BRANCATO: I think he was asking me a question.

MR. BRENNER: Well, if I can add another he'll want to respond to.

Detective La Costa testified that nine days before this she took a complaint from Nelson Dacosta threatening his life. I want to ask Detective Giorgio about whether he was aware of that also because, Judge, what I intend to suggest to Detective Giorgio there are six violent, aggressive events over a six, seven-month period. He's the investigating detective. Why can't I bring that up to him? I'm not making it up. They may cast a different interpretation on it, but the fact of the matter is this is all testimony.

THE COURT: Mr. Brancato, if Detective Giorgio did not personally conduct any investigation with respect to Dacosta, what prevents the defense from asking if he is aware of "A", "B" and "C"? Not his reputation that he's involved in narcotics, but the fact is that he had made a complaint about being threatened.

MR. BRANCATO: Because right now you're asking this detective to testify to something that's already been testified to.

THE COURT: How has it been testified to?

MR. BRANCATO: He elicited from Aponte that she took a complaint from Bacosta.

THE COURT: There's nothing wrong. You can ask him based on that that he conducted a further investigation with respect to Bacosta.

"A", was he aware of it?

"b", if he said yes, did he -- did he then seek any further investigation with respect to that?

He may not be aware of it. Or if he was aware of it, when did he become aware of it.

What else would you seek to ask of him because I'd rather do this now. I'd rather do it now rather than five interruptions during the cross.

MR. BRENNER: Just whether he had any information that Nelson Bacosta was involved in drug trafficking.

THE COURT: That question I would find improper.

2 MR. BRENNER: Judge, the predicate
3 question being did he do any independent
4 investigation vis-a-vis Nelson Bacosta.
5 If he says yes, then I suppose the
6 open-ended, however dangerous, question is
7 I can ask him what he had learned. I would
8 rather lead him what he had learned.
9 That's a good-faith question.
10 THE COURT: How would he learn?
11 MR. BRENNER: Judge, when the pipe
12 bomb gets to his house, the detectives go
13 find him, he's not there. He's in a drug
14 rehab.
15 THE COURT: That doesn't make him
16 involved in drug trafficking. There's a
17 big difference.
18 Now, we were talking about, as I
19 recall, the questions that you seek to pose
20 to Detective Giorgio with respect to
21 Mr. Bacosta.
22 Now, the first instance, if you were
23 asking did he conduct an independent
24 investigation.
25 MR. BRENNER: If he says no, the end

of it.

THE COURT: Otherwise, we'd have to get double, triple, down the line, hearsay.

MR. BRENNER: Judge, since you seem intent upon avoiding more side bars, and I can appreciate that, when Mr. Dacosta is in the 34th Precinct at one point he says: "I've had enough of this. If you're going to arrest me, arrest me."

The People didn't put that in. I want to.

MR. BRANCATO: I'm sorry, Mr. Dacosta?

THE COURT: Mr. Franza.

MR. BRENNER: Mr. Franza. "If you're going to go arrest me, arrest me."

I'm offering it for Mr. Franza's state of mind at the time. That's my proffer.

MR. BRANCATO: What day was this?

MR. BRENNER: February 11.

THE COURT: This is the date that he's actually arrested, I believe.

MR. BRANCATO: I've said before that we're not offering any statements made by the defendant on February 11, and that's a

statement made by him on the 11th. We do not seek to introduce it as an admission, and we say that it's hearsay.

MR. BRENNER: Except that I'm not offering it for its truth.

THE COURT: That catch-all in this case.

MR. BRENNER: No, I'm not, Judge.

THE COURT: I understand that.

MR. BRENNER: It's not a catch-all. Literally, I will not be offering it.

THE COURT: Obviously if you have something, either arrest me or leave me so or words to that effect.

MR. BRENNER: Just offering it for his state of mind.

MR. BRANCATO: Judge, I'm still not quite certain --

THE COURT: I'm going to allow him to ask Detective Giorgio did he conduct an inuependent investigation with respect to Mr. Bacosta.

MR. BRANCATO: That question is so opened-ended that it leaves for too much

speculation. The question on cross should be more specific than that.

THE COURT: That's just the point. Mr. Brenner would actually prefer to ask specific questions.

MR. BRANCATO: Perhaps a more specific question is better asked now and the ruling gets made now because it seems to me by asking a detective did you conduct an investigation on him and him saying yes or no, if he says no to that --

THE COURT: That's the end of the conversation.

MR. BRANCATO: It leads to too much speculation as to what the investigation entails. It should be more tied down than just saying did you conduct the investigation.

MR. BRENNER: I will ask him did he do any additional vision investigation as to whether anyone had any reason to do any harm, other than Mr. Franza, to Mr. Lacosta. That should be tailored enough. I'll accept his answer.

THE COURT: See, the difficulty with all this is the minute you allow question "A", you're going to get to "b" and "b" will go to "C" and eventually we'll come to a point where there are going to be all kinds of objections and someone is going to say you, Judge, you allowed "A" "B" and "C", now can you curtail it at "D"?

MR. BRANCATO: Judge, this man can only testify to what he saw or what the defendant told him in the way of an admission or what work he did, but for him to say --

THE COURT: He can testify if he conducted an investigation with respect to Mr. DaCosta.

MR. BRANCATO: Again, I object to that question because it is too broad a question.

THE COURT: Would you prefer to move --

MR. BRANCATO: But asking him whether he's aware that someone might have the -- have an axe to do harm to Mr. --

THE COURT: That's not the way it was going to be phrased at all.

MR. BRANCATO: What was the one that you offered -- you said something just a moment ago that he can ask him whether or not he's --

MR. BRENNER: Mr. Brancato's complaint was the question was too broad. I tailored it along the following lines: Did he do any independent investigation as to whether anyone other than Mr. Franzo had any reason to do harm to Nelson Bocoste.

That's what the question was going to be.

MR. BRANCATO: That's correct, Judge. I would object to that question, and I would object to it because it calls for hearsay on the part of the officer as to what someone may have told him, be it the defendant.

THE COURT: It's prefaced did he make or conduct an investigation. Why is that hearsay?

MR. BRANCATO: Your Honor --

THE COURT: Whether he conducted an investigation with respect to whether anyone else would do or wanted to do harm to Mr. Bacosto.

MR. BRANCATO: At which point? Are we talking February, are we talking July or in August?

THE COURT: We're talking at any time between maybe June or -- of 1990, right through --

MR. BRENNER: July 8, actually.

MR. BRANCATO: My complaint. It would bring out hearsay.

THE COURT: You keep saying that but there's no basis to your statement because he's going to ask him specifically his knowledge, not whether he learned of it from someone else.

MR. BRANCATO: Judge, his knowledge is predicated upon what people tell him.

THE COURT: All right.

MR. BRANCATO: That's what his knowledge is.

THE COURT: Fine. Then no officers

should ever be able to testify except to that which they observe in the street or --

MR. BRANCATO: I am inclined to agree with you or whether or not they're offering admissions by a defendant, but for an officer --

THE COURT: This is not an admission by the defendant.

MR. BRANCATO: -- for an officer to get on the stand and say I have a DD-5 that was prepared on such and such a day by Monterroy who spoke to Mrs. Mendez, my --

THE COURT: That I will sustain the objection to.

MR. BRANCATO: You didn't before. You didn't before.

THE COURT: I what?

MR. BRANCATO: You did not before. When I said at the side bar off the record that I didn't want him testifying to what Mrs. Mendez told Detective Monterroy, you didn't before.

MR. BRENNER: The Court says Mrs. Mendez had already testified to that,

and I was limited to her testimony.

THE COURT: Just to the areas within the window of her testimony.

MR. BRENNER: It was so limited.

MR. BRANCATO: Judge, according to Hoyle then, if he's testifying to what someone else told him he cannot testify to that. He cannot testify to what she told Monterrey.

THE COURT: I'm not asking -- I'm not allowing him to go into what other people told him.

First off, let's start this way. If his answer is no to the initial question, that concludes that line.

Is that correct, Mr. Brenner?

MR. BRENNER: That's correct.

MR. BRANCATO: And I understand, since you're going to call out the jury now, that you're not going to allow the defense the opportunity to ask this witness whether or not Mr. Franza made any complaints about two men coming after him?

THE COURT: That's correct. That's

out. If you listen to what we've just concluded, that's what we agreed to. Has nothing to do with Mr. Franzo. This is on the line of Ducosta.

Bring them out.

(Jury enters the courtroom)

THE COURT: You may continue.

Mr. Brenner.

MR. BRENNER: Thank you, your Honor.

CROSS-EXAMINATION: (con't.)

BY MR. BRENNER:

Q. Detective Giorgio, during the course of your investigation, did you review a report of July 8, 1990, nine days before the alleged shooting of this incident, in which Nelson Ducosta reported that he had been called and threatened over the telephone?

MR. BRANCATO: I object.

THE COURT: That wasn't the understanding.

MR. BRENNER: Yes, your Honor, it was.

THE COURT: Objection is overruled.

The witness may answer.

A. Would you repeat the question, please.

Q. During the course of your investigation, did you become aware that in July 8, 1990, Nelson Dacosta made a report to Police Officer Aponte of someone having called his home -- having called his home and threatened his life?

A. No.

Q. Now, on February 10 --

THE COURT: Year?

Q. -- 1991, you learned of a pipe bomb having been sent to Puerto Rico?

A. Yes.

Q. That was to the relatives of Myra Franzo?

A. Yes.

Q. Josephine Mendez?

A. Yes.

Q. And Nelson Dacosta?

A. Yes.

Q. And in February, first week of February of 1991, threatening letters were sent to Josephine Mendez, Myra Franzo and Nelson Dacosta?

A. Yes.

Q. On July 16, 1990, a person or persons came to the Mendez house posing as police officers looking for Nelson Dacosta?

A. That's what I had learned later on, yes.

Q. On August 11, 1990, a person unknown left a pipe bomb at the apartment of Nelson Bacosta?

A. Yes.

Q. Detective, did you have occasion to conduct an investigation regarding whether anyone other than Dominic Franzo had reason to do harm to Nelson Bacosta?

A. Yes.

Q. Now, on February 11, 1991, you placed Dominic Franzo under arrest?

A. Well, he was placed under arrest. I specifically was not the arresting officer.

THE COURT: You were not the arresting officer?

THE WITNESS: That's correct.

Q. Immediately prior thereto, he had been in the 94th Precinct?

A. Yes.

Q. For a number of hours?

A. Prior to his arrest, no.

Q. How long?

A. I would say he was actually told he was under arrest within 30 minutes that he was there.

half hour.

Q. 30 minutes of his arrival?

A. Of his arrival.

Q. And he was accompanied to the 34th Precinct by Detectives Herbert and Ramond; is that right?

A. Yes.

Q. And they were investigating the pipe bomb of August 11 that Nelson Dacosta - - for want of a better word, the Nelson Dacosta pipe bomb?

A. Yes.

Q. And he was with them for purposes of their investigation?

A. Yes.

Q. Isn't it a fact that immediately prior to his arrest Mr. Franza said: I've had enough of this. If you want to arrest me, arrest me or let me go?

A. I have no such recollection of him saying that.

Q. No?

A. (Nods).

Q. Were you in his presence at the time that Detective Ortiz placed him under arrest?

A. I believe we were together. We were within the 34th Squad, yes. I may have been the one that

told him he was under arrest.

Q. And you have no recollection of him having said that immediately prior thereto?

A. No.

Q. Now --

A. He may have asked if he was going to be arrested or if he was under arrest or words to that effect.

Q. Actually the question that I asked you was fairly specific, and I think your answer was you have no recollection of him having said if you -- I've had enough of this. If you're going to arrest me, arrest me or let me go.

A. No, I don't remember those words specifically.

Q. Now, Mr. Franzo had been in the company of two police detectives prior to that and then was in the 54th Precinct; is that right?

A. Yes.

Q. And this -- this piece of paper was in his pocket; is that right?

A. In his wallet.

Q. With his phone book?

A. The piece of paper with the two notations

regarding Puerto Rico and the numbers, yes.

Q. He had his phone book, piece of paper and wallet with other cards and identifying papers?

A. Yes.

Q. Which he had on him, in his physical possession at the time that he was with Detectives Ramond and Herbert?

A. Yes.

Q. And then the time he was at the 34th Precinct?

A. I can assume they were on his person, yes.

Q. Detective, did you at any time in the course of your dealings with Mr. Franza between July 17th of 1990 and Februcry 11, 1991 tell him that he was a suspect? Did you ever use those words?

A. Did I use those words, no.

Q. Did you tell him -- did you call him Nick, by the way?

A. I may have at times.

Q. Did you say: Nick, we think you're involved in this?

A. No, I didn't say that.

Q. Did you, in fact, lead him to believe that he was aiding in your investigation?

A. Initially, yes.

Q. You were -- as a matter of fact, he was helping you investigate initially?

MR. BRANCATO: I object to that.

THE COURT: Sustained.

Q. You received a report from the document examiner some time in September; right?

A. You're talking about the first handwriting samples?

Q. Yes.

A. Subsequent to my delivering them, yes. I said within two weeks, I believe.

Q. Do you agree the events of July 17, 1990, were violent?

A. I would, yes.

Q. And that the person who was responsible for them was a danger?

A. Yes.

Q. You mentioned something about an order of protection? On direct examination I believe you mentioned it.

A. I may have, yes. There was an order of protection.

Q. And you delivered it to Mr. Franzo?

A. I didn't deliver it to him. I mean --

Q. You gave it to him?

A. Yes.

Q. Made sure he got it?

A. Yes.

Q. The mandate was for Mr. Franzo to stay away from Mrs. Franzo?

A. Right.

Q. Mrs. Franzo was, during the course of this investigation, back to work at the Telephone Company -- at the post office? I'm sorry.

A. Yes.

Q. From September of 1990 to February of 1991, Mr. Franzo remained at liberty; is that right?

A. Yes.

Q. He could come and go as he pleased?

A. Yes.

Q. Mr. Franzo was, as you ascertained, a licensed firearm dealer?

A. No. I believe he had application in. He was awaiting approval to become a licensed firearm dealer.

Q. Detective, isn't it a fact that Mr. Franzo was licensed by the Bureau of Alcohol, Tobacco and

Firearms?

A. I have no such --

THE COURT: As what?

MR. BRENNER: As a dealer.

A.(con't.) I believe he was applying to become that. If he was, I have no such knowledge.

Q. Do you know for a fact whether Mr. Franzo had access to firearms? Only if you know.

A. A qualified yes. I know he had weapons, but they were not in his possession.

Q. And you know that he took target practice at the Olinville Range?

A. Yes.

Q. And after you received that report in September, you did not arrest him?

A. I did not.

Q. Or in October?

A. No.

Q. Or in November?

A. No.

Q. Or in December?

A. No.

Q. Or in January?

A. No.

MR. BRENNER: Your Honor, I have nothing further except may we approach?

(Whereupon, an off-the-record discussion was held at the bench.)

THE COURT: Members of the jury, at this time there will be a short recess.

Do not discuss this case among yourselves.

Take the jury out.

(Jury leaves the courtroom)

THE COURT: Now, on the record. Let's get Giorgio back in here.

(Det. Giorgio resumes witness stand)

THE COURT: We're on the record.

MR. BRENNER: May I inquire?

THE COURT: Yes.

(Whereupon, the following cross-examination by Mr. Brenner of Det. Giorgio is held out of the presence and hearing of the jury:)

Q. Detective, you stated that you had conducted an independent investigation regarding whether someone other than Dominic Frunzo had reason to do harm to Nelson Dacosta.

A. I said --

Q. You said you did.

A. I did.

Q. When was it?

A. During the course of this investigation.

Q. From when did it begin?

A. From the day I first spoke to Mr. Dacosta.

Q. Which is July 17, 1990?

A. Yes.

Q. All the way up to February of 1991?

A. No, it was not continuous.

Q. Did you ascertain at that time or at any point during your investigation that Mr. Dacosta was a drug user?

MR. BRANCATO: I object to this.

MR. BRENNER: It's outside the presence of the jury. That's the point of it.

THE COURT: No, no, I'm not allowing it. The objection is sustained.

Q. What did your investigation consist of?

A. Speaking to Mr. Dacosta at length and to members of his family.

Q. Did you speak to anyone else?

A. I think I contacted narcotics people, made a phone call regarding Nelson Bacosta.

Q. Why?

MR. BRANCATO: I object.

THE COURT: Overruled.

A. To see if there was any sort of a drug group or cartel or anything he was involved in or investigation involving him involved in any major drug transactions or things of that nature.

Q. What made you choose that manner of investigation?

A. Mr. Franzo had indicated at one point that it was his impression or his feeling, his belief that the people didn't go to shoot Mrs. Benoez and his wife but, in fact, went there to shoot Mr. Bacosta.

Q. When did Mr. Franzo communicate that to you?

A. Early on in the investigation at one point. I don't recall specifically -- no, I don't -- let me just look.

(Pause)

A.(Con't.) No, I didn't write it down, but I know he had mentioned that, and that was one of the reasons I spoke to the family at length and I spoke

to Mr. Dacosta at length involving any drug involvement he may have had or anybody looking to harm him.

Q. And the results of those interviews was negative?

A. Yes, sir. Negative with regard to him being involved in anything that might cause someone to want to kill him.

MR. BRENNER: I have nothing further, Judge.

REDIRECT EXAMINATION:

BY MR. BRANCATO:

Q. What was your conclusion after conducting this investigation whether anyone other than the defendant would want to do harm to him?

MR. BRENNER: I'm going to object to that. I didn't ask him for any conclusions.

THE COURT: He's your witness, but I'll allow him to redirect.

MR. BRENNER: I don't object to the redirect. I object to the form of the question.

THE COURT: I understand.

Q. What was your conclusion after conducting this investigation as to whether anyone other than the defendant had reason to harm Mr. Dacosta?

A. My conclusion was that I found no evidence, either direct or indirect, that anyone was looking to kill Mr. Dacosta.

THE COURT: All right. We're off the record now.

(Whereupon, an off-the-record discussion is held.)

THE COURT: Bring in the jury.

(Jury enters the courtroom)

(Whereupon, the following is held in the presence and hearing of the jury:)

COURT CLERK: Case on trial. The defendant, his counsel, the assistant district attorney and sworn jurors are present, your Honor.

THE COURT: Mr. Brenner.

MR. BRENNER: I have no further questions, your Honor.

THE COURT: All right. Mr. Brancato.

MR. BRANCATO: I have some.

REDIRECT EXAMINATION:

BY MR. BRANCATO:

Q. Detective Giorgio, the first time that you asked the defendant for handwriting samples on August 24, what was his response to you the first time?

A. He said he would give me handwriting samples.

Q. Now, counsel asked you whether or not during the course of the investigation you might videotape conversations with a defendant. When are those normally done, videotapes?

A. After there's been an arrest and an assistant district attorney is contacted and the defendant states he's willing to give such a statement, at that time the statement is videotaped.

Q. Now, on the first two statements that you took from the defendant, was he under arrest on July 17, 1990?

A. No.

Q. What about the second one on July 23, 1990?

A. No.

Q. Did there come a point during the course of your investigation that you attempted to learn whether FTD has an R & R Florist?

A. I did.

Q. And when was that?

A. I believe it was the day after the incident. On the 16th, the day after. I'm sorry, I'm sorry. Yes.

Q. And who did you speak with?

A. I contacted customer services, 1-800-621-2556, a Monica Schmelter. She was reached after I called the first number at 1-800-521-4366. And after explaining all the circumstances regarding the information on the paper, she checked and said that she had found no listing of any R & R Florist in any of their records and, as I recall, that was state-wide and possibly also nation-wide.

Q. Did you check and see if there was an R & R Florist in New York City?

A. Yes.

Q. What did you learn?

A. There was not.

Q. Now, counsel asked you concerning the box and the ribbon. You've had an opportunity to inspect this box, am I correct?

A. Yes.

Q. Are there any markings on that box? By

"markings", I mean are there any letter codes or numbers on that box?

A. None.

Q. Are there -- on the red ribbon that you have, are there any letter markings on that ribbon or any names on that ribbon?

A. There are not.

Q. Did you speak with any florist concerning boxes like that?

A. Yes, the florist I indicated earlier which was located I believe on White Plains Road. I have to find the actual florist. I may have it listed or location. Went in and asked to look at similar rose boxes, and the person indicated that --

MR. BRENNER: Objection.

A.(con't.) I don't have it listed, but it was the same day that I had visited the Pearl Pharmacy, the pharmacy that Mr. Franzo had said he had gone to purchase the Golden Trojans.

Q. After speaking with the florist, did you have in your possession any information to learn where that box or that ribbon may have come from?

A. None.

MR. BRANCATO: I have no further

2 questions.
3 THE COURT: Any re?
4 MR. BRENNER: No, your Honor.
5 THE COURT: You are excused.
6 THE WITNESS: Thank you, your Honor.
7 (Witness leaves courtroom)
8 THE COURT: Ladies and gentlemen of
9 the jury, at this time we will recess.
10 Do not discuss this case among
11 yourselves.
12 Do not reach any conclusions.
13 Do not allow any third party to
14 discuss the case with you.
15 We'll recess now until tomorrow
16 morning at 10:30. Have a very good night.
17 Take the jury out.
18 (Whereupon, the jury leaves the
19 courtroom.)
20 THE COURT: Anything else, gentlemen?
21 MR. BRENNER: Your Honor, I have a
22 calendar appearance in another part
23 tomorrow.
24 THE COURT: That's not the one in
25 Poughkeepsie?

MR. BRENNER: No, here.

THE COURT: You don't know what time it is?

MR. BRENNER: 9:30.

THE COURT: Let me ask you this, Mr. Brancato, just so I can keep ahead of this. Other than this Lamboy, who's on top tomorrow?

MR. BRANCATO: Detective Behan will also testify tomorrow as well as people from -- I have Ramona and also and Herbert on for tomorrow. They forwarded the pipe bomb that was found behind the defendant's door to ATF, as well as --

THE COURT: So their testimony will be rather short?

MR. BRANCATO: They also assisted in the search.

THE COURT: But your first witness tomorrow, we'll have the interpreter here for Miss Lamboy?

MR. BRANCATO: Right.

MR. BRENNER: Your Honor, just as a matter of caution, Detective Ramona and

Herbert took a statement from Mr. Franza.

THE COURT: Is there such a statement?

MR. BRENNER: There is. There's a DD-5? There's no notice. There's never been a notice statement.

MR. BRANCATO: Maybe if you pull out the one you're referring to, we can address that now.

(Whereupon, an off-the-record discussion was held at the bench.)

(Whereupon, case is adjourned to February 25, 1992.)

SUPREME COURT OF THE STATE OF NEW YORK:
COUNTY OF NEW YORK: CRIMINAL TERM: PART 52

THE PEOPLE OF THE STATE OF NEW YORK	INDICTMENT NO: 11987-91
-against-	TRIAL
DOMINIC FRANZA, Defendant.	

111 Centre Street
New York, N.Y. 10013
February 25, 1992

B E F O R E:

HONORABLE PAUL BOOKSON, J.S.C.
and a Jury.

A P P E A R A N C E S:

For the People: ROBERT M. MORGENTHAU, ESQ.,
District Attorney, New York County
One Hogan Place
New York, New York 10013
BY: JOHN BRANCATO, ESQ.,
GREGORY SHEINDLIN, ESQ.
Assistant District Attorneys

For the Defendant: ALLAN BRENNER, ESQ.
250 Madison Avenue
New York, NY 10017

ALEXANDER CUBAN
Official Court Interpreter

ANGELA LANT,
Senior Court Reporter

MR. BRENNER: Your Honor, in preparation for cross-examination of Agent Behan --

THE COURT: Who has not testified yet.

MR. BRENNER: That's correct.

THE COURT: Yes. Go ahead.

MR. BRENNER: At the time on February 13, 1991, subsequent to the execution of the first search warrant, there was a consent search of the basement area of the Guzman -- of the house that Mr. Franza was a tenant as well as exemplars taken from two typewriters belonging, I believe, to the landlord, Mr. and Mrs. Guzman.

I have a notation of that. I assume that the typewritten notes were tested against the exemplars taken from the typewriter and the two were compared. I don't have any report of that. I don't know what the results were.

THE COURT: Mr. Brancato?

MR. BRANCATO: I can't answer that question right now, Judge.

MR. BRENNER: Well, whether Mr. Brancato can answer it or not, since many articles were taken from the control and domain of the Guzman's and I assume are going to be attributed to

2 Mr. Franzo, tools --

3 THE COURT: Make no assumptions. But in any
4 event, the first witness is not Agent Behan.

5 MR. BRENNER: That's not my point. If these
6 typewriters were tested on a theory that
7 Mr. Franzo had access to them and were proven not
8 to have produced the writings, that is at least
9 favorable to the defense.

10 THE COURT: You see, it's premature only in
11 the sense -- I don't know if Behan is here yet?

12 MR. BRANCATO: He's not.

13 THE COURT: When he gets here, before we go
14 to the direct, we'll have Mr. Brancato find out
15 what the status of that is.

16 MR. BRENNER: Fine.

17 In addition, I don't know whether any
18 handwriting analysis was undertaken by Alcohol,
19 Tobacco and Firearms. I know they seized a large
20 amount of Mr. Franzo's documents for that purpose.
21 I know that some testing was done --

22 THE COURT: These are now not samples that
23 Mr. Franzo actually supplied at their request?

24 MR. BRENNER: That's correct. These are
25 items that were seized during the search warrant.

THE COURT: The question is simply do we know or do you know?

MR. BRANCATO: We know.

THE COURT: Were there nonhandwriting comparisons made of the materials seized?

MR. BRANCATO: The only nonhandwriting comparisons in this case were done by Detective Bresin.

MR. BRENNER: That's not accurate. The Federal Express way bill, air bill bearing the name Julio Ortiz and another document bearing that signature were sent down to Maryland to the Question Document Examiner employed by the Bureau who compared the two and found that they were done by the same person.

Now, that was not done by the New York City Police Department. My question is having done that, whether they did anything else.

MR. BRANCATO: Not that I'm aware of.

THE COURT: Let's get underway.

MR. BRENNER: Lastly, Judge, fingerprints.

Detective Giorgio made reference to latents that were lifted or not lifted. I have no fingerprint examination results except for those

furnished by the Bureau of Alcohol, Tobacco and Firearms. I assume that reports exist.

THE COURT: At least -- again, I don't like to speculate, but my recollection or at least my impression was there were no prints taken which were identifiable prints.

MR. BRANCATO: That's correct.

MR. BRENNER: Your Honor, there was a latent lifted from the front door of the apartment --

MR. BRANCATO: That --

MR. BRENNER: -- positive for a latent. I don't know what happened to that.

THE COURT: Not only was it lifted, the question is were they identifiable. Two prong -- you may lift a print, but it may mean nothing. Then you may not be able to lift a print.

MR. BRENNER: Since that all would have been hearsay, I don't think any witness has testified to that. Whether there was an identifiable print found by latent or not found by latent would have been hearsay. I don't think anybody has testified to that in this case. I assume there is a report so that if I wish to call that person, I could. I don't know who it is because I've never seen the

report.

THE COURT: Is there a report, a rendered report, any of the agencies involved with respect to prints?

MR. BRANCATO: There are some with respect to prints that are in files, Benan's file.

MR. BRENNER: The Federal, this I have.

THE COURT: Anyone else?

MR. BRANCATO: I believe there was, and over the lunch hour I will check.

THE COURT: Okay.

MR. BRENNER: That's all, your Honor.

THE COURT: All right, bring in the panel.

COURT OFFICER: Jurors are entering.

(Jury enters the courtroom)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and all sworn jurors are present, your Honor.

THE COURT: Mr. Sheinolin, call your next witness.

MR. BRANCATO: The People call Evelyn Figueroa Lunboy.

THE COURT: Once again, the Court was not

informed why, but we were delayed because two jurors were unable to be here at the assigned time.

THE COURT: Off the record.

(Off-the-record discussion)

THE COURT: I want the record to reflect that the official court interpreter is present.

Give your name.

THE INTERPRETER: Alexander Cuban, Supreme Court interpreter.

E V E L Y N F I G U E R O A L A M B O Y, called by and on behalf of the People, having been first duly sworn, testified through the official court interpreter as follows:

COURT OFFICER: For the record, please state your name, spelling your last name and your county of residence.

THE WITNESS: My name is Evelyn Figueroa Lamboy. I live in Paseo, Aguila. 2629 Levittown, Puerto Rico.

MR. SHEINDLIN: May I inquire, Judge?

THE COURT: Yes, Mr. Sheindlin.

DIRECT EXAMINATION:

BY MR. SHEINDLIN:

Q. Mrs. Lamboy, do you speak English?

A. Very little.

Q. Where were you born?

A. I was born in Aguita, Puerto Rico.

Q. Where do you currently live?

A. I live in Paseo, Aguila, 2629 Levittown, Puerto Rico.

Q. And you lived in Puerto Rico your whole life?

A. All my life.

Q. Have you graduated from college?

A. Yes, I graduated.

Q. Do you currently work?

A. Yes, I am working.

Q. Where do you work?

A. I work in the Telephone Company in Bayamon, Puerto Rico.

Q. How long did you work there for?

A. 26 years.

Q. At the current address where you live, how long have you lived there?

A. It has been 26 years.

Q. Did you live there as of February 4 -- excuse me, February 5, 1991?

A. Yes.

Q. Do you live in a house or an apartment?
A. In a house.
Q. And with respect to your family, do you have sisters?
A. Yes. At present, I have three sisters.
Q. Do you have any brothers?
A. No, I don't have any brothers.
Q. What are the names of your sisters?
A. Josephine Menuez, Angeles Roman and Elba Roman.
Q. Elba Roman passed away; is that correct?
A. Yes.
Q. What is the name of your mother's -- of your mother? Excuse me.
A. The name of my mother was Rosa Lamboy Matos.
Q. What is the name of your father?
A. My father's name was Juan Lipo Figueroa Aponte.
Q. And your three sisters, do they have a different father than you?
A. Yes.
Q. What is the name of their father?
A. Arocello Roman.
Q. Did your mother ever marry the father of your three sisters?
A. No, he didn't get to marry.

Q. Did your mother ever use the last name Roman?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. What is the telephone number where you live?

A. 809-784-1650.

Q. And was that your telephone number back on February 4, 1991?

A. Yes.

Q. And is your telephone number listed publicly?

A. It's public.

Q. Under whose name is it listed?

A. Evelyn Anna Figueroa Lamboy.

Q. And that's your name; correct?

A. Yes, that's my name.

Q. Did your mother live with you for a while?

A. All her life.

Q. And when did your mother pass away?

A. November 24, '91.

Q. And while your mother was living with you, was your telephone listed under your name?

A. I'm going to rectify the date of death of my mother. My mother died November 24th of '90.

Q. While your mother was alive and living with you, whose name was your telephone publicly listed under?

A. Under my name always. It was always under my name.

Q. Mr. Roman, the father of your three sisters, did he ever live in the house where you currently live?

A. No, he never lived there.

Q. When did Mr. Roman pass away?

A. Approximately 15 years ago.

Q. Do you have a sister that lives in Rio Piedras, Puerto Rico?

A. Yes. My sister Angeles.

Q. Rio Piedras is a town in Puerto Rico; is that correct?

A. Yes.

Q. What's the name of your sister that lives there?

A. Angeles Roman Quinones.

Q. Back on February 4, 1991, what was her telephone number and include the area code.

A. 809-765-4792.

Q. I'd like to draw your attention now to February 5, 1991. Did you work on that particular day?

A. Yes. I was working, and I even worked extra hours.

Q. Approximately what time did you get home on February 5, 1991?

A. About 7:30 in the evening.

Q. Is that on a Tuesday?

A. Tuesday, the 5th.

Q. Please tell the jurors what, if anything, unusual occurred as you got home -- arrived home on February 5, 1991.

A. When I arrived to my house around 7:30 in the evening, I noticed that in the gate of my house there was a notification from Federal Express indicating that I had a package that they had come to deliver it but they had not been able to deliver because no one was home.

I proceed, headed to my home and I didn't give that paper too much importance because I had not ordered any package. Then I placed it on top of a table. I went to bed.

Q. Did the paper indicate what the contents of the package was?

A. Yes. The package indicated that it was a valuable -- a very valuable camera. It indicated that it was being sent from New York, even had my name -- my telephone on, all the address, and I had to pay a certain sum of money.

Q. Did you order any camera equipment from New York?

MR. BRENNER: Objection, objection.

objection.

THE COURT: I'll allow it.

A. At no moment.

Q. This note that you got from Federal Express, where was it when you first observed it on February 5, 1991?

A. Placed on one of the bars of my gate.

Q. Now, I'd like to draw your attention to the next day, February 6, 1991. Did you work on this day?

A. Yes. I went to work as usual. When I returned, my neighbor from Paseo Aguila, 2650, indicated to me that another employee of Federal Express came and had tried to leave a package and I had not -- and he had not -- and he had not been able to leave that package because no one was home.

She indicated to me that she was willing to receive it, but he indicated that she had to leave $45. She didn't have that amount of money. She offered -- she offered if I left the money with her that she would receive the package for me.

I indicated to her that I was not waiting for any package from anyone and it was very strange for me --

MR. BRENNER: Objection, your Honor.

THE COURT: Sustained. Don't characterize.

Q. After you finished having this conversation with

your neighbor, did you go back to your house?

A. I proceeded to head to the home of my other sister, Elsa, and I indicated to her that I was going to speak on the phone because my phone was out of order, and I conversed with my sister Angeles. I explained that I had a note from Federal Express that indicated that I had a package of a camera. She indicated to me --

MR. BRENNER: Objection.

THE COURT: Tighten that up. Just tell us.

A.(con't.) Can I say?

Q. Continue.

A. She indicated --

MR. BRENNER: Objection.

THE COURT: Just tell us what she saw, observed, heard.

A.(con't.) She was opposed to my receiving the package.

Q. Why was that?

MR. BRENNER: Objection.

THE COURT: Don't give us conclusions. Tell us what you saw or what you heard.

THE WITNESS: I heard that --

THE COURT: What did she say?

THE WITNESS: That due to --

MR. BRENNER: Objection.

THE COURT: No, don't give us the conversation.

Q. Did you have a conversation with your sister at this time?

A. Yes, I had a conversation that she was opposed.

Q. After the conversation, did you leave your sister's house?

A. After the conversation, I returned home and I decided the following day and called Federal Express from my job during my lunch hour. I communicated with Federal Express and I explained to them about the package.

They indicated to me to leave some money with the next door neighbor, and I gave them the number of the check and the address of my neighbor. Her name is Olga Segatta, and she lives in Paseo Aguila, 2650.

I proceeded -- indeed when I returned home, I made out the check and hand it to my neighbor. She took charge of the check.

On Friday --

Q. Let me stop you for a moment. This all occurred on February 7, 1991; correct?

A. Thursday, 7th of February.

Q. Now, drawing your attention to the next day,

Friday, February 8, 1991, please tell the members of the jury what occurred after you got home from work.

A. When I returned Friday, the 8th of February, to my home, I proceeded to change clothes. I had even forgotten about the package, and my neighbor called me at 7 in the evening. She called me to hand over -- to deliver the package.

I proceeded to go up with the package. I walked up with the package like this. I placed it on the counter of my kitchen. I opened it carefully. Due to --

MR. BRENNER: Objection. Objection.

THE COURT: I didn't hear. What was that last word?

(Reporter read back the requested testimony)

THE COURT: Don't tell us due to.

MR. SHEINDLIN: She was explaining how she opened her package.

THE COURT: She can explain how she opened the package but not her motivation.

Q. What was the reason why you opened the package as you testified?

THE COURT: She testified she opened the package slowly.

MR. SHEINDLIN: Now, she's going to explain

why.

MR. BRENNER: And I'm objecting.

MR. SHEINDLIN: Otherwise, it wouldn't make sense why a person would open a package slowly.

MR. BRENNER: Objection, your Honor.

THE COURT: Let's not do this.

(Whereupon, an off-the-record discussion was held at the bench.)

Q. Without telling us why, did you open the package carefully?

A. Yes, I opened it carefully.

Q. And how much -- how far did you open the package?

A. About -- about an inch-and-a-half to two inches, approximately.

Q. What you were opening, could you specifically describe what you were opening?

A. Yes. I opened a cardboard box carefully that was carefully sealed. When I opened the cardboard box, inside the box there was an attache with some keys anchored to it with tape on the side. I proceeded to open it without placing the keys. I used the keys.

When I opened the attache with the key, I observed that inside the briefcase there was a very -- very wide pipe with some cables crisscrossing, an orange and white color.

2 Q. What was the most you ever opened up that black
3 case?
4 A. It was about -- approximately about an
5 inch-and-a-half because I took a lot of precautions.
6 Q. How long did you look inside that black case when
7 it was opened an inch-and-a-half?
8 A. Seconds because I was very frightened and it was
9 very impressioned.
10 Q. What did you do after you saw what you saw inside
11 the case?
12 A. I felt very confused and I was asking who could
13 have done such a mischievous, and I proceeded to close the
14 attache case very carefully. I grabbed it. I walked
15 through the house a little while because I don't know what
16 to do due to my nervousness. And then I walked out of my
17 house leaving the cardboard box and the papers and the keys.
18 I continued towards the street. A neighbor of the -- in
19 front -- in front of my house when he noticed the nervous
20 state that I was in asked me what was happening. I
21 explained that someone had sent me a package with a very bad
22 joke or with a bomb. Being that we didn't know what it was,
23 he said to call the police. I remained in the street with
24 the package, and when the police arrived about 25 minutes
25 later, there was a lot of neighbors around checking, saying

that it was not possible because I am not a problematic person. They remained with me all the time until the police arrived. The police placed it on top of their car. They observed it with a light carefully and said that something -- something powerfully was inside the package.

MR. BRENNER: Objection as to what they said, your Honor.

THE COURT: Who said?

MR. BRENNER: The police. I believe.

THE COURT: I'll allow it. Go on.

Q. After the police arrived, did they subsequently take that package away?

A. They removed all the people from the street, even the cars that were parked around the street, and they had us disperse, empty out the whole street.

The agents of the unit of explosives came. They took charge of the attache case, and they took it with them far away. They even went to my house. They checked all around the house, and they took the cardboard box with the papers and the keys.

Q. The name of the officer that took the cardboard box and the keys was --

A. Mr. Avoles, Agent Avoles.

Q. And he works for the Puerto Rico Police

2 Department?

3 A. Yes. He works for the police department, Puerto
4 Rico.

5 MR. SHEINDLIN: Your Honor, I ask what has
6 been previously marked as People's Exhibit 17 for
7 identification be shown to the witness.

8 (Handed to witness)

9 Q. I ask you to look at Exhibit 17 which is in front
10 of you. Does that fairly and accurately depict how the
11 black case that you opened on February 8, 1991, appeared to
12 you?

13 A. Yes.

14 MR. SHEINDLIN: I ask that the witness be
15 shown People's Exhibit 34 -- excuse me, at this
16 time, also, your Honor, I'm offering People's
17 Exhibit 17 into evidence.

18 (Handed to defense attorney)

19 MR. BRENNER: I have no objection.

20 THE COURT: Without objection, 17 received.

21 (People's Exhibit 17, previously marked for
22 identification, is received and marked into
23 evidence.)

24 Q. I ask you to look at People's Exhibit Number 34
25 which has been marked for identification. Do you recognize

it?

A. Yes.

Q. And what do you recognize it to be?

A. This is a copy of the document that I received indicating that I had a package and they had not been able to leave it at my house.

Q. That's the document you received on February 5, 1991?

A. Correct.

Q. Does the -- and it's a photograph of that document; correct?

A. Correct.

Q. Does the photograph of that document fairly and accurately depict how that document appeared to you back in February -- back on February 5, 1991?

A. It's correct.

MR. SHEINBLIN: At this time, your Honor, I'm offering this exhibit, Number 54, into evidence.

MR. BRENNER: No objection.

THE COURT: Without objection, 54 is received.

(People's Exhibit 54, previously marked for identification, is received and marked into evidence.)

Q. I'm going to ask you to look at what's the upper right-hand portion of the exhibit as you're facing it. Was your phone number the same as the phone number in that exhibit?

A. Yes.

Q. Specifically, that's the number 809-784-1630; correct?

THE INTERPRETER: What's the last?

MR. SHEINDLIN: 1630.

A. Yes.

Q. Is that the same phone number that's listed under your name in the public directory?

A. Yes.

Q. As you look at that document, the same portion, the upper right-hand side of that document, is your home address reflected in that document?

A. Yes, it's reflected.

Q. And specifically, that's the portion of the document that reads Paseo Aguila, 2629, and then the number two and the letter "N" and then the letters S-E-C-E, and then underneath that where it says Levittown, Cotano, Puerto Rico?

A. Yes.

Q. Now, looking in the upper left-hand portion of

that document, do you see the typewritten name of the business named USA Electronics?

A. Yes.

Q. And that's the portion of the document which indicates that they sent the package --

MR. BRENNER: Objection.

THE COURT: That's a conclusion.

Q. Is that -- the USA Electronics, is that listed under the sender portion of the document?

THE INTERPRETER: Excuse me?

Q. Is that listed as the sender portion of the document?

A. Yes.

Q. Have you ever heard of a USA Electronics prior to February 5, 1991?

A. Never.

Q. Have you ever been to a USA Electronics store prior to February 5, 1991?

A. Never. No, never.

MR. SHEINDLIN: I have no further questions at this time, your Honor.

THE COURT: The witness has yielded.

MR. BRENNER: I have no questions of this witness.

THE COURT: No questions. Step down.

Call your next witness.

MR. BRANCATO: Your Honor, the People will call Detective Sulma Ramond.

THE COURT: Detective Raymond to the stand.

Mr. Brancato, do we require the services of the interpreter further?

MR. BRANCATO: No, Judge.

THE COURT: Very well, excused.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the clerk.

DET. S U L M A R A Y M O N D, called by and on behalf of the People, having been first duly sworn, testified as follows:

COURT OFFICER: For the record, state your name and shield and your present assignment.

THE WITNESS: Detective Sulma Raymond. Shield 1102, Arson and Explosive Squad. R-A-Y-M-O-N-D. First name is S-U-L-M-A.

DIRECT EXAMINATION:

BY MR. BRANCATO:

Q. Detective Raymond, how long have you been a police officer?

A. Since 1979.

THE COURT: 19?

THE WITNESS: 79.

Q. And of that time, how long have you held the grade of detective?

A. Since 1985.

Q. What is your present assignment?

A. I work for the Arson and Explosion Squad.

Q. What are your duties as a member of the Arson and Explosion Squad?

A. We go out and investigate certain fires and explosives.

Q. Where is your office located?

A. 1 Police Plaza.

Q. Is that about four or five blocks from this building?

A. Yes, it is.

Q. How long have you been a member of the Arson and Explosion Squad?

A. For the last six years.

Q. Do you know Detective Maryann Herbert?

A. Yes.

Q. What is your relationship to her?

A. She is my partner.

Q. Was she your partner back in September of 1990?

A. Yes, she was.

Q. Did there come a point in September of 1990 that you were assigned a case that was previously under the control of a Detective Valdez?

A. Yes, I was.

Q. And did this case concern an investigation into a pipe bomb that was left at 644 West 185th Street here in New York County?

A. Yes, it was.

Q. Were you aware if the pipe bomb that was left outside of 644 West 185th Street, apartment 1-A, was vouchered in connection with this investigation?

A. Yes, it was vouchered.

Q. Who vouchered that bomb?

A. Detective Sadowy from the Bomb Squad.

Q. Detective Sadowy, you indicated he is a member of the Bomb Squad?

A. Yes.

Q. Is that a different unit than the one that you're a member of?

A. Yes, it is.

Q. When was that pipe bomb vouchered?

A. I would have to check my notes.

Q. Okay, if you'll look at your notes, please.

(Pause)

A. Vouchered August 11th of 1990.

Q. Under which voucher number was it vouchered?

A. Under David 675594.

Q. By "David" you mean "D"?

A. "D".

Q. Did there come a time during the time this case was under your control that you contacted Special Agent Chris Behan of the Alcohol, Tobacco and Firearms Department, branch of the Federal government?

A. Yes, I did.

Q. And when was that?

A. I would have to check my notes.

Q. Okay.

A. That was on February 13th of 1991.

Q. And at that time, did you -- what did you say to him?

A. I advised him that the property that was in the police lab was available for his office to take to analyze.

Q. When you say "the property that was in the police lab," what are you referring to?

A. To the voucher number. You know, the pipe bomb that was in the voucher number that Detective Sagowy vouchered.

179 1 Q. The number that you gave us just a moment ago?
2 A. Yes.
3 Q. After speaking with -- when you spoke to him, did
4 you give him the voucher number that you just referred to?
5 A. Yes, I did.
6 Q. Did you receive permission to turn that property
7 over to Alcohol, Tobacco and Firearms?
8 A. Yes, I did.
9 Q. When did you receive that permission?
10 A. On that date.
11 Q. And who did you receive the permission from?
12 A. From my supervisor, Sergeant Sheehan.
13 Q. Now, let me direct your attention to two days
14 before you spoke to Special Agent Chris Behan and told him
15 that he could take this property. February the 11th, 1991,
16 were you working that day?
17 A. Yes, I was.
18 Q. What tour were you working that day?
19 A. I would have to check my notes.
20 (Pause)
21 MR. BRENNER: Judge, may we approach while
22 the witness is looking?
23 (Whereupon, an off-the-record discussion was
24 held at the bench.)
25

Q. Detective Raymond, on February 11, 1991, were you working?

A. Yes, I was.

Q. What tour were you working that day?

A. I was working from 9:45 in the afternoon to 11 o'clock at night.

Q. Did you see the defendant that day, Dominic Franzo?

A. Yes, I did.

Q. Where were you when you first saw him?

A. In my office at One Police Plaza.

Q. Did there come a point that you and Mr. Franzo and Detective Maryann Herbert went to the 34th Precinct?

A. Yes, there was.

Q. About what time of day was it that you arrived at the 34th Precinct?

A. I would have to check my notes.

Q. Go right ahead.

(Pause)

A. Okay, it was around 6 o'clock in the afternoon, approximately.

Q. Now, did there come a time later that day that you saw Special Agent Chris Benon at the 34th Precinct?

A. Yes.

Q. Had you seen him prior to that date?

A. On --

Q. On February the 11th --

A. Prior to that date, no.

Q. Was that the first time you had met him?

A. No.

Q. Had you known him from a previous occasion?

A. Yes.

Q. Did there come a point later that night, late on the night of February the 11th, 1991, to early morning of February the 12th, 1991, that you went to the defendant's address at 3520 Barker Avenue?

A. Yes.

Q. Did you go there by yourself or with other people?

A. With other people.

Q. Who did you go with?

A. I went with my partner, Detective Maryann Herbert, Detective Ortiz from the 34th, members of the Alcohol, Tobacco, Firearms which was Chris Behan, Jerry Raffa, Special Agent Carey - I don't recall her last name - and members of the Bomb Squad.

Q. Was Special Agent Carey, the person that you don't recall her last name, male or female?

A. Female.

Q. And what was the purpose in going to that address?

A. We were going to execute a Federal search warrant.

Q. And whose apartment was going to be searched with this Federal search warrant?

A. Dominic Franzo's apartment.

Q. Did there come a point that you, along with the other agents, went into the defendant's apartment at 5520 Barker Avenue?

A. Yes.

Q. And after going into the apartment, could you please tell us what you did.

A. We searched his apartment, the whole apartment which consisted of kitchen, living room, bedroom.

Q. Did there come a point that Detective Herbert pointed something out to you?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. Did there come a point that you spoke with Detective Herbert?

A. Yes.

Q. After speaking with Detective Herbert, what did you observe?

A. She had in her possession a -- not a roll, a sheet of three cent stamps.

Q. And what happened with that sheet with the three cent stamps?

A. She turned it over to Special Agent Chris Behan.

Q. Were any other items taken from the apartment that night?

A. Yes.

Q. And who vouchered those items?

A. Special Agent Chris Behan.

Q. How long were you at the defendant's apartment at Barker Avenue?

A. We were in the apartment a couple of hours.

Q. And after being in the apartment a few hours, what did you do?

A. We went back to our office.

Q. When you say "we went back," who went back with you?

A. We dropped off Detective Ortiz back in the 54th, and myself and Detective Maryann Herbert went back to our office.

Q. The bomb -- the pipe bomb that you referred to earlier, the one that was vouchered under the voucher ending in 594, was that sent to the police laboratory to be dusted for fingerprints?

A. Yes, it was.

Q. And when was that done?

A. I would have to check my notes.

Q. Go right ahead.

(Pause)

A. That was done on August 11.

Q. Was that about six weeks before this case was turned over to you?

A. Yes.

Q. Were any prints listed from that pipe bomb?

A. No, there were not.

MR. BRANCATO: I have no further questions.

THE COURT: Mr. Brenner?

MR. BRENNER: Your Honor, something about parameters.

MR. BRANCATO: Could we have a side bar, please, on this?

THE COURT: Yes.

(Whereupon, an off-the-record discussion was held at the bench.)

THE COURT: Ladies and gentlemen of the jury, at this time we'll take a very short recess.

Do not discuss this case amongst yourselves.

Take the jury out.

(Jury leaves the courtroom)

THE COURT: We're on the record, Mr. Brancato.

MR. BRANCATO: Your honor, as happened yesterday when Detective Giorgio testified, there came a point that defendant sought to ask Detective Giorgio concerning statements the defendant made to him concerning an event; and at that point the Court ruled that in effect the defendant could not put in the defense through Detective Giorgio.

Likewise in this case, the defendant made statements to Detective Raymond that the People --

THE COURT: You're not introducing these statements?

MR. BRANCATO: We're not introducing them, and at this point I believe the defense should be precluded from introducing those statements.

THE COURT: Let me first find out from Mr. Brenner if he would have any difficulty in this area.

MR. BRENNER: No.

THE COURT: All right. What other parameters do you seek?

MR. BRANCATO: The other thing is that the

2 defendant on that day was supposed to meet
3 Detective Raymond to go take a polygraph test, and
4 as happened when Detective Giorgio testified, we
5 went over this ad nauseam as to whether or not the
6 "P" word would be used, polygraph word.
7 It is our position that that word should not
8 come out on cross-examination.
9 MR. BRENNER: Judge, as you may recall, I
10 approached and requested that we approach you.
11 THE COURT: Yes.
12 MR. BRENNER: My intention was to
13 predicate --
14 THE COURT: I also recall at the side bar
15 Mr. Brancato represented to the Court that he had
16 alerted Detective Raymond in this area.
17 MR. BRANCATO: I would just like to redlert
18 her, Judge.
19 MR. BRENNER: I will question her about her
20 movements that day vis-a-vis Mr. Franzo. I will
21 not preface any questions.
22
23 THE COURT: Without reference to the occasion?
24 MR. BRENNER: That's correct.
25 THE COURT: Get the detective out.

(District attorney and witness confer)

THE COURT: Ready? Bring in the jury.

COURT OFFICER: Jury entering.

(Jury enters the courtroom)

COURT CLERK: Case on trial.

The defendant, his counsel, assistant district attorney and sworn juror and witness are present.

THE COURT: Very well, Mr. Brenner.

MR. BRENNER: Thank you.

CROSS-EXAMINATION:

BY MR. BRENNER:

Q. Detective Brenner, on February 11, you were in Mr. Franzo's company at the time you arrived at the 34th Precinct; is that right?

A. Yes.

Q. You escorted him to the 34th?

A. Yes.

Q. The arrangements you had made with Mr. Franzo for that day did not involve going to the 34th; is that right?

A. No, it did not.

Q. And you had conversations with Detective Giorgio and Detective Ortiz prior to arriving at the 34th, did you not?

A. Yes.

Q. You spoke over the telephone?

A. Yes.

Q. And as a result of those conversations between yourself, Detective Giorgio and Detective Ortiz, you, Detective Herbert and Mr. Franzo left wherever you were at that time and went to the 34th?

A. Yes.

Q. Now, how long had Mr. Franzo been with you in your company prior to your arrival at the 34th?

A. Offhand, maybe half hour or so.

Q. And where had you met?

A. We had met at my office at One Police Plaza.

Q. And that had been a pre-arranged meeting?

A. Not exactly.

Q. Not exactly?

A. Not exactly.

Q. You had contact -- during the course of your investigation, you had contact with Mr. Franzo; is that right?

A. Yes.

Q. You had arranged to speak with him?

A. Yes.

Q. You had spoken with him on a prior occasion?

A. Yes.

Q. At least one?

A. Yes.

Q. Approximately when was that?

A. I would have to check my notes.

Q. Please do.

(Pause)

A. That was on January 18th of 1991.

Q. Now, the pipe bomb that was recovered at 644 West 185th Street, that was recovered in July -- I mean August of 1990; is that right?

A. I have to check my notes for the exact date.

Q. Okay.

A. Yes.

Q. August 11?

A. Yes.

Q. 1990?

A. Yes.

Q. And you spoke to Mr. Franzo for the first time in January of 1991?

A. Yes.

Q. Incidentally, you were not the original assigned detective, were you?

A. No.

Q. Detective Valdez was assigned?

A. Yes, she was.

Q. And you came on approximately the end of September?

A. Right.

Q. So from your entry into the case in September of 1990, about three months passed before you spoke to Mr. Franzo?

A. Yes.

Q. Were you conversing with Detective Giorgio during that period of time?

A. Yes.

Q. And you were aware, were you not, that Detective Giorgio was conducting an investigation of events that had occurred in the 34th Precinct?

A. Yes.

Q. And you repeatedly spoke to him between September and January, did you not?

A. Yes, I did.

Q. And finally, as a result of a conversation some time in December, you contacted Mr. Franzo; is that right?

A. Yes.

Q. The conversation that I allude to was between yourself and Detective Giorgio?

A. Right.

Q. Would it be fair to say that as police protocol, you needed his permission, in effect, for want of a better word, to speak to Mr. Franzo?

A. Yes.

Q. His investigation was existing before you come on the scene?

A. Yes.

Q. So you needed to get his authority to speak to Mr. Franzo?

A. Yes.

Q. Finally, some time in December or thereabouts, he gave you that permission?

A. Yes.

Q. And you contacted Mr. Franzo?

A. Right.

Q. And you spoke?

A. Yes.

Q. Then on February 11, you met; correct?

A. Correct.

Q. And all ended up at the 34th Precinct?

A. Yes.

Q. Did you tell Mr. Franzo that you were taking him to the 34th Precinct?

A. Yes, I did.

Q. And did you explain why?

A. Yes, I did.

Q. What did you say to him? Without telling us what he said to you, please tell us what you said to him.

A. That Detective Giorgio and Detective Ortiz wanted to speak to him.

Q. Now, were you present when Mr. Franzo was placed under arrest?

A. I was in the 34th Squad.

Q. Were you present during the lineup that was held after that?

A. I was present.

Q. Did you have occasion to meet Mr. Caesar Rodriguez?

A. Yes.

Q. And were you present while he observed the lineup?

A. Yes. I was.

Q. Now, you were investigating a pipe bomb that had been recovered back in August of 1990; is that right?

A. Yes.

Q. And the apartment -- the area at which the pipe bomb was recovered from belonged to whom?

A. Could you repeat your question?

Q. Well, was this found in the street? Was it found in a public railway or was it found by an apartment? Where was the bomb recovered?

A. It was found in front of an apartment.

Q. And during the course of your investigation, did you ascertain who was the inhabitant of that apartment?

A. Yes.

Q. Who was it?

A. Nelson Acosta.

Q. Nelson Acosta?

A. Un-hum.

Q. During the course of your investigation, did you speak to Mr. Acosta?

A. No. I didn't.

Q. Is it Acosta or is it Bacosta?

A. I would have to check my notes.

Q. Please do.

(Pause)

A. I have it down as Bacosta.

Q. Now, Detective, how long have you been a member of the Arson and Explosion Squad?

A. About six years.

Q. Was that six years prior to today or six years as of that date?

A. About five years as of that date.

Q. Would it be fair to say that you were familiar with pipe bombs as a result of your experience during that five-year period?

A. Somewhat familiar.

Q. Well, how many other pipe bombs have you had occasion to investigate over the five-year period prior to your investigation here?

A. About seven or so.

Q. Could you briefly, if you can, describe to us the way a pipe bomb is designed to work.

MR. BRANCATO: I object, Judge.

THE COURT: Overruled.

MR. BRANCATO: Judge, she hasn't been qualified as an expert in explosions.

MR. BRENNER: I am not offering her.

THE COURT: He is not questioning her on that basis.

A. No, I cannot.

Q. You cannot?

A. No.

Q. Do you know during the course of your investigation whether the -- withdrawn.

Did the pipe bomb that was left at Mr. Bacosta's

apartment require ignition?

A. I would have to check the Bomb Squad's records cause I was not present when it was recovered.

Q. Well, let me ask you this, Detective Raymond, when you were assigned to the case, would it be fair to say that you reviewed the documentation of the investigation up to that point?

A. Yes.

Q. You took Detective Valdez' reports and reviewed them?

A. Right.

Q. And the Bomb Squad reports and reviewed them?

A. Yes.

Q. And drew certain conclusions and knew what you were dealing with; is that right?

A. Right.

Q. Let me ask you now to use whatever you need to refresh your recollection as to whether this bomb needed ignition to explode.

A. I have to check my notes.

Q. Please do.

(Pause)

MR. BRANCATO: While she's doing that, can we approach?

THE COURT: Yes.

(Whereupon, an off-the-record discussion was held at the bench.)

Q. Detective Raymond, when you first came onto the case, did you examine the bomb?

A. No, I didn't.

Q. Have you ever examined the bomb?

A. No.

Q. Would it be fair to say you have no first-hand knowledge as to the workings or the mechanisms of this particular device?

A. Correct.

Q. Now, you told us that on February 11 into the morning of February 12 you were part of a group that went to 2520 Barker Avenue; is that right?

A. Yes.

Q. And there were members of the Federal agency there?

A. Yes.

Q. And there were members of the 54th Precinct; correct?

A. A member.

Q. A member. Detective Ortiz?

A. Yes.

Q. Members of the Bomb Squad?

A. Yes.

Q. And members of the Arson and Explosion Unit?

A. Yes.

Q. So there were two from the Arson Explosion Unit. That's Detective Herbert and yourself; is that right?

A. Yes, it is.

Q. How many people from the Bomb Squad?

A. Offhand, I can't recall.

Q. Well, was it ten?

A. No, it wasn't ten.

Q. Was it --

A. Offhand, I cannot recall.

Q. So there were the two of you. How many people from the Federal agency?

A. Approximately three or four.

Q. So somewhere in the neighborhood of between six and ten people, would it be fair to say, went to execute this search warrant?

A. Yes.

Q. And you assisted in the search?

A. Yes.

Q. Specifically, what did you do?

A. I observed to see if there was anything that we

needed in reference to the search warrant.

Q. Well, have you executed other search warrants?

A. Yes.

Q. Prior to that date?

A. Yes.

Q. How many?

A. About twenty or so.

Q. And how many of them had to do with the preparation or the manufacture of pipe bombs?

A. About five.

Q. Are there devices, if you know, only if you know, for cutting pipe to make a pipe bomb?

A. There are devices.

Q. Saw and knives and things to cut pipes so that the pipe can be filled with whatever explosive device; is that right?

A. Yes.

Q. And there's the pipe itself; correct?

A. Correct.

Q. And there are also end caps onto pipe bombs?

A. Yes.

Q. Would it be fair to say that when you went to 5520 Barker Avenue that you were looking for that kind of stuff?

A. Yes.

Q. Did you find any, any of that, what I referred to?

A. The pipe?

Q. And caps.

A. There were some.

Q. There was some?

A. Pipes in the apartment.

Q. In 5520?

A. Yes.

Q. And did you see them?

A. No, they did not.

Q. Well, did you?

A. No.

Q. I mean you were part of the search warrant team; is that right?

A. Yes, I was.

Q. And the search warrant specifically authorized for pipes, and caps or any other materials used for the manufacturer or shipping of an explosive device?

A. Yes.

Q. And you say there were pipes there but they weren't seized?

A. Right.

Q. Was there end caps as well?

A. I don't believe so. I don't recall.

Q. Detective, did you prepare any kind of a report as a result of your participation in the execution of the search warrant?

A. Yes.

Q. What kind of a report was that?

A. It's called a DD-5 complaint report.

Q. And is it under the case number that was assigned to the Bacosta, for want of a better word, pipe bomb, complaint number 16990?

A. No, it was not.

Q. So you prepared a DD-5 that is not part of the investigative materials that you compiled otherwise?

A. Could you rephrase your question?

Q. You prepared a series of reports as a result of your investigation of the pipe bomb recovered at 644 West 185th Street; is that right?

A. Yes.

Q. And that was under complaint number 16990?

A. No, it was not.

Q. What number was the complaint?

A. I don't have it with me. It's another case number.

Q. I'm sorry, perhaps -- I'm going to try to be as

clear as I can.

The pipe bomb records at 644 West 185th Street was assigned a complaint number; correct?

A. Yes.

Q. All your investigation and your investigative reports were prepared and filed under those numbers -- under that number?

A. Yes.

Q. And that number was?

A. Complaint number was 16590.

Q. The report that you prepared in connection with your role in the search warrant, that was prepared under a different number?

A. Yes.

Q. Do you have that with you?

A. No, I do not.

Q. Do you know where it is?

A. It's back at the office.

MR. BREWER: May we approach?

(Whereupon, an off-the-record discussion was held at the bench.)

THE COURT: Ladies and gentlemen of the jury, at this time we will recess until 2 o'clock this day, at which time hopefully we will resume.

Do not discuss this case amongst yourselves nor allow any third party to discuss the case with you.

Enjoy your lunch.

Take the jury out.

(Jury leaves the courtroom)

(Luncheon Recess)

A F T E R N O O N S E S S I O N

THE COURT: Bring in the panel.

COURT OFFICER: Jury entering.

(Jury enters the courtroom)

THE COURT: Have the witness recalled, Detective Raymond.

(Witness resumes witness stand)

THE COURT: You may continue.

MR. BRENNER: Thank you, Judge.

Q. Good afternoon, Detective.

A. Good afternoon.

Q. Detective, during the course of your investigation between September and February, did you have occasion to submit a police report known as a 49?

A. Yes.

Q. Can you tell us what a 49 is?

A. A 49 is a report that entails a certain incident

205 1 that occurred, and you state what the incident is in that
2 49.
3 Q. The 49, in the course of your investigation,
4 referred to the pipe bomb recovered at
5 644 West 186th Street; is that right?
6 A. No.
7 Q. I'm sorry?
8 A. No.
9 Q. Did the 49 in your investigation in this case
10 refer to that pipe bomb?
11 A. The one on 644 -- I never made out a report, to
12 the best of my recollection. I would have to check my
13 records.
14 MR. BRENNER: I ask this be marked for
15 identification.
16 THE COURT: Defendant's n.
17 MR. BRENNER: I'm sorry, your honor, I had
18 pre-marked "E", "F" --
19 THE COURT: "E", "F" we had, and we had "G".
20 MR. BRENNER: I had pre-marked "G", "H" and
21 "I".
22 THE COURT: This is "J" for identification.
23 (Said document is marked Defendant's
24 Exhibit J for identification)
25

Q. Detective, you are Suing Raymond?

A. Yes.

Q. Now, I'm asking you to look at what has been marked for identification as Defendant's J. I'm going to ask you whether that refreshes your recollection as to whether you submitted a 49 in connection with this incident.

A. Yes.

Q. And this incident is the pipe bomb recovered at 644 West 165th Street?

A. Yes, it is.

Q. You did, in fact?

A. Yes.

Q. You submitted that to a section of the police department known as C.C.I.U.; is that right?

A. Yes, it is.

Q. What does that stand for?

A. Career Criminal Investigation Unit.

Q. Career Criminal Investigation Unit.

To the best of your knowledge, can you tell us what do those people do, those folks at C.C.I.U. do?

A. To the best of my knowledge, they go out and check career criminals.

Q. Career criminals?

A. Yes.

Q. Would it be fair to say in police parlance that career criminals are those people who have been arrested on more than one occasion?

A. Yes.

Q. Perhaps convicted of crimes on more than one occasion?

A. That's correct.

Q. Would it be further fair to say after conferring with detective Herbert you submitted this request to the Career Criminal Investigation Unit?

A. Not after -- this is after conferring with my supervisor.

Q. Well, you conferred with someone and then you submitted this request?

A. Yes.

Q. That would be in furtherance of your investigation of this pipe bomb?

A. Yes.

Q. During the course of your investigation, did you have occasion to subpoena or attempt to obtain the criminal record of Dominic Frunzo?

A. Yes.

Q. You did so?

A. (Nods).

Q. In addition, did you submit Mr. Franzo's -- withdrawn.

Did you attempt to obtain his fingerprints?

A. I would have to check my records.

(Pause)

A.(con't.) I don't believe so.

Q. During the course of your investigation, did you come across the name Joseph DeJesus?

A. Yes.

Q. And did you submit, at any time, the fingerprint card for Joseph DeJesus to the Federal agency known as Alcohol, Tobacco and Firearms?

A. Yes.

Q. Was it at their request?

A. Yes, it was.

Q. Would it be fair to say that was for comparison with latent fingerprints that were recovered in connection with the Puerto Rico pipe bomb?

A. Yes.

Q. And you did so?

A. I did so.

Q. Do you know if you ever submitted Mr. Franzo's fingerprints for a similar type of comparison?

A. I don't believe so.

Q. Now, your investigation did not conclude with the arrest of Mr. Frenzo, did it?

A. Which investigation?

Q. You were assigned to the investigation not only of the Bocosta pipe bomb but ultimately to the New York investigation of the Puerto Rican pipe bomb?

A. That's correct.

Q. There were two concurrent investigations going on; isn't that right?

A. Yes.

Q. Alcohol, Tobacco and Firearms were conducting their investigation?

A. Yes.

Q. And under a New York Police Department complaint number, you were conducting an investigation of the Puerto Rican pipe bomb as well?

A. Yes.

Q. Would it be fair to say the two agencies were working together?

A. Yes, we were.

Q. That there was overlap between the efforts of each?

A. Could you rephrase?

Q. You did not understand my question?

A. No, I do not.

Q. Were you doing any of the same types of things during the course of your investigation? Only if you know.

MR. BRANCATO: I object to the form of that question.

THE COURT: Sustained.

Q. You went to speak to Caesar Rodriguez, yourself and Detective Herbert?

A. I would have to check my records. I did speak to Caesar Rodriguez, but I believe it was by phone and at the precinct, 34th Precinct.

Q. So you interviewed him?

A. I spoke to him.

Q. Well, did you prepare a DD-5?

A. Yes.

Q. Did it reflect the information that he gave to you?

A. Yes.

Q. Would it be fair to say then that you interviewed him in connection with his knowledge of the events surrounding the Puerto Rican pipe bomb?

A. Yes.

Q. And you memorialized that in your report? Do you know?

2 A. Yes.

3 Q. Do you know if anybody from Alcohol, Tobacco and
4 Firearms spoke to Mr. Rodriguez?

5 A. I don't know.

6 Q. In connection with your investigation of the
7 Puerto Rican Pipe Bomb, did you have occasion to come across
8 the address 750 West 181st Street?

9 A. Sounds familiar, but I would have to check my
10 records.

11 Q. Please do.

12 (Pause)

13 A. Yes.

14 Q. Now, was that not, in fact, the address on the
15 Federal Express way bill for USA Electronics?

16 A. Yes, it was.

17 Q. It's a further fact that USA Electronics is not
18 located at 750 West 181st Street?

19 A. That's correct.

20 Q. What did you find when you responded to
21 750 West 181st Street?

22 A. That it was Jewel -- excuse me. It's a jewelry
23 repair business at that location.

24 Q. And did you bring with you a photograph of
25 Dominic Franzo, the defendant in this case?

2 A. A photo array.

3 Q. When you say "a photo array," did you put his

4 photograph in the midst of other photographs?

5 A. Yes, I did.

6 Q. How many?

7 A. Six.

8 Q. And did you display them to the person who was the

9 tenant or the commercial tenant at 750 West 181st Street?

10 A. Yes.

11 Q. Did you ask him as to whether he could identify

12 any of the people in that photo array?

13 A. Yes.

14 Q. Did you prepare a DD-5 as a result of that

15 display?

16 A. I coded it with the same investigation.

17 Q. I'm sorry?

18 A. I coded it with the same investigation when I went

19 to 750 West 181st.

20 Q. Now, incidentally, Detective Raymond, you earlier

21 told us that you never saw the bomb, 644 West 165th Street

22 bomb, that you never looked at it after you were assigned

23 investigation and you don't know whether it needed to be

24 ignited or could go off by itself; isn't that right?

25 A. That's correct.

2 Q. I'd like you to look again at what has been
3 previously marked as Defendant's J for identification.
4 A. Yes.
5 Q. Without telling us what the report says --
6 Withdrawn.
7 That is your report?
8 A. Yes, it is.
9 Q. It is over your name?
10 A. Yes.
11 Q. It is a police official report that was submitted
12 from one branch of the police department to another branch?
13 A. That's correct.
14 Q. It was going to the career criminal investigation
15 for them to determine whether they could give you any more
16 information?
17 A. That's right.
18 Q. From their exposure to, quote, "career criminal,"
19 unquote?
20 MR. BRANCATO: Objection.
21 THE COURT: Sustained.
22 Q. Did you include information about the dimensions
23 of that bomb?
24 A. Yes, I did.
25 Q. The size?

A. Yes.

Q. The way it was -- the way it was comprised?

A. Yes.

Q. And did you include information as to whether it could ignite itself or had to be ignited?

MR. BRANCATO: I object, Judge.

MR. BRENNER: I'm not asking for what the information was.

MR. BRANCATO: Judge, I'll make my offer on the side.

(Whereupon, an off-the-record discussion was held at the bench.)

Q. Detective, did it include information as to whether the bomb could go off itself or needed to be ignited?

A. Yes.

Q. Did it include information as to whether the bomb had been ignited or had not been ignited?

A. The bomb itself?

Q. Yes.

A. No. It says the fuse.

THE COURT: It says the fuse?

THE WITNESS: The fuse.

Q. Did it include whether the fuse had or had not

been ignited?

A. Yes.

MR. BRANCATO: Judge, I object for the same reason. This is a report filled out from other reports.

MR. BRENNER: Is Mr. Brancato testifying?

THE COURT: Let's not pursue that.

Q. Detective, in your dealings with Mr. Frenzo, did he cooperate?

A. Yes.

MR. BRANCATO: I object.

THE COURT: I'll allow it.

Q. Was he -- did he respond to your telephone calls?

A. Yes.

Q. And when you asked that he be in a certain place was he, in fact, there?

A. Yes.

MR. BRENNER: If I may have one moment?

(Pause)

Q. Have you ever seen the pipe bomb which was recovered by the Puerto Rican police on or about February 5 or 6th of 1991?

A. Could you rephrase the question?

Q. Have you ever seen the pipe bomb?

A. The actual pipe bomb?

Q. Yes.

A. No.

Q. Have you ever seen a photograph of it?

A. No.

Q. Detective, you're conducting an investigation of a device under a complaint number of a New York City Police Department that you haven't seen?

A. I've seen x-rays of it, picture x-rays, but not a photo of the actual bomb.

Q. When you went on the search warrant execution with Detective Herbert, did you notice that she had stamps in her hand, a sheet of stamps? What you testified to on direct; is that right?

A. Yes.

Q. Where did she get those from, if you know, if you saw?

A. I do not know where she got it from.

Q. Would it be fair to say you saw her at one point without them and at a subsequent point with them?

A. Yes.

Q. And you did not see where she obtained them from?

A. No.

Q. Did you, yourself, recover anything during the

execution of this?

A. No.

Q. Where were you searching in the apartment?

A. I was at one point in the back room, the living room, the bedroom.

Q. Now, when you were in the apartment, did you observe -- withdrawn.

During the course of your time in the apartment, did you see any gun reloading equipment?

A. Yes.

Q. Where was that?

A. That, I believe, was in the bedroom.

Q. And only if you know, did you have occasion to see whether powder was recovered from the dred, gunpowder, smoker's powder of the gun reloading equipment?

A. I know it was recovered. I don't know exactly from what location.

Q. Were you present when electrical tape was recovered?

A. Yes.

Q. Where was that recovered?

A. That was in -- I believe in the living room area.

Q. And you don't know where the powder was recovered from?

A. Not offhand.

Q. What about the magic marker, do you know where that was recovered from?

A. The specific, no.

Q. And the various papers that were recovered, do you know where they were recovered from?

A. Some were from a file that he had in the bedroom and some were from the box case that he had.

Q. So some papers were in one place and some papers were in another place?

A. Yes.

Q. And the tape was in somewhere else?

A. Yes. Offhand, the specific of the recovery I don't -- I was not keeping track.

Q. Only if you know, any of this property that was recovered, was it all together in one particular place?

A. No.

Q. One corner of the room, for instance?

A. No.

Q. Now, on the search of February 12 -- withdrawn.

You are aware, are you not, there was a second search?

A. Yes.

Q. You were not part of that, were you?

A. I was part of it.

Q. You were part of the search of February 14?

A. Yes.

Q. Now, with regard to the first search, were any tools seized? First search, February 12.

A. I don't believe so.

Q. Hacksaws, drills, hammers, augers, anything like that?

A. I don't believe so. I'm not sure.

Q. Apart from a roll of electrical tape, a magic marker, papers including the stamps and powder, do you know if anything else was recovered from the search?

A. I would have to check my notes to see if I wrote anything else.

Q. Please do.

(Pause)

A. No, that is basically what I have written down.

Q. There were between six and ten officers searching the apartment for approximately an hour, an hour or two hours?

A. Approximately.

Q. Prior to that search, Mr. Franzo was with you; correct?

A. Yes.

Q. And then to the 34th Precinct, is that right?

A. That's correct.

Q. At any point during this time before the 34th, did you say --

MR. BARGATA: Can we close the door, please?

THE COURT: Just a minute. The officer will do it.

Q. Withdrawn.

When you first contacted Mr. Franzo about meeting him on the 11th, did you say to him: Mr. Franzo, come on down, we're going to arrest you?

A. I did not.

Q. Do you know whether Detective Herbert said that or did she say that in your presence to him?

A. Not in my presence.

Q. The purpose of the meeting was something else entirely?

A. That's correct.

Q. At any point during the course of your stay with him before you got to the 34th, did you say to him: Mr. Franzo, come on down to the 34th, they're going to arrest you?

A. I did not.

Q. Did Detective Herbert in your presence?

A. Not in my presence.

Q. So up until the time that Mr. Franzo walked into the 34th Precinct she was actually under arrest, neither you nor Detective Herbert had placed him under arrest; correct?

A. That's correct.

Q. Or stated in any way that it was your intention to do so?

A. That's correct.

Q. Was it conveyed to you by Detective Ortiz or Detective Giorgio that that was their intent?

A. No, it was not.

Q. And do you know when you got there up until the time that Mr. Franzo was arrested whether they said that to him?

A. I do not.

Q. And within 14 hours of that time, you were in his apartment; correct?

A. Approximately.

Q. Six to ten of you searching for two hours?

A. Yes.

Q. And you walked out with a magic marker; correct?

A. Right.

Q. A can of smokeless powder from the gun reloading area of the apartment?

A. Yes.

Q. A roll of electrical tape and a bunch of papers?

A. Yes.

Q. Thank you.

MR. BRENNER: I have nothing further.

MR. BRANCATO: No redirect.

THE COURT: You may step down, Detective. You are excused.

Call your next witness.

MR. BRANCATO: Your Honor, we will call Detective Maryann Herbert.

COURT OFFICER: Place your left hand on the bible, raise your right hand and face the clerk.

M A R Y A N N H E R B E R T, called by and on behalf of the People, having been first duly sworn, testified as follows:

COURT OFFICER: Please state your name, spelling your last name, give your shield number and your present command.

THE WITNESS: Detective Maryann Herbert. Shield number 1878, Arson Explosion Squad. H-E-R-B-E-R-T.

MR. BRANCATO: May I just have a moment, please?

(Pause)

DIRECT EXAMINATION:

BY MR. BRANCATO:

Q. Detective Herbert, how long have you been a police officer?

A. A little over nine years.

Q. Of those nine years, how long have you held the grade of detective?

A. Two years.

Q. What's your present assignment?

A. Investigator in the Arson Explosion Squad.

Q. Were you working in the Arson Explosion Squad back on July 17, 1990?

A. Yes, I was.

Q. Were you working there in February of 1991?

A. Yes, I was.

Q. Let me direct your attention to February the 11th, 1991. Were you working that day?

A. Yes, I was.

Q. What tour of duty were you working?

A. 2:45 in the afternoon to 11 p.m..

Q. Now, did there come a point on February the 11th, 1991, that you saw the defendant in this case, Dominic Franza?

A. Yes, I did.

Q. Could you please point to him and tell us where he is.

A. Seated over there.

MR. BRENNER: Indicating Mr. Franzo, your honor.

THE COURT: Let the record so reflect.

Q. Did there come a point that afternoon that you, Detective Sulma Raymond and the defendant, Dominic Franzo, went to the 34th Precinct located in the vicinity of 160th Street and Broadway here in New York County?

A. Yes, we did.

Q. About what time did you get to the precinct with Detective Sulma Raymond and the defendant in this case?

A. We arrived at the precinct a little after 4 p.m., about ten after 4.

Q. And when you got there, did you see Detectives Giorgio and Ortiz?

A. Yes, I did.

Q. Did there come a point later that day that you saw members of the Alcohol, Tobacco and Firearms Division of the Federal Government?

A. Yes, I did.

Q. Could you tell us the names of some of the people

that you saw at the precinct that night from the Alcohol, Tobacco and Firearms.

A. At the precinct, Special Agent Chris Bench, B-E-N-C-H-A-N; Alan Kasminsky - do your best on that one - Bruce Laudice; one at the precinct, I believe, those are the only people I remember.

Q. Did there come a point later that night that you looked at a police file which was a record kept by the 34th Precinct concerning some letters that were sent to Josephine Mendez?

MR. BRENNER: Objection, leading.

THE COURT: I'll allow that.

You may answer.

A. Yes, I did look at the case file that evening.

MR. BRANCATO: This is already in evidence, your honor. It's Exhibit 10.

(Handed to witness)

MR. BRANCATO: Show it to the witness, please.

Q. Do you recognize the two envelopes that comprise Exhibit 10 in connection with this case?

A. Yes, I do.

Q. When did you first see those envelopes?

A. I saw a copy of the envelopes, not the actual

envelopes. A Xeroxed copy such as this in the case folder that I was looking at that evening in the 34th Precinct.

Q. And what, if anything, did you notice when you looked at those envelopes?

A. That there were two three-cents stamps. There was 31 cents worth of postage, and the postage rates had just gone up to 29 cents from 25. So the six cents when I looked at the two three-cent stamps, I thought this was something you had laying around the house and when the postage went up perhaps put them on the stamps you had.

MR. BRENNER: Objection to he had.

THE WITNESS: I didn't say he had.

THE COURT: In any event, objection sustained.

Q. Did there come a point that you, along with Detective Raymond, Agent Benon and other members of Alcohol, Tobacco and Firearms as well as other officers went to the defendant's home at 3320 Barker Avenue?

A. Yes, we did.

Q. Now, in relation to when you saw -- in relation to when you went to the defendant's apartment, at what point was it that you saw those envelopes, a photo of those envelopes?

A. Several hours prior.

Q. Prior to going --

A. Prior to going to the residence.

Q. Did there come a point in the early morning hours of December 12, 1991, that you along with other officers executed a federal search warrant that was signed by a magistrate at the defendant's apartment at 3320 Barker Avenue?

A. Yes.

Q. And could you please tell us when you got into the apartment what, if anything, happened?

A. Well, the Bomb Squad had gone in, of course, with the dogs to search the apartment for explosives. We entered with ATF agents and detectives from the 34th Precinct and began to search the apartment.

Q. Could you please tell us how this search developed. What did you do at this point?

A. My personal action at this point?

Q. Yeah, sure.

A. Initially I stood by the door to make sure no one who wasn't -- who didn't belong there came and went, and everybody kind of sectioned off into rooms to conduct a search of the specific area.

Q. What room were you in in the apartment?

A. Mostly in the living room.

Q. Could you please describe the living room for us.

A. As you would come in the front hallway and turn to your right it was the front room on the right.

Q. Could you please tell us who was in that room with you at this time.

A. Chris Behan from ATF. I believe Jerry Koffa who's a supervisor. He was in several rooms but he was in that room for a while and my partner, Detective Raymond, was in that room periodically.

Q. Did there come a point that night that you saw some stamps?

A. Yes, I did.

Q. At which point --

First of all, where in the apartment -- what room were you in when you saw these stamps?

A. In the living room.

Q. Can you please tell us where in the living room you were when you saw them?

A. I was with Special Agent Behan standing by a wall unit with some shelves on it that had some papers.

Q. Could you please describe how it is that you noticed the stamps.

A. Well, Agent Behan was examining some papers that had been on the wall unit, and as he was flipping through

the papers, there was a small sheet of stamps, and that's when I indicated, I said, "There's the stamps."

Q. What happened with the stamps at that point?

A. They were secured by ATF and subsequently vouchered.

Q. Were other items vouchered at the apartment that night by ATF in your presence?

A. I observed the items -- the majority of the items that were to be vouchered, but as far as where they were removed from, exactly what location, I'm not aware.

MR. BRANCATO: I have no further questions.

THE COURT: Mr. Brenner.

MR. BRENNER: Thank you.

CROSS-EXAMINATION:

BY MR. BRENNER:

Q. Detective Herbert, you became involved in this investigation in September of 1990?

A. September of '90? Could you be more specific as to that date?

Q. The date?

A. No, as to what events you're referring to.

Q. Have you ever heard the name Ducosta or Franzo or Nenez before September 27, 1990?

A. September 27? I don't -- what incident are you

referring to on September 27?

Q. Detective, was it your first involvement of this investigation, the investigation of a pipe bomb recovered at 644 West 185th Street?

A. Yes, it was.

Q. Were you the original assigned detective?

A. I responded to the scene. I was not assigned the investigation.

Q. Were you ultimately assigned the investigation?

A. No, I wasn't.

Q. Who was?

A. Detective -- I'm sorry, can you just -- there were several incidents. This is the one that was outside the door?

Q. Detective, 644 West 185th Street, the apartment of Nelson Bocosta.

A. Okay, right. Okay.

Q. Were you ultimately assigned to the investigation of that case?

A. No, I was not.

Q. Who was?

A. Detective Valdez.

Q. And Detective Valdez continued the investigation throughout its entire life, the life of the investigation?

A. No, it was reassigned to Detective Raymond.

Q. Who works with Detective Raymond?

A. I do.

Q. But you were not assigned?

A. I was not assigned to the investigation.

Q. So you were working in conjunction with Detective Raymond on the investigation?

A. Yes.

Q. Was she in charge of the investigation at that point?

A. Yes.

Q. Now, when you went to the 34th Precinct on February 11, Mr. Franzo was with you?

A. Yes, he was.

Q. Did you explain to him why he was going to the 34th Precinct?

A. Well, we told him that the detectives in the 34th Precinct wished to speak with him.

Q. As far as what was happening on February 11, the plan was not originally to go to the 34th Precinct; is that right?

A. You'd have to ask Detective Raymond. I don't know what she had -- I know we had an interview and we were going to speak with him, but as to exactly what she had planned, I

don't know.

Q. When you went to the 34th Precinct, did you pick up the case file?

A. Not immediately upon walking in. Later during the course of the evening.

Q. And you saw the envelopes?

A. Yes, I did.

Q. Did you see the letters as well?

A. Yes, I did.

Q. And they were typewritten?

A. Yes, they were.

Q. During the course of the search of the apartment at 3320 Barker Avenue, did you find a typewriter, you, yourself?

A. No.

Q. Do you know whether anyone found one during the course of that search?

A. Typewriter?

Q. Yes.

A. I'm not certain. I don't believe so.

Q. When you went through the case file, whenever it was, prior to the search and you took note of the stamps, did you make a mental note that the notes were typewritten?

A. I suppose.

2 Q. And during your perusal of the apartment, is it
3 your testimony that you did not see a typewriter there; is
4 that right?
5 A. In the area I was in, I didn't observe. I don't
6 recall seeing a typewriter.
7 Q. Well, it's a fact, is it not, that none was
8 seized?
9 A. I was not responsible for seizing or securing any
10 of the evidence. It was a Federal warrant. So you would
11 have to speak with ATF.
12 Q. I appreciate that. However, on direct examination
13 you said you were observing the items that were seized.
14 Where exactly they came from, you weren't sure. Isn't that
15 what you said?
16 A. Yes.
17 Q. Now, I ask you again as you were observing the
18 items that were seized, regardless of your knowledge
19 everywhere it may have come from, can you see a typewriter
20 having been seized?
21 A. I said I stated I saw the majority of items that
22 were seized. In what I had observed, no, I did not observe
23 a typewriter.
24 Q. Did you see a green magic marker?
25 A. Yes, I did.

Q. A highlighter, in fact?

A. I don't know what type of magic marker it was.

Q. What color was it?

A. It was green.

Q. Light green, dark green?

A. Your basic Crayola green. Just green.

Q. Do you know where that was recovered from?

A. I believe it was in the wall unit.

Q. And was there a roll of black electrical tape, do you know?

A. I believe there was.

Q. Do you know where that was recovered?

A. No, I don't.

Q. In the living room area apart from the stamps, did you recover anything yourself?

A. No, sir.

Q. Just the stamps?

A. Just the stamps.

Q. In the sheet, how many stamps were in there approximately?

A. Approximately? I would say between 15, 16, 17, something like that. Not a large block.

Q. As you observed it, were you able to observe how many had originally been in the complete sheet?

233 A. No, I didn't.
Q. Or how many were, in fact, missing from the sheet?
A. It would depend on which end you tore them from. I mean I don't -- I don't know.
Q. That's a no? Is that a no, you wouldn't?
A. Could you rephrase the question? I'm not really sure.
Q. As you observed the sheet for the first time in its form as you took it from the area of the wall unit, were you able to calculate how many stumps were missing from the sheet?
A. No.
Q. In the course of your work with Detective Raymond in her investigation of the pipe bomb recovered at 644 West 185th Street, did you ever see that bomb?
A. The actual device?
Q. Yes.
A. I'm not certain. I know we had Polaroids of the device. It would be taken up to Rodman's Neck up at the outdoor range and dismantled. So in the interim, I'm not certain.
Q. The Polaroids of the device, would they be in the case file?
A. I don't know. Actually perhaps --

Q. Where did you see them?

A. Probably in the Bomb Squad case file.

Q. And they depicted the bomb as it was recovered?

A. It would -- most likely it would be somewhat dismantled. It wouldn't actually -- they won't photograph it intact usually.

Q. In the two years that you've been a detective, how many pipe bomb investigations have you been part of even if you weren't in charge of them?

A. I'm uncertain. I don't know.

Q. Is it more than one, more than this one?

A. Oh, yeah.

Q. As a matter of fact, you were part of two investigations in this case relating to pipe bombs; is that right?

A. When you say part of, my partner was assigned the investigations. It's my partner's.

Q. Detective Herbert, I'm sorry, you have testified that you weren't investigating the, quote, bacosta pipe bomb; correct?

A. Right.

Q. That your partner was investigating?

A. She was the assigned investigator.

Q. And you were assisting?

A. Assisting.

Q. How many other pipe bomb investigations have you assisted on?

A. I really couldn't give you a number.

Q. Well, did you assist on the investigation of the pipe bomb recovered in Puerto Rico?

A. It was assigned to my partner. So, yes.

Q. So that's two; is that right?

A. Yes.

Q. Is it more than those two?

A. Yes.

Q. Is it more than five?

A. Yes.

Q. And have you acquired any working knowledge of how pipe bombs work?

A. Basic, very, very basic knowledge.

Q. Believe me, if you can just give us a basic statement of how they work.

A. Well, we don't -- I think your best bet for that would be to get perhaps the bomb technician who was assigned to the investigation maybe.

THE COURT: He's asking you the question, not seeking a source where he can acquire this knowledge.

Q. You say you have a basic knowledge. If you can impart that.

A. It's a bomb which utilizes a pipe to hold some type of explosive.

Q. The explosive is inside the pipe?

A. Usually the ones I've seen, the ones I've been familiar with.

Q. Well, the two that you were assisting or working on the investigation, is that the way that they worked? The explosives were inside the pipe?

A. I would have to look at the paper work done by the bomb Squad.

Q. So you don't know?

A. (Nods).

Q. In terms of ignition, how does it go off?

A. There are a number of ways.

Q. One is by lighting a fuse; is that right?

A. Sure.

Q. The pipe bomb that was recovered at 644 West 185th Street, do you know what manner of ignition was used there or was there any?

MR. BRANCATO: Judge, I object. It calls for hearsay on her part.

THE COURT: Unless she personally knows.

MR. BRANCATO: She saw this, is that what she's saying?

Q. Did you see Polaroids of this bomb? I think that's what you told us.

A. At some stage. They probably were dismantled. They don't photograph intact explosive devices.

Q. Did they photograph the manner of ignition, the fuse?

MR. BRANCATO: I object.

THE COURT: Sustained.

Q. Did you see the manner of ignition in the photographs that you observed?

THE COURT: I don't know if that's amenable to seeing the manner of ignition.

Q. Did you see a fuse?

A. I don't recall. I would have to see the paper work.

Q. And the pipe bomb recovered from Puerto Rico, did you ever see that?

A. No.

Q. Did you see photographs?

A. No.

Q. Did you see x-rays?

A. No.

Q. Were there any tools present in the apartment at 5320 Barker Avenue on February 11, 1951, during this search?

A. There may have been.

Q. Were any seized?

A. I did not see any with the materials seized.

Q. You said there were dogs?

A. Yes.

Q. The Bomb Squad dogs? I mean are they under the control of members of the Bomb Squad?

A. Uh, yes, yes, yes.

Q. And they're there to sniff out explosives?

A. Explosives, yeah.

Q. They precede the rest of the force into the apartment?

A. Yes.

Q. To determine whether there's any danger to people coming in; right?

A. That's accurate.

Q. And you then all proceeded in; is that right?

A. Uh-hum.

Q. Would it be fair to say there were no explosives recovered from Mr. Franzo's apartment?

A. There was -- I don't know how you would phrase it. Perhaps explosive material.

Q. Was there smokeless powder?

A. Powder, yes.

Q. And that was by the gun reloading equipment?

A. I don't know. My basic area, I was in the living room; but I was also by that door, the entrance to the apartment.

Q. Did you participate in the second search of Mr. Franzo's apartment?

A. No, I did not.

Q. Did you participate in a consent search of other premises at 5320 Barker Avenue?

A. On the night --

MR. BRANCATO: I'm sorry?

Q. February 13, the following day.

A. No. no.

Q. Did you -- apart from the occasion when you were there on February 12 in the early morning hours, did you ever return to 5320 Barker Avenue?

A. I don't believe so, no.

Q. Thank you.

THE COURT: Anything further?

MR. BRANCATO: Yes. I'd like to have the contents of this envelope marked People's Exhibit Number --

COURT CLERK: Is that 37, Mr. Brancato?

THE COURT: 35. Has this been previously marked?

MR. BRANCATO: No, we're going to mark it now.

THE COURT: I believe it's 35. 35 and 36 previously marked?

MR. BRANCATO: No. Judge.

THE COURT: Are you sure?

COURT CLERK: Yes, two envelopes.

MR. BRANCATO: Can we have this marked as People's Exhibit Number 37.

(Said envelope marked People's Exhibit 37 for identification)

MR. BRANCATO: I would ask it be shown to Detective Herbert.

THE COURT: Very well.

REDIRECT EXAMINATION:

BY MR. BRANCATO:

Q. Detective Herbert, I'm directing your attention to the stamps to the center. No, no, let me just read it into the record. Not the one marked G-41, G-32, G-31 or G-42, but to the ones inside of that. Could you please look at that.

A. Yes.

Q. How does the size of that portion compare to the size of the stamps that you saw at the apartment that night?

MR. BRENNER: Objection. Improper question, your Honor.

THE COURT: If she is qualified to make such a comparison.

MR. BRENNER: Your Honor, since these aren't in evidence, she cannot.

MR. BRANCATO: I'll tie it up, Judge.

THE COURT: We'll take it subject.

You may answer.

A. This is -- it appears to be the same size block of stamps I observed that evening.

MR. BRANCATO: I have no further questions.

MR. BRENNER: May I see it?

THE COURT: Let me see it for a moment, Mr. Brancato.

(Shown to Judge)

(Shown to defense attorney)

MR. BRENNER: I have no further questions on this.

THE COURT: You're not offering it at this time?

MR. BRANCATO: No. There will come a point.

THE COURT: You may step down.

Call your next witness.

MR. BRANCATO: Special Agent Chris Behon.

THE COURT: Counsel.

(Whereupon, an off-the-record discussion was held at the bench.)

SPECIAL AGENT C H R I S B E H A N,

called by and on behalf of the People, having been first duly sworn, testified as follows:

COURT OFFICER: Please state your name, spelling your last name and give your present command.

THE WITNESS: Chris Behon, B-E-h-A-N. I'm an agent with U.S. Treasury Department, Bureau of Alcohol, Tobacco and Firearms.

MR. BRANCATO: Could I just have one moment, your Honor, just to step out one minute?

THE COURT: Yes.

(Pause)

COURT OFFICER: Would you also give your shield number, please.

THE WITNESS: Shield number is 208.

MR. BRANCATO: Thank you, Judge.

DIRECT EXAMINATION:

BY MR. BRANCATO:

Q. Agent Benon, can you please tell us what is your profession?

A. I'm an agent with the Bureau of Alcohol, Tobacco and Firearms, U.S. Treasury Department.

Q. How long have you been a member of the Alcohol, Tobacco and Firearms Division of the Treasury?

A. About 20 years.

Q. What are your duties as a member of the Treasury Department, Division of Alcohol, Tobacco and Firearms?

A. Mostly we investigate explosive violations and Federal arson investigations.

Q. What rank do you hold as an ATF agent?

A. Special agent.

Q. Could you please tell us your training that you received prior to starting work 20 years ago.

A. There's two basic schools you go to. They were comprised of a month each at the time, that you learn law and general duties of an agent and also some specifics about the Federal firearms law and Federal explosives law.

Q. Where do you work? Tell us the county in which you work right now.

A. Right now the office is in Queens County. We

cover the -- all of New York City.

Q. Who is your immediate supervisor?

A. Gerald Raffa, R-A-F-F-A.

Q. What rank does Mr. Raffa hold?

A. Group supervisor.

Q. How many people are in the group?

A. Five.

Q. Could you give us the names of those people?

A. Corey Dipirro, D-I-P-I-R-R-O; Bruce Lounais, L-A-U-R-D-I-S; Alan Kusnirsky, K-A-S-H-I-R-S-K-Y; Thomas Kelly, K-E-L-L-Y and myself. I think that's it.

Q. Back on February 11, 1991, were you working?

A. Yes, I was.

Q. And where were you working that day?

A. Eventually I was at the 34th Precinct in Manhattan.

Q. You say "eventually". Prior to going to the 34th Precinct in Manhattan, where were you?

A. I was in the Eastern District Courthouse in Brooklyn, New York.

Q. Did there come a point later that day that you learned of a pipe bomb that was sent via Federal Express to the Roman family in Levittown, Puerto Rico?

A. Yes, I did.

Q. When did you first learn that?

A. It was in the early afternoon, as I recall, 2 or 3 o'clock.

Q. And after learning of that, could you please tell us what you did.

A. At the direction of my supervisor, I went up to the 34th Precinct in Manhattan.

Q. And when you got there, did you see anyone there from your team?

A. I went up with Agent Kashinsky. I don't believe there were any other agents there at that time.

Q. Did there come a point later that night that other members of the team went to the 34th Precinct?

A. Yes.

Q. Do you know Detective Bernard Giorgio?

A. Yes.

Q. When was the first time that you met him?

A. That day, February 11th of '91.

Q. Where was it that you met him?

A. In the 34th Precinct.

Q. Did there come a point that day that you saw the defendant in this case, Dominic Franzo?

A. Yes.

Q. And when did you first see him?

A. It was at the precinct that day.

Q. Where specifically in the precinct? What floor of the precinct?

A. Second floor in the detective's squad room.

Q. Now, did there come a point later that day that you received some property from Detective Giorgio that was taken from the defendant in this case, Dominic Frenzo?

A. Yes, there did.

Q. What property was that?

A. May I refer to my case file?

Q. Sure.

A. It was a small brown telephone book and a piece of paper bearing the names of two towns and four telephone numbers.

Q. When did you receive that property from Detective Giorgio?

A. The evening of February 11.

Q. What did you do with those two items, that telephone book and the piece of paper with two names on it? Well, the words on it, what were the words on it?

A. Words on the piece of paper were Levittown and Rio Piedras, and the phone numbers were 809-784-1630; 809-765-4792; 925-8771 and 655-9319.

Q. What did you do with that piece of paper and the

telephone book that you received from Detective Giorgio?

A. I kept it on my person till the next time, the next day when I was back in the office and did the property reports involved with it.

Q. Did you voucher those items?

A. Yes.

Q. Let me hand you what's already been marked already as exhibit 35 for identification.

(Handed to witness)

Q. Do you recognize that exhibit?

A. The voucher I recognize. You mean the items in it, too?

Q. Yes. Please lift the voucher and you can see through the clear plastic.

A. The voucher I recognize as having filled out at the property clerk's office. It has my signature on it.

Q. Can we open up the envelope? It's been marked as exhibit 35 for identification.

MR. BRANCATO: Mr. Friedman, do you have scissors?

THE COURT: Any of the officers have a straight knife?

THE WITNESS: I think I have it, Judge.

THE COURT: You got it all out?

Q. Could you please open the inner bag. Does the federal government have substitute plastic like that?

A. Now, I need the knife or the scissors.

MR. BRANCATO: Can we use the scissors?

Q. Are you down to the bottom?

A. I think so. Oh, wait a minute.

MR. BRANCATO: Can we have this marked People's exhibit number --

THE COURT: Is this number 35?

MR. BRANCATO: I'd like to have it marked "A" and "B".

THE COURT: 35-A and B?

MR. BRANCATO: Yes.

THE COURT: Off the record.

(Off-the-record discussion)

THE COURT: Are we all set now?

THE WITNESS: I think so, your Honor.

Q. Looking at what is marked as Exhibit 35-A and -- looking at that, do you recognize that piece of paper?

A. Yes. I do.

Q. What do you recognize it to be?

A. It's the piece of paper I received from Detective Giorgio the evening of February the 11th, '91. It has my initials and the date on the back.

Q. What date is that?

A. 2-11-91.

Q. Looking at what is marked as Exhibit 35-B, do you recognize that?

A. Yeah. It's the brown telephone book that I received from Detective Giorgio on February the 11th, 1991. It has my initials and the date of 2-11-91 on the first page.

MR. BRANCATO: I would offer them into evidence.

MR. BRENNER: May I see them?

(Handed to defense attorney)

THE COURT: Morty, take back your scissors.

COURT CLERK: Are they finished with it?

MR. BRANCATO: No, no, can we just leave them, Judge?

MR. BRENNER: No objection.

THE COURT: Without objection, People's 35-A and B marked, received.

(People's Exhibit 35-A and 35-B received and marked in evidence.)

Q. Now, Agent Raffa --

THE COURT: This is Agent Behan.

MR. BRANCATO: I'm sorry.

Q. Agent Behan, did there come a point later that night that a member of your team applied for a search warrant from a Federal Magistrate to search the defendant, Dominic Franzo's apartment?

A. Yes.

Q. And who applied for that search warrant?

A. Supervisor Gerald Kaffa.

Q. Do you know where Agent Kaffa applied for the warrant?

A. Eastern District, U.S. Attorney's Office. I'm sorry, excuse me, the Southern District, U.S. Attorney's Office.

Q. Where were you at the point that Agent Kaffa was applying for the search warrant?

A. At the 34th Precinct.

Q. During the course of the day, did you have occasion to speak to ATF agents in Puerto Rico concerning this explosive device that had been sent to the Roach family?

A. I don't believe I personally spoke to any agents in Puerto Rico that day, no.

Q. Did other members of the team contact Puerto Rican authorities in your presence?

A. Not that I recall.

Q. Are you aware if any other members of your team contacted ATF agents in Puerto Rico?

MR. BRENNER: Objection. The answer to the previous question --

THE COURT: If he's aware.

Q. Are you aware?

A. Yes, I believe he did.

Q. And who was that?

A. Gerald Koffa, supervisor.

Q. About what time was it that you went to the defendant's apartment at 3520 Barker Avenue?

A. It was about 1:30 or 2 o'clock a.m. the following day, February the 12th.

Q. 1:30, 2 o'clock, is that in the morning?

A. Yes.

Q. Who from ATF went with you to that location, the defendant's apartment in The Bronx at Barker Avenue?

A. Gerald Koffa, supervisor, Corey DiPirro, Bruce Leonais, Alan Kashinsky, another agent named Lee Floyd. I think that was everybody.

Q. From your team?

A. From our office, yes.

Q. Were there other officers? By that I mean were there members of the New York City Police Department also

2 present?

3 A. Yes, there were.

4 Q. Could you please give us the names of some of the

5 people who were there.

6 A. I think Detective Raymond was there.

7 Q. Is that Sulmo Raymond?

8 A. Sulmo Raymond, yes. I believe Detective Herbert

9 was there, Maryann Herbert. There was police officer -- I

10 believe Detective Ortiz from the 34th was there. There was

11 some officers from the -- I believe the New York City Bomb

12 Squad.

13 Q. Who had obtained the search warrant to search the

14 defendant's apartment?

15 A. Gerald Raffa, my supervisor.

16 Q. And when you got there, could you please tell us

17 how the warrant was executed? By that I mean how did the

18 search of the defendant's apartment take place?

19 A. We were let into the apartment I believe either it

20 was the landlord or the defendant's parents opened -- they

21 had a key and opened the door for us. We went in and

22 conducted the search.

23 Q. At this point, where was the defendant?

24 A. At the 34th, as far as I know.

25 Q. The last time you saw him, where was he?

A. At the 34th Precinct.

Q. As you recall, either defendant's parents or the landlord let you in?

A. Yes.

Q. And once you got in, could you please tell us what procedures you employed in conducting the search of the apartment?

A. Different members of the team generally go to different rooms and once the location is secure, make sure there's nobody inside and conduct a search.

Q. And was that what was done in connection with this case?

A. Yes.

Q. What is the seizing officer or who is the seizing officer? What purpose does the seizing officer serve?

A. Generally the seizing officer maintains the custody of the evidence in the location that's being searched once a determination -- determination has been made that it's going to be seized or retained, and generally the seizing officer also transports the evidence back to the office where the paper work is done.

Q. Who was the seizing officer in connection with this case?

A. I believe Carey Dipirro. Carey Dipirro.

2 Q. Is she one of the people that you referred to
3 earlier when you gave the names of the members of your team?
4 A. Yes.
5 Q. Could you please tell us what area did you search
6 in the defendant's apartment that night?
7 A. Mostly I was in the living room.
8 Q. What area of the living room were you searching?
9 A. Well, I searched just about the whole living room,
10 but primarily a bookshelf or wall unit that was in the
11 living room that contained a lot of papers and books and
12 other things.
13 Q. Do you have a list of the property that was
14 recovered from the defendant's apartment that night?
15 A. Yes, I do.
16 Q. Could you please tell us what -- how many items
17 were recovered from the defendant's apartment?
18 A. Six.
19 MR. BRANCATO: I'd like to have this marked
20 People's Exhibit Number 58 for identification.
21 (Said envelope marked People's Exhibit 58 for
22 identification.)
23 MR. BRANCATO: Please show it to the witness.
24 Q. Do you recognize those two papers?
25 A. Yes, I do.

2 Q. You can take them out, please.

3 What do you recognize them to be?

4 A. Three -- two of -- two of the papers -- two of the
5 papers that we removed from the apartment the night we did
6 the search warrant.

7 Q. How do you recognize that those are two of the
8 papers that were taken from the defendant's apartment that
9 night?

10 A. They both have my initials on the back and the
11 date 2-12-91.

12 Q. What initials did you put on there?

13 A. "C.B.".

14 Q. And 2-12-91, when did you put it on, the same day
15 you retrieved those papers?

16 A. No. No, I did not.

17 Q. When did you put the date on?

18 A. I put the date on when the original exhibit was
19 broken down into sub-exhibits to make it clearer, which was
20 the 21st of February, 1991.

21 Q. But the date that's on the back of that next to
22 the initials "C.B.", what's the date?

23 A. 2-12-91.

24 MR. BRANCATO: I would offer them into
25 evidence at this point.

MR. BRENNER: No objection.

THE COURT: Without objection, People's 58 consisting of two sheets received.

(People's Exhibit 58, previously marked for identification, is received and marked into evidence.)

(Whereupon, an off-the-record discussion is held at the bench.)

MR. BRANCATO: Your honor, at this time --

(Whereupon, an off-the-record discussion is held at the bench.)

THE COURT: All right, let's resume.

MR. BRANCATO: Your honor, at this time I would ask that Agent Behan read Exhibit 58 which consists of two pages to the jury.

THE COURT: Very well.

Q. Before reading it, Agent Behan, where did these two pieces of paper come from? Which room of the defendant's apartment?

A. The living room.

Q. Could you please start with the first page.

A. "Advance sun submitting, W.F. Vickery, 1988."

MR. BRENNER: I object. May we approach?

THE COURT: Yes.

(Whereupon, an off-the-record discussion is held at the bench.)

THE COURT: Agent, I will ask you to read whatever appears on the paper.

THE WITNESS: Yes, Judge.

A. (con't.) Well, there's --

THE COURT: Read from left to right.

A. (con't.) There's a notation 47. I would assume it's $47. There's no color signs.

"Advanced Gunsmithing, W.F. Vickery, 1966."

Then the numbers "8.98, American Engineer Explosives in WWI.

45.00, Bombs and Bombings, Brodie, B-R-O-D-I-E.

9.95, Booby Traps FM5-31.

12.00, C.I.A. Field Expedient Incendiary Manual.

6.95, C.I.A. Field Expedient Methods for Explosive Preparation.

5.95, C.I.A. Field Expedient Preparation of Black Powder.

12.00, C.I.A. Improvised Sabotage Manual.

14.95, Destruction by Demolition Incendiaries and Sabotage, U.S.M.C..

22.50, Directory of American Military Goods, Dealers and Makers, E.S. Bogelon and W.F. Houdini.

10.00, Expedient Hand Grenades, G. Demitritt.

8.95, Explosives and Demolition, 5-25.

49.95, Explosive -- Explosives and Home-Made Bombs, Storre, S-T-O-F-F-E.

6.00, Explosives and Propellants from Commonly Available Materials.

35.00, Explosives, Propellants and Pyrotechnics.

5.95, Firearms Silencers, H. Wilson.

16.95, Firearm Silencers, Volume Two, J. Ninnery. Incendiaries TM 31-201-1, Unconventional Warfare.

10.00, Devices and Techniques.

5.95, Law Enforcement Guide to Firearm Silencers.

7.98, Manual of Grenades and New Grenades Charts," it looks like. "British and American, Major J.I. Cowan.

12.00, Nazi Silencer Patents, 1936-1945, D. Thomas.

15.95, U.S.S. Special Weapons and Devices and Equipment, D. McLean.

17.95, U.S.S. Sabotage and Demolition Manual, Department of Army.

6.00, Principles of Quick Kill, 23-71-1, Army.

20.00, Silencers Patents, Volume 3, European patent. D. Thomas.

13.95, Silencers for Hand Firearms, S. Huebner.

12.00, Silencers in the 60's, Great Design, Great Designers, J. Truby.

15.95, Six-Old Silencers Catalogs, D. McLean.

35.00, U.S. Silencer of Patents, Volume I and II." It looks like D-E-N G. Thomas.

That's all.

Q. Agent Behan, this has been previously marked for identification as Exhibit 57 for identification.

I call your attention to the area inside of G-4-2, G-3-1, G-3-2 and G-4-1, the inner part. Do you recognize those twelve stamps?

A. Yes, I do.

Q. What do you recognize those 12 stamps to be?

A. It's a sheet of three-cent stamps we removed from the apartment on February the 12th of '91.

Q. And how do you recognize those as the stamps that were taken from the defendant Dominic Franzo's apartment on the 12th of February, 1991?

A. It has my initials, "C.B." on the back and the date 2-12-91.

Q. Which room were those twelve stamps taken from?

A. The living room.

Q. Did there come a point during the course of this investigation that you sent those stamps to the police

laboratory, the New York City police laboratory, located at the Police Academy here in New York County?

A. Yes, I did.

Q. And when was that?

A. February the 22nd, 1991.

Q. And when you brought them there, did you deliver them to anyone at the academy?

A. Detective Bresiin.

Q. Is that John Bresiin?

A. Detective John Bresiin, yes.

MR. BRANCATO: Your honor, at this time I would offer those twelve stamps into evidence at this point.

THE COURT: Does Mr. Brenner have it?

MR. BRENNER: No objection.

THE COURT: Without objection, People's 38 received.

(People's Exhibit 38, previously marked for identification, is received and marked into evidence.)

MR. BRANCATO: I'd like to move this marked as People's Exhibit Number 39 for identification.

(Said envelope is marked People's Exhibit 39 for identification.)

Q. Please look at that exhibit and tell us if you recognize it.

A. Yes, I do.

Q. What do you recognize it to be?

A. It's a Federal Express airway bill, number 400-0002-5224.

Q. How do you recognize that bill?

A. It has any initials on the back "C.B." and the date 2-20 of '91.

Q. When did you receive that air bill?

A. On February the 20th, 1991.

Q. From whom did you receive it?

A. From Mr. Thomas Sullivan who works for Federal Express.

Q. What is Mr. Sullivan's job at Federal Express, if you're aware?

A. I believe he's a security officer.

Q. Did you make a request of him for that bill?

A. Yes, I did.

MR. BRANCATO: I would offer it into evidence at this point.

MR. BREMER: May I see it, your Honor?

(Shown to defense attorney)

MR. BREMER: I have no objection.

THE COURT: Without objection, 59 received.

(People's Exhibit 59, previously marked for identification, is received and marked into evidence.)

Q. Detective Behan, how long were you at the defendant's apartment in the early morning hours of February the 12th, 1981?

A. I would say about two hours.

Q. Could you please tell us aside from these stamps that are already in evidence as well as that two-page list that you read to the jury what other items were recovered from the defendant's apartment that night?

A. I removed a can labeled Bull's-Eye Smokeless Pistol Powder, a roll of black electrical tape, a green magic marker, miscellaneous papers which included the stamps and the two yellow sheets of paper, a piece of paper bearing the name Julio Ortiz and phone numbers 487-3425 and 3450; a piece of paper bearing the word Levittown and Rio Piedras and numbers 809-764-1430 and 809-765-4752.

Q. Let's work our way up from the bottom of the list you just read.

You indicated that you found a piece of paper in the defendant's apartment that had the words Levittown and Rio Piedras and some telephone numbers?

A. That's correct.

Q. Let me hand you what's already been marked for identification as exhibit number -- could you open this, please. I withdraw my statement. I ask you to open up that plastic container.

MR. BRENNER: We move to mark it.

MR. BRANCATO: It's already been marked.

MR. BRENNER: As?

(Attorneys confer)

MR. BRANCATO: Can we move this marked as 55-C.

(Said paper marked People's Exhibit 55-C for identification.)

MR. BRANCATO: Your Honor, can we deem this document marked 55-B without marking the document itself?

THE COURT: Can we put a tag on the envelope 55-B?

(Said envelope deemed marked People's Exhibit 55-B.)

Q. Looking at what's marked 55-C, do you recognize that piece of paper?

A. Yes, I do.

Q. What do you recognize it to be?

A. The piece of paper we removed from the defendant's apartment on February the 12th bearing the words Levittown and Rio Piedras and the two phone numbers.

MR. BRANCATO: I would offer it into evidence at this point.

THE COURT: Have you seen it, Mr. Brenner?

MR. BRENNER: No. If I might see it?

(Shown to defense attorney)

MR. BRENNER: I have no objection.

THE COURT: Without objection, 35-C is received.

(People's Exhibit 35-C, previously marked for identification, is received and marked into evidence.)

Q. Looking at what is deemed marked as 35-B, the contents of this plastic envelope, do you recognize it?

A. Yes. It's the piece of paper bearing the name Julio Ortiz and phone numbers 487-5425 and 3430 that we removed from the apartment on February the 12th of 1991.

Q. How do you recognize that as the piece of paper that was taken from this defendant's apartment the night that you executed the search warrant?

A. It has my initials "C.B." on the back and the date 2-12-91.

MR. BRANCATO: I would offer it into evidence at this point.

MR. BRENNER: No objection.

THE COURT: Without objection, 55-L received.

(People's Exhibit 55-D, previously marked for identification, is received and marked in evidence.)

Q. Now, you indicated earlier that you received the two items from Detective Giorgio and vouchered them with those two items recovered from the defendant's apartment; am I correct?

A. On a separate voucher, but yes.

Q. What did you do with them at a later point?

A. I turned them over to the New York City Police Laboratory.

Q. And when you turned them over, did you turn them over to Detective Breslin at the New York City Laboratory?

A. I'm not positive about that.

Q. Where did you send them?

A. I brought them to the New York City Police Laboratory, filled out a voucher.

Q. And did you leave them there?

A. Yes.

Q. What other items were recovered from the

defendant's apartment that night?

A. There was four sheets of white paper with typed lettering, three sheets of white paper with typed written letter; four other sheets of white paper with typewritten letter; one sheet of white paper with typed written notes; two receipts from Ullnville Arms and one credit card receipt and a silencer manual, a telephone bill, a receipt number 19182, a postal money order receipt number 41b0998639 and a business card from USA Electronics.

Q. Do you have the business card with the name of USA Electronics that was taken from the defendant's apartment that night?

A. Yes, I do.

Q. Please take it out and let's get it marked as Exhibit Number 40 for identification. We'll mark it as Exhibit Number 40 for identification.

(Said card marked People's Exhibit 40 for identification)

Q. Looking at that, do you recognize --

THE COURT: One moment.

(Pause)

Q.(con't.) Do you recognize that card that you have in your hand which has been marked as Exhibit Number 40?

A. Yes, I do.

Q. What do you recognize it to be?

A. The business card with the name USA Electronics on it that we took from the apartment on the night of February 12, 1991. It has my initials on the back, "C.B." and the date 2-12-91.

Q. From which room was that card recovered?

A. The living room.

MR. BRANCATO: I would offer it into evidence.

MR. BRENNER: No objection.

THE COURT: Without objection, received. That's marked now as 40?

MR. BRANCATO: 40.

(People's Exhibit 40, previously marked for identification, is received and marked for identification)

MR. BRANCATO: If we can have this marked collectively as People's Exhibits 41-A through E. We'll deem it marked "A" through "E", Judge, with each bag given a separate letter.

(Said exhibit deemed marked People's Exhibit 41-A through E for identification.)

(Handed to witness)

Q. Do you recognize those items?

A. Yes.

Q. What do you recognize them to be?

A. They are the sheets of yellow -- sheets of paper, white with typewritten letter -- letters.

Q. And where were they recovered from in the defendant's apartment?

A. All from the living room.

MR. BRANCATO: I would offer what has been marked collectively as Exhibit 41-A through E into evidence at this time.

MR. BRENNER: May we approach, your Honor?

THE COURT: Yes.

(Off-the-record discussion)

THE COURT: People's 41-A through E without objection received.

(People's Exhibits 41-A through E, previously deemed marked for identification, is received and marked into evidence.)

Ladies and gentlemen of the jury, at this time we'll take a short recess.

Do not discuss this case amongst yourselves.

(Whereupon, an off-the-record discussion is held at the bench.)

THE COURT: Let's withdraw my statement.

Let's go on.

Q. Agent Behan, were any other items taken the first night from the defendant's apartment at 3320 Barker Avenue?

A. No.

Q. Now, you made reference to a can of powder.

A. Yes.

Q. Who vouchered that?

A. Corey Dipirro.

Q. Do you have that exhibit here with you today?

A. Yes.

MR. BRANCATO: Judge, we'll hold off marking it until Mr. Dipirro testifies.

THE COURT: Actually, we can mark it.

MR. BRANCATO: Why don't we mark it. We'll mark it as 42 for identification.

(People's Exhibit 42 is marked for identification.)

Q. Agent Behan, what's marked for identification as People's 42, do you recognize it?

A. It's the can of Bull's-eye smokeless pistol powder we removed from the apartment the night of February 12, 1991.

MR. BRANCATO: Judge, there are a few other questions I have concerning that first search, but

2 it's dreadfully warm in here. My voice is such a
3 monotone. Can we put it off until tomorrow
4 morning?
5 THE COURT: I'd rather do it now. Can we get
6 you some water perhaps?
7 Q. You indicated some tape was recovered from the
8 defendant's apartment?
9 A. Yes.
10 Q. Do you have that tape here with you?
11 A. Yes.
12 MR. BRANCATO: May we deem that marked
13 People's Exhibit Number 43.
14 THE COURT: You want it deemed marked?
15 MR. BRANCATO: Yes, Judge.
16 MR. BRENNER: Your Honor, I don't have any
17 objection to it being being officially marked.
18 THE COURT: Mark it then.
19 (Said item is marked People's Exhibit 43 for
20 identification.)
21 Q. Do you recognize what you have in front of you as
22 Exhibit Number 43?
23 A. Yes.
24 Q. What do you recognize it to be?
25 A. It's a roll of black electrical tape that we

removed from the defendant's apartment on February the 12th of '91.

Q. Where was that tape when you first saw it?

A. It was in a -- either a toolbox or a box containing tools that had been in the closet.

Q. Who retrieved that tape from the box?

A. I believe I did.

MR. BRANCATO: I would offer it into evidence at this point.

MR. BRENNER: May I see it, your Honor?

(Shown to defense attorney)

MR. BRENNER: No objection.

THE COURT: Without objection, 43 received.

(People's Exhibit 43, previously marked for identification, is received and marked in evidence.)

Q. And, lastly, do you have the green magic marker that was taken from the defendant's house that night?

A. Yes.

MR. BRANCATO: Can we have this marked as Exhibit Number 44?

(Said envelope is marked People's Exhibit Number 44 for identification.)

(Whereupon, an off-the-record discussion is

held at the bench.)

MR. BRENNER: Off the record.

(Off-the-record discussion)

THE COURT: As soon as it's marked, show it to counsel.

(Shown to defense attorney)

MR. BRENNER: I have no objection to its offering into evidence.

THE COURT: Off the record.

(Whereupon, an off-the-record discussion is held at the bench.)

THE COURT: All right, without -- on the record. Without objection, People's 44 is now received.

(People's Exhibit 44, previously marked for identification, is received and marked into evidence.)

Q. Agent Bench, about what time did you along with other members of ATF and the New York City Police Department leave the defendant's apartment on February 12th, 1991?

A. I believe it was 3:30 or 4 o.m. on the 12th.

Q. Now, did there come a point that you went back and executed a second search warrant?

A. Yes, there did.

Q. When was that?

A. February the 14th, 1991?

Q. Who applied for this search warrant?

A. Carey Dipirro, I believe.

Q. Who signed this? Was it a Federal magistrate?

A. Yes.

MR. BRANCATO: Your Honor, I have no further questions at this point.

THE COURT: All right, gentlemen, before --

(Off-the-record discussion)

THE COURT: Ladies and gentlemen of the jury, at this time we will recess until tomorrow morning at 10:45.

Once again I ask the jurors, as I ask every participant, to be here so we can get under way at the designated time.

As I observed earlier this morning, there were two jurors, whatever the reason I'm not inquiring, were not here at the designated time.

In any event, tomorrow morning at 10:45.

Do not discuss this case amongst yourselves nor allow any third party to discuss the case with you.

Do not reach any conclusions.

Do not speculate.

We'll see you back here tomorrow morning. Have a good night.

Take the jury out.

(Court is recessed and the case adjourned to February 26, 1992.)

The above is certified to be a true and accurate transcript of the minutes in this case.

Angela Lant

ANGELA LANT, Senior Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

- -x

THE PEOPLE OF THE STATE OF NEW YORK :

Ind.No.

- against - : 11987/91

DOMINIC FRANZA, :

Trial

Defendant. :

- -x

February 26th, 1992 -
March 11th, 1992
111 Centre Street
New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,
and a jury.

A P P E A R A N C E S:

FOR THE PEOPLE:

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JOSEPH V. CONNOLLY
Official Court Reporter

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; Indictment Number 11987 of 1991; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

MR. BRANCATO: Your Honor, at this time I would request that this envolope be marked as People's Exhibit Number 45.

THE COURT: All right.

(Envolope, so marked People's Exhibit Number 45 for identification.)

THE COURT: All right, bring in the panel and we'll get underway.

COURT OFFICER: Jurors are entering.

THE COURT: Jury is entering.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Go ahead.

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Goodday, ladies and gentlemen.

Mr. Brancato, have that Agent Behan resume the stand.

MR. BRANCATO: Yes, your Honor.

(Whereupon, the People's witness, Agent Behan, resumed the witness stand.)

THE COURT: You are continued under oath.

THE WITNESS: Yes, Judge.

C H R I S B E H A N, Special Agent, having been previously called as a witness on behalf of the People, was sworn by the Clerk of the Court, resumed the witnes stand and continued to testify under oath as follows:

DIRECT EXAMINATION (Continued)

BY MR. BRANCATO:

Q. Agent Behan, yesterday when we broke in the afternoon, we broke you you telling us what items that you took from the defendant's apartment the night you executed the first search warrant that was signed by the federal magistrate.

Did there come a point that a second search warrant was obtained for the defendant's apartment at 3320 Barker Avenue?

A. Yes.

Q. And when was that second search warrant obtained?

A. It was either obtained on the 13th or the 14th of February. It was executed on the 14th of February, 1991.

Q. When you say "executed," does that mean you conducted the search on that date?

A. Yes.

Q. Who obtained the second search warrant?

A. Carrie DePiero.

Q. And yesterday you referred to her as one of the members of your team; am I correct?

A. Yes.

Q. What was the purpose for obtaining the second search warrant?

MR. BRENNER: Objection.

It was obtained by Miss DePiero.

THE COURT: By who?

MR. BRENNER: Miss DePiero.

THE COURT: Well, if Agent Behan participated with her in obtaining it, I don't know what his position was vis-a-vis.

Was she acting in isolation?

Were you coordinating with Agent DePiero at this point?

THE WITNESS: Yes, Judge. And the group supervisor.

MR. BRANCATO: Okay.

THE COURT: All right. Overruled.

Q. Could you please tell us the purpose of obtaining the second search warrant?

A. When we executed the search warrant on the 12th, we had seen in the apartment some packages of firecrackers. After we left the apartment, after the first search warrant, I learned that there had been a firecracker in another recovered device, that was recovered in front of Myra Franza's brother's apartment or house.

Q. Is that Mr. Nelson Dacosta?

A. Nelson Dacosta; right.

So, the purpose of the second search warrant was primarily to retrieve the firecrackers that we had seen in the apartment.

Q. When you say that the purpose was primarily to recover the firecrackers, what other items were you given permission to recover from the defendant's apartment by the federal magistrate?

A. Well, the affidavit mentioned packages of fire-crackers, gray duck tape and papers upon which the normal handwriting of Dominic Franza appears and other evidence of the manufacture and shipping of an explosive device.

Q. Now, can - -

MR. BRANCATO: Can I just approach one for a moment?

MR. BRENNER: Can we step up?

MR. BRANCATO: Sure.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

MR. BRANCATO: Okay.

Q. Agent Behan, what you just mentioned now, fire-crackers, could you give us the rest, please?

A. Gray duck tape tape and papers upon which the normal handwriting of Dominic Franza appears and other evidence of the manufacture and shipping of an explosive device.

Q. Now, when Miss DePiero went to swear before the magistrate on that warrant, was that language that you referred to, other evidence of the shipping and manufacture, was that lined-out by the magistrate?

A. I believe it was. But I'm - -

Q. Okay.

A. I'm not positive.

Q. You believe it was?

A. I believe it was; yes.

MR. BRANCATO: Your Honor, I will stipulate at this time, if counsel so desires, to that. It was, in fact, that portion was lined-out by the magistrate.

MR. BRENNER: I have no objection.

THE COURT: All right. Let's move on.

Q. Now, when you went to the defendant's apartment then with that second search warrant, did you recover any firecrackers?

A. Yes, we did.

Q. Do you have them here with you?

A. Yes, I do.

THE COURT: These have been marked?

MR. BRANCATO: No, we're going to have the envolope in which they are.

(Handed to Mr. Brancato.)

MR. BRANCATO: Your Honor, I would ask that this envolope, together with these packs, be marked collectively as People's Exhibit Number 46 for

identification.

COURT CLERK: Thirty-six?

MR. BRANCATO: Forty-six.

MR. BRANCATO: Can we do that, Judge? The Reporter is waiting.

THE COURT: Yes.

(Envolope, so marked People's Exhibit Number 46 for identification.)

COURT OFFICER: So marked for identification.

MR. BRANCATO: Hand it to the witness.

(Handed to the witness.)

Q. Do you rocognize the contents of that pack that you've just given us?

A. Yes, I do.

Q. What do you rocognize them to be?

A. The four packages of firecrackers we removed from the apartment on February 14th, of '91, that has my initials on it and the date, 2/14 , of '91.

Q. Now, one of the packets is in a little plastic container.

A. Yes.

Q. Could you please open that packet?

A. Yes.

Q. Empty the contents onto your table.

(Pause.)

Q. I'm going to ask you to please look at this piece of paper that came from that plastic container.

Do you rocognize that?

A. Yes.

Q. What do you rocognize it to be?

A. It is the wrapping from one of the four packs of firecrackers we removed from the apartment on February 14th, of '91.

Q. When you first saw that pack that's you're now holding, the cellophane wrapper, how was it packaged?

A. It was intact. All four packages were un-opened when we got them.

Q. Did you voucher those four packs?

A. Yes, I did.

Q. And what did you do with those four packs of firecrackers?

A. They were subsequently sent down to our laboratory in Rockville, Maryland.

Q. And what laboratory is that? Is that Alcohol, Tobacco and Firearms?

A. The A.F.T. Laboratory; yes.

Q. Were they sent to Special Agent Gregory Czarnopys the gentlemen that's outside the courtroom?

A. Yes.

MR. BRANCATO: I would offer them into evidence.

THE COURT: Mr. Brenner?

MR. BRENNER: No objection.

THE COURT: Without objection, received.

COURT CLERK: Forty-six.

THE COURT: Forty-six.

(Envolope, so marked People's Exhibit Number 46 in evidence.)

COURT OFFICER: So marked in evidence.

(Handed to Mr. Brancato.)

Q. Did you recover any tape the time you went to execute the second search warrant?

A. Yes, we did.

Q. And what kind of tape did you recover?

A. We recovered two pieces of duct tape and one roll of black tape.

Q. Where was that recovered from inside the defendant's apartment?

A. I have no clear recollection of exactly where it was recovered from.

Q. Could you tell us which room in the apartment?

A. I don't remember.

Q. Now, the firecrackers, where were they when you initially saw them in the apartment?

A. On the 12th or the 14th.

Q. On the 12th.

A. On the 12th, they were in the livingroom.

Q. When you went back on the 14th, where were they?

A. They were in the livingroom, on a coffee table or a small table.

Q. I guess my question is: Were they in the same place in the apartment on the 14th as you had seen them on the 12th?

A. Yes, they were.

Q. Did you recover any handwriting material - - handwriting papers from the apartment that night?

A. Yes. We recovered a file marked "Mr. Franza's file."

Q. And where was that recovered from in the apartment?

A. That was in the livingroom, in the - - on the shelves, in the shelf area.

MR. BRANCATO: Your Honor, this has been previously been marked for identification as Exhibit Number 45.

(Handed to the witness.)

THE COURT: All right.

Q. Do you rocognize that?

A. Yes, I do.

Q. What do you rocognize it to be?

A. It's the file marked "Mr. Franza's file" that we took out of the apartment on February the 14th, of '91. It's got my initials on it and the date, 2/14/91.

MR. BRANCATO: I would offer it into evidence at this time.

THE COURT: Counsel?

MR. BRENNER: No objection.

THE COURT: Without objection, 45, received.

(Envolope, so marked People's Exhibit Number 45 in evidence.)

COURT OFFICER: So marked in evidence.

Q. Agent Behan, did there come a point that you sent what is now in evidence as Number 45, what's Mr. Franza's file, did there come a point that you sent that to the Police Laboratory, to Detective John Breslin?

A. Yes.

Q. Now, the two pieces of tape and the roll of tape that you recovered on - - on executing the second search warrant, what did you do with that?

A. It was sent down to the A.F.T. Lab, in Maryland.

Q. Was it given an exhibit number?

A. Yes. The two pieces of duct tape were given Exhibit Number 14 and the roll of black tape was given Exhibit Number 17.

Q. And was that, likewise, sent to Gregory Czarnopys?

A. Yes.

Q. Did you recover any other property during the execution of the second search warrant?

A. We recovered a piece of paper with some typewritten notes.

Q. And where was that taken from?

A. The wall unit area in the livingroom.

Q. And what was done with that piece of paper?

A. That was sent to the New York City Police Department Laboratory.

Q. Now, did there come a point during the course of this investigation that you made a request or a request was made Federal Express for a money order?

A. Yes. The subpoena was issued for it.

Q. And - -

MR. BRENNER: Objection.

I ask to speak to counsel for a moment.

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

MR. BRANCATO: I'm sorry, American Express.

THE WITNESS: Oh.

MR. BRANCATO: My colleague corrected me.

Q. Was it - - a request made for the money order that was used to pay for the item that is already in evidence, the federal express - - the American - - the Federal Express package that was sent on the on the 4th?

A. Yes.

(Handed to the witness.)

MR. BRANCATO: That's number 25 for identification.

I'm sorry. That's been previously marked as Number 36 for identification.

Q. Do you rocognize the voucher on top - -

A. Yes, I do.

Q. Of that package?

A. It has my signature on it.

Q. When did you fill that out?

A. June the 5th, of '91.

Q. And can you please open it and tell us if you rocognize the contents?

(People's Exhibit Number 45 returned to Mr. Brancato.)

(Pause.)

Q. Do you rocognize that?

A. Let me see the back.

(Pause.)

A. It's the money order we received from American Express on the subpoena.

Q. And what did you do after receiving that piece of evidence pursuant to a subpoena?

A. I brought it to the New York City Police Department Laboratory.

Q. And to whom was it delivered?

A. I believe Detective Breslin.

MR. BRANCATO: I would offer it into evidence at this point.

MR. BRENNER: Just if I may see it, your Honor?

THE COURT: All right.

COURT CLERK: This is which exhibit, Mr. Brancato?

THE COURT: Thirty-six.

(Handed to Mr. Brenner.)

(Pause.)

MR. BRENNER: No objection.

THE COURT: Without objection.

(Envolope, so marked People's exhibit number 36 in evidence.)

Q. Now, 36 in evidence, the American Express money order, is there a number across the top, an A-B number across the money order?

A. Yes, there is.

Q. Looking at the Federal Express voucher, which is in evidence, is there likewise a number across the top, an Air Bill Number?

A. Yes, there is.

Q. Could you compare the two?

(Pause.)

A. They are the same number.

(Returned to Mr. Brancato.)

Q. Did there come a point when you went back to the location of 3320 Barker Avenue and spoke to the landlord of the building?

A. The landlord or landlady; yes.

Q. What's the name of the family who is the landlord at that address?

A. Guzman.

Q. Do you recall when you went back?

A. I went back on February the 13th, of '91.

Q. At that point, this was after you had done the first search warrant?

A. Yes.

Q. Is it before the second search warrant?

A. Yes.

Q. When you went back the second - - when you went back on the 13th, did you go into the defendant's apartment?

A. No, we did not.

Q. Where did you go when you went to 3320 Barker Avenue, on the 13th?

A. We went to the basement of the house.

Q. Did you speak to the landlord at that point?

A. Yes.

Q. Did you request permission of the landlord to go into the basement?

A. Yes.

Q. Did you receive permission?

A. Yes.

Q. What, if anything, did you recover from the basement?

(Off the record discussion between Mr. Brenner and the defendant.)

A. We recovered a pipe wrench marked "Ridge Tool Company," a second pipe wrench marked "heavy duty," a vise grip and six drill bits.

Q. What happened with those itmes?

A. They were subsequently sent down do it A.F.T.

Laboratory in Maryland.

Q. Did the landlord tell you whose property that was?

A. Most of the things in the basement, if not all of the things in the basement, it was my understanding, belonged to the landlord, Mr. Guzman.

Q. Now, those items that you just referred to, you indicated they were sent to A.F.T. in Rockville, Maryland?

A. Yes.

Q. Did there come a point that you went back another time? By that I mean, did there come a point that you went back to 3320 Barker Avenue, when you were not executing a search warrant?

A. Yes.

Q. At that time, when was that?

A. It was March the 28th, of 1991.

Q. At this point did you have a search warrant to go into the defendant's apartment?

A. No, we did not.

Q. Did you request from the landlord to go into the basement?

A. Yes, we did.

Q. And what, if anything, did you recover from the basement?

A. We recovered an assortment of tools, pieces of

wood, pieces of wire, drill bits, knives, tube of a glue-type material, a roll of black tape.

Q. What - - where were those items sent?

A. Where were they sent?

Q. Yes.

A. To the A.F.T. Lab, in Maryland.

Q. When you went back to 3320 Barker Avenue and went into the basement, who was with you?

A. Gregory Czarnopys, who is a chemist in the A.F.T. lab in Maryland and Carlo Rosotte, who is a toolmark examiner for A.F.T. in Maryland.

MR. BRANCATO: May I approach counsel for one moment?

THE COURT: Yes.

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

Q. Did you go back to 3320 Barker Avenue on any other occasions, other than executing the first search warrant on the morning of the 12th, going into the basement on the 13th, going back to execute the search warrant and, lastly, going back in March to go into the basement?

A. No.

Q. When did you receive the air bill from Federal Express?

A. (No response).

Q. Is that the date that you marked it?

A. Probably what's on the evidence tag.

(Handed to the witness.)

(Pause.)

A. February the 20th, 1991.

Q. Now, prior to that date, did you have any of the information from the air bill? By that I mean, did you have any information as to what appeared under the portion that bears the part of sender?

A. Yes.

Q. When did you receive that?

A. I believe we received it on the February 11th or 12th.

Q. And where did you receive it from?

A. We received it from Puerto Rico. Our office in Puerto Rico.

Q. What information appears under what is marked as "sender"?

A. There is a telephone number, area code 212-795-0011. The sender is listed as U.S.A. Electronics, 75o West 181st Street, New York City, New York, U.S.A., zip, 10033.

Q. Is there a name that is written in on the bottom of that air bill?

A. Yes.

Q. What name is that?

A. Julio Ortiz.

Q. Did there come a point that you went to 750 West 181st Street?

A. Yes.

Q. When was that?

A. I don't think that's in my reports and I don't recall the exact date.

Q. In relation to February the 11th, would it have been a day, a week, a month, you know?

A. Could have been a month or more.

Q. When you got there, did you speak with anyone at 750 West 181st Street?

A. Yes.

Q. What did you learn that location to be?

A. It's a jewelry repair store front.

Q. And was anyone with you at this time?

A. Yes, Detective Raymond, from Arson and Explosion.

Q. When you went in, did you speak to the gentlemen in the store?

A. Detective Raymond did. He didn't speak any English.

Q. Were you present at this time?

A. Yes.

Q. How - - what was the approximate age of the person in the store?

A. He was about seventy or seventy-five years old.

Q. What kind of store was it?

A. Jewelry repair store.

Q. Did you make inquiries through Detective Raymond as to any Julio Ortiz at that location?

A. Yes.

Q. What did you learn?

MR. BRENNER: Objection.

THE COURT: Overruled.

Q. What did you learn?

A. He didn't know any Julio Ortiz.

MR. BRANCATO: Okay.

THE COURT: Let me just understand this. This address is a repair type facility, nothing above it? Just one store front or is that part of a building?

THE WITNESS: It may have been a second floor, your Honor. I don't recall what - -

THE COURT: Or is that a residential floor or part of a commercial?

THE WITNESS: Well, 750 was just the store

front. There was no other door marked 750.

Q. Did you go to any other locations on that street?

A. Yes. There was an apartment building next door, 736 West 181st Street.

Q. Did you speak with anyone there?

A. Yes. We spoke to the - - to the superintendent, a Mrs. Gutierrez, I believe her name was.

Q. And did you make any inquiries concerning a Julio Ortiz at that location?

A. Yes, we did.

Q. And what did they say?

MR. BRENNER: Same objection.

MR. BRANCATO: I'll withdraw it.

Q. Agent Behan, there appears a telephone number above what is marked as sender.

Could you please tell us that number that appears above what is marked as sender?

A. 212- 795-0011.

Q. Did you make attempts to try to locate where that number came from?

A. Yes.

Q. And did you call it?

A. Yes.

Q. Did you get an answer?

A. No.

Q. Okay. What did you learn about the number?

MR. BRENNER: Objection.

It is being offered for its truth?

MR. BRANCATO: I'll withdraw it.

Q. How many times did you call the number?

A. I don't recall.

Q. When you called the number, could you please - - did anyone pick up on the other side?

A. No. There was a tone similar to what you get when you call a fax machine.

Q. Did you make any attempts to fax any material to that location?

A. I did not; no.

Q. Okay. Did you ever - -

MR. BRANCATO: Well.

Q. Did you ever learn where that fax machines goes to?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. Yet this was marked for identification as Exhibit 42.

(Handed to the witness.)

Q. You indicated yesterday that you recognized that. Once again, where do you rocognize that from?

A. The can reading Hercules Bullseye Smokeless Pistol Powder that removed from 3320 Barker Avenue on February 12th, of 1991.

MR. BRANCATO: I would offer it into evidence at this time.

THE COURT: Counsel?

MR. BRENNER: No objection.

THE COURT: Without objection, 42, received.

MR. BRENNER: Your Honor, I'm sorry. I withdraw my objection.

I ask that we approach.

THE COURT: All right.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Strike that last remark and we're going to hold off on that. That's with respect to 42.

(Returned to Mr. Brancato.)

COURT OFFICER: Ready, your Honor?

THE COURT: Yes.

(Witness resumed the witness stand.)

MR. BRANCATO: Your Honor, at this time I'll pass the witness - -

THE COURT: You have no further questions?

MR. BRANCATO: That's correct.

THE COURT: The witness is yielded.

MR. BRENNER: Thank you.

CROSS EXAMINATION

BY MR. BRENNER:

Q. Good afternoon, Agent Behan.

A. Good afternoon.

Q. Would it be fair to characterize the investigation from February 10th, 1991, up to the present as a joint investigation?

A. February 11th; yes, it would be.

Q. And when I say "joint," I mean that the agents of the Bureau of Alcohol, Tobacco and Firearms were working in conjunction with various departments of the New York City Police; is that right?

A. Yes.

Q. That would include members of the 34th Precinct?

A. Yes.

Q. Particularly detectives Giorgio and Ortiz?

A. Yes.

Q. Members of the Arson and Explosive Squad?

A. Yes.

Q. Particularly detectives Raymond and Herbert?

A. Yes.

Q. Were there also members of the New York City Police Bomb Squad that were part of this joint investigation?

A. To a small degree; yes.

Q. And to a degree, the Questioned Document Laboratory of the New York City Police Department, which I suppose falls under it's own heading, was also parts of this joint investigation?

A. Yes.

Q. Now, the Bureau of Alcohol, Tobacco and Firearms is, of course, a federal agency; is that correct?

A. Yes.

Q. It is a relatively large agency; is that correct?

A. Yes.

Q. The agency have laboratories of its own?

A. Yes.

Q. I know Mr. Brancato made repeated references to things that you sent to an Agent Czarnopys?

A. Yes.

Q. Is he an agent?

A. Yes.

Q. So, it is a Mr. Czarnopys?

A. He's a chemist, I believe.

Q. And that's a laboratory within the Bureau of Alcohol, Tobacco and Firearms; is that right?

A. Yes.

Q. What laboratory is that?

A. It is the National Laboratory, in Rockville, Maryland.

Q. Now, there is also a person by the name of Carlos Rosotte involved in this investigation.

A. Yes.

Q. He's also a member of the Bureau of Alcohol, Tobacco and Firearms; is that right?

A. Yes.

Q. And he's a tool examiner?

A. Yes.

Q. So, he has a specialty; correct?

A. Yes.

Q. And Mr. Czarnopys has a specialty?

A. Yes.

Q. Is there a Questioned Document Laboratory in the bureau?

A. I'm sure there is. Yes. There is.

Q. And when I say "questioned document," would it be fair to say your understanding is handwriting, the origin of

documents, the nature of documents, those kinds of inquiries are covered by that section; is that right?

A. Yes.

Q. Is there a fingerprint section to the bureau?

A. Yes, there is.

Q. Now, would it be fair to say, agent, that each of those four sections, the tool section, for want of a betterword, the chemical section, the fingerprint section and handwriting section were all utilized in connection with this investigation?

A. Were utilized in connection with this investigation?

Q. Yes.

A. I don't know specifically what the handwriting or document section may have done. I'm not positive about that.

Q. Did you at some point send two Federal Express way bills, two separate documents, both bearing the signature Julio Ortiz, for comparison at the A.F.T. Questioned Document Laboratory?

A. I believe that was sent by our office in Puerto Rico to the A.F.T. Lab.

Q. Well, but it was - - the agency is the agency, is it not?

A. Yes.

Q. And everybody is working together.

A. Yes.

MR. BRANCATO: I object. That's not a question.

Q. Is everyone working together?

MR. BRANCATO: I still object.

THE COURT: Sustained as to form.

Q. Well, were the agents in Puerto Rico working as part of your investigation of the pipebomb that was found in Puerto Rico?

A. Yes. We discussed the investigation.

Q. And - -

A. Frequently.

Q. And did someone from the Bureau of Alcohol Tobacco and Firearms send two documents bearing the signature of Julio Ortiz for handwriting comparison?

A. I'm not sure of the purpose.

I believe the air bill went to our lab from Puerto Rico and I'm not positive what examination was requested.

Q. Do you have your case file with you?

A. Yes.

MR. BRENNER: If I may have one brief moment, your Honor?

THE COURT: All right.

(Pause.)

Q. Do you have a document in your case file which you can use to refresh your recollection regarding that particular document examination?

(Pause.)

A. I have a report from Puerto Rico that mentions the sending of the evidence.

Q. Sending of the evidence.

Is there a report that reflects the results of any of - -

MR. BRANCATO: I object. That calls for hearsay.

MR. BRENNER: No, I'm not asking for the results.

THE COURT: He's not asking the content.

MR. BRENNER: I'm not.

MR. BRANCATO: Okay.

A. I'm sure there is a report. I don't have a copy of it.

Q. Well, would it be fair to say in that limited instance, at least, the Document Laboratory of the Bureau was utilized in this investigation?

A. I don't know. The original request, I don't believe, asked for handwriting.

Q. Well, agent - - Agent?

A. Yes?

MR. BRENNER: I'm sorry.

Q. Would such a comparison be an important part of the investigation?

A. Yes.

Q. And you don't know know whether it was done?

A. I'm not one hundred percent whether it was done on - - what was done on the evidence that was sent from Puerto Rico to the lab.

Q. Agent, you removed on various occasions typewritten documents from Mr. Franza's apartment?

A. Yes.

Q. The purpose in doing that was to preserve them for comparison as well; is that right?

A. Yes.

Q. Is, to the best of your experience, the comparison of typewritten documents unknown to a known source? Does that fall within the ambit of the Questioned Document Unit of the bureau?

A. I believe it would; yes.

Q. Your purpose in taking those documents was to compare them against what?

A. Compare them against the airway bill, Federal

Express Airway Bill, two threat notes that had been received by the family. There may have been something else I don't recall right now.

Q. So, at the time on February 12th, the early morning hours of February 12th when you entered Mr. Franza's apartment you had information that at least two documents relative to your investigation had been typewritten; is that right?

A. (No response).

Q. If not more.

A. Yes.

Q. Okay. There were two typewritten letters which you refer to as threatening letters; is that correct?

A. Yes.

Q. Had you seen them?

A. I don't believe I had seen them on the 12th; no.

Q. But you had information that those existed?

A. Yes.

Q. And you also had information from the agents in Puerto Rico, your agents in Puerto Rico the Federal Express materials had been typewritten?

A. Yes.

Q. So, you went to the apartment with a purpose, at least, of seeking whether the typewritten documents existed for comparison?

A. Yes.

Q. And you took various documents for that reason?

A. Yes.

Q. Was comparison done?

A. Yes.

Q. By whom?

A. By the New York City Police Lab.

Q. And did you receive a report of the results?

A. I believe I did.

Q. Do you know?

(Pause.)

A. I don't recall if I got a written report of the comparison on the typewriting we took from the apartment and the - - and I don't know if the New York City Lab compared the airway bill to that typewriting.

Q. Well, the airway bill, it was part of the federal investigation, was it not?

A. It was part of the joint investigation.

Q. Well, let's be more specific.

There is presently pending a federal complaint against Mr. Franza for the interstate or international shipping of an explosive device; is that right?

A. Yes.

Q. That's an exclusive federal prosecution, is it not?

A. Yes.

MR. BRANCATO: I object. It is a question of law.

MR. BRENNER: No, your Honor.

THE COURT: Yes. It is. It is.

MR. BRANCATO: It is a question - -

THE COURT: Counsel to the bench.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(Witness resumed the witness stand.)

THE COURT: That last colloquy or the last question and answer, that's to be stricken.

The jury is to disregard that.

You may continue, Mr. Brenner.

BY MR. BRENNER: (Continued)

Q. The shipping of an interstate - - international explosive device is a federal crime, is it not?

MR. BRANCATO: I object.

MR. BRENNER: Your Honor, I don't see the prejudicial - -

THE COURT: Well, it may be a federal crime, it may also constitute a state crime.

MR. BRENNER: Correct.

THE COURT: I don't want to get into that issue.

Q. Did you submit the typewritten materials to the federal laboratory, the A.F.T. Laboratory?

A. The - -

Q. For comparison?

A. The typewritten materials we secured on the search warrant?

Q. Yes.

A. No.

Q. However, Mr. Brancato elicited from you that all the physical property, tools, pipes, other materials, all of that was submitted, not to the New York City Police but to the federal laboratory; isn't that right?

A. Yes.

Q. For testing?

A. Yes.

Q. But handwriting and typewriting, those materials were submitted to the New York City Police?

A. Yes.

MR. BRENNER: I'd like this to be marked for

identification, your Honor.

THE COURT: This will be Defendant's G - - no, H.

MR. BRENNER: Correct.

THE COURT: H, I believe.

MR. BRENNER: Yes.

THE COURT: Defendant's H.

COURT CLERK: No, your Honor. It went up to J yesterday for identification.

THE COURT: So, this is K?

COURT CLERK: Yes.

THE COURT: All right, K.

It is not that I didn't know the sequence. As a matter of fact, for the moment I got confused with the alphabet.

It is K.

(Laboratory report, so marked Defendant's Exhibit K for identification.)

COURT OFFICER: So marked for identification.

(Handed to the witness.)

Q. Agent Behan, I'd like you to look at that two page document.

(Pause.)

Q. I ask you whether you recognize it?

A. It's a laboratory report from our lab in Rockville, Maryland.

Q. Does it refresh your recollection as to whether the A.F.T. Lab in this case did any comparisons of the handwriting recovered from the Federal Express air bills?

(Pause.)

A. You said handwriting?

Q. Yes.

A. Yes.

Q. It does refresh your recollection?

A. (No response).

Q. Was, in fact, comparison done between the two signatures, Julio Ortiz, that appeared on the two Federal Express air bills?

A. That's what the report indicates; yes.

Q. And were there, in fact, results, without telling us what they were?

A. Yes.

Q. And a copy of that report was sent to you, was it not?

A. It's addressed to an agent in Puerto Rico. I probably received a copy of it.

Q. You can address yourself to page 2.

A. Page what?

Q. Page two. There is there a "c.c.", is there not?

A. Yes.

Q. To whom?

A. To myself.

Q. So, at least in that regard signatures and handwriting were analysed by the A.F.T. Lab?

A. The evidence from Puerto Rico; yes.

Q. Well, the evidence from Puerto Rico was sent to you, was it not?

A. No, sir.

THE COURT: The evidence?

MR. BRENNER: The air bills. The original air bills.

Q. Mr. Brancato put them into evidence, didn't he?

A. Ultimately they're sent to us; yes.

Q. At some point during the course of your investigation did you have occasion to send fingerprints to the A.F.T. Fingerprint Laboratory?

A. Yes.

Q. And were those the fingerprints of Mr. Franza?

A. Yes, they were.

Q. And were those the fingerprints of a Mr. Joseph DeJesus?

A. Yes, I believe they were.

Q. Was that for comparison for latent prints produced from documents connected to the Puerto Rico pipebomb?

A. I'm not sure if the comparison was for prints on the documents or the device itself.

Q. Have you reviewed your case file before coming to testify here, agent?

A. Yes, I have.

Q. Would it be fair to say that fingerprints, the examination of fingerprints is the type of forensic evidence?

A. Yes.

Q. And the presence or the absence of fingerprints might be - -

THE COURT: When the examination is forensic evidence?

MR. BRENNER: Yes, your Honor.

Testimony about the - -

THE COURT: Forensic science, but not evidence.

MR. BRENNER: Forensic science. I stand corrected.

Thank you, your Honor.

Q. Forensic science.

A. Yes.

Q. And that the absence or presence of fingerprints

might well be important to an investigation?

A. Yes.

Q. In this case you deemed it sufficiently important to send the known fingerprints of Mr. Franza and known fingerprints of Mr. DeJesus to your laboratory?

A. Yes.

Q. Now, Agent Behan, you didn't send them to the New York City Police Department Laboratory, did you?

A. No, sir.

Q. Is that because it was recovered from the Puerto Rico bomb?

A. Yes. Our lab raised the prints on the evidence.

Q. There was a comparison done?

A. Yes.

Q. And was the report sent to you? The results of?

A. Yes.

Q. Agent, when you entered Mr. Franza's apartment for the first time, when you conducted your search, how long were you there?

A. I would say about an hour and a-half or two hours.

Q. And how many law enforcement officials were present, excluding the dogs?

A. I would say - -

THE COURT: Those are the ones that did the

sniffing?

MR. BRENNER: Yes, Judge.

A. Initially eight or ten, possibly.

Q. So, eight or ten agents went through Mr. Franza's apartment for approximately an hour and a-half?

A. Eight or ten agents and police officers. They didn't, I don't believe, all stay for the entire thing. But they were initially in the apartment; yes.

Q. People were participating in varying degrees in this search?

A. Yes, people were looking around; yes.

Q. Now, during the search did you seize any wire from Mr. Franza's apartment?

A. During the first search warrant; no.

Q. When I say "wire," copper wire, for instance?

A. No.

Q. Did you have information that there was copper wire used in the Puerto Rico pipebomb?

A. I don't recall that; no.

Q. Did you -- - you were looking for evidence of the manufacture of a pipebomb?

A. Yes. Manufacture and shipping of a pipebomb.

Q. Correct.

Did you find the pipes?

A. I don't recall any pipes in the apartment.

Q. Did you find any devices for the cutting of pipes?

A. No.

Q. Now, you said that there was a box of tools; correct?

A. Yes.

Q. And some where adjacent to either this tool box or this tool case was a roll of electrical tape?

A. I believe it was in the box.

Q. And you took that?

A. Yes.

Q. You left the tools?

A. Yes.

Q. Now, you subsequently went back, you told Mr. Brancato, to the basement of this apartment and took other tools?

A. Yes.

Q. At no point after February 12th did you go back and try and get Mr. Franza's tools; is that right?

A. No.

Q. Incidently, did you ever ascertain what Mr. Guzman's occupation was, without telling us what it was? Did you learn what he was?

A. I believe we did; yes.

Q. And there were a lot of tools in that basement, were there not?

A. Yes, there were.

Q. There were drill bits, there were knives, screwdrivers, screws, tape, a lot of stuff?

A. Yes.

Q. And you did ascertain what occupation he had?

A. I believe I did; yes.

Q. And you also ascertained, according to Mr. Brancato, that stuff was all his?

A. That was my understanding; yes.

Q. But it was taken, in any event?

A. Yes.

Q. Sent down to the federal laboratory for Mr. Czarnopys to examine?

A. Mr. Rosotte; yes.

Q. Mr. Rosotte, as well.

Mr. Czarnopys made no examination of the tools?

A. I don't believe he did; no.

Q. Now, your investigation in this case carried you to a lot of different places over a period of time, did it not?

A. Yes.

Q. And you did a lot of things - -

A. Yes.

Q. In the course of your investigation.

For instance, you subpoenaed Mr. Franza's bank records?

A. I'm sorry?

Q. Bank account records?

A. Bank account records?

Yes, I believe we did.

Q. Approximately -- -

MR. BRANCATO: What page are you on, Mr. Brenner?

MR. BRENNER: I'm on my paper.

Q. Do you know when that was?

A. Not exactly. I assume it would have been shortly -- a short period of time after the 12th or 13th of February.

Q. And the purpose of that, Agent Behan, was to determine what kind of financial movement there was in Mr. Franza's day-to-day existence; is that right?

A. Yes.

Q. Whether he was moving around large amounts of money, whether there was anything inconsistent or unusual showing up on those bank account records; is that right?

A. Yes.

Q. You subpoenaed his credit card records from that bank as well, did you not?

A. Yes.

Q. That was also for the same purpose and to - - in addition, to determine what purchases he had made, where and for what amounts?

A. Yes.

Q. And you received all of that; is that right?

A. Yes.

Q. You have that here?

A. No, I do not.

Q. You also subpoenaed Mr. Fransa's telephone records?

A. Yes.

Q. Showing out-going calls on a local level; correct?

A. Yes.

Q. And out-going calls to a long distance level?

A. Yes.

Q. For what period of time?

A. I believe it was - - we requested prior to the shooting incident, June or July, of '90, I guess it would have been, through the incident with the pipebomb to Puerto Rico.

Q. So, while your investigation was initiated at the time of the pipebomb's delivery to Puerto Rico, ultimately the scope included the shooting dating back to July, of 1990; is that right?

A. Yes.

Q. And you got those records, did you?

A. Yes.

Q. The purpose was to see who Mr. Franza had called, how often, if any numbers came up with frequency; correct?

A. Yes.

Q. Also to track down those individuals and to speak to them to find out what you could about Mr. Franza, his comings, his goings, etcetera?

A. Yes.

Q. You got all that information?

A. We got all the tool records; yes.

Q. Do you have them here?

A. No, I do not.

Q. In addition, you subpoenaed the union records for Mr. Franza?

A. Yes.

Q. What union?

A. The Electrical?

Q. International Brotherhood of Electrical Workers?

A. Yes, I believe so.

Q. I.B.E.W.?

A. Yes.

Q. And the purpose- - is there a particular local or

the entire union?

A. Local 3.

Actually, we subpoenaed the Joint Industry Board. I'm not exactly sure whether that's a local of the union or some affiliation with the union.

Q. And it was to see when Mr. Franza had worked, and under what circumstances?

A. And with whom.

Q. His associates?

A. Yes.

Q. So you can speak to them about Mr. Franza, his comings, his goings, his action, what he was up to; is that right?

A. We also want to see if there was a Julio Ortiz who had worked in the same union or with Mr. Franza.

Q. In other words, you subpoenaed Julio Ortiz' records as well?

A. Yes, we did.

Q. And you did that, all that and you got all those records?

A. Yes.

Q. And do you have them here?

A. No.

Q. You also had occasion to visiting - - to visit

certain plumbing supply stores in the area of Mr. Franza's home?

A. Yes.

Q. Gun Hill Plumbing Supply?

A. I believe that was one of them.

Q. And - -

MR. BRENNER: If I may have a moment?

(Pause.)

Q. Lexington Plumbing?

A. Yes.

Q. And that was to ascertain whether anyone there had sold Mr. Franza pipes to use use in the pipebomb.

A. Yes.

Q. And end caps to put on the ends of that pipe in both the Puerto Rican pipebomb and what I referred to as the Dacosta pipebomb?

A. Yes.

Q. And you did that. You went to them and you spoke to them?

A. Yes.

Q. And was that in the company of Detective Raymond, Detective Herbert, Detective Giorgio, Detective Ortiz?

Which one of those? Pick one. Were any one of them present during those?

A. No, I was with another agent, Alan Kansninsky; K-A-N-S-N-I-N-S-K-Y.

Q. Did you have a photograph of Mr. Franza?

A. Yes, I did.

Q. To each of these places where you went, did you display that photograph to them?

A. I believe I did; yes.

Q. Now, you also visited the Olinville Gun Club, did you not?

A. Yes.

Q. And you spoke to a gentleman or gentlemen at that place; is that right?

A. And a woman, yes, a lady.

Q. You had information that this was a place that Mr. Franza frequented?

A. Yes.

Q. He shot there?

A. Yes.

Q. He target-shot there?

A. I believe he did; yes.

Q. You also had information from your own agency that Mr. Franza was a federally licensed firearms dealer?

A. Yes.

Q. What does that mean?

A. It allows someone who has a dealer's license to buy firearms interstate.

Q. Buy firearms interstate from interstate dealers?

A. From wholesalers, other retailers, manufacturers, whatever.

Q. Would you agree that the business of firearms dealing and buying is a popular one?

MR. BRANCATO: I object.

MR. BRENNER: Withdrawn.

THE COURT: Sustained.

Q. There is a lot of that that goes on?

MR. BRANCATO: I object.

THE COURT: Sustained.

Q. Are there books and magazines about guns?

A. Yes, there are.

MR. BRANCATO: I - -

Q. Are there popular magazines that you can buy on the news stand about firearms?

MR. BRANCATO: I object to "popular."

MR. BRENNER: Your Honor, the People - -

THE COURT: Well, just a minute. Just a minute.

The objection is sustained.

If you want an argument, it is at the sidebar.

MR. BRENNER: Thank you.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Have the witness resume.

(Witness resumed the witness stand.)

BY MR. BRENNER: (continued)

Q. Agent, would it be fair to say that books an magazines about guns and ammunition are available, accessible from several sources?

A. Yes.

Q. You can get them out of the public library; is that right?

A. Yes.

Q. And you can get them at magazine stands?

A. Yes.

Q. On the occasion of your experience as an agent of the Alcohol, Tobacco and Firearms bureau, have you ever seen gun and ammunition catalogues?

A. Yes.

Q. Where individuals order through the mail various pieces of firearm related material?

A. Yes.

Q. And have you ever seen catalogues listing books about such materials?

A. I don't recall seeing that particular thing; no.

Q. Have you ever heard of the Rutgers' Book Center?

A. I don't think so.

MR. BRENNER: I'd ask that this be marked for identification, your Honor.

THE COURT: Is that affiliated with the university?

MR. BRENNER: I suspect not.

THE COURT: All right. This is L.

MR. BRENNER: L.

COURT CLERK: L, your Honor.

(Book, so marked Defendant's Exhibit L for identification.)

COURT OFFICER: So marked for identification, your Honor.

THE COURT: All right.

(Handed to Mr. Brancato.)

(Pause.)

THE COURT: Mr. Brancato, it is not for the purpose of making a selection.

MR. BRANCATO: No, your Honor.

THE COURT: Exhibit it to the witness.

(Handed to the witness.)

(Prior exhibit returned to Mr. Brenner.)

MR. BRENNER: Thank you.

THE COURT: Is there a question before the witness?

MR. BRENNER: I would just like him to look at it before I place a question.

(Pause.)

Q. Agent, in your experience in dealing in the bureau, you've investigated firearms related cases; is that right?

A. Yes.

Q. Illegal shipments of firearms; is that right?

A. Yes.

Q. Explosive devices, possessory offenses?

A. (No response).

Q. Yes?

A. Yes.

Q. Have you ever seen a document like that?

A. Probably have, but I have no specific recollection of it.

Q. When you went into the apartment, did you observe the reloading equipment in Mr. Franza's apartment?

A. Yes.

Q. What did you observe about it?

A. Other than that it was there?

Nothing particular. I believe there was some - - the equipment, some shell casings, possibly.

Q. Are you aware of the distinction - -

MR. BRENNER: Withdrawn.

Q. When you went into the apartment, did you find a receipt for an American Express Money Order?

A. American Express Money Order?

No, I don't believe so.

Q. Did you find a receipt from Federal Express?

A. No.

Q. Did you find any end caps?

A. No.

Q. Did you find any brown wrapping tape?

A. No.

Q. Did you find any fuses?

A. No.

Q. Did you find any brown wrapping paper?

A. No, I don't believe so.

Q. Did you find a Casio keyboard?

A. No.

Q. Did you find any white index cards?

A. I don't recall, one way or the other, on white

index cards.

Q. Did you find - - well, agent, the search warrant that your agency requested expressed that it was looking for white index cards, among other things.

A. If - -

Q. Is that correct?

A. I'd have to make reference to the search warrant.

Q. Do you have it?

(Pause.)

A. I don't think so.

No, wait a minute.

(Pause.)

A. Yes. It says "white index cards."

Q. So presumedly, agent, if you had seen white index cards, under the directive of the warrant you would have seized them?

A. Yes.

Q. And you did not?

A. Did not.

Q. Did you find any heavy duty self-sealing plastic bags?

A. No.

Q. Now, this was all material that your agency had requested based on information - - based on information that

your agency had as to what the components of the Puerto Rico pipebomb were; is that right?

A. Components in the wrapping and the shipping materials; yes.

Q. You asked for all those items; is that right?

A. Yes.

Q. You found a roll of black electrical tape in a tool box; is that right?

A. Yes.

Q. Some papers, some stamps?

A. (No respone).

Q. Yes?

And a - -

A. Yes.

Q. And a can of powder?

A. Yes.

Q. Anything else?

A. Green magic marker.

Q. Green magic marker was because there were green magic markings on the box; is that right?

A. There was some green markings on the box; yes.

Q. You also had information that the envelopes in this case were handwritten, the envelopes with the "threatening letters," had been handwritten?

A. I don't know if - - I don't specifically remember if we knew that the envelopes had been handwritten at that point or not.

Q. But you knew letters were typed?

A. Yes.

Q. And you don't recall whether you knew the envelopes were handwritten?

A. I really don't recall; no.

Q. You knew that the signatures "Julio Ortiz" on the way bills were handwriting?

A. Yes.

Q. Did you seize any pens?

A. No.

Q. Did you seize the green magic marker?

A. Yes.

Q. Any other kinds of magic marker?

A. Did we seize any other?

Q. Were they there?

A. I don't recall any others.

Q. Incidently, you told us that the letters were typewritten.

A. Yes.

Q. Did you seize a typewriter?

A. I don't believe there was a typewriter in there.

Q. There was no typewriter there?

A. I don't recall any; no.

Q. Now, the following day you went back to 3320 and engaged in a consent search of the Guzman basement.

A. Yes.

Q. Were you alone?

A. I doubt it. But I don't remember specifically who was with me.

Q. Would it be fair to say the joint aspect of the investigation was still continuing?

A. Yes.

Q. Would it be fair to say that on February 12th you had been in the company of numerous members of the New York City Police Department?

A. Yes.

Q. Were detectives Raymond and Herbert with you on February 13th when you went to the Guzman house?

A. I don't believe they were; no.

Q. Did you subsequently voucher property that was taken from that house that you hadn't taken?

A. Yes.

Q. And how did that property get to you?

A. It was given to me on February 14th by Detective Raymond.

Q. And did you have a conversation with her as to where she had obtained these materials or did you just voucher them because she gave them to you?

A. No, she said they had gotten them in the basement of the - - the Guzman's basement.

Q. When was that?

A. I believe they were there on the 13th, also. But I'm not positive.

Q. She - - she gave you pipes; is that right?

A. Yes.

Q. Specifically, what did she give you?

A. One end cap.

Do you want the dimensions? The dimensions of the end cap?

Q. Sure.

A. One end cap, approximately three inches in diameter; one pipe nipple, approximately five inches in length.

Q. Let me interrupt you because - - well, let's me interrupt you.

A pipe nipple, if I'm correct, is a pipe?

A. Yes.

Q. Go on.

A. An inch and a-half in diameter. Pipe nipple, approximately four inches in length, one and one-half inches

in diameter. A pipe nipple, approximately five inches in length, one and threequarter inches in diameter. Pipe nipple, approximately four and one-half inches in length, one and one-half inches in diameter. A pipe nipple, approximately four inches in length, one and three-quarter inches in diameter.

And that was all.

Q. Now, you were there but you didn't take that stuff?

A. No. We were not there together.

Q. Well, but when - - who was there first?

A. That I don't know.

Q. Well, when you were there, did you see that stuff?

A. There were a lot of pipes in the basement; yes.

Q. Did you take any of them?

A. No, I did not.

Q. But your information was that Detective Raymond and Herbert took them; correct?

A. Yes.

Q. And gave them to you to voucher?

A. Yes.

Q. When you hadn't taken them yourself?

A. Correct.

Q. Did you also make note that you had received or two typewriter exemplars had been taken?

A. I had information that exemplars had been taken; yes.

Q. So we're clear, exemplars are samples, are they not?

A. From a typewriter; yes.

Q. And your information was there were two typewriters in the Guzman house that were sampled?

A. At least two.

Q. And that was done by detectives Raymond and Herbert?

A. I believe, yes.

Q. What happened to that? I mean, you made mention to it in your report, did you not?

A. I think I did. Yes, I did.

My understanding is it went to the New York City Police Laboratory for a comparison.

Q. Do you know whether a comparison was done?

MR. BRANCATO: Judge, I object.

This goes on to the report, which is hearsay.

MR. BRENNER: No, only - -

THE COURT: No, it was whether it was done, not to as to content or conclusion.

MR. BRENNER: Correct.

MR. BRANCATO: Even if it was or was not, it

would call for hearsay.

THE COURT: All right. If he knows whether a report was made?

A. I was told a comparison was done; yes.

Q. Did you ever make a visual examination of the various typewritten documents in this case, you yourself?

A. Some of them. Possibly all of them. But some of them.

Q. Did you take, for instance, the Federal Express Air Bill and look at the typewritten documents, on the other hand, taken from Mr. Franca's apartment?

A. Yes, I'm sure I did that.

Q. You did?

And you looked for similarities?

A. I did.

Q. And differences?

A. Yes.

Q. Would you make a notation of whatever conclusions you yourself drew?

A. No.

Q. You didn't make any notation?

A. No, I did not. I don't recall making any notation.

Q. Did you take the copies of the "threatening letters" and compare them to the typewritten materials found in

Mr. Franza's house, visually?

A. Yes.

Q. Other than your naked eye, did you use any kind of device?

A. No.

Q. Did you make any notation of that comparison?

A. I don't recall. No, I - - I don't think so.

Q. One of the reasons you went to the Olinville Gun Club was to attempt to trace its case in which the bomb had been transported; is that right?

A. Yes.

Q. That was - - had been classified to you as a Doscaseal Gun Case?

A. Yes.

Q. And you went and spoke to the people at Olinville to determine whether Mr. Franza had ever purchased such a case from them; is that right?

A. Yes.

Q. And whether they had ever seen him with such a case?

A. Yes.

Q. And you wrote down what they said to you, did you not?

A. I believe I did; yes.

Q. And you asked them to sign their statements, did you not?

A. I'm sorry?

Q. You asked them to sign their statements, did you not?

A. I didn't take written statements from them.

Q. You're sure?

A. I'm pretty sure. But I.

Q. Agent Behan, the documents in which - - which you had collected in this case fall into several categories.

There are the case records, are there not?

A. Yes.

Q. The typed reports which you prepare, they are signed off by you and then reviewed by a supervisor and signed off by him?

A. Yes.

Q. There are transmittal reports in which you are sending stuff to various parts of the bureau?

A. Yes.

Q. And then there are your own handwritten notes?

A. Yes.

Q. In which, as you were proceeding through your investigation, you were writing down what was happening?

A. Yes.

Q. In those handwritten notes did you write down what the various individuals from Olinville, the Olinville Range told you?

A. I believe I did; yes.

Q. Did you visit any other places that sell such materials?

A. I visited another gun store in the Bronx and one in Manhattan. Only for the purposes of getting a similar case.

Q. Deak's Gun Shop?

A. Yes.

Q. Did you carry a photograph of Mr. Franza with you?

A. I believe I did; yes.

Q. Did you display it to them?

A. Yes.

Q. And you contacted, in addition, a dealership in Missouri?

A. Midland Arms?

Q. Midway Arms.

A. Midway Arms; yes.

Q. For the very same purpose?

A. Yes.

Q. To determine whether such a gun case that was used in the Puerto Rico pipebomb had been purchased by Mr. Franza?

A. Yes.

And, well, to see what if anything he had purchased from Midway Arms.

Q. And you documented all that, did you not?

A. Yes.

Q. Agent, Mr. Brancato introduced a piece of paper with the word "Levittown" written on it as being recovered in Mr. Franza's apartment; is that right?

A. Yes.

Q. That was important to this investigation because; A, the pipebomb had come from Puerto Rico which Levitown is located; correct?

A. Had been sent to Puerto Rico; yes.

Q. And also because the word "Levitown" appears on the Federal Express Way Bill?

A. Yes.

Q. The word "Levitown" in that notation, can you tell us how it is spelled?

A. Which notation?

Q. The notation, the piece of paper that was recovered from Mr. Franza's apartment.

A. L-E-V-I-T-O-W-N.

Q. Now, could you tell us how Levitown is spelled on the Federal Express Air Bill?

A. I don't know if I have a copy of that.

THE COURT: We have the air bill.

MR. BRANCATO: What number, Judge?

THE COURT: Thirty-nine.

THE WITNESS: I think I have it.

THE COURT: You can look at the exhibit, agent.

(Handed to the witness.)

THE COURT: You may respond.

A. Spelled L-E-V-I-T-T-O-W-N.

Q. So, the paper in Mr. Franza's apartment has it spelled one way; correct?

A. Yes.

Q. And the person, whoever, who typed the Federal Express Way Bill used two "T's"?

A. Yes.

Q. Now, the address that's on the Federal Express Way Bill, not the words Levittown, not the telephone number, the address, there is a street address, isn't there?

A. Yes, there is.

Q. The piece of paper that you recovered from Mr. Franza's apartment have the words Levittown and Roipodras, R-O-I-P-O-D-R-A-S, that a street address on there?

A. The street address on the small piece of paper?

No, it is not.

Q. Did you find any documents in Mr. Franza's apartment that had the street address that's recorded on the Federal Express Air Bill?

A. I don't believe so; no.

Q. Presumedly, if you had seen such an address in mister apartment - - in Mr. Franza's apartment you would have seized it?

A. Yes.

Q. Did you see the first roll - -

MR. BRENNER: Withdrawn.

Q. On February 14th you went back to Mr. Franza's apartment and seized another roll of electrical tape.

A. Yes.

Q. Did you see it the first time around?

A. I don't recall.

Q. Do you know if it was there?

A. I don't know.

Q. Was Mr. Franza's apartment secured after the search warrant?

A. Yes, it was.

Q. How so?

A. It was locked, either by his parents or by the landlady.

Q. Well, I suppose that I meant secured in the sense

that anyone other than police or law enforcement or federal agency officials could enter.

A. I'm sorry, would you repeat the question?

Q. I suppose that I meant security in the sense that anyone other than federal agents or police officers could enter.

It wasn't secured in that - - to that end, was it?

A. You mean while we were in there?

Q. After you left.

A. It was locked. The apartment - - I understand it was locked.

Q. By either Mr. Franza's parents or landlady?

A. That was my understanding; yes.

Q. When you went down to the Guzman apartment on February 13th, all the tools that you seized on the 28th, were already there?

A. Yes.

Q. A month and one-half later you went back and you seized them?

A. Yes.

Q. You didn't seize them on the 13th?

A. No.

Q. You had information about another pipebomb; isn't that right?

A. Yes.

Q. Did you have specific - - during the course of your investigation, did you have specific information about the components of that pipebomb?

A. Yes.

Q. Isn't it a fact that - - one of the components was a single firecracker?

A. Yes.

Q. Not a package, not five, not four but one?

A. Right.

Q. Did you find any unopened packages of firecrackers in Mr. Franza's home?

A. No.

Q. They were all sealed?

A. Yes.

THE COURT: Mr. Brenner, Mr. Brancato, would you step up a minute?

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, bring the witness back.

(The witness resumed the witness stand.)

(Defense exhibits returned to Mr. Brenner.)

BY MR. BRENNER: (Continued)

Q. Did you speak to Ceasar Rodriguez?

A. Yes.

Q. Ceasar Rodriguez is the Federal Express clerk who accepted the package which turned out to be the bomb?

A. Yes.

Q. And did he relate to you what he had seen and heard and done?

A. Yes.

Q. Were you present at the line-up at the 34th Precinct?

A. Yes.

Q. Mr. Franza appeared in that line-up?

A. Yes, he did.

Q. The purpose of that line-up, as best you can understand, was to assess whether Mr. Franza was the person who had tendered the bomb?

A. Had mailed the package; yes.

Q. Did you have occasion to investigate Mr. Joseph DeJesus?

A. Investigate?

No.

Q. Did you have occasion to investigation a person by

the name of Julio Ortiz?

A. I interviewed him.

Q. Did you do any investigation beyond that?

A. Yes.

Q. You subpoenaed his telephone records?

A. Right.

Q. Would it be fair to say that, agent, that one of the things you were looking for was to see whether Mr. Franza had called Mr. Ortiz or Mr. Ortiz had called Mr. Franza, among other things?

A. Yes.

Q. And so you subpoenaed, again, local records, long distant records of Mr. Ortiz' telephone number?

A. Yes.

Q. And do you ever - - you got all those?

A. Yes.

Q. Do you have them here?

A. No.

Q. Did you subpoena his bank accounts?

A. Julio Ortiz?

Q. Yes.

A. No.

Q. You subpoenaed his union record and his criminal record, did you not?

A. I believe I did; yes.

Q. And you got all that material?

A. Yes.

Q. Do you have it here?

(Pause.)

A. No, I don't have the Julio Ortiz criminal record report.

Q. Finally, agent, would it be fair to say that at no time did you submit the multiple pages of handwritten documents that you seized during the execution of a federal warrant at 3320 Barker Avenue for comparison with the handwriting which appeared on the Federal Express Air Bill and invoice and the American Express Money Order to a federal laboratory?

Is that fair to say?

A. I did not submit any of that to our lab, no, or any federal lab.

MR. BRENNER: I have nothing further at this time, your Honor.

RE-DIRECT EXAMINATION

BY MR. BRANCATO:

Q. Why didn't you submit it to the federal lab?

A. The document examination had been started by the Police Department with the delivery note that had been

dropped the day of the shootings. In consultation with my supervisor, we felt it was best to let them continue with the document examining end of the investigation.

Q. Now, Mr. Brenner asked you if you - - if you subpoenaed Julio Ortiz' phone records.

A. Yes.

Q. Did you subpoena - - what records did you subpoena?

A. I subpoenaed his home telephone records and his work telephone records or the number - - the number that appeared on one of the pieces of paper with the name Julio Ortiz that we retrieved from the apartment, two phone numbers, I subpoenaed those two records and local call records.

Q. All right. The two numbers that appear on the piece of paper with Mr. Ortiz' name on it, are those his work numbers?

A. Yes.

Q. Did you subpoena those records?

A. Yes.

Q. Did you look for the defendant's home telephone number on the work records of Mr. Ortiz?

A. Yes.

MR. BRENNER: Telephone records, your Honor? Work telephone records, your Honor.

Q. Work telephone records?

A. Yes.

Q. Was it on - -

MR. BRENNER: Objection.

THE COURT: Was it what?

Q. Did his number appear on that?

THE COUNT: Sustained.

Q. Did you look to see it any calls were made from Mr. Ortiz' work number to the Olinville Gun Club?

A. Yes, I did.

Q. What did you notice?

MR. BRENNER: Objection.

MR. BRANCATO: Judge, he asked the question.

MR. BRENNER: Objection. Objection, your Honor.

THE COURT: Well, he may ask the question. The question is - -

MR. BRANCATO: Can we approach?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the recovered discussion with the Court.)

(Open court.)

THE COURT: All right.

(The witness resumed the witness stand.)

THE COURT: You'll have a lot of exercise.

THE WITNESS: Plenty of exercise.

THE COURT: I wish somebody directed me to do that too.

Go on, Mr. Brancato.

Q. Did you look on Mr. Ortiz work phone records for the telephone number of the Olinville Gun Club, the club that you learned that the defendant was a member?

A. Yes.

MR. BRANCATO: I have nothing further.

MR. BRENNER: I have nothing more, your Honor.

THE COURT: Very good.

You are excused, Agent Behan.

Ladies and gentlemen, we will recess at this time for lunch.

Do not discuss this case among yourselves or allow any third person to discuss the case with you. Should anyone attempt to do so, do not engage in that conversation but report that to the court officer and not your fellow jurors.

We'll recess today until two-twenty this day.

Have a good lunch.

Take the jury out.

(WITNESS EXCUSED)

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Off the record discussion between Mr. Brenner and the defendant.)

THE COURT: All right, gentlemen, two-twenty.

(Whereupon, the Court took a luncheon recess in the proceedings.)

* * *

(Continued on the following page.)

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Pranza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

MR. BRANCATO: Your Honor, at this time I would request that these photographs be marked People's Exhibit Number 47 through People's Exhibit Number 52 for identification.

THE COURT: All right.

(Photographs, so marked People's Exhibit Number 47 through People's Exhibit Number 52 for identification.)

THE COURT: All right, bring in the panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: All right, call your next witness.

Mr. Brancato.

Call it in.

COURT CLERK: Yes, your Honor.

MR. BRANCATO: At this time the People call Gergory Czarnopys.

COURT CLERK: Your Honor, the defendant, his counsel, the assistant district attorney and all sworn jurors are present.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York versus Domonic Franza, shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

COURT CLERK: Be seated.

COURT OFFICER: In a loud voice state your full name, spelling your last name.

THE WITNESS: Gregory P. Czarnopys, C-Z-A-R-N-O-P-Y-S.

MR. SHEINDLIN: May I inquire, Judge?

THE COURT: Yes.

MR. SHEINDLIN: Thank you.

G R E G O R Y P. C Z A R N O P Y S, having been called as a witness on behalf of the People, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

Q. Where do you currently work?

A. I work for the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms.

Q. What is your current job title?

A. Forensic chemist, National Laboratory.

Q. How long have you worked in that position?

A. For three years.

Q. And what is your educational background?

A. I got a Bachelor's of Science in Criminalistics, with an emphasis in Chemistry in Michigan State University in 1988.

I've attended A.F.T. Arson and accellerant course, the advanced explosive investigation techniques, chemistry of prior techniques and explosives, forensic mycropkapy, introduction to hairs and fibers, international symposium on

trace evidence.

Q. With respect to explosives, how many anaylsis have you done over the course of your years of work with the Alcohol, Tobacco and Firearms Bureau?

A. Approximately one hundred twenty.

Q. And with respect to trace evidence, how many anaylsis have you made of trace evidence?

A. Over five hundred.

MR. SHEINDLIN: Your Honor, at this time I'm offering this witness as an expert in the area of explosive and trace evidence anaylsis.

THE COURT: Mr. Brenner?

MR. BRENNER: A brief voir dire, your Honor?

THE COURT: Yes.

MR. BRENNER: Thank you.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q. Mr. Czarnopys, you've testified before?

A. No, I haven't.

Q. This is your first time?

A. That's right.

Q. In how many years of being a chemist?

A. Three years.

Q. So, you've never been certified as an expert

before?

A. No, I haven't.

Q. For judicial purposes?

A. No, sir.

Q. Have you written any articles in the field of forensic chemistry?

A. No, I haven't.

Q. Do you subscribe personally to any of the journals of forensic science?

A. We have a list of journals that we get through the laboratory, that we're all to read the journals. Personally, I don't receive them to my home.

Q. Outside of the bureau, do you engage in any professional or scientific organizations? Do you belong to any?

A. Yes.

Q. What are those?

A. The Mid Atlantic Association of Forensic Scientists. Along with that, I belong to the Internation Association of - - International - - let me get it straight.

International Association of Bomb Technicians and Investigators.

Q. What do you have to do to belong to those?

A. They have - - you have to basically pay your membership dues.

Q. Okay.

THE COURT: Off the record.

MR. BRENNER: I have nothing further. I have no objection.

THE COURT: All right.

THE COURT: Now you have that designation.

Mr. Sheindlin?

MR. SHEINDLIN: Okay.

DIRECT EXAMINATION (Continued)

BY MR. SHEINDLIN:

Q. Specifically what are your duties with the Alcohol, Tobacco and Firearms Bureau?

A. I examine and analyze physical evidence with results to bomb investigations.

I also work in the speciality area of trace evidence.

And I also provide courtroom testimony and I - - my other assignments are training investigators on evidence collection and packaging.

Q. I'd like to draw your attention to on or about February 19th,, 1991.

On this date did you receive property under case number 91N0153?

A. Yes, I did.

Q. And what was that property?

A. The property I received was received by the laboratory. It came in from our Special Agent Rinaldo Rodriguez in Puerto Rico.

I received a series of exhibits contained in one box. Each one that was packaged separately. I received those and then I examined them.

Q. Specifically the box that you received, was that labeled as Exhibit Number 5?

A. Exhibit Number 5 was a brown box that was taped together.

Q. Okay. Under this lab number, did you receive something under Exhibit Number 6?

A. Exhibit 6 was a black plastic case I received.

Q. Okay. And were there components with the black plastic case?

A. Yes. There were many components inside the case and my job was to identify those.

Q. And was black powder with those components?

A. That's correct.

Identified the material from the inside of one of the end caps, the residue material as Three-F-G black powder, commercial grade.

Q. Now, in your expert opinion that you identified it

as black powder?

A. That's correct.

Q. Is that an explosive substance?

A. Yes, it is.

Q. Did you, on February 21st, 1991, receive property under lab number 91M0166 that was sent from the Alcohol, Tobacco and Firearms Bureau in New York and specifically sent by Special Agent Chris Behan?

A. Yes. Chris Behan was the agent. I believe it was delivered to the laboratory by Lee Floyd.

Q. And what was Exhibit Number 25 under that specific lab number?

A. Exhibit 25?

That exhibit - - let's see if I have it listed here?

(Pause.)

A. I don't have the exact contents of whatever is listed.

According to my report, Exhibit 25 contained a section of galvanized steel pipe, having an approximate length of six inches and a diameter of an inch and one-half.

Q. Under Exhibit Number 24, what property was received under that lab number, if any?

A. I received a bag of powder, that I had identified

it as being Flat End Ball, Smokeless Powder, double base smokeless powder. And in that powder there was a red firecracker.

MR. BRANCATO: Your Honor? If we may approach?

THE COURT: Yes.

COURT OFFICER: Step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Bring in the witness.

(The witness resumed the witness stand.)

MR. SHEINDLIN: Your Honor, at this time there is a stipulation entered into by the defense and People that the property which the witness has described under lab number 91N0166, specifically the pipe and gun powder, is referring to the pipebomb that was found outside Nelson Dacosta's apartment.

THE COURT: And the date?

MR. SHEINDLIN: Specific date is August - - oh, stated under that lab number 91N0166 is the

firecracker that was inside of that - - that was a component of that pipebomb found inside of Nelson Dacosta's apartment back in August, of 1990.

MR. BRENNER: As well as the powder, your Honor. It is so stipulated. August 11th, 1990.

THE COURT: All right.

MR. SHEINDLIN: Both parties stipulate under the first number that the witness testified to, 91M0153, with respect to the box, the case, the contents and powder, that those refer to the property that composed the pipebomb that was found outside of Evelyn Lamboy Figueroa's home on February 8th, 1991.

MR. BRENNER: So stipulated.

THE COURT: Very well.

BY MR. SHEINDLIN: (Continued)

Q. With respect to the gun powder that you received with respect to Nelson - - the Nelson Dacosta pipebomb, did you have a chance to examine that?

A. Which one? I'm not clear of which one.

Q. With respect to the powder that was in the bag.

A. In the baggie from the - - okay.

That one, the powder that I identified it is a being a Flat End Ball, double base smokeless powder.

Q. In your expert opinion, is that an explosive substance?

A. Yes, it is.

Q. The powder that was - - explosive substance that was in the Nelson Dacosta pipebomb and the explosive substance that was in the pipebomb found outside of Evelyn Lamboy's home on February 8th, 1991, were those the same types of explosive powder?

A. No, they are different.

Q. How were they different?

A. Well, the one from the case, 153, 91N0153, the one that was found in Puerto Rico, that was black powder. It is a totally different composition than what smokeless powder's black powder consists of various chemicals, potassium nitrate, sulfate and carbone and what it's use is totally different than what smokeless powder is.

Q. Okay. Now, with respect to what has been previously marked as exhibit number - -

MR. SHEINDLIN: Which is this?

MR. BRANCATO: This is number 42.

MR. SHEINDLIN: I ask that the witness be shown Exhibit Number 42.

(Handed to the witness.)

Q. Have you had an opportunity to evaluate the con-

tents of what are within that exhibit?

A. Yes, I examined it.

Q. And in your expert opinion, what is the contents that is within that exhibit?

A. Bullseye brand smokeless powder.

Q. And that is an explosive substance,; is that correct?

A. Yes, it is.

Q. Now, is it an explosive substance that was part of the Bullseye - - that's within the Bullseye brand smokeless powder container, is that the same or is that different than the explosive substance that was found in the Nelson Dacosta pipebomb and the explosive substance that you analyzed that was in the pipebomb in Puerto Rico?

MR. BRENNER: Objection to the compounding nature of the question.

THE COURT: Sustained.

MR. SHEINDLIN: Okay.

Q. Is that exhibit that you're holding now?

A. Huh-huh.

Q. Is the powder contained within that exhibit the same or different, in your expert opinion, as the powder that you tested in the Nelson Dacosta pipebomb?

A. It's different.

Q. Is the explosive powder contained within the exhibit that you are holding in your hand now the same or different, in your expert opinion, as the explosive powder that was recovered - -

MR. SHEINKLIN: Excuse me.

Q. That you analyzed pipebomb recovered in Puerto Rico?

A. It was different.

Q. Are all three explosive substances different?

A. They are different. The two types of smokeless powder that - - the type of smokeless powder that was used in the case in New York, this 91M166 - -

THE COURT: Before you complete your answer.

Do I understand your question, when you say "different," different from each other? Different from what?

Q. All three different from each other?

THE COURT: All right.

A. Yes. All three of them are different from each other.

But what I was explaining was the powder that's found in this particular - - that was recovered from this pipebomb, it's - - basically it is the same composition, what it is made of. It is manufactured differently. You can tell

the difference between this brand and this brand here, of powder. So, you can see that it is a definite difference in who manufactured this particular powder.

MR. SHEINDLIN: At this time I'm offering Exhibit Number 42 into evidence.

MR. BRENNER: No objection.

THE COURT: That without objection, 42 is now received.

(Plastic envelope, so marked People's Exhibit Number 42 in evidence.)

COURT OFFICER: So marked in evidence.

Q. The explosive substance that's in Exhibit Number 42, what is that used for?

A. It is, in this particular configuration as it is now - -

MR. BRENNER: Oojection. Objection as to what it's used for.

THE COURT: Put a question, please.

THE WITNESS: Pardon me?

THE COURT: No, I'm not talking to you.

Q. Are you aware of what the explosive substance in Exhibit 42 is used for?

A. Yes, I am.

Q. What is it used for?

A. It is when you receive it in this configuration, in this can, it is used for reloading. It is a canister of powder that you can purchase from a gun store or whatever store that allows - - that has the license to sell it. And it is used mainly - - the only use I know of is - - for legal use is for manufacuturing reloading ammunition for guns.

Q. And also manufacuturing ammunition for guns; is that correct?

A. Right. The same type.

Q. With respect to the explosive substance, the powder that you analyzed in the pipebomb found outside of Nelson Dacosta's apartment, are you aware of what is that explosive substance is used for?

A. Yes, I am.

Q. What is that used for?

A. The same general purpose as this particular type here in this can here. The smokeless powder is used for reloading, generally. When you get in that type of quantity, that's the only way it is sold in - - that I'm aware of and anyone at our lab is aware of.

MR. BRENNER: Objection.

THE COURT: Wait. Wait.

Objection is sustained.

Strike that after the answer. It is not

responsive to the question.

MR. SHEINDLIN: The question about anyone is aware of the lab is aware of; is that correct, that's being striken?

THE COURT: I'm sorry.

MR. SHEINDLIN: The part about anyone in the lab is aware of, that's being stricken?

THE COURT: No, it is being stricken on the quantity. I didn't hear anything about quantities. Let's keep it straight between this.

MR. SHEINDLIN: Let me.

THE COURT: This exhibit which is 42 and any reference to any other.

MR. SHEINDLIN: All right, let me ask the question again.

Q. Specifically, the explosive substance that you anaylzed in the pipebomb recovered outside of Nelson Dscosta's apartment, are you aware of what that explosive substance is used for?

A. Yes, I am.

Q. Specifically, what are you aware that explosive substance is used for?

A. That's used for reloading ammunition.

Q. And also manufacturing of ammunition; correct?

A. Manufacturing; correct.

Q. With respect to the explosive substance that you analyzed in the pipebomb recovered from Puerto Rico, are you aware of what that explosive substance is used for?

A. Yes, I am.

Q. And what is that explosive substance used for? What can that explosive substance be used for?

A. Generally that particular explosive is used for black powder rifles, use that to - - your material for the - - for a black powder rifle. It is not used in ammunition, that I'm aware of.

THE COURT: What is it used for? I didn't get that.

THE WITNESS: Black powder rifle.

THE COURT: What does that mean?

THE WITNESS: That means you're not getting an actual - - a bullet with the powder in there. You take the canister of powder, you pour it in your gun, you pack it with all the - -

THE COURT: Something like that use - -

THE WITNESS: Muzzle loader.

THE COURT: Not in the Civil War?

THE WITNESS: Yes.

THE COURT: I imagine in the Revolutionary

War?

THE WITNESS: Sure. Exactly.

MR. SHEINDLIN: To be clear, exactly.

Q. That Exhibit Number 42, that exhibit, that's a smokeless powder; is that correct?

A. That's correct.

Q. And the explosive substance you analyzed in the Nelson Dacosta pipebomb, that's also a smokeless powder?

A. That's correct.

Q. And that has a less corrosive affect on a firearm; is that correct.

MR. BRENNER: Objection. Objection, your Honor.

THE COURT: Sustained.

Q. What is the reason why somebody would want to use a smokeless powder as opposed to the powder in the Puerto Rican - - the pipebomb recovered in Puerto Rico?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. What different affect - - well, what's the reason for - -

MR. SHEINDLIN: Withdrawn.

Q. What is the different affect that the explosive powder in the pipebomb in Puerto Rico can have on a firearm

as opposed to the explosive powder in Exhibit Number 42?

MR. BRENNER: Objection to the form of that question.

THE COURT: Well, it is not that artfully drawn, but I'm going to allow it.

A. The black powder is generally more corrosive than smokeless powder.

Q. Okay.

THE COURT: When you say "corrosive," what exactly do you mean?

THE WITNESS: It produces more residue when it - - when it's ignited.

THE COURT: When it is discharged?

THE WITNESS: When it is discharged and you get residue on the interior of the gun, that is corrosive to metal at that time.

THE COURT: Does it require any greater maintenance to the weapon?

THE WITNESS: Yes. I would imagine so.

MR. SHEINDLIN: All right.

Q. How much, with respect to the smokeless - -

MR. SHEINDLIN: Excuse me.

Q. With respect to the explosive substance that you anaylzed from the pipebomb from Puerto Rico, how much of the

explosive substance did you receive to analyze?

A. I received a residue of it. There was some remaining particles, remaining on the interior of one of the end caps and I was able to get enough of an amount to do some tests to determine the size, which was a Three-F-G, and do the anaylsis to determine that it, indeed, was black powder.

Q. With respect to the explosive substance that you anaylzed with respect to the pipebomb recovered outside of Nelson Dacosta's apartment, how much of the explosive substance did you receive?

A. I received - - it was a baggy full. I don't know the exact quantity. I never weighed it.

MR. SHEINDLIN: I'd ask at this time the witness be showed - - shown, excuse me, People's Exhibit Number 47, marked for identification.

(Handed to the witness.)

(Off the record discussion between Mr. Brenner and the defendant.)

Q. Do you recognize it?

A. Yes, I do.

Q. And what do you recognize it to be?

A. A photograph that I took of the pipe that was Exhibit 25.

Q. And specifically, that's the device that we're

referring to as the Nelson Dacosta pipebomb; is that correct?

A. That's correct.

Q. Would you please hold it up and show the jury?

A. (Exhibited).

MR. SHEINDLIN: At this time, also, your Honor I'm offering that -- let me take a step back.

Q. Does that fairly and accurately represent how the Nelson Dacosta pipebomb looked to you when you received it?

A. Yes.

MR. SHEINDLIN: I'm offering that into evidence.

MR. BRENNER: No objection.

THE COURT: Let me have the exhibit.

(Handed to the Court.)

(Pause.)

THE COURT: Do you seek to have that published to the jury at this time?

MR. BRENNER: Please.

MR. SHEINDLIN: That's fine.

THE COURT: We'll go on while the jury has an opportunity to pass it.

MR. SHEINDLIN: Yes.

COURT CLERK: What number is that?

THE COURT: That's Number 47.

MR. SHEINDLIN: Yes.

(Deem marked.)

MR. SHEINDLIN: May I approach the witness?

THE COURT: Yes.

Q. I ask you to look at what has been marked for identification as People's Exhibit Number 48 and People's Exhibit Number 49.

(Handed to the witness.)

Q. Do you recognize them?

(Pause.)

A. Yes, I do.

Q. What do you recognize them to be?

A. Photographs that I took of the device, as now I received it before it was taken - - excuse me - - before it was taken apart.

Q. Okay. Specifically the photographs you're looking at, is that the pipebomb that we're referring to as the pipebomb from Puerto Rico?

A. That's correct.

Q. And does that fairly and accurately depict how that looked, how that appeared to you when you received it?

A. That's correct.

MR. SHEINDLIN: At this time, your Honor, I'm offering the two exhibits, Number 48 and 49, into

evidence.

THE COURT: Did you have an opportunity to see that, Mr. Brenner?

MR. BRENNER: Yes, your Honor.

I have no objection.

THE COURT: Without objection, 48 and 49 will be received.

MR. SHEINDLIN: I ask that they be publisned to the jury.

THE COURT: All right.

(Photographs, so marked People's Exhibit Number 48 and People's Exhibit Number 49 in evidence.)

(Whereupon, the exhibits were circulated among the jurors.)

COURT CLERK: Your Honor, may we have?

THE COURT: Forty-seven, 48 and 49 have been received without objection.

COURT CLERK: Your Honor, at this time may we have Exhibit Number 47 marked in evidence?

THE COURT: Yes.

(Photograpn, so marked People's Exhibit Number 47 in evidence.)

THE COURT: Let me see the exhibits.

(People's Exhibit Number 48 and People's

Exhibit Number 49 in evidence were handed to the Court.)

THE COURT: You may continue.

MR. SHEINDLIN: I ask that the witness be shown People's Exhibit Number 50 for identification.

(Handed to the witness.)

BY MR. SHEINDLIN: (continued)

Q. Do you rocognize it?

A. Yes, I do.

Q. What do you rocognize it to be?

A. This is a radiograph, an X-ray, basically, of the pipe with the fuse lighter, with the fuse lighter attached to it.

Q. And specifically, which fuse lighter is is it? From what pipe?

A. That's from the pipe from Puerto Rico.

Q. And when was that made, that exhibit?

A. When was the exhibit made?

Q. Yes.

A. It was made before I took the device apart. I removed it from the casing and then took the radiograph of it. From there.

Q. And that fairly and accurately depicts how the commercial fuse lighter appeared back on - - back when you

examined the device from Puerto Rico?

A. That's correct.

MR. SHEINDLIN: At this time, I offer that into evidence.

MR. BRENNER: May I see it?

THE COURT: Yes.

MR. BRENNER: I haven't seen it.

THE COURT: All right.

(Handed to Mr. Brenner.)

MR. BRENNER: No objection.

THE COURT: Without objection, 50, received.

(Handed to the Court.)

(Deemed marked.)

MR. SHEINDLIN: I ask that the witness be shown People's Exhibit Number 51 and 52, both marked for identification.

(Handed to the witness.)

THE COURT: Circulate the last exhibit.

(Whereupon, People's Exhibit Number 51 and People's Exhibit Number 52 were circulated among the jurors.)

Q. I ask you to look at them and tell the jury whether you recognize them?

A. Yes, I do.

Q. What do you recognize them to be?

A. They are photographs of Exhibit Number 5, from the Puerto Rico device, that I took pictures of. Cardboard box.

Q. That's the box that contained the device; is that correct?

A. That's correct.

Q. And does that fairly and accurately depict how that box appeared to you when you received it?

A. Yes, it does.

MR. SHEINDLIN: At this time, I'm offering People's exhibit - - these two exhibits into evidence, specifically exhibits 51 and 52.

THE COURT: Mr. Brenner?

MR. BRENNER: No objection.

THE COURT: Without objection, 51 and 52 are both received.

Circulate them.

(People's Exhibit Number 51 and People's Exhibit Number 52 were circulated among the jurors.)

MR. SHEINDLIN: I ask that the witness be shown what has been entered into evidence as People's Exhibit Number 44, a green marker.

(Handed to the witness.)

Q. Have you seen that before?

A. Yes, I have.

Q. And where?

A. This was Exhibit Number 3 that I examined at the laboratory. From the case 91MI - - 1065.

Q. Did you also have an opportunity to examine a box with green markings on it, specifically that's the box depicted in Exhibit Number 51 and Exhibit Number 52?

A. Yes, I did.

Q. And in your expert opinion, are the green markings in the box that contained the bomb in Puerto Rico consistent or inconsistent with the green magic marker in People's Exhibit Number 44?

MR. BRENNER: Objection to the form.

THE COURT: Sustained.

Q. You examined both of them; is that correct?

A. That's correct.

Q. And what was the reason why you were examining these two exhibits?

A. I was requested to do a comparison of the paint that was on the box and compare it to this particular marker, to see if they were consistent with one another.

Q. In your expert opinion, what did you conclude?

A. I found that the marks on the box was consistent with the paint that's in the marker.

Q. What is the basis for your expert opinion?

A. Well, I did a series of examinations. I did a visual examination, generally looking at the color of it, both with the naked eye, with the microscope, looking at all the surface characteristics of paint and then I proceeded with a chemical anaylsis of the paint. I looked at the particular binding medium of the paint, the elements that are present in the paint and I looked at the dyes and the paint, what gives it the color.

Q. And in your expert opinion, the paint on the box is consistent with the marker, People's Exhibit Number 44?

A. That's correct.

Q. And with respect to People's Exhibit Number 44, the green marker, are you familiar with what type of marker it is?

A. Yes. This is a - - well, the brand is obviously on here. But I went out and looked for this particular brand and to see if I could find any other brands and where I could find it. And the only places that I was able to find them were at arts and craft stores, and commercial art suppliers that had these particular markers.

MR. SHEINDLIN: Now moving on.

Q. Did you also have an opportunity - -

MR. SHEINDLIN: I ask that the witness be shown this exhibit.

Q. To examine People's Exhibit - -

MR. SHEINDLIN: Which one is it?

Q. Number 43? three?

(Handed to the witness.)

THE COURT: Incidently, Mr. Sheindlin, when you make reference to an exhibit which is already in evidence, make that statement.

MR. SHEINDLIN: Yes.

Q. Which is in evidence, People's Exhibit Number 43, black electrical tape.

A. Yes, I recognize it.

Q. Did you also have an opportunity to examine black electrical tape that was contained within the bomb from Puerto Rico?

A. Yes, I did.

Q. And in your expert opinion, after comparing the black electrical tape in People's Exhibit Number 43 in evidence with the black electrical tape in the bomb from Puerto Rico, are they consistent or inconsistent with one another?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. What was the - - in your expert opinion, what did you conclude after examining People's Exhibit Number 43 in

evidence and the black electrical tape from the bomb from Puerto Rico?

A. I found that the two exhibits were from the same manufacturer.

Q. And what is the basis for your expert opinion?

A. From the anaylsis I did on the tape, being a visual examine, again, and then microscopically examine it. This is very characteristic to the manufacturer, along with identifying or examining the adhesive on the back of the tape and, again, the elemental profile of that tape.

Q. What do you mean by the "elemental profile"?

A. I look at the tape and with a particular instrument and I examine the tape with that instrument and found - - found the different elements that are in this tape.

Q. Did you find any inconsistencies between the tape in People's Exhibit Number 43 in evidence and the tape that was in the bomb in Puerto Rico?

A. No, sir.

Q. Also, with respect to the bomb that you examined from Puerto Rico, were you able to observe - - were you able to examine wood supports that held and positioned the pipe within that bomb?

A. Yes, sir.

Q. And were there any colored markings on that - -

those wood braces?

A. Yes, there were. There were red marks on the cut pieces of wood.

Q. Did you also have an opportunity to examine two hacksaws that were sent to you from Agent Behan in the Alcohol, Tobacco and Firearm Bureau in New York City?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. Did you examine - - well, did you compare the two wood braces with anything?

A. Yes, I did.

Q. What did you compare them with?

A. I compared them to - -

MR. BRENNER: Objection.

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

THE COURT: All right.

Mr. Brenner?

MR. BRENNER: Your Honor, my objection is that Mr. Sheindlin and, apparently, the witness are apparently referring to things not in evidence.

THE COURT: Do you want to move? I don't mean physically.

MR. SHEINDLIN: I'll move along, yes.

Q. March, of 1991, did you come to New York City with Carlo Rosotti?

A. Yes, I did.

Q. Did you meet Agent Behan when you were in New York City?

A. That's correct.

Q. And did you participate in a consent search at 3320 Barker Avenue?

A. I - -

MR. BRENNER: Objection as to the word "consent," your Honor.

THE COURT: Yes.

MR. SHEINDLIN: It was used by defense counsel earlier.

MR. BRENNER: Not with this witness.

THE COURT: Just a minute. Let's not argue.

For the purpose of this direct examination, did you participate in a search of premises?

Q. Did you participate in a search of a premises?

A. Yes, I did.

Q. That was at 3320 Barker Avenue, in the Bronx?

A. I'm not sure of the address.

Q. During the course of that search, did you recover two hacksaw blades with red paint on them?

A. That's correct.

Q. Did you compare those two hacksaw - -

MR. SHEINDLIN: Well, withdrawn.

Q. You brought those two hacksaw blades with you back down to your laboratory?

A. No, I didn't.

Q. Where did you - - what did you do with them?

A. They were taken into custody by Special Agent Chris Behan and then they were later shipped down to - -

MR. BRENNER: Objection, unless this witness shipped them.

THE COURT: Did there come a time you received those blades?

THE WITNESS: That's correct.

Q. And what did you do with them when you received them?

MR. BRENNER: Objection.

Improper foundation, your Honor.

THE COURT: Well, first off, you have to establish that these are one in the same.

Q. Did you receive those same hacksaw blades down in your laboratory?

A. Yes, I did.

Q. Okay.

MR. BRENNER: I'm going to object, your Honor.

THE COURT: All right.

MR. BRENNER: May we approach?

THE COURT: Yes.

COURT OFFICER: Please step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

COURT CLERK: Your Honor, may we have the photographs marked as People's Exhibits Number 50, 51 and 52 in evidence?

THE COURT: Yes.

(Photographs, so marked People's Exhibit Number 50, People's Exhibit Number 51 and People's Exhibit Number 52 in evidence.)

THE COURT: All right.

THE COURT: Have the witness resume.

(The witness resumed the witness stand.)

BY MR. SHEINDLIN: (Continued)

Q. With respect to the pipebomb that was found outside of Nelson Dacosta's apartment, did you receive a firecracker from Agent Behan that was part of that pipebomb?

A. I received - - I received the evidence and there was a firecracker in there.

Q. Do you have that with you?

A. Yes, I do.

Q. Please take it out.

(Pause.)

MR. SHEINDLIN: I'm going to ask that that be marked as People's Exhibit Number 53 for identification.

THE COURT: Fifty-three?

MR. SHEINDLIN: Yes.

(Manila envolope, so marked People's Exhibit Number 53 for identification.)

Q. Looking at People's Exhibit Number 53, is that the firecracker that you testified to receiving?

A. Yes, it is.

MR. SHEINDLIN: At this time, your Honor, I'm offering that into evidence as People's Exhibit Number 53.

MR. ERBNER: No objection.

THE COURT: Without objection, 53, received.

(Deemed marked.)

Q. I show you what has been marked as People's Exhibit Number 46.

(Handed to the witness.)

Q. Which is in evidence.

(Pause.)

Q. Did you examine People's - - People's Exhibit Number 46 in evidence in your laboratory at the time when you received the firecracker, which is People's Exhibit 53 in evidence?

A. Yes, I did.

Q. And based on your examination and your expert opinion, what was your conclusion?

A. I determined that they were similar to the firecrackers that were in this particular exhibit here.

Q. Please tell the members of the jury what was the basis for your expert opinion?

A. I did a physical examination, I did a couple of measurements on the diameter and the length of the firecracker. I looked at the color of the paper and I examined the design of the paper.

MR. SHEINDLIN: Your Honor, at this time I'm going to ask that the exhibit be published to the jury.

I have no further questions at this time.

THE COURT: Very well. Circulate them to the jury.

(Whereupon, People's Exhibit Number 46 and People's Exhibit Number 53 in evidence were circulated among the jurors.)

THE COURT: Members of the jury, at this time we'll take a short recess.

Do not discuss this case amongst yourselves. We'll resume in a few moments.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(All exhibits returned to Mr. Sheindlin.)

MR. SHEINDLIN: Your Honor, at this time may we have People's Exhibit Number 53 for identification marked as People's Exhibit Number 53 in evidence?

THE COURT: All right.

(Manila envolope, so marked People's Exhibit Number 53 in evidence.)

THE COURT: If you want to step down for a minute, you may.

THE WITNESS: Thank you.

(WITNESS EXCUSED)

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being presen in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, bring in the witness.

(Whereupon, the People's witness, Gregory Czarnopys, resumed the witness stand.)

THE COURT: All right, bring in the panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present.

THE COURT: Mr. Brenner, the witness having been yielded.

G R E G O R Y C Z A R N O P Y S, having been previously

called as a witness on behalf of the People, was previously sworn by the Clerk of the Court, resumed the witness stand and continued to testify under oath as follows:

CROSS EXAMINATION

BY MR. BRENNER:

Q. Mr. Czarnopys, Mr. Sheindlin asked you some questions about some things that you examined that some how are similar or related to other things; is that right?

A. That's correct.

Q. Would it be fair to say, however, there was a whole lot of stuff that you examined that didn't relate to anything?

A. That's correct.

Q. How much?

A. There is - -

Q. How many bits?

MR. BRENNER: I'm sorry, withdrawn.

Q. How many exhibits were there in this case?

A. The number of items?

I have to look them up.

Q. Check.

A. Okay.

(Pause.)

Q. Mr. Czarnopys, can we agree it was in excess of

fifty?

A. Yes.

Q. That there was an Exhibit 50 and an Exhibit 51 and some numbered exhibits above that; is that right?

A. That's correct.

Q. Now, you told Mr. Sheindlin that in March, of 1991, you came up with Carlos Rosotti and Special Agent Behan, you went to a house at 3320, you looked around, you all took some things; is that right?

A. That's correct.

Q. And there came a time later on when you saw them again?

A. That's correct.

Q. Were they in pretty much the same condition as when you had first seen them?

A. That's correct.

Q. And was it your understanding that they had been in the custody of the Bureau of Alcohol, Tobacco and Firearms from the time you took them from 3320 until the time you saw them again?

A. That is correct.

Q. And Special Agent Behan transmitted all that stuff down to where you were?

A. That's correct.

Q. Do you know, to where you were is where?

A. I work in Rockville, Maryland.

Q. Rockville, Maryland.

And when you went out searching for paint markers and stuff and you told us that, that was out in Rockville; is that correct?

A. That is correct.

Q. Now, this - -

MR. BRENNER: Withdrawn.

Q. Do you have any idea where it is alleged that this pipe - - these pipebombs were manufactured?

A. I have no idea where they are manufactured.

Q. No, no. I didn't ask you whether you knew where they were - -

MR. BRENNER: Withdrawn.

Q. Your agency was investigating two separate pipebombs; is that right?

A. That is correct.

Q. And do you know where it was alleged that those pipebombs were created?

Only if you know.

MR. SHEINDLIN: Objection.

It calls for hearsay.

THE COURT: If he knows?

MR. SHEINDLIN: How is he going to, except for hearsay?

He has to lay a foundation.

THE COURT: Wait a minute.

Go ahead.

Q. Where - - where was all this stuff being shipped from?

A. It was being shipped from our - - from our agents; one in Puerto Rico, and one in New York.

Q. And the stuff that was taken by you and Mr. Rosotti and Agent Behan at 3320 Barker Avenue, that was up here in the Bronx; is that right?

A. That's correct.

Q. And those were tools, largely?

A. Mainly all the exhibits were tools.

Q. Other mechanical kinds of devices?

A. Yes. There was tools. I don't know the exact list of everything that we got.

Q. Well, there was tape, wasn't there?

A. Yes, there was tape.

Q. Knives?

A. I believe there was a knife.

Q. Yes?

A. I don't have the list with me.

Q. You don't have the list with you?

A. No.

Q. There were pipes?

A. There were pipes?

Q. Pipes? Did you recover any pipe nipples when you came up?

A. I don't remember recovering any of those.

Q. Did you have occasion to examine any of those other materials, not the ones that Mr. Sheindlin asked you about, but ones he didn't ask you about?

THE COURT: Just a minute. Just a minute.

(Pause.)

THE COURT: You may continue.

Q. Do you remember examining other objects, other than the ones Mr. Sheindlin asked you about?

A. Yes.

Q. In connection with your investigation?

A. That's correct.

Q. Did you examine a pocket knife?

A. Yes, I looked at a pocket knife.

Q. For trace evidence?

A. Yes, I did.

Q. Which was one of the objects taken from the basement of 3320 Barker Avenue?

A. I believe that - - that's correct.

Q. And you found - - the results were negative?

A. Negative.

Q. Did you look at an auger or auger drill bits?

A. That's correct.

Q. Presumedly this examination of these drill bits was to determine whether there was any trace evidence that the holes in the pipe had been drilled with them; is that correct?

A. Now it was - - it wasn't actually my comparison to do. That was a comparison for another examiner at the laboratory.

Q. But you looked at these?

A. Oh, I looked at them.

Q. You made a visual examination?

A. I examined them.

Q. And where you saw something that was of value, you wrote that down and where there were no results of value you wrote that down?

A. I'm not. Let me follow you here.

That's correct.

Q. There was brown packing tape on the end caps of the Puerto Rico pipebomb; isn't that right?

A. On the end caps?

Q. Yes.

A. No. Not to my knowledge. There was no brown packing tape.

Q. Was there brown packing paper at all used in either pipebomb?

A. Not in the particular pipebomb.

Q. Where was it used?

A. It was used on the exterior of the box, from the Puerto Rico device.

Q. Okay. Was brown packing tape seized from the basement of 3320 Barker Avenue?

A. Yes.

Q. Yes?

A. Yes, sir.

Q. It was examined by you?

A. Yes, I looked at the tape.

Q. It was found to be different, is that right?

A. That's correct.

Q. There was also other black tape taken both from Mr. Franza's apartment as a result of a search warrant, yes?

A. That's correct.

Q. And black tape from the basement at 3320 Barker Avenue?

A. That is correct.

Q. Those were examined by you?

A. Yes, I looked at all the black tape in this case.

Q. And aside from what you told Mr. Sheindlin about, the results were negative; is that right?

A. That is correct.

MR. BRENNER: Firecracker?

MR. BRANCATO: In there.

MR. BRENNER: In where?

MR. BRANCATO: In the bag.

(Handed to Mr. Brenner.)

Q. Now.

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

(Exhibits handed to the witness.)

Q. Did you make any effort to go out and buy firecrackers as part of your chemical investigation?

A. No, sir.

Q. Do you know where those came from?

A. I have no idea where - - I don't understand your question. Please repeat it.

Q. Well - -

A. Came from - -

Q. Who manufactured them?

A. Who manufactured them?

No, sir.

Q. Where they were sold?

A. No, sir.

Q. Have you ever been in Chinatown up here in New York City?

A. No, I haven't. Close to it.

Q. I'm sorry?

A. I say, I've been close to it. I've seen the outskirts, but that's it.

THE COURT: Close to it now.

THE WITNESS: That's what I mean.

THE COURT: Geographically.

Q. You had four packages of sealed firecrackers; is that right?

A. That is correct.

Q. You opened one.

A. One package.

Q. One package?

A. That is correct.

Q. You tested it for color, for design?

You also measured it; isn't that right?

A. That's correct.

Q. The firecracker that was recovered in Nelson Dacosta's, outside his apartment, as part of that pipebomb, what was the length of it?

A. I have to refer to my notes on that.

(Pause.)

A. The length of the firecracker, the body of it?

Q. Yes.

A. Okay. That was an inch and one-half inch.

Q. I'm sorry?

A. An inch and one-half.

Q. One and four-eighths; isn't that right?

MR. BRANCATO: Judge, a-half.

THE COURT: What's the difference between one and four-eighths and one and a-half?

MR. BRENNER: Well, there is a reason, your Honor.

THE COURT: All right.

A. No, sir. The length of the firecracker is one and one-half inch.

MR. BRENNER: May I have a moment, your Honor?

THE COURT: Yes.

(Pause.)

Q. Do you have your notes regarding the - - your examination of the firecracker?

A. Yes, I do.

Q. Can you hand that to the officer?

A. Sure.

(Handed to the Court Officer.)

MR. BRENNER: Can I see them?

MR. SHEINDLIN: Do you want to see my copy?

MR. BRENNER: No.

(Handed to Mr. Brenner.)

MR. BRENNER: May I?

(Handed to the witness.)

Q. Did you measure the fuse length of the single firecracker that was found in the pipe?

A. Yes, I did.

Q. What was the length?

A. That was one and three-eighths inch.

Q. And how many of the firecrackers in the open package did you measure?

A. I just measured one of those. In the open - - in the package I opened?

Q. Yes.

A. I just measured that one firecracker.

Q. You measured one out of the open package?

A. Out of the package I opened; yes, that's correct.

Q. You had at your disposal now many other from that package once it was open?

A. I had, I don't know, sixteen, I think that comes in a pack. Twenty-four.

Q. And you measured one?

A. Yes.

Q. Well, when you measured the fuse length of the one from the open package, what was it?

A. I measured it as one and four-eighths inch.

Q. That's longer or shorter than the one that was found in the pipebomb?

A. That is longer.

Q. Longer.

MR. BRANCATO: This is the fuse you're talking about?

MR. SHEINDLIN: The fuse.

THE WITNESS: Talking about the fuse length.

MR. BRANCATO: Okay.

Q. And did you write off that discrepancy to perhaps the individual manufacturer of that one?

A. No. I generally, when I examine these things, I find in these firecrackers the fuses vary in length.

Q. But you don't know that because you didn't look at any of the other lengths, did you?

A. From past experience, that's what I based it on.

Q. This investigation, this examination was not based on past experience, it was based on what was given to you; is that right?

A. That's correct.

Q. Okay. You had an open package, you had one fuse that was of a different length than the one that you were testing it against; is that right?

A. That's correct.

Q. There was a discrepancy - -

A. Well - -

Q. As far as - -

A. It is a variation, I would call it.

Q. A variation.

When does it stop being a variation and start being a discrepancy, based on your experience?

MR. BRANCATO: I object to that question.

THE COURT: Sustained.

Q. Did you measure any of the others ones you found a variation?

A. No, I didn't.

Q. Do you know whether every single firecracker in the closed packages that were recovered from Mr. Franza's apartment contained and identical fuse lengths to the one you measured?

A. No, I don't.

Q. Do you know whether they contained an identical fuse length which was at a variance with the one recovered in the

Nelson Dacosta apartment?

A. No.

Q. You said that you went out and you attempted to see whether the green marker could be purchased; is that it?

A. I went and I got exemplars to look at various markers that are out there.

Q. When you got exemplars, you got different colors than the one that you have; is that right?

A. I had no idea that was. I went and got there green markers, that's all they had. The green markers, I got green. That's all they had.

Q. Well, according to your notes, isn't it a fact that you got a bright green with shine?

A. That was the only one available from that manufacturer.

Q. Well, you didn't attempt to purchase others from different manufacturers of the same color?

A. I did.

Q. With what - -

A. That's all they did.

Q. All who had?

A. All the stores had that I went out to purchase them. That's the only ones they had in that particular brand. If it said bright green, that was the only one that had it.

MR. BRENNER: I would like to have these marked as identification.

THE COURT: M. Defense Exhibit M.

Are there two?

MR. BRENNER: Two.

THE COURT: M and N or?

MR. BRENNER: M and N.

THE COURT: Not M and N.

MR. BRENNER: M and N is fine, your Honor.

THE COURT: All right.

(Marker pens, so marked Defendant's Exhibit M and Defendant's Exhibit N.)

MR. SHEINDLIN: May I see them before they are shown to the witness?

(Handed to Mr. Sheindlin.)

(Pause.)

MR. BRENNER: Please show them.

(Handed to the witness.)

Q. Mr. Czarnopys, in your search for other markers, by different manufacturers, did you come across anything resembling either of those two?

A. No. Not in the way of brand.

Q. What did you come across?

A. The brands?

Q. Well, you say you went to several stores.

A. Right.

Q. Is that correct?

A. That's correct.

Q. And you were looking for similar colors by other manufacturers?

A. That is correct.

Q. And what was it, that there were no other similar colors by other manufacturers? Was there only one - -

A. There was only - - there was only - - the only two brands I got, that had other ones that they had in the store, was a water base, which was different than what - - I mean, the basic chemical examination would have been different. So, there is only two green markers from different manufacturers that I had available to look at.

Q. Well, Mr. Czarnopys, when you first got the marker, did you take the top off and make a marking with it?

A. When I first got it?

Q. When you first got it.

A. No.

Q. Well, you had the box, didn't you? Right?

A. That's correct.

Q. You saw what color that was?

A. That's correct.

Q. What exactly - - as an expert, what exactly was the purpose of buying two exemplars of colors different than that on the box?

A. Just basically it was for my knowledge of looking at the different markers that were out there and testing them.

Q. Well, you then proceeded to do a visual inspection. You took the marker with a piece of cardboard, similar to this?

A. It was similar to the box - -

Q. All right.

A. That the marks were on.

Q. You took the tops off and you used them?

A. Yes.

Q. Used three?

A. Right.

Q. The last two which you last bought?

A. Yes.

Q. Were visually different?

A. Right.

Q. Correct?

A. Yes.

Q. They were different colors?

A. They were different shades of that green.

Q. I'm sorry?

A. They were different shades of green.

Q. But you could see they were different?

A. Yes, you could.

Q. You tested them?

A. Yes.

Q. Why?

A. Just to see the mental profiles. You see, all - - I don't base my examination on one characteristic, I do a series of examinations before I determine if it is consistent with the product I'm examining. I do not just look at the color alone.

Q. How many manufacturers are there of paint markers?

A. From conversation with companies that manufactures the marker, they had referenced me to six manufacturers. In the - - excuse me - - six different brands of these markers.

Q. Of a type similar to the one that they manufactured?

A. Yes. That they manufactured.

Q. And how many of those were you able to obtain to test against?

A. Two of them.

Q. Of the same color?

A. Yes.

Q. No, of the same color as the one you had?

A. Oh, none.

Q. None.

So, in effect, you made no test of the marker of the color you had against any marker of a different manufacturer with the same color; isn't that right?

A. Hold on. Would you repeat that question, please?

Q. Okay. You were given a list of six manufacturers; is that right?

A. I wasn't given a list.

Q. You were told?

A. I was told there were six different manufacturers.

Q. That manufactured markers of a similar type?

A. No.

Q. What?

A. Well, a paint marker in general. Just a paint marker in general. It could have differences chemically and color-wise it was never - - I was never told they all made a color like that.

MR. BRENNER: I would like this to be marked for identification, your Honor. It is just a piece of cardboard.

THE COURT: Defendant's O.

(Cardboard, so marked Defendant's Exhibit O for identification.)

COURT OFFICER: Defendant's Exhibit O, marked for identification.

Q. Mr. Czarnopys, that's a piece of cardboard?

A. That's correct.

(Handed to the witness.)

A. Looks like it.

Q. Well, upon application of a paint marker, different paint markers of a different color demonstrate the color of that marker fairly?

A. It will show the color of what that marker is compared to the substance that's put on to.

MR. BRENNER: I offer that cardboard into evidence, your Honor.

Q. Would you tell us anything else at this point - -

THE COURT: On what basis?

Do you want to start?

MR. BRENNER: No, your Honor, I'll proceed. I'll withdraw the offer.

Q. Can you remove the caps from the two defense exhibits marked for identification?

(Pause.)

THE COURT: Let me have a sidebar because I want to alert counsel to something.

(Whereupon, all counsel approached the bench,

where there was an off the record discussion with the Court.)

(Open court.)

COURT OFFICER: Sir, step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, bring the witness back.

(The witness resumed the witness stand.)

BY MR. BRENNER: (Continued)

Q. Mr. Czarnopys, you've got two different pipebombs, two separate entities?

A. That's correct.

Q. Correct me if I'm wrong.

Would it be fair to say the pipe on one was six and one-half inches by six and one - - six inches by one and one-half?

MR. BRANCATO: Which one, Judge?

A. Which one are you talking about? Can - -

Q. There was two?

Was the dimensions of one them six inches by one and one-half inches?

MR. BRANCATO: Judge, for the record, can we say which one it is?

THE COURT: He's asking the witness.

MR. BRENNER: Why can't the witness tell me?

THE COURT: He's referring to his report.

A. Yes, I found one that was six inches, approximate length of six inches, and a nominal diameter of one and one-half inches.

THE COURT: Which one was that, just so we can?

THE WITNESS: That was the one from the New York area.

THE COURT: All right.

THE WITNESS: 91N0166.

Q. And the dimensions of the other were, correct me if I'm wrong, eleven and one-half by one and one-half?

A. That is correct.

THE COURT: Is that from Puerto Rico?

THE WITNESS: That is correct, your Honor.

Q. The end caps, again correct me if I'm wrong, but the end caps are the pieces that go on the open ends of the pipe; is that correct? On the threaded portion of the pipe?

A. You're correct.

Q. You say "the threated portion." The threaded por-

tion is either inside or outside and fits on it?

A. The end caps fits onto the pipe.

Q. Did you make a determination as to the origin of each pipebomb of the end caps?

A. I examined the end caps and I identified who the manufacturer is, according to the logo that's on the end cap.

Q. Starting with the Puerto Rican pipebomb, who were the manufacturers?

A. Okay. The manufacturer of the two end caps were manufactured by Siam Fitting, of Thailand.

Q. Conversely, is it not a fact that the end caps on the New York, as you've referred to it, pipebomb was Gragel, I.T.T.?

A. That is correct.

Q. Different manufacturer?

A. Definitely.

Q. We have different lengths; correct?

A. Different lengths?

A. Yes.

Q. Of the pipe?

A. Of the pipe.

Q. Different end caps?

A. That's correct.

Q. The fusing mechanism on the Puerto Rican pipebomb

was a wire and a pyrotechnique fuse; is that correct?

A. It was a pull-wire fuse lighter with a green pyrotechnique fuse.

Q. The fusing mechanism on the Dacosta bomb or New York bomb was a firecracker?

A. I assumed so. That's what it was.

Q. Incidently, when you examined the firecracker, was there any evidence or residue that the fuse to the firecracker had been ignited?

A. No, I didn't see any evidence to that.

Q. The explosive substance in the Puerto Rican pipebomb was black powder; correct?

A. In the Puerto Rican pipebomb; that is correct.

Q. When you light black powder it gives off smoke, does it not?

A. Yes.

Q. As opposed to - -

A. Orange flame.

Q. Gives off?

A. Some smoke, but characteristically different.

Q. The substance in the explosive substance in the Puerto Rican pipebomb was different that the explosive substance in the New York pipebomb?

A. That is correct.

Q. Two different bombs?

A. That is correct.

Q. Would it be fair to say that the only identical component is that they were both pipes?

A. They were both pipes.

Q. Were you able to identify who the manufacturer of the pipe was?

A. No, sir.

Q. Finally, the electrical tape. You said they were made by the same manufacturer.

A. That is correct.

Q. One of the rolls of tape had the manufacturer's name inside of it?

A. That is correct.

Q. How many rolls of tape did that manufacturer produce in the year 1990?

THE COURT: Total production or of that particular type?

Q. Of that particular type?

MR. BRANCATO: I object.

That calls for hearsay.

THE COURT: If he knows.

A. I do not know.

Q. Did you contact them?

A. I had talked to them.

Q. All right.

A. I didn't ask them that question.

Q. Did you ask them where the points of distributions were?

A. All over the country.

Q. All over the country. That would include all states?

A. Yes, I would assume so.

Q. And commonwealth?

A. Yes.

Q. And the District of Columbia?

A. I would assume so.

Q. That's a lot of states?

A. Yes.

Q. That's a lot of tape.

A. That's true.

MR. BRENNER: I have nothing further.

MR. SHEINDLIN: A few questions.

THE COURT: Mr. Sheindlin?

MR. SHEINDLIN: Yes.

RE-DIRECT EXAMINATION

BY MR. SHEINDLIN:

Q. With respect to the black tape that was just

referred to.

When you compared the black tape in the bomb from Puerto Rico to the black tape in People's Exhibit Number 43 for evidence, was it just the manufacturer - - well, it was the manufacturer that was identical; is that correct?

A. It was of the same manufacturer.

Q. Okay. But - - the manufacturer of the tape makes different types of tape?

MR. BRENNER: Objection.

THE COURT: If he knows.

A. They make a lot of different types of tapes. Different qualities of tape and they make a lot of different styles of tape.

Q. What are the differences in the tapes?

A. Various differences. It - -

THE COURT: I mean, are they characterized by name, if you went into a store to purchase a tape?

THE WITNESS: That is true. They are characterized by different names.

THE COURT: What would you be asking for with these various tapes?

THE WITNESS: Some are called black P.V.C., black electrical tape. Certain brand names from whatever manufacturer there is.

Basically, they are set up in the way of quality of tape. It gives a type characteristic of tape, being that the tape is stronger or - -

THE COURT: Do you know if they have different adhesive properties?

THE WITNESS: That is correct. They have different adhesive products from manufacturers.

Q. Do they also have different tapes have different widths to them; is that correct?

Q. That is correct.

Q. But the tape in the bomb from Puerto Rico and tape in People's Exhibit 43 in evidence, they are the same width; is that correct?

A. I have to check on that. I'm not sure if I measured that.

(Pause.)

A. Visually I examined it, too.

I don't have a measurement for it.

Q. To your knowledge, were there any inconsistencies?

A. No.

Q. When you examined the adhesive, what do you do to examine the different adhesives?

A. Well, we look at the adhesive in different ways. The color of the adhesive, the characteristics, using

instrumentation of the particular type of adhesive that is used to identify it.

Q. And the adhesive, that's the part of the tape that makes it stiff; is that correct?

A. That is correct.

Q. What type of instrument do you use to examine it?

A. The adhesive?

Q. Yes.

A. An Infared Forya Transformspectrometer.

Q. And you have that down in your lab in Rockville, Maryland; is that correct?

A. That is correct.

Q. And what ultimately does that tell you?

A. This tells us the bonding structure of the adhesive itself. The materials that are there in, the chemical bonds that are present in there. And it helps you to identify the type of adhesive that is, the type of compounds that are present.

Q. And when even a single manufacturer makes different brands of tape, do the manufacturers of - -

MR. SHEINDLIN: Well, I'll withdraw the question and ask you this way.

Q. The manufacturer of the tape in People's Exhibit 42 in evidence, do they manufacture different types of adhesives

on their tapes?

A. Yes.

Q. Okay. And is the bonding structure on the adhesive in People's Exhibit Number 43 in evidence the same as the bonding structure on the adhesive on the tape that was in the bomb from Puerto Rico?

A. You're talking about what I - - on the adhesive?

Q. Yes.

A. That is correct.

Q. Again, there were no inconsistencies; is that correct?

A. None.

Q. Now, with respect to the green marker in People's Exhibit Number 44 in evidence, you can't say whether this was the actual marker that made the green marks on the box that contained the bomb in Puerto Rico; is that correct?

A. That's correct.

Q. What you're - - were there any inconsistencies though with the type of paint in the marker in People's Exhibit Number 44 in evidence with respect to the green marks that were on the bomb that - - the box that contained the bomb from Puerto Rico?

A. I didn't see any inconsistencies.

Q. Does that include, in addition - -

MR. SHEINDLIN: Well.

Q. Does that include the chemical structures of the paints?

A. Yes.

Q. And does that also include simply the width of the markings that People's Exhibit Number 44 in evidence makes compared with the width of the markings on the box that contained the bomb from Puerto Rico?

MR. BRENNER: Objection as to that question.

MR. SHEINDLIN: It has to do with his visual observation.

THE COURT: Sustained.

Q. Did you observe the - -

MR. SHEINDLIN: I'll withdraw the question.

I have no further questions.

THE COURT: Mr. Brenner?

RE-CROSS EXAMINATION

BY MR. BRENNER:

Q. Mr. Czarnopys, manufacturer and same manufacturer, same adhesive, a piece of paper that was sent to you from New York?

A. The roll of tape?

Q. Yes. That tape and the tape that was recovered from the bomb, what are their respective widths?

A. I didn't measure those widths. I visually looked at them and they seemed to be similar to me.

Q. They seemed to be similar to you?

A. They were similar, to me, in width.

Q. Let me understand you.

The fuse length of the firecrackers which you have dismissed as a variance - -

MR. BRANCATO: Judge, I object.

These are - -

THE COURT: Sustained.

Q. You measured the fuse lengths of the firecrackers; is that correct?

A. That is correct.

Q. And they were different?

A. That's correct.

Q. And you took a visual observation - -

THE COURT: You're using the plural now.

MR. BRENNER: Yes.

THE COURT: As I recall the testimony, it referred to the examination, the measurement of one.

Q. I meant the respective, respective lengths were different of the fuses?

A. That's correct.

Q. And as far as the electrical tape was concerned - -

MR. BRENNER: Withdrawn.

Q. This tape was sent to you in an effort to elicit your expert opinion as to whether possibly within the relm of scientific opinion the tape on the bomb and the tape on the roll were the same; correct?

I mean, that was the point.

A. Yes. That is correct.

Q. Now, hypothetically, I'm going to pose a hypothetical to you.

If the tape on the bomb was, hypothetically speaking, five-eighths of an inch in width; follow?

A. I'm following. Yes, sir.

Q. And the width of the tape on the roll was seven-eighths of an inch, the manufacturer - - the identity of the manufacturer not withstanding, would your conclusion be that they were different?

MR. BRANCATO: I object.

It assumes facts that are not in evidence.

THE COURT: Objection must be sustained.

Q. However, you have come to testify in response to Mr. Sheindlin's questions that this is significant - - consistent in this case because it seemed to be to you; is that right?

A. No. I had visually saw what the diameters or the

width of the tape, I looked at them and when you're examining a tape that's been dispensed already, the proper use of it is to stretch the tape. And this tape was definitely stretched. And you lose the width.

Q. How much was it stretched?

A. I have no idea.

Q. Because you didn't measure it.

A. That is correct.

Q. Right?

The firecrackers you measured?

A. Yes.

Q. Visual impression was not sufficient, was it?

A. Visual impression?

Q. Your visual impression of length of the fuse - -

MR. BRANCATO: Judge, can we step back?

Q. And the - -

MR. BRANCATO: Lower his voice.

Q. The visual impression of the lengths of the fuse relative to one another was not sufficient, you measured them; correct?

A. That is correct.

Q. You used a device?

A. That's correct.

Q. Yes?

For measurements?

A. That's correct.

Q. Capable of measuring at least in eighths of inches?

A. That's correct.

Q. No such measuring device was used for the tape?

A. No, sir.

MR. BRENNER: I have nothing further.

THE COURT: Step down. You are excused, sir.

(WITNESS EXCUSED)

THE COURT: I believe that completes the witnesses for today, Mr. Brancato?

Mr. Sheindlin?

MR. SHEINDLIN: Yes, Judge.

THE COURT: All right.

We stand in recess - -

MR. BRANCATO: Judge, can we publish the tape to the jury at this time?

THE COURT: Is that 44?

MR. BRANCATO: Yes.

THE COURT: Yes. Very well.

While the jurors are examining that, counsel to the bench.

(Whereupon, People's Exhibit Number 44 was circulated among the jurors.)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

COURT OFFICER: The exhibits have been published.

(Returned to Mr. Brancato.)

THE COURT: Ladies and gentlemen of the jury, the exhibit having been examined, we'll recess now until tomorrow morning at eleven o'clock.

Do not discuss this case among yourselves or let any third party discuss the case with you.

Have have a very pleasant evening. Tomorrow morning, eleven o'clock.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Whereupon, the proceedings were adjourned until February 27th, 1992, at eleven a.m.)

* * *

(Continued on the following page.)

FEBRUARY 27th, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S :

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner an defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorney, in the absence of the jury in its entirety.

THE COURT: All right, bring the panel into the courtroom.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Frenza.

The defendant, his counsel, the assistant district attorney and all sworn jurors are present, your Honor.

THE COURT: Step up.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: We're just waiting for an interpreter now.

(Pause.)

THE COURT: Who is it that said, "those who

wait also serve"?

(Pause.)

(Off the record discussion between Mr. Brenner and the defendant.)

THE COURT: Call the interpreter again. I can't believe this.

(Pause.)

MR. BRANCATO: Judge, if I might?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, call another witness.

MR. SHEINDLIN: The People call Detective Donald Sadowy.

THE COURT: Detective Sadowy

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York

versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes.

COURT CLERK: Be seated.

COURT OFFICER: In a loud voice state your full name, giving the spelling of your last name, your shield number and current assignment.

THE WITNESS: I'm Detective Donald Sadowy. I'm a detective with the New York City Police Department Bomb Squad.

THE COURT: Spell Sadowy.

THE WITNESS: S-A-D-O-W-Y.

THE COURT: You may inquire.

D O N A L D S A D O W Y, Detective, having been called as a witness on behalf of the People, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

Q. How long have you been working for the New York City Police Department Bomb Squad?

A. Since 1984.

Q. And how long have you been working for the New York City Police Department?

A. Since 1980.

Q. And what did you do between 1980 and 1984?

A. From 1980 to 1984 I entered the Police Academy, went into field training for six months as a rookie and then I went into patrol precincts and performed parole functions in uniform.

Q. Prior to working in the New York City Police Department's Bomb Squad, did you receiving training for that?

A. (No response).

Q. For the Bomb Squad?

A. Yes, I did.

Q. What type of training?

A. I went to a formal training school that's run by the F.B. It is call the Hazardous Device School, in Huntsville, Alabama, Red Stone Arsenal. It is on an army base. It is the only place within the United States that trains civilian bomb technicians for police bomb squads.

Q. What's your educational background?

A. I have a highschool diploma and I've gone to two colleges, Los Angeles Community College, for a short time, and then John Jay College of Criminal Justice, for a short time.

I didn't achieve any degree.

Q. Okay. Do you receive continuous training as a

police officer in the New York City Police Department's Bomb Squad?

A. Yes, I do.

Q. What type of training?

A. We go to seminars and training classes that are periodically given by the F.B.I. And by the U.S. Army and other branches of the armed services in relationship to explosives, booby traps, military ordinance, also hazardous training, hazardous materials.

The only end of it we get involved with, if somebody finds chemicals which might be explosive in nature, then we would respond.

Q. Okay. Are you familiar - - well, let's me ask you this: Do you know what an improvised explosive device is?

A. Yes.

Q. What is that?

A. That could encompass almost anything that you, as a bombmaker, have the imagination to make.

We turn things, improvise explosive devices because many of the things we encounter when they were originally manufactured were not manufactured with the intent that the bombmaker has in mind.

When someone takes, say, a clock, a windup alarm clock, we would normally use that to wake us up in the morn-

ing, something like that. Well, people have taken clocks, plumber's items, such as pipes, batteries that we might use in our flashlights, and put them together with some explosives and if they are put together correctly by a bombmaker, could make a bomb.

Now, those items were never intended when they were manufactured to be part of a bomb. But they were put together in an improvised fashion to make an explosive device. And we label these things improvised explosive devices.

Q. I would like to draw your attention to August 11th, 1990.

Were you working on this particular date?

A. Yes, I was.

Q. And you were working for the New York City Police Department Bomb Squad?

A. Yes.

Q. At approximately eight o'clock in the morning did you receive a request to go to a particular location?

A. Yes.

Q. And what location was that?

A. Can I just refer to my papers - -

Q. Yes.

THE COURT: Yes.

A. For the address?

THE COURT: Yes.

(Pause.)

A. 644 West 185th Street, Apartment 1-A.

Q. Do you know what a case agent is or a case investigative agent?

A. Yes.

Q. What is that?

A. Someone who's responsible for a case and will stay with it, follow it up on all details, all leads and produce paperwork as per the investigation that he's doing or has done. And be responsible for that case.

Q. And what is that particular person's responsibility with respect to an explosive device that maybe found?

A. In my case, in my squad, as the case officer for this case, I maybe assisted by other members of my squad, but I am ultimately responsible for this case and down the road to possibly present it - - excuse me - - in court and explain it.

And I will be the one that's responsible to respond to the scene, identify, remove and render safe whatever improvised explosive device that we encounter.

Q. How is it determined who will be the case officer for any particular investigation that you're doing?

A. There are four bomb technicians assigned to a response team, which I am part of. And we just take it on a rotation basis. If my - - one partner caught the case yesterday, well, I'll be up to catch any case today. After I catch this case, then my other partner on the team, and it will just go and rotation.

Q. When you received this request on August 11th, 1990, at eight o'clock in the morning, were you the case officer?

A. Yes, I was.

Q. Okay. And, again, what was the location you went to?

A. 644 West 185th Street. In front of Apartment 1-A.

Q. And what did you do when you got to that particular - - that's in Manhattan; is that correct?

A. Yes.

Q. And what did you do when you got to that particular location?

A. When we arrived, there were other uniformed patrol officers there and we spoke with them. And after speaking with them, we were shown where the suspected item was.

At that time I placed on a bomb suit, which is strictly for my own protection.

Q. Can I stop you for a moment?

Could you explain to the members of the jury what a bomb suit is? Describe it for them.

A. Yes. It's a set of trousers, a jacket and a helmet with a face plate.

The trousers and jackets are a heavy green canvass like material. Underneath is about, approximately, one hundred layers of keflar. Keflar is the material used in police officer's bullet proof vests.

And to give you an idea, there is approximately twenty to twenty-five layers in a police officer's bullet proof vest. We use approximately a hundred in the bomb suit.

On top of that, there are hard plates that are inserted in the chest area and the groin area to give added protection.

We wear a helmet and a face plate to protect our face.

Q. Okay. Is there anything covering your hands?

A. No.

Q. And is that the only part of your body that's exposed?

A. Yes.

Q. And what's the reason you don't wear anything on your hands?

MR. BREMNER: Your Honor, I would object at

this point as to relevance of this. I don't know what relevancy - -

THE COURT: Fascinating.

MR. BRENNER: It may well be, your Honor.

THE COURT: We have just exhausted this aspect or we are?

MR. SHEINDLIN: I'm going to move right on.

THE COURT: Very good.

THE WITNESS: Can I finish?

THE COURT: Mr. Sheindlin?

Q. Yes.

A. We need manual dexterity to work.

Q. Now, with respect to this device, on August 11th, 1990, what specific apartment was it outside of?

A. Apartment 1-A.

Q. And do you know the name of the person that lived in that apartment?

A. Can I refer to my notes?

Q. Yes.

THE COURT: Yes.

(Pause.)

A. Nelson Dacosta.

Q. Okay. Would you please - -

MR. SHEINDLIN: Excuse me.

Q. Would you please explain to the members of the jury what you observed and what you did?

A. When we arrived at the scene, as we normally would, we would speak to the uniform patrol officers who are there before us and just to get a feel for what's going on; if there is - - did anybody hear anything or did anybody tell anybody anything or did anybody have any reason for putting something like this down. We just try to get whatever information we can that may assist us.

I put on a bomb suit. I took a portable X-ray fax machine that we carry on board our response vehicle and a radiograph, which is just a technical name for a piece of X-ray film that's inside of a cassette, portable cassette.

I went up and I approached this device and I was going to X-ray it, but it was laying on the ground. And because of the way that the X-ray film is and the cassette that holds it, I wasn't going to get a full picture on my radiograph.

So, what I did at that time was I took a nylon bag that had some tools that we utilize, placed the bag in close proximity to the improvised explosive device and then very gently, slowly and carefully lifted it and kept it in the same altitude, placed it on top of the bag.

Q. What does the word altitude mean?

A. Just the same position. I'm not twisting, changing it in anyway. Just lifting it as it sits and placing it right - - I don't want to disturb this thing any more than I have to.

I placed it on top of the bag and I utilize the the X-ray, two times.

The reason that I used the X-ray and radiograph twice was that it works on a pulse system that sends out X-rays to the improvised explosive device. It has to be able to penetrate both sides of the container in order to get a radiograph that I can read clearly.

The first one that I had I was not satisified with. So, when we did it and then developed it and looked at it, I went back and did a second one at higher pulses, enabling me to penetrate the pipe.

Q. What's the reason why you want to look inside the pipe, why you want to X-ray it?

A. We never take anything for face value or what people tell us. Because inside there can always be a secondary fusing system, possibly an anti-disturbance device.

We have a saying in our squad that it's a bomb until we can prove it is not a bomb. But we don't want anything to happen to us. That's - - and let's say also, we'll do this for safety purposes, to make sure there is no

other internal fusing system or anti-disturbance device that we can't see.

Q. Okay. After you looked at the X-ray, was there an anti-disturbance device, from what you could determine?

A. No.

Q. Could you also explain specifically what you observed with respect to this device, how it appeared to you?

A. It appeared to be a piece of pipe, with two metal end caps on either side, with tape wrapped around where it joined from the pipe to the end caps.

On one of the end caps there was a hole that appeared to have been drilled, with a piece of fuse sticking out from it. And this was inside of a sock. Just a regular person's sock.

Q. And after examining and - - is this what you consider an improvised explosive device?

A. Yes. We term it in that manner because the pipe and the end caps were not designed to be made to be used in this fashion.

Q. Okay. Tell the members of the jury what you did after you X-rayed this particular device?

A. After two X-rays were taken, I talked with my colleagues, my supervisor and my partner, who were both qualified and experienced bomb technicians and we agreed that

it would be prudent at this time to take the pipebomb, put it into a bomb blanket.

And all a bomb blanket is, really, is just - - it looks like a blanket with plastic coated canvass on it and has many layers of keflar and has bares on it and does away with fragmentation if it should explode.

Q. What is fragmentation?

A. Fragmentation is anything that's being picked up, torn apart from the force of an explosion. It could be pieces of paper or it could be a pebble right next to where the explosion happens and that piece of paper or pebble can travel at a very high velocity.

If that strikes anything or anyone, it could have the impact of like being hit by a bullet.

Q. Okay. What did you do at this point?

A. At this point I went back up in a bomb suit, took the pipebomb, placed it inside a bomb blanket, folded the bomb blanket over it and carefully carried it to what we call a bomb carrier.

All it is flatbed from a tractor-trailer truck, reinforced with steel, with steel cable in double layers, creating a buffer to cut down on the blast pressure and catch fragmentation.

I put it inside there and then secured the hatch on

the back of the truck so that while in transport if a device was to function, it would contain all the fragmentation and cut down on the blast pressure from anyone who might be in the surrounding area.

Q. And where was that device that you found brought to?

A. That was brought up to Rodman's Neck, the Police Department outdoor range facility, and on the back of that property there is a demolition range where we use for bomb disposal at.

Q. What county is that located in?

A. In the Bronx.

Q. Did you go there, also?

A. Yes, I did.

Q. What did you do once you got there?

A. We have some tools that we call the end cap remover. We encounter numerous pipebombs in New York City over the years and we've come up with a way to remove the end caps safely and remotely without one of us having to physically standing on top of it.

What it basically is, it's a metal and wood table. This is all out in the open, next to the wall of a demolition pit, with a plumber's vise mounted on the table.

I took the pipebomb out of the bomb carrier truck,

I carefully placed it into the plumber's vise and secured it.

Q. Were you wearing your bomb suit while you're doing all this?

A. Yes.

Then there is a metal collar that has three bolts that have threads on it. And very carefully secure that to the end cap that's protruding from the plumber's vise from the pipe nipple. There is a piece that has been welded on for us that is able to accept a very large ratchet handle. That's hooked up with a piece of bungie cord, a spring-like cord, that's secured to the table. Then there is a rope and a metal cable that comes off from the handle. That goes into a piece of P.V.C. tubing and it runs through a very large mound of dirt, maybe, twenty, thirty feet long and about six foot high and is reinforced with wooden railroad ties.

On the other end of that mound of dirt, in a safe area, there is a large steel box. Inside of that box I vent back there and the rope and cable that came off from the ratchet handle are attached to a large pool at a pivit point. And what we do is, we just pull back and forth a short distance and it remotely moves the ratchet a quarter turn at a time so it doesn't spin the end cap off, creating heat and friction. It does it very slowly at your own pace.

I did that and the collar with the end cap came

off.

Directly underneath that we had some boxes, which are similar to milk creates, secured in place, with a large plastic bag. So anything that would come off with the end cap itself and collar that's secured on it would fall into this plastic bag.

Q. Okay. Then what did you observe?

A. I walked back up, again wearing my bomb suit, and I observed that there was powder in the pipe, the end cap did, in fact, come off and a small - - and a small amount of powder had spilled out when the end cap opened.

And it appeared to me that with the little bit of powder that fell out when the end cap came off that the pipebomb was filled to capacity with powder.

Q. Were you able to look at the fuse device with respect to this bomb?

A. The fusing system was, basically, a piece of pyro-technique fuse coming out from just the small firecracker, which was inserted into the powder on the inside of the pipe. And where the hole was on the end of the metal end cap is the pyrotechnique fuse from the firecracker sticking out.

Q. Was it necessary for the firecracker to explode in order to detonate this device?

A. In my professional opinion, no. Because just theburning of the fuse through that hole, where there was powder right next to the fuse, would have been enough to ignite the powder and cause the pipebomb to explode violently.

Q. With respect to the powder, did you test it in anyway?

A. We do what's called for ourselves a field test. What that encompasses is very simple. I took a small pinch of the powder that I recovered out of the pipe with two fingers, I put it on a small piece of regular writing paper, maybe three-by-three or four-by-four inches, on one corner of it. And then we take a match or a cigarette lighter and light the other end of the paper, let it burn down and when the flame from the burning paper hits the powder it reacted by burning very violently. And intensely.

And that showed to us that the powder that was inside would have reacted with an explosion if heat, friction or flame was introduced to this.

Q. Okay. Did you in anyway examine the fuse on the firecracker that was part of this bomb?

A. We did a similar field test in the same manner. We took a very minute piece of fuse off the end and cut it, maybe an eighth to a quarter of an inch, approximately, and

again laid it down on a corner edge of paper, introduced the flame to the other ends of the paper, let it burn down and then we observed that the fuse, in fact, did burn as designed.

Q. Did you measure this pipe, the length of the pipe?

A. Could I refer to my notes?

Q. Yes, if need be.

(Pause.)

A. The pipe nipple itself was approximately six inches long and the diameter was an inch and one-half.

Q. When you say the - -

MR. SHEINDLIN: I ask that the witness be handed People's Exhibit Number 47, which is in evidence.

(Handed to the witness.)

MR. SHEINDLIN: Thank you.

Q. When you refer to the pipe nipple, can you hold up the exhibit, Number 47, and point out to the jury what you're testifying to?

A. What I described as the pipe nipple is this long piece in the center.

Q. Let me ask you, that photograph that you're holding, does that fairly and accurately reflect the bomb that you removed on August 11th, 1990, that you just testified to?

A. Yes, sir, it does.

Q. And what's the diameter of that, of the pipe nipple?

A. Approximately and inch and one-half.

Q. And the length of it?

A. Six inches, approximately.

Q. And can you please, again, hold up the exhibit and point for the jurors what are the parts of the end caps?

A. These larger pieces on the end are the end caps. Here and here.

MR. SHEINDLIN: Would the record reflect that what the witness is pointing to - - while he's facing the picture, the left-hand portion of the pipe is one end cap and there is another round piece which is removed in the picture next to the cap and that's the second end cap.

The witness also pointed to the - - in between those two end caps was the pipe nipple.

BY MR. SHEINDLIN: (Continued)

Q. What did you do with the - - with this pipebomb after you disassembled it?

A. Immediately after it was, what we term, rendered safe, the components were separated to where they couldn't harm anybody at this time. We took the components and we

separated them and we bagged them and marked them and made preparation for vouchering.

It's a Police Department form showing that we - - that I took custody of these items and I was then, when I went back to the office, would type up more paperwork, what's called a laboratory anaylsis test, and sent it to the Police Crime Laboratory?

Q. Did you request that it be fingerprinted?

A. Yes. I submitted, as part of the request, was latent fingerprints for the items that I submitted, chemical anaylsis of the powder and the fuse and the amount of powder was requested on the laboratory anaylsis request.

Q. Okay. When you yourself handled that pipebomb, which is exhibited in People's Number 47 in evidence, you were using your bare hands; is that correct?

A. I was wearing a bomb suit, but I just used my hands; yes.

Q. I would like to show you - -

MR. SHEINDLIN: May I approach the witness?

THE COURT: Yes.

Q. What's marked as People's Exhibit Number, I believe it is, 53 in evidence.

(Handed to the witness.)

Q. Do you rocognize that?

(Pause.)

A. I rocognize it as a firecracker, in that it looks very similar to the one that was used in the improvised explosive device.

Q. There any differences between that firecracker that you're holding in our hand now the and the one that you removed from the explosive device on August 11th, 1990?

A. No.

Q. As far as you can determine?

A. No.

Q. What's the voucher number that you assigned to the firecracker and the pipe?

A. May I refer to my notes?

THE WITNESS: The pipe that you removed on August 11th, 1990?

THE COURT: Yes.

MR. SHEINDLIN: Yes.

(Pause.)

A. D, as in David, 875394 was the Police Department voucher number.

Q. Okay. To your knowledge, was the - - were any fingerprints recovered off of the pipebomb?

A. Based on the written lab report that I received, there were no fingerprints recovered from the pipe or the

tape that was on the pipe.

Q. Not even yours?

A. Not mean mine.

Q. and you had touched it with your bare hands; is that correct?

A. Yes.

MR. SHEINDLIN: I have no further questions at this time, your Honor.

THE COURT: Mr. Brenner?

CROSS EXAMINATION

BY MR. BRENNER:

Q. Detective, I'd like you to carefully go over every single step that you took from the moment you responded to 644 West 185th until you vouchered the pipebomb.

A. We received the call at the office. Myself, my supervisor, Sergeant Hogue, and my partner, Detective Regarello went downstairs, we took an explosive detection K-9 out of the kennel, we went into a response vehicle which has all our equipment on it and we drove to the location where we were requested at.

We spoke with the police who were at the scene prior to our arrival.

Q. How many police officers were there?

A. I don't recall how many.

Q. Were they local - - I mean, were they uniformed police or from the precinct?

A. To the best of my knowledge, we had officers from the patrol precinct, one of their supervisors, emergency service officers who are in uniform with their supervisor, and some members from the precinct detective squad from that precinct.

Q. And what precinct is that?

A. I believe it was the 34th Precinct.

Q. Detective, you said that there are a lot of pipe - - in response to Mr. Sheindlin's questions, one of the answers you gave, you encounter a lot of pipebombs; is that right?

A. Yes.

Q. There are different kinds, are there not?

A. Yes.

Q. I mean, what makes a pipebomb a pipebomb is that the casing of the bomb itself is a pipe, a pipe nipple; is that right?

A. Yes, sir.

Q. What also makes it it a pipebomb is there is some explosive within or around it to cause pressure to blow it outward?

A. Yes.

Q. That's an over simplified statements, but essentially?

A. Basically, yes.

Q. There are ways to fuse that; is that right?

A. There is - - there is probably more ways to fusing it than I know of. It is up to the imagination of the person who is putting the item together.

Q. This particular pipebomb required a physical ignition; is that right?

A. I don't understand.

Q. Well, it had a firecracker with a fuse; is that right?

A. Yes, sir.

Q. And setting aside the concept of spontaneous combustion for a moment, in order for the action to take place that you described someone would have to take a heat source, bring it close enough to the fuse for the fuse to ignite and, therefore, set the events that you described into action; is that right?

A. That's one way.

Q. Okay. Are there other ways?

A. Yes.

Q. Describe them.

A. Can I refer to this photograph?

Q. Sure.

A. It's been my experience that either by mistake or by design when people take an explosive powder or filler and fill up a pipe nipple and they fill it to capacity, sometimes some of the powder gets into these threads to where you secure the end cap. And they tighten these down very tightly.

There have been occasions to where people have either been killed or seriously injured by just taking the pipebomb in their hands, holding on to the body of it and unscrewing the cap. The heat and friction generated by just unscrewing it with powder in the threads sometimes, not all the time but sometimes, will cause a violent explosion.

Q. A spark can ignite the powder; is that right?

A. Heat can also do it.

Q. Or heat.

In this instance, would it be fair to say that there was a fusing mechanism?

A. Yes.

Q. And did that fusing mechanism require, that mechanism require a heat source to ignite it?

A. Yes.

Q. Was it ignited?

A. No. Not based on my observations; no.

Q. Was there any evidence of an ignition source near the bomb when you recovered it?

A. No.

Q. Cigarettes, matches?

A. No.

Q. You looked for that because that's part of what - -

A. We checked the surrounding area.

Q. And didn't find anything?

A. No, sir.

Q. Now, there are fusing mechanisms which are designed to work by pressure. For instance, you can set up a fusing device at a string will sets off a fuse to set off a pipe-bomb; is that right?

A. (No response).

Q. As many ways as the imagination can foster; is that right?

A. Yes. It could be mechanical, electrical, heat source initiated. It could be any number of ways.

Q. Now, you told Mr. Sheindlin that you handled many pipebombs over the years that you've been on the Bomb Squad; is that right?

A. Yes, sir.

Q. Approximately how many?

A. (No response).

Q. Would it be more than one hundred?

A. I couldn't give an exact number, but I would safely say over one hundred.

Q. Different types?

A. Yes.

Q. Types like this?

A. From my own personal experience, I have not encountered one exactly like this.

Q. Are you familiar with whether other members of the Bomb Squad have, just as a general experience?

A. I haven't questioned all of the members in my squad. But not to my knowledge.

Q. All right.

A. It is possible, but I'm not aware of it at this time.

Q. Under what circumstances do you deal with pipebombs?

A. Sometimes we're called to the scene where a pipebomb is found, where its fusing system has not been initiated in anyway, such as in this case. Other cases to where the fusing system was - - was initiated, but it didn't function or it didn't function as designed, it partially functioned. Cases where the pipebomb did function as designed and was either initiated electrically or non-electrically or

mechanically. Situations to where we've been called in by outside law enforcement agencies and for whatever reason, maybe an undercover buy or a confidential informant has given reason to believe there was pipebombs in a certain area and we were requested, at the request of an outside agency, to assist them in examining and safely removing and dismantling these pipebombs.

Q. You made reference to undercover buys. Were those your words?

A. Yes, sir.

Q. Could you elaborate on those?

MR. SHEINDLIN: Objection.

MR. BRENNER: The witness' own words, your Honor. I just want to know what they mean.

THE COURT: You may answer.

Q. What does that mean?

A. Another agency, other than the N.Y.P.D., another law enforcement agency may have someone who is an agent or a law enforcement personnel or someone acting for them to approach someone and ask them do they have exsplsive - - improvised explosive devices, pipebombs for sale and they will make the purchase of them. They'll do it at a whatever location.

And once the deal is done, the people leave the

scene and they usually have us some where in the area, hidden a few blocks away, and we'll come over immediately and X-ray and examine these items.

Q. What other agencies do you work with in conjunction with - -

MR. BRENNER: Withdrawn.

Q. Do you work in conjunction with Alcohol, Tobacco and Firearms, the federal agencies?

A. That's one of them.

Q. What other agencies have you worked within the New York City Police Department that you've worked in conjunction with?

A. United States Secret Service.

Q. New York City Police Department, sir.

A. Excuse me?

Q. Within the New York City Police Department.

THE COURT: Specialized units of the police?

MR. BRENNER: Yes.

A. T.N.T.

Q. And what is T.N.T.

A. A tactical narcotics unit that works as a Task Force and goes into different areas around the city.

Q. Now, that cooperative work is done in connection with narcotics investigations?

A. Yes, sir.

Q. And you've had that experience?

A. (No response).

Q. Yes?

A. No reference to what?

Q. You have actually investigated pipebombs that were part of a narcotics investigation?

A. Yes, sir.

Q. With what frequency?

A. It will vary widely.

If I could just mention, the other agencies that we do work for also - -

Q. Well, if you could answer my question before you go on to the other?

A. I don't recall how frequent or how often.

Q. More than once?

A. I believe so.

Q. What other agencies?

A. Within the Police Department?

Q. Yes.

A. Emergency Services Unit. The Hostage Negotiators Unit. Precinct detective squads.

Off the top of my head, that's all I can recall.

Q. The Arson and Explosive Squad, what is that?

A. Also the Arson and Explosive Squad.

Q. Well, what is that?

A. That's a specialized team of detectives that basically investigate arsons and explosions.

Q. When you say "specialized," that means that those detectives are specially trained in the investigation of an arson an explosion?

A. Yes.

Q. They would have knowledge in those particular areas?

A. To a certain extent.

Q. Well, but they would have knowledge in those areas? You said special unit.

A. Yes.

Q. Is that right?

A. Yes.

Q. So "special" means, would it be fair to say, that specialized unit means they would have more knowledge than a precinct officer about arson and explosives?

A. Yes, sir.

MR. BRANCATO: I'll object to that question.

THE COURT: I'll allow it.

Q. Did they follow-up on investigations that are initiated by your unit?

A. That's the normal course of action.

Q. That's what happened - - that's what happened here; is that right?

MR. BRANCATO: I object, Judge.

He can't testify to what someone else may or may not have done.

MR. BRENNER: I.

Q. Did you refer this matter to the Arson and Explosion squad?

A. Initially it was referred to the precinct detective squad and then from there it was referred to the Arson Explosion Squad.

Q. Detective Valdez, if you know?

A. I don't recall off of my head.

Q. Have you had any communications with Detective Raymond and her lieutenant of the Arson Explosion Squad with reference to this investigation?

A. I don't recall on this case.

Q. You don't?

A. This - - I don't recall from memory. This happened in 1990. We're into 1992. I don't.

Q. A lot of pipebombs since then?

A. Yes. And I don't recall how many. But we've encountered a number.

Q. Several since then?

A. More than several.

Q. When you X-rayed the bomb, did it show a name of the person who had made it?

A. No, sir.

Q. Show where it came from?

A. No.

MR. BRENNER: Thank you, detective.

THE WITNESS: You're welcome.

MR. SHEINDLIN: A few more questions, your Honor?

THE COURT: All right.

RE-DIRECT EXAMINATION

BY MR. SHEINDLIN:

Q. The fusing device with respect to the pipebomb that you recovered outside the Nelson Dacosta apartment, that was made up of a firecracker; is that correct?

A. Yes. With a fuse attached to it.

Q. In your experience, with the exception of this bomb found outside of Nelson Dacosta's apartment, have you ever come across any other pipebombs that utilized a firecracker as a fuse as - - for a fusing device?

A. Not specifically a firecracker; no.

Q. Maybe a fuse, but not a firecracker; correct?

A. Yes.

MR. SHEINDLIN: Thank you.

THE COURT: Anything?

RE-CROSS EXAMINATION

BY MR. BRENNER:

Q. What fusing mechanisms have they had?

A. Excuse me?

Q. Mr. Sheindlin said this is the first one you ever saw; right?

MR. BRANCATO: That's not - -

THE COURT: Complete your statement.

Q. This is the first firecracker fuse for a pipebomb you ever saw.

MR. SHEINDLIN: That's - -

THE COURT: No.

A. It was a firecracker with a fuse inside the pipe.

Q. Right.

A. With the firecracker fuse extended out.

Q. Okay. Then I'm sorry. Then I didn't understand.

Have you ever seen a firecracker used in conjunction with a pipebomb before?

A. Not a firecracker; no.

Q. What - - what have you seen for fuse mechanisms?

A. I've seen fireworks of pyrotechniques types used.

but not attached to a firecracker.

I have seen large illegal fireworks attached to canisters that are under pressure from within.

Q. Okay. When you say large - - illegal fireworks, a roman candle would be an example of that?

A. The example that you give is not what I would use.

Q. Okay. So why don't you tell me what you would use?

A. Many, many of the fireworks that we encounter here in New York City are illegally manufactured and they come from outside of this jurisdiction. They are not under any regulation for how large of a container, for how much powder and what the powder mixture is composed of, which will vary. Some of the ones that I've encountered will be an inch, approximately, or larger in diameter and several inches in length, with a very hard bodied, cardboard container, so to speak, with epoxy on either end. And when these function by themselves, they can do a lot of damage, close to the human body.

And if you take an item like this and secure it, say, with tape on to a hard container, this will cause the container to protrude and possibly ignite and cause a spontaneous explosion, if there is some type of explosive filler within and causing fragmentation.

Q. How many of those have you seen?

A. Numerous. I couldn't give you a specific number. But numerous.

Q. Different types?

A. Yes.

Q. But the same principle?

A. Yes, sir.

Q. So, basically there are as many different types of pipebombs as there are different types of pipebomb makers?

A. Yes, sir. It is up to the imagination of the person that's making it.

Q. Have you ever seen, in your course of your investigation, numerous pipebombs, different in nature, which were proportedly made by the same person?

MR. SHEINDLIN: Objection.

This is outside the scope of the re-direct.

MR. BRENNER: I withdraw that.

THE COURT: All right.

MR. BRENNER: I have nothing further.

THE COURT: Incidently,, detective, there are any domestic maders of firecrackers, the small ones?

You said firecrackers made outside this area. There is no control. I was wondering if there are any made domestically which are under somebody's

supervision, like the F.B.I. or some agency approves?

THE WITNESS: Well, sir, to the best of my knowledge, the only ones that I would know of on the east coast of the United States would be the Grucchi family who make firework displays.

THE COURT: They make displays, but they don't sell packages of fireworks?

THE WITNESS: No, sir. And they are under federal - -

THE COURT: They are licensed?

THE WITNESS: They are licensed and they are under federal guidelines from A.F.T. and I believe the Department of Transportation and possibly maybe one other agency.

THE COURT: With reference to the small colloquial firecrackers that people get one way or another, there are none domestically made, as far as you know?

THE WITNESS: If they are it is without my knowledge.

THE COURT: Very well. You are excused, sir.

THE WITNESS: Thank you.

(WITNESS EXCUSED)

THE COURT: We've got the interpreter.

Call your next witness.

MR. BRANCATO: The People would call Jesus Garcia.

THE COURT: Jesus Garcia.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Would you state your name for the record, please, ma'am interpreter?

COURT INTERPRETER: Efigenia Placeres.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I swear.

COURT CLERK: Be seated.

COURT OFFICER: State your full name, spelling your last name.

THE WITNESS: My name is Jesus Manuel Garcia. The last name is spelled G-A-R-C-I-A.

COURT OFFICER: And your occupation?

THE WITNESS: I am the Director of the Division of Explosives of the Police Department of Puerto Rico, in the position of Investigative Agent Number 4.

THE COURT: You may inquire, Mr. Brancato.

J E S U S M A N U E L G A R C I A, Investigator, having been called as a witness on behalf of the People, was sworn by the Clerk of the Court, took the witness stand and testified through the Official Court Interpreter as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

Q. Agent Garcia, how long have you been a police agent in Puerto Rico?

A. I have been an agent for twenty-two years.

Q. And could you please tell us what your duties are as a police agent in Puerto Rico?

A. As police agent in Puerto Rico, I am in charge of the Explosive Division and my position being as supervisor in the technical and investigative department or section in cases regarding explosives.

Q. And very briefly, could you please tell us what training you've received in the field of explosives?

A. I have received the basic training in the school of

the - -

Q. Could you say that for us in English, if you can?

A. Okay. I received in training in Huntsville, Alabama, U.S. Arsenal.

Q. Why don't we do this. If you can answer my question in English, please do. If at any point you need the assistance of the interpreter, let us know, we'll state it on the record and we'll proceed accordingly.

(Whereupon, the witness continued to testify in English.)

A. After the basic training I went back to the school every three years to take refresh training for one week. The special training is for a week.

In addition to this, I take so much training in I.B.T.I. conference, annual conference in different place in mainland.

In addition, anually we have the special training that we coordinate with F.B.I. and A.F.T. people in Puerto Rico.

Q. You dismantle bombs; is that correct?

A. Yes, sir.

Q. How long have you been doing that?

A. Twenty-two year.

Q. All right. Now, back in - - back in February, of

1991, specifically February the 8th, 1991, were you working?

A. Yes, sir.

Q. And on that date did there come a point that you received a call to go see a lady that you later learned her name to be he have Lynnn Figueroa Lamboy?

A. Yes, sir.

Q. Where did you go to see that woman?

A. That was in Levittown, Puerto Rico, Paseo Aguila.

Q. P-A-S-E-O A-G-U-I-L-A, is that the way you spell it?

A. YesPaseo Auuila, number 26 - - 29.

Q. About what time did you get to that location?

A. We arrived there about eight-thirty p.m.

Q. And could you please tell us, when you got there, were there other police officers at the location?

A. Yes, sir.

Q. Did you see a woman who identified herself to you as Eveyln?

A. Yes, sir.

Q. Did you speak with her at that point?

A. Yes, sir.

Q. And could you please tell us, after speaking with her what happened?

A. Well, she explain me - -

MR. BRENNER: Objection. Objection.

THE COURT: Yes, don't tell us what she did or said.

Q. Did you talk to her at that point?

A. Yes.

Q. And after speaking to her, what did you do?

A. Well, after speaking - - speaking with she, we checked the suspect device.

Q. Okay. The suspect device.

Where was that?

A. Was in the front of the house of Mrs. Evelyn.

Q. And what did it look like?

A. Well, that was in the grass in front of the house, close to the sidewalk.

Q. On the grass in front of the house?

A. Yes.

Q. All right. Now, who were you working with that night?

A. Raul, R-A-U-L, Hadock, H-A-D-O-C-K, another agent.

Q. And what is Raul Hadock's job in the Police Depart-ment?

A. Is explosive denotation.

Q. He was your partner that night?

A. Yes, sir.

Q. Now, could you please tell us, did there come some point after speaking with Miss Evelyn that you and Agent Hadock went over to the device?

A. Well, was necessary for me to interview to Miss Evelyn because, according to the sergeant, the sergeant said this woman received - -

MR. BRENNER: Objection.

THE WITNESS: Okay.

THE COURT: Don't tell us according to somebody else.

MR. BRANCATO: Okay.

THE COURT: Just tell us what you know.

MR. BRANCATO: Can I just say something at the sidebar?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

Q. Agent Garcia, I'm going to ask you a question and the interpreter will translate it for you.

A. Huh-huh.

Q. And please respond in Spanish, just to this question.

A. Okay.

Q. Then we'll continue the way we're going.

A. Okay.

Q. Were you told by the lady that you referred to as Miss Evelyn that she opened the box, about an inch to an inch and one-half?

A. (Through Interpreter) They did not tell me that initially.

Q. Did there come some point that you were told that?

COURT INTERPRETER: I'm sorry?

Q. That you were told that?

A. (Through Interpreter) When I interviewed her and she explained to me the form in which she received the package, I asked her what she had done with this package. And that moment is when she tells me that because she considered it a little suspicious she decided to open it approximately one quarter of an inch.

Q. All right. Now, after you and Agent Hadock walked over to the - - well, describe for us what you walked over to and found on the grass in front of her house? What did it look like?

A. (Through Interpreter) When I got close with Agent Tejada, we saw on the grass a small suit case, black, which had two handles.

MR. BRANCATO: Your Honor, this has been marked collectively as - - well, we'd like to have this marked collectively as Exhibit Number 54.

THE COURT: All right.

(Package, so marked People's Exhibit Number 54 for identification.)

COURT OFFICER: People's Exhibit 54, marked for identification.

MR. BRANCATO: Could you?

COURT OFFICER: Show it to the witness?

MR. BRANCATO: Yes.

(Handed to the witness.)

Q. Please open that.

(Pause.)

Q. Do you rocognize the black box that is in front of you at this time?

A. (Through Interpreter) Yes, sir.

Q. Is that the black box that you saw in front of Miss Evelyn's house on the night of February 8th, 1991?

A. (Through Interpreter) Yes, sir.

Q. Could you please tell us what you did when you and Agent Hadock walked up to the box when it was outside of 26-29 Paseo Aguila, in Levittown, Catania?

COURT INTERPRETER: I'm sorry, could you

repeat the street name?

MR. BRANCATO: My Spanish isn't as good as your English.

THE COURT: You were speaking English?

MR. BRANCATO: I was trying to pronounce it, Judge.

THE COURT: All right.

Q. Tell us what you did.

A. (Through Interpreter) Agent Tejada and myself, we got close to the object and we attempted to listen. Any type of sound that would come from the interior.

Q. And - -

A. (Through Interpreter) And for that we used an electronic stethoscope.

Q. Who used the electronic stethoscope?

A. (Through Interpreter) Myself.

Q. And what did you do with the stethoscope?

A. (Through Interpreter) Once the stethoscope was assembled, I put the part that would be for listening on top of it and in various parts of the suit case.

Q. Could you hear any noise coming from within the suit case when you used this stethoscope?

A. (Through Interpreter) No, sir.

Q. What did that indicate to you?

A. (Through Interpreter) primarily, it knocked off the possibility that - -

Q. I'm sorry. I don't understand the translation.

MR. BRENNER: Knocked off.

MR. BRANCATO: Knocked off. I'm sorry.

THE WITNESS: (In English) Okay.

A. (Through Interpreter) Possibility of some type of clock or some object that would emit a sound.

Q. So, what happened after you knocked off that possibility? What did you do?

A. (Through Interpreter) We left and we required - - we elicited the services of a police photographer who would take a number of pictures.

Q. When - -

A. Of - -

Q. When you say you left, did you leave the street or did you move back from the box?

A. (Through Interpreter) We moved away from the package and we protected ourselves with the front part of the explosive-type truck.

Q. What happened then?

A. (Through Interpreter) We returned and then we put on it a cord utilizing a hook.

Q. And this cord and hook, where did it come from?

A. (Through Interpreter) It comes as a part of the towing mechanism of the explosives truck.

MR. BRANCATO: Can we have this marked as Exhibit Number 55, please, for identification?

THE COURT: All right.

(Photograph, so marked People's Exhibit Number 55 for identification.)

COURT OFFICER: People's Exhibit Number 55, marked for identification.)

Q. Can you please look at that photo?

(Handed to the witness.)

A. (Through Interpreter) Yes, sir.

Q. Does that photo refer to the truck that you referred to a moment ago that had the rope and the hook?

A. (Through Interpreter) Yes, sir.

MR. BRANCATO: I would offer it into evidence at this point.

THE COURT: Show it to counsel.

(Handed to Mr. Brenner.)

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

MR. BRANCATO: Your Honor, counsel has no objection.

May I continue?

(Pause.)

MR. BRENNER: Mr. Brancato, may I see all the photographs and maybe we can save some time?

(Handed to Mr. Brenner.)

THE COURT: All right, now you may continue.

MR. BRENNER: Your Honor, I'm going to stipulate that all these photographs previously marked for identification - -

THE COURT: Are these previously marked?

MR. BRANCATO: No, they haven't been.

MR. BRENNER: That they be admitted into evidence.

THE COURT: Let's get the sequence.

We have now 55. And without objection, I take it, 55 will be received.

Now we have People 56?

MR. BRANCATO: Yes.

THE COURT: Mark that, without objection.

MR. BRANCATO: And this will be 57.

THE COURT: And 57, without objection, received.

As soon as the marking is complete, we'll proceed.

(Photographs, so marked People's Exhibit

Number 55, People's Exhibit Number 56 and People's Exhibit Number 57 in evidence.)

COURT OFFICER: People's Exhibit 55, 56 and 57 marked in evidence.

THE COURT: Do you want that exhibited to the witness?

MR. BRANCATO: Yes, your Honor. I'll refer to the number.

THE COURT: All right.

Q. This is Number 55 that's in evidence.

(Handed to the witness.)

Q. Could you hold it up toward me, please?

A. (Indicating).

Q. Is that the truck that had the rope and hook mechanism attached to it?

A. Yes, sir.

Q. And what did you do with this hook and rope mechanism from that truck concerning that box?

A. (Through Interpreter) We proceeded to give it a small movement, to the object, with the purpose of knocking off any system of booby trap which would be in the interior of the suit case.

Q. So, is it fair to say that you got the hook with the rope and attached it to the handle on the brief case?

A. (Through Interpreter) Yes, sir.

Q. At the time that there was a tug onto the rope, where were you and your partner standing?

A. (Through Interprewter) We were some two hundred feet away, protecting us with the truck.

Q. After tugging on the box with the rope, did you - - what did you and your partner then do?

A. (Through Interpreter) We returned to the suit case and we proceeded to attach to it two adhesive strips with the purpose of doing the same thing that Miss Evelyn had done.

Q. Open it an inch or an inch and one-half?

A. (Through Interpreter) Exactly. We opened it one quarter of an inch.

Q. What was the purpose of putting the tape onto the box at that time?

A. (Through Interpreter) When we noticed a screw to the top of the case and see various wires, electrical wires, we were worried that what was inside might be activated if we opened it abruptly, the case.

Q. Okay. So, after putting the tape onto the box, did you then proceed to open it the inch or the inch and one-half?

A. (Through Interpreter) Once the tape was in place we opened the case approximately a quarter of an inch. I was

able to observe in the interior of the case there was a packaging, nipple type packaging.

Q. Was there a pipe in the box?

A. Something like pipe.

Q. Okay. Could you please tell us what happened then?

A. (Through Interpreter) After noticing that it had a lighter fuse and noticing that from one end of the lighter fuse there was an actual fuse, there was at the other extreme a wire that penetrated through a wire - -

MR. BRANCATO: Judge, can he testify in English at this point?

THE COURT: I have no preference.

MR. BRANCATO: I know.

COURT INTERPRETER: I'm sorry. Excuse me. I need to make a correction.

MR. BRENNER: Judge.

THE COURT: Whatever you're comfortable with.

COURT INTERPRETER: I need to make a correction.

THE COURT: If the witness is competent at the time to testify in English, he can testify in English.

COURT INTERPRETER: Your Honor?

THE COURT: I would suggest he testify in

English, but if he has a word which he doesn't have a comparable English word for, if he uses the Spanish, then you interpreter those words.

COURT INTERPRETER: Okay.

THE WITNESS: Okay.

COURT INTERPRETER: Excuse me. I need to make a correction. I do believe I utilized the word "wire" in the latter part of my last translation when what was said was a screw.

MR. BRANCATO: Okay.

THE WITNESS: Okay.

Q. Tell us in English, Agent Garcia.

A. Okay. After I saw the wire that crossed between the special screw and continued to the upper cap of the case, we decide to cut the wire because this is the only way that you can open the case.

After open the case, we saw the complete fusing system of the wire-pull lighter, lighter, and decide to cut the fuse. That is a pyrotechnique fuse.

Q. If I can stop you at that point?

There was a wire attached to the fuse?

A. No.

Q. All right.

A. The wire, the purpose of the wire is suppose when

you see the package and you intend to open, the wire provoke that the igniter start, you know, burning, and burning the fuse. Immediately the fuse provoke a spark inside of the pipe and the main charger burning and provoke the explosion.

Q. So, did there come some point that you placed a tool inside of the box in order to cut the wire?

A. The tools?

Q. Did you use a tool to cut the wire?

A. Yes. It was a wire cutter.

Q. And at that point was the box still opened at the length that you just described or did you open it a little more?

A. No. Was about less half - - one-half an inch. The same size of the tools; okay? That was possible to penetrate it to cut wire and cut the wire. That's only you.

Q. Who cut the wire?

A. Me. Myself.

Q. After cutting the wire, what happened?

A. We open the case and we decide to cut the fuse.

Q. You cut the fuse at that point?

A. Yes.

Q. And what happened then?

A. Okay. We - - we said to my photographer that take so many picture before continue to the procedure. And then,

when I touch the cap, the one cap of the pipe, we feeling like that the cap was loosened. And that moment we decide to put it more tape in the cap and by use of the - - of the cord, the same cord of the truck, we pull and the cap, fall down, was loose, take off. Okay?

Q. You pulled the cap off by putting tape onto it?

A. Yes. Was remote.

Q. And pulling on it with the cord; am I correct?

A. Yes.

Q. Now, do you have with you a picture of what the box looked like when you opened it up?

A. Yes.

Q. Do you have a picture here?

A. Is it there?

(Pause.)

Q. This is Number 57.

(Handed to the witness.)

A. Huh-huh. Okay.

This picture represent the back that was used for me to put it inside the all main charger of the pipe.

Q. What is in that bag, the bag that's on top of the suit case?

A. The black that you see is the powder, the black powder.

Q. Okay. That's in the plastic bag?

A. Yes.

Q. On top of the open case?

A. Yes.

Q. Is that the black powder that was taken from the pipe when you pulled on the end cap?

A. Yes, sir.

Q. What did you do then, after you - -

A. We did - -

Q. You took the powder?

A. Yes. We did the special fuel test with the so many grains of the black powder. We take a piece of paper, put in so many, a small quantity of the powder, and burn the paper and we can saw the - - the normal characteristic of the powder, when the powder burning.

Q. And did the powder burn after the paper was lit?

A. Yes. Was quickly and provoke the flame, you know.

Q. And did that indicate to you that it was gun powder?

A. That indicate that it is a black powder.

Q. Okay.

A. Which type? I don't know. We - - it necessary to send to the lab and the lab is suppose that.

(Photographs returned to Mr. Brancato.)

Q. Do you have a box in front of you, a cardboard box, a carton?

A. Huh-huh.

Q. Where did you get that from?

A. The box, we occupied the box on the table of the home of the house of the Miss Evelyn.

Q. And on the inside of the box, the black box, could you please open it and tell us what you have inside of there?

(Pause.)

MR. BRANCATO: Judge?

THE COURT: Step up.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

MR. BRANCATO: Judge, at this point - -

THE COURT: Let's get this exhibit put together.

Ladies and gentlemen of the jury, it has been suggested that we're into the luncheon hour. Perhaps at this time we'll recess for your luncheon and we'll resume here at three o'clock.

Do not discuss this case among yourselves or allow any third person to discuss the case with

you.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: You can step down.

(WITNESS EXCUSED)

(Whereupon, the Court took a luncheon recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, have the witness resume the witness stand.

(Whereupon, the People's witness, Detective Garcia, resumed the witness stand.)

THE COURT: Get the jury.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Step up, counsel.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, we'll resume.

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Mr. Brancato.

MR. BRANCATO: Your Honor, at this time we would offer what has been previously marked collectively as People's Exhibit Number 54 for identification into evidence.

THE COURT: That is the package?

MR. BRANCATO: That is the cardboard, along with the box and the pipes inside.

THE COURT: Mr. Brenner?

MR. BRENNER: We may we approach?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: We are ready.

MR. BRANCATO: We have made our offer, your Honor.

THE COURT: Oh, I see.

MR. BRENNER: Subject to the special considerations that we addressed at the sidebar, I have no objection.

THE COURT: All right, very well.

Are they previously marked?

MR. BRANCATO: No, your Honor. Perhaps we can have them marked?

THE COURT: Let's mark them. Give me the numbers.

MR. BRANCATO: What I suggest we do is have them marked 54-A, B, C, D, E, F and G, in that it will replace - -

THE COURT: A, B, C, D, E, F, G. All right, then let's proceed.

(Photographs, deemed marked.)

J E S U S M A N U E L G A R C I A, Investigator, having been previously called as a witness on behalf of the People, was previously sworn by the Clerk of the Court, resumed tht witness stand and continued to testify, in English, under oath as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

Q. Look at these photos which are marked 54-A through G.

(Handed to the witness.)

(Pause.)

Q. Agent Garcia, were those photos taken in my office this morning by Mr. Arroyo from that exhibit that you have in front of you?

A. Yes, sir.

Q. And did you and Mr. Arroyo spread out the exhibit onto a table and take those photos?

A. Yes, sir.

MR. BRANCATO: I would offer them into evidence.

THE COURT: All right.

With the understanding that there is no objection and they will be received.

Correct, Mr. Brenner?

MR. BRENNER: Yes.

Except, your Honor, the record doesn't reflect which photos or which exhibits. The record is baron of any reference.

THE COURT: We'll have them marked.

MR. BRENNER: They are marked now?

THE COURT: They are not.

Are they marked?

MR. BRANCATO: Nor identification.

MR. BRENNER: A through G.

THE COURT: The individual photo, have they been marked?

MR. BRANCATO: Yes.

COURT OFFICER: No.

THE COURT: No, someone says yes and someone says mark.

MR. BRANCATO: All right, then mark them.

THE COURT: They will be marked and then they will be admitted as marked.

Do you understand, Mr. Brenner?

MR. BRANCATO: Mr. Connolly, if you would?

MR. BRENNER: All I'm saying, without identifying them, there is nothing on the record that

each fairly and accurate represents anything.

THE COURT: He's getting to that, isn't he?

MR. BRANCATO: Yes.

THE COURT: That was one of the sidebars.

(Photographs, so marked People's Exhibit Number 54-A through People's Exhibit Number 54-G in evidence.)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

MR. BRANCATO: Okay.

Q. What is marked 54-A, is that a picture of that cardboard board container that is to your right with the printed side, "electroics," facing the top?

(Handed to the witness.)

A. Yes, sir.

Q. Is that the way it appeared today?

A. Yes, sir.

Q. What is marked as 54-B, in evidence.

(Handed to the witness.)

Q. Is that the back side of this cardboard container?

A. Yes, sir.

Q. Is that the way it appeared today?

A. (No response).
Q. Yes or no.
A. Yes, sir.
Q. What is marked 54-C.
(Handed to the witness.)
Q. Is that a photo of the box closed and with the two end caps?
A. Yes, sir.
Q. Is that the way it appeared today?
A. Yes, sir.
Q. What is marked 54-D.
(Handed to the witness.)
Q. Is that the box open and all the pieces comprising the components of that bomb spread around it?
A. Yes, sir.
Q. What is marked 54-E.
(Handed to the witness.)
Q. Tell us what's in that photo.
A. (No response).
Q. Is that the fuse?
A. That is the fuse and some of the wood, piece of wood, exclude - -
Q. I'm sorry?
A. Piece of wood, exclude this bag.

This bag.

Q. Screws?

A. Screws. And styrofoam, white styrofoam.

Q. The styrofoam?

A. Yes. And the lighter igniter.

Q. Could you please use the interpreter and tell us what that is?

A. (Through Interpreter) Lighter initiator.

Q. The lighter initiator.

Q. And how does the lighter initiator work?

A. When you pull the wire, you provoke electric inside the lighter and that make the special black powder burning. When burning, start the inside of the fuse, the burning of the fuse.

Q. Which goes into the black powder in the pipe?

A. Suppose the burning continue by the fuse and you have the fuse close to the - - to any black powder that burn.

Q. Okay. What's marked 54-F.

(Handed to the witness.)

Q. Is that the pipe - - would you tell us, the end caps that were in that package that night that you - -

A. Yes, sir.

Q. Defused it?

A. Yes, sir.

Q. And what's marked 54-G.

(Handed to the witness.)

Q. Are those the strips of black tape that were in that - - that were attached to that pipe the night that you had - -

A. Yes.

Q. Defused it?

A. Yes, that is so many black tape that was wrapped, was used by wrapping the pipe.

Q. Okay.

MR. BRANCATO: Judge, I believe the pictures were already marked in evidence; correct?

THE COURT: Yes.

Now, ladies and gentlemen of the jury, just follow. Everyone of these exhibits now were the contents of this package, 54-A, B, C, D, E, F and G. We will have them displayed for you right up on that stand next to the jury box.

And if you have the interest to examine them, please do.

Every picture or photograph which was just introduced represents some portion of this exhibit.

When the case is submitted to the jury, it may be, it may be that the actual exhibit will not be

physically present. The photographs will be. So, in the event and in the event that the jury requests the opportunity to examine that exhibit, they will have the photographs but not the physical, not the physical exhibit.

So, if you wish to familiarize yourself with it, I should indicate to you that now is that opportunity.

The Court Officers will display them item by item. You know, I mean the box which takes some room and the bag and the contents.

So, take one at a time.

The district attorney is indicating that in handling it you may pick up from the exhibit an odor.

What is that from?

THE WITNESS: That is the substance that is used by the lab to take.

THE COURT: To lift prints?

THE WITNESS: Yes.

THE COURT: But in any event, you may end up having a slightly off-color odor.

THE WITNESS: Not that bad.

THE COURT: I just want to indicate that to

the jurors.

I want that box exhibited, both top and bottom.

(Exhibit displayed to the jury.)

(Whereupon, Mr. Brancato and Mr. Brenner approached the witness, where there was an off the record discussion.)

COURT OFFICER: Your Honor, can the jury touch it?

THE COURT: Yes. We won't be checking their fingerprints, I can assure you.

(Pause.)

MR. BRANCATO: Judge, a moment ago I offered it into evidence.

THE COURT: And everything was received.

MR. BRANCATO: Right.

The strips of tape, please.

THE COURT: I want everyone of those exhibits.

(Further exhibits circulated among the jurors.)

THE COURT: Let me see the case. I want to see it up here.

(Handed to the Court.)

THE COURT: This was hooked up to the lighter?

THE WITNESS: Yes.

(Off the record discussion between the Court and the witness.)

MR. BRANCATO: Judge?

(Whereupon, all counsel approached the bench, where there was an off the record discussion between the Court, all counsel and the witness.)

MR. BRANCATO: Your Honor, with your permission, if we can turn this table around and have the witness stand in front of the jury, reassembling that exhibit the way it was the night he found it?

THE COURT: We'd have to turn the table around or clear an area?

MR. BRANCATO: We'll clear an area at the People's table.

(Pause.)

(Whereupon, the witness approached the People's table containing People's Exhibit Number 54 for identification.)

THE COURT: Are we ready now?

All right, let's get back on the record so we can demonstrate on the record what's being done.

MR. BRANCATO: Your Honor, for the record, we're asking that - -

THE COURT: Can you stand back farther, Mr. Brancato?

MR. BRANCATO: Sure.

THE COURT: You're blocking some of the jurors.

MR. BRANCATO: Sure.

THE COURT: Go ahead.

BY MR. BRANCATO: (Continued)

Q. Agent Garcia, could you please reassemble that pipebomb with the fuse and the casing in the manner in which you found it the night you defused it in front of Miss Evelyn Figueroa's apartment?

A. Okay.

(Pause.)

A. The base of wood that was used by the bomber was fixed in the case by the use of the - - of this four screw.

Q. Okay. Those four screws, where did they go through?

A. Coming from the base of the case, you can see the four hole to fix the two base of wood.

Q. So, the two pieces of wood then on the bottom were secured to the lower portion of the case by means of those four screws?

A. Yes.

Q. Okay.

A. When we open the - - that was the position that we found.

Q. Okay. Now it is closed.

A. We open, we - - before I put a special - - two tape with small loop. The purpose to not open the case completely. Only one inch.

Q. Okay.

A. Okay?

Q. Now, let me just interject.

Right now these two pieces of tape indicate evidence.

Is that what you used that night or did you use some other kind of tape?

A. Other. Other. Is special tape. Is fiber tape. Is very hard, you know. Is used for the purpose to keep any heavy material, any heavy object; okay?

Q. So, some other tape, other than what you have there now?

A. Yes.

Q. Okay. Show us how you opened it.

A. We open slowly. The tape break the security to us. We saw inside of the - - of the case and we can saw the wire and - - and the pipebomb.

After that, we remove the left tape and keep the right tape.

The purpose was to use the cutter, the wire cutter in this position, in this point of the case.

Q. Okay. That's the portion that on the top of the box there is a screw with some wire on the top.

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. All right.

A. After we cut it, the wire, we open, slowly, and immediately we cut the fuse.

Q. Where was - - when you opened the box, did it look like this photo that's in evidence as 57?

(Handed to the witness.)

A. Yes, sir.

(Returned to Mr. Brancato.)

Q. Now, where was the fuse in relation to that pipe?

A. Okay. The pipe have - - have some wrap it up electric black tape. And in this position, this piece of wood was placed and the igniter was fixed here with this up, transparent tape, scotch tape, something like scotch tape.

Q. Do you have that here?

A. Oh, look there.

(Handed to the witness.)

A. Okay.

Q. And is that the way it appears in this photo, Number 57?

(Exhibited to the witness.)

A. Yes. Yes, sir.

Q. Now, is there an opening down by the bottom of the fuse in the tape?

A. (No response).

Q. Is there an opening in the pipe down by the bottom of that fuse?

A. Okay. After we remove the - - the fuse, we decide to check the cap. When we check the right cap, we feel that was loose. We decide to remove this wood.

Q. On the right side, as you look at it.

A. Yes.

And use the wood and put it under the cap - - under the pipe, excuse me. We put it some, about three, four of the part of the cap, the fiber tape.

Q. You put fiber tape around the cap?

A. Yes.

Q. And what was the purpose in doing that?

A. Were, after we put in the tape, the end of the tape we made the knot with the cord to the truck.

Q. Okay. If I can?

After putting the tape, did you then connect the hook with the rope that you referred to earlier to the top of the cap, which now had the tape?

A. Not by the use of the hood. The end of the rope.

Q. The end of the rope?

A. Yes. We made the loop at the end of the rope and the hook. We pull it and we made it slowly.

Q. With the rope?

A. Yes. The cap start to move around the - - around the tape and was three - - three, four.

Q. Turns?

A. Turn that the cap go out.

In this moment, when we back, we saw so many of black powder.

Q. Okay.

A. We decide to use immediately the bag, the plastic bag and we remove the cap, put the bag inside of the - - of the - - of the cap, over the pipe.

Q. Okay. If I can just ask you - - at this point I'll ask through the interpreter and please respond in Spanish for the record.

A. Huh-huh.

Q. After the cap came off the right side of the pipe,

did some powder, black powder, come out?

A. Yes, sir. Yes, sir. Because it was full, completely full of powder.

Q. The pipe was full of powder?

A. Yes.

Q. At what point was it that you took the fuse, this fuse, out of the pipe? What point was it?

A. Which point?

Q. Yes.

The fuse.

Did there come some point that you took the fuse off of the pipe?

A. No, no. We keep the fuse in the same place. We cut only the fuse, not the lighter.

Q. Okay.

A. Okay?

Q. That's the igniter?

A. Yes, that's the igniter.

Q. Where is the fuse going into the pipe?

A. By the hole of the - - in the sides of the container, okay, of the pipe, we saw the hole.

Q. As you look at the hole, it is down by the left side?

A. Yes.

And by this hole was introduced the end of the fuse.

Q. Okay. About how much black powder was - - was taken out of the pipe?

A. Was approximately the - - between eleven or thirteen ounce.

Q. Okay. Is that what appears in this photo, in that plastic bag?

(Handed to the witness.)

A. Yes, sir.

Q. Okay.

(Returned to Mr. Brancato.)

Q. Did you test the powder at that location that day?

A. Yes, sir.

Q. And how did you do that?

A. We took - - we took so many that was in the case, put it in the small piece of paper, we go about one hundred feet, burning the paper and we can saw when the - - when it made the contact, the flame with the powder, and immediately that provoked the flash of the - - of the burning quickly. You know?

Q. Okay. Now, this portion of - - this portion of wire, where was it attached to?

A. This portion, this end is the continue of this

other end.

Q. Okay.

A. See?

Q. That's the piece of wire that protrudes from the top portion of the case, as you look at it from the inside?

A. Yes, sir.

Q. Okay.

MR. BRANCATO: If you could have a seat, please?

(Witness resumed the witness stand.)

Q. Do you have the Federal Express bill that was on the top of this cardboard package?

A. Yes.

(Handed to Mr. Brancato.)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(Whereupon, Mr. Brancato left the courtroom and momentarily returned.)

MR. BRANCATO: Your Honor, can we have this marked as People's Exhibit Number 58 for identification?

THE COURT: All right.

(Handed to Mr. Brenner.)

MR. BRANCATO: Any objection?

MR. BRENNER: No.

MR. BRANCATO: Your Honor, counsel and I have -- I've shown the exhibit to counsel. He has no objection to that exhibit --

THE COURT: Without objection, 58, received.

What is that exhibit?

MR. BRANCATO: A Federal Express.

THE COURT: Federal Express?

MR. BRANCATO: Yes.

MR. BRENNER: With specificity, the custom's air bill.

(Envelope, so marked People's Exhibit Number 58 in evidence.)

(Returned to the witness.)

MR. BRANCATO: I have no further questions.

THE COURT: The witness is yielded.

MR. BRENNER: I have no questions of this witness, your Honor.

THE COURT: You are excused, sir.

You want three minutes?

The jury is in the box.

(Whereupon, all counsel approached the bench,

where there was an off the record discussion with the Court.)

(Open court.)

MR. SHEINDLIN: Your Honor, may we have this marked as People's Exhibit Number 59 for identification?

THE COURT: All right.

(Sheets, so marked People's Exhibit Number 59 for identification.)

(Off the record discussion between Mr. Brenner and the defendant.)

THE COURT: Mr. Sheindlin, call your next witness.

MR. SHEINDLIN: Your Honor, the People call Tom Sullivan.

THE COURT: Tom Sullivan to the stand.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COUNT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York against Dominic Franza shall be the truth, the

whole truth and nothing but the truth so help you God?

THE WITNESS: Yes.

COURT CLERK: Be seated.

COURT OFFICER: State your name, spelling your last name.

THE WITNESS: Tom Sullivan, S-U-L-L-I-V-A-N.

MR. SHEINDLIN: May I inquire?

THE COURT: Yes.

MR. SHEINDLIN: Thank you.

T H O M A S S U L L I V A N, having been called as a witness on behalf of the People, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

Q. Mr. Sullivan, where do you work?

A. Federal Express Corporation.

Q. And how long have you worked there for?

A. Six years.

Q. And prior to working for the Federal Express Corporation, where did you work?

A. New York City Police Department.

Q. And how long have you work for the New York City

Police Department?

A. Twenty-one years.

Q. What is your current job title with Federal Express?

A. I'm the senior manager for the security department in the eastern region.

Q. And does that encompass all of New York City?

A. Yes, sir; it does.

MR. SHEINDLIN: At this time I ask that the witness be shown what has been previously been marked as People's Exhibit Number 59 for identification.

(Handed to the witness.)

Q. Let me start by asking you this: What is a Federal Express air bill?

A. A Federal Express air bill is a company document, a business document that accompanies each package that is shipped or introduced into our system.

Q. And are there any identifying marks on a Federal Express air bill?

A. They are serialized, yes, sir, by number.

Q. Is that referred to as an air bill number?

A. That's correct, sir.

Q. I ask you to look at Exhibit Number 59, which has

been marked for identification.

(Pause.)

Q. Do you recognize it?

A. Yes, sir; I do.

Q. What do you recognize it to be?

A. It's what we call a package tracking inquiry report. It indicates this particular package number, where it's been, the times it's been received into the system and where it ultimately wound up, the destination.

Q. When somebody wants to mail a package through Federal Express, does each package get its own individual air bill?

A. Each package is assigned an air bill number; that's correct, sir.

Q. And when somebody comes in with a package and an air bill, is that information entered into a computer?

A. The air bill number is entered into the computer; yes, sir.

Q. That's supposed to be done in every case in which somebody sends a package; is that correct?

A. That's correct.

Q. And when somebody - -

MR. SHEINDLIN: Withdrawn.

Q. That's done in the ordinary course of business; is

that correct?

A. Yes, sir.

Q. And the - - what you referred to as the package tracking inquiry, People's Exhibit Number 59 for identification, are those the computer records from the information which is recorded in the computer in the regular course of business?

A. Yes, sir; it is.

Q. Can you determine - -

MR. SHEINDLIN: At this time I also ask that the witness be shown what's been previously marked as People's Exhibit Number 39, which is in evidence.

(Handed to the witness.)

THE COURT: Is there a distinction between 39 and 58?

MR. BRENNER: Yes, Judge.

THE COURT: All right.

Q. What is the air bill number on Exhibit Number 39 in evidence?

A. The air bill number - - is this Number 39? Is this evidence Number 39 or 59? I'm confused.

MR. SHEINDLIN: Okay.

Q. Fifty-nine is the package tracking inquiry.

A. Okay.

Q. Now looking at Exhibit Number 39, the air bill?

A. Right.

Q. What is the air bill number on it?

A. 40006025224.

Q. And looking at the package tracking inquiry records, can you determine whether or not the package that pertains to the air bill, specifically People's Exhibit Number 39 in evidence, was mailed through Federal Express on February on the 4th, 1991?

A. Yes, sir. Based on the package tracking inquiry, the information in this particular sheet indicates that we received that package at fourteen-forty-five hours on February the 4th, at what we is known to us as the F.L.U.E. facility. And it was taken by employee Number 93118.

Q. Let me stop you so you can decipher some of the information for the jury.

Fourteen-forty-five hours, that means two-forty five in the afternoon; is that correct?

A. Yes, sir.

Q. And you referred to employee Number 93318 is that correct?

A. Yes, sir.

Q. Do you know the name of that employee?

A. That's Caesar Rodriguez.

Q. And you also referred to four letters to identify the Federal Express office location; is that correct?

A. Yes, sir.

Q. What were those four letters?

A. F.L.U.E.

Q. What office does - - do those four letters represent?

A. That particular designation is for a business service center located at 600 West 116th Street, in Harlem.

Q. Okay. That's Manhattan, New York; is that correct?

A. New York County; that's correct.

Q. Okay. Now, if somebody comes into a Federal Express office to mail a package and they want to pay by money order, does the employee that's working for the Federal Express that takes the package make any specific markings on the money order?

MR. BRENNER: Objection to the leading form of the question, your Honor.

THE COURT: For other reasons as well.

Sustained.

Q. When an employee receives a money order for a package, what does the employee do?

A. He should cross reference the air bill number to the money order that was received or the check or the credit

card, if it is paid for by credit card.

Q. Does he make markings on the money order?

A. He should make a notation on the money order or the check as to the air bill that's being paid for.

Q. And that's done in the ordinary course of the business; is that correct?

A. That's correct.

MR. SHEINDLIN: I ask that the witness be shown People's Exhibit Number 36, which is in evidence.

(Handed to the witness.)

Q. People's Number 36 is a money order; is that correct?

A. That's correct. An American Express money order.

Q. And it is made out to Federal Express; is that correct?

A. Yes, sir.

Q. Is there a marking which denotes the air bill number on People's Exhibit Number 36 in evidence, specifically the American Express money order?

A. Yes, sir; there is.

Q. What is the markings on it?

A. There is a notation made on the money order indicating air bill number 40006025224.

Q. Okay. When you say air bill number, the specific markings on the American Express money order which you're holding is A. B. with the symbol for number; is that correct?

A. That's correct, sir.

Q. And then the numbers that comes after that A. B and number sign, what are those numbers?

A. 40006025224.

Q. And are those numbers the same numbers on the air bill, People's Exhibit Number 39 in evidence?

A. Yes, sir; they are.

MR. SHEINDLIN: Okay, thank you.

Q. Just to be clear. Based upon the package tracking inquiry, which is the information recorded in the regular course of Federal Express business, they indicate that the package that was mailed under air bill Number 40006025224 was mailed from Manhattan, New York; is that correct?

A. Yes, sir.

Q. And from the Federal Express office located on 116th Street?

A. Yes, sir.

Q. Now, with respect to air bills in general, where can someone who wants to mail a package obtain an air bill?

MR. BRENNER: Objection.

THE COURT: Rephrase it.

Q. Where are Federal Express air bills kept so the general public can obtain them?

A. At anyone of our facilities or any van, Federal Express van in the city.

Q. Okay. Now, when you say facilities you mean Federal Express stores; is that right?

A. Business service centers. What we refer to as business service centers, which you would refer to as a store or a station.

Q. All right. And when somebody from the general public goes in to pick up a Federal Express air bill, there is no information entered on it with respect to who is sending it and where the package is to be sent to; is that correct?

MR. BRENNER: Objection, your Honor, to the form of the question.

THE COURT: Sustained.

Q. Perhaps it might help. You have with you, don't you, a Federal Express air bill that's blank, that has no information filled out on it?

A. Yes, sir; I do.

MR. SHEINDLIN: I'd ask that be marked as People's Exhibit Number, I believe we're up to, 60, for identification?

COURT CLERK: 59.

THE COURT: Fifty-nine it would be.

MR. BRENNER: No.

MR. BRANCATO: Sixty, your Honor.

THE COURT: Sixty.

(Air Bill, so makred People's Exhibit Number 60 for identification.)

COURT OFFICER: People's Exhibit Number 60, marked for identification.

MR. SHEINDLIN: I ask it be shown to the witness.

(Handed to the witness.)

Q. When you said that the general public can come in and pick up an air bill and, for example, a Federal Express location, is the exhibit, Poeple's Exhibit Number 60, marked for identification, represent the type of air bills that someone can come request and take?

MR. BRENNER: Objection.

Type?

Someone?

Objection.

THE COURT: Type?

Q. People's Exhibit Number 60, marked for identification, is that an air bill that someone from the general

public can come in and take from a Federal Express store?

A. Yes, sir; it is.

Q. And that has no specific information filled out on it; correct?

A. No, sir. It is left blank for the customer to prepare.

Q. And how does a customer obtain an air bill from a Federal Express location?

A. Just walks in and asks for one. If there is a counter there, he can just take it. It is freely accessible.

Q. When the air bills are mailed to a Federal Express location so that they maybe given out to the general public, in what quantities are they mailed to the Federal Express locations?

MR. BRENNER: Objection as to relevance, your Honor.

THE COURT: Perhaps you have something in mind?

MR. SHEINDLIN: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, resume the stand.

(The witness resumed the witness stand.)

MR. SHEINDLIN: Okay.

BY MR. SHEINDLIN: (Continued)

Q. Mr. Sullivan, when air bills are mailed - - well, specifically the air bills which are marked as People's Exhibit Number 60 for identification, those are international air bills; is that correct?

A. Yes, sir. That's correct.

Q. Okay. And the air bill that you examined, People's Exhibit Number 39 in evidence, that's an international air bill; is that correct, sir?

A. Yes, sir. That's correct, also.

Q. When international air bills are mailed to a Federal Express store or location, in what quantities are they mailed to them?

A. I really don't know the exact quantities that they are mailed to them. But they are - - they are sent in series of elevens.

Q. Okay. When you say series of eleven, you don't mean eleven documents, do you?

MR. SRENNER: Objection.

THE COURT: Let the witness explain what he means.

MR. BRENNER: Okay.

MR. SHEINDLIN: Okay.

Q. Explain to the jury what you mean by series of eleven.

THE COURT: What comes by series?

A. What I mean by that is, an international air bill numbers, for some reason when they are printed up by the printer, they are serialized in batches of eleven. For instance, if the printer begins with 0-0, the next number on the air bill is going to be eleven, follows by a twenty-two, followed by a thirty-three. If it starts with one, it will be twelve, etcetera. Like that.

THE COURT: Now, is that for any particular location? For each location it is a series of eleven or that's uniform throughout every Federal Express office?

THE WITNESS: It is uniform, sir, throughout the system. I don't - -

THE COURT: It is always an eleven sequence?

THE WITNESS: That's correct.

Q. That's with respect to international air bills; is that correct?

A. International air bill; right.

Q. With respect to People's Exhibit Number 60, marked

for identification, can you show the jury with respect to those international air bills how they are - - how the air bill numbers are sequenced?

A. For instance, you can see these are all attached. It starts out with the series of numbers, 40047517853. The next one on that batch is six-four.

Q. That's the last two numbers; correct.

Q. Yes, referring to the last two numbers.

Followed by the next one on that batch ending in seven-five. Then it skips eleven. The next one on that batch goes to eight-six, again jumping eleven numbers.

THE COURT: All right.

MR. SHEINDLIN: Okay.

Q. With respect to the air bill, People's Exhibit Number 39 in evidence, the international air bill, were you able to determine where the air bill that had the sequence of eleven prior to it, where the package that was attached to that air bill was mailed from?

A. Yes. By accessing its computer and feeding in the air bill number which would be eleven didgets below that and also eleven didgets past that, I was able to determine that the package - -

MR. BRENNER: Objection; hearsay.

THE COURT: No.

MR. BRENNER: Your Honor, may we approach?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Step over, please.

(Whereupon, the Court and all counsel approached the sidebar, out of the hearing of the defendant and the jury, where the following proceedings commenced:)

MR. BRENNER: The People are inquiring of this witness, as best I understand it, to identify the air bill number which is involved in this case, then to assess the one sent prior in sequence and the one sent subsequent in sequence.

They are then asking him to testify, based on his search through the computer, the locations of the transmittal of those packages or air bills.

My objection is that since the proffer of the People has been that they were sent from the Bronx and the defendant resided in the Bronx at the time of this occurrence, they are offering those two

locations for their truth.

Since this witness neither put the information in or was stationed in either of the places from whence the packages were sent, his calling of that information on the computer is the eliciting of hearsay information.

He has testified, in fact, to a statement made out of court by a person or persons unknown and un-identified. I have - - there is no way to challenge the reliability of that information since we don't know who put that information in the computer, when it was put in.

He's repeating an out of court statement for its truth and respectfully I submit it is the vilest form of hearsay.

THE COURT: Mr. Sheindlin?

MR. SHEINDLIN: My offer is based on the fact he said he accessed the computer information. He testified with every air bill sent, the numbers are entered - - the air bill numbers are encered into the computer at the time somebody mails a particular package.

THE COURT: In the age of computers, your argument was to the weight or admissibility. Because

the jury chooses to believe that that computer is in error or even to have - - he didn't have the input of what was putsinto the computer or the People have a history, perhaps of putting in inaccurate information, let them deal with the weight.

MR. BRENNER: Your Honor, the analogy would be, as far as I'm concerned, two officers coming in and testifying to the substance of a 9-1-1 telephone call which was recorded by computer. Which they could not do. That is hearsay.

THE COURT: I know that very well.

You have my ruling. We're going on it.

(Whereupon, the Court and all counsel returned to the open courtroom, where the following proceedings commenced:)

THE COURT: All right.

(The witness resumed the witness stand.)

BY MR. SHEINDLIN: (Continued)

Q. Mr. Sullivan, with respect to the air bill, which is - - which - -

MR. SHEINDLIN: Withdrawn.

Q. With respect to the air bill number which is eleven didgets below the air bill number in People's Exhibit 39 in evidence, were you able to determine where that - - where the

package that pertained to that air bill was mailed from?

A. Yes, sir.

MR. BRENNER: Objection.

A. That was sent from 1 Fordham Plaza.

MR. BRENNER: Objection.

THE COURT: Overruled.

You may answer.

A. That was sent from 1 Fordham Plaza, in the Bronx, a business service center that we know as H.P.N.B.

Q. And that's the Bronx County, New York; is that correct.

Q. Yes, sir. Number 1 Fordham Plaza.

Q. With respect to the air bill number which is eleven didgets above the air bill number in People's Exhibit Number 39 in evidence, were you able to determine where the package that pertains to that air bill number was mailed from?

A. Yes, sir. That also was mailed from H.P.N.B., which is 1 Fordham Plaza, in the Bronx.

Q. Bronx County, New York; correct?

A. Yes, sir.

(Off the record discussion between Mr. Brenner and the defendant.)

Q. How many Federal Express offices are there in the Bronx County, of New York?

A. That's the only one, sir.

MR. SHEINDLIN: Thank you.

I have no further questions.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. BRENNER:

Q. Mr. Sullivan, the fourteen packages that were mailed before the one which you've come and testified to, where were they mailed from?

A. I don't know, sir. I didn't make inquiry.

Q. The hundred before?

A. I didn't make inquiry.

Q. The hundred after?

A. I did not make inquiry on that.

Q. Fifteen after?

A. I didn't make inquiry on that.

Q. Two after?

A. Packages or air bill numbers?

Q. Air bill numbers.

A. The packages - - one of those packages afterwards was mailed from the H.P.N.B. Facility, at 1 Fordham Plaza.

Q. And one after that?

A. I don't know. I didn't go beyond that.

Q. And you've testified to the one that was right

before that; right?

A. That's correct, sir.

Q. What about the one right before that?

A. I did not inquire as to that one.

Q. At whose request did you make these inquiries?

A. I don't recall if it was the request of the A.F.T. or on my own that I checked those. I'm not sure.

Q. And when you were contacted by the District Attorney's Office, did they request that you make any inquiry beyond the one that you've testified to?

A. No, sir.

Q. Incidently, who entered that information into the computer?

A. The information is entered automatically by what they call a hand scanner.

Q. But who did it?

A. Which specific air bill are we talking about?

Q. The one before and one after.

A. Employee Number 91213.

Q. Who's that?

A. I don't know, sir. I didn't make inquiry as to that.

Q. And the one after?

A. That package was also handled by Employee Number

91213.

Q. We don't know who that; is that right?

A. I didn't make inquiry as to that.

Q. Now, with regard to air bill number ending in 5224?

A. Yes, sir?

Q. You've identified Mr. Caesar Rodriguez as the Employee Number 93118 ?

A. That's correct, sir.

Q. Who - - who sent this package?

A. Based on the package tracking inquiry, which - - I have no idea who sent this package based - -

Q. The customer.

A. The customer?

According to the air bill, it is indicated as U.S.A. Electronics.

Q. And there was an individual who signed his or her name to the bottom; is that right?

A. That's correct.

Q. What did that person look like?

MR. SHEINDLIN: Objection.

A. I have no idea, sir.

Q. Did that person have any conversation with Caesar Rodriguez?

MR. SHEINDLIN: Objection, your Honor.

THE COURT: Unless he happens to know that.

A. I don't know, sir.

Q. How is that person dressed?

A. I don't know, sir.

Q. What time did that person come?

MR. SHEINDLIN: Objection, your Honor.

Counsel knows he wasn't present in the store.

MR. BRENNER: Mr. Sheindlin - - may we approach, your Honor?

MR. BRANCATO: Judge?

MR. BRENNER: May we approach?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Have the witness return.

(The witness resumed the witness stand.)

MR. BRENNER: Your Honor?

BY MR. BRENNER: (Continued)

Q. Mr. Sullivan, would it be fair to say that the person who transacted the business that day was Mr. Rodriguez?

A. Yes, sir; it would.

Q. The person who accepted the package from the customer was a Mr. Rodriguez?

A. That's correct.

Q. The person who accepted payment from the customer was Mr. Rodriguez?

A. Yes, sir.

Q. In fact, he would be in possession of the knowledge of the questions that I've just asked you; is that right?

MR. BRANCATO: I object to that.

Q. If anyone were to have knowledge - -

MR. BRANCATO: I object to that question.

MR. BRENNER: I withdraw it.

THE COURT: He's asking another question now.

Q. If any person were to have knowledge of the identity, description and the manner of the transaction as it occurred on February the 4th, it would be Mr. Rodriguez, would it not?

MR. BRANCATO: I object to that.

THE COURT: Sustained.

MR. BRENNER: I have nothing further.

THE COURT: Any re-direct?

MR. SHEINDLIN: Nothing. Nothing, your Honor.

THE COURT: You are excused, sir. Step down.

THE WITNESS: Thank you.

(WITNESS EXCUSED)

THE COURT: Now, members of the jury, I take it we're going to recess now?

Mr. Brancato?

MR. BRENNER: May we approach?

THE COURT: Do you want to approach?

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(Exhibits returned to Mr. Brancato.)

THE COURT: Ladies and gentlemen of the jury, at this time we are recessing.

Now, just for your own guidance, I've had an inquiry from a juror as to the anticipated length of this trial, which I'm sure is of concern to everyone of you, at least those of you who want to be some where else.

It is our best guestimate, and you know I'm using the word guestimate, but within reason we're usually on target, that the case will be submitted to the jury a week from this coming Monday.

Now, in addition to that, I should indicate to

you that rather than have you come in tomorrow and have a fragmented day because of scheduling matters which you need not concern yourself with, we will recess the trial until Monday. I'd say Monday, at eleven-thirty.

Again, do not discuss this case amongst yourselves or allow anyone to discuss the case with you.

Have a very good weekend. Don't reach any conclusions, don't speculate. We look forward to see you back here Monday morning, at eleven-thirty.

Now, with respect to Miss Sulks?

JUROR: Sulkes.

THE COURT: Would you remain after the jury leaves?

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors, with the excepr of Miss Sulkes, left the courtroom.)

THE COURT: May we have these notes marked as Court Exhibits, please?

THE COURT: I understand from your note your about to begin or commence an assignment?

JUROR: Yes.

THE COURT: Now, I think it would be unfair under the circumstances to have you hanging by the day, not knowing whether we'll conclude on a particular day or not.

So, under those circumstances, on the record, at the request of Miss Sukes, who indicates that would be, what, your third week of going or into your third week if you stayed into the following week?

JUROR: If I stay next week it will be the third week.

THE COURT: Yes. Under those circumstances, because you have this employment situation, after a long hiatus - - I believe you indicated four months?

JUROR: Right.

THE COURT: That with the consent of all counsel you are going to be discharged at this time from further jury duty.

I do hope you enjoyed your stay with us.

JUROR: Thank you very much.

THE COURT: Good day and good luck.

JUROR: Thank you.

(Whereupon, the juror left the courtroom.)

THE COURT: Now, Monday, who do we have on

Monday?

MR. BRANCATO: I'll inform the Court of that tomorrow.

THE COURT: May we have the two notes from the jurors marked as Court Exhibit Number 1 and Court Exhibit Number 2, please?

(Notes, so marked Court Exhibit Number 1 and Court Exhibit Number 2.)

(Whereupon, the proceedings were adjourned until March 2nd, 1992, at eleven a.m.)

* * *

(Continued on the following page.)

MARCH 2nd, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant.

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice.

and a jury.

A P P E A R A N C E S :

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Bennesto, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Would you mark this as Court Exhibit Number 3, please?

(Letter, so marked Court Exhibit Number 3.)

THE COURT: All right, bring in the jury panel, please.

COURT OFFICER: Jurors are entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial continued.

The defendant, his attorney, the assistant district attorneys and all jurors are present, your Honor.

THE COURT: We'll resume now, ladies and gentlemen, with the recall of the witness -- a witness previously called and sworn, Detective Raymond.

Detective Raymond, I indicate to you that you've been previously sworn in this case. There is no need to administer an oath again. You are

sworn.

Mr. Brenner?

MR. BRENNER: Thank you.

S U S A N R A Y M O N D, Detective, having been previously called as a witness on behalf of the People, was previously sworn by the Clerk of the Court, resumed the witness stand and continued to testify under oath as follows:

CROSS EXAMINATION

BY MR. BRENNER:

Q. Detective Raymond, you've testified on direct examination that on the early morning hours, I believe, of February 12th you participated in a search at 3320 Barker Avenue; is that right?

A. I would have to check the records just - -

Q. Okay.

A. As to the date, that's all.

Q. Okay.

(Pause.)

A. What day?

Q. The early morning hours of February 12th, 1991.

This was the search with the federal agents, the Bomb Squad, members of the 34th Precinct.

(Pause.)

A. I have it as the 11th.

Q. Within the evening of the 11th, the night of the 11th into the morning of the 12th; is that right?

A. Right.

Q. I think you also told us there were explosive sniffing dogs?

A. Yes.

Q. Would it be fair to say, Detective Raymond, when you got to the apartment there were dogs inside?

A. Yes, there were dogs inside.

Q. Two?

A. Two dogs.

Q. And did you ascertain, however, by whatever means, however, that those dogs belonged to Mr. Franza?

A. We knew they belonged to Mr. Franza.

Q. And they were in the apartment?

A. Right.

Q. Mr. Franza was already under arrest; is that right?

A. That's correct.

Q. But they were there?

A. Yes.

Q. Now, on February 13th, 1991, did you have occasion to go back to 3320 Barker Avenue?

A. Yes.

Q. And did you go alone?

A. No.

Q. Who did you go with?

A. With Detective Herbert.

Q. Now, at that time did any agents of the Bureau of Alcohol, Tobacco and Firearms accompany you?

A. No.

Q. What was your purpose?

A. We were to go upstairs to the landladies' apartment.

Q. Right.

A. And check out her typewriters.

Q. And did you have information that they did?

A. Excuse me?

Q. Did you have information that they did have typewriters?

A. Yes.

Q. Was that super speaking to - - when you were originally there on the 11th through the 12th?

A. Yes.

Q. Did you have any other purpose?

A. Check the basement out.

Q. Did you, in fact, check the basement out?

A. Yes.

Q. Did you seize items?

A. No. We - - yes, I'm sorry, we did.

Q. Yes. You took pipes, did you not?

A. Yes.

Q. Anything else?

A. Off the record, I can't recall. But a couple of items.

Q. Okay. Did you ascertain, without telling us what it was, what Mr. Guzman's manner of employment was? What he did for a living?

A. I believe we did ask him. I don't recall what it was now.

Q. Okay. Did you see tools when you went down to the basement?

A. Yes.

Q. Did you take any of those?

A. (No response).

Q. Feel free to check whatever you need to check.

A. Agh?

(Pause.)

A. I don't believe so. I don't have it in my records.

Q. Now, there are - - there were two typewriters at the Guzmans?

A. There were three.

Q. Three?

A. (Indicating by a nodding of the head).

Q. Did you take them?

A. No.

Q. Did you type on them?

A. Yes.

Q. All three?

A. All - - no, two of them.

Q. And why did you not type on the third?

A. The other one was a electrical typewriter.

Q. And the information that you had was that - -

MR. BRENNER: Withdrawn.

Q. Your purpose was to attempt to compare a typewriter style with the "threatening letters" received by Josephine Mendez, Nelson Dacosta and Kyta Franza; is that correct?

A. That is correct.

Q. So, you had information that that was done manually?

A. That is correct.

Q. Where did that information come from?

A. From the 34th Precinct.

Q. Someone over there told you?

A. Yes.

Q. It was on a manual typewriter?

A. Yes.

Q. So, you sat down at the Guzmans' apartment and typed out the text of each of those letters, on each of the typewriters; is that right?

A. Yes.

Q. Now, you didn't suspect the Guzmans, did you?

A. No.

Q. The reason that you were there was the proximity of the Guzmans' apartment to the Franza apartment; correct?

A. Correct.

Q. And the proximity of the basement in that house to the Franza apartment?

A. That's correct.

Q. And you typed the full text of each letter?

A. Yes.

Q. How long did it take you, just by way of time? How long did it take you to do that?

A. A minute or two. Very little.

Q. A minute or two?

A. Three minutes. Very - -

Q. You type quickly?

A. Yes.

Q. And - -

MR. BRENNER: I'd ask that these be marked for

identification, your Honor.

THE COURT: We're up to O.

MR. BRENNER: O, P, Q and R, your Honor. O, R, S and T.

THE COURT: O, R, S and T. Defendant's O, R, S, T.

(Sheets, so marked Defendant's Exhibit O, R, S and T for identification.)

COURT OFFICER: Defendant's O, R, S and T, so marked for identification and shown to the witness.

(Handed to the witness.)

Q. Detective Raymond, those are photocopies, are they not?

A. Yes.

Q. The original exemplars - - they were exemplars, were they not?

A. Yes.

Q. Typewriting exemplars?

A. Yes.

Q. The originals, what did you do with them?

A. I had them in my possession.

Q. You had them in your possession?

A. Yes.

Q. Now, the New York City Police Department has a

Questioned Document Laboratory; is that right?

A. Yes.

Q. They do handwriting anaylsis?

A. Yes.

Q. Paper anaylsis?

A. Yes.

Q. And they do typewriting anaylsis, do they not?

A. Yes.

Q. Your purpose in obtaining these, in the first instance, was for someone to determine whether the typewriting reflected from the Guzmans' typewriter matched that of the threatening letters, that was your purpose?

A. Yes.

Q. Are you an expert - -

A. No.

Q. In questioned documents?

A. No.

Q. No?

Did you make a visual comparison?

A. No.

Q. You didn't?

A. Not typed.

Q. I'm sorry?

A. Just basically typed them.

Q. Just physically typed them?

A. Yes.

Q. You did no visual comparison?

A. No.

Q. You took and put them in an envolope?

A. Yes.

Q. And you kept them?

A. No. We went to the lab.

Q. Okay. When?

A. A week later.

Q. And you submitted them to Detective Breslin?

A. Yes.

Q. Did Detective Breslin ultimately sent you a report?

A. He told us right there that they were not the same.

Q. They were not the same?

A. No.

Q. You took them back?

A. Yes.

Q. And you've had them in your possession since?

A. Yes.

Q. Now, Detective Raymond, in connection with your investigation in this matter, you spoke to Dominic Franza for the first time in January, of 1991; is that right?

A. Yes.

Q. You asked him some questions; he gave you some answers?

A. Yes.

Q. He gave you some information; is that right?

A. Yes.

Q. And you spoke to him again later that month?

A. Yes.

Q. And in February - -

MR. BRENNER: Withdrawn.

Q. Also later that month, in January, of 1991, you did a B.C.I. check on Mr. Franza; is that right?

A. I would have to check my file.

Q. Please do.

A. In January?

MR. BRANCATO: While she is, can we approach?

THE COURT: Yes.

MR. BRANCATO: While she's doing that, your Honor?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Very good.

Have you located?

Q. Have you located?

A. Yes.

Q. It was later in January?

A. January 22nd.

Q. You did a B.C.I. check.

For all our purposes, that's the Bureau of Criminal Identification?

A. Yes.

Q. And you did that to ascertain whether Mr. Franza had a criminal record.

A. That's correct.

Q. Is that correct?

A. Yes.

Q. Within two weeks of that inquiry you submitted the forty-nine, that you've explained to us was a request for information from the Career Criminal Identification Unit; is that right?

A. Yes.

Q. Now, back on August 12th or 13th were you assigned to - -

MR. BRENNER: Withdrawn.

Q. Did you have occasion to attempt to interview Nelson Dacosta?

A. No, I did not.

Q. At any point?

A. Not at any point.

MR. BRENNER: I have nothing further at this time, your Honor.

THE COURT: All right.

Ladies and gentlemen of the jury, at this time we'll take a very short recess.

Do not discuss this case among yourselves or allow any third person to discuss the case with you.

Take the jury out.

You remain.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: Have you completed this witness?

MR. BRENNER: I don't.

THE COURT: You don't know?

MR. BRENNER: We may be able to use her services.

THE COURT: All right, let's do that if it will expedite matters.

MR. BRENNER: I received on page 1752 of the People's Rosario material, which was not identified

to me. The author of it was not identified to me.

BY MR. BRENNER: (Continued)

Q. Detective, your case number on this, the case number of the pipebomb recovered on August 11th, 1990?

A. That was E-84 of '90.

Q. You recognize this, the handwriting on this form?

(Handed to the witness.)

A. Yes, I do.

Q. Whose is that?

A. Detective Valdez.

Q. Where is Detective Valdez?

A. Huh?

Q. Where is Detective Valdez? She's still with - -

A. Yes, she's still with us.

MR. BRENNER: You see, Judge? We'll expedite it and we've solved the problem.

THE COURT: Solved?

MR. BRENNER: Yes.

THE COURT: You have completed with this witness?

MR. BRENNER: Yes.

THE COURT: For the record, Detective Raymond is now excused.

(WITNESS EXCUSED)

THE COURT: How long do you need?

MR. SHEINDLIN: Half an hour.

MR. BRENNER: Judge, I have a so ordered subpoena.

THE COURT: For who?

MR. BRENNER: Detective Gilbert Ortiz.

I don't know if the People can facilitate it. You signed it. He may need it.

Do I really have to go through the ordeal of trying to track this man down?

THE COURT: All right.

MR. BRENNER: I'm going to furnish it to the People so they can give it to Detective Ortiz, if he needs it.

THE COURT: All right.

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

MR. BRANCATO: Your Honor, may we have these exhibits marked as People's Exhibit Number 61-A and 61-B?

THE COURT: All right.

(Sheets, so marked People's Exhibit Number 61-A and 61-B.)

THE COURT: All right, bring in the jury panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate juror entered the courtroom and took their respective seats in the jury box.)

THE COURT: All right, call your next witness.

MR. BRANCATO: At this time the People call Agent Lund.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear that the

evidence you're about to give the Court and jury in the case of the People of the State of New York versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes, I do.

COURT CLERK: Be seated.

COURT OFFICER: State your name, spelling your last name.

THE WITNESS: Joseph C. Lund, L-U-N-D.

MR. SHEINDLIN: May I inquire?

THE COURT: Mr. Sheindlin?

MR. SHEINDLIN: Yes.

J O S E P H C. L U N D, having been called as a witness on behalf of the People, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. SHEINDLIN:

Q. Agent Lund, where do you currently work?

A. I'm currently employed by the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, assigned to the Explosive Technology Branch.

Q. Keep your voice up.

A. Yes.

Q. How long have you worked there for?

A. Since November, of 1987.

Q. Prior to working for the Bureau of Alcohol, Tobacco and Firearms, where did you work?

A. I was employed by the Baltimore County Police Department, Criminal Investigation Division, Detective Division, Bomb Squad.

Q. And how long did you work there?

A. From 1964 to 1970, on patrol. From '70 to '75 I was a criminal investigator. From '75 until I retired in '87 I was with the Bomb Unit.

Q. Did you serve in the military?

A. I joined the military in 1958 and I was assigned to an expolsives unit.

Q. What branch of the military did you serve in?

A. United States Air Force.

Q. What is your - - what are your duties with the Alcohol, Tobacco and Firearms Bureau?

A. I give technical assistance in the field of explosives to local, state and federal agencies, in reference to bombing cases, bomb investigations and improvised explosive weapons.

Q. When you say "technical assistance," what do you mean by that?

A. Either I respond to the scene of the bombing or I examine, review evidence and physical facts relating to a bombing to determine; number 1, is this a bomb; two, from evidence received, was this a bomb; and the last, from all the parts or components obtained, could this be a bomb?

Q. With respect to explosive devices, what is your educational background?

A. I graduated from the United States Army Missile Munitions School, for hazardous devices and improvised explosive weapons in 1977 and I've attended re-certification courses at the Redstone Arsenal, in Huntsville, Alabama.

In 1978 I went back for a re-certification. Again in 1980. And in 1982, in 1984, in 1988 and in 1991.

Q. That's all for re-certifications; is that correct?

A. That's correct.

Q. And what were you certified in?

A. Hazardous Device School, Improvised Weapons.

Q. Okay.

A. I've also attended the Bureau of Alcohol, Tobacco and Firearms training Center, in Glynco, Georgia, in New Agent Training and Explosive Investigation.

I returned for Advanced Agent Training in November and December, of 1990.

I attended a fourteen day course for the Response

Team. That's investigating bomb threats. United States. Also in 1990.

And I was certified an Explosive Specialist in December, of 1988, by the U.S. Treasury Department.

And re-certified against in 1990 as an Explosive Specialist for the government.

I've also attended the Federal Bureau of Investigation, the F.B.I. Academy, at Quantico, Virginia.

I've also a speaker at the State of the Art and attended the State of the Art Seminars in Explosive Investigations, Explosive Devices in 1978. Same course in 1980.

I attended the Bomb Squad Commanders Seminars, in February, 1981. Again, in 1983. And in 1984, in 1985, in 1986, in 1990.

I also attend the F.B.I. Academy's courses in collection and preservation of evidence in direct dealing with bombing investigations, in 1985.

I went to a special bomb technicians seminar with the F.B.I. in 1985.

Attended the conference with the International Association of Bomb Technicians and Investigatory, 1978, 1979, in 1980, 1981, 1982, 1983, 1986, 1987, 1988, '89, '90 and '91.

I've also attended the United States Naval School for the explosive ordinance disposal of improvised devices.

That's the course military people go through to handle improvised bomings.

I just completed that Friday, February-March, 1992.

Q. Let me stop you there.

You testified in court as an expert with respect to explosive devices?

A. Yes.

Q. And approximately how many times?

A. This will be for the Police Department and for federal government?

Q. Yes.

A. I don't know. Fifty-something times just with the government. I don't know how many times as a police officer.

Q. And approximately how many explosive devices have you investigated over the course of your career?

A. Since coming with the Treasury Department, my case load averages between one hundred fifty and two hundred explosive devices that I review, look at, examine per year.

Q. And with respect to improvised explosive devices, approximately how many of those devices have you been involved with with respect to investigations?

A. That's - - they are all improvised explosive, even

though they may be at one time a part on a military explosives, when they come to our shop it is usually an improvised explosive device.

MR. SHEINDLIN: Your Honor, at this time I'm offering this witness as an expert in the field of explosive devices.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q. Mr. Lund, you've testified on behalf of the government; is that right?

A. That's correct.

Q. You say "the government," would it be fair to say the U U.S. Attorney's Office, the Office of the U.S. Attorney?

A. Yes.

Q. You've testified on behalf of police departments?

A. Yes.

Q. New York City Police Department?

A. Not the New York City Police Department.

Q. Maryland?

A. State of Maryland, Wisconsin, Kansas.

Q. In total, total, how many times have you testified, approximately?

I mean, nobody is asking you exact numbers.

A. Fifty-something times.

Q. Totally, including all of the police departments?

A. No, I don't know about the police bombings. But I've kept a fairly accountable thing for the government. Usually around fifty, forty-five to fifty times.

Q. In all the times that you've testified, have you ever testified on behalf of the defense?

THE COURT: On behalf of what?

MR. BRENNER: The defense.

A. I don't think I've ever received a summons on behalf of the defense.

Q. I didn't ask you whether you received a summons. I asked you whether you ever testified?

A. No, I've never testified for the defense.

MR. BRENNER: Okay.

I have no objection.

THE COURT: All right. You may proceed, Mr. Sheindlin.

DIRECT EXAMINATION (Continued)

BY MR. SHEINDLIN:

Q. Sir, have you ever been licensed as a federal firearms license dealer?

A. Yes.

Q. And when was that?

A. 1982, 1983.

Q. And who were you working for at this particular time?

A. Baltimore County Police Department.

Q. And are the licensing or the duties of someone who's a federal firearms licensed dealer in Maryland the same as someone who is a federal firearms licensed dealer in New York?

MR. BRENNER: Objection.

THE COURT: If he's familiar with the statutes.

MR. BRENNER: Your Honor, he's the expert testimony to be proper, as far as I know, has nothing to do with firearms, only with explosive devices.

MR. SHEINDLIN: He's not testifying as an expert with respect to this.

MR. BRENNER: All right.

THE COURT: The objection is overruled.

Do you understand the question, sir?

THE WITNESS: Yes.

A. The statute, to obtain an F.F.L., is a government regulations is the same.

Q. And what are the duties or what is a federally - -

what is a federal firearms licensed dealer permitted to do?

MR. BRENNER: Objection.

THE COURT: This is - -

MR. BRENNER: Your Honor, this is hearsay.

THE COURT: He can testify as to what he knows to be the duties or obligations under that license, since he's licensed.

You may proceed.

A. An F.F.L. dealer is allowed to enter into more or less the buying and selling of firearms from manufacturers, dealers, jobbers, individuals and re-sell those weapons.

Q. Now, when you say "F.F.L.," those are initials for federal firearms license?

A. That's correct.

Q. Does someone who is licensed as an F.F.L., are they permitted to deal in silencers?

MR. BRENNER: Objection.

As to relevancy.

THE COURT: Well, I'll take it if he represents to me - -

MR. BRENNER: May we approach to the sidebar for a minute?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: The objection is sustained.

Have the witness resume the witness stand.

(The witness resumed the witness stand.)

MR. SHEINDLIN: I ask that the witness be shown People's Exhibit Number 38, which is in evidence.

(Handed to the witness.)

(Pause.)

Q. Would you please read out loud the first line on People's Exhibit Number 38, which is in evidence?

A. Advanced Gunsmithing, by W.F. Vickering, 1988.

Q. Do you recognize what that is?

A. It is a book on gunsmithing; yes.

Q. Have you read that book?

A. Yes.

Q. Would you please read the second line?

A. American Engineer of Explosives in World War I.

Q. Have you read that book?

A. I'm familiar with that book; yes.

Q. Does that book have anything to do with being a

federal - - a federally - -

MR. SHEINDLIN: Excuse me.

Q. Does that book have anything to do with someone who is F.F.L. licensed?

MR. BRENNER: Oojection.

THE COURT: Yes?

MR. BRENNER: Yes what, Judge?

MR. SHEINDLIN: I'll withdraw the question and re-ask it.

Q. With respect to the line that you just read, the second line of People's Exhibit 38, does that particular book contain information that pertains to the duties or obligations of someone who is F.F.L. licensed?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. I ask you to read the third line of People's Exhibit Number 38 in evidence.

A. Bomb and Bombing, by Brody.

Q. Have you read that particular book?

A. Yes.

Q. And what does that particular book deal with?

MR. BRENNER: Objection.

THE COURT: He read the book, he will tell you what the book deals with.

MR. BRENNER: Your Honor, the objection is to hearsay.

THE COURT: This is his impression of what the book dealt with. I'll allow it since he read it.

You may answer, sir.

THE WITNESS: Okay?

A. Bomb and Bombing, by Tom Brody, is one of the first books in the explosive field for investigations of bombings and investigation of explosives and how to conduct investigation, what not to do with reference to coming across the bomb.

Q. Would you please read on the fourth line of People's Exhibit Number 38 in evidence?

A. Booby traps. F.M. 5-31.

Q. Okay. Do you recognize what that is?

A. Yes.

Q. What is it?

A. It is a book on booby traps and how to set up booby traps in a military operation.

Q. Have you read that particular book?

A. Yes.

Q. What information does that book contain?

MR. BRENNER: Objection.

THE COURT: I didn't hear the last part of the

question.

Read the last part of that question.

(Whereupon, the requested portion of the proceedings was read aloud in open court.)

THE COURT: Sustained as to form.

Q. What are the general topics contained in that book?

A. Booby traps, how to set up booby traps, placements of booby traps, specifically designed as military operations, military manual.

Q. Did that book contain any information which you considered pertinent as an F.F.L. licensed dealer?

MR. BRENNER: Objection.

THE COURT: Sustained.

A. No, I saw nothing - -

MR. BRENNER: Objection.

MR. SHEINDLIN: It has been sustained.

May I have the exhibit back?

(Returned to Mr. Sheindlin.)

MR. SHEINDLIN: I ask that the witness be shown what is marked as People's Exhibit Number 47, which is in evidence.

(Handed to the witness.)

(Pause.)

Q. I ask you to examine it.

(Pause.)

Q. Let me, before even referring to that particular exhibit, would you please explain, with respect to an explosive device, what is a thermal effect?

A. That's heat. Thermal is after the device functions the amount of heat it produces.

Q. Okay. With respect to an explosive device, would you explain to the members of the jury what is blast pressure.

A. When a device explodes, the noise that you hear, the release of energy, there is a pressure build up at the time the container, the vessel explodes, the pressure of going from inside to outside, that's pressure. That's blast pressure.

Q. And would you please explain to the members of the jury, with respect to explosive devices, what is meant by fragmentation?

A. In a container that contains explosives, when this container vessel, pipe is functioned, when the container breaks, those pieces of that container go in all different directions. That part of the container at that point would be called fragmentation.

Q. Would you please hold up Exhibit Number 47 so the jury may view it, so they can see what you're referring to?

Now, with respect to Exhibit Number 47 in evidence, I would like you to assume that the - -

MR. SUBINDLIN: Let me also make this clear. Withdrawn.

Q. What is a pipe nipple?

A. It's a small length of pipe.

Q. And do you see a pipe nipple in People's Exhibit Number 47 in evidence?

A. Yes.

Q. Would you please point to it and show the jury?

A. The piece right here.

Q. Now, I'd like for you to assume that that pipe nipple in People's Exhibit Number 47 is approximately six inches long and one and one-half inches in diameter.

If that pipe nipple - - I want you to also to assume that that pipe nipple in People's Exhibit Number 47 in evidence is filled to capacity with smokeless explosive gun powder and that the end caps are sealed on the pipe nipple.

In your expert opinion, if that device were detonated, what would the affect be on a person who is in the immediate vicinity of that device?

A. A pipe of this nature, metal, full of powder, and functioned or exploded, would produced blast, thermal and fragmentation effect.

The fragmentation effect, to someone in close proximity, could cause serious injury or death. These are like un-aimed rifle bullets when a pipebomb explodes, going in various directions. It could be lethal.

Q. Is there a difference, in your opinion, between an explosive device that contains smokeless explosive gun powder as opposed to black explosive gun powder?

A. Yes.

Q. What did the difference?

A. The smokeless can release more energy. You can make a better bomb using smokeless powder than black powder.

MR. SHEINDLIN: I ask that the witness be shown People's Exhibit Number 48, which is in evidence.

(Handed to the witness.)

(Pause.)

Q. Would you please hold up for the jury, so they may see, what exhibit you're examining?

A. (Indicating).

Q. People's Exhibit Number 48 in evidence, have you seen that before?

A. Yes.

Q. What do you rocognise it to be?

A. This is a booby trapped pipebomb that came into our

laboratory for examination.

Q. And where is your laboratory located?

A. In Rockville, Maryland, just outside of Washington, D.C.

Q. And when was it that you had an opportunity to examine the exhibit depicted in the photo in, in People's Exhibit Number 48 in evidence?

A. In September, of 1991.

Q. And does the photograph in People's Exhibit Number 48 in evidence fairly and accurately depict how that pipebomb appeared to you when you examined it back in September, of 1991?

A. Yes.

Q. Would you please explain to the jury how that pipe-bomb was intended to work?

A. This pipe nipple, length of pipe, was capped on both ends, contained a quantity of explosive identified by laboratory anaylsis as black powder.

Attached to the pipe, which you can see - - this is up tied down would be better - - is a three of three-thirty-second pyrotechnique fused, referred to as canon fused.

Attached to that fuse, this commercial fuse lighter. That's normally used in the blasting industry.

The pull lighter functions by pulling on a small

ring at the end of this container, pulling it quickly, spits flame into a large piece of time fuse.

In this case, this has been modified to ignite the smaller three-thirty-second fuse.

The pipe is fixed inside of this gun case by wooden blocks. This wire was attached to the top of a gun case. So that if you would pull the gun case in the up-fashion, open it and raise it, the wire was attached to the top of the case, in that instance, when this wire is pulled, the flames are shot into the fuse and the fuse burns down. And function would be when the three-thirty-second pyrotechnique fuse would touch the black powder that's inside of this pipe, it would cause an explosion.

The explosives would ignite, burn and burning under pressure forms tremendous amounts of gas. The stretch of the pipe would cause the pipe to swell and then at the weakest part of this pipe it would break and pieces would go flying all over the place. That's fragmentation.

At the time that the pipe would break, we'd have a fireball, thermal effect and then all that pressure would release at one time. That's blast pressure.

Q. With respect to the commercial fuse lighter, would you please hold up People's Exhibit Number 48 and point to the commercial fuse lighter so the jury may see it?

A. The little cardboard tube right there.

MR. SHEINDLIN: May the witness get off the witness stand, your Honor, and approach the jury box and show the jurors?

THE COURT: Yes.

(The witness approached the jury box.)

THE WITNESS: The cardboard tube, right there.

MR. SHEINDLIN: Would you also walk to the other end of the jury box so they can see and point to the commercial fuse lighter?

THE WITNESS: (Indicating).

THE COURT: Would you give me now an individual showing?

THE WITNESS: Yes, sir. That little cardboard tube right there.

THE COURT: Yes.

THE WITNESS: That little cord, you can pull it, starts the flame.

THE COURT: And where is this fuse attached?

THE WITNESS: Commercial blasting, like when they do dynamite on bridges and things of that nature.

(The witness resumed the witness stand.)

Q. You made reference to the gun case.

Where is the gun case in People's Exhibit Number 48?

A. That's the entire case.

Q. That's the black case around the pipe?

A. Yes.

Q. What type of gun case is the gun case in People's Exhibit Number 48 in evidence?

A. It is a Doccosio manufactured. This one here is for handguns.

Q. Can you spell Doccosio?

A. I think it is D-O-C-C-O-S-I-O.

Q. And do you know what the purpose of a gun case is? What it is used for?

A. Yes.

Q. What is the gun case used for?

A. To carry a gun.

Q. With respect to the commercial fuse lighter, where can they be obtained?

THE COURT: Just a minute.

(Pause.)

THE COURT: You may continue.

MR. SHEINDLIN: Okay.

Q. Where can a commercial fuse lighter be obtained?

A. A blasting supply house.

Q. And approximately how much - -

MR. SHEINDLIN: Withdrawn.

Q. Do you know how much, what the approximate cost of a commercial fuse lighter is?

MR. BRENNER: Objection as to a "commercial fuse lighter."

THE COURT: Yes, ask him specifically with reference.

Q. With respect to Exhibit Number 48 in evidence, is that a commercial fuse lighter in the exhibit?

A. Yes.

Q. And with respect to that specific commercial fuse lighter in People's Exhibit Number 48 in evidence, approximately how much would that cost?

A. Last time I purchased one, which was several years ago, they were about twenty cents.

Q. And again I ask you to look at People's Exhibit Number 48 in evidence.

What would the affect be if that pipe nipple were filled with approximately eleven ounces of black gun powder, if the device was detonated?

In your expert opinion and to somebody - -

MR. SHEINDLIN: Withdrawn. Let me re-ask the question. I'm trying to make it more concise.

Q. In People's Exhibit Number 46, if the pipe nipple in the exhibit were filled with approximately eleven ounces of black powder, what would the affect be if that pipebomb were detonated to any person that was in the immediate vicinity?

A. This would, in close proximity to the person operating that case as intended, cause serious injury or death.

Q. And could you draw an analogy with respect to grenades as to the power that that booby trapped pipebomb possessed?

A. Using the same ratio of black powder and some grenades we tested and looked at, it is probably three grenades to that one piece of pipe.

(Off the record discussion between Mr. Brenner and the defendant.)

Q. And could you also explain to the jury why, if somebody were to open that black gun case approximately one to one and one-half inches, why that booby trapped pipebomb would not detonate?

A. Well, first when - - the way this is hooked up, there was a slight leadway that you could open the box an inch or two. Normally the opening of the box, if you were to pull the lid straight up, you would have functioned the

device. Apparently someone opened and looked inside just by opening up an inch. And that's why it didn't explode.

Q. In People's Exhibit Number 48, if the pipe nipple were filled with approximately eleven ounces of black powder and the device detonated, what type of property damage could it cause in your expert opinion?

A. I guess it depends on where it was at.

THE COURT: If it was a china stop, I take it?

THE WITNESS: A tremendous amount of damage; yes, sir.

Q. What type of power did the fragments contain that would be caused - - that would result as of when that pipebomb in People's Exhibit Number 48 in evidence would explode?

A. I guess the best answer I could give you, like an unarmed rifle bullets in every direction.

MR. SHEINDLIN: May I have a moment?

(Off the record discussion between Mr. Sheindlin and Mr. Brancato.)

MR. SHEINDLIN: No further questions, thank you.

THE COURT: Rather than start cross now, we're going to recess for lunch.

Ladies and gentlemen of the jury, do not

discuss this case amongst yourselves or allow any third person to discuss the case with you.

We will recess now until two-ten.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: You'll return, Agent Lund, after the lucheon recess.

(WITNESS EXCUSED)

(Whereupon, the Court took a luncheon recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Bring in the panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and all sworn jurors are present, your Honor.

THE COURT: Where is Agent Lund?

(Whereupon, the People's witness, Agent Lund, resumed the witness stand.)

THE COURT: All right, we'll begin now the cross.

MR. BRENNER: Thank you, your Honor.

J O S E P H C. L U N D, having been previously called as a witness on behalf of the People, was previously sworn by the Clerk of the Court, resumed the witness stand and continued to testify under oath as follows:

CROSS EXAMINATION

BY MR. BRENNER:

Q. Agent Lund, in response to Mr. Sheindlins' questions, without the list of books, there was a list that was presented to you, People's 38, I believe, in evidence?

A. I don't remember how many.

Q. But you started reading some titles; is that right?

A. Yes, sir; I did.

Q. Are those books available to - - in the public library?

A. The majority of the public libraries do not carry that list of books that I looked at.

Q. For instance, you're not stationed in New York presently, are you?

A. That's correct; I am not.

Q. Where are you stationed?

A. Rockville, Maryland.

Q. Rockville, Maryland?

A. Just outside of Washington, D.C.

Q. Do you know Mr. Caarnopys?

A. He has the office directly across from mine.

Q. You wouldn't know about the New York Public Libraries and what books it had in its possession?

A. That's correct.

Q. If you didn't go to the New York Public Library or to a public library, how would you obtain such meterials?

A. Those books are readily available, maybe one or two that I haven't seen on the list, through publications as Delta Press.

Q. I'm sorry?

A. Delta Press.

Q. The Delta Press is what?

A. Is a company that sells books of that nature, along with Paladin Press, which also sells the same type of literature.

Q. Let's focus in on one word you used.

A. Sells?

A. That's correct.

Q. You walk into a public library, you walk out and you bring it, take it home, bring it back; right?

Let me go back to the question of the library, to emphasize your library.

Q. As a criminal investigator I have went to the libraries in my area. Now, it is the federal government. But when I was assigned to the department, I always found those manuals to be missing.

Q. Missing as in not there?

A. Stolen.

Q. But that's in your area?

A. Right.

Q. You haven't been to the New York Public Library, have you?

A. I would venture to say they don't last long here either.

Q. You might venture to say that?

A. Yes.

Q. But you haven't been to the New York Public Library?

A. That's correct.

Q. Neither Mr. Brancato or Mr. Sheindlin or Agent Behan asked you to go to the public library to check if those volumes were missing, did they?

A. No, sir.

Q. With regard to what they do have or what they don't have or missing or there, you've only speculating; is that right?

A. That's correct.

Q. Okay. Now, back to my library question, with regard to how you use a library.

You walk in with a library card, you take a book out and you have to return it.

A. That's correct.

Q. If you don't return it, as you say, it is missing and you still own it; is that right?

A. That's correct.

Q. With regard to Delta Press and any other company that sells them, you have to - - you have to pay for those books; is that right?

A. Yes, sir; you do.

Q. Based on your experience, the manner in which you pay for such a volume is by check; correct?

A. Credit card.

Q. Credit card, money order?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You have to give them some money before they send you the book or they have to give you the book and bill you, one of those two ways; is that right?

A. Yes, sir; that's correct.

Q. Would it be fair to say in either regard there is some documentation, A, of the purchase or, B, of the shipment?

A. Yes, sir.

Q. That was Delta Press and what other company?

A. Paladin.

Q. Do you know whether Agent Behan or Mr. Brancato or Mr. Sheindlin or anyone else connected with either the New York City Police Department or the Bureau of Alcohol, Tobacco and Firearms contacted either of those publishers?

MR. BRANCATO: I object.

That calls for hearsay.

MR. BRENNER: Only if he knows, your Honor.

THE COURT: If he knows.

A. I only examine devices. That's my entire contact with this. I look at a device that comes to my shop and I determine, as I mentioned before, is it a bomb, was it a bomb, could it be a bomb. I have no knowledge of who is involved in the case or any other investigations.

Q. Well, I understand.

But on your direct examination you were asked questions about things that weren't really pertaining to is it a bomb, could it be a bomb, does it look like a bomb, you were asked questions about books by Mr. Sheindlin; is that correct?

A. That's correct.

Q. Now I'm asking you questions about books; okay?

A. That's correct; yes, sir.

Q. All right. Now my question was, and I take it your answer is no, that whether anyone connected with this investigation from the federal or from the New York City Police Department or the District Attorney's Office or any other agency contacted those publishing companies? Only if you know?

A. I do not know.

Q. Now, you, in the course of your experience, I mean,

you went on for a while about conferences that you've been to and you're also a member of certain associations?

A. Yes, sir.

Q. Maryland Arson Investigators' Association?

A. Yes, sir.

Q. International Association of Bomb Technicians and Investigators?

A. Yes, sir.

Q. International Association of Arson Investigators; right?

A. Yes, sir.

Q. And in the course of your experience you've made some presentations?

A. Yes, sir.

Q. That's where you stand up in front of a group of people and you tell them what they are interested in knowing and what you know?

A. Basically, yes, sir.

Q. Did you make a presentation entitled, 1988, called booby traps?

A. I have spoken about booby traps; yes.

Q. Did you make it to the D.E.A.?

A. Yes, sir.

Q. Could you tell us what the D.E.A. is?

A. Drug Enforcement.

Q. Drug Enforcement. Maybe of drugs; is that right? Narcotics?

A. Yes, sir.

Q. Yes?

Importing drugs, selling drugs; is that right?

A. Illegal drug activity; yes.

Q. Why would a bomb expert be talking to a bunch of drug investigators?

A. On occasion we've had injuries in marijuana fields, in narcotics investigations where the illicit manufacture of marijuana, persons would put a booby trap across the trail, in the trees, near their drugs, in the house, booby trap the doors, exists and things of that nature. And from time to time we put on a presentation explaining some of the latest type booby traps encountered by law enforcement.

Q. Now, in the fifty federal prosecutions that you've testified in, have any of them been narcotics related?

A. I'm not too sure I can really answer that because I only work on devices.

Q. Well, are the charges before you testified in your cases explained to you by the United States Attorney? Before you testified?

A. My charges usually are destructive devices.

Q. Have you testified in conspiracy cases?

A. I know I have on-going cases involving drugs, drug kingpins that have been murdered with remote control devices.

Q. Drug kingpins that have been murdered with what devices?

A. Remote control.

Q. Explosive devices?

A. Yes.

Q. Would it be fair to say, based on your experience, at least there is some relationship between the use of explosive devices and narcotics?

MR. BRANCATO: I object.

THE COURT: Sustained.

Q. Black powder. Gun powder. It is used for antique weapons, largely?

A. Black powder is used for antique weapons; yes, sir.

Q. Muzzle loading devices?

A. Yes, sir.

Q. Muskets, all those antique type of guns; right?

A. Yes, sir.

Q. The purchase of black powder is illegal, is it not?

A. Pardon?

Q. It is illegal to buy black powder, unless you have certain things in your possession; is that right?

A. I'm not familiar if it is illegal. No, I'm not.

Q. You don't know whether it is illegal in New York?

At this time could I, for instance, walk in, without any kind of a license at all, into a gun store and buy black powder?

A. Under a federal thing, in Maryland, yes, you could walk into Maryland and buy one produced of black powder and walk out.

Q. I've asked about New York.

A. I've never been to a gunshop in New York.

Q. So, you don't know?

A. I don't know.

Q. Agent Lund, you told us you're here to tell us whether it looks like a bomb, smells like a bomb, could be a bomb, walks like a bomb?

A. That's correct.

Q. You're not here to tell us Dominic Franza's responsible for that, are you?

A. That's right. I don't know.

MR. BRENNER: I have nothing further.

THE COURT: Any re-direct?

MR. SHEINDLIN: No re-direct, your Honor.

THE COURT: You are excused, sir.

THE WITNESS: Thank you very much.

(WITNESS EXCUSED)

THE COURT: Gentlemen?

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen of the jury, based on the scheduling it would appear that that would be the last witness for today. Accordingly, you will be free for the remainder of this day.

You are to return tomorrow morning, I would think, eleven o'clock and we'll proceed then.

Do not discuss the case amongst yourselves or allow any third person to discuss the case with you.

Have a good day.

Take the jury out.

Tomorrow morning, eleven o'clock, return.

(Whereupon, the sworn jurors alternate jurors left the courtroom.)

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Continued on the following page.)

MARCH 3rd, 1992

INDICTMENT NUMBER: 11967/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant.

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S :

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Both sides ready?

MR. BRANCATO: Yes, your Honor.

MR. BRENNER: Yes, your Honor.

THE COURT: All right, get the panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Very good.

MR. BRANCATO: Your Honor?

THE COURT: Good day, ladies and gentlemen.

We'll proceed now, Mr. Brancato. Call your next witness.

MR. BRANCATO: Your Honor, at this time I'm holding a two page document that has previously been marked for identification. It is marked 61-A

and 61-B.

It was shown to counsel earlier today and yesterday.

There is a stipulation as to this document at this time, your Honor.

THE COURT: All right.

MR. BRANCATO: If I may read?

THE COURT: Sixty-one-A and 61-B?

MR. BRANCATO: Yes.

THE COURT: Go ahead.

MR. BRANCATO: It is hereby stipulated between the parties, that is, the defendant and the People, that 61-A and 61-B comprise two pages of handwriting that was received by the New York Police Department in June, of - - in November, of 1990.

It is further stipulated between the parties that 61-A and 61-B are the handwritings of the defendant in this case, Dominic Franza.

So stipulated?

MR. BRENNER: So stipulated.

MR. BRANCATO: At this time I would offer them into evidence, your Honor.

THE COURT: All right, without objection.

(Letters, so marked People's Exhibit Number 61-A and 61-B in evidence.)

THE COURT: Who is your next witness, Mr. Brancato.

MR. BRANCATO: Your Honor, at this time the People call Detective John Breslin.

THE COURT: John Breslin.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York versus Dominic Franza should be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

COURT CLERK: Be seated.

COURT OFFICER: For the record state your name, your shield and command, please.

THE WITNESS: Detective John F. Breslin, B-R-E-S-L-I-N, shield 608.

MR. BRANCATO: May we have the easel set up,

Judge?

THE COURT: Yes.

THE WITNESS: New York City Police Laboratory Document Section.

Good morning, your Honor.

J O H N F. B R E S L I N, Detective, having been called as a witness on behalf of the People, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRANCATO:

Q. Detective Breslin, how long have you been a police officer?

A. A little over twenty-three years.

Q. And of those twenty-three years, how long have you held the grade of detective?

A. Ten.

Q. What is your present assignment?

A. I work in the New York City Police Department, Police Laboratory Document Unit.

Q. And how long have you been assigned to the Police Department Document Unit?

A. Seventeen years.

Q. What are the duties at the Police Laboratory

Document Unit?

A. My primary duties are the examination and comparison of handwriting, hand printing, indented writing, obliterated writing, alterations that might appear on documents, photocopy processes, various printing methods, the identification of photocopy machines, mechanical impressions, like a typewriter or check writer, and the development of latent fingerprints on paper and various specialized photography problems.

Q. When did you start working at the New York Police Department Document Section?

A. In August, of 1974.

Q. And have you been assigned there since then?

A. Yes.

Q. Could you please tell us what training, if any, you have in the field of document examination?

A. The first two years of my assignment to the Police Laboratory Document Unit I worked under the direct supervision of qualified document examiners. It was an internship program, where you work directly under their supervision.

And then there is another two year period where you do a semi-independent work. You would do this work independently and then it would be given to your training people for their review.

I've attended courses at the F.B.I. Academy, at Quantico, Virginia, in the question document area and survey of question documents course, a typewriter course, specialized photography courses and an international symposium on handwriting given by the F.B.I. Academy.

I've attended courses up at John Jay College of Criminal Justice, in the question document area.

I've attended a seminar on the Hitler diaries at Columbia University.

I've also attended various meetings in the scientific area, in the question document area on question documents and they also have workshops at those meetings where you attend them. It kind of makes you a little current in the field, what's going on in the rest of the world.

Q. Do you belong to any professional organizations in the field of question documents?

A. I've been certified by the American Board of Forensic Document Examiners as qualified in document examination.

I belong to the Northeastern Association of Forensic Scientists and the International Association for identification.

Q. Are there any requirements by those organizations to maintain your standing within the organization?

A. The American Board of Forensic Document Examiners, they have a certification program. And it took me - - and to remain certified you have to maintain current in the field, either by attending meetings, giving papers or attendance at workshops, various workshops to learn things or going to various seminars or courses that are given in the field.

I've been - - I've taken a re-certification for a period of every five years. You have to come up or maintain certain level of training. You have to come up with some fifty-odd points. And if you do, you get re-certified. If not, you can take a test.

Q. Have you ever testified in the Supreme Court of New York State as an expert witness in the field of forensic document examination?

A. I've testified as an expert in all five boroughs, supreme courts, and both federal districts.

Q. By both federal districts, am I correct?

A. Yes. The Eastern and Southern districts.

Q. Approximately how many times have you taken the witness stand to testify as an expert witness in the field of forensic document examination?

A. Approximately seventy-five times.

MR. BRANCATO: Your Honor, at this time I'm offering Detective Breslin's testimony at this

point in the field of forensic document examination.

MR. BRENNER: May I inquire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q. Are there publications, periodical publications in connection with the field in which you are an expert?

A. Yes, sir.

Q. And what are they?

A. Periodicals, meaning books or?

Q. Magazines. Periodicals.

A. Well, more or less, yes, the Journal of Forensic Science.

Q. What else?

A. The American Academy of Forensic Sciences has a publication.

There also is an American Board of Forensic Document Examinations which publish letters.

The other thing is, and the primary source of information, is the meetings that we attend and at which time papers presented.

Q. Who writes the articles for the Journal of Forensic Science? Do experts like yourself write them?

A. Other documents examiners, doctors, lawyers.

Q. Have you ever written?

A. It hasn't been published; no.

Q. So, you've never been published in the Journal of Forensic Science?

A. No, I haven't.

Q. Have you made any presentation or papers at any of these association meetings?

A. Yes, I have.

Q. In what area?

A. In the - - the name of the paper was the Electro Static Detection Apparatus and the Erasable Ballpoint Ink.

Q. Erasable Ballpoint Ink?

A. Yes. And E.D.S.A., Electro Static Detection Apparatus.

Q. And for what association was that?

A. That was for a combined meeting of the American Society of Forensic Scientists and the Canadian Society of Forensic Science, in Montreal.

Q. Are you familiar with the text Suspect Documents, Their Scientific Examination, by S.R. Pearson?

A. Yes, sir.

Q. Are you familiar with the text Scientific Examination of Question Documents, by Audway Hilton?

A. Yes, sir.

Q. And are you familiar with the Text Question Documents, by Professor Osborne?

A. Yes, sir. Two generations of Osbornes.

Q. Two generations of Osbornes?

A. Why don't you give the first names for the Osbornes?

Q. I only have professor.

A. Albert S., Albert D.

Q. Do you rely on those text in connection with the opinions that you formulate?

A. Yes, sir.

MR. BRENNER: I have no objection.

THE COURT: All right. Let's proceed.

DIRECT EXAMINATION (Continued)

BY MR. BRANCATO:

Q. By the way, Detective Breslin, you told us that you testified approximately seventy-five times as an expert witness.

Have you ever been called by the defense as an expert witness in a case?

A. Yes, sir. Twice.

Q. How many times was that?

A. Twice.

Q. Could you please explain to us what is meant in forensic document examination by handwriting comparison?

A. What an examiner will do is he will compare a question document, which is a document that someone will have a question about, whether the typewriting on it is altered or there are any altercations on it; "is the signatue altered?" It is a document or signature that someone has a question about, whether it's authentic or how it was made.

What I will do is I will compare that question document with known sample. That's the end, you look for similarities or identifying points between the two.

Q. And what instruments, if any, do you employ in comparing a question document to samples that are submitted to you?

A. I use various instruments. I use a camera, an eight-by-ten Robinson Copy Camera to photograph the evidence as it was originally submitted to me. So, if any - - any-thing might happen to it during my examination, whether it be a destructive method of examination, this way I have an original copy of the evidence. I use various magnifying-type glasses, various microscopes, stereo microscope and, again, enlarges and other instruments, Electro Static Detection Apparatus, E.S.D.A., E-S-D-A, and Video Spectro Comparer, rou- tinely in my examinations of various documents.

Q. Okay. Now let me ask you: A stereo microscope, could you please explain to us what a stereo microscope is?

A. A stereo microscope allows you to see depth. It gives you the extra. Where under a microscope you can only see length and width, this gives you a 3-D effect, if you will, where you can see depth in a particular writing or typewriting or original writings. Allows you to see depth in a particular thing.

Q. And what is the Esda that you mentioned just a moments ago, E.S.D.A.?

A. It's the Electro Static Detention Apparatus.

Q. How does that work?

A. It is an instrument used for the development or enhancement of indented writing or footprints on a particular thing.

Q. And the Video Spectro Comparer, what is that?

A. To eliminate hours in a dark room and photography problems due to advancements in video cameras, what's taking place is rather than spent a long time doing indented writing or ultra violet or infrared photography, we can put this under a video camera now and put a slide of various filters through with different light sources and we can get results with differences in inks.

It works like -- if I have two different inks and,

say, a check was written for - - the numbers were altered on that, if I had two different inks, it would react differently to various light sources and filters. And what takes place, if I had - - if originally the check was one hundred dollars and someone came and made it nine hundred dollars, it would make a circle up near the top of the "1". Using two different pens or two different types of inks, using various filters, what will show up, either the circle will glow or the "1" will glow, until you knock out one or the other, therefore, showing that the document has been altered.

It is a quick method of doing things and very highly satisfactory.

Q. What are collected writings in the field of forensic document examination?

A. Collective writings would be more or less normal course of business writings. Writings where you applied for a particular job. These would be done in your normal every day activity. School writings or writings that you - - in your house, your checkbook. Any of your normal, regular writings that you you would do during the normal course of your life.

Q. Is there a difference between collected writings and requested writings?

A. As far as document examination?

Q. Yes.

A. Yes.

Q. All right.

A. The document examiner, usually with collected writings, if there is a particular word or - - that appears in a question writing, it doesn't appear in any of the known collected writings that individuals might write, we ask for - - request writings.

Request writings are given by the defendant and they are specifically narrowed to the scope of the questioned document.

So, therefore if John Smith is in question and your name happens to be Sam Smith, Sam Browne, I can't use any of your known writings to compare against Sam Smith. So, I would ask - - John Smith. I would ask you to sit down and write John Smith for me.

Q. Did you have available to you in this case collected writings as well as requested writings?

A. Yes, I did.

Q. Now, did there come a point during the course of your involvement in this case that you were requested by Detective Gennaro Giorgio, of the 34th Precinct, to compare what is in evidence as Exhibit Number 26 - - were you asked to compare that exhibit to writings that were provided by a

Dominic Franza?

(Handed to the witness.)

A. Yes, sir; I was.

Q. And is that what's in evidence as exhibit - - Exhibit Number 22?

(Handed to the witness.)

(Pause.)

A. It says 11/8 here, sir.

MR. BRANCATO: Hold on.

(Pause.)

MR. BRANCATO: Your Honor, these four pieces of paper are presently in evidence as Exhibit Number 22.

THE COURT: People's 22?

MR. BRANCATO: Yes, Judge.

THE COURT: Were they vouchers?

What was the original?

MR. BRANCATO: Here's the markings. They are in evidence, Judge.

THE COURT: Were they from a vouchered document?

MR. BRANCATO: Yes.

MR. BRENNER: I have them as 22, also, Judge.

THE COURT: All right.

MR. BRANCATO: Yes.

Q. Looking at those four pieces of paper, which are in evidence as Exhibit Number 22, did you receive that note, the one that you're holding in your left hand, which is Exhibit 26, did you receive that note from Detective Giorgio?

A. This note?

Q. Yes.

A. I believe it came from a detective - - a Police Officer Brenda. Alexander.

Q. Okay.

A. Submitted to the laboratory.

Q. And is she - - and the notes that you're holding in your right hand, which are Exhibit Number 22, in evidence, were you requested by Detective Giorgio to compare the writings you have in your right hand, Exhibit Number 22, to the note that you're hold willing in your left hand, Number 26?

A. Yes, sir; I was.

Q. And could you please tell us how you compared those four pages of writing to the note that you're holding in your other hand?

A. I examined the question writing on People's 26 here and then I examined the known writings, People's 22?

Q. Yes.

A. And I did a side-by-side comparison of the writing.

I looked at similar letters and letter combinations that appeared in both of the writings.

And I arrived at the conclusion that the author of the question - - of the known writing, People's 22, did, in fact, write the question writing appearing on People's 26.

Q. Now, when you say that you made a comparison and came to that conclusion, would you please tell the jurors how you came to that conclusion?

A. I did a side-by-side comparison of the question and known writings. I looked for various identifying features; introductory strokes, pen stops, pen twists, the formation of the letters, the size, their relationship to one another, the speed in which the writing was executed and, again, to - - printing-to-printing and script-to-script.

I looked through a stereo microscope and arrived at my conclusion of identity.

Q. Let me hand you what has been previously been marked for identification as Exhibit Number 62 for identification.

(Handed to the witness.)

Q. Please look at it.

(Pause.)

A. Yes, sir.

MR. BRANCATO: Just turn it toward yourself.

Q. Do you rocognize that exhibit?

A. Yes, sir; I do.

Q. And - -

A. It bears my initials and on the rear.

Q. Did you prepare that exhibit?

A. Yes, sir; I did.

Q. And what is depicted in that exhibit?

MR. BRANCATO: Don't turn it around yet.

A. Okay. It's a - - the question signature portion in this area here, on People's 26.

Q. All right.

A. The word "Franza," F-R-A-N-Z-A, and the known writing that was submitted to me with a similar name - - same name, Franza.

Q. This is Exhibit 45 in evidence.

(Handed to the witness.)

Q. Let's look at the contents of that exhibit.

(Pause.)

Q. Do you rocognize that exhibit?

A. Yes, sir.

Q. What do you rocognize that to be?

A. This is a file that says, "Mr. Franza's file, personal."

I made this my document, known document, K-21.

There are thirty-nine sheets of paper in here with writing on it.

Q. Did you receive that document from detective - - from Special Agent Chris Behan, of Alcohol, Tobacco and Firearms?

A. Yes, sir; I did.

Q. And did you use that document in preparing 62 for identification?

A. Yes, sir; I did.

Q. Could you please tell the jurors how you used that document, which is marked "Mr. Franza's file," in preparing the other exhibit?

A. I photographed various signatures that appear in the file. Again, I made a side-by-side comparison with similar letters and letter conbinations and words that I found in the file with the writing that appeared on this document, People's 26.

Q. Okay.

A. And I took the "Franza," the word Franza that appears here and I made a comparison with the word "Franza" that appeared in these thirty-nine sheets of paper. And I made the side-by-side comparison. I looked under a stereo microscope and I made - - I found that there was certain identifying features that appeared within the known and the

question writing.

I arrived at a conclusion of identity, where the author of the known writings in here, along with the other writings, known samples that were provided to me, People's 22, did, in fact, write the document, the writing that appears on this document here, People's 26.

MR. BRANCATO: At this time I would offer what is marked as 62 for identification into evidence.

MR. BRENNER: No objection.

THE COURT: Received.

(Board, so marked People's Exhibit Number 62 in evidence.)

MR. BRANCATO: Your Honor, we ask that it be put on the easel and the witness be allowed to approach the exhibit?

THE COURT: All right.

(The witness approached the exhibit.)

Q. Could you please explain that exhibit? And let's start at the top.

What is marked - - what is the marking Q-1 mean?

A. This Q-1 was the - - there it is.

(Handed to the witness.)

THE WITNESS: Thank you, sir.

A. This is the evidence, okay, and depicts this

particular signature here.

Q. That's Number 26 in evidence.

A. Number 26.

This particular signature here or this portion of the word "Franza," all right, what I did was photograph this evidence prior to it being processed for prints and, again, I photographed it, I cut that particular signature out, put it on a white piece of paper, along with these other signatures.

This is K-21.

Q. What does K-21 mean?

A. That would be - - that's this file that I marked K-21. This is Mr. Franza's personal file that had writing in it.

Q. The "Franza" that appears next to what is marked K-21 - -

A. One second, sir.

(Pause.)

A. Yes, sir?

Q. To the right of the word Franza appears page 1, number 1.

What does that mean?

A. That was page 1 in that file folder and that would be the first signature.

There was various lines on that document. There

would be like one to ten or one to fifteen or one so six on that. There was numbers. And this would be number - - on page 1, in number 1, in that sentence that was there, that was the "Franza" that I used for the exhibit. I cut that out.

Q. On the next one it appears K-21, "Franza," page 19, number 5.

A. Same thing. That would be page 19, number 5. I used the "Franza" that appeared in the sentence number 5.

Q. K-21, "Franza," page 23, number 7.

A. Same thing. On page 23, I went down to number 7, and that was the "Franza" that I used for my exhibit.

Q. Now, you said a moment ago that in comparing the "Franza" that's marked on Exhibit Number 26 to those three Franzas that you lifted from Mr. Franza's file that you came to the conclusion that they were written by the same person.

Could you please explain to the jury how you came to that conclusion?

A. Again, in my examination, what I look for is similar letters, letters and letter conbinations. We're not machines. We don't write exactly alike each time when we write; all right? We write within certain parameters. Okay? And we have this habitual pattern that forms in our writing. We still write within these parameters, but there are points

of identification in in our writing.

An examiner, given proper known writing, okay, can make an examination to identity or non-identity of a particular writing, looking for various identifying features and stops and twists, the size of letters, the shape, their formation, how they connect with one another. We look at these particular writings and we can arrive at a conclusion of identity.

Okay?

In this particular factor, this is a question signature here. There is a stroke that comes down, okay, and then these other two strokes here. There is an introductory tick right on the top of this top portion of the "F". Okay? That can be found in this one, on this particular one here, 19, 5, and also can be found open K-21. Twenty-three, 7. In this particular one.

Q. What do you mean by an "introductory tick"?

A. It would be a pen motion, just prior to the start of a particular letter. It's just as the pen is coming down into the - - on to the paper to form this letter that the individual did, was - - he looked and he said, "well, that's where I have to start," and put my pen down and then he started the particular letter. So, it is like a little hesitation point. He puts his pen down and then he now

starts the letter, okay, or whatever that might - - whatever - - either a letter or a number; all right?

And in this particular case it was the letter, an "F", and it starts right there and it does appear in these two. It does appear here in this one, but it is not visible.It is very slight and it is on the line itself. But it does appear in all three.

Again, it comes down, makes this top stroke and center bar of the "F", as that same little introductory tick. Okay? And does slant downward. Okay?

That appears in this one, this one and this one, all three of them, again.

You notice that they do slant in a downward motion.

Again, the "R", the "R" starts off with a slight re-trace.

Q. What is - -

A. A re-trace is something where you start a particular letter and then you go right back up it again and start a little down stroke and then back up into the letter.

That's what transpired here. The gentlemen started and went back up to the top of the "R", started and re-traced back up the line.

Started, re-traced back up the line.

He did that in each case, done that in each one.

Okay?

He'll come up to a rounded top on the "R" and there is a pen twist, right here. That's when the pen comes around and now he's twisting the pen at a particular location.

He's done that in in this one, this one, and this one. He's done it in each one of them.

Again, coming around again, and then in this portion right here on the "R", he does it again. There is a pen twist and a changing pressure.

That can be also seen in each one of them.

He comes around and goes up this "A". It is a fairly straight line, up and then comes back, re-tracing it to some degree.

As you can see, he does that in all of them. Okay?

Again, the bottom portion over here, he comes around and again on this up-stroke here there is another pen twist that appears here. That appears in.

Q. All right. Could you just tell us for the record where is that pen stroke that you're referring to right now?

A. It is at the base of the bowl of the - - I'm sorry - - base of the bowl of the "A", all right, on the up-stroke; on the second portion of the "A", on the up-stroke, right in this area here.

Q. That's the first "A" in the name Franza?

A. Yes, sir.

Q. All right.

A. Again, that's completed, goes up, leaves the top of the "A" opened, comes around to this "N", okay, again pressure increases to the top of the "N", where there is a pen stop, actually stops there, and then drops down to this portion of the "N". So, he stops right at the top.

That can be seen here, comes up, stops, comes up, stops?

The stop is a little heavier dot that you make.

Then he continued down again in this backward slant, on this backward slant, down here, re-traces back up, does the same, same motion again and comes to his stop at this motion.

MR. BRANCATO: Okay. We have to get this into the record.

Q. So, tell us the first motion that you're talking about?

A. On the "N"?

Q. Yes.

A. Okay. The first motion comes up in this fashion, straight up to the top of the first hill, if you will, on the "M" - - "N". It makes a stop at that particular point.

Then there is a short little motion to this base

line - - to this center portion of the "N", which is slanted back towards the beginning of the word.

Again, that appears in each one of them. The short little drop and then the slant back.

Then there is a re-trace right up that line again, okay, to the second hill, where he'll make another stop that appears in all of them.

Then he comes, starts down again.

When he starts down again, he makes this stop right here for the next letter.

Q. That's between the "N" and the "Z"?

A. Yes, sir. That can be seen on all of them, also. That's very blatant.

Then he makes the "Z". He comes up to the top of the "Z", he stops at the top of the "Z", in this motion here, at the top of this, this connecting stroke of the "Z", he stops there and drawers a three-like motion. Okay?

Stops, over here, he actually lifts the pen up. Okay? And then puts it down.

Again, this portion of the "Z" is pointing down, downward, as you can see in all the other ones.

He makes this three-like motion, which drops below the line, okay, comes back around and connects to this "A" again, which was just like the first "A"; okay? It's this

long stroke, with a bit of a re-trace down around it, okay, a pen stop on this up-stroke of the "N", and he comes around and it rails off with a particular, a terminal stroke, away and up, fairly elongated here too.

Q. Now, detective - -

A. All right?

Q. Detective Breslin, these pen ticks that you've mentioned, as well as introductory strokes - - and what was the third classification that you gave?

A. Pen stops.

Q. Pen stops.

A. And terminal stroke.

Q. Yes.

Could you see them with the naked eye or did you have to use anything in observing these?

A. You can see it with a naked eye, a trained eye. But, again, it is much better under a stereo microscope where you can see greater detail.

Q. Did you employ this stereo microscope in comparing this material?

A. Yes, sir; I did.

MR. BRANCATO: If you'd have a seat, please?

(The witness resumed the witness stand.)

Q. Did there come a point that you received what is

already in evidence as Exhibit Number 39, this Federal Express air bill?

(Handed to the witness.)

(Pause.)

A. Yes, sir; I did.

Q. And did there come some point that you received requested writings of the defendant from Detective Gennaro Giorgio?

A. Yes, sir; I did.

Q. And is that what's in evidence as Exhibit Number 23-D?

(Handed to the witness.)

(Previous exhibits returned to Mr. Brancato.)

(Pause.)

A. Yes, sir.

Q. Did you compare those requested writings, that I just handed you together, with this two page document, which is in evidence as 61-A and B, against the writing that appears on the bottom of the Federal Express air bill, which is Julio - - which bears a name of Julio Ortiz?

(Handed to the witness.)

A. Yes, I did.

Q. And what conclusion, if any, did you draw after comparing the writing at the bottom of the Federal Express

bill, which is Exhibit Number 29, against those samples that you have in front of you?

A. I arrived at the conclusion that the author of all of these samples here, okay, did, in fact, write this signature that appears on the bottom of this airway bill, Julio Ortiz. He did, in fact - - the author of these writings did, in fact, write that signature on the bottom of this form.

Q. Okay.

MR. BRANCATO: Your Honor, for the record, that Federal Express airway bill is Number 39.

The two yellow pages are 61-A and B.

THE COURT: All right.

MR. BRANCATO: And the samples that he was referring to on the white paper - -

THE COURT: Twenty-two.

MR. BRANCATO: Is 23-D.

THE COURT: Twenty-three.

Q. Did you prepare an exhibit which demonstrates your conclusion?

A. Yes, sir; I did.

MR. BRANCATO: This has already been marked as Exhibit Number 64 for identification.

(Handed to the witness.)

Q. Please look at it.

(Pause.)

A. Yes, sir.

Q. Do you rocognize it?

A. Yes, sir. It is an exhibit that I made, it bears my initials on the rear.

Q. And does that concern the comparison you did concerning the airway bill against the two pages that are 61-A and B, as well as 23-D, which are those papers in front of you?

A. Yes, sir.

Q. How did you prepare that exhibit?

A. The same way I did the other exhibit.

I made a side-by-side comparison prior to making the exhibit. I made a side-by-side comparison of the question writing and the known writing. All right? And I arrived at a conclusion of identity.

And what I did was, I photographed all of this question writing and the known writing and I used portions of it in my exhibit.

Q. And what was your conclusion after examining it?

A. That the author of the question - - known writing that was submitted to me, on People's 23-D

Q. D.

A. And - -

Q. Sixty-one-A.

A. And 61-A and B did, in fact, write the signature appearing on - -

Q. That's 39, in evidence.

A. People's 39, the bottom of this airway bill, the signature portion.

MR. BRANCATO: I would offer that exhibit into evidence and I would ask that it be shown to counsel at this time.

THE COURT: This is 39?

MR. BRANCATO: No. Thirty-nine is in evidence, Judge.

THE COURT: Yes. Which one are you referring to now?

COURT OFFICER: Sixty-four.

THE COURT: Sixty-four.

MR. BRANCATO: Yes.

THE COURT: Very well.

(Handed to Mr. Brenner.)

(Pause.)

MR. BRENNER: I have no objection.

THE COURT: Without objection.

(Chart, so marked People's Exhibit Number 64 in evidence.)

COURT OFFICER: So marked in evidence.

THE COURT: Publish it to the jury.

MR. BRANCATO: Okay. If we can put it on the easel?

THE COURT: Do you want to make reference to it or?

MR. BRANCATO: Yes, I would like to have him approach the exhibit.

THE COURT: All right.

THE WITNESS: Yes, your Honor?

THE COURT: All right.

(The witness approached the exhibit.)

Q. Now, what appears on the top of that exhibit is marked Q-5.

What does that refer to?

A. That was my - - my determination, Q-5, that was the question document number 5 that appears in my report.

Q. And where did you take the - - the writing that appears to the right of Q-5?

A. I took it off this - - I photographed this airway bill. And this is People's?

Q. Thirty-nine.

A. Thirty-nine, in evidence.

I photographed this, this is the particular signa-

ture in question right down here.

Q. That's the lower left-hand portion; am I correct?

A. Yes, sir.

Q. And could you please tell us what you did once you photographed that portion?

A. I photographed the portion and I made - - prior to that I made my examination. This is only used for an explanation of how I arrived at my conclusion.

Q. And how did you make your examination in connection with that document and the papers that were submitted to you?

A. I did a side-by-side comparison of the known writing that was submitted to me.

Q. That's 23-D.

A. Yes, sir.

Twenty-one signatures that were submitted to me on different sheets of paper. I just scotch taped them all together here for photographing purposes.

I photographed those; okay?

And this is the question writing, again. I photographed that.

Q. Did you use these documents - -

A. Yes, sir.

Q. In making your determination?

A. Yes, sir.

Q. This is 61-A and 61-B.

A. Yes, sir.

Q. Okay.

MR. BRANCATO: We can just leave these over here.

THE WITNESS: Okay.

Q. Now, in doing this comparison, did you follow the same steps that you previously outlined for us when you showed us the other exhibit with "Franza"?

A. Yes, sir; I did.

Q. Did you employ the stereo microscope in this case?

A. Absolutely, sir.

Q. Okay. Could you tell us what you observed when you made this comparison?

A. Again, I found similarities and identifying features common to both the question writing and the known writing.

Q. And - -

A. And then - -

Q. Let me just ask you this question before you go on to this exhibit.

There appears at the right of the exhibit, as you look, some writing which is marked K-9, number 11. And K-9, number 13.

Did you use document 61-A in order to get the writing which is to the left of K-9, number 11?

(Handed to the witness.)

A. Yes, sir.

Q. And did you use the same document to get the writing which appears to the left of K-9, number 13?

A. Yes, I did.

Q. Could you tell, for the record, what are those words that are next to K-9, number 11, and K-9, number 13?

A. That's the word "judge" and "judgement."

Q. And could you please tell us, in making the comparison between the Federal Express air bill, as well as the writing which is 26-D, and the two pages of writing by the defendant, which is 61-A and B, how you came to the conclusion that the person who wrote Julio Ortiz on the air bill is the person who provided those samples?

A. May I demonstrate that?

Q. Please.

A. Again, this is the question signature on and these were known signatures that were provided to me, okay, including these two. Okay?

If we can start with the "J" in Julio?

This particular - - it is extremely distinctive.

Q. Can you please describe it for the record?

A. Okay. There is a long, again there is a little re-trace here in the beginning. He starts down and then comes back up. Okay? Comes up, where up to - - up to a sharp turn or a sharp eyelid, comes back down that same line again and comes around. It is like a three-like motion again, as we previously saw as to the letter "Z." Okay? And it's made in this fashion, up and then around and then connects up here. Okay?

Again, we see that long introductory stroke, has a little introductory motion here, as you can see here and here.

Q. That's on to the right K-9, number 11, and K-9, number 13.

A. Can you see that, sir?

Q. Yes.

A. Okay.

Again, this introductory - -

MR. BRANCATO: Can we move it out so some of the jurors in the back row can see?

(Pause.)

COURT OFFICER: All right?

THE WITNESS: Okay.

Q. Continue.

A. Again, there is this introductory stroke, a little

re-trace up, comes down, around and then back up. That can be found here. Okay?

The "J", "U" conbination.

In this one he comes right back up the line, stops and then comes around and makes the "U".

Q. That's on the question?

A. That's on the question.

On the known one.

Q. Number 11.

A. Comes around, the same motion, okay, comes right up and he comes up again to the top, makes his stop, and then comes around for the "U" that appears in judge and judgement. Those are both ways. Both times.

Q. Were there any other points of comparison that you made, aside from the "J"?

A. Yes, sir.

Q. Could you please tell us what they are?

A. Okay. Again, he comes across in the same fashion here, makes this this "U".

Q. That's at the question writing?

A. On the question writing.

He makes this first staff on the "U", comes up to this portion here, all right, re-traces it a bit, okay, and then comes off to this "L", okay?

Q. So, that's - -

A. Up - -

MR. BRANCATO: I'm not trying to interrupt.

MR. BRANCATO: For the record, that's the stem of the "U", just before you go into the "L".

THE WITNESS: Yes, sir.

A. Before the connecting stroke to it.

The connecting stroke is high and above the base line. Okay? That can be - - the - - pretty well demonstrated in this fashion here, the second hill of this "U" here, on this connecting stroke, is high and off the line.

Q. That's number 4, as you look at the chart?

A. Number 4 and number 8 here, the same way.

Here's the stroke, comes up, it is high and off the base line. Okay?

He comes up to the - - again, continues up to the top, when he makes this motion at the top, there is a pen twist at the top here.

Q. That's of the "L"; am I correct?

A. On the "L". Yes, sir, on the "L".

Q. Okay.

A. And then can be seen in number 3, 4 and 8.

Okay. This one is - - it can't be readily seen, again, and if - - in a photograph, but under a stereo micro-

scope it can be seen. So, it does appear in all of them.

Okay.

He comes down again, okay, to this portion and then comes back up for this "I".

Q. Okay. What portion are you referring to, for the record?

A. The connecting stroke between the "L" and "I". Okay?

Comes back down and around. There is a pen stop right at this "I". Right here. He stops his motion, to the next letter, and then starts to make that particular letter. Okay? Comes up to a little eyelid and comes right back down again. Okay? And connects into this "O", which is a - - is, again, up and then back down and then leaves it open. Okay? He's coming around, leaves that open. All right?

As you can see, that's the same way here. Okay. Leaves that open and trails off, back up. Leaves it open, trails off, back up.

Here it is very pronounced and, again, here it is not complete.

That's what I meant by variation; okay? We do not write exactly alike all the time. But this definitely falls within this gentleman's parameters in which he writes.

Q. Did - -

A. Okay?

Q. Did you make any notations concerning the name Ortiz that appears on the air bill to the samples provided by the defendant?

A. If I can still stay with Julio?

Q. Okay.

A. The "I", the dot on the "I" is consistently over one more letter, for some reason. He doesn't dot it directly above, where it would normally be written. It's written just to this side of it. Okay? It is more or less over this "O" as opposed to over the "I". That can be seen throughout.

There are other ones, other signatures where he doesn't make the "I" at all. Or dots the "I" at all. Excuse me.

Again, the - - the "O" is elongated, it's got like two intersecting lines here. He intersects a little lower than where he should be, but it is elongated. It is like it's on it's side, lying down on it's side, more or less.

It is oblong as opposed to being very circular.

Okay?

Again, the "R" in "Ortiz" is a slight re-trace, comes up, again there is a pen twist on this portion of the "R", right here, on the downward motion. Comes up, makes a small like hill-type motion and on his down stroke there is a

pen twist and he goes down to the bottom.

The pen twist is visible in all of the writings.

Q. Now, the re-trace on the "R", in Ortiz, is that similar or different than the re-trace of the "R" in Franza on the previous exhibit?

A. It's similar, sir.

Q. Okay.

A. Again, the "T" comes up and in the same fashion he makes that "L", he makes that pen twist, in the same spot, okay, and then he comes down to the base line and then makes that Z-like motion, which duplicates as a "J".

Q. For the record, the pen twist that you're referring to, where is that?

A. It's on the downward stroke on the top of the "T". The top of the "T", the crest of the "T", starts down, there is a pen twist there.

That can be seen here, here, here and here.

Q. And you're referring as you come down to 3, 4, 5 and 8?

A. Down the line. Right.

Q. Okay.

A. Again, you see it a lot better under a microscope than I can with a photograph.

Q. Okay.

A. Again, makes this Z-like motion, in Ortiz, he comes up, all right, makes this three-type motion, comes back up again and that's the way it stops. Okay?

This "I", again, is dotted way out of line. As you can see. It is consistently done.

MR. BRANCATO: All right, if you'd have a seat, please?

(The witness resumed the witness stand.)

Q. This is in evidence as exhibit number 36, the American Express money order.

(Handed to the witness.)

Q. Do you rocognize it?

(Pause.)

A. Yes, sir.

Q. And were you asked to make a comparison of the writing that appears on the lines to the order of and line that has sender's name and address? Were you asked to make a comparison of that writing with Exhibit Number 23-F, samples taken by Detective Giorgio from the defendant in this case?

(Handed to the witness.)

(Pause.)

A. Yes, I was.

Q. And could you please tell us what conclusion, if any, did you reach as a result of comparing the writing of

the defendant in 23-F to the writing that appears on the American Express money order, which is in evidence as Exhibit Number 36?

A. After careful examination of the known writing, which was provided to me, I concluded that the question writing appearing on this money order was written by the author of the known writing.

Q. Very briefly. In making this determination, did you employ any of the methods that you referred to earlier when telling us about "Franza," as well as the "Julio Ortiz" exhibits?

A. Yes, sir.

Q. Did you prepare an exhibit which demonstrates your conclusion?

A. Yes, sir; I did.

Q. This has been marked for identification as Exhibit Number 63.

(Handed to the witness.)

(Pause.)

A. Yes, sir.

Q. Did you prepare that exhibit?

A. Yes, sir; I did. It bears my initials on the rear.

(Returned to Mr. Brancato.)

Q. And how did you prepare that exhibit?

A. In the same manner I did the other - - the other exhibits.

I examined - - after examination of the question and known writing, arriving at a conclusion, I prepared this as a demonstration tool for the jury.

MR. BRANCATO: I would offer it into evidence at this time.

THE COURT: People's 63 for identification, without objection.

Was that a?

MR. BRENNER: No.

THE COURT: Oh, I thought that was an affirmative.

All right.

(Handed to Mr. Brenner.)

(Pause.)

MR. BRENNER: No objection.

THE COURT: All right, without objection, received.

(Board, so marked People's Exhibit Number 63 in evidence.)

THE COURT: Counsel, step up while that is being marked.

MR. BRANCATO: All right.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

COURT OFFICER: People's Exhibit Number 63 for identification, now marked into evidence.

THE COURT: All right, let's resume.

MR. BRANCATO: If we can put the new exhibit on the easel?

Detective Breslin, could you please approach the new exhibit, which has been received into evidence?

THE WITNESS: Yes.

(The witness approached the exhibit.)

BY MR. BRANCATO: (Continued)

Q. Now, a moment ago you told us that after comparing the money order to the samples that were just handed to you, Exhibit Number 23-F, that you concluded that they were written by the same person.

Could you please tell us how you came to that conclusion?

A. I - -

Q. By using the exhibit.

A. I used not just the sample on 23-F, I used all of

the known writing that was provided to me, all right, to arrive at my conclusions, not just portions of it. I looked at the whole scope of things. All right?

Again, this is the question signature. I made it Q-6. On my report it is referred to as question document Q-6. That would be this particular money order.

Okay. These K-23's, on my report, that reflects K-23 number 13 - - 12, 13 - - K-23, numbers 12, 13 and 20, which are People's 23-F in evidence. And they would be numbers 12, 13 and 20 in this file.

Again, using the same equipment, doing the same things I did with all of the other exhibits so far, I followed the same methodology and I arrived at a conclusion of whoever wrote the known writing did, in fact, write the question writing appearing on, again, the money order.

Q. Could you please take us through - - us through how you came to that conclusion?

A. Okay. Again, here's an introductory stroke on the top of the "J".

Q. On the question writing?

A. On the question signature. Okay?

There is an introductory tick on the top of the "J". The "J" is kind of laid back in this position. Again, straight down with a little hook. Again, same introductory

stroke, introductory tick and then again laid down.

The introductory is very pronounced here, cannot be seen here.

On 20 it can be seen as very pronounced there.

Q. Now, the one that's numbered number 13?

A. Yes, sir?

Q. Is there an introductory tick that's visible to the eye?

A. No, sir. And there is not an introductory stroke in the - - under stereo microscope.

Q. Okay.

A. It is not there on that particular one.

Q. Okay.

A. Again, in the cross-bar on top of the letters; okay?

Going to the "U", straight line down, comes right back up. There is a little introductory tick again on the top of this motion.

Q. That's number 12?

A. On 12.

It also appears up here.

Q. On the question writing on - -

A. On the question, appears there.

Again, down, with a flat type bottom over here. It

is almost like a horseshoe, if you will. It comes down like this and then it is flat across, okay, and then starts back up.

Q. You're referring to - -

A. Angling in as a horseshoe would - - would have a flat bottom to it.

Q. Okay. For the record, you're referring to the "U" in Julio; am I correct?

A. Julio, yes.

Again, that's the portion here.

Again, that can be found on 13, where it comes down, flat portion on the bottom and then comes back up and angles in, inward.

Again, the same here. A flat portion on the bottom and then angles up.

Q. That's on the 20?

A. On 20.

Okay. The "L" in Julio, again, a little introductory tick, comes straight down and then has a little bit of a re-trace at the bottom, comes down and comes back up slightly.

There is a the introductory tick on 12, comes back and there is a little bit of a re-trace, but there is an angle to the - - to the right on this particular one.

On 12.

There is the introductory tick, comes back, re-trace.

Q. That's on 13?

A. Yes, sir.

And on 20, introductory stroke, introductory tick, comes down, comes down, a little bit of a a re-trace on the end here. Okay?

Under the "I", in Julio, again, there is a stroke that comes down and then there is a little terminal stroke, again, to the - - to the right.

That can be found in 12, 13 and 20.

Q. What's a terminal stroke?

A. It's the ending of a stroke. The pen, rather than coming abruptly off the paper, it is dragged a little bit. So, it is the termination stroke.

It is like a slight - - it is - - it is not a drag stroke, where you're dragging it to the next letter, where he could go - - where if I was to write something, okay, and then carry on to the next letter, all right, that's not what's taking place. This is just a brief pause or brief hesitation, that it is just coming off the paper. It is not coming off abruptly.

That would be the terminal stroke or, again, this

ending tick, if you will.

Again, he makes the "O". Again, just rounded by kind of oblong.

And then he dots the "I", again, away from, okay, the particular letter. It is dotted over. In this case over - - between the "O" and "I".

Again. It's dotted over the "O".

Okay. The "O", in Ortiz, again, same fashion. Okay, it is very elongated, comes back up and meets the line here.

Again, elongated and around, elongated; around, elongated and bending up and around. Okay.

The "R", a small re-trace that starts just about midway here.

Q. That's at the top of the "R"? Can you tell us where in the "R" it is?

A. In the middle of the "R". Okay. In the middle of the "R" there is a small re-trace, goes down and then he goes back up past it and then on this angle. Okay?

You can see that there. Starts there, down and then comes back up past it and makes that turn.

You can see it here; down, back up, makes the turn.

And then here; down, makes the turn.

MR. BRANCATO: Your Honor, the record will

reflect that the witness, when he says "you can see here," has been going from 12 to 13 to 20 on the chart.

THE COURT: So noted.

THE WITNESS: Okay.

A. Again - -

Q. Would you please continue?

A. Again, the "D", again, straight line down, slight re-trace of a tick. Just comes down a little here. He comes back up the line, short of like a terminal tick, if you will.

Q. Where is that marking in the "D", for the record?

A. At the bottom of the "D", the terminal stroke of the staff. Comes down to the bottom and then there is a small little tick up. Like a - - where you would start the letter in the beginning, well, this is the end of it. So, it is a terminal tick. Okay.

And then, again, the cross-bar of the top of the "T", comes across on the top.

The "I", in this case is very angular, okay, and then dotted, okay. Again, there is the "I", "I", "I".

Again, it's similar to the other "I"'s over here, okay, and it has that little terminal tick and it does - - it is dotted over to the other side, as you can see in the word "Julio." It's done the same. Okay?

The "Z," it has this introductory tick on the top, comes down, then the "Z" starts, coming up here, stops, then he makes the rest of this motion. Okay? So, it has this little flag on the top, if you will, comes across, down, and then back up on an angle. It's - - it's not a sharp "Z", it is kind of old or curved-type back up. This bottom portion. Okay?

That can be seen here and, again, 23, swings back up, very pronounced here, where it comes down straight and then comes around and terminates back under.

Q. Okay. You're referring now to?

A. To the "Z"'s in 12, 13 and the 20.

Again, the little introductory tick, straight and then down and then back around, up, starting back up, difficult to see, being on the line here. In the photograph it is difficult to see. In real life under a microscope, stereo microscope, it's very visible.

Q. All right.

MR. BRANCATO: If you can have a seat, please?

(The witness resumed the witness stand.)

Q. Now, up to this point you told us the person who wrote the known sample in the last three exhibits also wrote the question document on all three exhibits; am I correct?

A. That's correct, sir.

Q. What is indented writing?

A. That would be writing or there would be a sheet of paper or some sort of object where writing has occurred on it. If you did a pad, all right, and I wrote something on the pad, all right, and then I took the original sheet away, I would leave impressions on the next sheet of that pad. Those impressions are indented writing.

Q. Can the indented writings on documents be enhanced?

By that I mean, is there anyway to find out what may have been written on a previous page?

A. Yes, sir. There is various ways.

Q. Okay. Could you please tell us in - - in forensic document examination some of the ways for enhancing writing?

A. Well, I guess if the most common error now to enhance the writing would be as a kid, take a pencil and rub it across it and what happens is the pencil will go across the area of this gulf or this hole, where the impression is, goes across that, skips over that portion, so the pencil kinds of covers most of the surface of the paper but does not go into the gulf or the impression in the writing. That's one way.

Well, not to destroy documents, we, until a couple of years ago, used light. We could cause shodows to appear in the holes. We would take a light, oblique lighting, and

send it across this on a lighting. You've done it yourself with sunlight. You've looked like this and you can see what was written on a pads. Okay? Because of the shodows that appear across it. All right?

And now these two gentlemen from England developed a fax machine or an instrument called the Electro Static Detention Apparatus.

Q. Is this what you referred to earlier as the E-S-D-A?

A. Yes, sir.

Q. Okay. Could you please tell the jurors how the E-S-D-A works?

A. What it does, it is an electro static transfer. It is very technical. But, again, what it was made to do was originally to come up with footprints off of tiles or some other things. But they found that it works great on paper for indented writing.

It will - - it is very, very sensitive. It will go down on that pad, you had the pad, someone wrote something and you take that top sheet away, it will go down maybe four or five sheets of paper. It is that sensitive. Okay?

And what takes place is, you take the document, you put it in a humidity chamber. Paper page, what it is made of is fibers and it absorps moisture. Okay? It also will take

an electrical charge.

We take it, put it in this humidity chamber, put this then onto this, it is a vacuum board. It is a very porous method of stone, ground stone type that has a vacuum pipe attached to it. Then we take our document and we lay it on top of that. Okay? And the vacuum board sucks it down.

We then take, it's like a plastic, a thin layer of plastic, like saran wrap, we take this saran wrap-type plastic and we pull it over the document and that too now gets sucked down to the vacuum board. All right? Smooth out all the wrinkles, all right, this board that's everything is attached to has a hinge and we can tilt it up.

So, we got our document on the board, everything is great, we give it a electro charge, just like a photocopy fax machine, has a electro static charge to it. Okay? What we do is we take this wand or corona, it is called, with an electric charged and we go up and down the paper, giving the paper and the plastic an electric charge. Okay?

Then we take little glass beads, very fine, minute glass beads with toner.

Q. Which toner?

A. Toner.

Q. The black stuff in a copy fax machine?

A. It is the ink on a copy fax machine. If anyone has

ever taken it apart, it is very messy. It is almost like powdery; okay? It's, again, very, very fine granular, almost powder, okay?

And what we do, we take these mistures of little beads and toner, comes in a container, comes in a container and all we do is we take it and after the document has this electric charge, this has either a positive or negative charge, and this either has a positive or negative charge, and what takes place is the opposites attract. When they take the toner with the glass little balls in it, power down the document, what happes is the little glass balls start rolling down, okay, and what happens, wherever there is an indentation the ball with the toner rolls in, okay, the ball will roll in, hit the toner station and glass balls rolls out. Okay? And continues on.

And I keep doing that until I get the right particular contrast that I particularly wanted. So I would keep powering this stuff down. It is retrieved, put it back in the cup and again power it down until I get the required contrast that I want.

Then I would take another plastic adhesive, go over that document so as not to disrupt the fibers, the toner, and wouldn't be smeared or anything. Then I got - - then what I have is, I have a particular hard copy that I can either

photograph that or use that as a negative - -

Q. Now - -

A. To print.

Q. Now, did you raise - - did you enhance indented writing in connection with this case?

A. Yes, sir; I did.

Q. This has been marked and received in evidence as Exhibit 35-D.

(Handed to the witness.)

Q. Please look at it.

(Pause.)

Q. That is D, as in David.

A. Yes, sir.

(Previous exhibits returned to Mr. Brancato.)

Q. And did you receive that document during the course of your work on this case?

A. Yes, sir. It was received as known writing.

Q. And was that received from Special Agent Chris Behan of Alcohol, Tobacco and Firearms?

A. Yes, sir.

Q. Did you apply the method that you just told the jurors concerning enhancing the indented writing concerning that document?

A. Yes, sir; I did.

Q. This has been previously been marked for identification as Exhibit Number 65, for identification.

(Handed to the witness.)

Q. Do you rocognize that exhibit?

A. Yes, sir.

Q. And what do you rocognize it to be?

A. It's a - - a portion of this particular thing, People's?

Q. Thirty-five-D.

A. It's just the top portion, this portion here, of Peoople's 35-D?

Q. Yes.

A. That I used - - that I processed for indented writing.

Q. And does that exhibit that you have, Number 65, does it fairly and accurately depict the writing that you received off of the exhibit that you're holding in your right hand, number - -

A. Other than - -

Q. Thirty-five-D?

A. Other than it being enlarged and this is the actual indented writing evidence that I received, yes.

Q. Okay. You said - - did you enlarge what you received off of that piece of paper?

A. Yes, sir.

Q. And how did you go about enlarging it

A. I photographed this evidence and then I enlarged that negative and produced this document.

MR. BRANCATO: I would offer it into evidence at this time.

(Handed to Mr. Brenner.)

(Pause.)

MR. BRENNER: May I?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q. You're technical explanation, I didn't follow it exactly so bear with me.

A. Yes.

Q. When you transferred or enhanced the writing, did it appear on that cardboard? I mean, it just - -

A. No, sir.

Q. Appeared?

What did it appear on?

A. That piece of acetate that I originally - - that saran wrap.

Q. And where is that?

A. Right here, sir.

Q. You have that?

A. Yes, sir.

MR. BRENNER: Can we have that marked for identification?

THE WITNESS: Would you like it, sir?

MR. BRENNER: I would like to see it.

THE WITNESS: I made numerous ones.

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

(Pause).

THE WITNESS: Here's two, sir.

MR. BRENNER: Can we have that marked for identification, your Honor?

THE COURT: All right, we will mark these People's Q - - no, we have a Q. U and V.

Two of them?

THE WITNESS: Two or three.

MR. BRANCATO: You mean Defendant's?

THE COURT: Defendant's U, V, W. Defendant's U, V and W for identification.

(Sheets, so marked Defendant's Exhibit U, V and W for identification.)

COURT OFFICER: Defendant's U, V and W, marked for identification.

MR. BRENNER: May I see them?

(Handed to Mr. Brenner.)

(Pause.)

(Handed to Mr. Brancato.)

BY MR. BRENNER: (Continued)

Q. They are of different quality? I mean, they are not exactly alike?

A. That's true, sir.

Q. Are those various attempts or vary - - the products of various attempts at the process?

A. Yes, sir.

Q. Some are lighter or darker than others?

A. Yes, sir.

Q. And - -

A. But I mentioned, to control the contrast, that's what you would do.

Q. Is it fair to say that you took the best one, in terms of contrast, the one that was clearest and enhanced it and made it into that cardboard exhibit?

A. Yes, sir.

Q. How many of these are there? How many efforts - - how many products were there of this effort?

A. I don't know an exact number.

Q. Approximately?

A. Approximately?

Q. Yes.

A. Ten, fifteen.

MR. BRENNER: I would like them all marked for identification.

We're going into double letters.

Your Honor, may we approach?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: We'll mark them with double letters, A-A, B-B, C-C, although we have X, Y and Z.

(Sheets, so marked Defendant's Exhibit A-A through E-E for identification.)

THE WITNESS: That's all there are, sir. I don't know how many you got there.

COURT OFFICER: Defendant's Exhibits A-A through E-E, so marked for identification.

THE COURT: Very good.

MR. BRENNER: It is like a Polaroid?

THE WITNESS: It is like a saran wrap or an

acetate.

THE COURT: Did you say E-E?

COURT OFFICER: Yes.

THE WITNESS: Yes.

THE COURT: So, there were five?

THE WITNESS: Yes.

COURT OFFICER: Yes.

(Handed to Mr. Brenner.)

(Pause.)

THE COURT: On the record.

The exhibits we've just marked now, are they basically the same exhibit that you have now in People's 65 for identification, the blown-up one? Are they basically the same, only different versions - -

THE WITNESS: Yes.

THE COURT: Of that?

THE WITNESS: Yes. Yes, your Honor.

THE COURT: All right.

BY MR. BRENNER: (Continued)

Q. I'm going to show you Defendant's E-E for identification.

A. Yes.

Q. Double D-D for identification.

(Handed to the witness.)

Q. Those are visibly different to the naked eye; is that right?

A. Yes, sir.

This is the rear of the document.

Q. The rear?

A. Of this.

I don't know what. This is People's?

MR. BRANCATO: Thirty-sive-D.

THE COURT: Thirty?

A. Thirty-five-D.

Q. Huh-huh.

A. I processed the front for indented writing and then I flipped it and did the rear. So, this would be the front and this would be the rear of it, sir.

Q. I see.

A. It is marked rear on the back, sir.

Q. People's 35 - -

MR. BRENNER: Withdrawn.

Q. This - - you first obtained these documents back in February, of 1991; is that right? The document, People's 35?

A. I believe so.

I have to hold on a minute.

(Pause.)

A. Yes. February 12th, sir.

Q. And the - - the discovery of the indented writing, would it be fair to say that that was approximately January, of this year?

A. Yes, sir. I think it was January 15th.

Q. So, this piece of paper, upon which this writing - - upon which you discovered this writing, was in whose custody between February, of 1991, and January, of 1992?

A. It was submitted to me and as known writing of thesuspect. And it was in my custody the whole time, until last week.

Q. Actually, you and Mr. Brancato were, I think, either in his office or in your office when you - - when you discovered that there was writing on this?

A. Yes, sir.

Q. Which office was that?

A. Mr. Brancato's office.

Q. So, you folks were sitting there going through the various exhibits; is that right?

A. Yes, sir.

Q. And at that time you didn't see this writing through the plastic, did you?

A. Through the plastic?

Q. Well, we have seen some of the evidence in this

case contained in sealed plastic baggies.

A. Yes, sir.

Q. Vouchering bags; is that right?

A. Yes, sir.

Q. You didn't - - did you see the writing through the plastic?

A. It was in a plastic bag. I was sitting in the office and I had all the evidence on my lap. And the sun was coming through the window. And I saw - - when I had it on my lap, he asked a question, I lean forward and I saw that there were impressions there. And I picked it up, looked at the light, and I said, "listen, I think I have some impressions here. I think I see the word 'Nelson Dacosta' on here. Would this be of importance to your case?"

Q. Can you see that in the courtroom?

A. Not with these lights, sir.

Q. You need sunlight?

A. Sunlight. Some sort of oblique lighting, hitting it on an angle.

Q. On an angle. if you held it to an angle - -

THE COURT: How about a desk lamp?

THE WITNESS: I believe so, sir.

THE COURT: That one, if you want one.

MR. BRENNER: No, I'm just.

THE COURT: All right. We do have a desk lamp.

MR. BRENNER: You do, Judge?

THE COURT: I believe we do.

MR. BRENNER: Do you want to set it up?

THE COURT: I don't want to set anything up. It is already set there.

Q. Did you observe it under a desk lamp or through a sunlight?

A. Sunlight, sir.

Q. Then you took it back to the laboratory and did your process on it?

A. Yes, sir.

Q. And this was in January, of '92?

A. I believe it was January 15th.

Q. As a result of this, did you examine any of the other documents that you have?

A. Yes, sir.

MR. BRENNER: Your Honor, I would offer all of it.

THE COURT: Collectively?

MR. BRENNER: Yes, into evidence.

And I have no objection - -

THE COURT: You talking about Defendant's U,

V, W, A-A through E-E?

MR. BRENNER: I offer that into evidence and I have no objection to the People's offer.

THE COURT: Mr. Brancato?

MR. BRENNER: Unless the People want to incorporate that into their own?

MR. BRANCATO: Judge, I have no problem with the proffer, so long as we - - he is admitting the one that's of the back piece of paper?

THE COURT: They are all there.

MR. BRANCATO: Okay.

THE COURT: May I see those exhibits before I rule on them?

(Handed to the Court.)

THE COURT: Just so that I understand this, Detective Breslin, these are all exhibits and the writings on them were indented writing which you, through whatever process was employed, eventually brought it out?

THE WITNESS: Yes.

THE COURT: Is that what they are?

THE WITNESS: Yes, your Honor.

THE COURT: All right. I here no objection then, Mr. Brancato.

People's 65 for identification is now, without objection, admitted.

Defendant's Exhibit U, V, W, A-A, B-B, C-C, D-D and E-E are likewise, without objection, are now received.

Ladies and gentlemen, at this time we will recess for lunch. Hopefully we'll resume at two-thirty.

Do not discuss the case among yourselves nor with any third party. The usual admonition.

I suppose that would include have a good lunch as well, if that's an admonition. I don't know.

We'll see you back here then.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: You may step down, detective.

THE WITNESS: Thank you, your Honor.

THE COURT: You are excused.

Actually, a a practical matter, for your own guidance, this case won't resume until about ten to three. That's between you and Mr. Brancato, when he wants you back.

But I did make that representation to counsel,

that we are doing something else at two-thirty, so that you have actually a longer lunch break.

MR. BRANCATO: He can come back at ten to three?

THE COURT: Unless you have some other arrangements you wants to make?

I have no impact with that. Whatever arrangements you make, that's between you gentlemen.

THE WITNESS: Thank you, your Honor.

MR. BRENNER: Just some calendar matters, in terms of scheduling?

THE COURT: I thought you had a calendar matter before me.

MR. BRENNER: I anticipate presenting a defense case.

THE COURT: All right, we can talk about this off the record and take a lunch break.

You can step down.

(WITNESS EXCUSED)

THE COURT: All right.

(Whereupon, the Court took a luncheon recess in the proceedings.)

* * *

(Continued on the following page.)

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his counsel and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, bring the witness back in, please.

(Whereupon, the People's witness, Detective John Breslin, resumed the witness stand.)

THE COURT: All right, bring in the jury panel.

COURT OFFICER: Jury entering.

THE COURT: Yes.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Just before you start off, at the conclusion of this case you'll be entitled to a more fuller explaination, not as to the case, but as to why we have so many delays.

Go a ahead, Mr. Brancato.

J O H N B R E S L I N, having been preveiously called as a witness on behalf of the People, was previously sworn by the Clerk of the Court, resumed the witness stand and continued to testify under oath as follows:

DIRECT EXAMINATION (Continued)

BY MR. BRANCATO:

Q. Detective Breslin, I'm going to ask you to be mindful of the fact that it is twenty to four and it gets a little warm in the afternoon.

THE COURT: Is that a question?

MR. BRANCATO: No.

MR. BRENNER: What's he supposed to do about that?

THE COURT: Was that to invite an answer?

MR. BRANCATO: I ask you to keep your voice up.

MR. BRENNER: Chill out?

MR. BRANCATO: This has been previously marked for identification as Exhibit 66.

(Handed to the witness.)

Q. Could you please tell us and tell us if you recognize it?

(Pause.)

A. Yes, sir.

Q. And what do you rocognize that to be?

A. That's the indented writing results from this particular piece of paper, which is People's?

Q. That's number 35-D; am I correct?

A. Thirty-five-D.

Q. Now, did you prepare that exhibit?

A. Yes.

Q. For the Court?

A. Yes, I did.

Q. And the surface that is on there, is that the entire piece of paper that's in evidence as 35-D?

A. I believe so.

Q. Please look at it.

(Pause.)

A. Yes, sir. That's the entire document.

Q. Okay. And you compared it to one of the exhibits that Mr. Brenner showed you before; am I correct?

(Handed to Mr. Brancato.)

Q. Which is marked as Defendant's U.

(Handed to Mr. Brenner.)

MR. BRENNER: One?

MR. BRANCATO: Yes.

MR. BRANCATO: At this time I would offer that exhibit into evidence.

THE COURT: U?

MR. BRANCATO: No, I'm offering - -

THE COURT: Or 66?

MR. BRANCATO: The People's Exhibit Number 66, which is a blow-up.

MR. BRENNER: I think that - - I thought it was already in?

MR. BRANCATO: Not that one.

THE COURT: Sixty-five is in.

MR. BRENNER: All right.

THE COURT: Hearing nothing to the contrary.

MR. BRENNER: No objection.

THE COURT: Without objection.

(Deemed marked.)

Q. If you could just put it on the easel?

(Witness approached the exhibit.)

MR. BRANCATO: Judge, if we can, can we have this easel placed immediately in front of the jury?

THE COURT: Yes.

Just a minute. The officers will assist you.

THE WITNESS: Thank you.

(Pause.)

Q. Detective Breslin, if you would please approach the easel?

Can you please show the urors the indented writing that you lifted off of the paper when you used the E-S-D-A fax machine?

A. Can everybody see this?

THE COURT: Perhaps you ought to put it back farther? It may be so close so that the people to the flank of the juror it may be difficult.

MR. BRANCATO: It may be if we show half the jury and then move it back for the other half.

THE WITNESS: Is that all right?

THE COURT: No objection.

(Pause.)

Q. Okay.

A. Okay. Again, what I processed this with, this fax machine called the - - instrument called E-S-D-A, Electro Static Detection apparatus.

What I do do, again put this on a vacuum board, cover it with plastic, give it a charge to time board and pour this toner, which is this black-like powder, with these glass beads down it.

What happens is, it was done in this fashion, poured in this area, down. And what we have is, again, wherever the ball will fall into, all right, the toner adheres to whatever there is a ridge and the ball rolls out

and the toner stays in.

What happened in this area here is these letters were formed. All right? I believe it says Nelson Dacosta, and address and a description, about six-one, two-ten, L-B-S, pounds, wife, Ruthie.

Q. Could you talk up so the gentlemen in the last seat can hear you?

A. I was going to go over there when I was finished here.

Q. Okay. But it would be best if you can speak up so he can hear you all the way down here.

A. Okay. All right. Again, found this indented writing in this area.

There is additional indented writing over here, where it gives a cross street, Broadway and Fort Washington.

And then over here there's additional writing.

And then in this area, what I believe to be an S-H-O-O-T, and then there is an address and then just so you can affirm that it came from this particular document, if you can look on this document, what we have here is Julio Ortiz and this number and these other writings. Okay. These other impressions.

What happens with this particular instrument is, if there is ink on a particular portion of the paper, the toner

wouldn't adhere to that particular portion of the paper. All right? It will keep moving on. And - -

(Exhibit taken by Mr. Brancato.)

THE WITNESS: Can I have that back?

(Returned to the witness.)

A. And if you can see this, in this particular area here.

Q. Can you describe that area for the document?

A. Where there is a fold in the document, just below the fold. The toner did not adhere on this J-U-L, Julio Ortiz, and the 4-8-7 phone number. Which is - - doesn't here. Okay?

There and there.

And writing that's there.

And also where the scratches are up here, again, the ink did not adhere.

One, two, three, four; one, two, three, four areas that the ink was - - the toner did not adhere there.

Q. Okay.

A. Okay?

MR. BRANCATO: Your Honor, at this point if Detective Breslin can come down to this end and show the jurors the exhibit?

(Pause.)

THE COURT: The only travelling show we have in the building.

MR. BRANCATO: And if in this instance, if he can just display it to the jury in as much as not testify?

THE WITNESS: Okay.

A. This would be here.

MR. BRANCATO: No.

THE COURT: This is a silent display, Detective Breslin.

THE WITNESS: Yes, your Honor.

(Pause.)

(Exhibit displayed to the jurors.)

THE WITNESS: Okay?

MR. BRANCATO: Okay. If the witness could please get back on the stand?

(The witness resumed the witness stand.)

Q. Now, Detective Breslin, this is - - this is Exhibit Number 65 and it is in evidence.

(Handed to the witness.)

Q. Does that reflect the upper portion of the exhibit that you just showed to the jury?

A. Yes, it does.

Q. If you can just put it on the easel, please?

(Exhibit displayed.)

Q. And could you please read the first line of that exhibit?

(Witness approached the exhibit.)

THE WITNESS: May I, your Honor?

A. I see a Nelson Dacosta, D-A, and it's obliterated by this portion right here.

Q. Is that the scribbling that appears at the top most part of the document?

A. That's correct.

Q. That's number 36-D.

A. Okay. And it has an address of 644 West 185th Street, S-T, with a line under it.

And what I get to be an apartment, either it is a 1-A; all right? What it has here, apparent description; six foot one inch, two hundred ten pounds. It says wife, Ruthie.

And then what I've got here is Wadsworth, and I guess this is B-E-T, Broadway. And that's what I'd get.

MR. BRANCATO: Okay, detective, if you'd have a seat, please?

(The witness resumed the witness stand.)

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRANCATO: Can we have this marked - - it

has been previously marked as Exhibit 67 for identification.

(Handed to the witness.)

Q. Do you rocognize that document?

A. Yes.

Q. And did you prepare that document at my request?

A. Yes, I did.

Q. What is that document?

A. These were two envelopes that were - -

THE COURT: Just a minute.

He prepared the document or the exhibit?

THE WITNESS: The exhibit.

MR. BRANCATO: The exhibit, at my request.

A. These were two envelopes that were sent to me for anaylsis.

MR. BRANCATO: These are already in evidence as exhibits 32-A and 32-C.

(Handed to the witness.)

Q. Do you rocognize those two envelopes?

A. Yes.

Q. What do you rocognize them to be?

A. These were the envelopes that were submitted to me for examination.

Q. Okay.

A. And these are enlargements of them, prior to me removing the stamps.

Q. Okay. What's in evidence as 32-A and 32-C, when you initially received those two envelopes that you're holding in your right hand, how did they appear?

A. Like this.

Q. Like the larger exhibit?

A. Yes.

Q. Okay. The exhibit that you're holding in your left hand, which is marked as 67 for identification, does that photo fairly and accurately depict how those two envelopes, 32-A and 32-C, appeared when you first received them?

A. Yes.

MR. BRANCATO: I would offer them into evidence at this time.

MR. BRENNER: Might I see the exhibit, your Honor?

THE COURT: Not the small ones, the large one.

MR. BRENNER: I'm sorry?

THE WITNESS: The larger one.

THE COURT: You want to see 67, which is being offered?

Thirty-two has been received.

MR. BRANCATO: Yes, as well as A, B and C.

THE COURT: Yes, A, B, C and D, which is the letter.

Mr. Brenner?

MR. BRENNER: No objection, your Honor.

THE COURT: Without objection, 67, received.

Poster, so marked People's Exhibit Number 67in evidence.)

COURT OFFICER: So marked in evidence, your Honor.

Q. Detective Breslin, if you could hold that up over your left shoulder so that the jury can see it at this point?

(Handed to the witness.)

Q. When you first received these envelopes, 32-A and 32-C, how much postage was on these envelopes?

A. Postage?

Twenty-five, thirty cents.

There was a quarter and two three cent stamps.

Q. Thirty-one cents?

A. Thirty-one cents.

Q. And on the lower one that's marked Nelson Dacosta, is that similarly posted?

A. Yes.

Q. Now, what did you do with these two envelopes that are marked 32-A and 32-C concerning the postage? What did

you do?

A. I photographed them prior to removing them for examination.

I had asked the investigators in the case, I don't remember which one, it was a female police officer or detective, or a detective, if they had access to the particular man's - - the suspect's house, could they get into the house.

Q. And did you receive some stamps?

A. Yes. I received known stamps from what I was told, from the gentleman's drawer.

MR. BRANCATO: Can we have this - - this has been previously marked as Exhibit 68 for identification.

(Handed to the witness.)

Q. Look at it and tell us if you rocognize it.

(Pause.)

A. Yes.

Q. What do you rocognize that to be?

A. This was the sheet of stamps that was submitted to me as known stamps from the suspect's home.

Q. Did you receive those stamps from Special Agent Chris Behan on February 22nd, 1991?

A. I believe that was the date; yes.

Q. When you received those - - those stamps, what did

you do with them?

Did you photograph them?

A. I photographed them.

Q. And does that photograph fairly and accurately depict the sheet of stamps that you received from Special Agent Chris Behan in connection with this case?

A. Yes. With the exception it has been enlarged.

Q. Okay.

MR. BRANCATO: I would offer them into evidence at this point.

(Handed to Mr. Brenner.)

(Pause.)

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q. Detective, the enlarging process, what does that entail?

A. I take a - - I took a photograph of the evidence and I just enlarged that negative.

Q. Well, in terms of enlarging negatives for this or any other photograph, would it be fair to say that as you enlarge details are lost?

A. In some cases, yes. But photographic, yes.

Q. In some instances details become fuzzy or blurrier than they were when they were the original size; isn't that

right?

A. Yes, sir.

But I've made my examination through a stereo microscope. This is - -

Q. We're not talking about your examination, detective.

A. This is - -

Q. This is an offer of this exhibit.

A. An exhibit.

Q. And I'm asking you about this exhibit.

A. I'm sorry, sir.

Q. Mr. Brancato will ask you about your examination.

A. Okay.

Q. And with regard to - - with regard to this exhibit, you are going to testify about details of the stamps, are you not?

A. Yes, sir.

Q. And you've already told us that with regard to the photographic enlargement process details are often blurred or lost; correct?

A. Yes, sir.

MR. BRENNER: I object, your Honor.

THE COURT: To the bench.

(Whereupon, all counsel approached the bench,

where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Step over, please.

(Whereupon, the Court and all counsel approached the sidebar, out of the hearing of the defendant, the jury and the witness, where the following proceedings commenced:)

THE COURT: People's 68 for identification, which is an enlargement of a stamp sheet; is that right, has now been offered.

MR. BRENNER: The nature of my objection is that this is - - there is jigsaw pussling evidence being offered here. As such, the details, the specific details of the stamps, the perforations, the edge of the paper assume critical importance. If enlarging the original, any of that detail is lost, then it cannot be successfully said that the enlargement, at least in the context of this proffer, fairly and accurately represents the stamps.

Thus, I'm objecting on those grounds.

The original stamps are in evidence. The detective conducted whatever experiments he did and

he can allude to that. But the uses of this document, which may be a distortion of the original, is improper.

THE COURT: Well, first off, before I give Mr. Brancato an opportunity to respond, I don't think that there is any testimony that it represents a distortion. The extent that the detective testified, he said that some detail might be either lost or omitted in the enlargement.

MR. BRENNER: Yes.

THE COURT: To characterize it as a distortion, I think, would be unfair.

Mr. Brancato?

MR. BRANCATO: Judge, our position is that counsel's argument is better towards the jury in the long run than the admissibility of it at this time. Is it not as to the weight as to the exhibit rather than it's admissibility?

MR. BRENNER: A perloin argument.

THE COURT: I'm aware.

In view of the fact that the original of this exhibit, the actual original is in evidence, is available to the jury for comparative purposes as well as this, this offered exhibit is here and

subject to cross examination, which counsel is free to illustrate to the jury through his examination, what detail, if any, is actually either missing or in anyway not represented precisely by detail as it appears in the original. In any event, the jury will have both of these exhibits before them and they can make their determination.

Accordingly, I'm going to admit it.

(Whereupon, the Court and all counsel returned to the open courtroom, where the following proceedings commenced:)

THE COURT: As soon as you're ready, People's 68, for identification, over objection, is now received.

(Cardboard, so marked People's Exhibit Number 68 in evidence.)

COURT OFFICER: So marked in evidence, your Honor.

THE COURT: Did you want this exhibit on the easel, Mr. Brancato?

MR. BRANCATO: Please, your Honor.

(Exhibit displayed.)

DIRECT EXAMINATION (Continued)

BY MR. BRANCATO:

Q. Detective Breslin, you indicated that you received those stamps from Agent Behan back in February, of 1991.

Now, what - -

MR. BRANCATO: This is number 67 in evidence.

(Handed to the witness.)

A. Yes, sir.

Q. What's - - what steps, with respect to those two envelopes, did you take in regard to the sheet of three cent stamps that's on the easel? What did you do?

A. I placed both documents in the humidity bath, just a chamber, a chamber, a confined box with a little water in it, and I let it sit there for a couple of hours, four or five hours, and it loosened the glue on the stamps. I was able to remove the stamps from the documents.

Q. And did you subsequently remove the stamps that appeared on the envelope, which is marked on the first line, Nelson Dacosta, Q-4?

A. Yes, I removed these two stamps and also I removed these two stamps.

Q. You're indicating the two three cent stamps that are on the Nelson Dacosta envelope, as well as the two three cent stamps that are on the Myra Franza and Josephine Mendez envelope?

A. And I also removed the twenty-five cent stamps on

both.

Q. Did you in anyway keep any tab as to what position each stamp came from?

Did you mark it in anyway?

A. Yes, sir.

THE WITNESS: Can I stand up, your Honor?

THE COURT: Yes.

(Witness stands.)

A. My document, my code for this was this is document Q-3 and this was the Q-3-1, Q-3-2. This is the first stamp, second stamp and this would be the third stamp.

MR. BRANCATO: For the record, he's referring to, as you look at the letter, from left to right; first three cent stamp is marked 1, the second 2 and the twenty-five cent stamp marked 3.

A. Okay. The same down here. This was document Q-4 and this was Q-4-1, Q-4-2 and Q-4-3.

Q. After removing those stamps, what did you do with them?

MR. BRANCATO: Sit down, please.

(Witness sits.)

A. I attempt to make a jigsaw match with the known stamps I was provided with.

Q. Okay. That's the previous exhibit that's already

in evidence showing the stamps from the apartment; correct?

A. Yes, sir.

Q. And how did you attempt to do that?

A. What I do is, under a stereo microscope I made a side-by-side comparison and just like you would with a regular jigsaw puzzle I tried to fit the pieces together on to see where they would fit.

And, again, under magnification you can see where I did match the four of the stamps, these four Paul Dudley White M.D. stamps, two areas on this known sheet of stamps.

Q. Okay.

MR. BRANCATO: This is already in evidence as Exhibit Number 37.

(Handed to the witness.)

A. Yes, sir.

Q. What does that exhibit contain?

A. This is - - this is a portion, the front and the rear, of the stamps.

I removed the four stamps from the two envelopes and I jigsaw matched them to various areas on the known areas. And I pasted them down on this piece of acetate.

Q. Did you prepare an exhibit which shows a larger version of what you're holding in your hand, Exhibit 37, the three cent stamps?

A. Yes, sir; I did.

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRANCATO: May we have this marked as People's Exhibit Number 69 for identification?

THE COURT: All right.

(Cardboard, so makred People's Exhibit Number 69 for identification.)

COURT OFFICER: People's Exhibit 69, so marked for identification.

(Handed to the witness.)

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

(Off the record discussion between Mr. Brenner and the defendant.)

Q. Detective Breslin, does that exhibit fairly and accurately depict Exhibit Number 37, which contains the three cent stamps and a blown-up version?

A. Yes, sir.

MR. BRANCATO: I would offer it into evidence at this time.

THE COURT: Voir dire.

(Handed to Mr. Brenner.)

MR. BRENNER: Detective, similarly questions

as before.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q. Your purpose in arranging this was to attempt - - was to ascertain whether the perforations in the paper that was attached to various parts of the perforations matched up with the remaining stamps; is that right?

A. Yes, sir.

Q. Okay. And you looked under a stereo microscope to do that?

A. Yes, sir.

Q. And that reflects depth?

A. Yes, sir.

Q. This does not; is that right?

A. I - -

Q. Does this reflect depth?

A. Depth and also where they meet.

Q. Does this reflect depth?

A. No, sir.

Q. All right.

A. But - - may I?

Part of the examination is not only depth but also on a flat portion where they do meet up in the jigsaw.

Q. And - -

A. That is readily seeable.

Q. As such, every centimeter of each piece of paper in those stamps is critical to the anaylsis; is that not?

MR. BRANCATO: I object to the form of the question.

THE COURT: Sustained.

Q. Well, you attempted to match up whether pieces of paper on the detached stamps connected to the pieces of paper on the remaining stamps; is that right?

A. Yes, sir. To find out if they matched or didn't match.

Q. Now, if there was a distortion, hypothetically, there was a distortion of either the pieces of paper reflected in the remaining sheet or the pieces of paper on the detached stamps, one would not get a fair and accurate picture of the effect, is that right?

MR. BRANCATO: I object to the question.

THE COURT: Sustained.

Q. Is it as true about this photographic blow-up as the distortion possibility as it was about the other exhibit we discussed?

MR. BRANCATO: I object.

THE COURT: There is no testimony regarding a distortion.

Q. Loss of detail, detective?

A. Not to the - - there is a loss of detail, but not to the extent where it can't be demonstrated here.

Q. How much detail is lost?

A. There is nothing better than the original evidence to look at.

Q. Absolutely.

A. Okay.

Q. How much detail is lost?

A. How much?

Q. Quantify it, how much detail is lost; one percent, two percent, three percent?

A. Minimal.

Q. What does that mean?

A. Not much.

Q. How much?

A. Not much.

THE COURT: Well, let's not go up and back.

A. Not much at all, your Honor. I loose a little depth due to the fact that a photograph is a two dimentional object.

Q. And as you enlarge it, is there any kind of a blurring affect at all in any part of the enlargement, as you enlarge a photograph from its original size larger and larger

and larger?

A. It would get blurry at a certain point. How big that point is? Is an indeterminate amount. Or size.

MR. BRENNER: I object.

THE COURT: Same ruling.

People's 69, now received over objection.

(Cardboard, so marked People's Exhibit Number 69 in evidence.)

MR. BRANCATO: May we have marked People's Exhibit Number 66 in evidence at this time, your Honor? I believe it was introduced into evidence but not yet marked.

THE COURT: All right.

(Cardboard, so marked People's Exhibit Number 66 in evidence.)

COURT OFFICER: So marked in evidence, your Honor.

MR. BRANCATO: May we have this marked as People's Exhibit Number 70 for identification?

THE COURT: All right.

(Cardboard, so marked People's Exhibit Number 70 for identification.)

COURT OFFICER: So marked for identification, your Honor.

MR. BRANCATO: Show it to the witness, please.

(Handed to the witness.)

DIRECT EXAMINATION (Continued)

BY MR. BRANCATO:

Q. Detective Breslin, what does that exhibit show? What does it depict?

A. It is the rear of the front of the stamps. It's the rear of them.

Q. Does it fairly and accurately depict the stamps as they appear in Exhibit Number 37?

A. Yes, sir; it does.

MR. BRANCATO: I offer it into evidence.

MR. BRENNER: Same objection.

THE COURT: Same ruling.

People's 70, over objection, now received in evidence.

(Cardboard, so marked People's Exhibit Number 70 in evidence.)

COURT OFFICER: So marked in evidence, your Honor.

MR. BRANCATO: May we have this marked People's Exhibit Number 72 for identification?

THE COURT: Seventy-one or 72?

MR. BRANCATO: I'm sorry. Seventy-one.

THE COURT: All right.

(Cardboard, so marked People's Exhibit Number 71 for identification.)

COURT OFFICER: So marked for identification, your Honor.

(Handed to the witness.)

Q. Could you please tell us, what does that chart depict?

A. It is an enlarged photograph of this particular area here, down in the bottom.

Q. Is that the bottom right-hand side?

A. Yes, sir.

Q. And does it fairly and accurately depict the relationship of Q-4-1 to the lower right-hand portion of the sheet of stamps that's on the easel?

A. Yes, it does.

MR. BRANCATO: I would offer it into evidence at this time.

VOIR DIRE EXAMINATION

BY MR. BRENNER:

Q. Detective, that's even bigger than the others one; is that right?

A. Yes, sir.

Q. Through your own testimony, you said the rate of

distortion depends upon the rate of enlargement?

A. Yes, sir.

Q. The larger the enlargement the more likely to be distortion, blurring, I think?

A. Yes.

Q. And that is, indeed, larger than anything we've seen so far; correct?

A. Correct.

Q. And we are also viewing this in the context of your assessment of whether pieces of paper attached to to perforated - - to perforations on a sheet of stamps connect or match up with detached stamps; is that right?

A. Yes, sir.

MR. BRENNER: Objection.

THE WITNESS: But - - may I?

MR. BRENNER: Counsel.

Objection, your Honor.

THE WITNESS: May I finish?

THE COURT: Yes, Detective Breslin, you didn't finish your answer.

THE WITNESS: Your Honor, as you can see, the fibers of the, as defense counsel has pointed out, the fibers are visible and the detail is there.

THE COURT: When Mr. Brenner inquired with

respect to blurring, you said at some point, depending on the degree of enlargement, it would influence the degree of blurring.

THE WITNESS: Yes, sir.

THE COURT: In what respect has this exhibit or what can you point to or delineate as being blurred?

Is the writing or the picture, the portrait blurred? What is blurred?

THE WITNESS: From my point of view, your Honor, there is nothing blurred.

THE COURT: It's magnified. Magnification, depending on the situation, can cause blurring, but it would depend on the degree?

THE WITNESS: That's - -

THE COURT: Has this exhibit been magnified to such a degree that would cause blurring and if it has caused blurring, a two part question, what part is blurred?

THE WITNESS: No, sir; it hasn't. It hasn't.

MR. BRENNER: May I see exhibit and the previous exhibit, your Honor?

THE COURT: Yes.

(Handed to Mr. Brenner.)

(Pause.)

MR. BRENNER: I have no objection. I withdraw my objection.

THE COURT: Without objection, People's 71 is now received.

(Cardboard, so marked People's Exhibit Number 71 in evidence.)

COURT OFFICER: So marked in evidence, your Honor.

(Handed to the witness.)

DIRECT EXAMINATION

BY MR. BRANCATO:

Q. Detective Breslin, when Mr. Brenner asked you is it possible that there might be some distortion or blurring on these exhibits that are already in evidence, number 69, the chart that you're holding in your hand, which is the lower right-hand portion magnified, as well as the chart that's on the easel, is there any blurring on those three exhibits?

A. No, sir.

MR. BRANCATO: Lastly, may we have this marked as People's Exhibit Number 72 for identification?

THE COURT: All right.

(Cardboard, so marked People's Exhibit Number 72 for identification.)

COURT OFFICER: So marked for identification, your Honor.

Q. Do you rocognize what is depicted in that photo?

(Handed to the witness.)

A. Yes, sir.

Q. What do you rocognize that photo to show?

A. The top - - you'll have to.

Q. This is Exhibit 69.

(Handed to the witness.)

A. May I demonstrate on this?

Q. Yes, just show us what area is depicted in that photo.

A. It would be this particular area right here, and this area here.

Q. That's marked Q-4-2?

A. Q-4-2 and the known, right here. This is the area in question.

MR. BRANCATO: I would offer it into evidence at this time.

MR. BRENNER: May I see it, your Honor?

(Handed to Mr. Brenner.)

(Pause.)

THE COURT: You should look at it, Mr. Brenner, if you want. Mr. Brenner, you should look

at it in conjunction with the other exhibit because it is referring to a portion of that exhibit.

(Pause.)

MR. BRENNER: No objection.

THE COURT: Without objection, People's 72 is now received in evidence.

(Cardboard, so marked People's Exhibit Number 72 in evidence.)

MR. BRENNER: Can we step up?

THE COURT: I'm sorry?

MR. BRENNER: Can we step up?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

MR. BRANCATO: Your Honor, may we have this marked People's Exhibit Number 73 for identification?

THE COURT: All right.

(Cardboard, so marked People's Exhibit Number 73 for identification.)

COURT OFFICER: So marked for identification, your Honor.

MR. BRANCATO: Would you show it to the witness, please?

(Handed to the witness.)

THE WITNESS: Thank you.

Q. Detective Breslin, do you rocognize the area that's depicted in that chart, which is Number 73 for identification?

A. Yes.

Q. What area is depicted in that chart?

A. It is the rear of the Q-4-2, the top stamp, which is here. It is the rear of that.

From this area to area is this area, that area, it is the rear of it.

Q. Does that photograph fairly and accurately depict the area of Q-4-2 to the "K" stamp on the rear?

A. Yes, sir; it does.

MR. BRANCATO: I would offer it into evidence.

THE COURT: May I just see it, quickly?

(Handed to the Court.)

THE COURT: All right, show it to Mr. Brenner.

(Handed to Mr. Brenner.)

(Pause.)

MR. BRENNER: Your Honor?

THE COURT: Yes?

MR. BRENNER: Same objection as previously.

THE COURT: Same ruling as previously.

(Chart, so marked People's Exhibit Number 73 in evidence.)

COURT OFFICER: So marked in evidence, your Honor.

BY MR. BRANCATO: (Continued)

Q. Detective Breslin, could you please approach the easel?

(The witness approached the exhibit.)

Q. Now, you indicated to us before that through the use of a process you removed the stamps from the envelopes that have already been referred to as exhibits in this case; am I correct?

A. Yes, sir.

Q. And could you please tell us what you did after removing those stamps?

A. I examined them under a stereo microscope to show, to get a larger magnification, to see depth on each one of the stamps, to see if they would fit together in any of the areas that might be exposed, where they might fit.

And I found that I was able to match all four stamps to areas on the known - - the known sheet of stamps.

Q. Now, you indicated before that this is - - this is

Exhibit 67 in evidence, which shows the two envelopes.

A. Yes.

Q. And over here you have marked Q-3.

A. Yes, sir.

Q. Where is this stamp, the first one as you look at envelope Q-3, as you look from left? Where is that located?

A. That would be here. This is Q-3-1 and there is Q-3-2, the next one.

Q. The first one then, can you point to it?

A. The top one.

Q. And the second one, which is this one that I'm pointing to right here, the one in the middle?

A. Q-3-2; yes.

Q. That's from the envelope marked "Myra Franza;" am I correct?

A. That's correct, sir.

Q. Now, the one that's marked Q-4, the one that has Nelson Dacosta, C-O, Josephine Mendez?

A. Yes?

Q. This stamp over here, as you look at it, the one on the left side, where does that appear on that chart that you have in front of you?

A. Down here by the boarder. In this particular area here.

Q. Is that marked Q-4-1 on the stamp?

A. This is Q-4-1.

Q. And the one that is in the middle, that is marked - - where - - what is that marked?

A. That's Q-4-2, up at the top, this area here.

Q. Could you please tell us what you observed when you took this first stamp off of the Q-4 envelope, the Nelson Dacosta envelope, when you put it against that sheet of stamps that you have?

A. Again, there was a boarder.

I don't know. Can you see this?

There is a boarder on the bottom of this, along here. And what I've done was, I took the boarder and see if it would match up to this particular area here. And it did.

There is a slice here where it was torn and it slices - - where it rips together and there are other identifying features throughout the line here.

I have an enlargement of it. May I - -

Q. Yes, please do.

A. Demonstrate with that?

Q. Yes, please do.

A. It is some where.

MR. BRANCATO: This is in evidence as Exhibit Number 71.

Would you put it on the easel.

(Handed to the witness.)

A. This area here.

Q. That's the lower portion?

A. There is a jigsaw, as it goes through here. As it winds through, you can see that the fiber match up pretty good. Excellently, as a matter of fact. And in this particular area here.

Q. That's between the first and second?

A. And second hole.

Q. Hole, as you look at the middle of the exhibit.

A. You see there, there is a tear in the paper where some - - some went one way, the other went the other way. In this particular area. It is like a crown, if you will; all right?

MR. BRANCATO: Can you put it on the easel so Mr. Brenner can see?

THE WITNESS: I don't think he can see from that angle.

MR. BRENNER: That's all right, I can see.

THE WITNESS: Okay.

Q. Can you please refer to that area, where you referred to that crown?

A. In this particular area here. Right up here,

between the first and second holes.

MR. BRANCATO: Your Honor, the record should reflect, as you look at the exhibit, there is a three, about four or five inches from the left, and the officer is referring to the vertical holes that go up from the bottom, one and two.

THE COURT: All right, let's see them.

(Handed to the Court.)

THE WITNESS: Right here, your Honor.

THE COURT: Yes?

THE WITNESS: That slides right in there. They intersect.

THE COURT: I see. Let me make sure that I understand the exhibit.

Do you want to join us, Mr. Brenner?

MR. BRENNER: Sure.

(Whereupon, Mr. Brancato, Mr. Brenner and the witness approached the bench, where there was an off the recovered discussion with the Court.)

(Open court.)

THE COURT: So, it is the first hole and the demarcation line between the two sheets or the two stamps or whatever it may be.

Very well.

(Exhibit returned to the witness.)

THE WITNESS: Thank you, your Honor.

THE COURT: Has that been explained now to the jury? I just want to make certain. This wasn't a private conference, it was for the benefit of the jury and the Court.

BY MR. BRANCATO: (Continued)

Q. Can you please explain to the jury what you noticed when you put - - if - - put the stamps next to each other and observed them under the stereo microscope?

A. Not only did the boarder match up, but in this particular area here, between this hole and this hole, there is - -

Q. The first and second.

A. There is a crown like.

If I hold this this way, you may be able to see it better.

There is a crown-like effect. There is a point, a valley, a point and a valley.

Now, those points and valleys intersect with the corresponding piece in the known. It slides right in there, like it is saw teeth. Okay? And they'll fit right in there. Fits right in.

Also, have the match on the boarder; it comes up

and then this.

Again, throughout the line there are - - there are tears. You can see there is more impression on this side, less on this side. Okay? More of an impression on this side, less on this side.

Accordingly, it is a give and take throughout this. It is a haphazard pulling of the paper, all right, that separates them. It brakes where it wants to break.

MR. BRANCATO: Detective, if you would just put it back on the stand?

(Exhibit displayed.)

Q. The other - - the other stamp that is marked Q-3-2, could you point that out for us?

A. Q-3-2?

Q. Yes.

A. Right here.

Q. And could you please tell us what, if anything, you observed when you put that stamp next to the twelve stamps that were taken from the apartment?

A. I matched that particular stamp, it matched better to the top of this one.

My problem was exhibiting it to a jury; all right? When you line things up, all right, with anything, when you line things up, if you put them just to people's eyes, you

line them up and just move them a little off center, people's eyes tend to match them or fill in the gap. They tend to make them match; okay, and see it with your eyes. You don't physically do it, but you do it with your eyes. That's my problem here.

I matched this one and to do so I had to elevate it slightly. Then to show it over in this one here now, in the same exhibit, all right, these holes already slightly, that was much more elevated because of that.

But what I did do was match it across the top here and it matches, again, as you can see. This intersection here - -

Q. Now you're referring to another exhibit.

A. This is the same exhibit.

Q. This is number?

A. The bottom. But this is - -

MR. BRANCATO: I'm sorry, excuse me.

Q. This is Number 71 in evidence.

A. This portion is going to be the first couple of holes across here, going this way.

Q. That's across the top?

A. Across the top.

Q. The larger exhibit, which has all the stamps against the black background.

A. Again, they intersect perfectly across the line; all right? The give and take on the paper and holes match. If one, this one, breaks down low, this one is high. They intersect.

Q. Tell us which hole you're referring to on 71.

A. This would be the first hole here, coming off the upper right. I guess we'll call this the second hole.

Q. Is that the second one above the M.D., to the right?

A. Between the second and third hole, again right where this, the postmark is, it intersects perfectly there.

Again, here, one, two, three, the fourth hole, it is a significant zigzag match. It moves something like this; all right?

Q. Can you explain the movement you just made?

A. It is an "S" like. It is an "S" like motion. All right? If you laid an "S" down.

Q. All right.

A. And that appears here.

Q. That's in what position?

A. Laying down.

Q. Yes. But what holes, so you can get it down?

A. One, two, three. Between the fourth and fifth holes.

Q. All right.

A. These two holes.

Q. Looking at Q-3-1.

A. This one here?

MR. BRANCATO: This is Exhibit Number 69.

Q. Could you please tell us what, if anything, you noted when you looked at the sheet of stamps, Number 37 in evidence, that's this sheet?

A. Yes, sir.

Q. At that position that's marked Q-3-1, what did you notice when you looked at it under the stereo microscope?

A. There is another exhibit that - - the first exhibit, without the known writing? Known - - the question stamps on it, may I have that?

(Handed to the witness.)

A. Yes.

Q. Let's read the number on that exhibit for the record.

A. Sixty-eight.

Q. That's Number 68 in evidence.

A. In this particular match that was done on this area here, it involves this area here.

Q. That's - - that's the upper right-hand corner, the three cent stamp.

Now, what portion of that stamp are you referring to?

A. We're going to call this hole one, two, three. The third hole up.

Q. From the three at the upper side, on the right?

A. The third hole up. There is this little, I don't know, hook, if you will. Okay?

Well, that hook, that is by far one of the better matches; all right?

What transpired was, the paper, when it was pulled, all right, that hook, the hook is this finger, and it was pulled, this is the hole, it was pulled like this.

Q. Okay. Now, what you're doing for the record, please, I have to get this down.

You used your right hand and you made a "V" with your fingers on the side and then you used your index finger of your left hand and had it between the "V"; am I correct?

A. Yes.

Q. In using that same description, that hook, all right, it fits right between?

A. You can take this, the two pieces of fiber on the known - - on the question stamp, all right, have been separated by this. It has been pulled right out of the center of it. Okay? So there is a top and there is a bottom, and this

thing fits right in and goes right into that hook, right into the hole. It fits perfectly.

Under a stereo microscope, there is no doubt that those two, two pieces of the question stamp and the known stamp at one time they were one.

Q. Now, what you have on - -

MR. BRANCATO: What is that chart?

Q. On this chart, Number 69, the one that's marked Q-4-2, could you please tell us what, if anything, you noticed when you put the stamp marked Q-4-2 against the stamp marked "K" in Exhibit 69?

A. Okay. In this particular area here, okay, which is, again, this area here.

MR. BRANCATO: Your Honor, the record should reflect that the witness is referring to Exhibit Number?

THE WITNESS: Sixty-eight.

MR. BRANCATO: Sixty-eight and he's referring to the middle stamp, at the top, and there appears to be a piece of paper protruding from the middle stamp at the top.

THE WITNESS: Can you see?

(Exhibited to the jury.)

Q. Can you please tell us what you observed when you

took that stamp marked Q-4-2 and placed it against that stamp?

A. Well, from the rear of this, this portion here, okay, is pulled off from the rear of the other - - of this particular stamp. And what happened is, it's like shaved off, if you will, all right? So this is a very, very thin piece of the back containing the glue that's on the stamp.

Now, I have an enlargement of that that is some where.

MR. SHEINDLIN: Sixty-eight.

MR. BRANCATO: Okay.

A. And it matches up perfectly with the glue that's missing on the question stamp.

So, again, this is another perfect match, as along with the other ones, but, again, this is another - - another portion where it was shaved off, a little piece of it was shaved off, the glue and some paper was removed and the remainder of the paper is still on the question stamp.

Q. Okay, now in looking - -

A. Can I demonstrate that or?

The rear.

MR. BRANCATO: May we have this marked People's Exhibit Number 74 for - - I'm sorry, it has already been marked as an exhibit, as Exhibit

Number 73. It is already entered.

(Handed to the witness.)

Q. If you would just step back and using Number 73, this glue that you're referring to, can you please tell us where it appears?

A. All right. This is the rear of this document. This is Q-4-2. It is the rear of it. And this particular area here, this is that little circle that has pulled away from this area. And this little white, this white area that's right in here, okay, it fits in there, is the area where the glue has been pulled off.

MR. BRANCATO: Your Honor, the record should reflect that the witness is referring to Exhibit Number 73 in evidence and he's referring to that section which, as you look at the chart, is the third completed hole.

THE COURT: From the left?

MR. BRANCATO: From the left.

Q. On the one that is marked Q-4-2, what did you notice at that position where the corresponding stamp had the hole intact?

A. It was a match.

Q. Okay.

MR. BRANCATO: Your Honor, at this time I have

no further questions for Detective Breslin.

And if we can publish these exhibits for the jury, I have no further questions.

THE COURT: All right, let's proceed.

(Whereupon, the exhibits were circulated among the jurors.)

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRENNER: Mr. Brancato?

MR. BRANCATO: Sir?

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

(All exhibits returned to Mr. Brancato.)

THE COURT: Have we completed?

MR. BRANCATO: Yes, Judge. I just have a few more questions first.

THE COURT: All right.

BY MR. BRANCATO: (Continued)

Q. Lastly, Detective Breslin, these two exhibits, the envelopes from which you raised the stamps marked 31-A and C.

(Handed to the witness.)

Q. Did you compare the writing that appears on those envelopes with these exhibits that are in evidence as 23-B, 23-C and 23-E?

A. Yes, I did.

Q. And could you tell us what conclusions, if any, you reached after examining the known writings against those two envelopes?

A. I found that there was some strong similarities between the known writing appearing on 23-B, E and C and the question writing appearing on People's 32-A and 32-C.

Q. Now, on the previous three exhibits, the ones that we started with this morning, the one marked "Franza," the one marked "Julio Ortiz" and the one from the federal - - the American Express bill, you indicated that at that time the person that wrote those exhibits, those questioned writings, also wrote the question documents; am I correct?

A. Yes, sir.

Q. Now, in this case you said there are strong similarities.

Is there a difference when you say there are strong similarities as opposed to saying that the person wrote the others?

A. Yes, sir. I could not identify the author of the

known writing as actually authoring these. But there are some strong similarities between them.

Q. And what, if anything, prevents you from saying that those two envelopes were written by the same person?

A. A lot of the letters, the writing, okay, a lot of the writing has over-writings on them.

Q. What is over-writing?

A. Over-writings is, as it implies, when the man made his particular "J" here in Julio Ortiz, in this particular capital "J", he just wrote over it again. And that appears in a lot of the other writings.

So, therefore, any real identifying features that might appear in one are hidden by the other and then because of that ink being below it, the other writing being on top, the other ink line being on top would distort or hide the other identifying features.

So, the second writing actually, it being copied or written down, it's not exactly writing, it is drawing. Because he's now just copying what's there. He's following a particular line. He's not writing at that point.

Q. When you say identifying features are covered, what identifying features are you referring to?

A. Those various things that I look for in my examination that you can find, habitually find in the writing, pen

stops, pen twists, introductory strokes, ending strokes, the correlation between documents - - between the writings, each letter, their size, their slant.

I mean, I can see some of the things but I can't see real identifying features only because they are being covered over by the other writings that are on there.

So, therefore, I had to say there are some strong similarities there but, therefore, I could not identified the author of the known writings as writing these.

MR. BRANCATO: I have no further questions.

THE COURT: Ladies and gentlemen of the jury, it is now five o'clock. Normally we would commence the cross examination at this time. But in fairness to each of you and all counsel, perhaps it's best that we defer that examination until tomorrow morning.

Ladies and gentlemen, tomorrow morning, ten-thirty.

Do not discuss this case among yourselves or allow any third party to discuss the case with you.

The usual admonitions.

Have a very pleasant evening.

Take the jury out.

(Whereupon, the sworn jurors and the alternate

jurors left the courtroom.)

THE COURT: Did you have some questions?

MR. BRENNER: Yes, prime questions for the witness.

THE COURT: Outside the presence of the jury.

MR. BRENNER: Outside the presence of the jury.

CROSS EXAMINATION

BY MR. BRENNER:

Q. Detective Breslin, I could not help but notice that you are carrying a red folder?

A. Yes.

Q. You have a folder?

A. Yes, sir.

Q. Is that your case folder?

A. No, that was a folder given to me by Mr. Brancato to put everything in.

Q. Do you have a case folder in connection with your work in this case?

A. This is it. Everything.

Q. Did you prepare notes in connection with various steps that you took in your investigation?

A. Notes?

Yes.

Q. Notes, yes.

A. Yes.

Q. Would you keep an entry log of the things you were doing, the materials you were receiving, the tests you were performing as you did it?

A. What takes place is, everything is time stamped when it came into the laboratory and how I work on it is - -

Q. Would you document the test itself, the readings, the results?

A. No, just in my report.

Q. The only document that exists in connection with this case is your report?

A. And my exhibits.

Q. That's it?

A. Yes.

Q. You didn't write down anything as you were - -

A. Agh?

Q. For instance, when you did your jigsaw match and you found the match, did you write down, match, other than your report?

Your report was the ultimate product; is that right?

A. Yes.

Q. That was the formal report that was sent to Mr.

Brancato?

A. Yes, sir.

Q. Did you - - did you dictate that from something else, from notes, from some kind of memorandum to yourself?

A. I wrote down the evidence that was submitted to me. That's what you're?

I wrote down all the evidence that was submitted to me.

Q. What else did you write down?

A. I checked off when I returned it back into the D.A.'s Office.

I received a subpoena for that.

MR. BRANCATO: Judge, if I can just be heard for one second?

THE COURT: Yes.

MR. BRANCATO: If counsel wants to sit down with Detective Breslin and go through his file and make sure that he's got everything, that's fine.

MR. BRENNER: This is not my responsibilities.

MR. BRANCATO: I know that.

THE COURT: It is not responsibility, it is a question of preservation.

MR. BRENNER: That's why I'm doing this.

MR. BRANCATO: I think it would be better

served at this point, because I see - - I think I know which way we're headed here. He's making a Rosario inquiry. If that's the case - -

MR. BRENNER: It wasn't a secret.

THE COURT: Rosario?

MR. BRANCATO: Yes. Let's have him sit down with Detective Breslin at his own table and he can go through each page and say whether or not he has or does not have it.

If he doesn't, then we can finish that. But let's first do that.

THE COURT: You don't need the Court for that, nor the Reporter.

MR. BRENNER: Your Honor, we are between direct examination and cross examination.

THE COURT: And the district attorney - -

MR. BRENNER: Your Honor, may I?

THE COURT: Offers - -

MR. BRENNER: May I finish?

THE COURT: If you'll suffer an interruption?

And the district attorney offers to have you go through the record that the detective witness has in an effort to determine if anything that he has that was not made available to you.

MR. BRENNER: Only if the Court will then entertain a further statement on the record if that material had not been furnished to me prior to the opening statement?

THE COURT: Well, I don't want to reach conclusions until I know what we're dealing with. That's only fair.

MR. BRENNER: I just don't - - your Honor, at this juncture of the trial I'm not looking for an informal resolution of the Rosario issue. I would imagine that - -

THE COURT: Well, the offer still stands?

MR. BRANCATO: Yes.

MR. BRENNER: I'll accept the offer. Just provided I do not - - I am not - - I'm going to reserve every right that I have.

THE COURT: That's it.

THE WITNESS: Didn't we do this in the office the other day?

MR. BRENNER: You asked me what I was looking for and I told you.

THE WITNESS: All right.

MR. BRENNER: You gave me what I was looking for, but I don't know what else you have.

THE WITNESS: Okay.

MR. BRENNER: The other day?

THE WITNESS: When was that?

MR. BRENNER: Four months ago.

THE WITNESS: All right.

(Whereupon, the proceedings were adjourned until March 4th, 1992, at ten a.m.)

* * *

(Continued on the following page.)

MARCH 4th, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant.

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S :

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Counsel, step up.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court).

THE COURT: Are you ready to roll with the cross?

MR. BRENNER: I have a statement for the record first.

You seem to be nervous about the progress of trial. I wish to discuss that.

THE COURT: I wanted to discuss the bench conference.

MR. BRENNER: I wish to make a discussion.

THE COURT: That's not of import at this time. If you have an impediment. You raise it.

MR. BRENNER: I have an impediment.

THE COURT: Then we'll place it on the record.

MR. BRENNER: Your Honor, I'm aware of time constraints which we agreed upon jointly, as counsel for the various parties in this criminal

prosecution.

At the same time that I indicated and agreed to those constraints, I stated to the Court my intention to call - - well, withdrawn.

Mr. Rosotti has always been represented to the Court and to the defense as a prosecution witness. Certainly on the face of papers provided and the witness list provided and presence of Mr. Czarnopys, his counterpart, as part of the prosecution case, it was not unreasonable for the defense to deduce he would be produced as well.

When I learned he was not going to be produced, immediately thereafter I fax'ed a subpoena to Mr. Rosotti, spoke to him on three separate occasions. This was Friday last, your Honor.

Yesterday, when I got back to my office, I had a call from legal counsel for the Bureau of Alcohol, Tobacco and Firearms, who informed me that in order to procure such a witness that I would need to get clearance from the commissioner of the bureau and that would have to take the form of an affidavit setting forth what witnesses I wanted, their projected testimony and the relevance of that testimony to this trial.

When I informed legal counsel that an equivolent witness had already testified, perhaps in substance to what I anticipated asking a different witness, his scientific test vis-a-vis physical property, I was informed, while counsel understood, it made no difference. And that the time table indicated to me was that if I got them that affidavit today, the very earliest Mr. Rosotti could be produced was late Monday or Tuesday morning.

I said at that point that, and I will "that the trial Judge would do a tap dance on my skull" if that was the representation I made to the trial court. And I was informed that that was not his problem.

It is, however, my problem. And I believe that I have acted diligently as soon as I was aware that Mr. Rosotti was not going to be a prosecutor witness in attempting to obtain him for the defense.

I also made inquiry of the legal counsel whether Mr. Brancato, in his efforts to obtain Agent Behan's testimony and Mr. Czarnopys' testimony had gone through the same thing. And the retort was, and I quote, "I understand where you're coming

from, but that doesn't matter either."

I don't know, indeed, whether the prosecution had to do that. It is not particularly germane at this point.

Similarly, I wish to call Agent Behan for matters which would have been outside the scope of - - which were outside the scope of the direct examination and which, for strategic reasons I wish to have come forward on the defense case, which is my right. And I was similarly informed, although Agent Behan has already testified to the subject matter of which I intend to inquire, that I had - - I will have to to go through the same hoops to get him present, although he physically, unlike Mr. Rosotti, who is in Rockville, is in the area and could be sitting outside as we speak.

I was informed that neither witness will be allowed to take the witness stand until that affidavit was furnished.

This morning, when I learned all of this, I took the half hour delay that I requested from the Court, I prepared the affidavit and I fax'ed it down, together with copies of the subpoenas for both witnesses, to Washington. That's what I was

requested it do. I do not know what will happen.

THE COURT: Inquiry. Inquiry.

Again, I have no way of prognosticating the result.

If legal counsel, whoever is in charge of this, declines to have the people testify, either both or anyone of them, what is the posture there?

MR. BRENNER: The posture of? I will make my record and the trial will proceed.

I mean, I don't intend - - I do not believe as a jurisdictional matter this Court can hold the United States of America in criminal comtempt.

THE COURT: I agree with you.

Nor do I believe this trial can be held hostage to the desires of this legal counsel some where in Washington.

MR. BRENNER: Parenthetically, I should note it hasn't be held hostage to the whims of the legal department to this date, although we had three federal witnesses testify on behalf of the prosecution.

THE COURT: Now there is another way. You see, I'm not that persuaded with respect to Behand. If it is for strategic purposes or you say what you

would inquire, we're going beyond the scope of the direct and, therefore, would not be proper on cross, that may be a judgement that you've reached, but necessarily I don't share that.

At this point, that's again not a germane or valid discussion.

But with respect to Special Agent Rosotti, what I recall from the numerous bench conferences, that Agent Rosotti was the individual responsible with respect to the tool or tools tools that were either taken or examined.

Am I correct?

MR. BRENNER: That's correct.

THE COURT: Now, I don't know what it is that you seek from him.

MR. BRENNER: I'll state it.

THE COURT: No, I don't think - - no.

But what I am thinking, would it be conceivable that you could either get a stipulation with counsel or a stipulation to the effect that if Agent Rosotti were called he would testify as?

MR. BRENNER: As far as I'm concerned, your Honor, that is a matter of last resort.

THE COURT: No, because I'm trying to accomo-

date. It is not that I seek in anyway to preclude anyone from proceeding in a manner which they think is most effective.

At the same time, I have to be mindful of my obligations and the timeframe.

So, if that were - - if that would be responsive in the - - not in the first instance, perhaps, but ultimately if it could be resolved on that basis, then I think that you and Mr. Brancato should pursue that and have that prepared in the event that if you encounter any delay or any sort of frustration or impediments coming out of it, Washington or Maryland or wherever it was, you'll have it in reserve, this back-up position.

MR. BRENNER: I'm certainly not interested in cutting off my nose to spite my face at this point.

If Mr. Rosotti is made unavailable to me for whatever reason and Mr. Brancato is generous enough on behalf of the People to agree to a stipulation that -

THE COURT: Rosotti?

MR. BRENNER: It is. It is not helpful to his case.

Hence, Mr. Rosotti's absence from the stand

would -

THE COURT: I do not wish to be judgemental about this. I'm saying, if there is another way of reaching or satisfying that objective, then I make that suggestion to both sides.

MR. BRENNER: I understand.

My impression, for whatever it is worth, from the lawyer that I spoke to, was that this was almost completely bureaucratic, that there was something substantive about this at all. Because I made inquiry as to whether this was because I was calling him on behalf of the defense or the nature of the prosecution or the substance of the testimony and my impression, and I - - it is, again for what it is worth, was that, no, this was merely a matter of enforcing the regulations.

THE COURT: Well, with respect to Rosotti, the indication was he was only available Monday afternoon or Tuesday morning?

MR. BRENNER: Monday.

THE COURT: In addition to that, when will you have a reading from them whether they'll make this individual available as opposed to when he will be available?

MR. BRENNER: Tomorrow morning.

THE COURT: They will know whether they are going to aprove it or not?

MR. BRENNER: He's preparing a memo now, was awaiting the subpoenas and my affidavit.

THE COURT: All right.

MR. BRENNER: Then was fax'ing it over to wherever they fax it to.

THE COURT: Here's what I suggest. We proceed now in any event and you have other witnesses in addition to the cross examination which is about to commence.

MR. BRENNER: I'm expecting Detective Ortiz today.

MR. SHEINDLIN: He's here.

THE COURT: Somebody said he's here?

MR. SHEINDLIN: He's here, Judge.

THE COURT: So, we can go on and tomorrow we'll have some resolution or we'll have some direction whether we're going to meet this problem with the feds or they will be cooperating in the sense that they've make the individuals available. Either the answer will be academic or we'll go a different route.

All right, let's bring in the panel and get underway.

MR. BRENNER: One other matter, briefly.

THE COURT: All right.

MR. BRENNER: Reference maybe made to the - - a Family Court order of protection. Reference was made by Detective Giorgio.

The original Family Court order of protection was for other purposes, was subpoenaed and provided to this Court.

I wish to sua sponte move it into evidence as a certified record.

THE COURT: Do we have it?

COURT CLERK: It is attached to the Court records.

THE COURT: I believe we received it. Did you go up that time and it was sent to us? I recall an envelope coming down. It was a brown manila envelope envelope, about six-by-nine in dimension. That's my recollection.

MR. BRANCATO: Can I see it?

COURT CLERK: This is it.

MR. BRANCATO: Can I just see that?

(Handed to the Court.)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, let's go. Let's get the panel.

MR. BRANCATO: Do you want him back on the stand, Judge?

THE COURT: Yes.

(Whereupon, the People's witness, Detective John Breslin, resumed the witness stand.)

COURT OFFICER: Jury entering.

THE COURT: Yes.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Very good.

Good day, ladies and gentlemen.

Mr. Brenner, we'll proceed with the cross.

MR. BRENNER: Thank you.

MR. BRENNER: Juge, may I proceed?

THE COURT: Yes.

MR. BRENNER: Thank you.

J O H N B R E S L I N, Detective, having been previously called as a witness on behalf of the People, was previously sworn by the Clerk of the Court, resumed the witness stand and continued to testify under oath as follows:

CROSS EXAMINATION

BY MR. BRENNER:

Q. Detective Breslin, as far as your forensic investigation, this was a forensic investigation; is that right?

A. Yes.

Q. You were involved in?

A. Yes.

Q. As far as your forensic investigation was concerned, vis-a-vis the handwriting, there were seven question documents; is that right?

A. No, sir. I have six.

Q. Well, there was the note that was recovered from the scene of the shooting itself; is that right?

A. Yes, sir.

Q. There were two typewritten letters?

A. Two typewritten letters?

Yes.

Q. One proportedly to Nelson Dacosta; correct?

A. Yes.

Q. Bearing the word "yo", as the first word. I think that's the way you identified it; right?

A. Yes.

Q. A second typewritten letter proportedly to Josephine Mendez and Myra Frenza; is that correct?

A. huh-huh.

Q. Two envelopes?

A. Okay.

Q. Proportedly in which those letters were contained;is that correct?

A. Yes.

Q. That's five?

A. Yes.

Q. Yes?

A. Yes, sir.

Q. A Federal Express air bill?

A. Yes.

Q. On which various typewriting and handwriting appeared?

A. Yes.

Q. That's six?

A. Yes, sir.

Q. And the American Express money order upon which handwriting appeared?

A. Yes, sir.

Q. Correct me if I'm wrong, but that's seven?

A. Yes, sir.

Q. So, there were seven questioned documents that you as a handwriting expert were investigating; is that right?

A. Yes, sir.

Q. Now, in terms of the chronology of all this, your involvement started sometime in August, of 1990; isn't that right?

A. I believe so. I can look at it, sir.

Q. Please do. Please check, if you need to.

(Pause.)

A. The first - - the note that was submitted, that was on the flower box, that was submitted to me on July 18th, of '90, sir.

Q. So, in July your involvement started?

A. Yes, sir.

Q. You had, at that point, nothing to compare it against; is that right?

A. That's correct.

Q. So, in July, of 1990, your purpose was to examine

it, not so much for comparison purposes but for other forensic evidence; is that right?

A. Yes, sir.

Q. Did you, for instance, have it tested for fingerprints?

A. I did.

Q. And what was the result of your test? Were you able to lift a latent fingerprint?

A. There were no fingerprints of value found on the document. There were latent images that were presented. I photographed them. I sent them down to our Latent Fingerprint Unit for that individual's anaylsis. Or examination.

The report I got back was that there were no latents of value present on the document.

Q. Detective, you prepared three reports in connection with your forensic investigation; is that right?

A. Yes, sir.

Q. All right. The first was sometime in September, of 1990?

A. Excuse me. Actually, it was four.

Q. There are four?

A. There were four reports.

Q. When was the last?

A. In December, December 13th, of '91.

Q. With regard to handwriting, specifically handwriting, how many reports did you prepare?

A. Three.

Q. Okay. The first was in September, of 1990?

A. Can I?

Q. Yes.

(Pause.)

A. The first report was 8/3/90.

Q. August 3rd?

A. Yes, sir.

Q. 1990.

That was with regard to the fingerprints?

A. The fingerprints.

Q. The first report on handwriting, September, of 1990?

A. September 6th, 1990.

Q. All right. Now, at that time you had the note which was recovered from the scene?

A. Yes, sir.

Q. And you had ten handwriting exemplars which had been furnished to you by Detective Giorgio; is that right?

A. That's correct.

Q. And based on your review of that and that alone you made a report in September, of 1990?

Yes?

A. That's correct.

Q. Detective, in February you received significantly more material, did you not?

THE COURT: What year, February?

MR. BRENNER: 1991.

A. Yes, sir; I did.

Q. And would it be fair to say that you received in excess of a hundred pages of the allegedly known handwriting of Dominic Franza?

A. In excess of a hundred?

Some where around there.

Q. Some where around a hundred pages?

A. Yes, sir.

Q. Thirty-nine of which were contained in Mr. Franza's file.

Yes?

A. Yes.

Q. Others which were on loose pieces of paper?

A. Yes.

Q. Others contained from other sources?

A. Correct.

Q. All right. But in February, of 1991, you had at your disposal approximately one hundred pages of his handwriting?

A. Yes, sir.

Q. And in addition, you had approximately thirteen pages of typewritten materials?

A. Approximately.

Q. Well, how many was it?

A. I don't know. I have to go through my reports.

Q. Please do.

(Pause.)

A. Approximately fourteen or fifteen sheets of typewritten paper.

Q. And those were furnished to you by Agent Behan; is that correct?

A. The majority of them; yes, sir.

Q. And the source was, they had been seized from the apartment of Mr. Franza?

A. That's what I was told.

Q. As a result of the execution of the search warrant?

A. I'm not aware of that.

Q. Okay. In addition, in February, of 1991, Detective Raymond, of the Arson and Explosive Squad, came to you with a set of typewritten sheets; is that right?

A. I believe female detective.

Q. Female detective.

She informed you that she had gone and obtained

some exemplars from two typewriters in another apartment in that building?

MR. BRANCATO: I object to what she told him, Judge.

Q. Well, as a result of a conversation with Detective Raymond did you have the occasion to scientifically conduct any typewriting exemplar test?

A. She brought some typewritten documents, what - - she brought some documents with typewriting on it, I don't know if they were originals or photocopies, and she said are these similar to any writing that appears on the two typewritten letters.

And I made an examination. I said, no, they are different. They are different.

Q. So, would it be fair to say that those exemplars, whatever form they actually were, did not become part of your file?

A. That's correct.

Q. And the visual examination that you did did not become a part of the report you prepared?

A. She did not admit the evidence to the laboratory in the proper manner. It wasn't vouchered and it wasn't submitted and it didn't follow the normal chain of evidence.

Q. So, that's a no?

A. Therefore, I didn't put that in my report.

Q. Okay. However, there was a second question document report; is that right?

A. (No response).

Q. October 28th, 1991.

A. Yes.

Q. And that was after you had received the approximately one hundred pages of paper with Mr. Franza's known handwriting on it; correct?

A. Yes.

Q. And the approximately fourteen or fifteen pages of typewritten materials?

A. Yes.

Q. And you already had the handwriting exemplars that Detective Giorgio had provided back in August, of '90?

A. Yes, sir.

Q. So, just so that I'm clear.

You had the exemplars?

A. Yes.

From August?

Q. Yes.

A. Right.

Q. You had the one hundred pages of proportedly known handwriting of Mr. Franza.

Yes?

A. Yes.

Q. You had fourteen or fifteen typewritten pages.

Yes?

A. Some where around there; yes, sir.

Q. Then you had the seven question documents.

A. Yes.

Q. And your job at that point, if I understand it, was to take those seven documents in the form that you had them in and compare them against the mounds of paper or the paper that you had received from Agent Behan; correct?

A. Yes, sir. That is correct.

Q. And to determine whether the author of the question documents was the author of the papers that you had received; is that right?

A. Was or was not.

Q. Right.

Yes?

A. Was or was not the author.

Q. Was or was not?

A. Yes, sir.

Q. And breaking it down further, you had to determine whether the handwritten question documents, of which there were five; is that right?

A. Yes, sir. I believe.

Hold on.

(Pause.)

A. Yes, sir.

Q. Matched the handwriting, the known handwriting; is that right?

A. That's correct.

Q. And the two typewritten envelopes - - the two typewritten letters matched the known typewriting?

A. That's correct.

Q. Now, how many - - dealing with your October 28th report.

A. Yes, sir.

Q. How many hours did you spend doing the examinations, in the manner that you've described yesterday to Mr. Brancato, with the stereo microscope and visual examinations, how long did it take?

A. Numerous hours.

Q. Well, how many? More than two?

A. Yes, sir.

Q. More than a hundred?

A. No, sir.

Q. I'm sorry?

A. No, sir.

Q. So, some where between two and one hundred?

A. I don't know exactly how many hours it took. It did - - it took a long time of sitting there and studying each signature. And document.

Q. In any event, would it be fair so say you proceeded in your normal diligent and workman-like fashion?

A. Yes, sir.

Q. Now let's deal with the typewriting.

There were typewriting materials taken from Mr. Franza's apartment furnished to you?

A. Yes, sir.

Q. There were two letters.

Yes?

A. Yes.

Q. There was typewriting on the Federal Express air bill; is that right?

A. Yes.

Q. As a matter of fact, the only handwriting that appeared on there at all, other than - -

MR. BRENNER: Withdrawn.

Q. There was a signature on the bottom left-hand corner?

A. Yes, sir.

Q. That was being submitted to you for your examina-

tion?

A. That's correct.

Q. The - -

A. Excuse me. Sir, the whole document was submitted for my examination.

Q. But in terms of handwriting, handwriting as opposed to typewriting, it was the signature that you were examining?

A. That's correct.

Q. I mean, there may have been others, like bill numbers, but you eliminated those as consideration for you; is that correct?

A. I was told that was in question and the typewriting was in question.

Q. In comparison with the typewriting on the - - on the letters, the "threatening letters," comparing that to the Federal Express air bill?

A. Yes, sir.

Q. Did you, in fact, find the author of the theatening letters was the author of the air bill?

A. The air bill and the letters, the typeface on that, was consistent with one another.

Q. Well, so the author not withstanding, those two documents were typed on the same typewriter?

A. I don't know that for a fact, sir. I never

received a typewriter to make my examination from. That would be like saying, yes, it's a - - it's a Chrysler Plymouth. Okay? Chrysler made a lot of Plymouths; all right? So I'm not saying it's a particular - - I'm saying this is Plymouth, but which Plymouth was made by Chrysler, I don't know. Okay?

It's - - the typewriter company that made that typeface made that for numerous typewriters. But - - all right? So, I'm not saying it is the same typewriting, I'm saying that the typeface is similar on each one of the documents. Okay?

I had no known typewriting to make my comparison to. They were all question. They were all consistent. That is all. I had no known typewriting to make my comparisons to.

The known writing - - known typewriting that I received is different from the typewriting that appears on the two letters and the airway bill.

Q. Well, - -

A. Airway bill?

Q. Plymouths, for the moment not withstanding, would it be fair to say that based on your examination that the air bill and the money order were not - - I mean, the air bill and the letters were not typed on the same typewriter as

those taken from Mr. Franza's apartment?

A. Can you say that again, sir?

Q. Would it be fair to say that the air bill, the typed portion of the air bill, and the letters, the "threatening letters," were not typed on the same typewriter as the documents found in Mr. Franza's apartment?

A. No, sir; that wouldn't be fair to say.

Q. And why is that?

A. Because the typeface is consistent in the three areas.

Q. I'm - - you've lost me completely.

A. The typeface, it is a brand or a particular style of type that is made. The typeface is made for thousands of typewriters. Okay? And it is consistent, it happens to be consistent between the three letters - - between the two letters and the that airway bill.

Q. Detective Breslin, that's not what I asked you.

What I asked you was, would it be fair to say that the two letters and the air bill, those three documents, those three questioned documents were not typed on the same typewriter that produced the known documents taken from Mr. Franza's apartment?

A. The three documents were not produced by the known samples taken from Mr. Franza's apartment. That's correct,

sir.

Q. All right. Now, the report that you prepared on October 28th, 1991, you sent that to Detective Gilbert Ortiz, Detective Gennaro Giorgio and Special Agent Chris Behan; is that correct?

A. That's correct.

Q. You certified that it was true copy of your findings?

A. Yes, sir.

Q. And you signed it?

A. Yes, sir.

MR. BRENNER: I'd ask this be marked for identification.

THE COURT: We're up to F-F.

(Sheets, so marked Defendant's Exhibit F-F for identification.)

COURT OFFICER: Defendant's Exhibit F-F, so marked for identification.

(Handed to the witness.)

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

MR. BRENNER: Does the witness have it?

THE COURT: Yes.

THE WITNESS: Yes.

Q. Is that a fair and accurate representation of the report that you prepared?

A. Yes, sir.

Q. It is a copy, however?

A. Yes. Fax copy.

MR. BRENNER: I offer it into evidence, your Honor.

THE COURT: Any objection?

MR. BRANCATO: Let me just take a look at it.

THE COURT: All right, take a look at it.

(Handed to Mr. Brancato.)

(Pause.)

MR. BRANCATO: May we approach, your Honor?

THE COURT: Yes.

COURT OFFICER: Step down, sir.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Step over.

(Whereupon, the Court and all counsel being present at the sidebar, out of the hearing of the defendant, the jury and the witness, where the

following proceedings commenced:)

THE COURT: The defense has moved the introduction of Exhibit F-F, which is a report dated October 28th.

MR. BRENNER: 28th.

THE COURT: 1991, from Detective Breslin; addressed to Detectives Ortiz, Giorgio and Behan, regarding his examination of the document, question document, the conclusions that he reached.

MR. BRENNER: Now, I offer this - - well, my offer is that it is a formal report of the witness whose testimony has been proffered by the People as an expert.

I should note that the report documents only what he examined, assumedly when he examined it, what his observations were and what his conclusions were.

It contains no hearsay whatsoever, no indication in so doing he relied on anything outside the scope of the record or outside the scope of his own personal knowledge.

It is certified by him to be his - - the conclusion that he has testified to in court.

I believe that if it was necessary I could

establish that he did it as part of his duties as a forensic scientist, that he did it in the course of an investigation when he was requested as part of proper police procedure and that's why he certified to such.

It is certainly relevant to this proceeding. I mean, the relevancy cannot be questioned since it has to do with the subject matter of his testimony, the subject matter of his testimony.

I also have never been in a position where I've seen an expert's report which was non-hearsay in nature and did not rely on matters outside the scope of the record not admitted.

That's my proffer.

THE COURT: Mr. Brancato?

MR. BRANCATO: My only contention at this point is that this report, that he sent to three other law enforcement agents, at this point is an out of court statements by him and thus far nothing has been established to show any inconsistencies on the part of the witness.

MR. BRENNER: Hearsay only becomes - - it is only hearsay when somebody else attests to it.

THE COURT: I think what we're focusing on is

the wrong aspect, not whether it is hearsay.

The fact remains, you're offering it for what purpose?

MR. BRENNER: Because it is relevant and material to his testimony.

THE COURT: That's a conclusion.

MR. BRENNER: Judge, he has - -

THE COURT: That's a conclusion.

MR. BRENNER: He concluded in this report - -

THE COURT: You have the right to cross examine, you have a right to make inquiry with respect to his findings and reports that he rendered. And should it develop, and should it develop there are inconsistencies, you have the exhibit before you and you can confront him with it.

But offering it now, it is not a question of relevancy. It appears that there is no purpose, there is no purpose unless I'm to accept that it is being offered for something contradictory.

MR. BRENNER: No, I offer it for its truth. I offer it on behalf of the defense.

THE COURT: That's something that you may elicit from the witness directly at that point.

Now, it may just well be, depending on the

responses, that at some point it may come in.

But at this point you can proceed by examining the witness, even with reference, but without this documents, if ever being in evidence.

Let us proceed.

(Whereupon, the Court and all counsel returned to the open courtroom, where the following proceedings commenced:)

MR. BRENNER: You sustained the objection?

THE COURT: Yes.

(The witness resumed the witness stand.)

THE COURT: All right, the objection is sustained and we'll proceed.

BY MR. BRENNER: (Continued)

Q. Detective, in addition to the typewriting examination you did, you did a handwriting examination prior to October 28th, of 1991?

A. Yes, sir.

Q. And you looked, did you not, diligently and workman-like fashion through the hundred or so pages of documents that were alleged to be the known handwriting of Dominic Franza?

MR. BRANCATO: I object.

That assumes a fact not in evidence.

MR. BRENNER: Well, your Honor, may we approach?

THE COURT: Yes.

COURT OFFICER: Step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(The witness resumed the witness stand.)

MR. BRANCATO: I'll withdraw my objection.

THE COURT: Very well. Let's proceed.

BY MR. BRENNER: (Continued)

Q. For purposes of clarification, detective, when I say October 28th, I refer to October 28th, 1991.

That's the date of your second report; is it not?

A. Yes, it is.

Q. All right. Now, prior to that report you examined the hundred or so pages of the allegedly known handwriting of Dominic Franza?

A. Yes.

Q. And you included in that the handwriting exemplars furnished to you by Detective Giorgio back in - - in July or

August, of 1990?

A. That's correct.

Q. Now, documents that you examined, this is People's 63 in evidence - -

MR. BRENNER: I'm sorry.

Q. People's 64 in evidence,

MR. BRENNER: The record should reflect I'm referring to K-9, number 11 and K-9, number 13.

A. That's correct.

Q. Now, these two words, judge and judgement, with the, as you described it, distinctive "J"'s?

A. Yes?

Q. You had these in your possession prior to your report of October 28th, 1991, did you not?

A. Yes, sir.

Q. They were part of the hundred or so pages?

A. Yes.

Q. You also had in your possession the question document bearing this signature.

Yes?

A. That's correct.

Q. You were able to look at Q-5; right?

A. Yes, sir.

Q. And K-9, number 11, and K-9, number 13, in their

original form and compare them?

A. That's correct.

Q. As well as the other ninety-nine or so pages of Mr. Franza's allegedly known handwriting?

A. That's correct.

Q. And that would include Mr. Franza's personal file, thirty-nine pages?

A. Yes.

Q. Now, yesterday you came and told us, with the aid of these various exhibits, that the author of the question documents bearing the signature of Julio Ortiz and the American Express money order was the same as the known, the author of the known writings; is that right?

A. What you're saying is the airway bill and the money order?

Q. Yes.

A. Yes, sir.

Q. That's what you told us yesterday?

A. That they were authored by the author of the known writing.

Q. That is what you told us yesterday?

A. Yes, sir.

Q. And you used these exhibits to highlight those points; is that correct?

A. That's correct.

Q. On October 28th, 1991, in your report, did you reach that conclusion?

A. No, sir.

Q. What conclusion did you reach?

A. May I read from?

Q. No.

A. No?

I stated that there was some strong similarities between the question writings appearing - - question signatures appearing on, I believe at the time they were Q-5 and Q-6, the money order and the airway bill, but a more definite opinion could not be effected at that time.

And I further stated that I would ask for, if possible, additional writings be provided that were closely paralleling the question writing, be it obtained from the suspect in the case and submitted to me for examination.

Q. Well, actually your report said that it wasn't just Q-5 and Q-6 who you couldn't conclude authorship to was Q-3, Q-4, Q-5 through Q-6, October 28th, 1990?

A. Can I read the report?

MR. BRENNER: No, it is not in evidence. You may refresh your recollection.

THE WITNESS: Didn't he put that in evidence?

THE COURT: No.

THE WITNESS: I'm sorry.

THE COURT: It is marked as Defense Exhibit F-F.

THE WITNESS: I'm sorry, your Honor.

Q. You can use it to refresh your recollection.

A. I can use mine.

Q. You can use your own to refresh your recollection.

A. Thank you.

(Pause.)

A. Yes, sir. It was Q-3 through 6.

Q. So, Q-3, Q-4, Q-5, Q-6, four question documents in this case, October 28th, 1991, you had every document at your disposal that you have now, except for the last set of writing exemplars; is that right?

A. That's correct.

Q. Minus those documents, you were unable to reach a conclusive opinion as to the authorship of Q-3, Q-4, Q-5 and Q-6; is that right?

A. That's correct.

Q. Would it be fair to say that the difference, at least in terms of the substance you had before you - -

MR. BRENNER: Withdrawn.

Q. You did a final report, a third and final report.

A. Yes.
Q. That was in December, of 1991?
A. Yes, sir.
Q. You have that with you?
A. Yes, sir.
MR. BRENNER: Can I have this marked for identification?
THE COURT: G-G.
COURT OFFICER: These have been marked F-F. Did you give me the right ones?
MR. BRENNER: I'm sorry.
(Two sheets, so marked Defendant's Exhibit G-G for identification.)
COURT OFFICER: Defendant's Exhibit G-G, so marked for identification.
(Handed to the witness.)
Q. Is that a fair and accurate fax'ed copy of the report you prepared in December 13th, 1991?
(Pause.)
A. Yes, sir.
With the exception of your check marks, that I imagine you put on there. Someone put on there.
MR. BRENNER: Okay.
Q. Detective, again referring to People's 64 in

evidence.

You referred yesterday to these as distinctive; is that right?

A. Yes.

Q. In the question document Q-5, you were examining back in October, there is a "J" in what appears to be a "U".

Yes?

A. Yes.

Q. And in the two words that you extracted from the two page document, which was allegedly Mr. Franza's known handwriting, there is also a "J" and a "U"?

A. Yes, sir.

Q. And you were able to examine the "J" and the "U" in this word and the "J" and the "U" in this word and the "J" and the "U" in this word?

A. That's correct.

Q. Of course, you didn't have any of this yet; is that right?

A. Yes, sir.

Q. So, looking at this and this and this and everything else you had, you were only able to conclude that there were strong similarities and you were not able to conclusively state that the author was the same; is that right?

A. Yes, sir. The collected writings that were given

to me did not fully allow me to complete the examination.

Q. The collect - - there is a lot of writing in this case, isn't there? Known writing?

A. Yes, sir. The problem was a lot - -

Q. Sir. Not - -

MR. BRANCATO: Then I object.

MR. BRENNER: I didn't ask for a problem.

MR. BRANCATO: The form of his question.

MR. BRENNER: I asked whether there was a lot of writing. I think that can be answered yes or no.

THE COURT: Well, I'm going to sustain it because that question is pregnant with various possibilities as to its interpretation.

MR. BRENNER: Well.

THE COURT: Let's not argue the point.

MR. BRENNER: No, I was going to ask another question.

THE COURT: Very good.

Q. Mr. Franza's file, correct?

A. Huh-HUH.

Q. Thirty-nine pages?

A. Yes.

Q. There wasn't just one or two words on each page?

A. No.

Q. There was, on some occasions, fifteen, twenty, twentY-five lines of handwriting, is that right?

A. Of handwriting; yes.

Q. And would it be fair to say that in your review that - -

MR. BRENNER: Withdrawn.

Q. You had other documents as well; is that right, that wasn't part of Mr. Franza's file?

A. That's correct.

Q. In November, of 1991, Detective Giorgio submitted additional handwriting exemplars to you; is that correct?

A. November, of 1991?

May I?

Q. Yes.

(Pause.)

A. Yes, sir, that was my - - that was the last set of samples that were submitted to me.

Q. And it was subsequent to that that you prepared your final report.

Yes?

A. Yes.

Q. And in that - - that's the report in which you conclusively stated that the author of Q-5 and Q-6 was the

same as the author of the exemplars and the known writing?

A. That's correct.

Q. And so the record is clear, Q-5 and Q-6 are again the Federal Express air bill and the American Express money order?

A. That's correct.

Q. Now, exemplars, correct me if I'm wrong, exemplars are samples done in a controlled environment; is that right?

A. Yes, sir.

Q. Which a subject is asked to write certain words for purposes of comparison to question documents; isn't that right?

A. There are - - there are different types of exemplars. There are request exemplars and there are collected known writings or exemplars.

Q. Well, the exemplars furnished to you in July?

A. They would be collected. No, they would be request.

Q. And - -

A. July.

Q. And November?

A. Those were request writings.

Q. So, the two sets of exemplars that we're concerned with in this case are both of the requested type?

A. Yes, sir.

Q. And the subject is asked to - - is requested to write certain words, perhaps in a certain form, for comparison with question documents which may be similar in that form; is that right?

A. That's correct.

Q. And that's what was done in November, of 1991?

MR. BRANCATO: I object.

He doesn't know what was done.

Q. Well, the exemplars that you got - -

A. That were submitted to me in November?

Q. Right. Those were in a particular form, were they not?

A. Yes.

Q. All right. As a matter of fact, one of these sets of exemplars was in the form of the face of a money order; am I right?

A. I believe that to be correct.

Q. I show you People's 23-F in evidence.

(Handed to the witness.)

A. That's it.

Q. Now, would you agree that there are various factors which influence the way a person writes?

A. Yes, sir.

Q. For instance, physical condition, would that affect the way a person would write?

A. Yes, that would. If the man was injured or he broke his arm, that would have a drastic.

Q. Most extreme example. If someone had epileptic or palsey and had a shake to their hand, that would certainly affect the way that they wrote?

A. Yes, sir.

MR. BRANCATO: I object.

MR. BRENNER: He's an expert, your Honor.

THE COURT: Well, it's not a defined conclusion. It is probably the greatest probability.

Q. These scientific matters that we talk about, they are questions of probability, are they not?

A. Questions of probability? Could you repeat that?

Q. Well, handwriting - - forensic science, like any other science, is not a matter of certainty, is it? Absolutely certainty?

A. Absolute certainty?

As far as I'm concerned, yes.

Q. Oh, it is.

There is no margin for error in forensic science?

A. In forensic science?

Q. Yes. That's what I asked you.

A. There is a margin for error in everything.

Q. Including forensic science?

A. Yes.

Q. Okay. Now, would other factors that affect the way a person writes include mental factors?

A. That's correct, sir. That's a possibility.

Q. Stress?

A. Yes.

Q. Anxiety?

A. Again, all of these are possibilities that would, might affect someone's handwriting.

Q. Nervousness?

A. Yes.

Q. Fear?

A. Yes.

Q. Trepidation?

A. Explain that?

MR. BRENNER: Withdrawn.

THE COURT: Well, this going to be a thesaurus of words?

MR. BRENNER: Withdrawn. Withdrawn, your Honor.

Q. Detective, I would like you to assume the following facts in evidence. I would like you to listen carefully; all

right?

This is with regard to the handwriting exemplar submitted to you in July, of 1990; okay?

A. Yes, sir.

Q. All right. That I want you to assume that the person who is the subject of the exemplars is married.

I want you to assume that that person's wife in June, of that year, June of 1990, left him.

I want you to further assume that on July 17th, 1990, that his wife was shot in the face and taken to the hospital in critical condition.

I want you to further assume that his mother-in-law was also shot on that day and taken to the hospital in a similar condition.

I want you to further assume that he is not able to see her in the hospital on that night.

Please further assume that on the same night the subject is taken to the 34th Precinct and questioned about his marital problems with his wife.

I want you to further assume that he's asked about the circumstances of her leaving him.

He's asked about his activities of the day of the shooting; where he was before the shooting and after the fact that his wife was shot.

He's further asked about his bad relations with his mother-in-law, who has also been shot.

He's then asked to look at a statement and sign it.

Please further assume that on that night he remains in the precinct from approximately eight-thirty p.m. until two o'clock the next morning.

In addition, pleases assume the following facts as well:

One week later he meets with the same detective who questioned him on the 17th, who after a discussion related to the investigation advises him that he has a right to remain silent; that anything he says can be used against him in a court of law; and, that he has a right to an attorney.

Please assume he's then questioned again about his relationship with his wife and the occasions upon which he sent her roses.

Please further assume that the person who shot his wife and his mother-in-law came to the apartment under the ruse of having delivered roses.

Please further assume he's questioned about his knowledge of the basement apartment in the rear, which is referred to in the note found at the scene.

He's then again asked to sign the statement.

Please also assume, August 24th, 1990, this person

is at the 34th Precinct, again meets with the same detective who spoke to him on the first two occasions. He's served with an order of protection directing that he stay away from his wife.

MR. BRENNER: May we approach, your Honor?

THE COURT: Yes.

COURT OFFICER: Detective?

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Have the witness resume.

(The witness resumed the witness stand.)

BY MR. BRENNER: (Continued)

Q. Detective, you can recall so far? I don't have to go through it again, do I?

A. You're asking me to assume a lot. But go ahead.

Q. August 24th, 1990, this person is at the 34th Precinct, he meets up with the same detective who questioned him on the two prior occasions; that detective serves him with an order of protection directing that he stay away from his wife.

This is the same detective who has questioned him

twice and read his his rights on July 23rd, 1991.

He's told that the shooter left the note at the scene and he's asked to submit handwriting exemplars.

Please further assume he's given a sample of the note by this same detective, taken to a room in the police precinct and is asked to copy the sample over ten times.

Further assume that after five minutes this same detective, who has questioned him twice about his domestic problems with the victims of two shootings, about his flower sending habits, read him his rights and gives him a piece of paper stating that he have should stay away from his wife, he sits down and he watches the subject write out these exemplars.

Assuming all those facts in evidence, in your expert opinion, would those facts be consistent with the subject being under stress, anxiety, nervous or apprehension?

MR. BRANCATO: I would object.

THE COURT: Step up.

(WITNESS EXCUSED)

THE COURT: Step over to the side.

(Whereupon, both counsel approached the bench, where there was an off the record discussion with the Court.)

(Oepn court.)

THE COURT: Step up.

(Whereupon, the Court and all counsel approached the sidebar, out of the hearing of the defendant, the jury and the witness, where the following proceedings commenced:)

THE COURT: If you, Mr. Brenner - -

MR. BRENNER: I'm listening, Judge.

THE COURT: If you speak a definite instead of a possibility, he already answered that as a possibility - -

MR. BRENNER: A possibility of what?

THE COURT: If your question was a man now served with an order of protection, order of protection, would those factors - - would those factors - -

MR. BRENNER: Possibly?

THE COURT: Affect, affect handwriting, as you asked him with stress, nervousness, tension, trepidation, fear, whatever else.

MR. BRENNER: Right.

THE COURT: But what you're saying, you're trying to turn that into a definite. But this witness has no way of being qualified to answer that as a definite.

Can those factors contribute? Yes. It is possible. But that doesn't mean it does or it did.

MR. BRENNER: I didn't say it did. The question for an expert is consistency, Judge. I asked him whether it was consistent, period.

THE COURT: Consistent what?

MR. BRENNER: With such factors affecting this man's handwriting.

THE COURT: Again, that calls - - that calls for a definite.

All you can say, it is the reverse of that which you're asking, which is permissible, which you did ask as to items as to when you did it collectively.

As you went down the list, you asked could stress affect handwriting. He said it could. Could fears? Yes. Could this? Possibility.

Just a minute. Just a minute.

MR. BRENNER: That's not the - -

THE COURT: But to ask him is it consistent with lends itself to the conclusion that it did.

MR. BRENNER: No.

THE COURT: And that's - - it does. I mean, you may differ with me.

MR. BRENNER: Judge, like any other expert witness, the question is asked whether evidence is consistent with a conclusion. The jury is free to accept it or reject it. Mr. Brancato is free to cross examine it.

As I've heard eighteen different times, it goes to weight, not admissibility.

I mean, it is a question of consistencies. The jury is free to reject whatever he says.

THE COURT: Read me the question that Mr. Brenner had posed before the objection.

(Whereupon, the requested portion of the proceedings was read aloud in open court.)

THE COURT: The difficulty I had and I still have, that assumes that - -

MR. BRENNER: Judge?

THE COURT: That assumes something that's not before us.

MR. BRENNER: Might those factors - -

THE COURT: Those factors might describe?

MR. BRENNER: Yes.

THE COURT: Fine.

MR. BRENNER: That's what I'll ask.

THE COURT: Fine.

MR. BRANCATO: The objection is sustained?

THE COURT: He's going to rephrase it.

(Whereupon, the Court and all counsel returned to the open courtroom, where the following proceedings commenced:)

(The witness resumed the witness stand.)

BY MR. BRENNER: (continued)

Q. Detective, assuming all of those factors, might those factors, in evidence, contribute to the subject being anxious, nervous or apprehensive during the writing of the exemplars?

MR. BRANCATO: I have the same objection.

THE COURT: Read me the last part of that, after "might that."

(Whereupon, the requested portion of the proceedings was read aloud to the Court.)

THE COURT: Objection is overruled.

You may answer.

THE WITNESS: Thank you, your Honor.

A. May I question?

THE COURT: I'm sorry?

THE WITNESS: May I ask? I don't have all the factors.

THE COURT: Those that were put before you.

THE WITNESS: Okay.

A. I don't know whether the gentlemen is under arrest at the time?

I don't know that.

Q. Detective, under the facts that I've elicited to you, the litany of facts dating to July 17th, 1990, all the facts, the meetings with the detective, the facts of the shooting as I alleged to you, what detective - - the detective told the subject, all those facts, on August 24th, 1990, would those factors contribute to the subject being anxious, nervous or apprehensive, might they, during the writing of the exemplars?

That's all.

MR. BRANCATO: I still object to that question.

THE COURT: Same ruling; overruled.

Those factors. I mean, we can deduct and add factors. We're talking about those put before you.

THE WITNESS: It is an extremely hard answer to come up with, your Honor.

THE COURT: All right.

THE WITNESS: Due to the fact - - if there was no court order to force the man to sit and write or there was no arrest where he was asked, the man

freely gave this writing of himself, I would say that there is no - -

THE COURT: Your answer is basically no?

THE WITNESS: It could go either way, your Honor.

THE COURT: It could go other way. All right.

MR. BRENNER: Thank you, detective.

Q. Now, try to keep in your mind the factors that I've just elicited, all the facts to the degree that you can, please add the following facts in evidence.

That on August 24th, 1990, the subject submitted handwriting exemplars to Detective Giorgio, the same detective we referred to throughout.

A. What was that date, sir?

Q. I believe it was August 24th.

THE COURT: August 24th.

Q. 1990.

A. Okay.

Q. That on or about September 5th, 1990, you, Detective Breslin, determined that the author of the note left at the scene and the known - - the author of the exemplars submitted by Detective Giorgio are the same.

Further assume in February, 1991, letters are received by Josephine Mendez, addressed to she, Nelson

Dacosta and Myra Franza.

Please further assume that in February, of 1991, a pipebomb is recovered in Puerto Rico.

Further assume that on February 11th, 1991, the subject is brought to the 34th Precinct, he's arrested by Detective Giorgio and Ortiz, he's placed in a line-up to see if he's the person who tendered the pipebomb to Federal Express, he's thereafter indicted for the attempted murder of his wife, her mother and her grandmother.

Please further assume in November, 1991, while the case is pending, he submits further handwriting exemplars to the same detective mentioned throughout.

Assuming those facts in evidence, in your expert opinion, might those facts contribute to the subject being nervous, anxious or apprehensive at the time of the execution of the exemplars, in November, of 1991?

MR. BRANCATO: Judge, I have an objection.

I want to voice it at the sidebar. I want to voice it on the record.

THE COURT: All right.

(WITNESS EXCUSED)

(Whereupon, the Court and all counsel approached the sidebar, out of the hearing of the defendant, the jury and the witness, where the

following proceedings commenced:)

MR. BRANCATO: Judge, this man was tendered before this Court and jury by the People as an expert in forensic document examination.

What has happened now, we have crossed disciplines with a forensic document examination specialist and we have now asked him to speculate as to whether or not this would cause stress, this would cause anxiety, this would cause tension.

This man is no more capable of saying that this defendant would be under stress than I am of getting up there and testifying.

MR. BRENNER: Judge?

If we're going to do this at this volume, then we should do it outside the presence of the jury.

THE COURT: All right.

MR. BRANCATO: This man is no more an expert in this questioning, which is asking him to go into the mindset of a defendant, then you are or I am and into further psychiatry.

You are crossing disciplines here.

MR. BRENNER: Judge?

MR. BRANCATO: There is no evidence.

MR. BRENNER: Judge?

MR. BRANCATO: I want to say this.

MR. BRENNER: No.

MR. BRANCATO: I have spoken before and I've let you speak on the record. But I feel strongly about this.

MR. BRENNER: That's right. When Mr. Brancato felt strongly about something his voice tends to rise in decimals. That's my only problem.

THE COURT: All right. Do you want to respond? I got the gist of what you're saying.

MR. BRANCATO: The gist - -

THE COURT: I got that.

MR. BRANCATO: We're crossing disciplines here.

THE COURT: Now you're being repetitious. Once is enough.

MR. BRENNER: Out of the mouth of his own witness, it wasn't planned by me, he said it would make a difference whether the man was under arrest.

THE COURT: Let's be realistic about it.

As a forensic expert he cannot testify whether an individual would be under stress. That's the point.

MR. BRENNER: That's right.

THE COURT: What he can testify to is the fact

that stress, disability, illness, a multitude of facts could influence.

MR. BRANCATO: And - -

THE COURT: Now, what Mr. Brenner is attempting to do is bridge those two. By saying under these facts or these facts would those facts be sufficient to cause an individual - -

MR. BRENNER: I didn't say cause. You - -

THE COURT: Well, contribute. Might that not contribute.

MR. BRENNER: Contribute.

THE COURT: Well - -

MR. BRENNER: I would loved to have asked him.

THE COURT: I'm sure you would.

MR. BRANCATO: And this is why you are asking him to make the leap and say - - what you're doing is you're putting before the jury that he was under stress at the time as opposed to. That is not a question, that is not a question that he's asking that pertains to professional judgement on his part.

MR. BRENNER: Then give - -

MR. BRANCATO: He cannot testify that this defendant was under stress at that time any more than I can.

MR. BRENNER: He's not being asked that.

MR. BRANCATO: If he's being asked - - well, assume that at the time that he started to write it he started to cry or assume that when he started to write it his hands went to his face and he gave out a gasp, that's one thing. But what you're asking him to do is to gear his response from a personal point of view in the sense that you're asking him, a person in this situation, might a person in that situation be under stress.

MR. BRENNER: That's - -

MR. BRANCATO: That flies in the face of everything that you and I and Mr. Brenner knew because we know there are some situations where people are being told that they are being arrested for the death of a loved one and they are as calm as a cucumbers. We know there are some situations where people are told that you're the suspect and they look and laugh.

I have, this Court is well aware having tried a host of the cases, that the response of an individual individual is not one that this man can testify to.

THE COURT: Well, I - -

MR. BRENNER: He can ask him on re-direct. He can ask him all those questions.

THE COURT: I think the point is well taken.

I allowed you to ask him and I think that's a proper question, whether or not those factors could influence - -

MR. BRENNER: Could contribute. Could contribute.

THE COURT: But now to bridge the two.

MR. BRENNER: I asked him the same question with additional facts, exactly the same question.

THE COURT: I think it was wrong the first time and I think it should not have been allowed because once you start asking him to play the role of an expert in psychiatry, as opposed to a forensic handwriting expert, he can state from his knowledge that these factors can influence handwriting.

MR. BRENNER: All right.

THE COURT: Not the state of the mind of the defendant is such.

MR. BRENNER: All right.

MR. BRANCATO: But - -

THE COURT: Just a minute, Mr. Brenner.

MR. BRENNER: I'm sorry, I thought.

THE COURT: We haven't broken off.

MR. BRANCATO: It appears now that at the bench the Court realized that you should have sustained my objection.

I'm asking for a curative instruction.

MR. BRENNER: I move for a mistrial.

MR. BRANCATO: Move for a mistrial.

I'm asking for a curative measure at this point; that that question and that answer be stricken.

THE COURT: No. That's denied because the witness didn't answer either in the affirmative could. You know, he left it there, he's hazy as to the question tried to pin him down. He had no definitive response.

So, the same ruling and now the objection is sustained.

(Whereupon, the Court and all counsel returned to the open courtroom, where the following proceedings commenced:)

THE COURT: By the way, gentlemen, step up for a minute.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with

the Court.)

(Open court.)

(The witness resumed the witness stand.)

BY MR. BRENNER: (Continued

Q. Detective, you have told us, and would you agree, that authorities agree that stress and anxiety and nervousness might well be factors that might affect a person's handwriting?

A. Yes.

Q. Now, you testified yesterday, vis-a-vis Exhibit 62 in evidence; is that right?

A. Yes, sir.

Q. Would it be fair to say that People's 62 in evidence is the only cardboard exhibit that you prepared with regard to questioned, the question document which was the flowered note, the flower note?

A. That's correct.

Q. Now, these three samples of known writing, K-21, page 1, number 1, K-21, page 19, number 15, and K-25, page 23, number 7, were what you compared it against; is that right?

A. Yes.

Q. And that's - -

A. I - -

Q. You looked at - -

A. Those, I used those documents and actually all the writing that was submitted to me.

Q. Well, with regard to the original exemplars, the ones back in July, did you prepare any exhibits with regard to those, any cardboard exhibits?

A. No, sir.

Q. Do you have any cardboard exhibits showing you the word "Franza" on the note is the same as the word "Franza" in the handwriting exemplars?

A. No, I didn't.

Q. Now, these three "Franza's," if I may refer to them as such, come from the document Mr. Franza's file; is that correct?

A. Yes.

The three were what? Page what?

Q. Page 1, page 19, 20, 23.

A. K-21?

Q. Yes.

(Pause.)

A. Yes, sir.

Q. Okay. This is Mr. Franza's file?

A. Yes.

Q. Now, detective, again correct me if I'm wrong,

would you agree that in terms of comparison it is valuable for - -

MR. BRENNER: Withdrawn.

Q. It would be important to have as contemporaneous a known writing to the questioned writing as possible, would that be advantageous?

THE COURT: Just a minute. What did you mean by "comtemporaneous"?

Q. Do you understand my question?

A. Yes.

THE COURT: I don't.

Q. Could you explain to the jury?

MR. BRANCATO: No.

THE COURT: Just a minute.

Q. When I say "contemporaneous," I mean the position in time of the known writing when that was authored versus the position in time of the questioned writing and when that was authored; is that right?

A. We may have a difference of opinion on the word too.

THE COURT: Does that mean that any comparison cannot be made unless they are done contemporaneously?

MR. BRENNER: No.

Your Honor, I'm asking if it was advantageous to have them as close as possible.

Q. Is that right?

A. The best known writings to be provided would be, of course, comparable writing, script to script and printing to printing, same or similar letter and lettering conbinations and the best sample to obtain would be before the incident, during that same timeframe of the incident and then after the incident.

Q. Right.

A. To show a consistency within all the writings of the particular author.

Q. Writing, handwriting breakes down into class characteristics and personal characteristics, does it not?

A. Class or individual; yes, sir.

Q. And class characteristics - - well, tell us what, what are class characteristics?

A. They would fall - - a class characteristics would be a particular characteristic would fall into a general class. This is how everybody makes a "G". All right? Or an "O". All right? These were - - they would fall into a general category; that, yes, this particular letter is comparable. It is a general observation. This is a general characteristic here that the majority of people make this

type of thing.

Individual would be something within that general characteristic, okay, that's going to be individual to one particular person.

The way it habitually forms, whether it can be found in a lot of these samples, in the same place, each time.

Q. Detective, class characteristics can also breakdown in terms of writing systems; is that right?

A. That's correct.

For, again, unnatural writers. Most people when they learn how to write by the - - they go to grade school and what they attempt to do is copy, if you will, or model what was - - what everyone can see above the blackboard, the alphabet above the blackboard. Everybody goes and tries to copy that particular thing when they go and write.

When you mature as a writer, what takes place is you put your own shortcuts or characteristics into it. And that's what I look for.

Q. Variations from the class characteristics?

A. From class to individual characteristics.

Q. Now - -

THE COURT: Off the record.

(Off the record discussion between the Court

and the witness.)

Q. Detective, the variations or the deviations from the class are progressive, are they not?

MR. BRANCATO: I object.

THE COURT: Well, first - -

MR. BRENNER: I'll put it another way.

Q. You have told us that the handwriting system is taught at a fairly young age; is that?

A. That's correct.

Q. Taught it standard fashion in primary and grade school; is that correct?

A. Yes.

Q. Incidently, do handwriting systems vary ethnically?

A. Ethnically?

Q. Well, do people in Europe follow the same handwriting system as people in the United States?

A. There are different systems taught even within the United States.

Q. That's not what I asked you.

A. And in Europe and in the rest of the world there are different systems taught throughout the world.

Q. Is the system taught in Europe different than the system taught in the United States?

A. Yes.

Q. If someone is born in Europe and raised for a while in Europe and comes to the United States and finishes their education, might their handwriting not be a hybrid of the two systems?

A. Very possible.

Q. In Spain, if you know, people write with a different system? Are they taught with a different system than the United States?

A. I don't know that for a fact. There is a - - there are many systems throughout the world.

Q. And, again, there might well be a hybrid or two systems learned, based upon where a person was raised and where they were educated?

A. Yes.

MR. BRANCATO: I object to that.

THE COURT: A possibility.

MR. BRANCATO: Yes. I object to that.

THE COURT: Go ahead.

MR. BRENNER: Thank you.

Q. Now, you've told us that this is taught at a young age in the school room and that personal characteristics emerge from what is taught as in the class; is that right?

A. They develop over a period of time as the writer matures.

Q. All right. And so when I say progressive, I guess I'm sorry I used the word wrong. They develop over a period of time?

A. Yes.

Q. Correct?

A. That's what I stated.

Q. Do you know when this was authored?

A. No, sir.

Q. The subject matter of this has to do with a particular proceeding, does it not?

A. What?

Q. Does it not? I mean, you read this?

A. Yes, sir.

Q. Without telling us anything more, it has to do with a particular proceeding?

A. I believe so. I'm not sure.

Q. Do you know when that proceeding was?

A. No, sir; I do not.

Q. The "J" that you've referred to yesterday, in K-9, number 11, and K-9, number 13, that reflects what we've discussed as a personal characteristic, does it not?

A. Yes, sir.

Q. This is a deviation from the class characteristic of "J"'s?

A. Yes, sir. It's highly individualized.

Q. You described that a person starts below the line; is that right, comes up, and if there wasn't a bottom on this, it would look like a "B"; is that right?

A. Yes, sir. It would.

Q. There is a - - there is a fairly - - there is a loop here?

A. Well, a loop or a more or less a re-trace. I don't see a loop.

Q. Well, there is - - there is open space, is there not?

A. A loop is a circle. I don't see a circle. What I see come in and he goes right out.

Q. Oh.

A. Like a re-trace of it.

Q. But it isn't a re-trace because the re-trace would be over the same line?

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

MR. BRENNER: Who?

MR. BRANCATO: The last juror.

MR. BRENNER: Can you see now? I'm sorry.

Q. Coming over the top and doesn't cross down over the line again?

A. Sometimes when you make a three - -

Q. I'm directing - -

A. It is open.

Q. I'm talking about this incident right here. There is a space in here, is there not? I mean - -

A. There is a space.

Q. There is paper you can see through there?

A. Yes.

Q. Right on top.

A. Yes, sir.

Where are we talking? Which side of the "V"?

Q. The very top of the "J".

A. Top of the "J"?

(Handed to the witness.)

A. This portion up here?

MR. BRENNER: May I have it back?

(Handed to Mr. Brenner.)

Q. You had a pointer yesterday. Can I borrow it?

A. Yes, sir.

MR. BRENNER: Thank you.

A. Here you go.

(Handed to Mr. Brenner.)

Q. This part right here.

A. Yes, sir.

Q. That's - - you can see paper through there, can't you?

A. Yes, sir.

Q. All right. And you can see paper through here?

A. Yes, sir.

Q. Can you see paper through there?

A. No, sir.

Q. Would you call this oval?

A. Oval?

Q. Yes, oval.

A. Some what.

Q. Is this rounder?

A. Rounder?

Q. Rounder?

A. It is found.

Q. More round?

A. More round, yes.

Q. Is this oval?

A. Yes.

Q. And this is round.

Now, I guess you would call this a re-trace?

A. No, sir.

Q. Well, there is paper in between there, isn't there?

A. Yes.

Q. You can see paper?

A. Yes, sir.

Q. The writer came over the top, came down, swung around so that there is a space in there; is that right?

A. Yes, sir.

Q. The author.

Did the same thing here, so there is a space in there.

Yes?

A. Yes.

But also appears in the "G".

Q. There is a space here.

A. Yes, sir.

Q. Oh.

MR. BRENNER: Thank you.

(Pointer returned to the witness.)

MR. BRENNER: May we approach?

THE COURT: What was that?

MR. BRENNER: May we approach?

THE COURT: Mr. Brancato?

COURT OFFICER: Please step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the recovered discussion

with the Court.)

(Open court.)

(The witness resumed the witness stand.)

THE COURT: Ladies and gentlemen of the jury, at this time we'll recess for lunch until two-twenty-five.

Do not discuss this case among yourselves.

With the usually admonition, have a very good lunch.

Two-twenty-five, hopefully.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Off the record discussion between Mr. Brenner and the defendant.)

THE COURT: All right.

(Whereupon, the Court took a luncheon recess in the proceedings.)

* * *

(Continued on the following page.)

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, have the witness resume the witness stand, please.

(Whereupon, the People's witness, Detective John Breslin, resumed the witness stand.)

THE COURT: All right, get in the panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorneys and the sworn jurors are present, your Honor.

THE COURT: We're making progress.

All right, gentlemen.

J O H N B R E S L I N, Detective, having been previously called as a witness on behalf of the People, was previously sworn by the Clerk of the Court, resumed the witness stand and continued to testify under oath as follows:

CROSS EXAMINATION

BY MR. BRENNER:

Q. Detective, in the - - in the sphere of comparing known writing to question writing, there are various variables that one looks for; isn't that right?

A. Variables?

Q. Variables? Factors to consider?

A. Yes.

Q. You testified to some of them yesterday. There were others as well.

For instance, spelling is something that one examines; correct?

A. Yes.

Q. In Q - -

MR. BRENNER: Not Q-1.

Q. Did you ever refer to the note found at the scene of the shooting as anything other than the note found at the scene of the shooting? Did you label it in anyway?

A. On the first report it was Q-1, on the second report it was Q-1.

Q. Okay.

A. Being question note, we're talking about?

Q. Yes.

A. That was on the flower box.

Q. Right.

A. Yes.

Q. In regard to that note, were there any mis-spelled words, from your examination of it?

A. I don't recall offhand.

MR. BRENNER: Do we have that?

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

Q. Showing you People's 26 in evidence.

(Handed to the witness.)

Q. For instance, the word delivery?

A. Yes, sir.

Q. Is that spelled D-E-L-I-V-E-R-Y?

A. V-E-R-Y; yes, sir.

Q. That's the way it is spelled on the note?

A. D-E-L-I-V and the it is E-R-Y.

Q. Right.

A. Or I-R-Y.

Q. Well, you've alluded to punctuation dotting?
A. Yes, sir.
Q. There is no dot anywhere near that, is there?
A. No where near that.
Q. Okay.
A. At the end, I guess, a colon, there is two dots.
Q. Two dots, being a colon after the word delivery?
A. I believe so.
Q. Right. The word florist?
A. Yes. F-L-O-R-I-S-T.
Q. To the best of your knowledge, that's the correct way to spell it; isn't that right?
A. Yes, sir.
Q. Basement?
A. B-A-S-E-M-E-N-T.
Q. And as far as you know, that's the correct way to spell it?
A. Yes, sir.
Q. You are an expert in handwriting?
A. Spelling is very poor with me; yes.
Q. Do you know anything about the patterns of spelling or?
A. Patterns of spelling?
Q. Well, would it be fair to say, and only if you

know, that when an adult reaches a certain age that he or she is a poor speller, unless they take some remedial action they will remain a poor speller?

MR. BRANCATO: I object.

Q. Only if you know.

MR. BRANCATO: I object to that question.

THE COURT: Sustained.

Q. When you looked through Mr. Franza's file, the thirty-nine pages, did you find any spelling errors?

Did you look for any spelling errors?

A. Did I look for spelling errors?

Q. Did you look for spelling?

You said it is something that you compare when you compare known to question?

A. I looked for writing. That was my - -

Q. I think you said you looked for, you examine the spelling?

A. Yes, sir.

Q. In a known document; right?

A. Yes.

Q. To see if there is any comparison to the spelling in a question document; is that right?

A. Yes, sir.

Q. Now, if for instance, hypothetically, the same word

were mis-spelled in a question document and a known document, that would be something you would consider?

A. Yes.

MR. BRANCATO: I object to that.

Well, okay.

Q. Did you take note of whether the quality of the spelling in Mr. Franza's file? Did you?

A. The quality of the spelling?

Q. Yes.

A. Not particular note to it.

Q. But you've already said that the words in the note, as far as you can tell, that note, were all correctly spelled?

A. Some what.

Q. Okay. Page 1 of Mr. Franza's file. Do you have it in front of you?

A. No, sir.

MR. BRENNER: Do you have that?

(Handed to the witness.)

Q. People's 45 in evidence.

MR. BRANCATO: What page?

MR. BRENNER: Your page?

MR. BRANCATO: Your page.

MR. BRENNER: Your page.

MR. BRANCATO: Yes, give me that.

MR. BRENNER: 1286.

Q. Actually the cover, if you could direct your attention to the cover?

(Pause.)

Q. Now, you've alluded to this as Mr. Franza's personal file; is that right?

A. Yes.

Q. Could you, for the ladies and gentlemen of the jury, spell the way personal appears in the cover of that?

A. P-E-R-S-O-N-N-E-L.

Q. To the best of your knowledge, is that the correct spelling of the word personal?

A. No, sir.

Q. That's a mis-spelling; is that right?

A. Yes, sir.

Q. Okay. Now, directing your attention to page 1, line 10.

A. Yes?

Q. The word environment or can you recite how it appears there?

A. If that's what the word is, environment.

Q. Could you spell out whatever word it is?

A. It is either N-E or N-I-N-V-I-O-M-E-N-T.

Q. What is your reading of what that word is?

MR. BRANCATO: I object.

THE COURT: Say what he reads it as?

Q. If you can?

THE COURT: If he can.

Q. If you can make sense, some sense out of it, can you tell us what sense you make out of it?

A. Environment.

Q. Line 11, the word - - could you spell out the word there?

A. What appears to be H, printed H, and then Y-P either E or R - - E or I, there is no dot, R-C-O-N-D-R-I-A-C-K.

Q. Could you tell us what your best impression of what that word is?

A. Hypochondriac.

Q. To the best of your knowledge, is that the correct spelling of that word?

A. I'd have to look that one up.

Q. Would you agree that it reads hypercondriac, the way you spelled it?

A. Well, gee. I'd have to look it up.

Q. Okay.

MR. BRANCATO: May we approve for one moment,

off the record?

THE COURT: Yes.

COURT OFFICER: Please step down, detective.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(The witness resumed the witness stand.)

Q. Detective?

A. Yes?

Q. Page 3.

A. Yes.

Q. Line 29.

A. Page 3, line 29?

Q. Maybe we don't have the same pages.

A. Where are you?

MR. BRENNER: 1289.

Q. Do you have a line 29?

A. I got up to 7.

Q. Then it is page 2, the second page of page 2.

A. All right.

Q. Line 29.

A. Yes, sir.

Q. The last word on the line, on line 29.

Spell it, please?

A. Capital V, I would imagine, I-I-S-A-T-A-A-I-O-N.

Q. And what word does that appear to be to you?

A. Visitation.

Q. Do you know whether that's the correct spelling of that word?

A. I don't believe it is.

Q. Page 5.

A. Yes, sir.

Q. Line 8, last word on the first line of line 8.

(Pause.)

A. The last word?

Q. There are two lines under the numeral 8; is that right?

A. Yes, sir.

Q. The last word on the first line?

A. Last word, first line.

Capital C-O-M-M-I-S-I-O-N-E-R.

Q. What does that word appear to be to you?

A. I believe it to be commissioner.

Q. Do you know whether or not that's the correct spelling of that word?

A. No.

Q. Next page, detective.

A. Which would be what, 5, line 6? Line 6.

Q. No, apparently some of these - -

A. There are blank ones.

Q. The page between 5 and line 6. Still page 5, line 12.

A. Still page 5?

MR. BRENNER: Your page 1293, Mr. Brancato.

A. Page 5, line 12?

Q. Yes.

A. Yes, sir.

Q. Third word. Could you spell it for us, please?

A. I believe it to be R-E or I-C-E-M-E-N-D.

Q. And could you give us a fair - - your assessment of what that word is or could be?

A. Recommend.

Q. Do you believe that that's the correct spelling of that word?

A. No, I don't.

Q. Incidently, some of these words are difficult for to you make out. Are they - -

A. Difficult for - -

Q. Do they appear illegible in some places?

A. Illegible?

Q. Well, I think you said R, appears to be I or E; is that right?

A. Well, some letters, like an "I" or he being an upright letter, coming down, all right, whether it is a tight loop or not tight loop, it is not dotted, it's subject more or less to is it an I or an E?

Q. Okay.

A. But - -

Q. Your page 11.

(Pause.)

Q. Line 2.

A. Yes, sir.

Q. Third word.

A. F-A-M-I-L-A-R.

Q. What word do you believe that to be?

A. Reading the sentence, it's, I would imagine, it to be familiar.

Q. Do you believe that that's the correct spelling of that word, detective?

A. It's - - no, I don't.

Q. Page 15.

A. Yes, sir?

Q. Line 5.

A. Yes, sir.

Q. Second line from the bottom, last word.

(Pause.)

A. Capital R-I or E-S-E-V-I-O-U-R.

Q. And what word do you believe that to be?

A. I would imagine reservoir. Reservoir.

Q. Do you believe that's the correct spelling of that word?

A. No.

Q. Page 17.

(Pause.)

A. Yes, sir.

Q. Line 9. Second line in that enumeration, last word.

A. Lower case.

Q. Spell it please?

A. T-R-Y-R-A-N-T.

Q. Now, what is your reading of that word in the context of the sentence?

A. Of the sentence?

Tyrant.

Q. The person who wrote this put an "R" before the "Y" so it reads tryrant; is that correct?

A. Yes.

Q. That's not the correct spelling of this word, is it?

A. That's correct.

Q. Page 20.

(Pause.)

A. Yes, sir.

Q. Line 4, third word.

(Pause.)

A. S-P-E-A-P.

Q. Speap. That's what it spells.

A. Excuse me?

Q. Speap. Isn't that the way it is written?

A. S-P-E-A-P, yes.

Q. What is your belief of what this word is supposed to be?

A. I imagine it is supposed to be and it, the other words are spelled correctly, it is could not speak English in school.

Q. So, this word is not spelled correctly either; is that correct?

A. That's correct.

Q. Line 7, on the same page, first word.

(Pause.)

A. A-T-T-I-N or E-N-D-A-N-C-B, attendance, I believe.

Q. That's not the correct spelling of that word; is it?

A. That's correct.

Q. Line 8, same page.

Second line in that number, all capital letters, fourth word in from the left.

(Pause.)

A. Yes, sir.

Q. Could you spell that?

A. S-K-O-K-A-N-E.

Q. The word after that is Washington, is it not?

A. Yes, sir.

Q. So, this spelling Spokane; isn't that correct?

A. (No response).

Q. Correct?

A. I imagine that's how you pronounce it.

Q. Spokane?

A. Yes.

Q. Next page. Page 21.

(Pause.)

Q. Line line 6, first word.

(Pause.)

A. Line 6, first word? The black writing?

Q. Twenty-one. This is page 21, line 6.

A. This word?

MR. BRENNER: Page 1309.

THE WITNESS: Excuse me?

MR. BRENNER: I'm talking to Mr. Brancato.

Q. Yes, that word. Spell it please?

A. I, capital I-R either R or an I-A-T-I and then an E or A - - it is a loop at the end. I wouldn't venture a guess.

Q. What do you believe this meant to spell?

A. Well, it has - -

MR. BRANCATO: I object because he can't make out the letter, so he can't say what it is meant out to spell.

Q. A fair reading of the sentence, would the word be irraridge?

A. That's a fair assumption, sir.

Q. Would that be a fair spelling of it or a correct spelling of the word?

A. No, sir.

Q. Page 31.

(Pause.)

A. Yes, sir.

Q. Line 10, second full line, four words from the end.

(Pause.)

Q. After the numeral 2?

A. Okay.

Q. Spell that.

A. O-C-A-S-I-O-N-S.

Q. What does that word spell, if you know?

A. Again, in the context of the letter, Janice - -

Q. No, just tell us what it spells. If you can't, that's all right. Please don't read the rest.

A. I'm sorry, I thought you said - -

Q. What does it spell, actually?

A. I would imagine it's the word occasions.

Q. Is that the correct spelling of that word?

A. No.

Q. Next page, 32.

(Pause.)

A. Yes, sir.

Q. Line 6, second full line, first word.

(Pause.)

A. Second full line?

Q. Huh-huh.

A. First word?

Q. Line 6?

A. Line 6?

Okay.

Q. Second full line of that sub-division, first word.
A. E-V-E-R.
Q. Second line down.
A. Oh. Sorry.
Q. That's all right.
A. P-A-S-I-O-N-A-T-I-L-Y.
Q. To the best that you can ascertain, what does that word spell?
A. Passionately.
Q. Is that the correct spelling of that word?
A. I don't believe so.
Q. Page 34.
(Pause.)
A. Yes, sir.
Q. First line, numeral 1, third word in from the left.
(Pause.)
A. S-E-A-M-I or E-D. Probably E-D.
Q. What does that word spell?
A. Again, in the context, it should be seemed.
Q. Is that the correct spelling of the word in the context?
A. No, sir.
Q. The last word in that line.
(Pause.)

A. L-I-E-R. Liar.

Q. Is that the correct spelling of that word?

A. I don't believe so.

Q. Next page.

MR. BRENNER: Your page 1326.

Q. Line 15.

A. Thirty-four?

Okay, they are reversed or are they?

Q. Thirty-four; right. Line 15. First word.

A. It's S, capital S-U-P-P, it could be, in this case it could be an "I", an "E" or it might be an "O".

Q. Well, if it is an "I" or an "E" or an "O", what does the word then - -

A. And then R-T is the next next two.

So, it is, I guess, support to family.

Q. Up on that line 13.

A. Thirteen?

Q. Yes. Five words from the left, after the word "had."

MR. BRANCATO: Where?

MR. BRENNER: (Indicating).

A. U-L-S-U or S-I-R or S-U-S.

Q. And what is your reading of that word?

A. The next word is, looks like gallstones. So, I

would imagine it is ulcers.

Q. Is that the correct spelling of that word?

A. No, sir.

Q. On page 36, line 14.

(Pause.)

A. Yes, sir?

Q. Does the word uclers appear again?

A. Yes, sir.

Q. Is the spelled the same way as on the previous occasion?

A. Where was that previous occasion?

Here we go.

Q. It is on page 34, line 13.

A. All right, this one is, again, a larger "U". So, I guess it is a capital U-L-S-E-R-S.

Q. Is that also mis-spelling?

A. I believe so.

Q. The next page, finally, detective, line 6.

(Pause.)

Q. On page 37.

A. All right, you have to hold on a minute.

(Pause.)

A. Okay.

Yes, sir?

Q. Line 6.

A. Line 6; yes, sir.

Q. The middle line in that triplet of sentences, the first word.

MR. BRANCATO: Which one?

MR. BRENNER: 1320, line 6.

A. It is either F-I-I-E or F-I-R-E or it is an F - - I imagine it is fire exists.

Q. The word correctly spelled?

A. No, sir.

Q. Lastly, detective, very, I promise, lastly, page 38, which I think is the last page in this document.

(Pause.)

A. Yes, sir.

Q. The first line. Sixth word in from the left.

A. From the left? Next to last word?

Q. Yes.

A. A-T-T-I or E-M-P.

Q. What is your reading of the spelling of that word, given the context of the sentence?

A. Did you gave them or gin?

Q. Given the context of the sentence?

A. I'm sorry.

Q. That's all right.

A. Attempt.

Q. That's not spelled correctly either; is that correct?

A. That's correct.

MR. BRENNER: Thank you.

Q. Now, you didn't happen to keep count of how many times we did this?

A. No.

Q. It was numerous though, was it not?

A. Correct.

Q. Approximately twenty?

A. All right.

Q. Now, when you were reading through this - -

MR. BRENNER: Withdrawn.

Q. You examined this document from - - in those - - some where between two and one hundred hours in which you worked on the handwriting comparison; is that correct?

A. Two and one hundred?

Yes, sir.

Q. And you told us that in comparing known writing to questioned writing one of the factors, and how much weight you give, one of the factors is spelling.

A. Yes, sir.

Q. And did you say to yourself, gee, this guy is a bad

speller, the guy who wrote this is a bad speller?

MR. BRANCATO: I object.

MR. BRENNER: What ground?

THE COURT: Rephrase that.

Q. Did you make note?

A. I made note of the spelling on the first, a mental note, of the spelling on the first set of exemplars I was given.

Q. I'm sorry, maybe I wasn't clear because I didn't ask you about the first set of exemplars, I asked you about this document.

A. Oh, this document?

Q. Did you make a note, a mental, physical or any other kind of note, about the spelling that you observed here?

A. No.

Q. Well, you made reference to that first set of exemplars; is that right?

A. Yes, sir.

Q. Now, correct me if I'm wrong, but the mental note that you made was the word delivery?

A. That's correct.

Q. And the mental note that you made was the word delivery was mis-spelled.

Yes?

A. Yes, sir.

Q. It was spelled D-I-L-I-V-E-R-Y.

A. I believe that's the way it was spelled.

Q. Right. That's not the right spelling?

A. That's correct.

Q. That's a mis-spelling; correct?

A. Yes.

MR. BRANCATO: I object.

THE COURT: Step up.

COURT OFFICER: Step down, please.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(The witness resumes the witness stand.)

MR. BRENNER: Detective, let me rephrase my question.

BY MR. BRENNER: (Continue)

Q. In the exemplars, the spelling of the word delivery, as D-I-L-I-V-E-R-Y, is incorrect; isn't that right?

A. Yes, sir.

Q. Now, has it been your experience, detective, that

in handwriting exemplars the subject might intentionally mis-spell a word so as to avoid detection?

A. That's a possibility.

Q. Now, the word delivery here was incorrectly spelled; right?

A. Yes, sir.

Q. With regard to Mr. Franza's file, you have, we have, my questioning, your answers, identified approximately twenty instances in thirty-nine pages where words were also incorrectly spelled; is that right?

A. Yes, sir.

Q. One of the values of known handwriting is that it's done at a time when nobody is looking over your shoulder; isn't that right?

A. I don't know what you mean, sir.

Q. All right, let me put it another way, detective.

The value of it in terms of handwriting anaylsis is that it is proportedly done in the normal flow of events and not with someone is scrutinizing it for comparison; correct?

MR. BRANCATO: I object to the form of this question.

THE COURT: I think you can make it much simpler.

Q. Detective, known handwriting is not done at the

request of a detective, is it?

A. Yes, sir.

Q. No, the known handwriting, this known handwriting?

A. This?

Q. Right.

A. This wasn't; yes, that's correct.

Q. All right.

A. I believe so.

Q. Well, you don't know when it was done?

A. I honestly, I do not know when this was.

Q. And you don't know - -

A. When this was made or - - or done. I've no idea.

Q. You had no information from either Detective Giorgio, George Ortiz or Special Agent Behan that this was anything other than handwriting that was recovered in the apartment pursuant to a search warrant?

A. I was told - - that - - I was told that this was known writing of a suspect.

Q. Right.

A. That is all.

Q. And on the outside it has Mr. Franza's personal file; is that right?

A. Right.

Q. And there are approximately twenty mis-spellings in

this document; is that right?

A. Yes, sir.

Q. And there was a word incorrectly spelled consistently in the handwriting exemplars; is that right?

A. Yes, sir.

Q. That same word was correctly spelled in the note recovered at the scene, was it not?

A. Yes, sir.

MR. BRENNER: Thank you.

Q. Now, we discussed - -

MR. BRENNER: Withdrawn to the predicate, your Honor. I apologize.

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

Q. I asked you a series of questions before the lunch break about people doing exemplars under anxiety and stress and nervousness; is that right?

A. Yes, sir.

Q. And you, you answered that on occasions that - - those mental operations or psychological operations may have an affect on the way someone writes.

A. That's possible.

Q. Right. Now, you were not in the room with Detective Giorgio and Mr. Franza in November, of 1991, when

these exemplars were executed, were you?

A. No, I was not.

Q. But do you have information, do you not, that one of the sets of exemplars was from Mr. Franza next to an "X" and a signature line to write the words or to sign the words Julio Ortiz?

Yes?

A. You'll - - could you please repeat that? I'm sorry.

Q. One of the requests was for Mr. Franza, on a proverbial dotted line, a signature line next to an "X", to write or sign the name Julio Ortiz.

Yes?

A. That was at my request.

Q. Okay. And that was for comparison with the signature Julio Ortiz that appeared both on the American Express money order and the upon the Federal Express air bill; is that right?

A. That signature portion was just for the, I believe, the airway bill.

Q. And how many exemplars did you request?

A. Some where around fifteen.

Q. And how many were you provided?

A. Can I refresh or reflect my notes?

Q. Showing you People's 23 in evidence.

(Handed to the witness.)

(Pause.)

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

A. Twenty-one, sir.

Q. Twenty-one.

MR. BRENNER: If I may have a moment?

MR. BRANCATO: Can I talk to counsel for a moment?

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

MR. BRANCATO: Okay, Judge. I'll talk to counsel after he's completed.

MR. BRENNER: Thank you.

Q. There are twenty-one.

Detective, is one of the signature lines, one of the exemplars signed Ortiz Ortiz?

A. It is. Number 14.

Q. Ortiz Ortiz.

The others are signed Julio Ortiz; is that right?

A. Yes, sir.

Q. When you saw that, did you ask Detective Giorgio what happened?

A. (No response).

Q. I mean, that's the not the requested exemplar, is it? The requested examplar is the name Julio Ortiz.

A. Yes, sir.

Q. And Mr. Franza, when being asked by Detective Giorgio to sign Julio Ortiz, wrote it a number of times and then in the middle of those exemplars he writes Ortiz Ortiz.

A. Well, I would imagine he was asked to write in script Julio Ortiz. The first one he printed.

Q. No.

A. Number 1.

Q. No.

A. And then - -

Q. Ortiz Ortiz appears?

A. Yes, sir.

Q. Did, just when you observed that, did you say, based on your experience, did it occur to you that the person who did this did this out of nervousness?

MR. BRANCATO: Oh, I object to that question.

THE COURT: Sustained.

Q. Do you know why that happened? Did you ask Detective Giorgio why one of these exemplars had the last name twice?

MR. BRANCATO: I object.

MR. BRENNER: As to whether he asked, Judge?

THE COURT: If he asked.

Q. Did you?

A. Did I?

Q. Ask him?

A. No, I did not.

MR. BRENNER: Thank you.

Can I have those back?

(Exhibit returned to Mr. Brenner.)

Q. Detective, in referring to People's 63 in evidence?

A. Yes, sir?

Q. This is the question document; isn't that right?

A. Yes, sir.

Q. You talked about a particular, a initial stroke with a tick; is that right?

A. Yes, sir.

Q. And the initial stroke, the tick appears above the line crossing the "J"; is that right?

A. Yes, sir.

Q. Does it in any of the ones that are on here?

A. On there?

No, sir.

Q. Does it appear on any of the exemplars, the other eighteen?

A. I don't know, sir.

Q. You don't know?

A. Not offhand.

Q. Let me ask you, if it had it would be similar to this; is that right? I mean, if it had it would be a characteristic that would be similar to the question document?

MR. BRANCATO: I object, if it had.

THE COURT: Yes, the question will have to be rephrased.

MR. BRENNER: I'm sorry, I can't hear you?

THE COURT: The question will have to be rephrased.

MR. BRENNER: Okay.

Q. Showing you, again - -

MR. BRENNER: I don't know what. I don't know.

Q. Showing you People's 23 in evidence.

(Handed to the witness.)

A. Yes, sir?

Q. Now, before I ask you about that, just travel back, up to the point that you received K-23 and its fellow exemplars.

A. Yes?

Q. You were not able to conclude, conclusively con-

clude that the author of the question document and the author of the known handwriting were the same? You hadn't concluded that?

A. Before what, sir?

Q. You received the - - you received these exemplars in November, of 1991.

A. That's correct.

Q. Prior to the receipt of these exemplars, you were not able to conclude that the author of the known document and the question document, Q-3 through Q-6 were one in the same?

A. I said there were some strong similarities between them. However, I could not make a more definite opinion.

Q. And when you got this, you got a more definite opinion?

A. Yes, sir.

Q. Now I ask you. The tick that appears above the line on the "J" in the question document, does it appear in that fashion in any of the exemplars?

A. In any of the exemplars?

Q. In any of these exemplars.

A. Yes, sir.

Q. Oh, it does?

A. Yes, sir.

Q. And which one is that, sir?
A. Twelve, 15. Very pronounced in 19.
Q. Does it appear on here - -
A. 20.
Q. Detective?
A. Where are you?
Q. I'm on the exhibit you prepared.
A. Twelve. Twelve.
Q. The tick - -

MR. BRENNER: Let me ask this so there is no question in my - - in your mind what I'm asking you.

Q. The cross line of the "J"?
A. Yes, sir?
Q. The straight line across?
A. The cross bar.
Q. Right. The tick above it?
A. Yes, sir?
Q. Following through down into the rest of the "J".
A. Right.
Q. It appears that way in this exhibit?
A. Yes, sir. Right at the top.

MR. BRENNER: Okay. Just one more question.

Q. On the known, the "I"?

A. Yes, sir.
Q. That's extremely angled, is it not?
A. That's the question one, sir.
Q. I'm sorry. The question one.
A. That's the question.
Q. The "I" is extremely angled, almost forty-five degrees?
A. Yes, sir.
Q. It is out of alingment with the rest of the sloop, is it not?
A. No, it's pretty consistent with the "R".
Q. What else?
A. With the "R", the "O" is fairly slanted in Ortiz.
Q. Right.
A. Yes.
Q. What else?
A. Again, going down the other - - to the other word, that - -
Q. "U", "O"; right?
A. Yes.
Q. A lot of it is forty-five degree angled?
A. Not forty-five degree angled.
Q. Close?
A. It is slanted to the right.

Q. Right. In this word and in this word?

A. Yes, sir.

MR. BRENNER: Thank you, detective.

I'll take those back.

(Returned to Mr. Brenner.)

Q. The raised writing, detective, do you know when that was written?

A. No, sir.

The indented writing?

Q. Yes. Yes, I'm sorry. The indented writing.

A. Okay.

Q. Do you know when that was written?

A. No, sir; I do not.

Q. Do you know how many sheets of paper were between what you recovered and where it came from?

MR. BRENNER: I'm sorry, my question is inartfully asked.

Q. You told us that the process which you utilized can make clear indented writing through one or two or three pages of paper.

A. Yes, sir.

Q. And that would depend upon the strength of the impression when it was first written?

A. Yes, sir.

Q. The quality of the paper?

A. Yes, sir.

Q. The type of writing instrument used?

A. Yes, sir.

Q. The strength of the author?

A. Well, that would be the pressure; yes.

Q. Yes?

A. Yes.

Q. Incidently, the note in this case was written in red ink.

A. Yes, sir.

Q. Is there a process for testing - - testing - -

MR. BRENNER: A comparison, actually, that's what I mean.

Q. There is parts of the forensic science area is the testing of ink in a known document as opposed to ink in a question document to see whether the origin is the same, same type, same manufacturer; isn't that right?

A. Yes, sir.

Q. There is stuff in there that's written in red, is there not?

A. I believe so, sir.

MR. BRANCATO: In where?

Q. Mr. Franza's file. Mr. Franza's personal personnel

file?

A. Yes, sir.

Q. Did you do an ink test?

A. This particular writing here is what I believe to be a flair-type pen, where this was written with a ballpoint pen, sir.

Q. May I have that?

A. The cover.

(Handed to Mr. Brenner.)

MR. BRENNER: Thank you.

If I may have thirty seconds, your Honor?

THE COURT: Yes.

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRENNER: I don't want to hold up. I'll continue.

BY MR. BRENNER: (Continued)

Q. In any event, do you know how many pieces of paper were between the original writing and the indented writing?

A. No, sir; I don't.

Q. The process doesn't allow for that kind of specificity, does it?

A. No. It's very sensitive where you cannot tell.

Q. Lastly, detective, the stamps.

Your attention was drawn to the three cent stamps; is that right?

A. No, to the stamps.

Q. Well, the twenty-five cent stamps are still in there, are there not? They are in the voucher envelope with the envelopes?

A. Well, I had to, to make my exhibit, I had to put them down on a piece of plastic and I adhered it to that.

Q. This?

A. Yes.

Q. Yes. But you testified that there was thirty-one cents of postage on each envelope.

A. Yes, sir.

Q. There were two three cent stamps and two twenty-five cent stamps?

A. That's correct.

Q. Two twenty-five cent stamps, from two envelopes - -

MR. BRENNER: Withdrawn.

Q. Did you test the writing of the one envelope against the writing of the other envelope?

Do you understand what I'm asking?

A. No.

Q. In the envelope addressed to Nelson Dacosta, care of Josephine Mendez, and the envelope addressed to Myra

Franza and Josephine Mendez, were they written by a common author?

A. Author or authors. They very similar in nature.

Q. There are similarities between the two?

A. Yes, sir.

Q. Okay. So, at least in the course of your examination you ascertained that those two envelopes possibly originated from the same person?

A. Possibly.

Q. And you know, by virtue of the address, that they went to the same place?

Yes?

A. I - - aren't they two different addresses, sir? I don't remember offhand.

THE COURT: Two different what?

THE WITNESS: Addresses.

MR. BRENNER: May I?

MR. BRANCATO: Go right ahead.

THE WITNESS: That's it.

Q. People's 67 in evidence.

A. Okay.

Q. Same address?

A. Yes, sir.

Q. Okay.

A. They were addressed to different people though.

Q. But the address is the same?

A. The numbered address; yes, sir.

Q. 485 West 187th Street?

A. Right.

Q. The return address, both in terms of the sender and the address are the same.

A. Right.

Q. Right?

The postmark and date similar?

A. Yes, sir.

Q. Okay. And in your estimation, based on what you saw, there is a possibility, a strong similarity and could have been written by the same person?

A. Yes, sir.

Q. Okay.

A. That was prior to the submission of the known writings now.

THE COURT: May I have the exhibit?

MR. BRENNER: That's fine, detective.

Q. You took the two three cent stamps, tested them against the sheet?

A. Yes, sir.

Q. Did you take the twenty-five cent stamps off and do

anything with them?

A. I had no known sample to compare them to.

Q. What about each other?

A. No, sir; I didn't.

Q. Well, you talked about jigsaw; right?

A. Yes, sir.

Q. Jigsaw effect.

These two envelopes had things in common, did they not?

A. Yes, sir.

Q. You ultimately established that one of the things that they had in common was the stamps, the three cent stamps?

A. That was when I matched it to something known.

Q. But - -

A. But having the two question stamps, all right, coming from some source, all right, to turn around and say that this question stamp and this question stamp came from the same roll - -

Q. What if they came from each other?

A. That's what I'm saying, one was peeled off from the other, I didn't think that would have any bearing on who sent the - - who sent it. There was nothing known to compare that to.

Q. But each other?

A. And the question still is, where did they come from? Not each other, what source did they come from?

Q. So, aside from the fact that they might have been a connection, thus linking the two letters together more, there would have been no value to do that; is that right?

A. Well, I already had the other stamps in evidence that they were linked with the knows and there was no value to pursue it.

I also had no known roll of stamps - - roll of twenty-five cent stamps to make that comparison to.

Q. People's 71 in evidence.

This is an enlargement without distortion; isn't that right?

A. Yes, sir.

MR. BRENNER: Can everyone?

Q. Would it be fair to say, detective, that the top rim on this side, counting down from the perforation, all right, 1, 2, 3, 4, 5, 6, these six holes, would it be fair to say, based on your experience and your own observa- tions, that the top rim on this side is higher than the top rim on the other side?

A. No, sir. They are a match.

Q. You see these as aligned so that there would be a

complete circle; one side is not higher than the other?

A. Definitely.

MR. BRENNER: I'd like this published to the jury, your Honor, again, at this juncture.

THE COURT: It is in evidence.

(Whereupon, the exhibit was circulated among the jurors.)

THE COURT: Have all the jurors had an opportunity?

MR. BRENNER: Your Honor, I would like this marked for identification as a defense - -

THE COURT: It hasn't been marked?

MR. BRENNER: No. This is Q-4-1. It's got no marking, your Honor.

THE COURT: Mark it.

This will be Defense H-H.

COURT CLERK: H-H?

THE COURT: H-H.

(Photograph, so marked Defendant Exhibit H-H for identification.)

COURT OFFICER: So marked Defendant's Exhibit H-H for identification.

MR. BRENNER: Show it to the witness.

(Handed to the witness.)

Q. Now, detective, this is an exhibit that's been prepared by you?

A. Yes, sir.

Q. And that's not - - has not been previously marked by the People or offered into evidence by the People; is that right?

A. I believe so. That's correct.

Q. Well, you were here yesterday. You didn't say that this fairly and accurately represents something and then have them move it in, did you?

A. I did a lot yesterday.

Q. And today?

A. Yes, sir. And if you just marked it now, I would imagine it wasn't marked in yesterday.

Q. Okay. What does that fairly and accurately represent, if anything?

A. It is a photograph of the rear of this.

Q. Okay.

A. Which is People's?

THE COURT: People's?

A. People's 71.

Q. And the statements you made yesterday with regard to distortion and blurring in response to my questions?

A. Yes, sir.

Q. That you didn't believe there was any, that's as true for these as it was for those?

A. Yes, sir.

Q. And it fairly and accurately represents the rear of Q-4-1 and the test that you did on it; is that right?

A. Yes, sir.

MR. BRENNER: I offer it into evidence, your Honor.

MR. BRANCATO: No objection.

THE COURT: Without objection, Defense H-H for identification is now received.

(Photograph, so marked Defendant's Exhibit H-H in evidence.)

(Handed to Mr. Brenner.)

Q. Again, using your experience - -

MR. BRANCATO: Judge, can we put it on the easel? I can't see through Mr. Brenner.

THE COURT: Why don't we put it up on the easel?

MR. BRENNER: I'm sorry.

THE COURT: And it will be available to everybody.

MR. BRENNER: Thank you.

(Exhibit displayed.)

MR. BRENNER: Judge, may I approach the witness from that side so that I can?

THE COURT: Yes.

Would it help if you can borrow Detective Breslin's pointer once again?

MR. BRENNER: Yes.

BY MR. BRENNER: (Continued)

Q. Detective, using your experience and your observation, your powers of observation, is it not a fact that the upper rim of this side, on this hole, this hole, this hole, this hole, this hole, again, 1, 2, 3, 4, 5, 6, in your alignment is higher than this side?

A. Is higher?

The whole stamp is higher.

Q. Well, this is the opposite side of that.

A. This - -

Q. You said that wasn't?

A. This is out of alignment too, sir. But it matches up.

Q. Detective, not - - not - - not two minutes has gone, you said it wasn't higher, that it was a perfect match, that it wasn't higher.

A. It is a perfect match.

Q. You said it was not higher, did you not?

A. I don't remember. I - - it is higher.

MR. BRENNER: I have nothing further from this witness, your Honor.

THE COURT: All right.

RE-DIRECT EXAMINATION

BY MR. BRANCATO:

Q. Detective Breslin, using the exhibit that he just put in?

A. Which one?

Q. This one over here, this is the Defendant's Exhibit Number - - lettered H-H.

Counsel just asked you whether or not those six holes are higher.

The question I have: Are they aligned?

What do you mean when you say they are aligned?

A. Aligned?

When I made my match, okay, they aligned with one another, the holes are aligned up. But to demonstrate to you, all right, if I align them and they fit in together, you wouldn't see where - - you wouldn't see.

Like in this particular one here, this is open to the - -

Q. Now - -

A. All right, you will not be able to see clearly the

lines, where they intersect, where the rip was. So, what I did was, I aligned them just slightly out of position. This way you can see and you can make your own alignment and see how they do fit together. Otherwise, I wouldn't be able to demonstrate it to you.

So, one stamp is higher than the other; okay? That was done so you can put the puzzle together, so I can demonstrate that to you.

If I put them together you'd see a straight line. They'd be just like the other perforations here where there are no tears. You wouldn't be able to see it.

But in pulling it away slightly and moving it out of position slightly, okay, this is blown up seventeen times, all right, it is very, very slight the alignment. Again, so you can take them and fit them into position. That is the reason it was put out of position.

I couldn't demonstrate it to you if I just stuck it together. You would just have to take my basic word for it. It would be useless as no exhibit at all. That's more or less what it would be.

If for, again, I mis-aligned them for that purpose, so you can adjust the position, you can put them together yourself, you can see how they will fall in together. If I put them together, you wouldn't be able to see them.

Q. Detective Breslin, if you put them together, like the top line of the defendant's exhibit, and there were some fibers on one, is it possible to have an overlapping then with the fibers of another?

A. That's correct.

In a few of the stamps there is an overlapping of the actual thing. So, if I put them together, one would cover the other, you would not see that.

In the top one, if I can refer to that exhibit?

Q. Yes.

Which exhibit shows that, Detective Breslin?

(Witness approached the exhibits.)

A. This and this.

MR. BRANCATO: Let me just get these into the record.

We have here Exhibit 68 in evidence and Exhibit Number 73 in evidence.

Q. Using 73 first, could you please show us that?

A. I would rather use that one first.

Q. All right, would 68 show it?

A. Yes, sir.

Q. Go right ahead.

A. Yes.

(Handed to the witness.)

A. This flap, if you will, that's sticking up, this portion here.

Q. That's the middle stamp on the top?

A. This portion here, this portion here, if I took the stamp and laid it right on top of that, you wouldn't have seen this. You wouldn't see this portion of the evidence at all. All right?

So, I have to adjust the position or just move it slightly out of alignment, as I did here. This is the rear of this, it is this - - this is the flap portion right here, all right, and what I did was, I moved them slightly out of alignment and you can see here this is the top portion of that, okay, where the glue is on the rear. And this white portion over here, okay, is where the glue has been removed from.

Now, that was done for demonstration purposes only. Under a stereo microscope the evidence is clear, that this chance impression, okay, this chance happening, okay, it was ripped, the fibers did come apart; all right?

If I can use an analogy?

If you're ever in a toilet and pulled the toilet paper and it was two-ply toilet paper, sometimes the sheets, okay, you'll end up with one sheet on one side and one sheet on the other side; okay? That's the best I can do off the

cuff. All right?

That happens sometimes. That's a chance happening. That's what happened here. The fiber split and what transpired was some of the fibers, okay, this whole portion over here.

Q. That's on 68.

A. Can be found here. Okay?

This portion over here was removed from there. The fibers split, okay, and the glue went with one, with this, with this, the question stamp, the glue was removed. It stayed on here. So, this portion over here that's missing, the glue stayed on this.

This particular one, the question one, it's missing. And that's, the top half of the circle, this portion here.

Q. That's the middle stamp on sixty - -

A. Okay.

Q. On the initial sheet recovered from the apartment?

A. Is from this particular stamp here. It has been ripped off and taken from there.

That's the most pronounced and demonstratable one. And there was no other way, no better way to demonstrate it. Other than that. That I know of.

MR. BRANCATO: All right, detective, if you

can have a seat, please?

(The witness resumes the witness stand.)

Q. Detective, these thirty-nine pages that are marked Mr. Franza's file?

A. Yes, sir. This goes with that.

Q. There are several lines on each page; am I correct?

A. Yes, sir.

Q. Okay. I'm not going to ask you to spell words.

MR. BRANCATO: Judge, can we have this file, in its entirety, exhibited to the jury at some future point?

THE COURT: Yes. With the appropriate instruction.

MR. BRANCATO: Yes, Judge.

Q. Now, Detective Breslin, on cross examination Mr. Brenner asked you about certain documents that are marked Q-1, Q-2, Q-3, Q-4, Q-5, Q-6.

Could you please define for us now, Q-1, what did you term as Q-1?

A. There were two different reports. Actually, four different reports that were written and I have two Q-1's because there were two instances.

Q. Okay. In the initial instance, what was Q-1 termed?

A. It was the - - this particular document here, the letter that was found on this flower box.

Q. And initially that was marked as the first question document.

A. Right.

Q. Am I correct?

A. Yes.

Q. Now, there came a point, based upon what you said to the previous response, that you termed something else as Q-1.

A. That's correct.

Q. When did that happen?

A. Sometime in - - if I may?

Q. Be my guest.

A. Sometime the following February when additional writing, additional evidence was submitted to me.

Q. Now, when this additional evidence was submitted to you, this is in February, of 1991?

A. Yes.

Q. At this point had you already identified the samples submitted by the defendant in August, of 1990, to authoring that note that you have in front of you, the one that was found on the flower box?

A. Yes, sir. I used those samples to arrive at the

conclusion that the author of the known writing did, in fact, write this.

Q. And that's the note on the box?

A. That's the note that was on the box.

Q. So, some point in 1991, in your - - in your description of these documents, you now term something else as Q-1; am I correct?

A. Well, this was one case that was submitted to me. Of course, then the additional known writings that Detective Giorgio took, that was one set of - - that was one particular case; okay? And I had a Q-1, which was this.

Q. That's the note on the box?

A. Right.

And the known writings, which I marked K-1 to 10, which is People's - -

Q. Okay, hold on. Don't get me confused with numbers now.

A. How about we just say that the known writings from Giorgio from August.

Q. Okay. Those were the samples provided by the defendant - - well, you received samples from Detective Giorgio that you matched against the note on the box; am I correct?

A. That's correct.

Q. And at some point in February, of 1991, you received additional known writings of the defendant; am I correct?

A. That's correct.

Q. Now, Mr. Brenner kept referring to over a hundred pages.

What - - precisely what papers did you receive of the defendant in February, of 1991, did you receive?

A. February, of '91?

On February 11th I received the question items. What were they? The envelopes, the two envelopes.

Q. Okay, let's start.

At this point in February, of 1991, you received two envelopes.

A. Right. And - -

Q. What did you designate those envelopes? Did you designate them question documents?

A. Yes.

Q. Which numbers did you assign to them?

A. I assigned them, both envelopes were Q-3 and Q-4.

Q. So, Q-3, in February, of 1991, was an envelope?

A. Yes.

Q. To Myra Franza; am I correct?

A. Yes.

Q. And Josephine Mendez.

Q-4 was the envelope with the name of Nelson Dacosta; is that correct?

A. Yes.

Q. So,, Q-3 and Q-4 were the envelopes.

What was Q-5 in February, of 1991?

A. That was the Federal Express form.

Q. And that is what's in - -

A. Airway bill.

Q. Evidence, as Exhibit 39.

MR. BRANCATO: Am I correct, Mr. Brenner?

MR. BRENNER: That's correct.

Q. And Q-6, what was Q-6 in February, of 1991?

A. That was the money order.

MR. BRANCATO: Mr. Brenner, is that Number 36?

MR. BRENNER: I don't know. I gave them back.

THE COURT: That's the money order.

MR. BRANCATO: Yes.

THE COURT: American Express money order, that's People's 36 in evidence.

A. That money order came in in June.

Q. Okay. So, back in February, of 1991, up to that point is it fair to say up to February, 1991, you had identified the defendant's writing on the box of flowers, the note?

A. That's correct.

Q. And your question documents, in February, of 1991, what were your question documents, the one that you were trying to compare and identify or eliminate, in February, 1991?

A. They were the - - the two envelopes, two letters, the airway bill and that was it.

Q. Okay. What was Q-1 and Q-2 in February, of 1991? Did you designate anything Q-1 and Q-2?

A. I believe they were the typewritten letters.

Q. That was in this envelope - - that were in these envelopes?

A. Yes.

Q. I believe you said on cross examination that at some point you didn't stated - - you stated there were great similarities between Q-3, Q-4, the envelopes - -

MR. BRENNER: Objection.

The word was strong, I believe.

MR. BRANCATO: Sorry.

MR. BRENNER: I'm a stickler, but I thought that's what the word was.

Q. Strong similarities, Q-3, the envelope, Q-4, the other envelope, and Q-5, which was the Federal Express bill.

A. Yes, sir.

Q. When did you make that determination - -

A. I - -

Q. Of strong similarities?

A. Prior to my October report.

Q. What did you base that opinion on, that there was strong similarities?

A. Again, based on my examination of the question writing and the known writing.

Q. Okay. Let's go over the known writing.

In February, of 1991, what known writing did you have available to you?

A. In February, the end of February, I had - - I had three slips - - four slips - - three slips of papers, pieces of paper and a phone book.

Q. Okay.

A. A little telephone address book.

Q. Did you have available for you in February, of 1990, what is marked as Exhibit 35-A, 35-C, two slips of papers bearing some telephone numbers?

(Handed to the witness.)

Q. As well as this telephone book, which is 35-B?

(Handed to the witness.)

Q. As well as this piece of paper, which is 35-D?

(Handed to the witness.)

MR. BRENNER: Your Honor, may we approach?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(The witness resumes the witness stand.)

THE COURT: You may continue, Mr. Brancato.

MR. BRANCATO: Thank you.

BY MR. BRANCATO: (Continued)

Q. You indicated in February - - well, did you have those documents that are in front of you?

A. Yes, sir.

Q. Did you have Mr. Franza's file available to you?

(Handed to the witness.)

Q. In February, of 1991?

A. Yes, I did.

Q. Did you have any other writing, except for what you have in front of you now?

A. Yes, sir.

Q. And the four sheets of paper that the defendant wrote from detective - - for Detective Giorgio, in August, of 1990?

A. Yes, I had other documents.

Q. All right. What other documents did you have?

A. I had those two letters that had judge and judgement on them.

Q. That's Exhibit Number 61-A and B.

A. And the paper that was attached to that one.

Q. Anything else, other than the thirty-nine sheets of paper?

A. There were envelopes that were attached to those various letters.

Q. Is that it?

A. May I read away?

Q. If it would refresh your recollection to look at your report, please.

(Pause.)

A. Yes, sir; there were other sheets.

Q. What is that?

A. Four sheets of line paper, with - - white paper, with typewriting on it and writing on it.

Q. Okay. Anything else?

A. Another three page photocopy with typewriting on it, four page photocopy with typewriting on it.

Q. I'm talking about handwriting now.

A. There were two sheets of yellow paper bearing writing, which I think you just gave me.

Q. That's 61-A and B.

A. Yes.

An envelope with writing on it, a copy of a New York City Police Department form.

Q. Anything else?

A. I believe that's it.

Q. Okay. Now, at some point you indicated to Mr. Brenner that you concluded that Q-3, Q-4 and Q-5 had great similarity to the writing of the defendant.

MR. BRENNER: Objection.

May we approach, off the record?

THE COURT: Yes.

COURT OFFICER: Detective, step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(The witness resumes the witness stand.)

Q. Detective please, I've been reminded by my colleague that you used the word strong similarities.

MR. BRENNER: Actually, reminded by the Judge.

THE COURT: It is my learned colleague.

MR. BRANCATO: I wasn't referring to you, Judge.

THE COURT: No, I'm not your colleague.

Q. Now, when did you conclude that were strong similarities? When was that?

A. In October, prior to my October report.

Q. And is that in October, of 1991?

A. That's correct.

Q. What does it mean when you say strong similarities?

A. I found a sufficient amount of identifying features, but not enough to come across with an absolute definite opinion as to authorship. So, I couldn't identify him, nor could I eliminate him as writing the particular document based on the known writing that I had to compare it with.

Q. What was similar in the defendant's writings and the sample to the writing on the two envelopes and to the Federal Express bill, as well as the money order?

MR. BRENNER: Objection.

Outside the scope of re-direct, your Honor.

THE COURT: No, I'll allow it.

You may answer.

THE WITNESS: Thank you, your Honor.

A. That's a lot of ground to cover. Can we take it one at a time or?

Q. Yes.

A. Okay. In the two envelopes; all right?

(Handed to the witness.)

A. Again, in the two envelopes there was general formation of the letters were - - had strong similarities. Okay? But due to the fact that in the letters, all right - - the envelopes, rather, in the envelopes - -

THE WITNESS: May I, your Honor?

THE COURT: Go ahead.

MR. BRANCATO: Can we just close that door?

THE COURT: All right.

(Witness approached the exhibit.)

A. The two envelopes, there were strong similarities, strong similarities between the question writing that I had and the known writing. Okay? But due to the over-writings, as I mentioned before, over-writings being if someone wrote something and then went back and covered that particular letter, like an "N", in Nelson, they went down, made the letter and then went back and did it again, I lose the lot of detail, comparable detail at that point. So, all I have is the general formation of the letter to go on.

MR. BRENNER: Your Honor, I object again on the grounds of improper re-direct. I did nothing of over-writing. I did not go into this at all on

cross, at all. The People did this on direct. This is the second time.

THE COURT: Once again, Mr. Brancato, within limitation I'll allow you. But this is not a new direct.

MR. BRANCATO: I don't intend to go over everything, Judge.

THE COURT: No, nor would I allow it.

THE WITNESS: All right.

A. That was the reason I could not fully identify the author.

Q. Did you make any request in October, of 1991, to Detective Giorgio?

A. I asked for compatible writing, either by court order or just a request that the defendant be asked or ordered to sit down and write and supply with known writings in the sometime, wording and amount and that I asked for. I asked for fifteen, at least fifteen samples written with the same typewriting instrument, on some sort of paper made in a similar fashion. I tried to duplicate the circumstances to the best of your ability.

That's what I asked Mr. Giorgio to go out and do. And he supplied me with samples.

Q. Now, is there any advantage to have requested

writings as opposed to collected writings which do not contain the same wording and same form of writing?

MR. BRENNER: Objection.

Improper re-direct.

THE COURT: I think we're getting a little too far afield, so we better.

Q. What was - - what benefit, if any, is there to have the requested writing in the form of the question document?

MR. BRENNER: Objection.

Outside the scope of re-direct.

THE COURT: Overruled.

A. What happens is, I can compare similar letters and letter conbinations.

In the first exhibit, for instance, I only had the "J" "U conbination in judge and judgement on that - - to compare to Julio Ortiz; all right? I had the "J" and the "U" and a lot of "J"'s in Janice, in the word Janice that appears in here.

Q. That's Mr. Franza's file?

A. There are over thirty "J"'s in here that look just like that other "J", that very individualistic "J". There are at least thirty in there.

The only reason I didn't use them was, I had a "J" "U" conbination for Julio, "J" U", in that other piece - - in

that other document. Otherwise, I would have used those "J"'s.

But the bottom line is, I didn't have the rest of the word, the rest of the two names, Julio. I had the "J" and some of the other letters, but not in great amount for compatible material. I needed additional writings to better explain and better examine the document.

Given those additional writings, I was able to come to a conclusion. If I wasn't given the additional writings, the best I could say, there were strong similarities. But given the documents, I was able to make an identification.

MR. BRANCATO: If you would sit down, please?

(The witness resumes the witness stand.)

Q. Now, Mr. Brenner asked you before about contemporaneous writing.

What's the best time to have samples as opposed to question documents?

What do you mean when you say contemporaneous writings?

MR. BRENNER: Objection.

Mr. Brancato - -

THE COURT: I'm sorry?

MR. BRENNER: That's Mr. Brancato's term. AND asking the witness what he means by Mr. Brancato's

use of the term.

I object to the form.

THE COURT: I'm going to sustain it because earlier, I believe, you used that phrase and I sustained an objection then. Consistency demands that I sustain this objection as well.

MR. BRANCATO: All right.

A. The question?

(Off the record discussion between Mr. Brenner and the defendant.)

Q. For an adult, a man thirty-three years old, could you please tell us, can you compare writing from eight to nine years ago written by a - - writings of an adult from about twenty-five to writings at about the age of thirty-three?

MR. BRENNER: Objection.

Assumes facts not in evidence, your Honor.

THE COURT: Hypothetical.

MR. BRENNER: It has to have facts in evidence.

THE COURT: Well, if you rephrase it I'm going to allow it, Mr. Brancato.

Q. The man who sits over there with the black - -

MR. BRENNER: Objection.

THE COURT: Sustained.

MR. BRENNER: Objection, your Honor.

THE COURT: Sustained.

Q. In your practice of comparing writing, would you compare writing from a thirty-three year old to a - - a thirty-three year OLD writing, which was written at the time that that person was twenty-five?

MR. BRENNER: Objection.

Again, assumptions facts that have not been established.

THE COURT: That same question, if it is rephrased, will be permitted.

Q. Assume that a person is in his early thirties. Would you compare his writing from his mid-twenties?

MR. BRENNER: Objection.

THE COURT: Sustained.

MR. BRANCATO: Judge, may we approach?

THE COURT: Yes, you may.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(The witness resumes the witness stand.)

Q. Detective Breslin, this is in evidence, it is Mr. Franza's file, which has been referred to all this afternoon.

Could you please read the top of page line - - the top line on line - - page 37?

A. January 30th - - says 31st, January, '82, five p.m.. Five-O-O p.m.

Q. Assume that that document was written on that date or after that date and the person who wrote it is presently thirty-three years old.

Would you compare the thirty-three year olds hand-writing today to his writing ten years ago?

A. Yes.

Q. Would that be considered contemporaneous writing?

MR. BRENNER: Objection.

THE COURT: Unless you get the witness' definition, I'm not allowing it.

Q. What is contemporaneous writing?

A. That would be writing before, during and after a particular incident. Whenever this incident took place, which would be in '90, '91, I would like any writings that I could possibly get before that time period, during that time period and then after that time period. This would give me a clear picture or the parameters in which the author writes.

It would enable me to make a better decision and come to a better conclusions from all of the writings in that time period; okay?

Writing does change; okay? When we get up in years; all right? When you're up in years and you're writing starts to deteriorate, either illness - -

THE COURT: When you say "up in years," what years are you referring to?

THE WITNESS: To years around your years, your Honor.

THE COURT: No, you said "up in years." I wanted to know for the record what you meant by "up in years."

THE WITNESS: Up in years with an illness or some sort of illness or sickness - -

THE COURT: Natural progression of age, would you consider up in years?

THE WITNESS: Yes. But latter years.

THE COURT: I'm not asking for a prognosis of when we can anticipate my change, but merely what age you're talking about.

THE WITNESS: Some where late sixties, seventies.

THE COURT: Very well, you may continue.

Q. So, based upon your definition then, would you consider a person's writing when he were twenty-one or twenty-two to be contemporaneous when he's thirty-three?

A. Yes, sir. That's a fair description; yes.

Q. Now, this morning Mr. Brenner asked you a hypothetical question, a question that he asked you to assume.

Let me ask you: He asked you might that person be under stress at the point that he asked you to assume all those factors.

The note that was on the box, the one that you have in front of you?

A. Yes, sir.

Q. Could you please compare what stress the author of that note might have been under, assuming these facts:

The person wrote the note, the person wrote the note to send it with someone to make a delivery of the flowers - -

MR. BRENNER: Objection.

THE COURT: Read that last hypothetical.

(Whereupon, the requested portion of the proceedings was read aloud to the Court.)

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. When Mr. Brenner asked you to assume all those

facts in the hypothetical, I'm going to ask you to assume what he said.

But I'm also going to ask you to assume two other facts:

Assume that the night that the person - - I'm going to ask you to assume three other facts:

Assume that the night that the person's wife was shot he told the police that he would do everything he could to cooperate with the investigation.

I want you to assume that later that night, after all the things that Mr. Brenner told you, that the person went home and that the police drove him there.

Assume that the police asked him for a tape from his answering fax machine and assume that at the point that he turned over that tape, about seven hours after his wife was shot, he asked for a receipt for that tape and at that time his wife was still in the hospital.

And I want you to assume everything else he said and I want you to assume that when he's asked to give these samples, I want you to assume the additional fact that wasn't in the original hypothetical, that he told Detective Giorgio, no, and walked out of the P.D.U., less than one month or a little more than one month after his wife and his mother-in-law were shot, his wife in the face, and his mother-in-law

five times, and he walked out, a little more than a month and one-half after he told the detective initially that he would cooperate, and that he stayed away for about ten to fifteen minutes before finally returning.

Would that person be under more or less stress than what he asked you in the original hypothetical?

MR. BRENNER: Objection to the form.

Your Honor, I would like to approach.

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(The witness resumes the witness stand.)

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRANCATO: Detective Breslin, I'm going to withdraw my hypothetical.

BY MR. BRANCATO: (Continued)

Q. What I want to ask you before finishing, your training, you indicated earlier, is in the field or forensic document examination.

A. That's correct.

Q. Is that correct?

A. Yes.

Q. And do you have any formal training in the field of psychology?

A. Only taking psyche courses in college.

Q. What we all have taken.

MR. BRENNER: Objection.

A. One-O-one.

MR. BRENNER: Objection.

THE COURT: Strike one-O-one.

MR. BRENNER: I'll withdraw the objection.

Q. Do you have any formal training in psychiatry?

A. No, I do not.

Q. The fellow who is sitting against the wall with the beard, the Court Officer, you're looking at him now.

Could you tell what that person is thinking at the time that he's sitting here?

MR. BRENNER: Objection, your Honor.

THE COURT: Sustained.

MR. BRANCATO: I have no questions.

RE-CROSS EXAMINATION

BY MR. BRENNER:

Q. Detective Breslin, if we need the easel, I'll

approach. But this is referring to People's 72 for evidence.

A. Yes, sir.

Q. Right?

You see this hole?

A. Yes.

Q. That's almost complete, is it not?

A. Almost.

Q. It is rounded, rounded - -

MR. BRANCATO: Judge, I have an objection.

When I asked some questions he said it was outside the scope of the cross.

MR. BRENNER: Talked about the stamps.

MR. BRANCATO: Now he's going into this. I have that objection.

MR. BRENNER: Your Honor, with all due respect?

THE COURT: Let's not argue. I'm going to overrule it.

MR. BRENNER: Thank you.

Q. This is complete; is that right, or close to complete?

A. Almost.

Q. Based on your observation and your experience, would you say that the top of the holes following are to the

left, alinged to the left of the ones on the bottom?

(Handed to the witness.)

A. (No response).

Q. Yes or no.

A. To the left?

The top stamp - - you're going to have to. You're saying what now? What is the question?

(Handed to Mr. Brenner.)

Q. This hole is complete. The - -

MR. BRANCATO: Judge, I can't see the document.

If you can put it up?

MR. BRENNER: Can you all see it?

Q. The edges on the top here form almost a complete circle; correct?

A. Almost.

Q. In your observation, are the edges of the top on these holes following them over to the left?

(Handed to the witness.)

A. Yes, sir. That was done - -

Q. Thank you.

A. That was - -

Q. Thank you, Detective Breslin.

MR. BRENNER: I have nothing further.

RE-DIRECT EXAMINATION

BY MR. BRANCATO:

Q. Why was that done, Detective Breslin?

A. Again, so the jury could make the match. So I could demonstrate on the other side of the stamp, okay, where the glue was removed. Where the glue was, it would have covered it; all right? And it would have been a very good match. Without me moving it slightly you would have never saw the little white space on this side where it was moved from.

That's why it was moved, as you're pointing out.

Q. But this hole - -

MR. BRANCATO: I have no further questions, Judge.

THE COURT: We're now on the re, re-cross.

RE-CROSS EXAMINATION

BY MR. BRENNER:

Q. This hole - -

THE COURT: I'm allow it.

Q. This hole?

A. Yes, sir.

Q. Doesn't show a mis-alignment, it is almost a perfect circle, isn't it in? It is part of the same stamp?

For the jury's purposes, to demonstrate to the jury

you put this together in an almost perfect circle yet the others are pulled to the left; isn't that right?

A. No, sir.

Q. Isn't that right?

A. No, sir.

Q. It is not right?

A. It is not a total, complete circle.

MR. BRENNER: I would like this published to the jury and then I have no further questions.

MR. BRANCATO: Judge, it has been published already.

THE COURT: Show it to the witness.

THE WITNESS: Can I see the other bit?

MR. BRENNER: Not by me.

THE COURT: Which exhibit, sir?

THE WITNESS: The one, just the known stamps on it.

THE COURT: Do you know which one he's making reference to?

MR. BRANCATO: Yes.

MR. BRENNER: I - -

THE COURT: I'll give the witness an opportunity to explain.

THE WITNESS: Thank you.

THE COURT: Is that the one?

MR. SHEINDLIN: 68.

THE COURT: Is that the one?

THE WITNESS: No.

(Handed to the witness.)

THE WITNESS: The top stamp over here is almost - -

THE COURT: Will you stand back so counsel can get the benefit?

Counsel, why don't you get around?

MR. BRANCATO: Judge, that's Exhibit Number 68.

THE COURT: All right.

THE WITNESS: Can I?

THE COURT: Yes.

THE WITNESS: Thanks.

A. This particular - - I'll stand down.

Right here, this is what we're talking about, this spot here; all right? It is a complete circle or almost complete circle; okay? As you can see here. Some of the fibers have been disturbed in this area right here.

This is the top of this. Here's the circle.

Counting over, from the edge, which is this, 1, 2, 3.

One, 2, 3, this is the spot right here, where these things match. Okay?

I couldn't show that in any other way, other than the way I've shown it. This portion has been pulled away from here. I don't know how else to explain it. That's - - if I were were to put the other stamp on top of this - -

MR. BRENNER: Your Honor.

A. What would happen, it would cover it totally.

THE COURT: Yes?

MR. BRENNER: Your Honor, there is no question at this point.

MR. BRANCATO: You told him you'd give him a chance to explain.

THE COURT: I told the witness I'd give him an opportunity to finish his answer.

MR. BRENNER: I understand.

THE COURT: So, it would not be dangling. It is just the explanation as to those holes, when they are completed, as far as that question.

THE WITNESS: Yes.

THE COURT: We're not going beyond that.

MR. BRENNER: Yes.

THE WITNESS: I've done that.

Thank you.

(Exhibits returned to Mr. Brancato.)

THE COURT: Step down, Detective Breslin. You are excused.

THE WITNESS: Thank you, your Honor.

THE COURT: We'll take a short recess.

MR. BRENNER: May we step up?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen of the jury, at this time we'll take a short recess and we will resume.

Do not discuss this case among yourselves.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Continued on the following page.)

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Bring in the panel.

COURT OFFICER: Jury entering.

THE COURT: Yes.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial continued.

The defendant, his counsel, the assistant district attorneys and the sworn jurors are present, your Honor.

THE COURT: Very well, Mr. Brancato.

Mr. Sheindlin, you may continue.

MR. SHEINDLIN: Your Honor, there are two stipulations which we'd like to read into the record.

THE COURT: Very well, proceed.

MR. SHEINDLIN: The first stipulation is: It is hereby stipulated by the People of the State of New York and the defendant that if Dr. Gary Ruth testified Dr. Gary Ruth on would testify that on July 17th, 1990, Myra Franza was admitted and medically treated at Harlem Hospital, as a results of suffering from a gunshot wound to her facial area and a fractured jaw.

Dr. Gary Ruth would further testify that on July 22nd, 1990, he performed oral surgery on Myra Franza to surgically repair Maya Franza's fractured jaw.

Additionally, Dr. Gary Ruth would testify that as a result of the gunshot wound suffered Myra Franza, she has permanent nerve damage to her facial area.

THE COURT: All right, so stipulated.

MR. SHEINDLIN: That completes the first stipulation.

With respect to the second stipulation:

It is hereby stipulated by the People of the State of New York and the defendant that if Dr. N. Qwiloh, Q-W-I-L-O-H, Chief Resident, Harlem

Hospital, testified, Dr. Qwiloh would testify that on July 17th, 1990, Josephine Mendez was admitted to Harlem Hospital suffering from five gunshot wounds.

The first gunshot wound was located in Josephine Mendez' facial area and caused a fractured jaw.

The second gunshot wound was located in Josephine Mendez' upper chest area.

The third and the fourth gunshot wounds were located in Josephine Mendez' right arm.

The fifth wound, the fifth gunshot wound was located in Josephine Mendez' left forearm.

Doctor, I believe it is, Qwiloh would testify that Josephine Mendez required medical treatment in Harlem Hospital until August 1st, 1990.

Dr. Qwiloh would further testify that Josephine Mendez would have died if not medically treated for her gunshot wounds.

That completes the second stipulation.

THE COURT: Very well.

MR. SHEINDLIN: Your Honor, that completes the People's case. The People rest on the direct case at this time.

THE COURT: All right. With the understanding that I'll reserve, it's up to you.

MR. BRENNER: If I may have a moment with my client?

THE COURT: All right.

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRENNER: The defense calls at this time Detective Gilbert Ortiz.

He's out in the hall.

THE COURT: Detective Ortiz to the stand.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

COURT CLERK: Be seated.

COURT OFFICER: For the record, please state your name, shield and your command, spelling your

last name?

THE WITNESS: Detective Gilbert Ortiz, O-R--T-I-Z, shield number 1867, 34th Precinct Detective Squad.

THE COURT: You may inquire.

MR. BRENNER: Thank you.

G I L B E R T O R T I Z, Detective, having been called as a witness on behalf of the defense, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. Detective Ortiz, by whom are you employed?

A. New York City Police Department.

Q. And what capacity?

A. Detective.

Q. With what precinct?

A. 34th Precinct.

Q. And for how long have you been so employed?

A. I've been a police officer eleven years.

Q. And how long a detective?

A. Four years.

Q. Now, back in 1990 were you similarly employed?

A. That's correct.

Q. And you were a detective then?
A. Yes, I was.
Q. Directing your attention to July 17th, 1990.
Did you have occasion to become involved in the investigation of a shooting at 450 West 187th Street?
A. Yes, I was.
Q. Could you describe briefly the circumstances of your involvement, when you became involved?
A. I was the assigned officer to the case.
Q. Stop.
A. By that - -
Q. Okay. Would you explain what that means?
A. By that, the way we're assigned cases is by a timeframe. Anything what happens within that time period you are assigned to investigate it. Along with other members of your team.
Q. Did your team include any other detectives?
A. Yes, they did.
Q. And who were they?
A. Detective Monteri, Detective Erbergess, Detective Giorgio, Detective Muldoon.
Q. But who was, in fact, the assigned detective?
A. I was.
Q. Now, did you have occasion on that date to go to

the premises at 485 West 187th Street?

A. Yes, I did.

Q. Approximately what time was that?

A. (No response).

Q. If you have anything at all, if you need anything at all to refresh your recollection, you can do so.

A. It was approximately nine o'clock at night.

Q. And did you - - anyone accompany you?

A. Yes.

Q. Who was that?

A. Lieutenant Resnick.

Q. And did there come a time when you left the premises at 485 West 187th Street?

A. Yes, I did.

Q. And where did you go?

A. Back on the 34th Precinct.

Q. And who did you go with?

A. Lieutenant Resnick.

Q. Was Mr. Dominic - - you see Dominic Franza in the courtroom?

A. Yes, I do.

Q. Do you rocognize him?

A. Yes, I do.

Q. Was he in your company?

A. No, he was not.

Q. Now, when you were at 450 West 187th Street, People's - -

MR. BRENNER: People's 29 in evidence, show this to the witness.

Q. Did you see this at that location?

A. No, I did not.

Q. Did there come a time when you saw it there after?

A. At the 34th Precinct.

Q. That night?

A. Yes.

Q. And People's - - People's 26 in evidence.

(Handed to the witness.)

Q. Did you see that?

A. Yes, I did.

MR. BRENNER: Mr. Brancato, with your permission, can he open that?

MR. BRANCATO: Sure.

MR. BRENNER: It is sealed.

Q. Please open that.

(Pause.)

Q. Would you open the inner envolope?

(Pause.)

MR. BRENNER: Hand that to the officer.

(Handed to Mr. Brenner.)

MR. BRENNER: Thank you.

Q. Detective Ortiz, what is the condition of the note when you saw it for the first time?

(Handed to the witness.)

A. It was similar to this.

Q. What was its condition relative to the box?

A. When I saw the note, it was away from the box. It was separated.

Q. Did you ever see it attached to the box?

A. No, I did not.

MR. BRANCATO: At what point?

MR. BRENNER: At any point.

MR. BRANCATO: Oh.

A. No, I did not.

Q. Can you pick up the box, please?

Can you explain the surface visually, the top? The top surface.

(Pause.)

Q. Can you run your hand over the top, please?

(Pause.)

Q. Have you seen any staple marks in that box?

A. No, I did not.

Q. Did you feel any?

A. No, I did not.

Q. Can you please pick up the note?

(Pause.)

Q. The top left-hand corner of the note, what do you see?

A. A staple mark.

Q. In the top right-hand corner, what do you see?

A. Also a staple mark.

Q. Please turn the note over.

What do you see on the other side?

A. Top right and left-hand corner, there is also staple marks.

Q. Detective, turning your attention to February 11th, 1991.

Where were you - -

A. I - -

Q. At approximately five-thirty in the evening?

A. I was at the 34th Precinct.

Q. Did there come a time when you saw Mr. Franza?

A. Yes, I did.

Q. What time was that?

A. Approximately twelve o'clock in the afternoon.

Q. Did there come a point in time when you placed Mr. Franza under arrest?

A. Yes, there was.
Q. And what time was that?
A. I would have to see the arrest report. I'm not.
Q. Do you have the arrest report with you?
A. No, I do not.
MR. BRENNER: I would like that marked for identification.
THE COURT: I-I, that's for identification.
(Sheet, so marked Defendant's Exhibit I-I for identification.)
COURT OFFICER: So marked Defendant's Exhibit I-I for identification.
(Handed to the witness.)
Q. You can use that to refresh your recollection.
A. Thank you.
(Pause.)
A. Five-fifteen.
Q. Immediately prior to placing Mr. Franza under arrest, Mr. Franza say anything to you?
MR. BRANCATO: I object.
May we approach?
THE COURT: Yes.
COURT OFFICER: Detective, please step down.
(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(The witness resumes the witness stand.)

THE COURT: All right, there is an objection before the Court.

The objection is sustained and we'll spread that at the appropriate time. But you may continue.

MR. BRENNER: I have no further questions of this witness.

THE COURT: All right, cross examination.

CROSS EXAMINATION

BY MR. BRANCATO:

Q. Detective Ortiz, you've been a member of the Precinct Detective Unit for four years?

A. That's correct.

Q. Were you aware how long Detective Giorgio has been a member of the Precinct Detective Unit?

A. I believe ten years.

Q. And are you aware of the total amount of time that he's been a detective?

THE COURT: If you know?

THE WITNESS: If I know?

A. I believe twenty years.

Q. You said that in this case you were the assigned officer.

A. That's correct.

Q. Is it fair to say that the assigned officer is merely the next person up to catch a case?

A. Yes.

Q. And you said before that there are several members on your team, that's Detective Borgess?

A. Yes.

Q. Detective Giorgio?

A. Yes.

Q. Detective Muldoon?

A. Yes.

Q. And Detective Montor?

A. Yes.

Q. Is it fair to say that when - - when a detective picks up a case, when he's assigned a case, that there are other detectives who assist him in that investigation?

A. Yes, it is.

Q. Now, in this case, by the time you returned to the precinct, on July 17th, 1990, Detective Giorgio was already

back at the precinct; is that fair?

A. Yes, he was.

Q. Is it fair to say at that time Detective Giorgio was already speaking with the defendant in this case, Dominic Franza?

A. Yes, he was.

Q. That's not unusual in a case where another detective would speak to a witness, is it?

A. No, it isn't.

Q. Have you spoken to people when other detectives were assigned the case?

A. Yes, I have.

Q. Did you take statements from other people in other detectives' cases?

A. Yes, I have.

Q. In this case there wasn't anything unusual then when Detective Giorgio was speaking to Dominic Franza, was there?

A. No, there wasn't.

Q. There came a point that Detective Giorgio spoke to the defendant a second time; am I correct?

MR. BRENNER: Objection.

THE COURT: If he knows.

We'll have to figure out what you mean by a

second time as opposed to a first time. Tighten it up. Give me a date.

Q. There came a point on July 23rd, 1990, that Giorgio spoke to the defendant for a second time; am I correct?

A. Yes, there was.

Q. And at that time you were still assigned to the case; am I right?

A. Yes, I was.

Q. Was there anything unusual in the fact that Detective Giorgio, the person who spoke to Dominic Franza the first time, spoke to him the second time?

MR. BRENNER: Objection, your Honor.

Beyond the scope.

THE COURT: I tend to agree with Mr. Brenner at this point.

Q. Detective Giorgio had made the initial contact speaking with the defendant in this case; am I correct?

A. Yes.

Q. And he spoke to him then the second time; am I correct?

A. Yes.

MR. BRANCATO: I have no further questions, Judge.

THE COURT: Any re-direct?

MR. BRENNER: No, your Honor.

THE COURT: You are excused, sir.

THE WITNESS: Thank you.

(WITNESS EXCUSED)

THE COURT: Ladies and gentlemen of the jury, at this time we will recess until tomorrow morning.

Gentlemen, in that connection, will you come up? I want to get a little guidance.

Mr. Brancato, Mr. Sheindlin.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen of the jury, we'll recess until tomorrow morning at eleven o'clock.

Do discuss this case amongst yourselves nor allow any third party to discuss the case with you.

Do not reach any conclusion.

We'll see you all back here tomorrow morning at eleven o'clock.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: Now, do you waive your clients appearances for what we're going to discuss on the record now, counsel?

MR. BRENNER: Yes.

(The defendant left the courtroom.)

THE COURT: Mr. Brenner sought to elicit from the witness, Detective Ortiz, regarding a statement made by Mr. Franza on the date when he was arrested, which was?

MR. BRENNER: February 11th, 1991.

THE COURT: February 11th, 1991, at the 34th Precinct or squad. I don't know what the correct designation is.

Mr. Brancato objects, that the statement, and we'll spell it out for the record so the record will at least have the statement, were facts to the effect, correct me if I'm wrong, either arrest me or let me go.

Is that the correct quote?

MR. BRENNER: I had enough of this.

THE COURT: I had enough of this.

MR. BRENNER: Either arrest me or let me go.

THE COURT: Now, Mr. Brenner offers, offers to introduce that statement not for its truth but for

the state of mind. Now, whether that's tantamount of conscious- ness or not of guilt.

Mr. Brancato objects because the statement is non-prejudicial, but a self-serving statement.

Anything else that you mentioned at the sidebar? I don't want to cut you off.

MR. BRANCATO: Merely, Judge, that the People believe that that statement is a self-serving declaration and we might point out to the Court that if our reading of what the state of mind exception to the hearsay rule is, it is also offered in those situations for truth.

THE COURT: Well, my ruling - - I'll let you comment in a moment - -

MR. BRENNER: How can you comment technically for the record? You'll be ruling before I'm being heard, Judge.

THE COURT: No, I summarized your argument.

MR. BRENNER: No.

THE COURT: I said that - -

MR. BRENNER: You asked me to connect it to certain things.

THE COURT: I was going to go into that.

MR. BRENNER: I said I would like to do it on

the record so I wouldn't have to do it twice.

THE COURT: All right, you make your argument.

MR. BRENNER: All right.

THE COURT: Mr. Brenner, you claim that this is consciousness of what?

MR. BRENNER: Your Honor?

THE COURT: You're seeking to admit - - wait a minute. There is more.

Yes?

MR. BRENNER: Your Honor, my proffer is as follows. This is a circumstantial evidence case, which everybody concedes.

The People have adduced on at least three occasions evidence which they suggests demonstrates the state of mind of the defendant to be consistent with that of a guilty person. The first example to which I refer, and which was received over objection, was after the defendant's statement that he would cooperate to the fullest came in through the People's witness, they then elicited that he refused or said he would not provide handwriting exemplars, although he ultimately did.

This was, according to the People's proffer and the Court's ruling, received as evidence of

guilt and evidence of inconsistency with his statement that he would cooperate.

THE COURT: Did I say that? Run that by me again.

MR. BRENNER: The Court's ruling was that the relevancy of that statement - -

THE COURT: Which statement now?

MR. BRENNER: The relevancy of the statement that he refused to give writing exemplars.

THE COURT: Yes?

MR. BRENNER: This is part of the record, a week earlier or a month and one-half - -

THE COURT: Represented that he would fully cooperate.

MR. BRENNER: Right. The proximity of four hundred fifty days having - - thirty-five days having passed between the first statement of cooperation and refusal not withstanding, that was the nature of the Court's ruling, that it was inconsistent with his original statement of cooperation.

The People's offer was that it was consciousness of his guilt, that a guilty man wouldn't cooperate, even though he was under no obligation to do so.

Second: There is evidence that the People have offered through Detective Giorgio that he sat there and he wrote slowly, he looked at it, he took a long time through the handwriting exemplars and it was only when Detective Giorgio came in that he sped up, again evidence circumstancially to show a state of mind of a guily, hesitant person person who is trying to fool the handwriting exemplar.

THE COURT: I don't know if that's factual, if that's the purpose it was admitted for, to show his state of mind.

Is that the ruling or is that what it was offered for?

MR. BRENNER: That's what was offered.

Lastly, your Honor, the People have put in and proclaimed this evidence of the acceptance of a receipt for tape, what person with his wife lying half-dead in the hospital would ask for a receipt for a tape?

Again, this is evidence of the interior workings of the defendant's mind. This is part of the People's circumstantial case.

I believe that given the circumstantial nature of the case that I have the right to meet this

evidence with proof of my own, proof of a similar kind.

And I grant you, the People have a burden of proof and I have no burden of proof. The People have rested. I intend now to assume, at least to some degree, the mantle of proving certain things, meeting the thrust of the People's evidence.

The People have also put, parenthetically have also put in evidence that in the defendant's apartment and on his person were documents which tie him inferencially to the sending of a pipebomb to Puerto Rico.

THE COURT: Yes.

MR. BRENNER: He walked into the 34th Precinct with those documents in his physical possession, inside his wallet, in his telephone book, a piece of paper bearing the address and telephone numbers.

He then stated to the police, "listen, let me go or arrest me."

My argument - -

THE COURT: Your argument is if he knew he carried that with him - -

MR. BRENNER: No.

THE COURT: If he asked to be arrested and he

wanted to be arrested or released and those papers were vouchered - -

MR. BRENNER: Your Honor, if those papers had any incriminating value, my argument is that a guilty person would not ask to be arrested.

I'm not saying he knew they were incriminating, I'm saying they are not incriminating and the proof of their non-incriminating nature; A, this is his wife's family in the first instance and he walks in with these things in his pocket; B, and he says, let's me go and arrest - - or arrest me, with this stuff in his pockets?

That goes to his state of mind, vis-a-vis the People's proof.

All I'm trying to do is meet - -

THE COURT: What you're trying to do is not establish the question of the consciousness of guilt but you're trying to establish consciousness of innocence.

MR. BRENNER: No.

THE COURT: You may characterize it differently, but that's exactly what it would be doing.

Now, my ruling, which I now am putting on the record and elaborating on, is to this degree that I

would have allowed you to elicit that, if it was that consciousness was something more than, more than you are able to tie it in with something more than the fact that he was carrying the papers because you're - - what you're asking is a double argument in order to get it in in the first instance, that he knew, he knew that the papers he carried are consistent with innocence and, therefore, he made this statement because he was an innocent man, knowing full well that if arrested at that time and those papers were seized from his person that would give proof to the fact that he is innocent.

That is a convoluted - - well, it may be an argument, but I cannot accept that and weigh that against the prejudice of the that self-serving nature.

MR. BRENNER: Judge, with all due respect, I do agree that the way the Court just stated it it does have the appearances of the convoluted argument. I do not hesitate to agree.

That is really not the way that I stated it. It is not the nature of the proffer.

THE COURT: In any event, I've ruled, I've

ruled that I'm sustaining the objection and it was at that point, it was at that point that you had no further questions, I believe, of that particular witness.

MR. BRENNER: There were two purposes for calling the witness.

THE COURT: Yes. I didn't ask you. I didn't inquire when you initially called him. And Mr. Brancato was allowed a very rather short, abreviated cross, not by his choice but by the Court's ruling as well, that the direct was so limited that the cross, of necessity, was likewise limited.

That concludes that issue.

Now, if you would like to make your motion de novo, the People having rested before Detective Ortiz?

MR. BRENNER: I will reserving all motions until the end of the entire case.

THE COURT: No problem. You have that.

Now, once again, gentlemen, off the record.

(Off the record discussion between the Court and all counsel.)

THE COURT: All right, gentlemen, tomorrow morning, eleven o'clock.

(Whereupon, the proceedings were adjourned until March 5th, 1992, at eleven a.m.)

* * *

(Continued on the following page.)

MARCH 5th, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRENZA,

Defendant.

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S :

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Mr. Brancato?

MR. BRANCATO: Yes, sir?

THE COURT: I was alerted that somebody wanted to put something on the record?

MR. BRENNER: I do.

THE COURT: All right.

MR. BRENNER: Several matters.

THE COURT: All right.

MR. BRENNER: First with regard to the line-up of witnesses.

I had a conversation with Mr. Ihson, of the legal office of the Bureau of Alcohol, Tobacco and Firearms, who informed me that, aside from the procedural aspect of compliance with the federal regulations, that the witnesses would be here on Monday. He will call me this afternoon to confirm that.

But he indicated that both witnesses expressed their willingness to appear and that there were not going to be any problems.

He also advised me that the regulation, just

for future reference, is that when a party, other than the federal government or a state government calls a witness, then and only then are these procedures necessary. So, under no event did Mr. Brancato or any representative of his office has not complied.

Mr. Rodriguez, Ceasar Rodriguez is outside.

Mr. DaCosta, Nelson DaCosta, was personally served by me and I don t see him. I don t know whether he s intending to comply.

I know from speaking to Mr. Mercado, I informed him he was served. Mr. Brancato made representations to me that Mrs. Franza, Myra Franza, had called him vis-a-vis something about the subpoena. So, inferentially it has been received, acknowledged.

I don t know whether Mr. DaCosta intends to comply. And if he does not, I assume I ll take the next appropriate step under the C.P.L.R. and C.P.L. It was not a so ordered subpoena, but a personal judicial subpoena.

Next: With regard to Mr. Rodriguez, I think both sides are anticipating an evidence - - a problem of evidence.

Mr. Rodriguez testified in the Grand Jury presentation in, I believe, October or November, of 1991. I'm not really sure of the date. But it was the second Grand Jury proceedings.

Just so the record is clear, Mr. Rodriguez is a Federal Express employee who was working at the Federal Express station in Manhattan who accepted both the package, which was ultimately shipped to Puerto Rico and which was the pipebomb, and the payment of an American Express money order. And as the Court knows and as the record has clearly evinced to this point, the question of the authorship of both the air bill on the package and the American Express money order are questions before the jury.

The People's position through the testimony of Detective Breslin was that the authorship of both those documents is Mr. Franza.

In the Grand Jury Mr. Rodriguez was asked the following questions and given the following answer: He was asked the following questions by Mr. Brancato and gave the following answers:

Just for context.

And this is page 62 of his testimony, page 1546 of the Rosario material.

"QUESTION: How many times did the man come into the store to mail this package?

"ANSWER: Okay. He came in in the morning, then he left to get a money order and came back.

"QUESTION: Okay. When the man first came in, did he attempt to pay by cash?

"ANSWER: Yes, he was.

"QUESTION What did you tell him? What is the practice of Federal Express? Do they accept cash?

"ANSWER: We don't accept cash or currency today, get a check or money or bring a credit card with him.

"QUESTION: Did the man leave?

"Yes he did."

Then Mr. Brancato shows a Grand Jury exhibit, which I presume was the American Express money order.

"Look at that. Do you rocognize it?

"ANSWER: Yes.

"Question: What do you rocognize it to be?

"ANSWER: This is not the money order he brought back with him and then filled it out."

Skipping down a question or two.

"QUESTION: Do you know if the man wrote that out in your presence or was it written out before he came in?

"ANSWER: Okay. He wrote it in there, right in the presence."

The defendants position in this case, of course, is that he is neither the sender of the pipebomb nor the author of these documents. Therefore, any evidence of that is consistent with his position of innocence.

Mr. Brancato did not call Mr. Rodriguez on his direct case. I have spoken to Mr. Rodriguez, who is sitting outside, and he informed me that the man came in with the American Express money order already filled out. And that he expressed that to Mr. Brancato.

THE COURT: After his Grand Jury testimony?

MR. BRENNER: Well, my understanding, and I will stand corrected if I m wrong, is that around or about the time of the commencements of the trial or sometime thereafter Mr. Rodriguez came in and spoke with someone, who he described as Mr. Sheindlin, although the name was not even close. And he expressed to me the details of that confer-

ence and that, in effect, he told Mr. Sheindlin thatthe man came in, gave him the money order, it wasalready filled out.

THE COURT: Did he voluntarily come in for the purpose of clarifying that issue?

MR. BRENNER: No, I believe it was for the purpose of possible testimony on the People's direct case.

Again, I will stand corrected if that's not right.

THE COURT: All right.

MR. BRENNER: If Mr. Rodriguez were to testify to what he has represented to me now and that he represented to Mr. Sheindlin, my intention would be, pursuant to Section 60.35 of the Criminal Procedure Law, to impeach him with his sworn testimony before the Grand Jury.

THE COURT: All right.

MR. BRENNER: The predicate being that it is inconsistent, that it is material to the defense, it adversely affects the position being proffered by the defendant during the course of this trial.

I should also note that if there are some popular notions that I need to be surprised by the

testimony, the case law in this Department and throughout New York State is that that is not an element, as a predicate element of confrontation.

I don t know what Mr. Rodriguez will say under oath.

THE COURT: Neither do I.

MR. BRENNER: Both Mr. Brancato and I agree this is not the most predictable of witnesses.

I think there are various possibilities in terms of handling this in a manner most conducive to both expediency and fairness. One possibility that leaps to mind, and I know this happened before, is to take his direct testimony as it were, under oath, outside the presence of the jury, to determine as a preliminary matter whether he will say what he has told Mr. Sheindlin and has told me.

THE COURT: What would that accomplish?

MR. BRENNER: It would allow the Court to determine this in liminy.

I think both sides - -

THE COURT: Let's just play that scenario out. If he were to testify now that at the time he received the American Express money order it was already fully, that's in contradiction to his Grand

Jury testimony.

MR. BRENNER: Yes.

THE COURT: Therefore, where do we go from there?

You want the opportunity to impeach him in front of the jury?

MR. BRENNER: Yes, Judge.

To be completely candid here, I don t want him to get up there, say that and then have an objection to my confronting him be sustained.

THE COURT: We re dealing with that objection right now.

MR. BRENNER: That's right.

THE COURT: So, a preliminary, an in-camera hearing, in effect, serves the purpose because the other side of that would be if he were to testify that, in fact, it was brought in and filled out in his presence, consistent with the Grand Jury testimony, then you'll make your argument to the jury on another score, but it would have nothing to do with impeachment.

MR. BRENNER: That's correct.

THE COURT: What purpose would this preliminary serve?

MR. BRENNER: I suppose - -

THE COURT: I mean, you suggested it. I suppose you had something in mind.

Are there any other possibilities in mind?

MR. BRENNER: Again, I don't know what the People s position is.

THE COURT: Let me hear from Mr. Brancato.

MR. BRANCATO: Your Honor, I have spoken to Mr. Rodriguez several times during the course of this investigation. And as - -

THE COURT: He still remains an employee of the Federal Express?

MR. BRANCATO: As far as we know, yes.

And as Mr. Brenner states, he is a most unpredictable witness. We have spoken to him and we have tried to ascertain what he remembers, what he thinks, what he guesses. And it is for that reason that I would not put this man on cross examination and hold him out to the jury as - - and ask them to believe his testimony. Because he goes all over the board.

What happened here - -

THE COURT: Just address yourself to this one single - -

MR. BRANCATO: I'm getting to it.

THE COURT: This single issue.

MR. BRANCATO: I m getting to it.

The defendant wishes to to put Mr. Rodriguez on the stand as their witness, the C.P.L. very clearly states out those circumstances under which a party may impeach their own witness.

The C.P.L. goes on to state, in 60.35, when upon examination by the party who called him a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence of the witness' previously made under oath or in writing.

In this case Mr. Rodriguez's testimony does not fall within the ambit of tending to disprove the position of the party calling him. Mr. Rodriguez is not going to say that the man who sits in front of him, Dominic Franza, is the one who came into the store.

THE COURT: Just a minute. Just a minute.

The People's case in chief deals with handwriting and handwriting being used as the basis to identify the perpetrator.

MR. BRANCATO: That's correct.

THE COURT: And the People contend the perpetrator in this case is the defendant.

MR. BRANCATO: The People contend that the money order was made by the defendant.

THE COURT: And that the defendant is responsible for the acts committed, whether he did it -- whether he himself committed it or somebody at his behest committed it?

MR. BRANCATO: That's correct.

THE COURT: Therefore, that testimony which relates to the identification of the individual, the People having put that in issue now, what precludes the defense from coming forward and here is a witness, because his testimony is not limited just to that Grand Jury, whether he saw the witness, make it out in front of him or not, in fact, if he says, if he testifies once again that he did see the individual appear before him and fill out the form. Then Mr. Brenner will inquire as to the features of what he can remember of this individual, can he not?

MR. BRANCATO: Yes.

And the reason why we're having this conversa-

tion right now is because Mr. Brenner and I anticipate that he's not going to say that some person that he can identify by features wrote something out.

THE COURT: Not a question of identify, it may be a lack of his ability to recall and identify. But he may have features he recalls or no features he recalls.

But the other side is perhaps?

MR. BRENNER: On that particular point, I should note that Mr. Rodriguez reviewed a line-up within three or four days.

THE COURT: And did not identify anybody?

MR. BRENNER: That's right.

THE COURT: Anyone?

MR. BRENNER: Did not identify anybody. Mr. Franza was in that line-up. He also provided a description in the Grand Jury that was not consistent with Mr. Franza's description.

THE COURT: Well, when you say he identified somebody in the Grand Jury - - no.

MR. BRENNER: No, he described someone in the Grand Jury.

THE COURT: Described someone in the Grand Jury

as the person who filled this out?

MR. BRENNER: He testified to that and then he was questioned by Mr. Brancato about description and he said about five, five-six, hispanic, because his board - - he said the same thing to me.

THE COURT: Well, it seems then, now that you've fleshed this out a little further, that the major difference, the major difference is whether or not when he testified in the Grand Jury that the form was filled out in his presence or it was brought in completed.

But in any - - I mean, that's the major difference. Because, in any event, if it was done in his presence or not, he has no way of recognizing who did it.

It is not a case in which where if it was filled out in his presence he can recall either an article of clothing, height, weight, so forth and so on.

MR. BRENNER: His non-identification - -

THE COURT: Not identification, does he make a description?

MR. BRENNER: Yes.

THE COURT: Other than five-six, five-seven?

MR. BRENNER: Dark skinned, hispanic.

THE COURT: But he doesn't recall anything else about the individual?

So, you can examine him on those issues, regardless of whether or not - -

MR. BRENNER: Un-question - -

THE COURT: The only difference here, the only real substantial difference, if there is a difference, is his testimony in the Grand Jury regarding whether the form was filled out in his presence or not filled out in his presence.

Now, if he should testify it was not filled out in his presence, that would contradiction - -

MR. BRENNER: His Grand Jury testimony.

THE COURT: His Grand Jury testimony. And you would seek to impeach him on that signular issue?

MR. BRENNER: Just that.

THE COURT: You take the position, Mr. Brancato?

MR. BRANCATO: We take the position that that statement by Mr. Rodriguez does not affirmatively damage the defendant's case before the jury.

I'll give the Court an example.

In a case where - - we'll take the position of

"A" shoots "B". And then goes and tells "C", I shot a person, but I shot him in self defense.

What's clear from the wound is that this is not a self defense type case. The victim is shot four times in the back.

THE COURT: You see, the difficulty - -

MR. BRANCATO: Let me finish.

THE COURT: Well - -

MR. BRANCATO: Judge, you're not letting me finish.

THE COURT: Go ahead.

MR. BRANCATO: The witness testifies before the Grand Jury and says, I spoke to "A", who told me he shot this person in self defense.

Comes the trial, the People put on the medical examiner to describe the wounds. The witness is then called. The witness is then asked, "do you know "A", the defendant?" The witness says, "yes, I know him. My relationship to him is one of aunt to nephew."

"Did you speak to him on such and such a date?

"No, I did not.

"Such and such a date" - -

THE COURT: You're going to give me an example

that's either so far afield or so involved. Let's do something precise, with precision as opposed to something that I don't know what the issue is by the time you give me this hypothetical. Make it simple.

And it doesn't have to be analogus, we can use the facts in this case.

MR. BRANCATO: Well, Judge, since I may go on a bit, I'm going to ask Mr. Sheindlin give you an example that is short and to the point.

THE COURT: Fine.

MR. BRANCATO: In fact, we'll give you a copy and we'll hand counsel a copy of the case we're referring to.

(Handed to the Court and Mr. Brenner.)

THE COURT: Well, give me a moment to peruse this case.

(Pause.)

THE COURT: Mr. Sheindlin?

MR. SHEINDLIN: Yes. I was going to state with respect to the Dann case, D-A-N-N, that was a case where the witness at trial - -

THE COURT: I read the case outside.

MR. SHEINDLIN: Okay. The Court stated it was error to use the contradictory statement to impeach

the witness because it did not affirmatively damage the case of the prosecution and that's what they used in explaining - -

THE COURT: Here we have to use the flip side.

MR. SHEINDLIN: Well, the logic is the same. But it applies to the defense.

THE COURT: Now it is the flip side.

MR. SHEINDLIN: Yes.

THE COURT: Substitute for prosecution now the defense.

MR. SHEINDLIN: What it would be - -

THE COURT: That's how we're going to read it.

MR. SHEINDLIN: All right.

THE COURT: Where is the statute?

(Handed to the Court.)

THE COURT: Go ahead.

MR. SHEINDLIN: The flip side would be, does the testimony with respect to that one particular issue of Ceasar - -

THE COURT: Even the commentary by Judge Bell, I could say it is troublesome.

MR. SHEINDLIN: Cesar Rodriguez's testimony with respect to this one particular issue affirmatively damages the case of the defense?

THE COURT: Let's focus on that area.

MR. SHEINDLIN: Yes.

THE COURT: And I'll give Mr. Brenner an opportunity to respond.

MR. SHEINDLIN: Yes.

THE COURT: Go ahead.

MR. SHEINDLIN: The reason why, I submit to you, it doesn't affirmatively damage is because he's not going to say that the defendant wrote that particular document. It's going to be, in essence, it's still going to be left a question as to who wrote that document. It doesn't affirmatively damage the defense case.

As to how that compares to the Dann case, in the Dann case the witness' prior statement, which was signed, said that he didn't know if the defendant was in the Camaro and that was a material issue for proving negligent homicide against that defendant.

That case, because that particular stamp was found to be improperly admitted, that prosecution case was dismissed for legal insufficiency.

But regardless, that was not considered to affirmatively disprove the prosecution's case. It

can have power, but that doesn't necessarily mean that the power of the evidence affirmatively disproves - -

THE COURT: Let me ask you, Mr. Brenner.

MR. BRENNER: Yes?

THE COURT: Would it be correct or fair to say if this were allowed in, assuming the witness - - there are a many assumptions - - the witness testifies, contradiction with the Grand Jury testimony, would you not be using it as evidence in chief?

MR. BRENNER: No.

THE COURT: Why?

MR. BRENNER: Because the statute doesn't permit me.

THE COURT: I know what the statute states. I asked you what would you be doing?

MR. BRENNER: On a prior occasion Ceasar Rodriguez testified under oath in the Grand Jury.

THE COURT: And, therefore, you seek to introduce that to impeach Cesar Rodriguez's credibility?

What is the purpose of that?

MR. BRENNER: I'm sorry?

THE COURT: Within the scheme of the statute, what would your purpose be?

MR. BRENNER: Within the scheme of the statute, what would my purpose be?

THE COURT: Yes.

MR. BRENNER: Mr. Rodrguez was the eye witness to the tendering of the American Express money order. He was a witness to how it was tendered, how the bomb was tendered.

THE COURT: All right.

MR. BRENNER: He has - - his testimony is also - - will be, I assume, that Mr. Franza was not the person who tended the bomb or the money.

THE COURT: But that aspect, regardless of whether or not he saw the filling out of a card, that is before the Grand Jury and that's not an issue.

You see what I'm saying?

MR. BRENNER: Yes.

THE COURT: You are in no way precluded of the witness and inquire as to that.

MR. BRENNER: I understand.

THE COURT: So, what exactly is the purpose of this contradictory statements if not to be argued then to the jury as evidence in chief?

MR. BRENNER: Well, your Honor, if - - I mean,

I can't put him up for any of those other things without eliciting from him what he saw during the course of the transaction.

THE COURT: But regardless of what the ruling is with respect to the Grand Jury testimony, he can be asked as to what he saw, what he recalls from that time.

MR. BRENNER: That's correct.

He will say that the man walked in after be refused and gave a signed money order.

THE COURT: All right.

MR. BRENNER: Now, that tends to disprove the defense case that it wasn't Mr. Franza that did it.

And I should note that you cannot use Cesar Rodriguez's testimony in isolation. Because if you did, I think if you did Mr. Sheindlin might well be correct.

Mr. Rodriguez's testimony comes on the heels of the People's expert testimony that the author of the American Express money order was Mr. Franza. That lends context to the defense position. The defendant says, it's not - - I'm not guilty of any of these things, it is not me.

THE COURT: I looked through a number of cases

while out in the corridor. And I'm persuaded that in this case, and there were cases that were similar, I don't mean on the facts but the evidence was basically circumstantial, that to allow this does not conform to the statutory requirement because how does that tend to disprove the position of the defense?

MR. BRENNER: If Mr. Rodriguez comes in an agrees with Detective Breslin circumstantially?

THE COURT: But he's not a handwriting expert. Let's start there. And he's already, he's already, even if he does remember the individual, the only question before us now is did he recall whether it was filled out in his presence or it was submitted completed.

MR. BRENNER: Well, certainly, Judge, if he were to testify that it was filled out in his presence, that was his direct examination.

THE COURT: Yes.

MR. BRENNER: Then one would have to say that either he's lying or mistaken or Detective Breslin's expertize is subject to question. Because - -

THE COURT: Well, again, again - -

MR. BRENNER: No, Judge.

THE COURT: The district attorney then would have the opportunity to use - -

MR. BRENNER: What?

THE COURT: Not to rely on the contradictory testimony but rely on the Grand Jury testimony where he identifies the individual, he would be allowed to inquire all about what he recalled. Likewise, you would be.

MR. BRENNER: No, Judge, if Mr. Rodriguez took the stand and in response to my questions said, the guy came in, he had an American Express money order and I could see it was blank and he asked me for a pen and I gave him a pen and he filled it out; then I said to him, Mr. Rodriguez, look around the courtroom, do you see that man, and he says, no - -

THE COURT: Now stop there.

MR. BRENNER: If I may?

THE COURT: Just stop there for a moment.

But that's subject to further examination. This is an office where people are coming in and out. Did he stand the entire - - the individual that you say you saw filling this out, did he stand for the entire time before you to fill it out? Were other people there? Were you distract-

ed? Were you doing other duties? Was he accompanied by anybody else?

MR. BRENNER: No question about it.

THE COURT: There is a multiple of possibilities.

MR. BRENNER: But that makes it the same as any other evidence in a criminal case. It is a subject to confrontation. It doesn't absolute the value in the abstract. We have to deal with this testimony in the abstract because that's all we have. We don't have what he'll say on cross examination.

I'm possessing to you that if he were to say that he saw the man fill it out, he gave him a pen, he watched him sign his name, that he watched him put in all the various numbers, it would tend to prove the defendant's position that he's not the author because Mr. Rodriguez did not identify, back in February, Mr. Franza as the person who brought it in.

And I suspect when asked to look around the courtroom, he would say he's not here. That would tend to disprove the defendant's involvement in writing the American Express money order and sending

the Federal Express package.

THE COURT: Now - -

MR. BRENNER: It would also tends to undercut the People's expert testimony through Detective Breslin.

THE COURT: I don't agree with that.

Bring in the jury.

MR. BRENNER: Judge, please.

THE COURT: You have - -

MR. BRENNER: I'm not directing the Court not to bring in the jury.

THE COURT: Hold it.

MR. BRENNER: But if the ruling, I have several indications. I'm not putting this man on the stand with such a ruling.

THE COURT: Number 1: Let's put it this way. Perhaps just to satisfy you, so we don't operate in a vacuum, we will bring in the witness, swear the witness and put the question to him, as you originally suggested. Only for the purpose of either rendering this academic or not.

If the witness is going to - - of course, the difficulty I have, based on the representation of both counsel, he may testify one way in this in-

camera and then when the jury is here he may testify in the opposite, if that's possible.

MR. BRENNER: That's a different problem.

THE COURT: Well, that would be another problem. But assuming he comes in and says consistently that he did fill it out in his presence, which is exactly what the Grand Jury had, then you have a choice of exploring any other testimony or not calling him as a witness. That's your choice.

MR. BRENNER: Judge, you are posing a hypothetical. You just said that if he says - - if he gives testimony which is favorable to me, I have the option of not calling him.

THE COURT: No. If he gives testimony which is consistent with his Grand Jury testimony, he didn't say anything - -

MR. BRENNER: No, his Grand Jury testimony is that he saw the guy fill it out.

THE COURT: If his testimony here is consistent with that, do you intend to call him?

MR. BRENNER: Absolutely.

THE COURT: If his testimony is contradictory to that and then you would seek to impeach him based on the Grand Jury testimony and you have my prior

ruling that I will not allow it, then you say you have several other applications?

MR. BRENNER: Based on that ruling?

THE COURT: Yes, based on that ruling.

MR. BRENNER: Yes.

THE COURT: So, what are the other applications?

MR. BRENNER: I would move for a mistrial.

THE COURT: On what ground?

MR. BRENNER: On the ground that you are eviscerating the defense by your ruling.

THE COURT: Then you have a fairly - - you can gleen the applications at your disposal.

What else?

MR. BRENNER: I would not put Mr. Rodriguez on the stand.

THE COURT: All right, bring in Mr. Rodriguez then. We're going to make that preliminary inquiry.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court in the case

of the People of the State of New York versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes.

COURT CLERK: Be seated.

COURT OFFICER: In a loud voice state your name, spelling your last name and give your county of residence.

THE WITNESS: Ceasar Rodriguez, R-O-D-R-I-G-U-E-Z.

COURT OFFICER: County which you live?

THE WITNESS: Ozone Park, Queens.

THE COURT: I'll allow you, very briefly.

MR. BRENNER: For the purpose of this inquiry I'm going to curtail the questioning.

THE COURT: All right.

C E A S A R R O D R I G U E Z, having been called as a witness on behalf of the defense, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. Mr. Rodriguez - -

MR. BRENNER: May I lead partially, your

Honor?

THE COURT: Yes.

Q. Mr. Rodriguez, you're an employee of Federal Express?

A. Yes.

Q. What is the nature of your employment?

A. I'm a customer service agent.

Q. And in February, 1991, specifically February 4th, 1991 were you employed in the same way?

A. Yes.

Q. And where were you working on February 4th, 1991?

A. 600 West 116th Street.

Q. Now, did there come a time when an individual brought a package to Federal Express for transportation to Puerto Rico?

A. Yes.

Q. Approximately when was that?

A. This was about eleven-thirty in the morning.

Q. And incidently, looking around, do you see that person in the courtroom?

A. No.

Q. And what happened? Tell us what happened.

A. He came in the morning, comes in with the box, gives me the paperwork already typed in and everything. I

then take the box, I put it on the scale, I look at the paperwork and he has everything on it, except the weight, he has four pounds, I look at the scale and it is nine pounds. I tell him, sorry, it is nine pounds, not four pounds.

Then I tell him, how would you like to pay for this? I tell him the price. He says cash. I said, sorry, we don't accept cash, we can take a credit card check or money order.

Then he then leaves, he comes back, like about three hours later, with the money order, filled out with the paperwork.

I then do the transaction, gives him - - give him the copies and he then leaves.

Q. Okay. So, it is your testimony that the person who brought back the money order - -

MR. BRENNER: Withdrawn.

Q. When they presented the money order to you it was already filled out?

A. Yes, it was.

Q. The name?

A. Everything was filled out already.

Q. The amount?

A. Right.

Q. The address?

A. Right.

Q. Did, at any time, you observe the individual writ- anything at all while he was in the Federal Express office?

A. No. I remember him just giving it to me and just telling me, "now what?"

THE COURT: Sir, would you step out?

COURT OFFICER: Sir, step out with me, please.

(WITNESS EXCUSED)

MR. BRENNER: My intention would be at that juncture, your Honor, in the presence of the jury, to confront Mr. Rodriguez with his prior statement that this man, who tendered a bomb to him in the Federal Express office and paid for that bomb with an American Express money order, which the People's witnesses have identified as the handwriting of the defendant, had previously testified that the person who brought it in, who is not Mr. Franza, filled it out in his presence.

THE COURT: All right.

MR. BRENNER: The American Express money order.

He stated it twice in the Grand Jury. The testimony is under oath. The testimony was approximate to - - more approximate to the time of the actual event than his testimony here today.

It substantially disproves the defense that Mr. Franza was not the author of that document.

And I should note, I should emphasize, the defense is not just one of general innocence. There are claims, this is a circumstantial case which rests on, from what I can best gleen now, authorship of various documents, tying the author to the sending of a device and sending an assassin to shoot Myra Franza and her mother.

So, authorship, in an of itself, is a critical part of the prosecution case. As such, the defense is, as critically, that the defendant is not the author.

The defense is simply, I did not write that Federal Express bill, somebody - - the American Express money order, somebody else did. Somebody else wrote it.

This witness testified in the Grand Jury somebody else wrote it. To not allow me to elicit that on a prior occasion he made that statement, which does substantially disprove the prosecution case and helps to prove the defense case, I believe seriously prejudices the defense.

I understand the nature of the Court's ruling,

if that is, indeed, the Court's ruling.

THE COURT: Do you want to make a statement?

MR. SHEINDLIN: May I?

Yes.

I don't contest the fact that - - well, with respect to the Grand Jury testimony, Ceasar Rodriguez stating, I saw the man in the Federal Express store, who is not the defendant, actually fill out the documents, I don't contest that that would affirmatively help the defense. I don't think anybody would. But that's not the standard. It is whether his testimony affirmatively damages the defense.

For example, if he were to say, I know that it was the defendant that wrote out the documents, that affirmatively damages the defense. Or if he were to say, I can tell you - - well, let's me just leave it at that. That's an example of affirmatively damaging the defense.

The fact that the person who went to the Federal Express office handed this package containing the bomb to Ceasar Rodriguez and the documents already filled out is ambiguous. It doesn't affirmatively damage the defense.

That's the People's position.

MR. BRENNER: Your Honor - -

MR. SHEINDLIN: That's the standard for tending to disprove.

MR. BRENNER: I should also note that the record will reflect that Mr. Brancato opened on this person coming into the Federal Express office, coming out, going out and getting a money order. That, in conjunction with Detective Breslin's testimony, leads me to believe that the very strong argument of the People will be that Mr. Franza was standing by in a nearby location just in case anything went wrong and this killer or this sender of the message of death, I believe was the word Mr. Brancato used, ran out to Mr. Franza and got him to fill out a money order because that's what was necessary to send the package.

Now, Mr. Rodriguez's testimony - -

THE COURT: Just a minute.

That's your own scenario.

MR. BRENNER: No, that was the original statement.

THE COURT: That Mr. Franza stood by?

MR. BRENNER: That Mr. Franza - - that the

actual sender went out and Mr. Franza filled out the money order.

THE COURT: All right.

MR. BRENNER: I mean, that's the People's case.

THE COURT: That hasn't been the testimony thoughout?

MR. BRENNER: I'm sorry?

THE COURT: I didn't hear any testimony to that effect, have you? There there been any testimony along that line?

MR. BRENNER: Is the Court saying there would have had to have - -

THE COURT: Have you heard any testimony?

MR. BRENNER: Oh, absolutely not.

THE COURT: The fact remains that you seek to introduce this as evidence in chief of your defense.

MR. BRENNER: That's the Court's classification of my offer.

THE COURT: Well, all right.

As I indicated to you earlier, I don't believe that your offer, under these circumstances, complies with the statutory requirement and, accordingly, if we reach that juncture in front of the jury you have a preliminary ruling that I would sustain the objec-

tion to your proffer of the contradictory testimony in the Grand Jury by Mr. Rodriguez.

Now, in view of that ruling, you have another motion that you want to make?

MR. BRENNER: I have a statement.

I am not going to call Mr. Rodriguez and the only reason is because of the Court's ruling.

THE COURT: Well - -

MR. BRENNER: I am going - - Judge, if I may I make my statement on the record?

THE COURT: All right.

MR. BRENNER: I am not calling a defense witness because of the Court's ruling in liminey on this particular issue.

I believed that to call Mr. Rodriguez to testi-by to what he just testified to would be so consistent with the People's case, although on a prior occasion he testified inconsistent with the People's case, to do so I believe would be to expose my client to providing inculpatory information through a witness who under oath testified to exculpatory information.

I should also note that, since we're on the subject, that prior to this being furnished as

Rosario material, this is not disclosed to me in anyway, shape or form.

THE COURT: On the issue of surprise.

MR. BRANCATO: What issue?

MR. BRENNER: On the issue of exculpatory material.

Mr. Sheindlin has, through his articulate statement, insisted this is favorable to the defense, his almost exact words. Mr. Rodriguez's testimony, somebody else filled this out, would be favorable to the defense, but not enough to get it in under this statute.

Having conceded that it was favorable to the defense, Mr. Brancato, having made the presentation whenever it was made with this favorable defense evidence, I am questioning why this wasn't disclosed prior thereto, why and - - and, incidently, the prejudice is that if it was disclosed prior thereto, back when it happened, that this problem, this situation in which Mr. Rodriguez has altered his testimony, may not have arisen. Because Mr. Brancato noted, this is a witness who vacillates. If we had been notified that Mr. Rodriguez gave testimony favorable to the defendant back when it happened, I

might have been able or whoever was representing Mr. Franza at the time might have been able to send investigators to take a statement from Mr. Rodriguez consistent with his Grand Jury testimony and lock him in a way that this couldn't have happened. But that's not what happened, Judge.

THE COURT: I just want to address one point that you made and that is that in view of the Court's ruling you choose not to call Mr. Rodriguez.

MR. BRENNER: That's correct, your Honor.

THE COURT: Now, absent that aspect of confronting him with what you believe to be impeaching your own witness, absent that aspect you are free to explore any other aspect, as you well know. So that choice is your choice.

MR. BRENNER: Judge, those are fine words. But the bottom line is without being able to confront Mr. Rodriguez, apart from identification matters, and I should also note it is not the People's position that the person who sent the bomb was Mr. Franza, the physical person it couldn't be because Mr. Rodriguez didn't identify him in the Grand Jury. So, Mr. Rodriguez has no evidence to offer that is inconsistent with the People's position other than

what he told the Grand Jury back in November, of 1991. To put him on and explore for other purposes things that the People are already conceding and then let him say, oh, yeah, by the way, the way it happened is entirely consistent with what the People's expert says here is suicide. And I don't generally engage in that.

THE COURT: Well, I'm not here to determine what the defense or, for that matter, the prosecution, how they should proceed. Those are determinations that are left solely to themselves.

MR. BRENNER: Most respectfully, Judge, it was the nature of my application that you, in effect, denying the way the defense should proceed.

THE COURT: Well, I'm sorry?

MR. BRENNER: You are, in fact, determining the way that the defense should proceed.

THE COURT: Well, if you are dissatisifed with that ruling, your objection is noted.

But I believe, in looking at the case and at the section, that that is the proper ruling and, accordingly, since I've now made that ruling, if you wanted to make a further application following that why don't you make it now?

MR. BRENNER: Your Honor, at this time I would move for a mistrial.

I would move for a mistrial based on two grounds.

First is the nature of the Court's ruling in an over itself; that by the Court's ruling,, as I stated earlier, eviscerated the defense. It is keeping, effectively keeping the defense witness off the stand.

And I understand the Court's equivocation that I am free to explore other areas. Not really. That's my assessment.

The second is: I'm moving for a mistrial based on the People's failure at the juncture to which the knowledge was made available to them to disclose what is clearly, in light of what else they presented in the Grand Jury, Brady material.

THE COURT: Well, Mr. Brancato, on the second issue? The first issue is covered.

MR. BRANCATO: Your Honor, Mr. Rodriguez testified in this case at the time that Mr. Brenner was the attorney of record for the defendant and after this - -

THE COURT: Why would that be of any great

importance, who the attorney was?

MR. BRANCATO: Because a moment ago he said we should have turned it over to whoever.

MR. BRENNER: I said myself or whoever.

THE COURT: I don't think that's germane to the record.

MR. BRANCATO: He was the attorney of record.

THE COURT: In any event, if it had to be turned over, if Mr. Brenner succeeded somebody else, it would have to be turned over. So, don't address that aspect of it. That's not important.

MR. BRANCATO: I told Mr. Brenner, I can't give you the exact date, but I told Mr. Brenner about Cesar Rodriguez at the point that I handed up the Grand Jury minutes to the Court.

The Court had the Grand Jury minutes, because we ordered them on a rush basis in as much as we had superceded the initial indictment, and came in and answered ready on the second. I can't give you the exact date on that, but it was before the turn of the year.

There were times that Mr. Brenner had asked me how he could get in touch with this man. I said he could get in touch with him through Federal Express.

They have a very through way of calling officers. You have to call an eight hundred number and they will plug you into an office. I told them the only way I got no touch with him was going through the operator.

I did not have Mr. Rodriguez's personal number to the store until about four weeks ago. And I turned - -

THE COURT: Supposing that was so, wouldn't Mr. Brenner be entitled to the information four weeks ago?

MR. BRANCATO: Mr. Brenner had the Grand Jury minutes.

MR. BRENNER: Your Honor, I'm not addressing myself to the question of whether this was furnished as Rosario material.

THE COURT: No, what he's addressing, once the People learned of this contradictory testimony with this witness - -

MR. BRENNER: If I may interject?

Mr. Rodriguez's existence, his existence, who is he and the fact that he failed to keep - - failed to pick Mr. Franza out of a line-up was made - -

THE COURT: Go ahead.

MR. BRENNER: Was made clear to me. Mr. Brancato, about five weeks into my representation, stated that Cesar Rodriguez was the one who had not picked Franza out of the line-up. That's one thing. That's one thing.

In learning that it wasn't the People's position that it was Mr. Franza who had physically sent the bomb anyway, I considered that of minimal import.

However, it was never disclosed to me until the Rosario material was furnished in preparation, in - - with a view towards jury selection that Mr. Rodriguez had said under oath that the guy who came in wrote out the American Express money order.

Mr. Sheindlin, in categorizing this, has said, as a representative of the People, that is favorable to the defense.

What else - - what other inquiry should we be making at this point? It was not turned over. It wasn't timely turned over, it wasn't turned over at a juncture when I could have done something about it.

THE COURT: You could have done? What were you prevented from doing at that point?

MR. BRENNER: I'm sorry?

THE COURT: If you say that was of such import to the defense case, wouldn't you have moved to puruse that prior to trial?

MR. BRENNER: Judge, as soon as I got the information - -

THE COURT: Which was when?

MR. BRENNER: I pursued it.

When I got the Rosario material, which was interspersed over a two and one-half to three week period before trial and during the course.

THE COURT: Continue.

MR. BRENNER: During the course of the trial.

THE COURT: But during that period what have you done with respect to Mr. Rodriguez?

MR. BRENNER: I attempted to locate Mr. Rodriguez.

Mr. Brancato was right that he was difficult to locate. But I'm not talking about the efforts now, I'm talking about the timeliness of the disclosure back four months ago when, perhaps, if Mr. Rodriguez had been spoken to with some ripeness in proximity to his Grand Jury testimony this situation would have been avoided. This situation, which I

am claiming as prejudicial to the defense.

THE COURT: What I'm trying to determine is at the time he initially testified, that would have come out through the Rosario material. It is the subsequent time when he now backtracks which triggers this.

MR. BRENNER: No, your Honor.

THE COURT: Supposing mister - -

MR. BRENNER: My position - -

THE COURT: Supposing Mr. Rodriguez had come in today and testified - -

MR. BRENNER: My position - -

THE COURT: That he recalled the individual or the individual filled it out in his presence, consistent with his Grand Jury testimony?

MR. BRENNER: Correct.

THE COURT: We wouldn't have this issue at all.

MR. BRENNER: Absolutely.

THE COURT: So, at what point does this issue become tangent to the Court?

MR. BRENNER: Well, there are two issues. The first is, under Bagget, is this favorable to the defense?

THE COURT: Yes.

MR. BRENNER: The first question.

THE COURT: Yes.

MR. BRENNER: And if it is, Mr. Brancato on the day that this man raised his hand in the Grand Jury and said that to the Grand Jurors was under an obligation to make it known to the Court and disclosure to the defense.

THE COURT: Well, the Brady obligation is a continuing obligation.

MR. BRENNER: No, your Honor, it may be continuing because Brady material may arise during the course of a litigation.

THE COURT: I understand.

MR. BRENNER: But it is not continuing in the sense that you can do it late. You must do it when you learn of it. I mean, that's what the law says.

THE COURT: Whether or not Mr. Sheindlin's characterization of this as favorable or not favorable, that is not the ultimate arbiter if this is considered.

MR. BRENNER: No question about it.

THE COURT: If this is considered favorable. So, I don't think it serves any purpose to merely

rely on his characterization as its ultimate resolution.

MR. BRENNER: When the People put in a witness before the Grand Jury, and I believe that Breslin testified on either the same day as Rodriguez or the day before or the day after, and gets up and says here's the money order, here's Franza's known writing, ladies and gentlemen, the person who wrote these are the same, they are the same, then the next witness gets up and says, ladies and gentlement, I work in Federal Express, the guy who walked in, who wasn't Dominic Franza, he wrote that, though, parenthetically and inferentially he's not the same as the guy who wrote the known writing.

THE COURT: All right.

MR. BRENNER: How that could be anything but favorable to the defense escapes me.

If I'm not the final arbiter, clearly the People can't decide that unilaterally.

THE COURT: I didn't say they can. I acknowledge that. I merely don't want us to think that everything is tangent on the People's characterization.

MR. BRENNER: I would never so stated.

THE COURT: All right.

MR. BRENNER: The next question under Bagley is, "what's the impact of it?"

THE COURT: Yes.

MR. BRENNER: The standard is, had it been disclosed at the time when it was first learned?

THE COURT: Would you have pursued it in some way, perhaps locked it in or avoided - -

MR. BRENNER: And with that, would this infor- information, in its essence, be such that - - I'm trying to get the exact words - - that the jury's determination might be different?

THE COURT: Yes.

MR. BRENNER: And we had an expert yesterday who said Franza wrote this and the witness to get up and say, well, somebody wrote it in front of me but it wasn't that guy, I don't know, Judge. That's a close question in my mind.

And again, I'm not the arbiter.

THE COURT: Do you want to respond briefly?

MR. BRANCATO: Only to say that this statement by Mr. Rodriguez first came to light at the point that he testified in the Grand Jury back in late October, of 1991.

THE COURT: All right.

MR. BRANCATO: A few days later the People moved the case against the defendant to trial. At that time I told counsel.

You tell me if I'm wrong.

MR. BRENNER: A few days later, in October, you moved the case to trial?

MR. BRANCATO: No, November now. And it was adjourned on a couple of occasions. But I told counsel that there was a witness who had viewed a line-up and did not pick out his client.

At that point he had the name of the person and he could have done what he saw fit with that information.

MR. BRENNER: But that's not the information that is the subject of the inquiry. Because at that time when Mr. Brancato disclosed that it became very clear to me that the People's theory was that that didn't matter.

Your Honor, on a procedural matter?

THE COURT: Yes?

MR. BRENNER: Mr. DaCosta was subpoenaed for today. It is my impression that he's not here.

The rest of my witnesses are all available

tomorrow. They are all going to be here tomorrow. I'm not putting Mr. Rodriguez on the stand.

THE COURT: All right. Let me address the question of DaCosta because that's going to be the next area.

You served a subpoena, either you personally or you had cause to be served a subpoena on Mr. DaCosta?

If he doesn't honor that subpoena, if you intend and now anticipating, if you going to move on a material witness basis?

MR. BRENNER: No. I believe both the C.P.L.R. and C.P.L. mandate that the next thing that do is I have you so order one, which I will do.

THE COURT: All right.

MR. BRENNER: I will serve.

THE COURT: Now let's take it a step further. Either he cannot be served or he is served and he defies and is comtemptuous of the subpoena?

MR. BRENNER: Then that would be my intention.

THE COURT: That doesn't though change the process. It doesn't change the program. It may delay it, but it will not - -

MR. BRENNER: I certainly hope not.

THE COURT: All right.

MR. BRENNER: I'm not anticipating delaying the trial for any of this.

THE COURT: All right.

MR. BRENNER: I'll give you a so order today.

THE COURT: I'll sign it.

MR. BRENNER: We have witnesses scheduled for Monday. It will be dealt with by then.

THE COURT: Well, Mr. Brancato?

MR. BRANCATO: As an aside to that, as Mr. Brenner stated initially this morning, Miss Franza called me up and indicated that someone had served her brother with a subpoena.

THE COURT: Yes.

MR. BRANCATO: In speaking with her, I think one of the concerns that she has or that the brother has is that back in August, of 1990, Mr. DaCosta was at a hospital here in New York County.

THE COURT: As a patient?

MR. BRANCATO: As a patient.

THE COURT: All right.

MR. BRANCATO: And it was during that timeframe that the pipebomb was placed outside of his door.

In listeing to her, she told me that her

brother's concern was that these concerned - - these treatments concerned psychiatric treatment and she started asking me whether her brother had to disclose that, that he had gone for it, that he was under treatment, and I do not, as I told her then and I'm say now, I don't want to be in a position of giving any appearances toward him that I am advising him as to whether or not he has any privilege to claim or not claim. I don't want to touch that with a ten foot pole.

THE COURT: The answer is simple. In the event Mr. DaCosta appears, the Court will assign counsel to represent Mr. DaCosta. He'll confer with him and that determination will be made by him, neither the advise of counsel or the Court.

MR. BRENNER: That's reasonable.

MR. BRANCATO: That's my reason for bringing it out.

THE COURT: However, I will say this. Since the defense seeks the appearances of Mr. DaCosta, that if you have communication or can communicate with his sister, Miss Franza, that you advise them that he comply with the subpoena.

MR. BRANCATO: I told her this morning, and I

can state it, that he cannot avoid the subpoena. He has to come down to court.

THE COURT: Now, in connection with that hospitalization, does the court have any records of that now? Was any record subpoenaed?

MR. BRENNER: Yes, the record was subpoenaed. If the Court doesn't have it, it hasn't been supplied.

COURT CLERK: We did not get it.

MR. BRENNER: It was not signed so ordered.

THE COURT: We did?

MR. BRENNER: No, you did not sign it. So, I look the liberty, which is my right, of submitting it, since it is not a New York City public agency, of submitting it un-so ordered and making it return-able here and whatever happens happens.

THE COURT: Do you know when you had that served?

MR. BRENNER: A week to ten days ago.

THE COURT: I would call up the agency or the agency or institution and find out?

MR. BRENNER: I will.

THE COURT: Do they have a legal department or a record department?

MR. BRENNER: They have a record department.

What happens is, all the civil suites backlog them.

THE COURT: Let me now just go off the record with counsel for the purpose of our own guidance.

(Off the record discussion between the Court and all counsel.)

THE COURT: All right, bring out the jury panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respec- tive seats in the jury box.)

COURT CLERK: Case on trial continued.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Once again, ladies and gentlemen, as you probably are aware, we are here but you have not participated.

Once again I must tell you that for the remainder of this day, as a result of scheduling matters, matters which you need not concern your-

self with, you have have the remainder of this day at liberty and we'll resume tomorrow morning at ten o'clock.

I'm sorry for the inconvenience but, again, I don't want you to speculate as to any reason why.

Do not discuss this case among yourselves or allow any third person to discuss the case with you.

Should anyone attempt to do so, do not engage in that conversation and bring that fact to the attention of the Court as soon as you are able to, but not to the attention of your fellow jurors.

Thank you for your cooperate and your understanding. Have a good day.

Ten o'clock tomorrow morning.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: All right, gentlemen, tomorrow morning, ten o'clock.

(Whereupon, the proceedings were adjourned until March 6th, 1992, at nine-thirty a.m.)

* * *

(Continued on the following page.)

MARCH 6th, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S :

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Sheindlin and Mr. Brenner being present in the courtroom, in the absence of the defendant, where the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Domionic Franza.

Present is the court is Assistant District Attorney Sheindlin and defense counsel Brenner, in the absence of all other parts.

COURT OFFICER: Juror entering.

(Whereupon, Juror Number 2 and Alternate Juror Number 1 entered the courtroom.)

THE COURT: Let the record reflect the assistant district attorney, Mr. Sheindlin is present, defense counsel is present and the two jurors, in the absence of the other members of the panel.

We had a communication at the close of business yesterday to the effect that there was something that the jurors wished to discuss with the Court in the absence of the other jurors.

Before I make inquiry, is that a collective question from both jurors?

JUROR: Yes.

THE COURT: Or separately.

ALTERNATE JUROR: Slightly different.

THE COURT: Whichever one wishes to discuss it on behalf of the other as well.

ALTERNATE JUROR: The situation we wanted to bring up is - - concerns your comments that we shouldn't discuss the case among ourselves and

something happened yesterday. We don't think we did anything wrong but we wanted to mention it to you just in case.

We were on the subway yesterday morning, we bumped into each other and we started chating on the subway about some of the humorous things that had happened in court, like the alphabet.

THE COURT: I'm sorry?

ALTERNATE JUROR: The alphabet and the phone was dropped.

Then the conversation turned to whether or not we dated lawyers and with respect to that, you know, whether or not any of the attorneys in this case were our types.

We were talking about the attorneys and - -

THE COURT: No problem.

ALTERNATE JUROR: Then we noticed Mr. Brenner was on the subway car with us.

THE COURT: Very propitiously, I understand.

In any event, when the Court makes those repeated admonitions about not discussing the case, the Court is mindful that people tend to discuss and they discuss the decor of the room or the satorial splendor of some of the participants, so

forth. Not to discuss the case with reference is to the case itself.

JUROR: Like specifics?

ALTERNATE JUROR: All right.

THE COURT: So long as everybody maintains those guidelines, you will not be in any violation of the rules.

But I do thank you for bringing it to the Court's attention.

ALTERNATE JUROR: Okay.

JUROR: Thank you.

(Whereupon, the two jurors left the courtroom.)

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced.)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his counsel and the assistant district attorneys, in

the absence of the jury in its entirety.

THE COURT: As to the subpoenaed record matter, the District Attorney's Office subpoenaed the medical or psychiatric record.

MR. BRENNER: My position is they improperly did so.

THE COURT: Improperly?

MR. BRENNER: In violation of the rules of the Court issued subpoena.

There is no such thing as a District Attorney's subpoenas that doesn't deal with either the Grand Jury or bringing material before the Court. This is not for a Grand Jury proceedings. And the material is not to be furnished to the District Attorney's Office.

The Court of Appeals dealt with that in People versus Natal, N-A-T-A-L.

If I may, your Honor?

THE COURT: Yes.

MR. BRENNER: In that case the Court held that it has long been recognized that District Attorney may not issue subpoenas except through the process of the Court in the exercise of power to compel witnesses to produce physical evidence only before

a Grand Jury or a court where a proceedings is pending.

C.P.L.R. 610.25, subdivision 1, makes clear that where the District Attorney seeks trial evidence the subpoena should be made returnable to the Court, which has, "the right to possession of the subpoenaed evidence."

It is for the Court, not the prosecutor, to determine where subpoenaed material should be deposited as well as any - -

THE COURT: Why don't you start with the opening paragraph by Judge Kaye, in People v. Natal.

MR. BRENNER: Judge, can I make an observation?

THE COURT: No. But I mean - -

MR. BRENNER: Can I make an observation?

THE COURT: You're citing something out of context in a dis - -

MR. BRENNER: But I was in the middle of doing it. For whether it was mis-stated or not, I was in the middle.

THE COURT: Please. I just thought you should look at the first paragraph as well, which I'm sure you did.

MR. BRENNER: In this case, the Court of Appeals held that the District Attorney avoided all the protections provided against abuse of subpoena process and succeeded in transforming a court process into a function of his own office.

And I'm looking at the first paragraph, your Honor. I see no particular or significant relevance to it, vis-a-vis this case.

The question is: Did the District Attorney issue a subpoena for anything while a case is pending that is returnable anywhere other than the Court?

Certainly if I had done the same thing and marched in here with Mr. DaCosta's psychiatric records having been returned to my office, with the except that said, "in lieu of appearances you can send it to me," I suspect that I would be hearing a similar argument from the prosecutor, although I don't know and it is not germane. I concede whatever he would say under those circumstances is not germane.

The fact of the matter is that these now controversial documents have been received by the District Attorney and reviewed by them, apparently,

and I have not seen them.

THE COURT: Mr. Brancato?

MR. BRANCATO: Your Honor, the defendant's reliance on the case that he submitted to both you and I is misplaced in as much as what he has termed as not germane is that the Court affirmed the defendant's conviction.

The difference between this situation and the one - -

THE COURT: Don't tell me the facts in Natal.

MR. BRANCATO: I'm not.

THE COURT: There are different facts - -

MR. BRANCATO: The difference between that case and this, these are not the defendant's psychiatric records. These are Mr. DaCosta's records.

The defendant can claim no injury in this regard. We have turned over those records to you today. Yesterday you did not pose the question to the People whether or not we had the defendant's record.

THE COURT: I wasn't aware of any such thing until Mr. Brenner alerted the Court, it was at the close of the business day, and I alluded to that

earlier when Mr. Brenner tried to reach my law secretary and conveyed to me the facts that he was trying to obtain the records, that he had gone up to Columbia P and S and that he learned that, in fact, the one copy that they did furnished was sent to the District Attorney's Office. There was no discussion as to how those papers got there, as I recall.

MR. BRENNER: That's correct.

THE COURT: Merely that they were forwarded to the District Attorney's Office.

At that point I felt rather than get into it, I advised Mr. Brenner the matter would await today when all parties would be in court.

MR. BRANCATO: We subpoenaed these records with the subpoena that we have traditionally used in the past and we have never misrepresented to this Court anything concerning these records.

The defendant's discussion with the Court was one in which the People took relatively no part in and record will bear that out.

MR. BRENNER: Well, your Honor, there is misrepresentation outright and then there is misrepresentation by silence. When the Court turned to me

on the matter of whether Mr. DaCosta was going to need an attorney because of the information that Mr. Brancato raised as an issue and said, well, what are the records - - no.

THE COURT: No, just a minute. That's a mischaracterization. The Court indicated that Mr. DaCosta would have counsel because having been called as a witness Mr. DaCosta must be afforded all protections not solely related to the fact of these records.

MR. BRENNER: Your Honor, I don't mean to contradict the Court, but the record, if anything, will reflect that Mr. Brancato stood up and said I was contacted by Myra Franza, who indicated to me that Mr. DaCosta have some concerns that questions concerning psychological treatment might be raised.

THE COURT: I comtemptemplated, no matter what, he's entitled to counsel.

MR. BRENNER: Then the Court said, where are the records? And I, not nothing that Mr. Brancato had subpoenaed them, as the Court did not either, you addressed it me and I said I didn't know. There was silence from this side of the room.

Because, in fact, the People knew where the

records were, the records were in their possession. They never misrepresented anything, they just choose to remain silent on the issue.

THE COURT: You say it was an act of omission as opposed to commission?

MR. BRENNER: And as far as distinguishing Natal, I refer toe People versus Warmus, a progeny of People versus Natal, relies exclusively on that decision, the cite being 148 Misc.2d 374.

THE COURT: I have your copy.

MR. BRENNER: The People have also been returned with that, in which it is not a question of whose property it is, it is a question of the way the subpoena is utilized by the People.

I should also note that the Westchester District Attorney's Office, which is the subject of both of these cases, also had the usual practice of sending out subpoenas and having materials returnable to them.

THE COURT: Well, also in the decision, although as I told you what the first paragraph said, the last paragraph in the opinion says, as for the appropriate remedy in this case, we cannot agree with the defendant. Even if the subpoenaed

evidence were precluded, resersal would not be required. The defendant was unequivocally identified by the eye witness and conceded his presence near the crime scene. The evidence of guilty was over whelming.

MR. BRENNER: No question.

THE COURT: The District Attorney's subpoena practice should not be replicated.

Now, I don't think on all fours the facts are totally different here. I mean, they are not even a close call.

MR. BRENNER: I don't acknowledge the facts are the same.

THE COURT: But I do note the language of the Court of Appeals that the District Attorney's subpoena practice should not be replicated.

Now, that would appear to be a critique of the practice utilized by the District Attorney in this case.

MR. BRENNER: I agree.

THE COURT: All right.

However, taking all other factors into consideration, this Court can admonish, can admonish the District Attorney's Office not to engage in such

practice. However, the relief that you seek, that you follow if, in fact, this was a deliberate transgression, does not lie.

MR. BRENNER: I understand, your Honor. So I am left next to inquire or to assert normally I believe what would have been appropriate here is, given the context of the records themselves, that a review by the Court, in-camera, before anybody saw them because they are the possession of the Court, vis-a-vis proper subpoena procedure would have been appropriate.

THE COURT: Yes.

MR. BRENNER: Now I can't say that because I'm in the position of the District Attorney having subverted proper procedure - -

THE COURT: Let me just stop you there.

Of course, we don't know, and I'm going to inquire of Mr. Brancato, did you or your assistant, Mr. Sheindlin, examine the record?

MR. BRANCATO: We went through them.

THE COURT: Okay, go on. Because it may have been that the record was there but nobody even perused it.

MR. BRENNER: Now, if the Court were to take

the records and review them in-camera, they wouldn't be in-camera, they would be half in-camera.

THE COURT: Well, I think what we'd have to do at this point now to, in effect, level the playing field is to make the records available to you to examine.

MR. BRENNER: Thank you, your Honor.

THE COURT: And unless I hear something to the contrary, I have that intention at this moment.

I remind you, I'm not passing on the issue of what could or would not come in because maybe nothing would come in here. Because there are references here made to facts.

Now, it is interesting because we get into a subsidiary issue. Ever a patient were taken to the hospital, for medical reasons, and were to discuss in connection with those medical records how an accident or how the injury was sustained, that would not be admissible. However, this is a psychiatric record. This record would have to be, and I've only made a quick examination, if it is going to be used, much of the material citing, not the medical aspects but citing the information related by Mr.

DaCosta to the interviewing doctor would have to be redacted or sanitized in some way, regardless of who it helps or who it hurts, but by its very nature would have to be redacted.

MR. BRANCATO: Your Honor, are you finished with all your pre-trial motions?

THE COURT: On this issue.

MR. BRANCATO: Mr. Brenner?

MR. BRENNER: I'm done.

MR. BRANCATO: Do you have anything else?

MR. BRENNER: I think we're still addressing this issue.

THE COURT: Yes?

MR. BRANCATO: Well, when we're finished with this, Judge, I have something to put on the record.

THE COURT: Wait a minute. We are finish with this issue. That's what I've just concluded, what we're doing.

What's the other issue that you want to raise?

MR. BRANCATO: Well, Nelson DaCosta has been served with a subpoena by the defense in this case to testify and I have no intention of impeaching Mr. DaCosta's credibility.

THE COURT: Ergo what?

MR. BRANCATO: I don't believe that the defense should put this witness in front of the jury and try to impeach him.

THE COURT: Wait a minute. Now we've made two assumptions.

MR. BRANCATO: That's it. That's correct.

THE COURT: I don't make any assumptions, all I can say, Mr. Brenner is an experienced attorneys and knows you can't put on a witness on for that purpose. But that doesn't preclude him from calling if he may have any other purpose in mind.

MR. BRANCATO: That's correct.

MR. BRENNER: I am - -

THE COURT: And I will certainly not preclude a defense from putting anybody on.

MR. BRANCATO: That's correct, Judge.

THE COURT: He knows the parameters.

MR. BRENNER: Absolutely, your Honor.

MR. BRANCATO: I have - -

MR. BRENNER: I intento to call Mr. DaCosta as a fact witness. However, I would be less than candid if I did not say that I anticipated at some juncture a request to examine him as a hospital witness might be in order. I don't know. That's

for the Court to determine.

THE COURT: That's not initially what I determine because I don't have a situations - -

MR. BRENNER: Well, your Honor, I will give the Court - -

THE COURT: Other than the fact there is a relationship.

MR. BRENNER: I will give the Court information which I've now - - I've now furnished to the District Attorney in the form of reverse Rosario material.

I had, when I spoke to Mr. DaCosta on the last two occasions, I spoke to him twice, the last being yesterday. His comment to me was, "would you give a message to Dominic? Tell him I'm going to put five bullets in his head. He's a scum bag."

I hope - - actually, he said, "you may try - - you're going to try some shit but it's not going to work." Then he said, "I hope you get him off because I'm going to get him."

On the previous occasion he made allusions again, he called - - in conversing with me, he said, "are you the scum bag's lawyer?" He then said, "he's a prick. What I'm doing isn't going to

make a fuck of a difference. He did it."

When we were out in the hall, in the - -

THE COURT: Today?

MR. BRENNER: Today, in the presence of this officer, Mr. DaCosta turned to me and inquired as to whether I had given the scum bag the message.

Primarily, your Honor, I would say that, as an officer of the Court, the tone and the substance of those remarks certainly suggest a hostility both toward Mr. Franza and towards Mr. Franza's cause in this indictment.

I have reason to believe that that will continue.

So, I am giving the Court some basis. I ahve furnished what I wrote down to Mr. Brancato as with regard to Rosario.

THE COURT: Let me see what is your contribution in this area?

In effect, I don't know what we have to await. In effect, you're making your application now that you want to call Mr. DaCosta as a hostile witness.

MR. BRENNER: I believe he is a hostile witness; yes, your Honor.

THE COURT: All right.

MR. BRENNER: Now, just - -

MR. BRANCATO: Are you - -

MR. BRENNER: Before Mr. Brancato responds, I in no way believe that that gives me the right to impeach him. This is not - -

THE COURT: Well, you can impeach your own witness but, again - -

MR. BRENNER: It has nothing to do with the hostility. All it allows me to lead, ask leading questions.

THE COURT: Yes.

MR. BRENNER: I make no claims to being allowed to impeach him.

THE COURT: I understand.

Mr. Brancato

MR. BRANCATO: I think the defendant's application - -

THE COURT: Does he need an interpreter? I don't know.

MR. BRENNER: His language seems to be okay to me yesterday.

THE COURT: At least that language.

Go ahead.

MR. BRANCATO: I think this determination or

the defendant's request that you determine to be a hostile witness on the basis of what my colleague has just put on the record is a bit premature. And I say that because Mr. DaCosta was served with a subpoena to come to court to testify on behalf of that person over there. That person is charged with sending someone to shoot his wife - - his mother and his sister.

Human nature being what it is, it would be absurd for anyone to believe that Mr. DaCosta would walk across a street to want to entend this defendant's cause in anyway.

However, what his feelings are toward this man at this point - - first let's see how he reacts in front of the jury. And I think to determine at this point that he's a hostile witness, based upon what Mr. Brenner has just said, Mr. Brenner has just stated what the human reaction would be in such a circumstance.

THE COURT: Supposing you're correct, what - - why would he not qualify as a hostile witness?

MR. BRANCATO: I'm sorry?

THE COURT: Why would that not qualify as a hostile witness?

MR. BRENNER: Hostility is a human reaction. That's the essence of it, your Honor.

THE COURT: Right.

MR. BRANCATO: Because first you have to - -

THE COURT: Unless you're asking this Court to differentiate that there is a personal hostility toward the defendant, but that hostility wouldn't impact upon his testimony.

Now, I don't think anybody can be so precise as to make that differentiation.

MR. BRANCATO: Your Honor, our position is that a hostile witness is one who is going to lie or alter facts to a jury. In a case - -

THE COURT: This case, this case has heard testimony, in the case, from Detective Giorgio and I believe another detective that on the night of the incident or the evening of the incident of the shooting Mr. DaCosta attempted or did, in fact, assault the defendant and words were exchanged.

Now, that was, if anything, an immediate reaction. And that condition continues, at least the feelings that Mr. DaCosta seems to evince, vis-a-vis Mr. Franza or his counsel, in that capacity.

I'm going to allow him to be called as a

hositle witness.

MR. BRANCATO: Judge, why don't you first take his testimony?

THE COURT: You see, because I believe I have enough here and - -

MR. BRANCATO: What you have - -

THE COURT: I don't want to change horses mid stream.

MR. BRANCATO: What you have - -

THE COURT: I'm allowing Mr. Brenner is to examine the witness, to lead the witness. That's - - that's it.

MR. SHEINDLIN: May we approach for a moment, Judge?

MR. BRENNER: No.

THE COURT: Yes.

MR. BRENNER: On the record, your Honor.

MR. BRANCATO: Say it over here.

MR. SHEINDLIN: On the record?

THE COURT: Go ahead, Mr. Sheindlin.

MR. SHEINDLIN: Hostilities in this case is almost a misnomer, to call a hostile witness on the sole basis of hostility. To qualify him as a hostile witness for the following reason.

THE COURT: I don't think it is necessary for this Court to engage in a semantical anaylsis of the word hostile.

MR. SHEINDLIN: All right, I'll move on.

Mr. Brenner says, where were you on July 17th, 1990 and the witness goes through it and he's answering when he's going through his recitation of the facts, that doesn't make a hostile witness.

If the witness starts lying, if the witness starts changing facts, then he becomes - -

THE COURT: Who is going to be the arbiter of that?

MR. BRANCATO: You.

MR. SHEINDLIN: He has a certain burden to prove that to the Court. That's not for us.

THE COURT: All right, you have my ruling.

MR. BRENNER: Your Honor?

THE COURT: Now, with - - yes?

MR. BRENNER: The logistics of calling him, I have another witness who I'm going to call first.

THE COURT: We have to get an attorney and I have to give you an opportunity to examine the records as well.

MR. BRENNER: Your Honor?

THE COURT: Let's go.

MR. BRANCATO: Judge, we - - we said before, we have no intention of going over his record.

THE COURT: Right.

MR. BRANCATO: And we don't want to hear that coming out on direct.

MR. BRENNER: What record? His criminal record?

MR. BRANCATO: Yes.

MR. BRENNER: I have no intention of soliciting his criminal record.

THE COURT: What about the hospital record? I'm telling you, if it is your intention after perusing, you want to introduce aspects or question him, I'm going to make a pre-ruling as to what aspects.

MR. BRENNER: I understand.

THE COURT: I didn't say you would. But I'm doing it in an orderly fashion so there will be no later complaints.

MR. BRENNER: All right.

(Records handed to Mr. Brenner.)

THE COURT: Are we ready to go at this time? Counsel?

MR. PEARLMUTTER: David Pearlmutter, 350 Braodway.

THE COURT: Mr. DaCosta, you have been subpoenaed as a witness in this proceedings.

Do you understand?

THE WITNESS: Yes.

THE COURT: The Court has assigned, unless you tell me you have your own counsel, the Court assigned an experience lawyer to assist you and consult with you before your testimony.

This is Mr. Pearlmutter standing here now. He's assigned and paid for by the Court. His alliance though is to you. He represents you. He represents nobody else.

Do you understand me?

THE WITNESS: Yes.

THE COURT: Anything you tell him is confidential, between you and Mr. Pearlmutter. And he may not, under any circumstances, revealed the content of your conversation, which is privileged.

So, you can consult with him prior to your being called as a witness.

Mr. Pearlmutter is now assigned.

MR. PEARLMUTTER: Thank you.

THE COURT: Anything else?

MR. BRANCATO: Two things.

THE COURT: All right.

MR. BRANCATO: The first is that the defendant is now going to call his girlfriend, Rosemary Gonzalez.

THE COURT: So?

MR. BRANCATO: One: Since we have been told she was not with the defendant at the time that this bomb was sent and since we have reason to believe that she was not with him at the time that his wife was shot seven months previous to that, we would like some showing as to what relevance she has to offer at this time.

Secondly: Secondly: If she's going to testify to any telephone conversations that she may or may not have had with the defendant, we do not want to be in a position where she's going to say he called me and told me he was calling me from. Because that would be hearsay.

THE COURT: Mr. Brenner is an experienced enough lawyer that he wouldn't flirt with that type questioning.

MR. BRANCATO: Judge, wait a minute. Wait a

minute. Judge, please. We got into this situation very, very early with some letter and an envelope.

THE COURT: Now, I think - - well, I don't want to argue.

MR. BRANCATO: I think as a result of that you ramrodded a stipulation down the parties because you didn't want to have to get into a position of counsel having to say, in front of the jury, that he didn't have that letter.

THE COURT: The fact is, as explained to the Court, I don't believe it is on the record, but it was done at least at the sidebar, Mr. Brenner made representations to the Court subsequent to that that he had information, whether it was erroneous or otherwise, but he had information and it was based on that information, admittedly hearsay information, but he had information to the effect with regard to the postmark of those letters.

MR. BRENNER: Your Honor, just to alleviate any further discussion?

I intend - -

THE COURT: If you intend to address the Court, stand up.

MR. BRENNER: I'm sorry.

I intend to elicit no such testimony from Miss Gonzalez.

THE COURT: Off the record.

(Off the record discussion between the Court and all counsel.)

THE COURT: All right, bring in the jury panel, please.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Welcome back.

Once again, ladies and gentlemen, I know I sound repetitious, let me just assure you while you were confined to that room and we were outside here, it was not a social reason for being here, there were other issues that had to be dealt with. So, once again, I hope you understand it and take it in that light, that no discourtesy was meant nor

did we try to impede the progress of this trial.

As a matter of fact, we try, whenever possible, to move it along as expeditiously as possible. I know some of you may not appreciate that point, but I assure you that is the fact.

Mr. Brenner, call your next witness.

MR. BRENNER: The defense calls Rosemarie Gonzalez.

THE COURT: Rosemarie Gonzalez.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear that the testimony you're about to give the Court and jury in the case of the People of the State of New York against versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes.

COURT CLERK: Be seated.

COURT OFFICER: In a loud, clear voice state your name, spelling your last name and county of residence.

THE WITNESS: Gonzalez, G-O-N-Z-A-L-E-Z, New York City. Rosemarie.

THE COURT: You may inquire, Mr. Brenner.

MR. BRENNER: Thank you, Judge.

R O S E M A R I E G O N Z A L E Z, having been called as a witness on behalf of the People, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. Miss Gonzalez, I'm going to ask you to speak as loudly and as clearly as you can in response on to my questions; all right?

A. Yes.

Q. Miss Gonzalez, how old are you?

A. Thirty-four.

Q. And where do you reside?

A. New York City.

Q. Where in New York City?

A.

Q. And could you tell us, what is your educational background?

A. Up to one year of college.

Q. Where?

A. Manhattan City - - Manhattan Community, City College.

Q. And are you employed?

A. Yes.

Q. By whom?

A. Morealy Associates.

Q. You have to keep your voice up so that the juror in the back corner be hear you; all right?

A. Yes.

Q. Morealy Associates, what is Morealy Associates?

A. They are a major bridal manufacturer.

Q. And what do you do for them?

A. I'm a receptionist.

THE COURT: Major what?

THE WITNESS: Bridal - -

THE COURT: Bride's gowns?

THE WITNESS: Gowns for brides, bridesmaids.

THE COURT: I would be more interested in finding the location of this.

Go ahead.

Q. How long have you so employed?

A. Two years.

Q. And were you employed before that?

A. Yes.

Q. And what capacity?

A. Receptionist, also.

Q. For whom?

A. For a major silk Manufacturer.

Q. And how long was that for?

A. Nine months, until they went out of business.

Q. And before that were you employed?

A. I was - - I worked as a buyer for a major department store for as a year and one-half, until they went out of business.

Q. And before that?

A. Twelve and one-half years in a woman's clothing store botique, with under three different ownerships.

Q. And when you left there, what was your job?

A. Manager's position.

Q. What did you start as?

A. A salesgirl.

Q. Now, Miss Gonzalez, I'm going to ask you if you know this man, Dominic Franza?

A. Yes, I do.

Q. For how long do you know him?

A. I've known him - - met him July, of '82 to the present.

Q. And back in July, of 1982, how did you meet him?

A. I met him through his mother.

Q. And what were the circumstances, specifically?

A. We were introduced, briefly, and she's always wanted me me to meet her son. And we met.

Q. And what happened after that?

A. A few weeks later he called me and we made a date and we went out and started going out.

Q. And after that what happened, after you dated for awhile?

A. Yes became romantically involved and started living together.

Q. And for how long did you live together?

A. From '83, from October, of '83 to March, of '87.

Q. And where did you reside?

A. In the Bronx.

Q. Where?

A. Thirty-three - - first at 3325 Barker Avenue and then 3320 Barker Avenue.

Q. 3320 Barker Avenue, is it fair to say is the present address of Mr. Franza?

A. Yes.

Q. Now, did there come a time in 1987 when your romantic relationship with Mr. Franza came to an end?

A. Yes.

Q. Can you tell us the tone or the terms under which it came to an end?

A. It was a friendly breakup.

Q. And did you maintain contact with Mr. Franza after that?

A. Not really. We, you know, we bumped into each other occasionally, you know, in the neighborhood. We would just pass, say hi, keep on going.

Q. Did there come a time when you began to see Mr. Franza again?

A. Yes.

Q. And when was that?

A. I bumped into him after his separation. And he told me about it.

Q. Approximately when was that?

A. The summer of '90.

Q. And can you describe the nature of your relationship at that point, in the summer of '90?

A. Friendly.

Q. How often did you see him during that period of time?

A. Not too often.

Q. If you can approximate?

A. Once every couple of weeks or so. Once in a blue

moon. Never that often.

Q. Without relating anything that Mr. Franza said to you, did you speak to him relative to Myra Franza?

A. Yes.

Q. Without, again, without telling us anything he said to you, did he you speak to him relative to the shooting?

A. Yes.

Q. Now, did there come a time when the relationship which you described as friendly changed?

A. Yes.

Q. And when was that?

A. Towards early fall.

Q. Approximately?

A. October, November.

Q. And - -

THE COURT: What year?

THE WITNESS: Of '90.

Q. And what was the nature of the change?

A. We started getting romantically involved.

Q. Now, at the point in which you began to become romantically involved, what would you do? what were your activities, you and Mr. Franza?

A. We would basically hang out in the apartment, watch T.V., go out to dinner or we would social lise in the apart-

ment with friends.

Q. How often did you and Mr. Franza see each other from the fall of 1990 onward?

A. I'd spend weekends with him.

Q. When you say you "spend weekends," could you be more specific?

A. From Friday night to Sunday night and then during the week I saw him maybe once or twice after work.

Q. Now, when you say you spent weekends and from Friday to Sunday, where was that?

A. In his apartment.

Q. Which is where?

A. 3320 Barker Avenue.

Q. Now, during the course of your relationship with Mr. Franza, did you have occasion to meet any of his friends?

A. Yes.

Q. Do you know Tracey Jenkins?

A. Yes.

Q. Do you know his family?

A. Yes.

Q. Do you see his family sitting in court?

A. No.

Q. Are you familiar with the Olinville Gun Range?

A. Yes, I am.

Q. What is that?

A. It is a range where he goes to practice shooting.

Q. And have you ever been there?

A. I've been there; yes.

Q. And what were the circumstances of your having been there?

A. Trying to teach me how to shoot.

Q. Did you learn?

A. Not really. I need a lot more practice.

Q. With regard to the apartment at 3320 Barker Avenue, did you ever see any guns or gun related equipment there?

A. Yes.

Q. What did you see?

A. His reloading equipment.

Q. Anything else?

A. Whatever equipment that it takes to make the bullets or whatever.

Q. And where was that equipment?

A. It was in his bedroom, on a rolling table.

Q. Did you ever see him use it?

A. Yes.

Q. How often?

A. Only once.

Q. Between November, of 1990, and February, of 1991,

did you ever observe Mr. Franza engage in any unusual - -

A. No.

Q. Activities?

A. No.

Q. Did you ever see him involved in anyway with pipes or wires or tape?

A. No. No.

Q. Did you see anything around the apartment that would suggest - -

A. No.

Q. Now, directing your attention to February 11th.

MR. BRENNER: Withdrawn.

Q. February 12th, 1991.

Did anything unusual happen on that day?

MR. BRANCATO: I'm sorry, what date?

MR. BRENNER: February 12th, 1991.

A. Yes, I received a call at my job and he told me he was in jail.

Q. Now, your telephone at work, can you tell us what the number is?

A. 947-3490 or 947-5513.

Q. In addition to the times that you would see Mr. Franza on the weekends, from the times you would see him during the week, was there any other kind of contact that you

and he had?

A. He would call me several times at the job or I would call him.

Q. So, you would speak on the telephone?

A. Yes.

Q. Now, did you learn when Mr. Franza had been arrested?

A. Not the first; no. When he called me, that Tuesday, otherwise I didn't know.

Q. Do you know now when he was arrested?

A. Yes.

Q. Would it be fair to say he was arrested on February 11th, 1991?

A. That's what I've heard; yes.

Q. Do you know what day of the week that was?

A. Monday.

Q. The weekend immediately preceeding his arrest, were you with him on that weekend?

A. Yes, I was.

Q. And what did you all do?

A. Saturday we entertained, we had friends over, watching a Sugar Ray Leonard fight. And just, you know, having a small party.

Q. What friends?

A. Get together.

Q. What friends were they, as best you can recollect?

A. Some friends from the gun range.

Q. And do you know their names?

A. Higgins, with his girlfriend, Willie and his wife, Joe, a friend, John, and, I believe, Roger was there, another gentlemen named Roger.

Q. And the weekends before that, do you recall where you were that weekend?

A. We were together; yes.

Q. Now, would it be fair to say, Miss Gonzalez, that you, between the months of November, 1990, and February 11th, 1991, that you were not with Mr. Franza every minute?

A. No.

Q. Of every day, seven days a week?

A. No.

Q. Is that right?

A. Correct.

Q. Miss Gonzalez, between the months of November, 1990, an February, of '91, can you tell us how was the relationship?

A. Very good.

MR. BRENNER: I have nothing further.

THE COURT: The witness is yielded.

MR. BRANCATO: Just a moment, Judge.

(Off the record discussion between Mr. Brancato and Mr. Sheindlin.)

CROSS EXAMINATION

BY MR. BRANCATO:

Q. Miss Gonzalez, you indicated earlier that you lived with the defendant from October, of '83, until March, of '87;am I correct?

A. Yes.

Q. And at that time you lived in the Bronx with him?

A. Yes.

Q. And you presently reside in Manhattan?

A. Yes, I do.

Q. So, you're familiar with the Bronx; am I right?

A. Not that much. Just basically the area where we lived.

Q. Well, you lived at Barker Avenue; am I correct?

A. Yes.

Q. And Barker Avenue, from Fordham Plaza, is it fair to say that that's a ten minute ride by car?

A. I wouldn't - - I would not know. I never timed. I really couldn't say.

Q. Well, you know where Fordham Plaza is; am I correct?

A. I've been through there by car. But I never been there myself personally.

Q. Isn't it about three miles from where - -

A. I - -

Q. You lived with Mr. Franza?

A. I couldn't say. I don't know the direction, how far it is from where I live.

Q. You know where White Plains Road is?

A. Yes.

Q. From where Mr. Franza lives?

A. Yes.

Q. And how far is that?

A. It is only a couple of blocks or so.

Q. It is within walking district; am I correct?

A. Yes. That's where the train station is.

Q. And U.S.A. Electronics, which is located on White Plains Road, is that near the train station?

A. Yes, it is.

Q. Now, Fordham Plaza - - when you lived up in the Bronx, were you driving?

A. No, I don't drive.

Q. You don't have a license?

A. No, I don't know how to drive at all.

Q. So, is it fair to say that you rely on public trans-

portation?

A. Yes, I do.

Q. Is it fair to say that when you go some where on public transportation you have to check out the maps in the area in order to get there?

A. Well, if - - basically when I'm going some where I already know how to get there. I don't usually go out of my way to go some where where I've never been before.

Q. Did you ever go to Fordham Plaza?

A. No.

Q. In your life?

A. No.

Q. Did you ever pass by it?

A. I've passed by it.

Q. How - -

A. But I never stopped there or gone into, personally, myself.

Q. But you've passed by there?

A. Yes.

Q. Is it fair to say that during the four years that you lived up in the Bronx you've passed by it numerous times?

A. I wouldn't say that.

Q. Is it fair to say that you passed by it in the four years that you lived there and the times that you've been in

the Bronx since, is it fair to say that you've been there, at least passed by there at least fifteen to twenty times?

A. I really couldn't say; no.

Q. Where - -

A. I don't - - you know, I don't keep track of, you know, where we drive by. Sometime we just get in the car and go driving, no where particular.

Q. Where is Fordham Plaza located from 3320 Barker Avenue?

A. I couldn't say, sir. I really couldn't say. I have never lived in the Bronx for a few years now. Even when I was there I didn't know how to travel. Only from where I lived to my job.

Q. Okay. But you told us earlier that you lived there for four years?

A. Yes.

Q. And you told us that when you were living there in the Bronx you were living on the same street in which - - well, you were living at 3325 Barker Avenue?

A. Yes.

Q. And then you moved to 3320 Barker Avenue?

A. Yes.

Q. So, you were on the same street?

A. Huh-huh. Right across.

Q. From your apartment, on Barker Avenue, to Fordham Plaza, when you went there, how would you get there?

MR. BRENNER: Objection.

There is no testimony that she went there, your Honor.

Misleading question.

THE COURT: Rephrase it.

Q. You passed by there, you said earlier; am I correct?

A. We've drove through the neighborhood. But never been there, no. Never stopped at the place.

Q. You never stopped at the plaza?

A. No.

Q. When you drove to the neighborhood at Fordham Plaza, how did you get there?

A. By car.

Q. And what path would you take?

A. Mr. Brancato, I really couldn't say. I mean, I don't pay attention to streets or when I'm in the car I don't drive, I'm just a passenger. I really don't, you know, I'm in the car enjoying the ride.

Q. So, you're saying then that in the four years that you lived in the Bronx, up until 1987, and during the period since the summer of 1990, that you don't know how to get to

Fordham Plaza?

A. No. I've never gone there; no.

Q. When did the defendant get married to Myra Franza?

A. I believe it was in May, of '87.

Q. And that was roughly two months after you moved out?

A. (No response).

Q. Was the defendant going out with Myra Franza while you were living with him?

A. No.

Q. Do you know when he met her?

A. No, I don't. It was after we broke up.

Q. And do you know Miss Franza?

A. No, I don't.

Q. Have you ever met her?

A. No.

Q. You indicated that your name was Rosemary - -

A. Rosemarie.

Q. Rosemarie Gonzalez?

A. Huh-huh.

Q. Have you ever been known by Rosemarie Rodriguez?

A. No.

Q. Now, Tracey Jenkins, have you met Mr. Jenkins?

A. Yes.

Q. And Mr. Jenkins is a friend of the defendant; am I correct?

A. Yes.

Q. Mr. Jenkins used to work at Pergement; am I correct?

A. That I heard he did; yes.

Q. Pergement's Home Store out in Spring Valley?

A. Well, at the - - you know, at the time he was working for Pergement, Dominic and were just friends. I mean I, heard he was working there but Dominic and I were just starting to get reacquainted.

Q. And this was sometime in the summer, of 1990?

A. I believe so.

Q. Was Mrs. Franza still in the hospital when you started to speak to him and get acquainted with Mr. Franza?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. During the time of the summer, of 1990, up to February, of 1991, was the defendant working?

A. No, he wasn't.

Q. Now, he's an electrician; am I correct?

A. Yes, he is.

Q. And did he do any - - well, he wasn't working as an electrician during that time?

A. No, he wasn't.

Q. Did he do any side-jobs during that time?

A. No. Not that I was aware of; no.

Q. And how was he supporting himself during that time?

A. He was receiving checks from his union.

Q. And you indicated that you had seen reloading equipment at his apartment.

A. Yes.

Q. Would that be cans of gun powder?

A. There were powder and the bullets, you know, the shells and stuff. Whatever it takes, I guess, to make the bullets.

Q. And you saw him do this?

A. Yes.

Q. Do you know the defendant's family?

A. Yes.

Q. Is it fair to say that you're very friendly with them?

A. Yes.

Q. Is it fair to say that you and the defendant have been together with his family at their house?

A. Yes.

Q. His brother Michael, do you know where he lives?

A. I believe he lives in Brooklyn.

Q. And do you know his wife?

A. Yes.

Q. Is she a friend of yours?

A. Yes.

Q. Have you been to her business?

A. No.

Q. You're aware, aren't you, that she has a business?

MR. BRENNER: Objection. Objection.

THE COURT: Let him delete the question.

Q. Were you aware that she has a business?

A. Yes, I've heard about it.

Q. What kind of a business is that?

A. I believe she does resumes. I know something that has to do with computer typewriters.

Q. Okay. The defendant is an electrician by trade; am I correct?

A. Yes.

Q. Do you know where he keeps his tools?

A. He has a tool bag.

Q. And as an electrician he runs wiring; am I correct?

A. It is parts of his job.

Q. Have you seen any wiring at his apartment, loose wiring?

A. No.

Q. Any tape?

A. Tape?

Yes.

Q. Now, when you went to his apartment, when was the first time that you went back to his apartment after - - after his wife was shot? When was that?

A. I believe it was late summer.

Q. When?

A. September. Of '90.

Q. Did you see any firecrackers in his apartment when you went back?

A. No.

Q. How often did you go to his apartment in November and December?

A. Every weekend I would spend the weekend with him, from Friday night to Sunday.

Q. And you told us earlier that you spent the weekend with him just before he was arrested - -

A. Yes.

Q. On February 11th?

Did you see any packs of firecrackers - -

A. No.

Q. In the apartment?

A. He kept them in the bureau so they weren't in

sight.

Q. He kept them?

A. In the bureau, yes. But I didn't see them at first.

Q. You knew that they were there?

A. Not at first.

Q. Did you see them at some point?

A. Because at - - he keeps his sheets and towels in the bureau, so when I would go and get a towel or something they were there.

Q. So, you did see firecrackers?

A. Not at the beginning.

Q. When did you first see that there were packs of firecrackers in the apartment?

A. When I started spending weekends with him and started, you know, getting, you know, intimate.

Q. Are you aware that the pipebomb that was put outside of Nelson DaCosta's apartment had a firecracker inside of it?

MR. BRENNER: Objection.

Q. Are you aware of that?

MR. BRENNER: Objection. Objection.

THE COURT: If she knows it?

Q. Are you aware of that?

A. I've heard.

Q. Okay.

MR. BRANCATO: I have no further questions at this time.

THE COURT: Any re-direct?

RE-DIRECT EXAMINATION

BY MR. BRENNER:

Q. Firecrackers that you saw, Miss Gonzalez, were thepackages open or closed?

A. They were closed.

Q. Did you ever see any open packs of firecrackers?

A. No.

MR. BRENNER: I have nothing further.

THE COURT: Any re-cross?

MR. BRANCATO: No.

THE COURT: You are excused.

(WITNESS EXCUSED)

THE COURT: Counsel to the bench.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen of the jury, at this time there will be a short recess.

Do not discuss this case amongst yourselves.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Cominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, bring the jury panel in.

MR. BRANCATO: Your Honor, if I may?

THE COURT: Go ahead.

MR. BRANCATO: Is there anything that the defendant, since he's calling Mr. DaCosta, seeks to introduce through this medical record?

We've already said that we have no - -

THE COURT: All right, you don't have to go on.

MR. BRENNER: Judge, I've seen half of it. There is nothing that I feel would be appropriate to introduce.

THE COURT: You discussed about having the last witness attend, Mr. Brancato?

MR. BRENNER: No, it is not necessary. Leave it the way it is.

THE COURT: What was that? I feel like I came to the party and I missed.

THE COURT: You'll be invited again.

Have the witness excluded.

Bring in the panel.

MR. BRANCATO: The other thing, you said that you had worked out?

THE COURT: Mr. Pearlmutter will be present and if Mr. DaCosta wants to consult with Mr. Pearlmutter, he will be able to consult with him outside the presence of the jury.

MR. BRANCATO: All right.

THE COURT: All right, bring in the jury panel.

COURT OFFICER: Jury entering.

THE COURT: Yes.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial continued.

The defendant, his counsel, the assistant district attorney and all sworn jurors are present, your Honor.

THE COURT: Call your next witness.

MR. BRENNER: The defense calls Nelson DaCosta.

THE COURT: Nelson DaCosta.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

(Continued on the following page.)

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York versus Dominic Franaz shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

COURT CLERK: Be seated.

COURT OFFICER: In a loud voice, please state your name, spelling your last name, and county of residence.

THE WITNESS: My name is Nelson DaCosta. I live at 645 West 185th Street, Apartment 1-A.

D-a-C-O-S-T-A.

THE COURT: You may inquire, Mr. Brenner.

N E L S O N D a C O S T A, having been called as a witness on behalf of the defense, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. Mr. DaCosta, you are the brother of Myra Franza?

A. Yes, I am.

Q. You are the son of Josephine Mendez?

A. Yes.

Q. You are also the brother of Carlos DaCosta?
A. Yes.
Q. And you were the brother of Wilfred DaCosta?
A. Yes.
Q. Back in 1990, July, where did you reside?
A. Same place.
Q. 644 Weat 185th Street?
A. Yes.
Q. In July, 1990, did you reside there alone?
A. July?
Q. July.
A. Yes.
Q. Mr. DaCosta, are you married, sir?
A. Separated.
Q. And when were you separated?
A. I was separated in June.
Q. Of 1990?
A. 1990.
Q. Your wife Ruthie?
A. Yes.
Q. You had a child?
A. I have two.
Q. She took the children and went to Chicago?
A. Yes.

Q. In June, of 1990?

A. Yes.

Q. Directing your attention to July 8th, 1990.

A. July 8th?

Q. July 8th.

Did you receive a telephone call?

A. Yes.

Q. Did the person on the telephone threaten to kill you and your entire family?

A. Nope.

Q. Did you report to Police Officer Aponte, of the 34th Precinct, that the person threatened to kill you and your family? Did you report that, sir?

A. I did not report that, what you're saying.

Q. You did not?

A. I did not.

Q. Mr. DaCosta, did you receive information from your mother that on July 16th, 1990, that two men posing as police officers were looking for you at her house?

A. Yes, I do. I know about that.

Q. Did she ask you what that was about?

A. Yes.

Q. Did you tell her that you had received a phone call threatening you a week earlier?

A. No.

Q. You did not?

A. (Indicating by a shaking of the head).

Q. You did not, sir?

A. No.

Q. Did you tell Myra Franza that you had received a telephone call?

A. No.

Q. Did you tell Carlos DaCosta?

A. No.

Q. Mr. DaCosta, in May, of 1990.

A. May?

Q. Did you use narcotics?

MR. BRANCATO: Objection.

THE COURT: Step up.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(Whereupon, the witness resumed the witness stand.)

MR. BRENNER: Read back the last question,

please?

Your Honor? May I have the last question read back?

THE COURT: Yes.

(Whereupon, the requested portion of the proceedings was read aloud in open court.)

THE COURT: You may answer.

A. No.

Q. Mr. DaCosta, would it be fair to say in April, of 1990, you did?

A. April? You talk about May or April?

Q. April.

A. I don't know about that.

Q. I'm sorry?

A. I don't remember about that. Maybe I did.

Q. Would it be further fair to say that it is heroin?

A. Yes.

Q. And cocaine?

A. Yes.

Q. Would it be fair to say you purchased those drugs?

A. In April?

What you talking about?

Q. April.

A. April, May, June.

No. No, you're mistaken.

Q. Mr. DaCosta, for how long prior to April, of 1990, going backward, had you used heroin and cocaine?

MR. BRANCATO: Judge, I object to this line of questioning.

THE COURT: Sustained.

MR. BRENNER: To the line or to the question, your Honor?

MR. BRANCATO: To both.

THE COURT: In view of the bench conference, counsel knows the limit.

Q. Mr. DaCosta, in February, of 1991, did you learn that a letter had been written to you in Spanish?

A. No.

Q. When did you learn of that?

A. The day that - - that - - that Brancato - - Giorgio picked up the letter.

Q. Showed it to you?

A. No.

Q. Have you ever seen it?

A. No.

MR. BRENNER: May I have it?

MR. BRANCATO: You got a copy of it.

MR. BRENNER: I would like the real, initial

one in evidence.

THE COURT: It is around People's 20?

MR. BRENNER: Twenty-six, I believe. But I'm not sure.

MR. SHEINDLIN: Thirty-two.

MR. BRENNER: I'm not sure.

THE COURT: Thirty-two.

MR. SHEINDLIN: Both letters?

MR. BRENNER: Just the one to Mr. DaCosta.

THE COURT: Well, People's 32 had A, B, C and D. So you're talking about B or D; is that correct?

Mr. Sheindlin?

MR. BRENNER: That's correct.

THE COURT: All right.

MR. BRENNER: I ask that the witness be shown People's 32-D in evidence.

(Handed to Mr. Brenner.)

COURT OFFICER: People's 32-D, shown to the witness.

(Handed to the witness.)

(Pause.)

A. Yes, I seen that this. But Giorgio picked up - - he picked that - - this here my mother's house.

Q. So, you have seen it?

A. (Indicating by a nodding of the head).

Q. Back in February, of 1991?

A. Whether whenever. Whenever he picked it up?

Q. In August, of 1990, specifically August 11th, 1990?

A. August 11th?

Q. Was a pipebomb recovered from your apartment?

A. Yes.

Q. Were you there?

A. No.

Q. For how long prior to that had you not been at that apartment?

A. I don't remember.

Q. Was it a day, a week?

A. When I went to the hospital.

Q. For how long?

A. For three weeks.

Q. So, you were not at home?

A. I just told you, no.

Q. Mr. DaCosta, on August 11th, 1990, a pipebomb was recovered from your apartment; is that right?

A. Yes.

Q. On July 6th - - 16th, 1990, two men came to your mother's house looking for you, posing as detectives?

A. Yes.

Q. On July 8th, 1990, someone called you up and threatened you and your family?

A. He didn't say that. I just told you that. He didn't say that.

Why don't you ask me what they say?

Q. Did you make a report to the police?

A. I made a report.

Q. And they asked you what the person said; yes?

A. (No response).

Q. Yes, sir?

A. Yes.

Q. And you told them?

A. I told them.

Q. And it was a female police officer?

A. Yes.

Q. Mr. DaCosta, within the - - a five month period prior to the telephone call that you received, in July?

A. Five months before?

Q. Within the five month period before, before July?

A. Before?

Q. Going back July, June, May, April, March, February, within that five month period?

A. Yes?

Q. Were you using narcotics?

MR. BRANCATO: I object.

THE COURT: Sustained.

THE WITNESS: What I?

THE COURT: Don't answer.

MR. BRENNER: I have nothing further of this witness, your Honor.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. BRANCATO:

Q. Mr. DaCosta, when you - - Mr. Brenner asked you about receiving a telephone call and talking to a police woman.

Would you please tell us the circumstances under which you spoke to the police woman?

A. Okay. Ruthie, my wife, she was selling Avon products. And when she left me, she over - - she owed the guy two hundred dollars. In Avon products.

MR. BRENNER: I'm going to object to this, your Honor.

MR. BRANCATO: Judge, he brought it out.

MR. BRENNER: I'm going - -

THE COURT: Just a minute.

MR. BRENNER: Well, he - -

THE COURT: Just a minute.

Contain yourselves and approach the bench.

The witness stands down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Step over.

(Whereupon, there was a sidebar conference between the Court and all counsel, which was recorded but not transcribed.)

(Whereupon, the witness resumed the witness stand.)

BY MR. BRANCATO: (Continued)

Q. Mr. DaCosta, could you please tell us, the phone calls that you received, what did the person say on the phone?

A. What did the punk - - he said, "I want to speak to Ruthie."

Q. Okay.

A. And then Ruthie had already left me. But she left to Chicago. So, then I said, "Ruthie's not here," and I hung up.

Then the next day he call back again; "I want to

speak to Ruthir." And I says, "she's not here." I say, "who is this?" "I want to speak to Ruthie." "She's not here."

Plung. I hang up again.

Then he calls back again. Then I, the next day, "I wants to speak to Ruthie." "Who this?

Then I thought they was having an affair with him, you know? So, then I started cursing him, you know. You know.

Q. Without - - without getting - -

MR. BRENNER: Objection.

Let the witness answer, your Honor. Mr. Brancato asked a question, let him answer.

A. So then I say, "who the fuck, you know?" Then I say - - so, then I started cursing. "Yes, she over here. Why don't you come over here and get her?" You know. Then he hanged up. I hang up.

Then he starred calling and then not saying nothing. Just calling the next day, I say - - to see if Ruthie answer the phone. Then he call up again. So then I call - - about two or three days later he kept calling, he didn't say nothing.

Then I call the telephone - -

THE COURT: You say he didn't say anything, there was no voice?

THE WITNESS: No voice.

THE COURT: You don't know who called?

THE WITNESS: Yes, I tell you in a minute.

A. So, then I call the Telephone Company. I say, "listen, I'm being harassed on the telephone." So, then the Telephone Company tells me, "has he threatened you?" I said, "no." Okay. I hangs up.

Then about two days later, he call back again. I say, "hey, there somebody threatening me over the phone. Can you trace this phone call?"

Q. Did anyone threaten you?

A. No. No. I just said that so they can trace the telephone call. But I wanted to see who the one harassing me, like that. That's what it was.

Nobody say he was going to kill me family. Okay? I just said that, just said that to the policeman, "yeah, he say he going to kill me," but I had to say something so they can trace the phone or they not going to trace the phone call if you don't say nothing.

Q. Is it fair to say then - -

A. Then somebody in a few days, some, a few days later, this lady call; "hey, we have a misunderstanding here. Your wife owes us two hundred dollars for Avon products." And I say, "I'm sorry, miss, she's not living here no more."

And then I say - - that's when that, after that, that's when that, that prick there try, you know, did that.

THE COURT: Strike that last comment.

Yes, Mr. Brancato?

Q. The night that your mother and your sister were shot?

A. Yes.

Q. Did there come a point that you went to the apartment on 187th Street?

A. Yes.

Q. Did you see the defendant that night?

A. I seen him.

Q. When you saw him, what did you do?

A. I punch that punk right in his face. That's what I did.

THE COURT: Just a minute.

Counsel, come up here.

COURT OFFICER: Sir, step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(Whereupon, the witness resumed the witness stand.)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(WITNESS EXCUSED)

(Open court.)

THE COURT: All right.

(Whereupon, the witness resumed the witness stand.)

BY MR. BRANCATO: (Continued)

Q. Mr. DaCosta, Mr. Brenner asked you earlier did you do cocaine.

Who gave you the cocaine?

A. I brought it in the street.

Q. And where were you in August, of 1990?

A. In August? August?

I was in my house.

Q. Were you there the whole month?

A. Yes, I be living there for twelve years.

Q. You were living at 485 West one hundred - -

MR. BRANCATO: I'm sorry.

Q. 644?

A. 644.

Q. West one hundred eighty?

A. Fifth street.

Q. Fifth street.

That's between Broadway and Wadsworth?

A. Broadway and Wadsworth.

Q. And was there a time in August, approximately three weeks after you saw your mother and your sister carried out of the - -

MR. BRENNER: Objection.

Q. Your mother's - -

THE COURT: Sustained.

Q. Did you see your mother and your sister get into the ambulance, the night they were shot?

MR. BRENNER: Objection.

A. No, I didn't.

THE COURT: I'll allow it.

Q. Three weeks after that, did you go in for psychiatric treatment?

A. Yes.

Q. How long were you in the hospital, Columbia Presbyterian Medical - -

A. I was - -

Q. Center for psychiatric treatment?

A. I was there for three weeks.

Q. You weren't living - - you weren't - - you weren't physically in your apartment the night of August 11th, 1990?

A. August 11th, 1990?

I don't know.

Q. Do you know where you were?

A. August 11th?

I don't know. Maybe I was in the hospital. I don't remember. I don't specifically remember that day.

Q. How long were you in for psychiatric treatment?

A. I was there for three weeks.

MR. BRANCATO: Just a moment.

(Off the record discussion between Mr. Brancato and Mr. Sheindlin.)

Q. Do you remember when you got out of the hospital for psychiatric treatment?

A. No.

Q. In relation to when your mother and your sister were shot, what was the time between that they were shot and the time you went in for psychiatric treatment?

A. A few weeks later, I got real bad, you know? I had to go in the hospital.

MR. BRENNER: I'm going to object.

May we approach, your Honor?

THE COURT: Yes.

COURT OFFICER: Step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(Whereupon, the witness resumed the witness stand.)

BY MR. BRANCATO: (Continued)

Q. Mr. DaCosta, you indicated that you lived at 644 West 185th Street for about twelve years now; am I right?

A. Yes.

Q. And Mr. Brenner showed you a letter that you had seen from Detective Giorgio.

A. Yes.

Q. Did you receive any other letters like that at your mother's address after February the 11th, 1991?

A. I don't. For me? Letters towards me?

Q. Yes.

A. Just one letter, as far as I know.

Q. That's the one you were shown?

A. Yes.

Q. You haven't received any letters like that at your

apartment; am I right?

A. No.

MR. BRANCATO: I have no further questions at this time.

THE COURT: Any re-direct?

RE-DIRECT EXAMINATION

BY MR. BRENNER:

Q. Mr. DaCosta, did you receive something from a - - in your apartment, in the mail, you received something from the cemetery, you called up the police telling them it was a threat, didn't you?

MR. BRANCATO: I object.

A. No, I didn't.

MR. BRANCATO: I object.

THE COURT: Just a minute.

MR. BRANCATO: I don't - -

MR. BRENNER: This is - -

THE COURT: Step up.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Step over.

(Whereupon the Court Reporter approached the sidebar, where the following proceedings commenced:)

THE COURT: Read the last question. I'm sorry, the last question of Mr. Brancato. Or the last two questions of Mr. Brancato.

(Whereupon, the requested portion of the proceedings was read to the Court and all counsel.)

(Continued off the record discussion between the Court and all counsel at the sidebar.)

(Open court.)

THE COURT: All right, let's go.

(Whereupon, the witness resumed the witness stand.)

MR. BRENNER: Your Honor, the last question is withdrawn and I have no further questions for this witness.

THE COURT: Very well.

Mr. DaCosta, you may stand down. You are excused.

(WITNESS EXCUSED)

(Continued on the following page.)

THE COURT: All right. Now, if my information is correct, gentlemen, the scheduling is such - - is there a possibility or that possibility is now precluded?

MR. BRENNER: The witness apparently took care of that possibility himself.

THE COURT: In that event, ladies and gentlemen, at this time we will recess not only for lunch but for the remainder of this day and we'll resume at eleven o'clock on Monday morning.

Do not discuss this case among yourselves.

Do not reach any conclusions.

Do not speculate.

Have a very pleasant weekend and with the usually admonitions, have a good day and a good weekend.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRENNER: Judge?

THE COURT: Yes?

MR. BRENNER: In the interest of avoiding

further discourses of the nature that we have, two of my witnesses are police officers who will testify to two incidences reported to them by Mr. Franza. They will not report to the substance of what he says. They will report to having had a conversation with Mr. Franza - - as the district attorney does, as a result of a conversation with Mr. Franza, what, if anything, did you do, in those - - with regard to two incidences that occur between the time of the shooting and the time that Mr. Franza is arrested. One is a - - where shots are discharged at him, the police investigate, recover spent gunshot shells and do an investigation. The other is an occasion where he makes a complaint and two hispanic men are arrested in possession of a sawed-off shotgun.

That - - I'm making an offer of proof, which I do not concede is necessary, but in the interest of avoiding further discussion, so we can resolve this now, I believe it is relevant to the defense.

The author of the letter, in Spanish, made reference to may attempt to take the life of Mr. Franza, the husband of Myra Franza, on two occasions. To dispell spell the prosecution's tact that this was a ruse by Mr. Franza, making refer-

ence to himself in these letters, this is my offer, as well as there are other reasons.

THE COURT: Mr. Brancato?

MR. BRANCATO: There is no relevancy as to Mr. Franza calling the police in August and asking the police to arrest Mr. Rivera and Mr. Reyes.

What the defendant is talking about now, I'm not unfamiliar with. There was an event in August, I believe, of 1990?

Am I correct in the month, mr. Brenner?

THE COURT: Is there no communication now between counsel?

MR. BRENNER: Basically where we are, your Honor, you can classify it as you want.

THE COURT: I'll say it on the record. Lawyers are like the sheers of a scissors, you cut what's in between, not each other.

MR. BRANCATO: Judge, the defendant is seeking to introduce this evidence. So what relevancy does this event have? Thus far the Court is unaware as to the date this happened.

THE COURT: Well.

MR. BRENNER: I said, it was between the time of the shooting and the time of Mr. Franza's arrest.

THE COURT: Why would the defendant not be able to introduce that as consistent with the defense theory that in connection with the exhibit which makes reference to a threat, either on the life or the safety of Mr. Franza, in fact, that, in fact, somebody attempted?

MR. BRANCATO: Because this information is so speculative that it's un-worthy of this Court.

THE COURT: What's speculative? That someone tried to shoot him?

MR. BRANCATO: Judge, why don't you just listen to me?

THE COURT: I will.

MR. BRANCATO: All right. I spoke to Mr. Rivera, one of the two people that was arrested in this case. Mr. Rivera indicated that he, along with Mr. Reyes, two people who live on the next block from the defendant, were approached by a young man, a black man, with a Jamacian accent. This person may be, I can only speculate to this, but this person may be the next door neighbor's brother. The person approached them and said that he was interested in selling a car. First he tried to offer mag wheels to them. But then he said, "I

can sell you the whole car. Would you like to buy the car?"

And so they tossed this around and there came a point that the two men, Reyes and Rivera, went to the defendant's house. Mr. Rivera told me that when he went there he went there with the intention of buying the car.

THE COURT: Just a minute. Just a minute. I'm missing something.

MR. BRANCATO: You're not listening to me.

THE COURT: Reyes and Rivera have a conversation?

MR. BRANCATO: You're not listening to me, Judge.

THE COURT: That's what you're telling me.

MR. BRANCATO: Yes, I'm telling you exactly what you're going to now recount.

THE COURT: Let's hear it again. I want to hear it again, if you tell me I'm not listening and obviously you're convinced I'm not listening. I was going to recount it to demonstrate either I'm listing, not listening or getting an incorrect version.

Try it once again.

MR. BRANCATO: Would you read it for us?

THE COURT: Yes.

(Whereupon, the requested portion of the proceedings was read aloud in open court.)

THE COURT: Now I have the same question that I had before.

MR. BRANCATO: Having that as a predicate, when they got to the apartment, when they got to 3320 - -

THE COURT: First answer my question. They met an individual on the street described as this black Jamacian person and they were negotiateing either the sale or the purchase of a car or the wheels and then you say they went to the defendant's house?

MR. BRANCATO: Yes.

THE COURT: How did that - -

MR. BRANCATO: That's correct.

THE COURT: How did that come into play?

MR. BRANCATO: That's correct.

THE COURT: That's what I'm asking you, where is the defendant a participant in this sale or purchase? That's my question.

MR. BRANCATO: Can I continue?

THE COURT: Yes.

MR. BRANCATO: The person showed them a registration that had the name of Dominic Franza on it, as well as an address.

With that information they then went to 3320 Barker Avenue, a day or two later. When they got there, they rang the bell and at this point the defendant called the police.

When the police responded, when the police responded, Officer Trainer, the person the defendant is going to call, that man will say that he saw both Rivera and Reyes walking away from the defendant's door.

He'll also say that at this point he could see both men and they were not carrying anything in their hands.

He'll go on to say that they were stopped some distance away from a car that was in the street with the motor running. But that from the point that he saw them walking away there was nothing in their hands, to the point that they were stopped some distance away.

What happened then was that Officer Trainer spoke to the defendant, who said, that he was con-

cerned because these two had come to his house with questions about his car and he thought that there was something wrong with his car. Not that a gun was put in his face, not that he was threatened with a gun, but that they were making inquiries about his car and he was concerned that something may have happened to it.

The police did check the car that was out on the curb with the motor running. One of the officers will say that they retrieved a sawed-off shotgun, without any rounds in it. There was a round found by the defendant's door.

The defendant, after these two men were taken to the precinct, did not make any allegation that this weapon had been threatened to him, did not make any allegation that they threatened his life, but only that it concerned his car.

And Officer Trainer said to him, "well, where is your car?" He said, "take me to it," and they got in the car and they went up to where his car was and the defendant was we assured that his car was still there.

These men were arrested and charged with criminal possession of a weapon, I believe, in the

third degree. The on-line booking work sheet is not clear. It shows an E Felony and I think they may have charged it - - they may have charged it incorrectly. I think what they did was they said that C.P.W., four, was an E Felony.

Officer Trainer will say that the defendant did not make any allegation to him at that time that he was threatened by these men; they did not threaten him with any weapon; and, that the defendant never said that that he saw any weapon.

This is what the defendant wishes to put before the jury as one of the incidences in which his life was threatened.

What he's trying to do here, which can be abundantly clear, is he's trying to use a situation which may, may have been set up in some way, he's trying to say that this is one of the two instances where threats and actions have been carried out against his life.

This is so speculative - -

THE COURT: What's the second incident?

What happened to the case of Reyes and Rivera?

MR. BRANCATO: One guy got a misdemeanor and one guy was 343'ed, in our parlance, that the case

was dismissed because Reyes said to the police officer, he said, "that's my shotgun. I bought it for forty dollars this morning." He got a misdemeanor out of it and the other guy was cut loose, Rivera.

Now, to put on - - to put on Officer Trainer and to ask him, did you respond to that location; what was the call; and say it was a ten-fifty-two or whatever numbers they assigned to it and then to say, what is that number, that's about a dispute; when you got there did you see Mr. Franza; yes; without telling us what he said.

MR. BRENNER: Oh.

MR. BRANCATO: Brenner, I'm telling you, if you do this to me again - -

MR. BRENNER: What will you do, Mr. Brancato?

MR. BRANCATO: Brenner, I'm telling you. Don't pull this stuff.

MR. BRENNER: What will you do?

MR. BRANCATO: Don't pull this stuff.

MR. BRENNER: What will you do? Will you grit your teeth at me again? What will you do?

MR. BRANCATO: Judge, what happened here, to put him on and to ask him did you responding to a

dispute, did you speak to Mr. Franza, don't tell us what he said, don't tell us what he said, did you recover a shotgun, did you recover a shell, will enable any logical inference from that that's one of the instances here where there was a threats made on his life; that's one of the instances where my client could have lost his life, shot, that is so speculative.

THE COURT: Now let me just ask you this, assuming that was the scene, why would you be precluded on cross examination from fleshing out the details?

MR. BRANCATO: Because once you throw the skunk into the jury box you're not going to get the smell out. And what the defendant is doing here is he's trying to put in the defense through the lips of a witness. That's something that he has to testify to.

That could have been over a car, the sale of a car, that could have been over that he gypped these guys, they could have been going there to buy shells from there because he is a gun dealer.

THE COURT: All right.

MR. BRANCATO: How did - -

THE COURT: What is the second incident, because you say there are two?

MR. BRENNER: There are shots fired at the defendant's car. The defendant - - there are bullet holes in the car window.

THE COURT: Where is there? Subsequent?

MR. BRENNER: January, 1991.

THE COURT: January, 1991. What happens?

MR. BRENNER: Shots are fired in the 49th Precinct, the complaint is made, they are bullets holes in the window, shells are recovered, the car is taken for repair because the windshield is shattered. There is a complaint made to a detective, who investigated.

THE COURT: All right. What do you say on that?

MR. BRANCATO: My position is that what he's trying to introduce here is that someone else fired those shots and that testimony in an of itself is so speculative as to who fired the shots and for what reasons that they were fired.

They can speculate that it was the Metahin cartel that fired it. They can speculate that Mr. Franza went out with a gun and fired the shots into

his own car and then reported it.

What you're allowing here is for the defense to come in through the lips of someone else.

MR. BRENNER: I - -

MR. BRANCATO: Judge, the defendant has been going in incredible ways throughout this case to put in his self-serving declarations and this is another instance where he's trying to put something in through a police officer that should only come in through his testimony.

And I dare say that if you hear that this is going to be tied up in the long run, it is going to be left hanging. It is going - -

THE COURT: Let me just ask you this. Let me just ask you this.

If the defendant were to testify or supposing someone else observed it - -

MR. BRANCATO: Judge, if the defendant were to testify, let me anticipate what you're going to say, then could you call back the officer and put it in? Yes.

THE COURT: If a third party observed this, do you think you'd have an objection? Third party observed some individual on the street putting

shots into the car, do you think you could object or you'd have a good objection?

MR. BRANCATO: You know, at this point - -

THE COURT: I'm asking a simple question.

MR. BRANCATO: You want a yes or no?

THE COURT: That's the way I'd like it.

MR. BRANCATO: Maybe.

THE COURT: That's not an answer. A yes or no.

Now I'll hear Mr. Brenner.

MR. BRENNER: Your Honor, Mr. Brancato spoke to Mr. Rivera. Mr. Rivera was, as best I can gleen, at one time a defendant in this case.

THE COURT: In this case?

MR. BRENNER: No, in the case that we're referring to, the first instance.

It has been my experience in the past that when a defendant or a suspect or someone who is charged with certain activity attempts to explain it to a prosecutor or a police officer, they might be disbelieved.

What Mr. Brancato is reciting is the account that Mr. Rivera furnished. Now, it may well be true, it may not be true. Mr. Brancato wants to

meet the thrust of the evidence, then let him put Mr. Rivera on the stant to let the thrust - -

THE COURT: There is no other version.

MR. BRENNER: I'm sorry?

THE COURT: But there will be no other version.

MR. BRENNER: Your Honor, the People's case is circumstantial in nature. We've discussed this over and over.

THE COURT: You see, just one moment. Just one moments.

If Mr. Rivera were to testify to his version, whether it is true or untrue, if the defendant were to testify, he has an opportunity to contradiction, give his version. Then it is a question of fact for the jury, whose version they will accept.

But you're saying now if we only have one version, we only have one version, that version should not be accepted because it is - -

MR. BRENNER: We don't have any version. Mr. Brancato has given you his account after speaking to someone who was once a defendant. Since when is that admissible?

THE COURT: Well, we're not admitting.

MR. BRANCATO: No.

MR. BRENNER: Since when it is dispositive? He spoke to some guy.

MR. BRANCATO: I am not offering - - I am not offering Mr. Rivera's version as dispositive on the issue. I'm not asking you to consider that any more then I said you should consider arrest me or cut me loose. I'm saying, that subject to different interpretations.

Now, let's look at the - -

MR. BRENNER: Your Honor, I think I was speaking. You asked me to address myself to what Mr. Brancato said.

MR. BRANCATO: Maybe we should take a lunch break? No, we're not taking a lunch break.

Go ahead, Mr. Brenner.

MR. BRENNER: Your Honor, what I would be asking the jury to infer, to infer is no less speculative than introducing a can of black powder evidence which is not related in anyway to any of the black powder used in any of the devices, the District Attorney wants the jury to infer and some may speculate because he has one type of black powder in his apartment that therefore he has

access to the two distinctly different kinds of black powder that used in the devices.

THE COURT: We're not arguing by analogies.

MR. BRENNER: There is no other way to argue in a circumstantial case. Where the People want certain inferences to be drawn, clearly they don't want other inferences to be drawn on the defense case. That's what this is about. My way or no way, according to the prosecution. Only that evidence which is consistent with the road leading to guilt.

THE COURT: Now, how are you planning to introduce the shooting or the windshield being shot?

MR. BRENNER: I'm sorry?

THE COURT: Is that a police officer?

How are you going to introduce that?

MR. BRENNER: There is a detective who responds to the scene?

THE COURT: And finds that the windshield has, in fact, been?

MR. BRENNER: Bullet holes.

THE COURT: And does retrieve a cartridge in the automobile?

MR. BRENNER: That - -

THE COURT: Some where in the area?

MR. BRENNER: That I don't know.

MR. BRANCATO: I - -

MR. BRENNER: Now, mister Brancato wants to argue this was a setup, consistent with the February 4th letter or February 5th letter to make it seem as if he was, indeed, the victim and the he went to go to the grand extreme of having someone shoot at him or someone come to his door or whatever, whatever, that goes to weight. Let him argue that. Just like he says let me argue this to the jury. It is a matter of weight.

Now, we're dealing purely in inferences in this case. We're dealing in a case where the prosecution's burden is to exclude to a moral certainty every - -

THE COURT: Don't get into the editorial.

MR. BRENNER: That's not editorial, that's the state of the law.

THE COURT: All right, what else did you want to add, Mr. Brancato?

MR. BRANCATO: Judge, I have no problem meeting the defendant's case over here. So it is not one that we're asking for our cake and eating it.

But the thing is that in any piece of evidence, there has to be some relevance. And I am telling you that what I proffer to you as to why you should not let in this account, that the true substance - -

THE COURT: Yes?

MR. BRANCATO: The true substance is known only by Reyes, Rivera and the defendant, Dominic Franza, is because the subsequent action taken by the defendant to the police officer, his own witness, the detective - -

THE COURT: Once again - -

MR. BRANCATO: Judge, let me finish.

THE COURT: Go ahead.

MR. BRANCATO: Officer Trainer is going to testify that when he spoke to the defendant the defendant's first inquiry was, they said something about my car. I think there is something wrong with my car.

The defendant did not tell them that he had been threatened by a weapon. The defendant did not say they waved a gun at him or threatened his life.

So, in effect, what you're asking the jury to conclude here is that someone was arrested outside

the defendant's door, with a gun, and he's going to claim that this is one of the two instances.

There has to be a better way of putting that in to show the relevancy of that situation - -

THE COURT: If you will suffer an interuption, not that I'm asking the defense to make a committment, but it seems a lot of this will become academic if it turns out that the defendant does, in effect, testify.

MR. BRENNER: I would agree with the assessment.

THE COURT: Yes.

MR. BRENNER: That - -

THE COURT: Accordingly, I will defer the decision until Monday when we have that answer at well.

And I might add, gentlemen, and I want to, and I'm going to put it on the record since the record already includes some of the exchanges, it behooves both of you to conclude this case in a professional matter and not to allow it to deteriorate into a personality contest. You both have, in effect, an interest to represent and you're doing it to the best of your abilities. But that does not permit

or allow you to allow this to actually deteriorate to the extent that it is starting to at this point. After four weeks I appreciate everybody's nerves are becoming a little more frayed. But, again I caution you, recharge your batteries and come back on Monday refreshed.

Let's proceed.

Is there anything else?

(No response).

THE COURT: There being nothing further.

All right, eleven o'clock.

(Whereupon, the proceedings were adjourned until March 9th, 1992, at eleven a.m.)

* * *

(Continued on the following page.)

MARCH 9th, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant.

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S :

(Same as previously noted.)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, bring in the jury panel.

COURT OFFICER: Jury entering.

THE COURT: Yes.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Good morning, ladies and gentlemen.

We will commence now.

Mr. Brenner, call your next witness.

MR. BRENNER: The defense calls Carlo J. Rosati.

THE COURT: Incidently, counsel, to the bench.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right and face the Clerk of the

Court.

COURT CLERK: You solemnly swear the evidence you're about to give the Court and the jury in the case of the People of the State of New York against versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

COURT CLERK: Be seated.

COURT OFFICER: State your name, spelling your last name.

THE WITNESS: Carlo J. Rosati, R-O-S-A-T-I.

THE COURT: You may inquire.

MR. BRENNER: Thank you, your Honor.

C A R L O J. R O S A T I, having been called as a witness on behalf of the defense, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. Mr. Rosati, by whom are you employed?

A. I'm employed by the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms.

Q. And what position do you hold with the bureau?

A. I'm a firearms and tool marks examiner.

Q. How long have you been so employed?

A. Sixteen months.

Q. Could you describe briefly for us what a firearms and tool mark examiner does?

A. In the field of firearms and tool marks, as an examiner, I would examine firearms, bullets, cartridge cases, and compare components or, as in tool marks, I can examine tools and compare them to marks, also going further as to microscopic marks which a tool would produce on a particular item.

This is done visually, as well as microscopically, using various microscopes, such as a comparison microscope, which is two set of optics, which allows an examiner to look at two different items, spliting a visual field by tying to microscopic lines and comparing them as one object.

Q. Mr. Rosati, prior - - sixteen months ago, before you joined the bureau, but whom were you employed?

A. I was employed by the Federal Bureau of Investigation.

Q. In what capacity?

A. For one and one-half years I was a fingerprints examiner, for eleven and one-half years I was a firearms, tool marks examiner, eight of those years I was the senior firearms, tool mark technician for the F.B.I. lab.

Q. Mr. Rosati, can you briefly state your training in this particular area, prior to your work with the Federal Bureau of Investigation?

A. The majority of my training has been on-the-job training. However, I have had advanced courses from the F.B.I. Academy in Quantico, Virginia, I have toured firearms manufacturers, I have attended their seminars, I have attended masters of forensic science courses from George Washington University, in Washington, D.C. and I also, during highschool and college, worked in a fax machine shop, which allowed me to have the basis of what causes tool marks and how tools function.

Q. Do you belong to any professional organizations?

A. Not at this time; no.

Q. Have you testified before in a court of law?

A. I have testified in both federal and state courts before.

Q. And on those occasions, have you been qualified as an expert in firearms and tool mark examining?

A. I have been qualified in both fields previously.

Q. Now, incidently, when you testified in federal court, did you testify on behalf of the government, the United States of America, or the defendants?

A. Until now I have always testified for the govern-

ment.

Q. It would be fair to say this is the first time you've been called by the defense?

A. Yes, that's correct.

MR. BRENNER: Your Honor, at this time I would offer Mr. Rosati as an expert witness in the area of tool mark examining.

MR. BRANCATO: I have no objection.

THE COURT: All right.

Q. Now, Mr. Rosati, did you have occasion, in March, of 1991, to come from Rockville, Maryland to New York City?

A. Yes, I did.

Q. And can you tell us briefly, under what circumstances did you come?

A. I was requested to assist in a search of a residence to obtain tools to compare to previously known identified evidence at the Rockville laboratory. I was requested because of my expertize in tools to obtain specific class tools for comparison.

Q. So, aside from your expertize in the actual comparison, you were called upon to participate in the search; is that right?

A. Yes, that's correct.

Q. Presumedly because you knew what to look for with

regard to what had already been submitted to you as evidence; is that right?

A. That is correct.

Q. Now, would it be further fair to say what was submitted to you was the contents of two separate pipe bombs?

A. What I had submitted to me was one pipebomb, improvised device, for comparison, which came in a black case.

Q. Did there come a time when you were furnished with other components of a separate pipebomb?

Incidently - -

MR. BRENNER: Let me withdraw that.

MR. BRANCATO: I'm sorry?

MR. BRENNER: Let me withdraw the question.

Q. Did you prepare a series of reports in connection with your investigation of these materials?

A. Yes, I did.

Q. Were they in the normal course of A.F.T. business?

A. Yes, that's correct.

Q. Would it help you in testifying if you could use those to refresh your recollection if at any point you do not remember the answer to a question?

A. Yes, that would because of the volume of evidence which I examined.

MR. BRENNER: Your Honor, I would like the

witness' reports marked for identification for that purpose, so he may use them.

THE COURT: Where are the reports?

MR. BRENNER: He has them in front of him.

THE COURT: How many separate reports are there, Mr. Rosati?

THE WITNESS: There would be three reports, your Honor.

THE COURT: All right.

X, Y and Z. These will be marked X, Y and Z.

(Reports, so marked Defendant's Exhibit X, Y and Z for identification.)

THE COURT: Each one, I take it, consisting of several sheets?

THE WITNESS: Yes, your Honor.

MR. BRENNER: Your Honor, while we're at it, may we mark this for identification as well?

THE COURT: This will be JJ.

(Cardboard, so marked Defendant's Exhibit JJ for identification.)

(Handed to the witness).

Q. Mr. Rosati, did you, in conjunction with your investigation, prepare a list of the exhibits that were submitted to you?

A. Yes, sir; I did.

Q. And were they numbered?

A. Yes, sir.

Q. And was that list prepared to aid you in your comparison?

A. Yes, sir; it was.

Q. And was the list prepared in the normal course of your A.F.T. work?

A. Yes, it was.

Q. I would like you to look at Defendant's Exhibit JJ for identification.

Apart from the size, does that fairly and accurately reflect the list of the exhibits that were submitted to you and that you recorded as being submitted to you in your report?

(Pause.)

A. It's the same list as my report.

MR. BRENNER: I would offer it into evidence at this time, your Honor.

THE COURT: Mark it.

(Cardborad, so marked Defendant's Exhibit JJ in evidence.)

THE COURT: Any objection?

MR. BRANCATO: I just want to see it.

THE COURT: Show it to counsel.

(Handed to Mr. Brancato.)

(Pause.)

MR. BRANCATO: Your Honor? Judge? Can I just ask a few questions based on this?

THE COURT: Voir dire.

MR. BRANCATO: I have a few questions for you on this list.

VOIR DIRE EXAMINATION

BY MR. BRANCATO:

Q. Item number 1 says, one Bullseye Smokeless Powder can.

Did you do any test concerning that can of smokeless powder?

A. No, I did not. But that was in the box of evidence, so I listed it.

MR. BRANCATO: Okay.

Q. And which branch of your office would be responsible for conducting any test on that?

A. Our explosive chemist would have examined the contents of that can.

The can is nothing more than a commercially manufactured container for that product.

Q. Now, the roll of tape, the second item.

MR. BRENNER: I object, your Honor, as improper voir dire.

I believe this would be cross. What does this have to do with the admissibility?

THE COURT: One second.

This was admitted as a list that reflects the items submitted. Now you're asking about what was done do it?

MR. BRANCATO: Okay. I'll do it on cross, Judge.

THE COURT: All right.

MR. BRANCATO: That's fine.

THE COURT: Without objection, People's JJ for identification is now received.

(Returned to the witness.)

MR. BRENNER: Officer, can we post it on the easel?

DIRECT EXAMIANTION (Continued)

BY MR. BRENNER:

Q. You don't have one of those pointers, do you?

A. No, sir; I don't.

I have an ink pen that I can use.

MR. BRENNER: All right.

Q. Incidently, Mr. Brancato referred to the explosive

chemistry lab or you did; is that right?

A. I did, sir.

Q. When you went to - -

MR. BRENNER: Withdrawn.

Q. You went to 3320 Barker Avenue as part of this search, did you not?

A. I believe that was the address. But I did not make a list of it since I was not the controling officer for the search.

Q. The controlling officer was Special Agent Chris Behan?

A. That's correct.

Q. And he was with you?

A. That's correct.

Q. And there was, indeed, someone else there, was there not?

MR. BRANCATO: Judge, he's leading his own witness.

MR. BRENNER: He's an expert.

THE COURT: To that extent, I'll allow it.

Q. Was someone else present with you?

A. Yes, A.T.F. Laboratory Explosive Chemist Gregory Czarnopys was present at the search.

Q. Now, prior to the search you had in your possession

the components of a pipebomb; is that right, in a black case?

A. If I may?

Greg Czarnopys would have examined the device, as to what it is. That is not my field of expertize.

But after he made his determination, I was requested to look at certain evidence and to make a list of types of tools that may have produced certain tool marks on that evidence.

Q. All right. Now, when you say "tool marks," I know you told us briefly before what those are. But could you be more specific?

What are tool marks?

A. Basically, anything can cause tool marks. If I was to take my ink pen and scratch the surface of this table and this ink pen was submitted to me to compare it to the scratch on the table, I would take the ink pen, scratch another surface, producing my own test, and then I could take both the evidence, the scratched table as well as my test, placing one on one side of a comparison microscope and one on the opposite side of the comparison microscope and again look for those microscopic lines that would allow me to make one of three determination; either a positive identification, which is yes, this ink pen did make those marks; or, no, this ink pen did not make those marks; or, a no conclusion.

I just can't tell whether I do have the right tool or I don't have the right tool or maybe I'm just not reproducting the marks the same way.

But that is basically any tool can make tool marks. In every day life you do things that actually cause tool marks that I would be able to make one of those three determinations.

MR. BRENNER: May I see People's 54-A through J in evidence?

A through G in evidence, the photographs.

(Handed to Mr. Brenner.)

Q. Mr. Rosati, when you eliminate, after doing a comparison - - you used the word "eliminate." What does that mean?

A. Elimination would mean that a particular item has no value towards the evidence that I'm examining. It may be due to size or it may be due to something more significant or unique to a particular thing that I'm examining.

What I mean as in size, could be a pry bar. I may be looking at a pry bar mark that is a quarter inch. And yet the tool that's submitted to me to examine may be two inches, which is totally outside the possibility of that particular tool producing that tool mark. So, that is an elimination.

Q. Did you examine the pipe nipple which was inside

the black case?

A. Yes, I did.

Q. And, again, the pipe nipple is a way to refer to the pipe itself; is that right?

A. The section of pipe that was in there is classified as a pipe nipple.

Q. Now, when you examined that, did you find any tool marks on the pipe nipple?

A. There were tool marks on the pipe nipple which I examined; yes.

Q. Did you draw any conclusions about those particular tool marks at the time you first examined them?

A. At the time that I examined them - - may I refer to my notes on that?

Q. Please.

(Pause.)

A. Do you have an exhibit number, sir, for that?

Q. For what?

A. The pipe nipple.

Q. I believe that you referred to the entire pipebomb as Exhibit 6 and you broke it down into six-one, six-two, sixt-three, six-four. I think that's correct.

Is it not?

(Pause.)

A. I did observe gripping type marks on the pipe nipple itself. Those griping type marks can be classified - - a gripping type tool is either a vice or a pipe wrench or locking pair of pliers are classified as a gripping-type tool. Something which an individual can use to hold something else in an either permanent or semi permanent state.

Q. What is a pipe wrench?

A. A pipe wrench is a tool which has an adjustable jaw. The more common one has a wheel jaw.

If this was the main body of the pipe wrench and this is the front permanent jaw, you would have a wheel that you can adjust to move the second jaw in and out to fit a particular item.

It's an adjustable tool, up to the extent of the particular sized tool that we're using.

Some of them can go from contact against the other jaw up to one or two inches, and yet others are as hugh as two feet, I've seen. And just a hugh pipe wrench.

Q. Did you find any other tool marks on the pipe nipple itself? Were there any holes drilled in it?

A. There was a drill hole noted, which was measured to be nine-sixty-fourths of an inch.

Q. Any other tool marks on the pipe nipple itself?

A. None to speak of, other than those.

Q. Now, did you examine the end caps?

A. I did examine the end caps, which would be exhibit - - my Number G-62 and also 63.

Q. And were there any tool marks on the end caps?

A. There were, again, gripping-type tools on these end caps.

However, other than what was on the pipe nipple, these tool marks were more of a pipe vice, which is a second type of vice. But a pipe vice actually uses four jaw. It has four opposing jaws to hold pipes for various types of work that would be done on a pipe or an end cap.

Q. And when you went to the basement at this house, did you see a pipe wrench or a pipe vice there?

A. No, we did not find that particular type of tool.

Q. Okay. Now, there were other materials that were part of Exhibit 6 as well?

There was, for instance, there was wood, was there not?

A. Yes, sir; there was.

Q. The wood had been cut, based on your examination?

A. The wood had been cut.

Q. There was styrofoam?

A. There was styrofoam.

But there were no marks of value on the styrofoam

for me to examine.

Q. Was there electrical tape?

A. There was electrical tape.

Q. Based on your examination, had the electrical tapebeen cut as well?

A. The electrical tape, that examination was not performed by me. That was performed by another examiner.

Q. Were there any other pieces of evidence in Exhibit 6 that you examined for tool marks?

A. Let me refer to my notes again.

(Pause.)

A. Yes, Exhibit 61, which was the black case, my Exhibit 61, had a variety of different exhibits. It had screws, it had some wires, there were drill holes in this black case and I examined all aspects of that case for tool marks.

Q. With regard to the wire, had the wire been cut?

A. The wire had been cut.

Q. Now - -

A. That's correct.

Q. Did you examine the wire for any particular kind of a mark when you did your examination?

A. I examined the wire from Exhibit 6 for the presence of tool marks as well.

The types of exams that I would do on wire is to look for how the wire was cut, whether it is torn because of the fact that there is insulation, plastic insulation around wire.

If you were to use a knife to cut the wire, you would have some ripping and tearing as you pulled it apart. If you use a set of cutters, you have opposing jaw cutters, it would leave more of a clean cut through the wire.

So, I did examine that - - the wire that was in this, in this exhibit and, again, there was no conclusion to my examination.

Q. If you cut wire with a particular instrument, like the wire, if it was copper wire, it leave pieces or residue on the instrument that cut it?

A. That is true.

Q. What else did you examine?

Did you examine the screw that was in the black gun?

A. There is a large screw on top of the case, it's actually on the exterior of the case, and I did examine that large screw, as well as other screws which were - - another screw on the inside portion of it. That was examined by myself.

Again, I did not find any tool marks of value, tool

marks of value. I did not come up with a positive conclusion in that examine examination.

Q. What did you examine that you did find have tool marks of value, aside from the pipe nipple?

A. There were numerous items that had tool marks ofvalue. The black case has an aluminum band that goes around both portions which are used to lock that case together, to support it because the case is made out of plastic, a vinyl plastic. The aluminum band that goes around it had tool marks in several different areas, as well as the screw itself having tool marks on it.

Again, all of those examinations, which I performed, I did not - - I came up with a no conclusive answer.

Q. When you say "no conclusive answer" and use it in terms of an examination, are you referring to what you compared it against?

A. That is correct.

Q. Okay. If you could stand up, sir?

MR. BRENNER: If it is all right, your Honor?

THE COURT: All right.

(Witness approached the exhibit.)

Q. Item number 1, Mr. Brancato asked you about, it is listed as a Bullseye Smokeless Powder.

You didn't didnn have anything to do with that, did

you?

A. No.

Q. The role of this, you did not have anything to do with that?

A. No, I did not.

Q. Item number 3, the marker, you had nothing to do with that?

A. No, sir.

Q. Item number 9 is a pipe wrench; item number 10 is also a pipe wrench; is that right?

A. That's correct.

Q. You told us what a pipe wrench is.

A. Yes, sir.

Q. Correct?

Those are two of them?

A. That's correct.

Q. Were they recovered during the course of your search?

A. Those were recovered. All - - as a matter of fact, all of the tools were recovered during our search.

Q. All right. Now, when you went to the apartment with Agent Behan and Mr. Czarnopys, you had already examined the vice device and is it fair to say you already knew the kind of tools that you were looking for?

A. That's correct. According to the cursory examination which I performed on what was already in the laboratory, I had a pre-determined notion as to what class of tools I'm looking for.

What I mean by class is, what I was talking about earlier, as a gripping tool. A gripping tool would be a pipe wrench or locking pliers or something else that is used to grip something. And cutting tools are another class.

Q. Now, the two pipe wrenches, did you examine them to determine if they could have caused the tool marks on the pipe nipple?

A. I did examine those to make that examination.

Q. And what was your determination?

A. That it was a no conclusion, conclusive answer.

Q. Now, item number 11 is a - - it says a locking pliers?

A. Suppose to be locking plier.

Q. Typographical error?

A. Yes.

Q. And what are those?

A. Locking pliers are a pair of what most people refer to as like a vice grip. But a vice grip is a trade name so we do not use that because of the fact that there are various manufacturers of what are locking pliers.

Locking pliers has a take-up wheel on it and when you clamp it on, has a pair of pliers, it gets to a certain tension to where it locks itself.

Q. Did you examine that to determine whether it could make the tool mark on the pipe nipple?

A. I examined that as well but, again, there was a no conclusive answer.

Q. All right. Number 12 or line 6, numeral 6 drill bits.

Did you examine those?

A. Yes, I did.

Q. And do you recall what the sizes were?

A. Not off the top of my head, I do not. But I have my notes, which I can refer to.

Q. If you can, Mr. Rosati?

(Pause.)

Q. Mr. Rosati, perhaps I can tell you?

A. Sure.

Q. Would it be fair to say in addition to matching size to hole that, when you drill with a drill bit through a piece of metal that the metal that you're drilling through might leave residue on the drill bit?

MR. BRANCATO: I object.

MR. BRENNER: Well, rather than save time.

Q. What do you look for when you compare a drill bit to, let's say, a piece of metal that you're trying to compare it to?

A. As far as in tool mark examinations, a drill bit, when it passes through something, when it drills a hole completely through an object, there are tool marks present, obviously, because of the action of the drill bit going around. But because of the fact that a drill bit is a long item, as it's passing through and the revolutions of the drill causing those marks makes it virtually impossible to make an identification in that kind of examination.

The only type of tool mark that is possible to identify in a drill bit-type examination is when a drill bit does not go all the way through or if it does pass through something it leaves a mark on the opposite side by the cutting angle of the drill. The point of the drill would leave a tool mark where it stopped.

But because of the action again of the drill bit passing through a hole, it just, the mark is being removed by the next piece of metal coming around and it just keeps doing that over and over and over again.

Q. Mr. Rosati, did you compare the various drill bits with the various holes found in the case and in the pipe?

A. Yes, I did.

Q. Did you match any for size?

A. For size I did. I made several out of all the drill bits I examined. I made several size matches, but no positive matches.

Q. How many drill bits did you examine?

There is Item 49, there is thirty - - there is thirty-one; is that right?

A. Yes, sir.

Q. In Item 49 there is another thirteen?

A. Yes, sir.

Q. That's forty-four; correct?

A. That's correct.

Q. And the item that we refer to here, there are six. Approximately fifty drill bits?

A. That's correct.

Q. When you say you matched several for size, how many of the fifty did you match?

A. There are approximately four or five with the same diameter as those drill bits.

Q. Okay. The wire that you compared?

A. Yes, sir?

Q. The wire was found in the basement?

A. That's correct.

Q. Did you do a comparison against the wire that was

found in Exhibit 6?

A. I examined the ends of the wire because of the fact that they have a already been cut and I examined those to wire with from Exhibit 6.

Q. And what was your conclusion?

A. It was a non-identification as far as several of the pieces of wire due to size. But also we had several no conclusions just due to the fact of damage to the ends of the wire.

Q. Okay. The piece of wood was recovered from the basement, Item 41?

A. Yes, sir.

Q. Did you compare that to the wood that was in the device?

A. I was requested just to make a cursory examination. But that is an examination which is outside my relm of expertize because I am not an individual that can examine individual cells of wood to make a comparison to other pieces of wood.

Q. Who does that at A.F.T.?

A. We have an individual who has been brought in now. But at the time we didn't have an individual to do that.

Q. And your cursory examination, what did it reveal?

A. My cursory examination was a non-conclusive answer

due to the fact that if it was my general feeling that if - - my general opinion that if there was a possible examination there was another section of wood that was missing. I could follow certain grain structures to make a examination. However, with a section of wood missing, that is not possible.

Q. All these tools, approximately how many tools were there?

I mean, total. I mean, there are fifty exhibits. But how many tools, in total?

A. In counting the drill bits and all of the remaining tools which are grouped together, there are approximately sixty tools.

Q. And you examined them all?

A. Yes, sir.

Q. And you did it in the manner that you referred to previously?

A. That's correct.

Q. You compared them against the known materials that you had?

A. That's correct.

Q. And then you prepared a report?

A. That's correct.

Q. You furnished the report to Agent Behan?

A. Yes, I did.

Q. Incidently, within the last two weeks have you been contacted by anyone from the New York District Attorney's Office?

A. Yes, I have.

Q. Were you asked to come and testify?

A. I'm sorry, sir?

MR. BRANCATO: I object.

A. I'm going to - -

MR. BRANCATO: I object to that question.

MR. BRENNER: Your Honor, I'll withdraw the question.

THE COURT: All right.

MR. BRENNER: I have no further questions, your Honor.

THE COURT: Very well.

Cross.

(The witness resumed the witness stand.)

CROSS EXAMINATION

BY MR. BRANCATO:

Q. Agent Rosati?

A. Yes, sir?

Q. You came to New York along with Gregory Czarnopys back in March, of 1991; is that correct?

A. That's correct.

Q. And you came on March the 1st?

A. The actual date eludes me at this time, sir.

Q. But it was sometime in March; am I right?

A. I believe it was the first week in March.

Q. And when you came to New York with Agent Chris - - with agent - - with Mr. Czarnopys, you met Agent Behan, the gentlemen who is outside the room?

A. That is correct.

Q. And then Mr. Behan or Agent Behan took you to a location up in the Bronx; is that right?

A. That's correct.

Q. Now, up to that point had you seen the bomb that had been sent to Puerto Rico?

A. I had looked at evidence which Gregory Czarnopys had requested me to come to his laboratory to look at, to make a determination.

Q. And up to that point it was sent to Mr. Czarnopys then, the bomb?

A. In our laboratory the evidence would be sent to the general evidence technician and then, according to the order of examinations, one examiner at a time would check the evidence out to do their examinations.

My examination is generally the last examination because - - excuse me - - because the examination that I do

generally does not hurt anyone else's examination. An explosives chemist would be looking for residue, then you would have the latent examiner look at the evidence and then I would be the last because of the fact that if I handled the evidence before them my fingerprints would be on the evidence, so on and so forth.

Q. Now, you don't know where that pipebomb that Mr. Czarnopys showed you, you did not know where that bomb was put together; am I correct?

A. No, I do not.

Q. And so is it fair to say that when you went there you were looking to see whether or not any of the items at 330 Barker Avenue could be matched up against that?

A. That's correct. I had already looked at the evidence in the laboratory. From my cursory examination of that evidence, I had a pre-determined list of types of tools which I was looking for when I accompanied both Gregory Czarnopys and Agent Behan to the address mentioned to conduct a search.

Q. All of the items that are listed on that defendant's exhibit, those aren't all the exhibits that were recovered that day though; am I correct?

A. No, they are not. Because of the fact that there would be a separate list which would show the device and it's

components.

Q. So, the marker that's referred to as number 3, that wasn't recovered that day; am I right on that?

A. I don't recall when that marker was recovered.

Q. Okay.

A. It may have been recovered that day. I'm just not sure because that's one that I did not examine.

Q. Is it fair to say that this is just a list of all the items that were sent to the lab at Rockville, Maryland?

A. That's correct.

Q. And that they were put in some sort of order; am I right on that?

A. Yes, they were.

Q. But is it fair to say that some of these items, some of these items were taken the day that you went with Mr. Czarnopys?

A. The majority of those items were taken on that day.

Q. But other items were recovered at either a previous time or at a later time?

A. That's correct.

Q. Now, when you went to 3320 Barker Avenue, did you meet the landlord in the case?

A. (No response).

Q. In the building?

A. Yes, we did.

Q. And that's Mr. Guzman; am I correct?

A. Yes, that's correct.

Q. And Mr. Guzman is a mechanic; am I right?

MR. BRENNER: Objection. Objection.

THE COURT: Sustained.

Q. Did you know what Mr. Guzman's occupation was?

A. Not - - I don't have a positive determination as to what his occupation was. But I believe it was mentioned that he had something to do with the automotive field; yes.

Q. He was not a car dealer that you know of; am I right?

A. I don't know that.

Q. Now, at the time you went to 3320 Barker Avenue, the defendant's apartment had already been cleared out?

MR. BRENNER: Objection.

Q. Am I right?

MR. BRENNER: Objection.

THE COURT: Sustained.

MR. BRANCATO: Judge, may we approach?

THE COURT: Yes.

COURT OFFICER: Step down.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench,

where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right.

(The witness resumed the witness stand.)

BY MR. BRANCATO: (Continued)

Q. When you went - - when you went to the apartment in the Bronx, the building in the Bronx, you indicated that you met a gentlemen who identified himself as the landlord; am I correct?

A. That is correct.

Q. And you went into the basement of that building; am I right?

A. That is correct.

Q. And there came a point that you went into the first floor of that building at 3320 Barker Avenue?

A. Yes, there was.

Q. And this wasn't - - this wasn't the landlord's apartment; am I right?

MR. BRENNER: Objection.

THE COURT: As to form, sustained.

Q. When you went into the apartment on the first floor, 3320 Barker Avenue, there was no furniture in that floor; am I right?

MR. BRENNER: Objection.

THE COURT: Sustained.

Q. When you went into the first floor at 3320 Barker Avenue, could you please describe the apartment?

THE COURT: Do we have what apartment number we're dealing with?

MR. BRANCATO: The first floor.

THE COURT: Is there one apartment on that entire floor?

THE WITNESS: (No response).

THE COURT: Was there more than one apartment or one apartment on that floor?

THE WITNESS: One apartment.

THE COURT: All right, one apartment.

You may respond.

A. When we entered the apartment on the first floor, we, obviously because of the fact we were doing a consent search, we were looking for, again, anything that would benefit our examinations.

Q. Was there any furniture when you went into that apartment?

A. The apartment was - - was already previously cleared and cleaned at that time.

Q. So then that first floor apartment then had already

- - had no furniture in it?

A. No, it had no furniture in it at all.

Q. And it had been cleared - - well, when you got in there it was an empty apartment; am I correct?

A. That is correct.

Q. Even though the furnishings had been cleared out of that - - even though there were no furnishings in that first floor apartment, you, along with Mr. Behan, went to the basement; am I correct?

A. Besides the fact that there were no furnishings in the apartment, afterwards, after an examination of that apartment, Greg Czarnopys, the explosives person from our laboratory, as well as Agent Chris Behan, we proceeded to the basement to continue a search.

Q. And you recovered these items, that some of which - - some of the items that are on that list; am I correct?

A. That is correct.

Q. And after taking those items from the basement, did you - - did you give the landlord a receipt for those items?

A. I did not. But I believe that a receipt was written by the agent who was the lead agent on the case.

Q. You indicated that you inspected the black carrying case?

A. That's correct.

Q. That's a gun carrying case; am I correct?

MR. BRENNER: Objection.

THE COURT: Overruled.

A. I could not make a determination as it being just a gun carrying case. It is a generic case which can be used for many different things. It is a vinyl case, but it does have the ability to lock. But again - -

THE COURT: The ability to what?

THE WITNESS: Lock.

THE COURT: To walk?

MR. BRANCATO: To lock.

MR. BRENNER: To lock.

THE WITNESS: It is my accent. Sorry.

MR. BRANCATO: Well, we've been told by some folks down in Maryland that we have an accent.

Q. Now, are you familiar with the tools that an electrician might use?

MR. BRENNER: Objection.

THE COURT: Rephrase that.

Q. Are you familiar with the tools that an electrician might use in his trade?

A. Yes, I am.

Q. Can you tell us some of those tools?

A. Depending on the type of an electrician, it could

be a wide variety of tools.

MR. BRENNER: I'm going to object, your Honor, to - -

A. For example - -

MR. BRENNER: The answer and the question.

THE COURT: Overruled.

A. For example, if an individual was working for are R.C.A. making chassis to televisions, they would be using very small electrical cutters and clippers. But then yet going to the other end of the spectrum, if an individual was working in a large factory or some place we needed very large tools, he could have all of the tools from a small cutter to large cutters or pipe wrenches or anything of that nature. They could have any type of tool from what you would use like working on your car to common tools that you use around the house.

Q. Now, the wire that was used in the explosive device that was sent to Puerto Rico, did you examine that wire?

A. Yes, I did examine that.

Q. And that's wire that an electrician uses, is it?

MR. BRENNER: Objection to the form.

THE COURT: Sustained.

Q. Could you tell us, what would the purpose of that wire be?

A. The wire that I examined would be a wire that you could purchase in any hardware store. And it has different useage, from anything from speaker wire to other wires which can be used for working on re-wiring an electrical device in an automobile, such as a radio.

Q. What's an auger?

A. An auger is a type of drill bit that an individual would use to drill a hole for a lock in a door.

If this doorknob over here has a hole that goes through to the other side, an auger was used to drill that nice round hole so your doorknob fits in there.

Q. So, is it fair to say you have a drill in your hand, an auger would be the attachment that you put on the drill to push the hole through the door; am I correct? To drill the hole through the door?

A. That's correct. It would cut out the hole.

Q. And - -

THE COURT: Not limited to a door?

Q. Or a - -

THE COURT: His examination was a door?

MR. BRANCATO: Yes.

THE WITNESS: That's my examination.

A. It is not limited to just that.

Q. And was an auger found in the basement at 3320

Barker Avenue?

A. We recovered two different auger bits from that search.

Q. By the way, any tools recovered from the - - from the first floor apartment that you indicated had no furnishings inside?

A. To my knowledge, we did not recover anything from the first floor apartment. I did not recover any tools and I do not believe that any other items were recovered by either of the other two agents in the case.

Q. Now, the auger that was found in the basement, did you compare that auger to the piece of wood that was found in the pipebomb that was sent to Puerto Rico?

A. I did examine the wood from inside of the black plastic case and I did compare the two augers which were submitted to the laboratory in Rockville, Maryland.

It was my determination that one of the augers was eliminated due to size. It is just too large.

Q. By that you mean the hole that that auger would be drilling would be bigger than the one that was found in the case?

A. That is correct.

Q. What about the other one?

A. The second auger was the same size as the wood

which was drilled from the device that was in the black case.

Q. So then is it fair to say then that the piece of wood had a whole of a similar size as the hole that that auger could drill?

A. That is correct.

MR. BRANCATO: I just have a few other questions.

Q. So the day in March, the first week in March that you came to New York along with Mr. Czarnopys, you didn't recover any tools from the first floor apartment at 3320; is that correct?

A. That is correct.

Q. And the only tools that were recovered were the ones that you gave the landlord the receipt for; is that correct?

A. The tools which came from the basement of that residence, which I believe that Agenct Behan gave him a receipt for.

Q. And Mr. Guzman, the person who identified himself as the landlord to you, where does he live at 3320?

A. I believe he's on the second floor of that residence.

MR. BRANCATO: I have no other questions.

THE COURT: Any re-direct?

RE-DIRECT EXAMINATION

BY MR. BRENNER:

Q. Mr. Rosati, did you know or were you told that that first floor apartment that you went in had been searched two prior times?

MR. BRANCATO: I object.

MR. BRENNER: Your Honor?

THE COURT: He had that information. I'll allow him to answer.

Q. Did you?

A. I did not have that information. I was requested to just attend this search.

Q. So, you don't know whether there had ever been tools in that apartment?

A. No, I do not know that.

Q. And the auger that you compared, anything unusual about it?

A. I'm sorry, sir, can you?

Q. What was the size of the hole?

A. The size of the hole is approximately - - excuse me. One and - - I'm sorry. Two inches, sir.

Q. Two inches?

A. Two inches across.

Q. Would that mean the auger bit itself is approxi-

mately two inches?

A. Yes, sir.

Q. A nice round number, two inches.

MR. BRANCATO: I object.

MR. BRENNER: Nothing further.

THE COURT: Sustained.

Any re-cross?

MR. BRANCATO: No.

THE COURT: Step down, sir. You are excused.

THE WITNESS: Thank you, sir.

(WITNESS EXCUSED)

THE COURT: Call your next witness.

MR. BRENNER: Special Agent Chris Behan.

THE COURT: Agent Behan to the stand.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

THE COURT: The record will reflect Agent Behan had previously testified on the People's case. He's being now called as a witness.

Just for the order, please swear the witness.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in

the case of the People of the State of New York versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

COURT CLERK: Be seated.

MR. BRENNER: Your Honor, I'm requesting theexhibit, I believe it is Exhibit 38 in evidence?

THE COURT: Thirty-eight?

MR. BRENNER: I believe that's the right one. It is a two page document.

THE COURT: Mr. Sheindlin is now looking for it.

Are there any other that we need?

MR. BRENNER: I don't think so, your Honor.

COURT OFFICER: State your name, spelling your last name, shield number and present assignment.

THE WITNESS: Special Agent Christopher Behan, B-E-H-A-N, shield 208, Arson Explosion Group, New York City.

THE COURT: You may inquire, Mr. Brenner.

MR. BRENNER: Thank you.

C H R I S T O P H E R B E H A N, Special Agent, having been called as a witness on behalf of the defense, was sworn by the Clerk of the Court, took the

witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. Agent Behan, you have testified previously.

Can you briefly tell us what your employment is?

A. I'm a Special Agent with the U.S. Treasury, Bureau of Alcohol, Tobacco and Firearms.

Q. Can you tell us how long you've been so employed?

A. Almost twenty-one years.

Q. Now, with regard to explosives and explosive devices, have you - - how many investigations have you conducted?

A. Fifty to one hundred. Just a guess.

Q. Over twenty-three years?

A. Yes.

Q. Would that include the types of devices which are the subject of this case?

A. Some, yes.

Q. And did you have particular training in this area, the area of explosive devices?

A. Yes.

Q. And what training was that?

A. It is training in the original two schools you go to. I then attended a number of explosive related and bomb

investigation related seminars and courses.

Q. Would those courses include the detection of such devices?

A. I'm not sure I know what you mean by detection.

Q. Well - -

THE COURT: Let me just ask you, gentlemen. Was Agent Behan previously found to be an expert in these areas?

MR. BRENNER: No.

THE COURT: All right.

MR. BRENNER: Not to my recollection.

THE COURT: All right.

Q. I guess putting it simply, in lay persons' terms, were you trained to know a pipebomb when you looked at it?

MR. BRANCATO: I object.

MR. BRENNER: Well, I don't know how else to ask it.

THE COURT: Would he rocognize a pipebomb?

MR. BRENNER: Yes.

THE COURT: If you saw a pipebomb or what is termed to be a pipebomb, would you rocognize it?

MR. BRANCATO: Given that question, I'll withdraw my objection.

THE WITNESS: Your Honor, there are pipebombs

that are self-contained, from the outside look just like pieces of pipe. But most of the times you would rocognize a pipebomb to be a pipebomb.

Q. And would the training have included the dismantling of such devices?

A. I've had some training in that, but I'm not qualified to do it nor am I authorized to do it.

Q. Would your training include investigation into how such a device was manufactured, how it was made?

A. Yes.

Q. Okay. And those were courses and seminars; is that right?

A. Yes.

Q. As well as, would it be fair to say, on-the-job training?

A. Yes.

Q. Now, the investigation of explosive devices doesn't just include dealing with the device itself; is that right?

A. No, it does not.

Q. Could you describe what else the investigation of such a device, the manufacture and transport of such a device would include?

A. Well, the primary thing would be identifying the components of a device that's either exploded or unexploded.

That's usually where you start the investigation. The investigation might have some suspects, initially, or they may be developed later on.

Q. Would the investigation include follow-up of various - - on various information received during the course of the investigation?

MR. BRANCATO: Judge, may we approach for one moment?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, let's go.

(The witness resumed the witness stand.)

BY MR. BRENNER: (Continued)

Q. Agent Behan, have you testified in federal prosecutions?

A. Yes.

Q. On how many occasions?

A. Fifteen to twenty.

Q. And those are prosecutions where you've testified on behalf of the United States of America?

A. Yes.
Q. You've been called by an Assistant U.S. Attorney?
A. Yes.
Q. Have you testified in state prosecutions as well?
A. Yes.
Q. How many times?
A. Two or three that I recall.
Q. Including this one?
A. Yes.
Q. And on those occasions were you called by an an assistant district attorney?
A. Yes.
Q. Would it be fair to say - - well, on how many occasions have you been called by the defense?
A. Never, that I recall.
Q. Except this?
A. Except this one.
Q. Now, I'm going to show you what has been previously marked as People's Exhibit 38.
THE COURT: Isn't that in evidence?
MR. BRENNER: In evidence.
(Handed to the witness.)
Q. Do you rocognize that, Agent Behan?
A. Yes.

Q. What do you rocognize it to be?

A. It's two sheets of yellow paper that were removed from Mr. Franza's apartment on February the 12th, of '91.

Q. Would it be fair to say that that document contains a list of titles?

A. Yes.

Q. Some with authors?

A. Yes.

Q. Do they have any other - - does that list have any other markings?

MR. BRANCATO: Judge, I object.

This has already been testified to on the People's case.

MR. BRENNER: Your Honor, this is now the defense case.

THE COURT: All right, I'm going to allow it again. Same ruling with the limits.

But go ahead.

MR. BRENNER: Thank you.

Q. Are there any other markings on that document?

A. Yes.

Q. And what are they?

A. They appear to be prices.

Q. Now, Agent Behan, what specifically were you

investigating between February, of 1991, and the present with regard to this case?

A. Well, it initially started as the investigation into the manufacture and shipment of the pipebomb from New York to Puerto Rico. The case overlapped the shooting that preceded that shipment of the pipebomb.

Q. Did it overlap with anything else as well?

A. There was a recovered pipebomb, I believe it was in August, of 1990.

Q. Did you ever have occasion to compare the two types of explosive devices?

A. Did I personally ever compare them?

Q. Or compare what was known about them?

A. I learned things from comparisons that were done.

Q. You did a case report on this in connection with this case?

A. Yes.

Q. And that was in the normal course of A.F.T. business?

A. Yes.

Q. You are absolutely required to fill out a case report as the investigating special agent; is that right?

MR. BRANCATO: Judge? Judge?

I would just object to the question because

he's leading his own witness.

MR. BRENNER: Well, all right.

Q. You prepared - - did you prepare a case report?

A. Yes.

Q. What is a case report?

A. A case report is a formal report outlining charges against a person or persons and it's sent to the U.S. Attorney's Office.

Q. Are you under any kind of obligation in connection with your responsibilities as a case agent to prepare such a report?

A. Normally it is the case agent that does the case report.

Q. Now, do you have your case report with you?

A. Yes.

Q. With regard to the items that are on People's 38 in evidence, did you ever look at any of those materials?

A. I did not.

Q. Would it be fair to say that your investigation included the manufacture of two separate explosive devices?

A. Yes.

Q. Would it be further fair to say that there are titles on that list that lend themselves to - -

MR. BRENNER: Withdrawn.

Q. There is a title "Bombs and Bombings;" is that right?

A. Yes, there is.

Q. This was found in mister - - where was this - - that document found?

A. In Mr. Franza's living room.

Q. And after February 11th, 1991, what was Mr. Franza's status?

A. He was under arrest.

Q. For?

A. The - - in connections with the shooting of his wife and mother-in-law.

Q. Mr. Behan, do you know what he's on trial for now?

A. Yes.

Q. The shootings and what else?

A. And for the, I guess, possession of a pipebomb.

Q. Now, there is a book on that list called "bombs and Bombings;" is that right?

A. Yes.

Q. Have you ever read it?

A. No, I have not.

Q. Did you ever look at it?

A. Not that I know. Not that I'm aware of.

Q. With regard to your investigation, did you ever

make an effort to determine whether Mr. Franza had purchased it?

MR. BRANCATO: I object.

THE COURT: I'll allow it.

If in fact he made such inquiry.

A. Did I ever?

No, I never inquired if he owned or purchased it.

Q. There is a title on there, "Explosives and Home-Made Bombs;" is that right?

A. Yes, there is.

Q. Would it be fair to say, based on your experience, Agent Behan, that the two devices that are involved in this case and in this trial are homemade bombs?

Only based on your experience.

A. Yes.

Q. There was a title of a book on this list; correct? Yes?

A. Yes.

Q. "Explosives and Homemade Bombs"?

A. Yes.

Q. Found in Mr. Franza's apartment; correct?

A. Yes.

Q. Did you ever look at that book?

A. No.

Q. Did you ever speak to Mr. Cliff Lund with regard to any of the items on that list?

A. I may have had one conversation with him in reference to the books.

Q. And after that conversation did you make an effort to get near the volumes?

A. No.

Q. Now, during the course of your search of Mr. Franza's apartment, on February 12th, 1991, did you have occasion to observe whether any tools were present?

A. There were some tools in a tool box.

Q. Now, based on your experience in pipebombs, would it be fair to say that they are made on occasion with tools?

A. Yes.

Q. Did you seize any of the tools that you observed?

A. No, I did not.

Q. When you returned to the apartment on February 14th, 1991, would it be fair to say that the apartment was still in the same condition - -

A. Yes.

Q. That it was?

A. Yes.

Q. Now, in March, of 1991, you went to the apartment again; is that right?

A. Yes.

Q. What was the condition of the apartment then?

A. It was vacant at that time.

Q. Because - - did you seize anything from the apartment at that time?

A. Vacuum cleaner bag.

Q. Back on February 14th, 1991, did you seize any tools from the apartment on that day?

A. Tools?

No.

Q. Now, during the course of your investigation did you or someone at your request go to a place known as College Stationery?

A. Yes.

Q. And where is that located?

A. I believe it is on Broawway and 116th Street, in Manhattan.

Q. And what was the purpose of that part of the investigation?

A. We had learned that the money order that was used to pay for the shipment of the pipebomb had been purchased at that stationery store.

Q. Did you go yourself?

A. No, I did not.

Q. Did the person that went at your request go with a picture of Dominic Franza?

A. No.

MR. BRANCATO: I'm sorry, did he go?

I didn't hear an answer.

A. Did he go - -

THE COURT: He said no.

MR. BRANCATO: Okay.

Q. Do you know who went?

A. I believe it was Carrie DePiero.

Q. You were the case agent; correct?

A. Yes.

Q. Did she go at your request?

A. The supervisor's request.

Q. Do you know whether she went with a picture of Mr. Franza or not?

A. I don't believe she did. But I'm not positive.

Q. She would know; correct?

A. I guess she would; yes.

Q. Now, during the course of your investigation did you have occasion to investigate two separate beeper numbers?

A. Yes.

Q. Okay. Just in case anyone doesn't know, what are beepers?

A. Beepers are telephone paging devices.

Q. Do they have telephone numbers?

A. Yes.

Q. And you investigated two; is that right?

A. Yes.

Q. For what purpose?

A. The beeper numbers had shown up, I believe, on Dominic Franza's telephone toll records and we wanted to find out who they belonged to.

Q. And did you find out who they belonged to?

A. We found out who one belonged to.

Q. During the course of your investigation, did you have occasion to speak with a person by the name of Julio Ortiz?

A. Yes.

Q. When was that?

A. I believe it was in the springtime, of '91. I'm not sure of the date right now.

Q. Where was it?

A. It was at the 34th Precinct.

Q. Who else was present?

A. Detective Giorgio and, I believe, Detective Ortiz.

Q. Did you prepare a report as a result of that interview?

A. Yes, I did.

Q. Did you speak to Mr. Ortiz yourself or did they speak to him in your presence?

A. Both. They did most of the talking.

Q. Would it be fair to say you asked some questions as well?

A. I think I did; yes.

Q. All right. Would it be further fair to say that the purpose of speaking to Mr. Ortiz was that was the name that appeared on some of the materials connected with the case?

A. Yes.

Q. Did there come an occasion when you, together with detectives of the 34th Precinct, went to speak to two people by the name of Wayne Francis and Tracey Frances?

A. Yes.

Q. When was that?

A. I believe it was just a few days after the incident, February the 15th, I think.

Q. And did you speak to them?

A. Yes.

Q. Did the detectives from the 34th Precinct speak to them?

A. Yes.

Q. Now, was this part of your investigation?

A. Yes.

Q. Did it concern the shooting as well as the bomb incident?

A. Yes.

Q. Did you prepare a report in connection with the results of that conversation?

A. Yes, I did.

Q. Without telling us what they said, do you remember what you wrote?

A. Yes, I do.

Q. And what did you write?

MR. BRANCATO: I object.

MR. BRENNER: Your Honor?

MR. BRANCATO: I object.

MR. BRENNER: May we approach, your Honor?

THE COURT: Yes.

(WITNESS EXCUSED)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: All right, let's go.

(The witness resumed the witness stand.)

BY MR. BRENNER: (Continued)

Q. Agent Behan, without relating to us what they said, did you make an entry in your report relative to that interview?

A. Yes.

Q. You recall independently what that - - what you wrote?

A. In substance, yes.

Q. Can you tell us?

A. I believe I reported that Mr. Franza's or Tracey Francis hadn't given any information relative to this case, was the way I phrased it.

Q. Now, did there - - did there come a time when you or A.F.T. agents returned to Mr. Franza's premises?

A. Mr. Franza's?

Q. Yes.

A. Yes.

Q. And would it be fair to say that was for a purpose of a further search?

A. Yes.

Q. And did such a search, in fact, take place?

A. I believe it did, yes.

Q. What was the search of?

A. The garage. I believe Mr. Franza's garage.

Q. Who performed the search, if you know?

A. Group Supervisor Jerry Rafer and, I believe, Agent Kashinsky.

Q. And what, if anything, was seized, taken?

A. They took a piece of wood that had a wheel or something attached to it. May have been something else. I don't recall. A box, possibly.

Q. Where are those items?

A. They are in our evidence room, in Queens.

Q. They haven't been brought to trial here?

A. No.

MR. BRENNER: I have nothing further of this witness, your Honor.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. BRANCATO:

Q. When Mr. Brenner asked you when you went to speak to Wayne and Tracey Francis, you made some notations; is that correct?

A. Yes.

Q. You said they offered no information relative to this case?

A. Yes.

Q. Is that case that you're referring to the accept-

ing of the explosive device to Puerto Rico?

A. Yes.

Q. Is that what you mean when you say relevant to this case, sending the explosive device?

A. Yes.

Q. And, in fact, your end of the investigation was the sending of that explosive device; am I correct?

A. At that point; yes.

Q. And at that time they did not tell you anything about sending - - the sending of that explosive device; am I right?

A. Yes.

Q. They did not tell you anything concerning that pipebomb that was sent to Puerto Rico; am I right?

A. Yes.

Q. So, when you say that they offered no information then relevant to this case, is it fair that you're saying this case, meaning the federal investigation dealing with the sending of the explosive device to Puerto Rico?

A. Just that; yes.

Q. You had been to the defendant's apartment on the early morning hours of February 12th, 1991; correct?

A. Yes.

Q. And when you got back there, about three to four

week later, that apartment had been cleared out; am I correct?

A. Yes.

MR. BRANCATO: I have no further questions.

THE COURT: Any re-direct?

MR. BRENNER: None, your Honor.

THE COURT: Step down. You are excused.

(WITNESS EXCUSED)

THE COURT: Counsel to the bench.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen of the jury, at this time we're in recess and return at two-fifteen.

Do not discuss this case among yourselves or allow any third party to discuss the case with you.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Off the record discussion between Mr. Brenner and the defendant.)

THE COURT: All right, two-fifteen, yes.

(Whereupon, the Court took a luncheon recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

MR. BRENNER: Judge, may we step up?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(Off the record discussion between Mr. Brenner and the defendant.)

THE COURT: Yes, counsel?

MR. BRENNER: Your Honor?

THE COURT: Yes?

MR. BRENNER: Mr. Franza is well aware of his constitutional right not to be obliged to testify and also aware of the instruction that will be given, if he does not testify, that no inference can be drawn from that.

THE COURT: Provided you request that.

MR. BRENNER: I will so request.

THE COURT: All right.

MR. BRENNER: Mr. Franza and I have had fairly extended discussions about whether in this case it would be in his best interest to testify.

Based on a number of factors, I have advised him that I did not believe that it was in his best interest to testify. I feel that at some juncture Mr. Franza felt conversely to that.

We have discussed it again.

THE COURT: What you have discussed or the contents, obviously; one, you need not nor should you share with the Court.

MR. BRENNER: I - -

THE COURT: But most important, so the record - - not only the record, but that your position is protected, you may make inquiry of Mr. Franza for the record, having discussed the matter with you

and consulted with members of his family as to you having espoused to him and elaborated, I guess, the pluses and minuses, both of you have reached a determination and you should elicit that determination from him so the record may have his words on it on that issue.

MR. BRENNER: Your Honor, I - - I've gone through that inquiry before and I've always felt some what discomforted with it, in that it is self-serving for the defense counsel. I don't believe that it is necessary.

Mr. Franza had an opportunity to discuss this with his family throughout the trial.

THE COURT: I'll put the question to Mr. Franza.

For the record, you discussed this matter with your attorney with respect to your right to testify, which you obviously have an absolute right, and the corresponding answer is that you have an absolute right not to testify and should you not testify the Court, at the urging of counsel, will instruct the jury that no inference can be drawn whatsoever, nor is that a matter of their deliberation or consideration whether or not you testify or the fact that you

did not testify is not something which the jury may consider.

Now, having discussed this matter with your attorney at length and having discussed this matter with your members of your family, do you wish to testify or not?

Again I say, I'm not suggesting that you should or should not. It is merely that I want the record to be clear that you have that opportunity and you had that choice.

THE DEFENDANT: I've had that opportunity, your Honor. I went over it with my attorney and I agree with him. And I'm going to go by what he suggests.

THE COURT: Which is that you what?

THE DEFENDANT: I will not testify.

THE COURT: All right, very well. That's sufficient to the Court.

Now we have Mr. Rodriguez; is that correct?

MR. BRENNER: Yes.

THE COURT: How long is that anticipated?

MR. BRENNER: Ten minutes, on direct.

THE COURT: Bring in the panel.

COURT OFFICER: Jury entering.

THE COURT: Yes.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorneys and the sworn jurors are present.

THE COURT: Very well. Mr. Brenner, call your next witness.

MR. BRENNER: The defense calls Cesar Rodriguez.

THE COURT: Cesar Rodriguez.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York versus Dominic Franza shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes.

COURT CLERK: Be seated.

COURT OFFICER: In a loud voice state your full name, giving the spelling of your last name.

THE WITNESS: My name is Cesar, C-E-S-A-R, Rodriguez, R-O-D-R-I-G-U-E-Z.

MR. BRENNER: Before I begin, your Honor, may I have from the People Exhibit 36 in evidence and 39 in evidence?

MR. BRANCATO: They are right here.

(Handed to Mr. Brenner.)

MR. BRENNER: All right.

May I inquire, your Honor?

THE COURT: Yes

C E S A R R O D R I G U E Z, having been called as a witness on behalf of the defense, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. Good afternoon, Mr. Rodriguez.

A. Good afternoon.

Q. By whom are you employed?

A. Federal Express.

Q. What capacity are you employed?

A. I'm a customer service agent.

Q. Tell us briefly what a customer service agent does?

A. I assist customers in tending our packages.

THE COURT: Slow down.

A. And traces and that's about it.

Q. Where are you presently employed?

A. At 988 Eighth Avenue.

Q. I'm sorry?

A. 988 Eighth Avenue.

Q. Now, back in February, 1991, specifically February 4th, 1991, were you employed by Federal Express?

A. Yes.

Q. Were you employed in a similar capacity to that capacity that you're in now?

A. Yes.

Q. Where were you employed?

A. I was employed at 79th Street, but at that time, that specific date, I was at 600 West 116th Street.

Q. Now, I'm going to show you what has been previously marked, I believe, People's 39 in evidence.

(Handed to the witness.)

Q. Do you rocognize that?

A. Yes.

Q. Now, directing your attention to February 4th, 1991.

Did there come a time when you saw a package with People's 39 attached to it?

A. This package came with the customer that brought it in; right.

Q. Somebody brought it in?

A. Right.

Q. Incidently, the person who brought it in, can you describe?

A. It was a short, dark skinned guy, about five-six.

Q. Could you stand up, Mr. Rodriguez?

A. Sure.

(Witness stands)

A. It was a short person, like - -

Q. Mr. Rodriguez, how tall are you?

A. Five-five, five-four. It was taller than me.

Q. A little taller than me?

A. Yes.

Q. In terms of complexion, same as yours, a little darker?

A. Darker.

Q. And please sit down.

MR. BRENNER: Thank you.

(Witness sits.)

Q. Can you describe, if you know, the ethnic back-

ground of that person?

A. He had like a little accent, like hispanic.

Q. Do you see that person in this courtroom?

A. No.

Q. And what time did you first see this person, approximately?

A. It was about eleven-thirty in the morning.

Q. And he brought you the package?

A. Yes.

Q. And did you speak to him?

A. Well, I just - - I just started a transaction. He told me he wanted to send a package to Puerto Rico. I took the package. And weighed it.

The package - - the air bill had the wrong weight on it so I explained to him it has the wrong weigh. And it was nine pounds.

And then I asked him, "how would you like to pay?" He says, "cash." I said, "sorry, we don't accept cash. You have to get a credit card, check or money order."

That's when he then took the package, left and came back later on.

Q. Okay. Now, when he said those words to you, is that when you noticed that he had an accent?

A. Yes.

Q. And how long were you dealing with him on the first occasion?

A. It was less than a minute, I think.

Q. And did there come a time when you saw him again?

A. I saw him again in the afternoon.

Q. And could you tell us about that?

A. Yes. He came in with the money order and this here, with the paperwork, and put the box on the counter. I then took the box and weighed it again, just in case anything changed. And I then took the money order and started a transactions on the paperwork.

Q. Okay. I'm going to show you what has been previously marked as People's 36, I believe, in evidence.

(Handed to the witness.)

Q. Do you rocognize that?

A. Yes.

Q. And what do you rocognize it to be?

A. My handwriting, the air bill number.

Q. Did you write the air bill number on it?

A. Yes.

Q. Would it be fair to say that was the money order tended to you by the individual?

A. Right. This is the one that was brought in.

Q. After you accepted the money order, what, if

anything, happened?

A. After I accept the money order, I just bring the air bill, I give him the copies, distribute the copies of the air bill and I just process the package.

Q. Was there any further conversation between you and he?

A. No, there wasn't.

Q. Was the person who came back in the afternoon the same person who was there in the morning?

A. Yes, it was.

Q. Can you tell us how he was dressed?

A. I really don't remember the clothing. I remember the texture, dark skin, short guy and like dry hair.

Q. When you say - -

A. Like - -

Q. When - -

A. Something like my hair.

Q. Something like your hair?

A. Yes.

Q. Did he have any special hair?

A. I really don't remember the features.

Q. Okay.

MR. BRENNER: I have nothing further at this time.

Thank you, Mr. Rodriguez.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. BRANCATO:

Q. Mr. Rodriguez, that day you were working at the store located on 116th Street and Broadway; am I correct?

A. Right. Yes.

Q. And you indicated that the man came in with a package that had this air bill on it; am I correct?

A. Correct.

Q. And the information on that was already filled out; am I correct?

A. Correct.

Q. And the name on the bottom of the air bill is Julio Ortiz; am I correct?

A. Correct.

Q. So, when that signature was already on there when he came in; am I correct?

A. Yes, it was. Everything was already on it.

Q. So he tendered you, he handed to you the package and he tried to pay you with cash; am I correct?

A. Right.

Q. And you told him at that point that Federal Express doesn't accept cash money, but he had to pay in some other

form?

A. Correct.

Q. Either money order?

A. Check or credit card.

Q. Check or credit card.

And then the man picked up the package?

A. Right.

Q. And walked back out of the store with the package.

A. Correct.

Q. Am I right?

A. Correct.

Q. And did you tell the man where to go to buy a money order?

A. Well, I did suggest that there was a store on the corner.

Q. Is that College Stationery?

A. Yes, it is. It is a College Stationery.

Q. And the man took the package and went out the door; am I correct?

A. Correct.

Q. And when he went out the door, you indicated that he came back sometime later.

A. Right.

Q. And about two hours, two and one-half hours later?

A. Right.

Q. And you had directed the man to a store right around the block; am I right?

A. Right. Right around the corner.

Q. Yet he came back about two, two and one-half hours later?

A. Correct.

Q. And at the point he came back you indicated that he handed you that money order?

A. This one; right.

Q. And that the only information that you wrote on there was the air bill number?

A. Correct.

Q. And this happened on February 4th?

A. Right. The same day.

MR. BRANCATO: I have no further questions at this time.

THE COURT: Re-direct?

MR. BRENNER: Nothing for this witness, your Honor.

THE COURT: You are excused, Mr. Rodriguez.

(WITNESS EXCUSED)

THE COURT: Gentlemen, this would be the time, I believe, where there is another stipulation?

MR. BRENNER: May we approach?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen of the jury, at this time we will recess until tomorrow morning at ten-thirty.

But there is an added announcement that I'm going to give you a caveat, which I told you at the outset I would give you the day before you are charged.

It is our intention that sometime tomorrow this case will be submitted to the jury. There may be further testimony tomorrow, followed by the summations of respective counsel, the charge by the Court and then you'll retire to commence your deliberations.

When you were initially selected I told you of those things you may wish to bring with you, such personal items as a medication, change of clothing and a toothbush and in the event, and I underscore, in the event the jury is sequested. The court

officers will instruct you as well.

But it is our intention that this case will go to the jury tomorrow.

Do not reach any conclusions about the case.

Do not discuss this case among yourselves, nor allow any third party to discuss the case with you.

Of course, if anyone should attempt to do so, bring that fact to the attention of the Court, but not to the attention of our your fellow jurors.

Have a very good day. Be here tomorrow morning at ten-thirty.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: Mr. Brenner?

MR. BRENNER: Judge, with regard to Cesar Rodriguez, I just want it to be clear that my calling of him under these circumstances in no way should suggest that my - -

THE COURT: You are forfeiting - -

MR. BRENNER: My prior exception to the Court's ruling is in anyway altered.

I believe that Mr. Brancato's application and mine was in liminy. There was a ruling from the

Court and the asking of any questions about the Grand Jury would have been absolutely bad faith. But my failure to do so means - -

THE COURT: No, your record is protected.

MR. BRENNER: All right.

THE COURT: Yes.

MR. BRENNER: Your Honor, is it at all possible during the course of these rather lengthy and probably intense?

THE COURT: Yes?

MR. BRENNER: Closing arguments, that that instrument be some how lowered or disconnected or taken off the hook?

THE COURT: You mean the phone?

MR. BRENNER: Yes. Because it does ring with some frequency and rings fairly loudly. I cannot speak for Mr. Brancato, but I would find it disconcerting.

THE COURT: All right, we'll do something about that.

What else?

MR. BRENNER: That's all.

THE COURT: Ten-thirty tomorrow.

All I can say is in formulateing your argu-

ments, streamline.

MR. BRENNER: Judge, will you be permitting us to incorporate the law as you intend to charge it?

THE COURT: No. I don't think that's a function of counsel and I don't think it is proper summation. Once you allude to it, it is subject, always, to objection that counsel is now instructing the jury or trying, even innocuously, saying the Judge will instruct you that and using that.

Are you raising your hand?

MR. BRANCATO: I would like to say something.

THE COURT: Go ahead. It is an open forum.

MR. BRANCATO: Okay.

THE COURT: Yes.

MR. BRANCATO: I don't think either Mr. Brenner or I are in disagreement that the theory in this case is that the defendant, acting with someone else.

THE COURT: Acting in concert.

MR. BRANCATO: Yes. I don't mean to get into a long dis - -

THE COURT: Is this for the record?

MR. BRANCATO: I'm sorry?

THE COURT: All right, we can now take this

off the record.

(Whereupon, there was an off the record discussion between the Court and all counsel.)

THE COURT: All right, tomorrow morning, ten-thirty.

(Whereupon, the proceedings were adjourned until March 10th, 1992, at ten-thirty a.m.)

* * *

(Continued on the following page.)

MARCH 10th, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant.

111 Centre Steeet

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S:

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, get in the panel.

(Off the record discussion between Mr. Brenner and the defendant.)

COURT OFFICER: Jury entering.

THE COURT: Yes.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Good morning, ladies and gentlemen.

COURT CLERK: Case on trial.

The defendant, his attorney, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Call your next witness, Mr. Brenner.

MR. BRENNER: The defense would call Julio Ortiz.

THE COURT: Julio Ortiz.

COURT CLERK: Remain standing.

COURT OFFICER: Place your left hand on the

Bible, raise your right hand and face the Clerk of the Court.

COURT CLERK: Do you solemnly swear the evidence you're about to give the Court and jury in the case of the People of the State of New York versus Dominic Franza, shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes, I do.

COURT CLERK: Be seated.

COURT OFFICER: In a loud voice state your name, spelling your last name and county of residence.

THE WITNESS: Julio Ortiz, O-R-T-I-Z, and I reside in Manhattan.

COURT OFFICER: Defense witness.

THE COURT: You may inquire.

J U L I O O R T I Z, having been called as a witness on behalf of the defense, was sworn by the Clerk of the Court, took the witness stand and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BRENNER:

Q. MR. Ortiz, before today have we ever met, you and

I?

A. No, we haven't.

Q. Can you tell us when the first time you and I spoke was?

A. It was yesterday.

Q. Mr. Ortiz, by whom are you employed?

A. I'm C.W.A., a case worker for C.W.A., Child Welfare Administration.

Q. What branch of the city or state government is that?

A. Manhattan.

Q. Is it part of the Department of Social Services?

A. Yes, H.R.A.

Q. How long have you been so employed?

A. Two and one-half years.

Q. And before that, how were you employed?

A. I was a counsellor for the Salvation Army.

Q. Now, directing your attention to my left.

Do you know this man? Do you know Dominic Franza?

A. Yes.

Q. When did you first meet Mr. Franza?

A. We worked at a - - at Roosevelt island. I was an apprentice, electrical apprentice, he was a mechanic.

Q. And that - -

A. That was 1980 - - I don't know. 1980 something. I don't recall the year.

Q. Can you describe the nature of your relationship, if any? Was it friendly, not friendly?

A. Yes, it was friendly.

Q. Directing your attention so the summer of 1990.

A. Right.

Q. Did you have occasion to see Mr. Franza?

A. Yes, I did. I was doing field work at around 103rd Street and Second Avenue and he went by in his car, with his car, driving his car. And he called me. That's when I met him.

Q. And what happened after that?

A. Well, we spoke and then he gave me a lift home.

Q. Did you have a conversation with him?

A. Yes, we did.

Q. After that conversation, did you give him anything?

A. Yes, I gave him my name and a phone number. I don't recall if it was my home phone number or my job phone number. And he also gave me his name on a piece of paper and a phone number.

Q. And after that time, in the summer of 1990, did you have occasion to see Mr. Franza again?

A. I never saw him after that again.

Q. Until today?

A. Until today.

MR. BRENNER: I have nothing further at this time.

THE COURT: Mr. Brancato?

MR. BRANCATO: Okay.

CROSS EXAMINATION

BY MR. BRANCATO:

Q. MR. Ortiz, you indicated that at some point during the '80's that you worked with the defendant.

A. Right.

Q. Do you remember when that was?

A. It was in 1988. I - - I think '87. I don't know. I don't have a clear date when was that. I know the place, but I don't remember the date.

Q. You don't remember when you worked with the defendant?

A. The year?

Q. Yes, the year.

A. 1988, 1989.

Q. You're not sure?

A. I'm not sure. I know I worked with him.

Q. And you indicated that you were an electrician apprentice?

A. Yes.

Q. And that the defendant, you said, was a mechanic?

A. Yes.

Q. And by mechanic, do you mean that he would deal with pipes and fixtures, like that?

A. Electrical work.

Q. Electrical work.

A. Yes.

Q. So, he wasn't an electrician that with deal with computerized chips; am I correct?

A. No, just with lights, you know, and wires. Outlets, you know.

Q. And these were lights and outlets and wires that were run in what, construction sites?

A. Yes.

Q. And in those construction sites, they run the outlets and wiring through pipe.

A. Pipes, yes.

Q. Am I correct?

A. Different size of pipes.

Q. And so during the course of running that - - running that material through pipes, did you assist Mr. Franza?

A. Well, I was assigned to work with him once. As his

helper.

Q. When you run that material through pipes, there are occasions where you have to cap the pipe at the other end; am I right?

A. By cap, what do you mean?

MR. BRENNER: Objection, your Honor.

Outside the scope of direct.

THE COURT: I'll allow it.

Q. Pipe cap.

A. Cap?

Yes. A cap, yes.

Q. And you have to use a pipe cutter sometimes in order to cut the pipe?

A. Yes.

Q. And you did this with Mr. Franza; am I correct?

A. Well, I don't know what type of - - I know that I assisted him doing work. But I don't - - cannot tell you precisely that type of work that we did.

Q. But even though you don't have a recollection as to the year that you worked with him?

A. Right.

Q. Do you have a recollection that you worked on construction sites with him?

A. Yes, doing electrical work; yes.

Q. Okay. Now, you indicated that you met the defendant sometime in the summer of 1990.

A. Yes.

Q. And that you met him some where down about 103rd Street?

A. Yes, some where in that area.

Q. And Second Avenue; am I right?

A. More or less; yes.

Q. And when you - - when you met him, did he call out to you or did you call out to him?

A. No, he was the one who saw me and he was the one who - - who call on me.

Q. And so he gave you a ride then to where you live?

A. Yes.

Q. Where do you live?

A. Washington Heights.

Q. Where in Washington Heights?

A. 172nd Street.

Q. What's your address?

A. 630 West 172nd Street.

Q. And during the course of going up to your residence on what, 172nd Street, you and defendant exchanged telephone numbers; am I right?

A. Well, we did that at the end of the ride; yes.

Q. And at that time did you give him your name?

A. Yes.

Q. And did he write it down?

A. I think he did; yes.

Q. And did he - - he had a pad; am I correct?

A. I don't.

Q. Well, let me ask you. Do you carry a pad on you?

A. Sometimes I do, in my bag; yes.

Q. This is already in evidence as Exhibit 35-D.

(Handed to the witness.)

Q. That's your name on there, Julio Ortiz?

A. Right.

Q. And those two telephone numbers, those are your work numbers; am I correct?

A. I - - I'm probably because I have changed from one office to another so many times that I.

Q. Mr. Ortiz, there are two telephone numbers over there.

A. Yes.

Q. And the prefix of the seven digit number is what?

A. 487-3425.

Q. And "487" is your office; am I correct?

A. Not now. Probably was though my office when I was working West 122nd Street.

Q. And so you gave the defendant your name and your two telephone numbers; am I right?

A. Right.

Q. And he wrote them down; am I right?

A. Right. Because that's not my handwriting.

Q. That's not your writing; am I right?

A. No.

Q. And then he wrote down his name?

A. Huh-huh.

Q. And his telephone number and he gave it to you?

A. Right.

Q. That's not your writing on that piece of paper; am I right?

A. No, it is not.

Q. And you didn't give him a piece of paper to write it down; am I right?

A. I don't think I did.

Q. And so he gave you - - he gave you his telephone number and name the day that he drove you up to Washington Heights?

A. Right.

Q. Do you know where 750 West 181st Street is?

A. 750 West one hundred what?

Q. Eighty-first street?

A. It is near my - - it is near my home. But I don't know exactly where it is at.

Q. Did you ever live there?

A. No.

Q. Back in the summer of 1990, 750 West 181st Street was a pawn shop; am I right?

MR. BRENNER: Objection.

A. I don't know.

MR. BRENNER: Objection.

A. I don't know.

THE COURT: If he knows.

A. I don't know.

Q. It is near your home, isn't it?

A. Yes. But I don't know all the places. I mean, if there is there, you say it is there, I don't know.

Q. Aside from this one day in the summer that you met the defendant and he gave you the ride uptown?

A. Right.

Q. Did you see him after that?

A. Never saw him again. Never spoke to him again.

MR. BRANCATO: I have no further questions at this time.

THE COURT: Any re-direct?

MR. BRENNER: None, your Honor.

THE COURT: You are excused, Mr. Ortiz.

THE WITNESS: Okay.

(WITNESS EXCUSED)

MR. BRENNER: May we approach?

THE COURT: Yes.

(Exhibit returned to Mr. Brancato.)

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen of the jury, at this time there will be a short recess.

Do in the discuss this case amongst yourselves.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York versus Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Ready? Yes?

MR. BRENNER: I just need to pull some evidence.

THE COURT: All right.

(Pause.)

THE COURT: By the way, gentlemen, step up here.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(Off the record discussion between Mr. Brenner and the defendant.)

MR. BRANCATO: There are two things.

First: Judge, when the typewritten documents were introduced in this case, there are five separate documents. Mr. Brenner and I, at the bench, stated that these documents were being admitted solely for the purpose of comparisons of typewriting

on those documents to the bill of laden on the Federal Express air bill.

MR. BRENNER: And the "threatening letters."

MR. BRANCATO: That's correct.

We agree that if the jury were to inquire as to those letters that the jury would be submitted -- they would be handed an alphabet from those letters, as well as numbers.

Am I correct, Mr. Brenner?

MR. BRENNER: That's correct.

I intend to make no use of them during summations.

THE COURT: Is that alphabet been prepared?

You say there is going to be a separate alphabet?

MR. BRENNER: We would only -- we would make copies of the exhibits, blackout that -- everything but the initial caps, reflecting the alphabet and numerals and submit those to the jury.

Is that fair?

MR. BRANCATO: That's correct.

The second thing that I want to say, Judge, is that the first event of July 17th, 1990?

THE COURT: Shooting.

MR. BRANCATO: Concerns four counts in the indictment. July 17th, it concerns four counts in the indictment. Two are attempted murder and two were assault, in the first degree.

We are asking that you submit to the jury alternative counts, in the sense that if they acquit the defendant on the attempted murder that they then go down and consider the assault, in the first degree, counts.

Certainly one view that the jury might consider in this case is that Mr. Franza tried to wreak havoc on his family, his wife's family.

THE COURT: But didn't intend to have them killed.

MR. BRANCATO: Exactly.

THE COURT: I think that's a rather tortured view and, accordingly, I - -

MR. BRANCATO: Judge, let me just say - -

THE COURT: I informed you at the bench that I felt that the charges with respect to the assault would not be charged. But I'm listening.

MR. BRANCATO: Okay. You know well, Judge, that the intent required in attempted murder often gives jurors concern to stop, think, re-think their

position and that in many instances jurors are troubled by that intent to kill another.

And we're saying that in this case the assault, in the first degree, counts should be given to the jury. Those are C felonies, each one carrying a maximim of five to fifteen years. And they are consecutive counts.

We're asking that you submit that. I know that the Court's concern in charging the jury, this is not something that will take that long a period of time to charge the jury. I believe that they can be instructed on this count in rather swift fashion and that you can just ask them to consider what they had heard on the count of assault, in the first degree, to the wife and just substitute the name of Myra Franza in that regard.

THE COURT: It is not the size of the charge that concerns me.

MR. BRENNER: Your Honor, is the court re-considering?

MR. BRANCATO: Judge, Mrs. Mendez indicated that - -

THE COURT: I said I'm listening. I didn't say I'm doing anything.

MR. BRENNER: Well.

MR. BRANCATO: Mrs. Mendez indicated in her testimony that, in addition to being shot, that the person who came into the apartment also had a knife and she indicated that this person had pricked at her face with the knife. Someone on the jury may believe that if the person truely wanted to kill Mrs. Mendez, and I agree - -

THE COURT: I believe she received six bullets.

MR. BRANCATO: Five.

THE COURT: Five.

MR. BRANCATO: Five.

There is a view that a juror may take that if this person truely wanted to cause her death he would have slit her throat at the time rather than prick her face with the knife.

Additionally, there is testimony that Mrs. Franza was shot one time and the jury could conclude that these were six shots that were spent in the apartment and that if the person wanted to kill Mrs. Franza he could have slit her throat.

So, there is certainly a reasonable view of the evidence that supports assault, in the first degree. And I'm asking at this point that you

charge those two counts.

THE COURT: Anything else? Do you have any other matters?

You said you wanted some other matters?

MR. BRANCATO: I believe that you're going to charge the remaining counts, attempted murder - -

THE COURT: The only one I don't know for certain I'm going to charge, although the element is some what different, is the simple criminal possession of a weapon, in the third degree, which refers to the same explosive device. But it doesn't have the element of intent to use it unlawfully against the personal property of another. That's the only - - that one is still open in my mind.

Do you want to be heard, Mr. Brenner?

MR. BRENNER: Your Honor, I don't want to waste the Court's time. If the Court is adhering to the original ruling on the assault counts, I wouldn't make argument.

THE COURT: I think you should make arguments. I haven't concluded. I'll give you an opportunity to be heard.

MR. BRENNER: Your Honor, as I understand it, the theory of this People's prosecution is that Mr.

Franza made statements, "I'll kill you; I'll kill your entire family; I'll fury you in the park," and that he sends a gunman to that apartment to effectuate that purpose. The gunman shot five shots into Josephine Mendez, then stood with his arm extended at Myra Franza and then shot one time at her face.

After that, she pretended she was dead, according ing to her testimony, which would certainly eliminate the notion that he would slit her throat at that juncture since she lead him to believe, by her testimony, that she was dead.

I do not believe, given the nature of the injuries, the intent, as testified to on the People's case with regard to Mr. Franza's prior threats, that his intent was to wreak havoc in the light viewed most favorably to the People, but rather to cause the death of the individuals involved.

In addition, I should note if the People are going to argue that havoc was amend attempted to be brought on those two occasions, then they should be requested a lesser situation assault, assault, in the first degree, with regard to the pipebomb in Puerto Rico because the intent could be throughout,

wreak havoc on all members of the family. I haven't seen such a charge, wasn't charged as a lesser included, it is an attempted assault, in the first degree.

I would oppose. I would join in the Court's original ruling to not submit the counts to the jury.

MR. BRANCATO: There is - -

MR. BRENNER: There is also - -

MR. BRANCATO: There is certainly a reasonable view of the evidence that the jury could decide that the shooter in this case exceeded the mandate set forth by the defendant.

THE COURT: Would that be a defense?

MR. BRANCATO: They could - - your Honor, we have the burden - -

THE COURT: I'm talking about the - -

MR. BRANCATO: We have the burden - -

THE COURT: I'm talking about the legal view point. If a contractor were to shoot and kill C or rather to injure C, but be determines on his own not only to shoot and injury but to shoot and kill, does that exonerate, you say?

MR. BRANCATO: We are saying - -

THE COURT: I'm asking you a simple proposition.

MR. BRANCATO: Let me just finish my statement before I address your hypothetical.

We are saying since we have the burden of proof in this case, that the jury could conclude that the defendant wanted serious physical injury to the family but did not want to bring about a death in the family.

THE COURT: Supposing that were so, supposing that were so, would he be exonerated if the shooter exceeded his contractual obligation? Legally? Do you think so?

That was my hypothetical.

MR. BRENNER: Don't look at me. I'm not going to answer that question.

THE COURT: I'm asking you.

MR. BRANCATO: Judge, we have - -

THE COURT: You keep avoiding the answer.

MR. BRANCATO: Because we have to prove that the defendant - -

THE COURT: I asked you a simple question.

MR. BRANCATO: That the shooter - -

THE COURT: Well - -

MR. BRANCATO: I'm inclined to say no. But I would not, you know, say that an appellant division in this county at a future date night not come back and say that the People have to prove that the defendant shared the same intent as the person who went to the apartment.

THE COURT: Two individuals engage in a robbery, one is the wheelman and one is the shooter with the understanding that he's not to shoot anybody, just to threaten them with a gun. But for whatever reason he goes in and he shoots somebody --

MR. BRANCATO: Judge.

THE COURT: Does that exonerate the wheelman?

MR. BRANCATO: Judge, there you're dealing with felony murder, which is different than the charges here.

THE COURT: Acting in concert - -

MR. BRANCATO: Because these charges require specific intent.

THE COURT: But acting in concert under these circumstances, I believe, is sufficient.

Do you agree or disagree, Mr. Brenner?

MR. BRENNER: Your Honor, as I said, I join - - I join - -

THE COURT: No. If a shooter were to exceed the - -

MR. BRENNER: It is not a difference.

THE COURT: It is not a difference?

MR. BRENNER: No.

And that comes from a position of not asserting that defense in this case.

THE COURT: I understand that.

MR. BRANCATO: Judge, whether the defendant asserts the defense or not, if this case is reviewed at a future point they are only going to be concerned with whether the People's proof met that intent.

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

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

What else?

MR. BRENNER: Your Honor, I was informed earlier that you intend to charge the concept of constructive possession, vis-a-vis the pipebomb delivered to Puerto Rico.

THE COURT: Yes?

MR. BRENNER: Your Honor, this is a case in which - -

THE COURT: Yes?

MR. BRENNER: This is a totally circumstantial case. And to charge constructive possession in a totally circumstantial case, from the outset, your Honor, I believe is a redundancy.

In addition, this is a - -

THE COURT: Why is it a redundancy?

MR. BRENNER: Constructive possession is a specific as to circumstantial evidence. The proof that Mr. Franza possessed that bomb at any time is totally circumstantial. There is no evidence he actually held it.

So, if he constructively possessed it in a --

THE COURT: You can have a circumstantial case where you're still alleging there is direct evidence.

MR. BRENNER: But that's not this situation.

THE COURT: I didn't say in this situation.

MR. BRENNER: I - -

THE COURT: I mean, they are not.

Go ahead.

MR. BRENNER: I said a totally circumstantial

case.

THE COURT: Go ahead.

MR. BRENNER: Secondly, your Honor, this is a case convered completely in all its counts by accessorially liability, again, under the People's theory. I certainly have no objection to charging that the possessory count is - - was carried out in accessorialy fashion, acting in concert. But I don't believe that it lends itself, the evidence itself lends itself to a constructive possession.

The hypothetical I earlier posed to Mr. Sheindlin - -

THE COURT: I reached no conclusion whether that can be charged as constructive or actual, under the acting in concert.

MR. BRENNER: Lastly, for the record, your Honor, there is a People's exhibit entitled Mr. Franza's personnel file, which contains - -

THE COURT: What is that exhibit number?

MR. BRENNER: I don't recall.

THE COURT: So, I can isolate that?

MR. BRANCATO: Forty-five, your Honor.

THE COURT: Franza File file, 45; right?

Now, is that the only exhibit that has been

received just for the writing but not - - they are not to consider the content?

MR. BRENNER: No, there are other documents received.

THE COURT: Let's get them all together. I don't want to do this piecemeal.

(Pause.)

MR. BRENNER: I'm sorry?

THE COURT: You said you were going to give me other exhibits, so I can just isolate those exhibits, which are being received but not for their content.

MR. SHEINDLIN: Forty-one, also.

THE COURT: Forty-one? That's A to E. Forty-one I have consisting of A through E.

MR. SHEINDLIN: Yes.

THE COURT: And what is that, actually?

MR. BRANCATO: That's the typed material.

MR. BRENNER: The typed material.

THE COURT: So, both those exhibits are being received in demonstration of the - -

MR. BRENNER: Forensic comparison purposes.

THE COURT: Forensic comparison, but not for the content; is that correct?

MR. BRENNER: That's correct.

THE COURT: All right, what else?

MR. BRANCATO: But, Judge, you indicated that you would let the jury read that file in its entirety.

MR. BRENNER: When I'm asking - -

THE COURT: They can read it, obviously, for the purpose of using a comparison, but not for the purpose in anyway in their consideration in this case. There is a distinction there.

MR. BRENNER: But for their substance?

THE COURT: Yes. What else?

MR. BRENNER: At this juncture, your Honor, nothing.

THE COURT: All right, bring in the panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: All jurors are present, your Honor.

THE COURT: Ladies and gentlemen of the jury, at this time we will hear the closing arguments.

MR. BRENNER: Your Honor?

THE COURT: The defendant rests?

MR. BRENNER: The defendant rests his case.

THE COURT: Yes, both sides having arrested, officially, that is.

Mr. Brenner?

MR. BRENNER: Thank you.

MR. BRENNER: Good afternoon.

It has been, as I think we will all agree, a long road in this case. I think we are in our fifth week of testimony. We have heard from approximately forty witnesses, received into evidence approximately seventy exhibits and have had sidebar conferences too numerous to count.

Now it is my time to talk to you for the first and the last time on behalf of Dominic Franza.

In a case like this, it is a struggle to assess how exactly to speak to the jury. Quite candidly, I think that many defense lawyers would say that it is not so much what you say to twelve people, it is how you say it.

There have been times in cases when I have raised my voice and in tones quivering with indignation, pointed at these guys and raised issues of

frame-up, malicious prosecution, cover-up. That's not the day for this. Because, ladies and gentlemen, I believe that Mr. Brancato will express rage and anger over the injuries sustained by Myra Franza and Josephine Mendez in tones that well may well raise the rafters.

I'm not here with rage or indignation or rage. I'm here because, I submit to you, that there are questions in this case which - - for which the evidence provides no answers and doubts for which the record resounds with reasons.

Reasonable doubt. Reasonable doubt is the concept which protects a person from weak accusation. It is the shield which protects an accused person from the concept that as a general proposition you can prove anything about anybody.

The Judge will instruct you on precisely what reasonable doubt is.

Now, I don't know what Mr. Brancato is specifically going to say on behalf of the prosecution, but I'd be willing to bet that he's going to say that he has proven his case beyond a reasonable doubt. You know why? Because in twelve years, ladies and gentlemen, I have yet to hear a prosecu-

tor stand up and say, yo, hold on, there are questions here for which there are no reasonable answers. There is troubling stuff here. There is stuff that doesn't add up. We haven't proven our case beyond a reasonable doubt. You guys should acquit. And I trust that in this case Mr. Brancato will not do that.

Now, conversely, I have heard prosecutors say that defense counsel in this case, ladies and gentlemen, would have you believe X, Y and Z. He would have you believe his client is not guilty. He would have you believe the following.

I wouldn't have you believe anything.

I've heard terms like red herring, smoke screen, sand in your eyes, fancy dancing, keep your eye on the ball, trying to pull a fast one. I don't know if Mr. Brancato will say that. I've heard that before. And I'm not here to do any of that. We've been here too long. There are issues too serious in this case. The crimes are serious in nature. I'm not here to cast red herrings at you, I'm not here to blow smoke in your face, I'm not here to do a fast dance. I'm here to talk to you about this case.

What is the prosecution theory of this case, the prosecution theory underlying the crime for which my client, Dominic Franza, stands accused?

The prosecution theory, as best I can gleen, runs something like this. That in June, of 1990, Myra Franza, the wife of Dominic Franza, leaves her husband. This is the result of a stormy marriage. She goes to live with her brother, Carlos DaCosta, and spends time with her mother, Josephine Mendez, at the same time. And this has happened before. It happened in 1989 as a result of an incident in which Mr. Franza had a fight with his wife, grabbed her and struck her and as a result of that occurrence she left, she brought a Family Court petition and got an order of protection and had him arrested. She then went to her brother's house and again spent time with her mother, Josephine Mendez, at 485 West 187th Street.

There was, for whatever reason, a reconciliation at that time, in 1989. The two got back together. But the marriage failed.

Sometime around June 28th, 1990, again as a result of a fight in which Mrs. Franza says that her husband hit her, she leaves. There is, however,

no immediate order of protection; there is, however, no immediate Family Court action. She just leaves.

According to the prosecution theory of this case, at that point this man, in a fit of fury, bitter anger and a thurst for revenge, plans to kill his wife, her mother, her brother and her mother's mother.

But, according to the prosecution, he does it in a cunning, secretive, crafty way. Because, according to the prosecution, on June 30th, 1990, Mr. Franza purchases a car for his wife. On July 12th, 1990, he purchases cruise tickets for them to go away together. Both of these are ruses. They are a pretext, pretext of affection and desire to cover up his wicked state of mind. This is the prosecution theory.

On July 17th, 1990, an incident takes place. Sometime between June 28th, of 1990, and July 17th, of 1990, this man hires a killer, a killer to go to the apartment at 485 West 187th Street and take the life of his wife and her mother. And he does it in cunning and crafty and secretive fashion.

And the prosecution theory is that the fashion that he chooses is to hire someone to pose as a

floral delivery man. And the fashion that he chooses is to have this floral delivery man go to Myra Franza's apartment, to Josephine Mendez' apartment, where Myra Franza is, to gain access by imitating a floral delivery man and the sophisticated and cunning means of this is he handwrites, in his own handwriting, a note which he has stapled to the box, which the floral delivery man brings with him.

That is the cunning, devious, crafty criminal mind at work.

On July 17th, 1990, a six foot tall, thin hispanic man approaches the neighborhood of 485 West 187th Street, has a flower box tucked under his arm, the one that's sitting on the ledge. He's looking around, according to the testimony of Josephine Mendez, this is the prosecution theory, he's looking around to check the numbers. She sees him through the window. He rings the bell. She answers. He says floral delivery for Myra Franza. She leaves to ask Myra, who is inside taking a shower, whether she wants flowers and then, ladies and gentlemen, the tragic criminal event take place.

There is no assertion on the part of the

defense that constitutes a trivialization of what happened on that day. None. It is terrible, it is tragic, it is criminal. If you believe that this man did it, then you must convict. But you should not for one moment believe that there is any effort to make less of what happened in this apartment than what did.

Cunning, devious criminal mind.

What happens is that the neighbors and someone outside the building hears loud sounds, not muffled, not silenced, but loud sounds, sounds like an aluminum bat striking a piece of metal or a piece of furniture. Gilda Ferraro, not knowing that Myra Franza is one of the victims, thinking that something is wrong, and at the direction of her daughter calls Myra's apartment. She says, come over, something happened to your mother. Leaves a message on the answering fax machine. The answering fax machine is Dominic Franza, according to the prosecution theory, the mastermind, the cunning criminal mastermind of these facts.

This mastermind listens to the answering machine, hears the message by Gilda Ferraro. What does he do? According to the prosecution theory,

he calls up the landlady, according to the prosecution theory, he says, Myra and I aren't together again, you're looking for Myra, I'm on my way over to find out what the hell happened. Shrewd move, according to the prosecution theory. Shrewd. Go to the scene. Go to the scene of the crime. Go to the scene of a crime that you just arranged. Put yourself right where the bodies are. Shrewd.

According to the People's witnesses and the prosecution theory, Mr. Franza then hops into his car, which is parked in the driveway between his building and the building of Wayne and Tracey Frances, and drivers off, not to be seen again that night. The car is not seen again, either.

According to the prosecution theory, however, he arrives at the scene in a different car, with somebody else, who is driving.

He gets out of the car, he heads towards the building at 487 West one hundred - - 485 West 187th Street, no doubt to see his handy work, and Nelson DaCosta steps out of the crowd and punches him in the face.

According to the prosecution theory, then Mr. Franza, the devious, cunning criminal, ends up in

the 34th Precinct having been taking there by Borges and Oritz.

According to the prosecution theory, once at the 34th Precinct, and clearly in an effort to cast suspicion some where else, he procedes to tell the detectives how bad his marriage has been, how upset he was that Myra left, how hard he tried to get back together with her, and knowing that the modus operandi of this case was a floral delivery, proceeds to admit that he has sent her flowers on many occasions and, indeed, was planning to send her flowers the following day, together with the cruise tickets that we've earlier referred to.

Shrewd. Shrewd.

In the 34th Precinct, until two o'clock in the morning, Detective Giorgio asks him question after question about his marital woes, about his problems with his mother-in-law, about his activities that day, about his floral delivery habits and Mr. Franza, certainly in an effort to cast suspicion some where else, answers them all. Answers all those questions.

Detective Giorgio says, "well, what what are you doing there?" And according to the prosecution

theory, Mr. Franaz says, "I got a message on my answering fax machine." And Giorgio says, "well, let's have it. We'd like that. Franza says, "okay." I mean, after all, the cunning, devious criminal mind at work gives up the answering fax machine tape.

Two o'clock in the morning he is taken home by Detective Borges and Ortiz again. Once there, they ask him for the tape, he gives it to them and he asks for a receipt. Gosh, how cold and calculating, after spending six hours in the precinct where it has be abundently clear that the light of suspicion is being cast exclusively on him, to ask for a receipt, in such an act as if he had to protect himself. Because, ladies and gentlemen, I do not doubt that Mr. Brancato will stand up and say, "a receipt? A receipt? That is consciousness of his guilty mind. What person in that situation would is ask for a receipt?

Well, the situation was that he had been brought to the 34th Precinct; the situation was that he had asked to see his wife and wasn't allowed to; the situation was that he was kept at the 34th Precinct for line six hours, being asked

questions about his habits, his marriage, his problems. He asked for a receipt.

The prosecution theory.

A week later, according to the prosecution theory in this case, Dominic Franza meets up with Detective Giorgio again. This time Detective Giorgio said, "hey, you have the right to remain silent. Hey, anything you say can be used against you. Hey, you have a right to a lawyer."

Dominic Franza, criminal mastermind at work, devious, cunning, crafty, says, "okay, I'm talk to you. What do you want to know?"

"Tell us again about your marital problems." "Oh, okay. I have all these problems with my wife. I'm upset that she left. I was hurt. I cried on the telephone the last time we spoke."

Pretty cunning. Pretty shrewd.

"Well, Mr. Franza, tell us again about your floral delivery habit. I mean, after all, there was a floral delivery man at that door. That's the guy that pulled the trigger. Tell us about what you've done in the past." "Okay, this is what I've done in the past."

Casting that light on somebody else. Shrewd.

The prosecution theory.

Franza then goes on his way. But he's not done. Because, ladies and gentlemen, clearly when he leaves on July 23rd, 1990, a reasonable person in Dominic Franza's position, has to think, hey, they are looking at me. They are asking me about where I was, what I did, what I feel, what my habits were, my problems with my wife. They are not asking me about other people, they are not asking me about who I think did this or what I think happened. They are asking me about me. He's got to think that when he leaves on July 23rd. But he's a cunning, crafty, devious criminal.

August 11th, 1990, pipebomb, Nelson DaCosta's takes house. The tension squarely focused on Mr. Franza.

The prosecution theory.

He's responsible, probably in an effort to gain retribution for having been slugged on the jaw on the 17th.

But alternate theory number 2.

As parts of the original vendetta to gain revenge on Myra Franza for leaving.

Prosecution theory.

Having done that, he shows up at the 34th Precinct on August 24th. Detective Genero Georgio serves him with an order of protection saying, "hey, buddy stay away from Myra Franza. And this has to do with this shooting, by the way. Stay away. This is a legal document. Stay away. Remember the other one? This is the same thing."

Reasonable person in Mr. Franza's position, oh, what does he think? What does he think? Well, they are clearly suspecting somebody else. Yes, the investigation is going in the right direction.

Or does a reasonable person think, they are looking at me. I'm the prime suspect here. I've got a document from my wife saying, stay the hell away.

Detected Georgio then asks Mr. Franza, "you give us some handwriting sample? I mean, after all, there was a note left at the scene. It was handwriting, it wasn't typed, it wasn't printed. Somebody wrote in their own handwriting, R and R Florist; person, Myra Franza; address, 485 West 187th Street; confirm delivery, rear apartment, etcetera. Somebody wrote that and left it at the scene. So, we want you to write that out and show

us what it looks like."

Now, Mr. Franza is at the 34th Precinct, just got that piece of paper that says stay away, buddy, culmination of the two interviews with Detective Giorgio in which he's clearly the suspect and, according to the prosecution theory, Mr. Franza, in an effort to cast suspicion to someone else, to avoid detection, says, "no, I'd rather not."

Then, after guilty reflection, after thinking like a guilty person would, according to the prosecution theory, Mr. Franza, ten minutes later, changed his mind and says, "okay, give them to me, I'll write them."

Detective Giorgio writes out a sample for him, sits him down in a room, leaves for five minutes, comes back, Mr. FRanza is staring at the sample and slowly writing the first exemplar.

The People theorize, hypothesize, argue that that more than anything else, under those circumstances, is an indication of guilt, disguizing his handwriting.

Detective Giorgio sees this, sits down and stays in the room for the remainder of the time watching Dominic Franza fill out the exemplars.

Dominic Franza goes on his way and on September 5th, 1990, Detective John Breslin, of the Question Documents Section of the New York City Police Department sends a report to Detective Giorgio and it says, hey, the guy who wrote that note and the person who filled out those exemplars, this man, one and the same.

Pretty persuasive stuff. There is a note at the scene of a shooting. Handwriting know, exemplars, they are the same. This is a guy who threatened to kill his wife, to bury her in the park, take out her entire family. This is a guy who on - - by September 5th allegedly arranged for an assasin to go to that apartment and send a pipebomb to Nelson DaCosta's house and now they've got a note, persuasive note, that matches his handwriting.

Now, you know how persuasive it was? You know how persuasively they looked at their own evidence? September 5th, February 11th. September 5th, February 11th. Mr. Franza wasn't arrested for five months after the results of that handwriting test came back.

The People would like to beg the strongest thrust of their case on the forensic evidence in

this case, on the words and the exhibits that came from the mouth and preparation of Detective Breslin.

When the police got the results of that examination, they didn't arrest him. They let him - - he was at liberty. Do whatever you're going to do, Dominic. Take care of business.

That's the prosecution theory.

Between August 24th, when the handwriting exemplars are given, and February 4th nothing happens. On February 4th, 1991, according to the prosecution theory, Dominic Franza hires a short, dark hispanic man to bring a bomb, a package to Federal Express, to send it to Catano Levittown, Puerto Rico, to the Roman family, on February 4th.

This guy, this hired guy, goes down with cash, tries to pay Federal Express with cash. You can't do that. They tell him they can't do that. They refer him to the College Stationery around the corner. The guy disappears for three hours.

At that point, according to the prosecution theory, Dominic Franza, wherever he is at that time, zooms down to 116th Street and the Broadway, buys an American Express money order at College Stationery, gives it back to the short, dark hispanic guy

who goes back to Federal Express and sends the bomb.

Prosecution thoery.

On February 6th, after the package has already been sent, Dominic Franza, again a shrewd and cunning fashion, types two letters in broken Spanish and sends them to Nelson DaCosta, care of Josephine Mendez, and to Josephine Mendez and Myra Franza. Shrewd, because he types them.

He types them, no doubt, to avoid detection, to avoid suspicion, to cast the light of the investigation on somebody else.

What does this shrewd, cunning criminal mind do? He writes out the envelopes in hand. And sends them on their way. At a time when the Federal Express package is already on its way to Puerto Rico.

On February 8th, 1991, according to the prosecution thoery, the bomb arrives in Puerto Rico and it is almost opened, it is detected, disarmed and the Bureau of Alcohol, Tobacco and Firearms becomes involved.

On February 11th, 1991, Dominic Franza leaves his house to meet with detectives Raymond and Herbert of the Arson and Explosive Squad. He leaves

his dogs behind, leaves his house and goes to meet them. Ends up in the 34th Precinct, where he's placed under arrest by Detective Ortiz and Detective Genero Giorgio.

At the time of his arrest, taken from his pocket is a wallet with a piece of paper with the names Rio Padres, Levittown and a series of telephone numbers. One of the telephone numbers corresponds to the shipping label on the Federal Express package.

Sometime in the late night hours of February 11th and early morning hours of February 12th ten law enforcement people swoop down on 3320 Barker Avenue with a search warrant and search the apartment for three and one-half hours. They find, among other things, a sheet of three cent stamps, another piece of paper with the words Rio Padres and Levittown and telephone numbers on it; a piece of paper with the name Julio Ortiz and some telephone numbers on it.

Julio Ortiz is the same name that appears on the return address of the threatening letter envelopes, the American Express money order and on the Federal Express label.

They find a business card from U.S.A. Electronics, U.S.A. Electronics, and also a shipping label of the sender of the package to Puerto Rico.

They also find a green magic marker, electrical tape, typewriting documents and a handwriting document, among which is a two mailing list in alphabetical order, listing tiles of gun smithing, explosives, silencers and other military related topics.

In the second search, on February 12th, February 13th, pipe nipples are recovered from the basement of 3320 Barker Avenue.

In addition, Detective Raymond, on February 13th, goes and gets some typewriting exemplars from Mr. Guzman, from their typewriters.

On February 14th there is a second search of Mr. Franza's apartment. What is seized is another roll of electrical tape, a sleeve of papers entitled Mr. Franza's personnel file and some other materials.

On March 28th, 1991, there is a search again of the basement of 3320 Barker Avenue. This is carried out by Special Agent Chris Behan and two

experts from the Bureau of alcohol, Tobacco and Firearms, Carlos Rosati and Gergory Czarnopys. They recover about forty tools, which are taken and examined for whether they compare favorably to the manufactured device in Puerto Rico.

While all this is happening, Detective Breslin is now comparing all the handwriting documents that are seized from the apartment, all the exemplars that he has, and the question documents. He prepares two reports, one in October, 1991, and one in December, of 1991. The bottom line, according to the prosecution, is except for the handwritten envelopes, the author of all the documents involved in this case is Dominic Franza.

He also concludes, according to the prosecution theory, that the stamps which are on the envolope match up with the stamps that were taken from Dominic Franza's home.

That, in a nutshell, I believe, ladies and gentlemen, from what I can gleen from sitting through this trial, is the prosecution theory of what happened here; that Mr. Franza, in a fit of jealous rage, bitter anger, and the need for revenge set in motion, through a apparently unending

serios of small hispanic men, a series of incidents involving threats, threatening letters, shootings and attempted bombings. That is the prosecution theory of what happened.

Now, ladies and gentlemen, I would have to agree that that theory would make good fodder for a mini series on television. However, I submit to you, that it is innately inconsistent, it is illogical and it is not supported by the evidence.

Now, Mr. Brancato, at some point, much later today, will stand up and tell you what the evidence is in this case. Let me tell you what the evidence isn't.

The evidence isn't that Mr. Franza, had any connection with any of these mysterious hispanic males. And think about this. He had the resources of the New York City Police Department Arson and Explosive squad, the 34th Precinct, the Bomb Squad and resources of the Bureau of Alcohol, Tobacco and Firearms, hundred of person hours spent in this investigation. And, ladies and gentlemen, you heard it, they spoke to everybody. They had access to Mr. Franza's neighbors, they had access to his friends, they had access to his fellow employees

from the union, they had access to everyone, people down at the gun club. They spoke to everyone. Not one piece of evidence that he was ever seen, heard, in association with any of these people alleged to be the perpetrator, the shooter, his counter part, the fellow who was seen running from him. From the scene, the two men who had been there the day before posing as detectives, who Mrs. Mendez told you were different, four, and how the short dark hispanic guy who delivers the bomb, five. Not one piece of evidence linking Mr. Franza to any of them.

These guys, these agents, these police had access to telephone records, all his outgoing calls,local and long distance. How many of you could subject yourself to such scrutiny as well. They could see everything, who he called long distance and local. They were looking for anything suspicious, any unknown numbers, anybody they could talk to who would give them information.

And you know what they got? They got nothing. They got zero. Not one link to anyone suspicious, to anything unseemly.

But they didn't stop there. There is no evidence that Mr. Franza here was able to finance

any of this.

Ladies and gentlemen, at the risk of sounding trite, killers don't come cheap. The man who stepped into the apartment at 485 West 187th Street new precisely what he was doing. He knew where to shoot and how to shoot. He was cold and he was calculating. In short, he was a practiced killer. There is no evidence that Mr. Franza paid for any of this.

And these guys, these agents, these police officers had access to every financial record that he had. His bank accounts statements, his cancelled checks, his money transfers, his cash withdrawals, his credit card accounts, they were looking for just what I'm talking about. They were looking for movements of money in a mysterious way, money coming in that couldn't be accounted for by his disability or or comp payments, transfer of money, credit card receipt for packages that would be some how linked to the shooting, to the bombing. And you know what they got? They got nothing. Nothing. Not one piece of evidence evincing a financial ability to compensate these killers.

But there is more. There is more.

There is no evidence of how this - - these

pipebombs were manufactured. And believe me, they tested everything and re-tested it, microscopes, stereo microscopes through the eye. As many tests as could be done were done. And what did they come up with? What did they come up with? Bottom line, a magic marker, consistent with the writing on the box; a roll of electrical tape, consistent with the unmeasured strips from the box, by the same manufacturer.

What else?

An auger, two inches, consistent with the size of the hole in the wood, in the Puerto Rican pipebomb, and a firecracker, consistent with four unopened packages of firecrackers in Mr. Franza's apartment. That's it.

Ladies and gentlemen, that's nothing. How is this made? Where was it made? When was made and by whom was it made? Both, two different pipebombs. Powder.

Well, the man is it a gun buff. He's a gun enthusiast. He buys powder. He had powder in his apartment, Bullseye Smokeless Powder. Problem. Problem. The powder they find in his apartment doesn't match the powder in either of the

pipebombs. Problem.

Well, let's just say that that shows that he had access to powder. But that's not enough. The burden of proof in this case is proof beyond a reasonable doubt. It isn't enough to say he could have, he might have. Possibly. Probably. It is likely. They had access to every place nearby where he could have bought that powder. Gun shows, gun shops, gun ranges. they talked to them all. And what did they find? They found nothing. They found nothing to link this man to the powder in either of those pipebombs.

But there is more. There is roses recovered at the scene. Now, this isn't Valentine's Day and it wasn't Mother's Day. Surely the police, who responded within moments of the shooting and had the roses and had the box and had the ribbon would have been able to ascertain from any of the local florists, "is this yours? This look like yours? Does this really look yours? The box looks like yours? The flowers arranged like you would arrange them? Did anybody come in and order a dozen roses today, yesterday or the day before? What did they look like? Did they look like this guy? Was he a

tall six foot Puerto Rican guy?

Detective Giorgio took it to one florist in the Bronx, showed him a picture of Dominic Frenza what did they get? They got nothing. Nothing to link Dominic Franza to those roses.

But there is more. Tools. Oh, tools and tools and tools. Drill bits, auger, hammers, pliers, screwdrivers. Forty assorted tools.

The auger matches. The drill bits could be the same size. Nothing.

Mr. Brancato will say, oh, but Mr. Franza is an electrician. He's an electrician. If some how being an electrician gives you innate knowledge on how to make improvised devices.

You know why? And this is the closest I would ever suggest that the People came to throwing a red herring at you in this case. Because there was a piece of wire in one of these bombs. A piece of copper wire, stereo wire, electrical wire, all purpose wire. Wasn't used in an electrical way. Neither of these devices was electrical in nature. They were pipebombs. Wire. Wire. Wire. Electrician's wire. Dominic Franza; guilty. Proof; beyond a reasonable doubt. Oh, my.

Bottom line: They didn't link the wire to anything he had access to. And where did they search? Where did they go? Here, there, ever where. They searched his house, they searched the basement that he had access to, they searched the garage of the his next door neighbors. What were they looking for? Stuff to make pipebombs with. What did they find? They found nothing.

Special Agent Chris Behan, agent for twenty-two years, a veteran of twenty-five hundred and a hundred explosive related investigations. He goes into Mr. Franza's house, two times. Morning of February 12th, the day, February 14th. He sees tools. Huh, tools. There is the electrical tape. Let me take the electrical tape off the tools and I'll take that. Leave the tools right there. He knows how pipebombs are made. Knows that you need tools to do it.

Ladies and gentlemen, if any of those tools, which were in Mr. Franza's house, had any value in this case, do you really think would he leave them there? I mean, Agent Behan is as he was, an experienced, trained investigator of explosives. He left the tools there. Twice. Got to be they were of no

value. Got to be he didn't see anything that was related to the manufacture or transport of an explosive device, which, incidently, was his mandate when you walk into that room. You can take A, B, C, D, E, F, G, H, I, J, K, L, M, O, P and you can take any evidence offered of the manufacture and transport of a explosive device. Go ahead. Left the tools behind. His tools, they don't match. The tools in the basement, they don't match.

The People are going to say, he kept a secret cache of tools some where. An electrician. Ladies and gentlemen, if they had a reason to believe there were tools related to this pipebomb during the course of that investigation, they would have been here. You know what they got? They got nothing. That's what they got.

Mr. Brancato, on behalf of the People, said, but wait, we have People's Exhibit 38 in evidence. We have this. We have a list, alphabetical order list of books. These books. They talk about bombs. Hey, innocent person wouldn't have a list of books like that. Got to be guilty; right?

Prove it. Prove what those books say. Where were they? What do those titles mean? The only

one who got asked was Cliff Lund, the expert from Rockville, Maryland. What did he say "Bombs and Bombings" is about? How to take bombs apart. Not how to put them together.

He also told us, just can't have a list, you got to have the books. I mean, the books, the list by themselves, what does that do? You got to have the book. If you're going to build a bomb, you have to have a book to do it. Where do you get the books from? You can't get them from the library. You have to send a check or money order to a mail order house. Did anybody ask to you check if that happened? That's none of my business. I'm here to tell you whether it looks like, tastes like and smells like a bomb.

Whose business is it? The case agent. Who is the case agent? Special Agent Chris Behan. And what did Agent Behan tell you? A seasoned veteran of one hundred explosive investigations tells you, takes this from the house, never gives it a second thought.

Ladies and gentlemen, I submit to you that if that seasoned investigator in the middle of the investigation of a double pipebomb occurrence didn't

give it a second thought, neither should you.

Now, we also have raised writing, indented writing found three hundred sixty-five days after, approximately, after Dominic Franza is arrested. You have blow-ups. Raised writing the size of a Volkswagen. What does it say on there? Nelson DaCosta, 644 west 187th Street, five foot nine, two hundred ten pounds, wife is Ruthie. They say that the word "shoot" appears on there as well.

Let's just talk about the address. And the name.

Never told who wrote that. Never said when it was written. Under what circumstances. You don't know, I don't know, Mr. Brancato doesn't know. Detective Breslin didn't know. Nobody knows. You know what it means? You know what it means in this case?

I know what the prosecution thinks it means. The prosecution thinks it means that Dominic Franza here was out to get Nelson DaCosta. That's what I think the prosecution is going to argue to you.

You know what I think it means? I think it means nothing. Without knowing who wrote it, without knowing when it was written, without knowing

under what circumstances it was written, what does it mean? Refers to Ruthie. Ruthie. Ruthie left in June, of 1990. Ruthie was history. She took her two children from that Nelson DaCosta household in June, of 1990, and she got as far away as she could.

Arguably it was written at a point before she did that or else there would be no reason to refer to her. But I don't know and they don't know. So, what value does it have? What does it mean? It means nothing. It means nothing.

Two typewritten letters. Spanish, broken Spanish. Myra Franza gets on the stand and says, yes, he speaks in broken Spanish too. What a coincidence. But what does that mean? What does broken Spanish mean? Who got on the stand to say this is the way he would write this letter? They were typewirtten. Who got on the stand to say, oh, yeah, those letters, they were done by a typewriter that Dominic Franza had access to? No, no, no, no. The police and the A.F.T. agents recovered sixteen pages of typewritten copy from Dominic Franza's apartment. They matched it up against the writing on the air bill and on the threatening letter, in which, incidently, were done on the same typewriter. Not sur-

prizing. They matched that up. You know what they got from that comparison? They got nothing. Not a thing. Zero.

Then they went upstairs to the landlord's house. What the hell, he has access, maybe he walked in, snuck in one day when they were sleeping and typed away these threatening letters. Maybe he asked to borrow the typewriters, bring them down to his house and type them there and bring them back. It is possible. So they went, Detective Raymond typed the entire threatening letter, each threatening letter on these typewriters. Very through. Very diligent.

Walks into Detective Breslin, throws them down, he says, don't bother. Don't bother. Don't even bother vouchering them. Don't even bother putting them into evidence. Put them in an envelope, tuck them in your desk some where and if Brenner asks for them bring them to court. Just don't bother.

Again, what did they get? They got nothing.

Ladies and gentlemen, the only place where there is no evidence is here, and at first glance maybe it looks different, is motive. Now, I concede to you the People are under no obligation in

in any case to prove motive as part of their proof. It is not their job. It is not part of the law. But I also submit to you that they endeavored to do so in this case. They endeavored to produce evidence before you that showed that this man and this man alone, to the exclusion of every other reasonable possibility, had a motive to do what he did. And we're all familiar with the expression, hell has no fury, I mean, it is like a women scorned. But the time has changed and so has the expression. And that's the theory here. Scorned, furious. Furious, kill. That Dominic Franza devloved from wanting Myra to stay, to wanting her to come back, to wanting her dead. As well as her family. That's the theory.

Let's examine that and look carefully at that reasonably. And with the stereo microscope of our common sense.

Myra Franza leaves. Dominic Franza wants her to come back. He calls her. And viewed in non cynical, non criminal mastermind fashion, he buys her a car. Come back, I bought you a car. Viewed in non cynical, no criminal mastermind fashion, let's go on a cruise, maybe we can put this back

together. I want you to come back. No way. No way.

On August 24th, 1990, Dominic Franza is served with a piece of paper that says, I've left you, stay away from me, stay away forever. I think you had something to do with this.

Now, viewed non cynical, at that point Dominic Franza must realize she's not coming back. The marriage is over. She's gone. Up to that point, upset? Yes. Unhappy? Yes. Hurt? Yes. Why would he put it all on the line? Why would he do the things that they are charging him with doing? Does it make sense to you? Being convinced beyond a reasonable doubt that you have evidence that Dominic Franza is of the type of individual who would throw caution to the wind, put his handwriting on the note that ends up at the scene of a shooting and have his wife and hermother killed? Beyond a reasonable doubt?

In August, of 1990, she sends him a message, no more, I'm not coming back, it is done.

In the fall of that year he begins to resume his relationship with Rosemarie Gonzalez, who he knows for longer than Myra Franza, from before Myra

Franza. They begin to see each other romantically and by the turn of the new year they are happyly involved in a regular, routine romantic relationship.

Why would he throw that all away? Why would he engage in such conduct at that time? Does it make sense to you? Is there a motive there? Myra was gone, Rosemarie was back. They were seeing each other two or three times in the week and weekends. Do you have evidence that Dominic Franza is the type of person who was a weekend lover and a daytime bomber? Evidence beyond a reasonable doubt where? Because they say so? Because it is their theory? Because there is an indictment? Because he was arrested? Where? Where is the evidence? Because it must be so?

Ladies and gentlemen, the standard of proof in criminal cases is beyond a reasonable doubt. If you can state a reason for a doubt that you have, you must acquit.

Does it make sense to you that this man, involved with the woman that he was involved with before, happyly, free of Myra, done with her, she's gone, would send letters and a bomb? When did he do it?

Why did he do it? Do you have proof of that? Do you have proof beyond a reasonable doubt? I submit not.

Ladies and gentlemen, I have addressed myself to the absence of evidence here and I further submit to you that on that and that alone there are reasonable doubts and holes in this case big enough so that if, heaven forbid, Mr. Brancato and I were to link arms we could walk safely through those holes. There is not enough here. There is not enough evidence. There is not proof beyond a reasonable doubt. There isn't evidence where there ought to be evidence.

A criminal mastermind? Mr. Brancato will tell you there is no evidence because of the nature of the beast. You don't commit these kinds of crimes in broad daylight. Murder is a secret game. You hide what you've done. You clear the decks, you clean the slate. You don't leave anything behind for the A.F.T. agent and the New York City police to find. That's why there is no evidence here. Because he was shrewd and he was calculating and he was careful and he took care of everything.

Well, yes, but you can't have it both ways.

The prosecution wants the benefit of that bargain. He took care of everything, except that he left his handwriting at the scene of the shooting. He took care of everything, except when he cleaned the stuff away he made the bomb with he left behind the magic marker, the electrical tape and the stamps, the name Ortiz. He took care of everything, except that he walked into the 34th Precinct with a piece of paper with the name Rio Padres and Levittown and the telephone numbers on it. You can't have it both ways. Either he's shrewd and calculating or he's stupid, stupidity.

This was a crime of a stupid person, if it was committed by that man. And they can't have it both ways. They can't say, we don't got evidence because he was too smart and then say, we do have some evidence because he was too stupid. You can't have it both ways.

Which way is it? Do you know? Do you know? Because if you don't know, if you're confused, if you're not sure, if you're uncertain, you must acquit. If you don't know what happened or who did it, you have only one choice, not guilty.

Given the evidence that they do have, I

submit to you there are inconsistencies within that. The big piece of evidence here, one of which must be made, Dominic Franza master of assasins, has arranged for his wife and her mother to be executed summarily. Careful planning. Can't tie into anyone, can't tie the killer to him, can't tie him to the killer. There is no evidence of phone calls, there is nothing. He's done this beautifully. Presumedly he's waited from June 28th to July 17th while planning. He planned it perfectly.

Accordingto the prosecution evidence in this case, Mr. Franza goes into his house, comes out and says, Myra is shot or perhaps her mother is shot. He's not supposed to know that. That wasn't on the answering fax machine. He's not supposed to know that because Vickie Ferraro told us she never said that. He's not supposed to know. He comes out and says it. It is a big piece of evidence because, ladies and gentlemen, if he comes out and said something that he wasn't supposed to know, what does that show you? They are going to say it shows you he planned it, he did it, he's guilty. Beyond a reasonable doubt. No question about it, there is no other explanation.

You know what though? There is a problem with that evidence. There is a problem. The problem, that there is reason to doubt that the day that he said what he said, if he did, was the 17th. You know what the nature of the doubt is? These people came in. They were very nice, very polite, friendly, not antagonistic either side. Oh, Dominic, we saw him every day of the week from the time we started living next to each other before the shooting and every day of the week after the shooting and we would talk. And, basically, they couldn't even pin down the date. Mr. Sheindlin's question was, "on or about July 17th."

Incidently, he didn't ask that of Myra Franza and he didn't ask that of Josephine Mendez. He asked that question of the Frances'. On or about July 17th, why? Why do you think? I know what I think.

MR. BRANCATO: I object to what counsel thinks, Judge.

MR. BRENNER: I submit.

THE COURT: Well, I don't think that's proper. But you do it another way, you have your fair comment.

MR. BRENNER: I submit to you that the reason is they couldn't tell one day from the next. They had no reason to remember it. They weren't even asked about that until months and months after the shooting. Six months after the shooting, some detective strolls in and says, by the way, on the 17th what did Dominic Franza say. But it is better than that, or worse, depending upon which side of the room you're sitting on.

They say, he comes out, he says, Myra has been shot, or my brother's mother has been shot, he jumps in his car, he drives off. And they never see him again that night. They are up until about eleven or twelve, he doesn't come back and the car doesn't come back. That's the day that this happened. And there is no reason to doubt that that happened on that day, according to those witnesses. None at all.

The problem is that Dominic Franza shows up at 485 West 187th Street with Tracey Jenkins and with Tracey Jenkins' car. Tracey Jenkins is a black male who is driving, Dominic Franza is a passenger. When all is said and done on July 17th, or actually in the morning of July 18th, Franza here ends up back

at his house, driven by the police officers, because he's never left the 34th, and where is his car? According to the police officers, his car is sitting in the driveway. Never left. He didn't get there through his car, he didn't drive away, he ended up at the scene in Tracey Jenkins' car. They didn't see Tracey Jenkins.

Do you have a reason to doubt whether these witnesses are talking about the same day? It doesn't make any sense otherwise.

And if you have reason to doubt it, then their testimony, given what it is, is valueless. It has no bearing on the outcome of this case. If you don't know what day they were talking about, then you cannot accept their testimony. Their testimony was being offered for one purpose, one purpose alone, that on that day, that dreadful day, Dominic Franza came out of his house and said something that he shouldn't have said, for reasons that he had no reason to know. If you don't believe or you don't have - - if you're not certain that they are talking about the same day, their testimony means nothing.

I submit to you that given the People's own

evidence in this case, the officers and their testimony in conflict, there is no way to know. No way to know.

Now, I've already alluded to the other inconsistencies. I mean, Mr. Brancato stood up four and one-half weeks ago and told you how cunning and crafty Mr. Franza was about planning this. Incidences which undercut that theory here. The notion that he would write the envelopes for letters that he had typewritten. Are those the earmarks of a material genius? I mean, really. That he would make out an American Express money order in his own hand at a time when he had to know the focus of the investigation was just on him? I mean, really. Cunning and crafty?

This crime was done by someone with sub-normal intelligence. And you can't have it both ways.

The evidence, ladies and gentlemen, is a wash. What it comes down to is the forensic evidence. The evidence of handwriting, the evidence of the stamps. Because when all is said and done, that's what this case is about.

Detective Breslin at some point said that there is no such thing as a certain science. There is

margin for error. Assuming hypothetically none of the other evidence in this case pointed towards the guilt of Dominic Franza, do you believe that you could convict on the basis of evidence which immerges with margin of error? Handwriting, stamps.

Now, Detective Breslin was on the stand for quite a long time. And said quite a number of things. And we have all these jigsaw puzzles he showed up.

Ladies and gentlemen, I submit to you that these are the sizes of the perforated holes as they are supposed to be. That size. That's the diameter. They are small.

These are big. If you, in your mind's eye, I know that Detective Breslin repeated, I did it this way so you could see it, I did it this way so the jury would understand. Okay, fine. Now is your time to understand. In your mind's eye, if you close up these ends, I submit to you that what you will have is a series of holes that are larger than these. It's not a match. It may be the same type of puzzle, but the pieces don't fit. Look at it carefully. He said a perfect match. I submit that you cannot see a perfect match here. That if you

close this gap in your mind's eye, these holes will still be larger than these holes. That is not a perfect match. That is an ill fitting match.

I questioned Detective Breslin about how when he put this down on the surface - - excuse me - - this hole was closed. And the ends meet. It is a closed hole. He said, well, sort of just about, maybe it could be. I submit to you it looks like a closed hole. But the rest of them are open. And while this is almost symmetrical, the rest of them are to the left. This is the same stamp. How is that possible?

I know, I know Detective Breslin said he did it this way so you would understand. I'm not sure what he meant. I submit to you, you are the triers of the fact. You have to review this. I see and I submit that the evidence shows that this hole is symmetrical, that these holes are not. This is not a match. The puzzles may be of the same type, but the pieces don't fit.

The scrutiny of each one of these exhibits will reveal the same thing.

Is this proof beyond a reasonable doubt? Do you have no hesitation in convicting Mr. Franza on

the basis of this evidence?

The handwriting. There were a lot of documents taken that were proportedly Mr. Franza's handwriting. One of those documents was written approximately ten years ago. Detective Breslin said that he would consider that contemporaneous. Perhaps. Perhaps in the expert field of handwriting anaylsis ten years, fifteen years, twenty years, thirty years is contemporaneous I don't know. I submit to you that it is not.

I submit to you that since Detective Breslin did not know the circumstances under which Mr. Franza wrote those documents, and that, incidently, is Mr. Franza's personnel file, spelled P-E-R-S-O-N-N-E-L, that since he did not know the circumstances, the stress or the anxiety or the neveousness of those documents, they are not a reliable barometer of Mr. Franza's handwriting. That, not withstanding for the moment, he prepared three reports, one back in September, of 1990, where he had the ten exemplars that Dominic Franza filled out back in August, based on that he concluded Franza is the man, he wrote the note.

You will see those exemplars. You are free to

compare those against the note, draw your own conclusions.

The second report, all have a luminous material, everything but the last set of exemplars, the conclusions; strong similarities between the known writing and the writing on the American Express money order, the Federal Express bill and envelopes. Strong similarities.

Well, strong similarities, almost, I submit, are not the stuff of which proof beyond a reasonable doubt is made.

Last report is in December. Now he states conclusively, except for the envelopes, the writing is by the same author.

What does that tell you? I submit to you that what it tells you is you can take all the known writing in this case, put it to the side, because the two conclusive opinions in this case, timewise, came after the first set of exemplars, and after the second set of exemplars. That's it. Again, strong similarities. Nothing conclusive.

First set, second set. Detective Breslin told you that stress, anxiety, fear, apprehensiveness, anything emotional or mental might have a bearing

on how someone performs handwriting exemplars, how they write. For instance, he told us if someone suffers from Parkinson's disease and they are shaking, that will affect their handwriting. If someone is nervous and shaking, I assume, inferentially, that that would affect their handwriting as well. If someone's palm is sweating from fear, from nervousness, from apprehensiveness, as I am now, that might well affect their handwriting at well. I don't know. I submit to you that it would.

And I submit to you the following facts: Dominic Franza was brought into the 34th Precinct on August 24th. At that time he had been interrogated twice by Detective Giorgio. Once he was advised of his right to remain silent, his right to an attorney and that anything he would say could be used against him. He had been served with an order of protection, saying "stay away. You are the guy. Stay away." He had been asked about his flower delivery habits, about his bad relations with his wife and his mother-in-law. In short, when Dominic Franza sat down in that room on August 24th, 1990, a reasonable person would believe that he was the suspect, the prime suspect, the target of that

investigation. I mean, after all, what was he being asked to do? I mean, he wasn't being asked to do a striptease, he was being asked to submit his handwriting for comparison against the note found on the scene of this deadly shooting. Would a reasonable person be nervous?

Adding to that, if he was being asked by a detective who had read him his rights, who had interrogated him twice, who gave him a piece of paper saying "stay away, you're the boy," would a reasonable person be nervous? Would a reasonable person be apprehensive? Would a reasonable person be fearful? Would a reasonable person be under stress?

If you say yes, then you have reason to doubt the handwriting comparison of Detective Breslin.

If you have reason to believe that Mr. Franza wrote more slowly or more quickly than he normally would because he was scared or nervous or could have been, there is reasonable doubt.

Take all those facts, now place the timeframe in November, of 1991, Mr. Franza has been indicted, the accusation against him stands as attempted murderer of his wife, her mother and her grandmother

in Puerto Rico. Terrible, terrible accusations. The results of the first handwriting test are already known. September 5th, they were known. So Franza sits in a room, again with Detective Giorgio and is asked again to write his name and various other things.

Would he have reason to be nervous? If so, do you have reason to doubt the value of that handwriting evidence?

He wrote Ortiz Ortiz. Now, it may well be that the People will argue, gee, he was trying to hide, he was trying to evade, he was trying to disguize. Ortiz Ortiz will not fool anybody.

Or do you have reason to believe that he was nervous? That he wrote quickly, without thinking? And if you have reason to believe that he was nervous, don't you have reason to doubt the validity and value of the handwriting evidence?

And make no mistake about it, it comes down to the exemplars because you take those away and we've got strong similarities. Nothing more, nothing less and that is not the stuff of which proof beyond a reasonable doubt is made. Not strong similarities.

Now, I suspect that Mr. Brancato will take the

blow-ups that we have, handwriting the size of a V.W. bus and put it up in front of you, as is his right, and, indeed, as is his obligation. You are the judges of the facts, but you are also to determine whether it is reliable evidence or whether you have reason to believe that the stress, the nervousness, the focal point of the investigation made him so anxious, so stressful, so nervous that it is just not reliable.

That as an uncertain science, with a margin of error, that it is not proof beyond a reasonable doubt.

Lastly, the People have the obligation in this case, which the Judge will inform you is a case based on circumstantial evidence, of eliminating every hypothesis but that consistent with guilt. In other words, they must eliminate all the reasonable roads but that which you must travel to the conclusion that the defendant is guilty. If there are other roads, reasonable roads, roads founded in the evidence, founded in the exhibits, founded in your common sense that you can travel down, that are consistent with this man's non-guilt, you must follow them and you must find him not guilty.

Fact number 1: Nelson DaCosta used drugs in 1989, 1990.

Fact two: Nelson DaCosta brought his drugs on the street.

Fact three: June, of 1990, Ruthie DaCosta takes their two children and, as I told you before, goes as far away as she possibly can, to Chicago,, leaving Nelson alone.

July 8th, 1990, someone called the DaCosta house and says, "I'm going to kill you and your family."

MR. BRANCATO: I object, Judge.

THE COURT: Yes?

Read that last comment before the objection by Mr. Brancato.

(Whereupon, the requested portion of the proceedings was read to the Court alone.)

THE COURT: Step up.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Objection is sustained.

MR. BRENNER: On July 8th, 1990, Nelson

DaCosta tells Police Officer Carmen Aponti that someone has called him up and threatened to kill him and his entire family.

On July 16th, 1990, two men, hispanic men, impersonating police officers, come to the Mendez home looking for Nelson DaCosta.

Mr. Franza has testified, also by Myra Franza, knows where Nelson DaCosta lives. Two people come looking for him, about seven-thirty at night. Seven-thirty the next day two people, only one enters, but two are seen leaving, two hispanic men, come again to the Mendez household. They are, in fact, assasins.

August 11th, 1990, someone places a pipebomb at Nelson DaCosta's home.

February 4th, February 6th, 1991, Nelson DaCosta receives a threatening letter, claiming that he owes someone something.

February 11th, Dominic Franza is arrested.

February 8th, a pipebomb is received in Puerto Rico, directed at Nelson DaCosta's family.

Six incidences of violence, four directed at Nelson DaCosta. Two before Nelson DaCosta punched Dominic Franza in the face.

Is that a path which you can travel which is consistent with non-guilt? I submit to you that it is.

Ladies and gentlemen, reasonable doubt, reasonable doubt is the principle upon which our legal system is based. Reasonable doubt is the cornerstone of what is fair and what is just. Reasonable doubt is what must make you acquit Dominic Franza in this case.

Thank you.

THE COURT: Very well. Ladies and gentlemen, that concludes the defense's concluding arguments. We will recess now. Your lunch will be here momentarily.

Once again, do not discuss this case among yourselves. Do not reach any conclusion.

When you return after the luncheon recess you'll hear the closing argument by the prosecution, followed by the Court's charge and then you'll retire to deliberate.

Do not discuss this case amongst yourselves.

Have a good lunch.

Take the jury out.

(Whereupon, the sworn jurors and the alternate

jurors left the courtroom.)

THE COURT: Two-thirty, gentlemen.

(Whereupon, the Court took a luncheon recess in the proceedings.)

* * *

(Continued on the following page.)

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York versus Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Get out the jury.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorneys and all sworn jurors are present, your Honor.

THE COURT: We resume now.

Mr. Brancato?

MR. BRANCATO: Good afternoon, ladies and gentlemen.

Mr. Sheindlin and I would like to take this

opportunity to thank you for your service here during the trial. I'm sure that Mr. Brenner and the Court would join me in thanking you for your attention to detail during the last couple of weeks. You heard over thirty witnesses. You've examined approximately seventy exhibits and at this point we want to thank you for your service.

I don't want to belabor this point, but during the course of jury service a great many people were asked whether they could devote their time to listening to this case and giving the attention to detail like you and your fellow jurors. Some of them came up with very good reasons why they could not serve, others, perhaps, may have given excuses as to why they shouldn't be here. But for volunteering in this case and for listening to the evidence and for examining the exhibits, you have our heart felt thanks.

I should tell you at the outset that my summation to you this afternoon will probably run about three hours. And I say that because it is only fair to let you know where we're headed.

I know that you've listened to the evidence in this case over approximately four weeks. I know

that there were many instances where you were herded in and out of this courtroom, ushered to the back, asked to wait and in each and everyone of those instances we noticed, the attorneys in this case, that when you came back you gave us the same careful attention to detail as you did when you left moments earlier.

Please bear in mind that I've never summed up for three hours in a case. And so I'm sure, in the same way, you've probably never sat listening in a manner that you're now going to listen to a three hour summation. In our own way, we're both going to be suffering some what. I'm going to be doing something that I'm not used to do doing and you're going to go doing something that you're not used to doing. I'll try as best I can during the course of my summation to be cognizant of the time, to be cognizant of the fact that you're sitting these seats which aren't the most comfortable. But I have no doubt that you'll give me the same careful attention that you gave to Mr. Brenner this morning.

At the end of listening to me here today you may feel that most of what I said was unnecessary and that it was repetitive, I went over certain

pieces of evidence with you, I showed you things that you had already seen before. And you may feel that, gee, you know, he kept us sitting here for three hours and he just went over everything that we heard and went over the past couple of weeks. I realize that in this case the People have the burden of proof against this defendant and so I don't want to take the chance that anything that perhaps one of you may take for granted, as showing something, might be missed on perhaps a fellow juror. So, it is because of that, it is because that I don't know, Mr. Sheindlin doesn't know, the Judge, Mr. Brenner, we don't know what you're thinking as you listen to the testimony that I want to go through everything with you. Perhaps one person will say, gee, I missed that initially and then you'll go in the back and you'll disucss it and it will jog their memory. So, I feel it is important to go through all the evidence at this point.

What I'd like you to do at this point is nothing more than you're doing right now, sit down, relax and just listen to what I have to tell you about this extraordinary case. Allow me the opportunity to share with you the evidence in this case

and allow me the opportunity to show you this evidence and perhaps in a way that you're already thinking about or perhaps in a way that a fellow juror might then start to think about. Give me the chance to tell you about this case and what brought you through that door to sit as a juror in this case.

Essentially, you people have been summoned here because during the period of July, 1990 to February, of 1991 this defendant took it upon himself, he arrogated to himself the ability to decide who should live and who should die. This defendant took it upon himself a power greater than the State of New York in deciding that certain select people would no longer be allowed to live, those people being his wife, his mother-in-law and his wife's grandmother in Puerto Rico. He laid to waste and accepted part of a civilized society that no person should go out and kill another.

And I said in my opening, and I say it to you now, whether you believe in providence, whether you believe in nature, whether you believe in God, the events in this case are such that if there was not something that intervened, someone that intervened

you would have three people dead in this case.

MR. BRENNER: Objection.

THE COURT: That's his comment.

MR. BRENNER: Excuse me, your Honor?

THE COURT: I'm allowing it.

MR. BRANCATO: What I want to share with you at this point are the events during that collective six month period so that we all have some idea as to what madness propelled by this defendant brings him before you today.

I have to tell you that I listened with great attention, as I'm sure you listened with the same wrapped attention, to Mr. Brenner's summation here. And I found his summation very interesting, very well spoken. There is no denying, I don't say this to be unnecessarily congratulatory, but Mr. Brenner is a well accomplished attorney. I'm sure you noticed, like I did, there was maybe once or twice when he went back and looked at his notes in this case. So, he had a very good grasp of what he wanted to tell you.

I say that it was very interesting because there was a large portion of Mr. Brenner's summation that had absolutely no basis in the evidence that

you heard here for four weeks. It was interesting because, given one little facit, the defense in this case spun around a theory to throw out to you. Kind of like the brass ring that we all may have had when we were little children on the merry-go-round and you reach for the ring as you go by in the merry-go-round in the hope of getting it and getting another ride. And I say to you now and I will explain to you that the defense in this case put out that brass ring in front of you, with absolutely not a shred of credible evidence and asked you to believe a scenario that had no basis in the testimony that came from that witness stand or the exhibits that were introduced to you over the last four weeks.

One of the things - - one of the things that you may have noticed, like others noticed when Mr. Brenner was summing up to you, was that Mr. Brenner made very little mention in his summation before you in those two hours of the handwriting exhibits that were put in evidence before you. At one point he picked up a chart that had to do with the stamps that were recovered from the envelopes. But at no point did he pick up and show you the exhibits which detail in rather graphic fashion this defendant's

handwriting to the writings that appeared on the documents of the Federal Express bill, the American Express money order and the note left on the box of flowers. Leaving those three aside, he said very little, if any, about the writing that appeared in indented fashion on the Exhibit 35-D, which is the note from Julio Ortiz, the one that bares his name, the one that he referred to earlier today. And I submit to you, ladies and gentlemen, that he just didn't forget about those exhibits - -

MR. BRENNER: I'm going to object, your Honor.

THE COURT: That's his comment.

MR. BRENNER: May we approach, your Honor?

THE COURT: Yes.

Reporter.

(Whereupon, the Court and counsel approached the sidebar, out of the hearing of the defendant and the jury, where the following proceedings commenced:)

MR. BRENNER: Comment on the evidence in a case is in one thing, comment on what I forgot or didn't forget or my tactic or what I did or what I said is not evidence in the case and the Court - -

THE COURT: I'm not allowing him to testify,

obviously.

MR. BRENNER: The Court just said what I didn't forget. I'm not on trial here. That's not fair comment on anything having to do with this case. It is a comment on my performance, my strategy and my tactics, period. That's improper.

MR. BRANCATO: I'll submit the defense.

THE COURT: All right.

(Whereupon, the Court and coursel returned to the open courtroom, where the following proceedings commenced:)

MR. BRANCATO: I submit to you, ladies and gentlemen, that the defense in this case, in its summation to you, did not just forget about those exhibits. The defense, in their summation to you, carefully avoided those exhibits because those exhibits, ladies and gentlemen, greater than the testimony of any witness in this case, greater than Cesar Rodriguez, greater than Julio Ortiz, those exhibits allow you to look at them and to ring them up in the true fashion that says, this defendant wrote this information, this defendant sent these letters. And the proof that we have is better than any witness who may have seen an event for a few

moments. The witness we have for you is better than any witness who said I overheard the defendant say. That evidence is something that allows you to call on your common sense, your common sense and God given intelligence, which no one asked you to leave at the door when you came in here and was selected as a juror. If you trust in your ability to think in this case, if you trust in your ability to look at something in this case, you can view this evidence as a selective mind that says without equivocation, this defendant did it and he did it in this fashion and he's guilty of these crimes that are charged against him in the indictment.

I'm not going to talk to you over the next moments about something that didn't come to you in the form of the evidence in this case. I'm not going to spin a theory for you. I'm going to run the risk of boring you to the extent that I'm going to go over the evidence that you heard through the testimony of the witnesses in this case. I'm going to run the risk of boring you by going over the exhibits that you have seen and through the testimony of Detective Breslin in this case.

This whole event takes taking place now. These

summations, they are not geared towards which one is the most elequent person because I will readily acknowledge my opponent is a much more elegant speaker than I. The whole purpose behind a summation is to go over the evidence that came forth through the lips of the witnesses and the exhibits before the Court. And so it is that that I'm going to go over with you at this point.

I'm sure that when you come to your final verdict in this case, I'm sure that there will be some things in your mind that you'll say, well, we know he did it but who was the actual person that was sent to do the shooting? Or you'll listen to the summations and you'll review the evidence and you'll say, we know he had this pipebomb sent to Puerto Rico and we know that he threatened the family, but who was the person who dropped it off at the post - - at the Federal Express office? And I submit to you, ladies and gentlemen, at this point we do not have to prove that the person the defendant sent to Federal Express is named mister so and so. We do not have to prove that the person lives at a certain address. We do not have to prove whether the defendant paid him in large money or

otherwise paid him in some other form. We don't have to prove that.

What we have set out to do and what we have done for you through the testimony in this case is shown that the defendant is the author of this plot. We have shown that the defendant is the prime mover behind his wife and his mother-in-law being shot. We do not have to answer some of those questions which may make for very entertaining talk, if perhaps after this case is over and some of you go out for dinner, some of you may say, gee, you know, what was the real name of the guy that Franza sent? And I wonder how he met him? That may make for great talk over the dinner table, but the task that's being set before you at this time is whether or not this defendant, acting in conjunction with another person, set about to kill his wife and mother-in-law; whether this defendant, acting in concert with another person, set about to send a pipebomb to the wife's grandmother in Puerto Rico. That is the focus, that is the charges that are submitted for your consideration.

You're not going to be asked at the end, now having rendered your verdict, you must agree what

the person's identity is. You're being asked to consider these counts and these counts alone today.

The first point that I wish to make with you at this point is that which was referred to in Mr. Brenner's summation to you, and that is of circumstantial evidence. I'd like to discuss it in brief detail with you because at the end this Judge is going to read to you a charge that gives the legal explanation of circumstantial evidence. So, at this point it is not my job to detail everything for you.

The People called many witnesses in this case and put in a host of exhibits. And it should have come as no surprise to you that no one walked into court, no one took the stand and said, I was present when this man paid money to someone to go shoot his wife and mother-in-law. It should come as no surprise to you that we did not call someone to get up on the stand and say, I'm the one that he sent; he paid me "X" amount of dollars, he told me to do it, because we told told you that when we selected you as jurors that there wasn't going to be one witness to walk into this Court and say they heard the defendant say he was going to have his wife killed;

there was not one witness who was going to come in and say that they were present when the defendant made this contract or that we're a party who took out the contract.

During the course of the trial the People have had to rely on exhibits and other testimony and circumstance which points without stopping, in an unyielding fashion, that this defendant is the one who caused these events to transpire. This complexity of fact, document and circumstance is what is called circumstantial evidence.

In this case, ladies and gentlemen, counsel for the defense, through their summation to you, has used the word circumstantial evidence before you as kind of a buzz word. And that when you hear that buzz word of circumstantial evidence it's something that should override your ability to reason and think and something that should move you to leave your common sense and good judgement aside and say, well, gee, it's circumstantial evidence.

Ladies and gentlemen, in certain cases, this Judge will tell you, circumstantial evidence can be as probative as direct evidence. In certain cases circumstantial evidence, I submit to you, can be

more persuasive than direct evidence.

This defendant stands accused before you of sending someone to shoot his wife and mother-in-law. This defendant stands accused you of sending a pipe-bomb to the wife's grandmother in Puerto Rico. Those are extremely serious charges.

Would any of you feel better if someone came into court and said, I was the shooter, I got caught, but I made a deal to save myself and I'm going to tell you that he's the one who sent me? Would any of you feel better if someone said, I heard the defendant talking to someone, I heard the defendant say? Because at that point your good instinct should tell you, what does the shooter have to gain by deflecting blame from himself? What is he trying to gain? Favor. What does this person who may have seen someone talking with the defendant, can we be sure that the person is recognizing the defendant as he stands here?

Let me give you an example.

You heard during the course of testimony the defendant's own witness in this case, Cesar Rodriguez. Now, Cesar Rodriguez, I'm sure you'll agree, is a very pleasant gentlemen who came into

court and told you, I work at Federal Express; I was working there on February 4th, 1991; a man came in to drop off a package. The package was ultimately the bomb sent to Puerto Rico. Mr. Rodriguez told you that he had a chance to observe this person and he gave some what of a description of that person. And he said to you that on February 4th, 1991, the man gave him this money that I'm holding in front of you and that the man then dropped off the package and left.

Would you have felt better if Mr. Rodriguez was able to say, that is the person? Because look at something very interesting. On February 4th, 1991, Mr. Rodriguez accepted a money order that's dated 4/4. Mr. Rodriguez, acting in some what of an ordinary routine way, paid so much attention to detail in this case that he accepted a money order in February that's dated April 4th.

Mr. Rodriguez wasn't giving the attention to the detail that you are right now. Mr. Rodriguez was not being cognizant of everything that was happening.

How do we know that this is the money order? There is the name Julio Ortiz, 75 West 181st Street,

New York, New York. There's the air bill number that Mr. Rodriguez indicated he wrote, the same air bill number that is in evidence, Exhibit Number 39, has U.S.A. Electronics, is signed by Julio Ortiz, or a person proported to be Julio Ortiz, 75 West 181st Street and the same number. But Mr. Rodriguez, in this ordinary event that didn't have any special significance to him, took something for the wrong date.

I submit to you that what we have here, when I said that circumstantial evidence, could be more compelling than direct evidence. You do not have to worry about whether or not a witness was being mindful of who is sitting in the fourth row, third seat. You do not have to be mindful of whether or not Mr. Rodriguez is looking, as you did, to the color of the shirt, the height, the weight. We have put it up for you so that you can look at it and you could come to a conclusion based upon your common sense and intelligence.

When you look at the evidence in this case, ladies and gentlemen, you can come to the decision as to whether or not this defendant is guilty of these crimes. You do not have to rely on someone

else coming in here and saying, I heard someone say', I saw someone do. We've put it up in graphic fashion so that you can sit down with it and you can say, this defendant did it and I can point to his writing over there and his stamps that were taken from the apartment.

This is truely a case where circumstantial evidence is more compelling than any direct testimony.

When counsel attacks the nature of the circumstantial evidence in this case, counsel is doing his job much in the same way that I'm doing mine now. But in the long run it is not going to be the eloquence of either one that carries the day, it is going to be your collective decision. And in that regard his attack on the circumstantial nature of this case, I submit to you, would be the same if there were direct evidence in this case. It is a man doing his job.

MR. BRENNER: Objection. I object to that being fair comment, your Honor.

THE COURT: All right, let's move on.

MR. BRANCATO: Ask yourself, why is this a circumstantial case?

Ask yourself why you're now going through this evidence?

The answer is clear. That in this situation one does not go out on the street corner handing out pamphlets looking for people to do certainties. The answer is clear that in a case like this one tries in some way to cover his tracks.

I'm not about to stand here and tell you, as counsel assumed that I would, that Mr. Franza is a great mastermind of the criminal world. Ladies and gentlemen, common experience tells us, people get caught because people slip up. If they didn't slip up, they don't get caught. At least they don't get caught that easily.

The defendant in this case slipped up at a few junctures. Whether he slipped up because he let his guard down or whether he slipped up in the hope of being smarter than the next person, the defendant made a few slip-ups. And in a few moments I'm going to go over with you what resulted when those slip-ups were made.

First I want to touch a point with you and that is the point that the Judge is going to charge you on, accomplice liability.

It has been no secret throughout, since the time we selected the jury up to the point where we concluded with the last witness, and it is no secret at this point, the People's contention is not that this defendant went to his mother-in-law's house and shot his wife and his mother-in-law. That's not the People's contention. The People's contention throughout has been that this defendant got someone to do his dirty work. This defendant got someone to go and assassinate his wife and his mother-in-law.

Indeed, even in the defendant's closing argument to you, the defendant acknowledges that the person who went to that apartment that night went there with the intention of killing someone. The defendant, in his summation to you, acknowledges that this person going there was not going to merely hurt, this person was going to murder.

The concept that the Judge will tell you about, accomplice liability, is basically that if a person, the defendant in this case, solicits, or aides another person to commit a crime, then that person, the defendant, who solicits or aides another in committing that crime is as guilty as the person who

commits the crime.

A very brief example. If you and I, along with this lady over here - -

MR. BRENNER: Objection.

THE COURT: He hasn't finished his statement.

MR. BRENNER: Objection. He's using the jury.

MR. BRANCATO: If those three people - -

MR. BRENNER: Using the jury is improper.

THE COURT: All right.

MR. BRANCATO: If those three people sitting in the first three rows, if they go out to commit a bank robbery; this lady, she's going to provide the floor plan and the guns for the operation; that gentlemen, he's going to drive the getaway car; and that person over there, that fellow, he's going to walk in, point the gun and say, stick up, give us your money, under the law of accomplice liability those three people are equally as culpable. They are equally as guilty because the law in this state says that whether you provide the floor plans and guns and the know how or whether you're the guy whose driving the getaway wheels or you're the person who is going in and pointing the gun and say give me your money, the law says that you're as

guilty as the next person. It doesn't say that the person who provided the floor plans for the banks and the gun is twenty percent guilty; it doesn't say that the person who drives the getaway wheels is thirty percent guilty; and it doesn't say that the person who does the actual stickup is fifty percent guilty. The law says that if you're acting together to bring about this result, you're as guilty as the next party. And it is on that law that this defendant is charged in this indictment.

The third point that I want to bring up at this juncture is that it's the evidence, the evidence in this case, ladies and gentlemen, in graphic detail, does much greater justice to this cause than any summation can. The evidence in this case speaks to your mind and your intellect better than anyway that I can through the use of words. The evidence in this case allows you to say, I can disregard everything he just told me, I can see what's on there and I can see that this defendant started these events in place.

Let's first start. There was at one point indented writing that was referred to by Detective Breslin. Detective Breslin said in the old days

when you had indented writing you write on one page, it goes down to the other in the way that I'm just showing you. At one point you used to get a pencil and try to drop some shavings of led in it. At another point, if you held a light off to the side and you looked at the light from a distance, you could see through the reflection that there were these indentations. But both of these were rather craft ways of dealing with it. In fact, those didn't deal with the technology of the day. Now you have something better, and you have the ESDA, Electro Static Detection Apparatus.

Exhibit 35-D, Mr. Ortiz, the last witness the defendant called today before you, Mr. Ortiz said the defendant, Dominic Franza, wrote his name and his - - and his telephone number and gave it to him. The defendant, Dominic Franza, then took Julio Ortiz' name and telephone numbers.

Detective Breslin told you at some point they noticed that there was indented writing and that he sought to raise that writing, to enhance it, so he used an apparatus that science has given. And what you're left with - - what you're left with is the upper portion, which is now in evidence as Exhibit

Number 65.

(Exhibit displayed.)

MR. BRANCATO: Nelson DaCosta, 644 West 185th. 1-A. Six feet one inch, two hundred ten pounds, wife Ruthie.

Mr. Brenner said, who knows what circumstances those were written under? Who knows what the person meant when he wrote that. There is one person, ladies and gentlemen, who knows what that means. There is one person who knows why there is height and weight and a description of where and that's the writer, the person who authored that.

This came off of this piece of paper. The defendant's own witness said that the defendant supplied the paper. The defendant's own witness said that the defendant wrote down his name and telephone number.

There is one person who truely knows why Nelson DaCosta's height and weight were written down and that wasn't written, ladies and gentlemen, for no innocent person.

I ask you at this point, compare the indented writing that appears in that exhibit, compare Nelson DaCosta, compare the capital "N" and the

printed "E", which is smaller than the "N". Look at the long line "L", look at the "S", "O', "N". But more importantly, look at the "D" in DaCosta. It is a capital "D" written between an "S" and an "A". Look at that and then look at the Nelson DaCosta that's on this envolope. Look at the same way, capital case "N", the "E" written as a capital letter but smaller in size than the "N", the "L" written as a long line. Look at the "D" and look at the "D" over here. Look at the roundness to the "D". Look at the capital "D" between the "S" and the "A".

Detective Breslin told you there are strong similarities when you look at them and you, as a juror, looking at that - - sir, look at that capital "T". Look at the "D" between the "S" and the "A" in DaCosta. And look at how it's a capital in greater size between the "S" and the "A".

I submit to you, ladies and gentlemen, that that raised writing, those strong similarities are one of the very many points that show this defendant, this person who was writing height, weight of his brother-in-law, this person who was writing wife Ruthie, this person who was writing the address, was

not writing that information for any innocent person. And I submit to you it's one of the very many instances that you can look at, not take my word for it, not take Detective Breslin's word for it, but look through your own eyes and say, I can match the strong similarities up here to the way the letters are formed here.

Think about this. The defendant in this case claims that this, this pipebomb that was put outside of Mr. DaCosta's apartment, it was someone else, it was the mythical guy out there who was trying to get him. Why is this defendant writing on one of the preceeding pages that he gave to Julio Ortiz, why is he writing his brother-in-law's address, his brother-in-law's height and his brother-in-law's weight? Is it for his own benefit? Does he not know? Or is it to instruct? Is it to show? To give direction? Why between Broadway and what looks like with, looks like a stem for an "A", "D", worth. Why the direction on the preceeding page?

There is one person who knows why it is there. There is one person who knows full well, the author.

Ladies and gentlemen, the author. The author of that indented writing. The author of those enve-

lopes. The author of this whole sick affair, that lead about almost to the distruction of a family and resulted in great pain to Mrs. Mendez, her daughter and almost the death of one of her relatives in Puerto Rico.

The architect of this event is not the crime mind of the century. The architect of this event is a person who thought that he was smarter than the next one, a person who believed that he could some how cover his tracks sufficiently to insure getting away with this crime.

There were slip-ups and once the initial slip-up was made he had to then take steps to coverup the rest of his tracks.

The significance of this piece of paper with the raised writing, one of the many things that you gleen from this piece of paper, the raised writing, identical, identical to the Nelson DaCosta.

Now, Detective Breslin said strong similarities. You know why I can't say he's the one based upon the handwriting comparison? Because it's raised writing and the best I can do with raised writing is I can look at it and I can compare it visually. I don't have a chance to do the twirls,

the twists that you see under a microscope. So, for that Detective Breslin needed something else. And that other writing is what came some where about November, when Detective Giorgio, in the room right back here behind this courtroom, the room that you sit in at every break, when that defendant sat down and gave him handwriting samples and that handwriting locks him in without any doubt.

Don't take my word for it. Don't take your fellow jurors' word for it. Look at it. Look at it and compare it for yourself. But that defendant's writing locks him in into all of these events.

Let's first start - - let's first start with what happened in July, of 1990. To understand these events, in July, of 1990, you have to understand the relationship between the defendant and his wife.

Mrs. Franza told you that she married this defendant in 1987. And I believe the testimony out of the defendant's own witness, Rosemarie Gonzalez, said that two months after she broke up with the defendant the defendant got married to Mrs. Franza.

You heard from Mrs. Franza that there were periods in her marriage where there was physical

abuse, there was mental abuse, there was psychological abuse. She did not use those three terms, but I am characterizing to what she testified to before you in that fashion.

Now, counsel told you in his summation, the defendant told you that we're going to paint, in trying to anticipate, that the People are going to paint out this marriage as one of extreme violence. Ladies and gentlemen, do not allow me to categorize it, but let me give you some things to consider. And as you're being asked to consider this, you decide whether or not these are ordinary events in any marriage or that the manner in which statements are made and the manner in which physical abuse is given heighten it to some point out of the ordinary.

Let's first start with Mrs. Franza saying, in March and April, of 1989, she had an argument with the defendant. This was after she indicated that she had been in an accident, that her neck was in a brace. This was a period later. So, she's no longer wearing the brace at this point. But that this argument with the defendant takes place where he then assaults her. He hits her to the point that she goes to the hospital.

Ordinary run of events between husband and wife where the spouse goes to the hospital or maybe a little out of the ordinary?

Don't make your decision based upon that one factor.

The defendant, in striking his wife, threatens his wife not with I'm going to beat the heck out of you, but I'm going to kill you, I'm going to bury you in the park and I'm going to get your family, I'll kill them. You can recall the testimony that she gave that afternoon better than I can summarize it to you. But together with the beating, you now have a threat of killing the spouse. You now have a threat of burying the spouse, you know have a threat of killing the family. That factor, coupled with beating the wife, ordinary run of the events or a little out of the ordinary?

Don't take those two circumstances by themselves because maybe you want a little more.

So, Mrs. Franza then leaves the apartment she shares with the defendant and she goes for several days to live with her brother and mother on 187th Street. Physical abuse, threats to kill and now one party moving out. Ordinary run of events or a

little out of the ordinary?

Factor in that she goes to court up in the Bronx to seek an order that this defendant stay away from her and not go near her. That after she's been beaten and gone to Bellevue Hospital, after she has been threatened with being killed, after she has had to move out and after she has had to go to the Bronx to get an order from a judge, basically saying, don't come near me. Normal tension in a marriage or a little out of the ordinary?

I submit to you, ladies and gentlemen, that that is the foundation to un-ordinary events. That is the foundation to the extreme violence that took place at a later point. Because what happened here, ladies and gentlemen, it escalated. It went from one stage, where there was hitting and threatening, it went to another stage, where one person had to go to the hospital, it escalated to a point where one party had to move out, and it escalated that the whole scenario came over again in the same detail and that escalation, ladies and gentlemen, is what brought us to July 17th, 1990. That logical progression, where this defendant bullied his wife -- and, yes, I used the word bullied, because after

the first event - - two page letter. After the first event counsel handed Mrs. Franza a letter that she wrote for the defendant to get a pistol permit. And in it he bullied her to say that she had exaggerated the events that happened earlier. And wasn't her explanation as to why she wrote that letter so, wasn't it so much within the common experience that she said I wanted to try to save my marriage, I want to try to work it out. And he told me to write that it wasn't what it was. He told me to write that it was blown out of proportion.

I submit to you, ladies and gentlemen, that the defendant, when he had his wife write that letter, was using the same psychological distress to his wife, was using the same psychological employed and abuse to his wife as when he threateded her loved ones by saying I'll get you you and I'll get your family. Those aren't the word that people mouth between husband and wife. And reach from your own experience on that.

MR. BRENNER: Objection.

THE COURT: Overruled.

MR. BRANCATO: Reach from your own experience.

Convey with each other. Fighting where he hits her and she had to go to the hospital? Threatening to kill her? Her having to move out? Her seeking an order of protection to stay away from him? This is anything but the ordinary course of events between husband and wife. This is a situation where the bully, in this fashion, took advantage of his wife and the bully now tries to have you believe that it wasn't really what she said it was. Poor Myra, the woman who was shot at point blank range with a .38 through the cheek, where the bullet exited the back of her head; poor Myra, the woman who had to reach down her mother's throat to clear her throat when the mother had the death rattle on the floor in the apartment on July 17th; poor Myra, she blew it out of proportion. Bull to that. Nothing was blown out of proportion.

And you know from your own experience and your knowledge of the ways of the world, you know that her explanation as to why she went back; he said it would be different; he said it would change; we would go for counseling; the abuse would stop. We all sit here today and you can all think at this point, pretty dumb decision on your part, Myra.

Pretty dumb going back. But the plain fact of the matter is, hindsight is twenty-twenty at this point. And Mr. Franza was nothing more than a woman looking to salvage her marriage, looking to salvage her relationship with this defendant. Because maybe it would be different. She wasn't about to foreclose herself of that possibility.

And it continued up until in July when she was shot.

We've located the letter. But let me just read this to you and recall her testimony as she stood on the stand.

There are a host of exhibits. So bear with me one second while I go through this list.

(Pause.)

MR. BRANCATO: As I try to find it, ladies and gentlemen, I'm sure that many of you are thinking back. I'm sure many of you. I'm having a hard time locating.

But I'm sure as I sum up to you, I'm sure many many of you can remember when counsel says, well, didn't you say you blew it out of proportion? Isn't that the word that you used, it was overblown, it was blown out of proportion? And her response to

you, he told me to do it, for the sake of peace I wrote it, for the sake of preserving my marriage I went back.

That's what you have. That's the bullying that I'm referring to here.

In June, of 1990, Mrs. Franza is hit with stark reality. And that stark reality is that she finally understood things were not going to change. She finally understood with that beating in June, of 1990, that all these events were one event after another and that she had to do something very drastic at that point. She had to get out. And she went out and much the same fashion that she went back in 1989. She went to live with her family on 187th Street.

That is the backdrop on which this whole case plays itself out. It is against that backdrop and not one where you have, well, you know, this is just between husband and wife.

I'm not going to raise my voice, as counsel anticipated, I'm not going to scream to the rafters. But, ladies and gentlemen, as I say it to you as softly as I can, don't those circumstances scream out in and of themselves to a violent relationship

that this defendant had to his wife? Don't those circumstances of sending his wife to the hospital and threatening to kill his wife and her family scream out to you that there's something here that's so twisted, there is something here that is so wrong that we are not dealing with a normal relationship of this defendant to his wife? I submit to you that they do scream out in this fashion.

I'm not going to raise my voice. The circumstances themselves speak for themselves.

I said I would start with the evidence in this case. Let's go over some of that.

Let's start with the note that's found on the box of flowers.

And before we go into any of the handwriting in this case, before we go into any of the testimony that Detective Breslin indicated this was the defendant's writing, let me first, allow me, allow me the opportunity to respond to one of the points that counsel made to you. Allow me to respond to the point of the writing, the defendant being under stress when the defendant gave those handwriting samples to Detective Giorgio. Please allow me the

opportunity to respond to him by saying that when the defendant gave Detective Giorgio the those handwriting samples, after he had been arrested -- remember the twenty page hypothetical? Assume that defense counsel asked Detective Breslin, the person's wife had been shot, the person wanted to go to the hospital, four weeks later he's asked to give handwriting and he asked him to assume a lot of facts. Allow me the chance to ask the rhetorical question. The defendant's hand was so tired or so sweaty that he wrote like the note on the box? The defendant's hand was so shaky that he wrote in the manner that you have here in front of you? The nervousness, you heard the old saying, the devil made him do it? The nervousness made him write like the guy who wrote the box? The nervousness made him write Franza the way it appears here.

MR. BRENNER: Objection.

May we approach?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

MR. BRANCATO: Ladies and gentlemen, the note that was on the box of flowers, the note that the assassin brought into the apartment that night, look at the word Franza. Look at it up close. This is what Detective Breslin had to work with.

(Pause.)

MR. BRANCATO: Look at the word "Franza." Look at the capital "F" in printed form, with the script "R", "A", "N", "Z", "A".

And now, folks, compare that writing of Franza to the writing Detective Breslin compared. Compare that Franza to the name Franza which was written a host of times in the personnel file; the Franza that was written, what counsel said, was about ten years before, long before there was a Myra, long before there was a Rosemary, long before any of us came into this courtroom. Three Franza's taken from that personnel file. The three Franza's compared against Q-1, Franza on the note. Look at the printed "F" in capital form. Look at the script R-A-N-Z-A.

Look, this is the greatest sample you can ask for. It's handwriting by the defendant at a time when he knew he would not be compared to something ten years later. And that counsel would tell you

that this is not contemporaneous writing? You're not comparing the handwriting of a third grader to a sixty year old. You're not being asked to compare the scribbling of a child to the mature writing of an adult. You're being asked to compare a twenty-three year older handwriting to his writing ten years later. And I submit to you that there is great consistency. I submit to you that when the defendant, and I'm sure you're going to look through Mr. Franza's file, I'm sure you're going to look over it in careful detail, when he sets about to writing Mrs. Franza, writes it in the fashion that was written on this note, you will see it and you will have a chance to look at it and you can look at this next to that writing of ten years ago.

But bear in mind when you look at it, the one thing, unfortunately, that you can't grasp, that Detective Breslin could, is that when you look at the writing under a microscope you see the stops and starts in the pen movement. You see where there are twists in the letterings. Because that, ladies and gentlemen, is not so readily available to the naked eye as you can see under the microscope. And in this regard, ladies and gentlemen, Detective

Breslin's testimony is devastating. Detective Breslin's testimony throughout, on direct and cross examination, show a person who has no ax to grind with this defendant, a person who is asked to compare and a person who puts it out to you and says, this is something from Mr. Franza's file and Mrs. Franza, she said, that's my husband's writing. And when you look at that file and you look through it in very careful detail, you're going to see that this writing that appears in that file shows that that is that. You can get anyone of these four, cut them out and you can play the shell game. You can move four into position one, two into position three and they are all identical. That is what we put up for you. That is what we said, look at this and make a comparison.

I re-state, look at this, Nelson DaCosta, and make a comparison. And we've put it out there for you to draw upon.

This is the note that was affixed to the box of flowers. You'll recall the testimony. There was testimony that, yes, it was stapled together, but it was just laying on top of the box of flowers. There was no testimony that you heard from Detective Gary

Osborne - - remember the fellow who put the initials "O" with the "G" in the middle - - he said this note was on top of that box of flowers when he got there and photographed it. You got a photograph of it as it sits there on the chair. Detective Osbrone - - Detective Osborne said this is what was on there.

Now let me go over some of this with you. As I go over it with you, ask yourself what the author of this document has knowledge of. Ask yourself what kind of person would know these things?

You know from the testimony here that Josephine Mendez lives at 485 West 187th Street. And you know because she told you. She says, I live in apartment 1-D with my husband Salcelo.

The person who wrote this knew that they could get in touch with Myra Franza, not Myra Mendez, Myra Franza at this time was accessable at 485 West 187th Street. The person who wrote this knew that Myra could be found in apartment 1-D. The person who wrote this knew that there was a basement apartment in the rear.

And there has been testimony that the basement apartment in the rear was for Carlos DaCosta, Mrs. Mendez' other son.

The person who authored this note knew that Franza was accessable at Mendez' apartment; the person knew the address; the person also knew that there was a rear apartment that Myra could be found at.

I submit to you, ladies and gentlemen, that that information is of such an intimate knowledge, it is the type of intimate knowledge that a family member or a very close friend might have, and I submit to you that the person who authored this note was acting in no friendly manner. I submit to you that this is the intimate knowledge that this defendant had because what happened in 1989? His wife left him and his wife went to live with the mother. His wife went to live with the brother. She slept at the brother's, she ate at the mother's.

The defendant went, after he said let's make it over again, let's try another time, the defendant went to help her pick up her belongs and move back. The defendant is the brother-in-law and son-in-law to the parties in this case.

The intimate knowledge reflected on this note shows that the person who wrote it was a person with

very close knowledge of the family. The person in this case, ladies and gentlemen, is the defendant.

Confirm delivery.

Counsel made reference in his summation to you about someone going the night before looking for Nelson DaCosta. And I submit to you, ladies and gentlemen, that that person or persons who went there weren't looking for Nelson DaCosta. They were looking for a way into the apartment. Because where does Nelso live? 644 West 185th Street, apartment 1-A.

How long has he lived there? About twelve years.

The person was going there to get into the apartment and, I submit to you, the person was going to shoot the occupant of the apartment.

The flowers and this note provide the ruse for the person to now gain access to the apartment. Because when you look at the note, what does it -- what is it made to look like? It is made to look like a receipt where the person accepting has to sign their name on that line. So, you had to sign to get the flowers and you had to open the door to write your signature. So, you have to open the door

and the ruse that was provided in this case to gain entrance at first was maybe for Nelson, but in the long run the person was looking for Myra Franza, writing on that exhibit, copies from the defendant's own hand years earlier.

Confirm delivery.

Let me put these before you at this point. Look at "confirm delivery." Confirm delivery, because you have to open the door to get in. And you have to get in to do the shooting.

Look at the "F" in confirm. Harken back to your earlier days, the backwards "F". Look at the loop to the "F" on the bottom, the loop is on the left side as you look at it. Look at that "F" in confirmed deliver off the defendant's own hand.

Now look at the if on confirm delivery. Look at the backward "F". Look at it.

Look at the backward "F". The loop doesn't come around the right side of the "F". The loop is coming backward, a peculiarity. Something that's not taught in grade school, a distinct feature of the defendant's writing.

Look at the "delivery." Look at the "D". Look at the capital "D". It is not one of the old "D"'s

that people might write in writing a "D", where they go the old way that I'm now doing for you, where you come down, around and you write your capital "D".

The defendant mis-printed letters and script writing. The "D" that is on these exhibits that the defendant provided in his own hand show that very round nature, almost like not a harsh manner in writing the top of of the "D", coming up and around into the bottom. Not the written "D". And not a very hard "D". But look at the "D" that he wrote over here in confirm delivery. And look at the "D" that appears in this exhibit.

(Pause.)

MR. BRANCATO: Now, one of the things that Detective Giorgio indicated he was careful to do was writing up a sample for the defendant to use. Write a sample so that he would not have the one that was taken off of the box of flowers. Give him the sample so then you can see what he writes.

And I submit to you, ladies and gentlemen, that one of the things the defendant did, it is almost kind of funny, he tries to disguize his true hand by misspelling the word delivery nine out of ten times. Nine out of ten times he tries to misspell

delivery to you.

On the top of this one, you must ask yourself or herself whether or not this was the first one that Detective Giorgio indicated the defendant was writing. But there is no dot on top of the first marking between the "D" and the "I".

I submit to you that the defendant, through his questioning of Detective Breslin and putting this out to you on summation, that the defendant is now saying, and this might be like the best way to evaluate this case based upon reason, on the basis of whether or not a thirty-three year old man knows how to spell the word delivery, decide guilt or innocence. If I asked you on behalf of the People to convict based upon ability to spell or not spell a word, you'd laugh me out of here. And the defendant asks you now, he's not guilty because he can't spell delivery.

Look for other similarities, though, in his writing.

One of the things looked to, Detective Giorgio gave him something, R and R Florist. This is the note that Detective Giorgio wrote. And when Detective Giorgio wrote the "and," for R and R, this is

not the most important thing but it is another little thing that keeps hitting and another little thing that keeps pointing. Detective Giorgio used the old symbol that many people use and in trying to express and in R and R, he used the old symbol of and. And this is the one that he used.

Now, I'm not telling you this because I'm asking you to convict based upon this one circumstance. I'm asking you to look at it and see how the finger keeps pointing in that direction.

The old way, right?

On the note R and R Florist, it is not written with the old and symbol, it is written R plus R Florist. Like the - - like the mathematics symbol, plus. R plus R. That's the way it is over here.

Now, Detective Giorgio did not give this to the defendant, he did not put it down, say, here, copy that for me. But the defendant reverted in these samples by not writing the "and" symbol over here that I have in front of me, the defendant reverted and wrote R plus R Florist.

Small circumstance. And I'm not asking you to convict him based upon that small circumstance. But look at the revision.

Detective Giorgio writes this copy, gives it to the defendant to follow. Look at the way street is written in the copy. S-T. S-T.

One thing that the defendant does with the S-T, look at them, one, two, three, four, five, six, seven, eight, nine, ten. He underlines the S-T. He reverts to a manner that is not shown on the sample.

What do you have here? 187th Street. S-T is underlined here, the revision.

Doing something in a some what of unconscious fashion that, I submit to you, speaks legions about trying to spell the word delivery, the same way or differently.

One other reversion. And if you look at these very carefully you'll see. At one point during the giving of these exemplars, the defendant did something that should jump off the page at you. The defendant did something that should scream out to you.

Ma'am?

(Handed to Mr. Brancato.)

MR. BRANCATO: Look at the way "florist" is written. The printed "F", the capital "L", in

printed fashion on the note, look on the note, the one that I'm holding. Look on this note. Printed "F", capital "L". The script "O", "R", "I", "S", "T".

(Pause.)

MR. BRANCATO: Printed "F", capital "L", "O", "R", "I", "S", "T".

And in one instance, ladies and gentlemen, his hand, not having seen this, his hand and eye not having been in contact with this, in one instance the defendant allowed his hand to slip to the point that he wrote capital "F", printed "L", in capital form, script "O", "R", "I", "S", "T".

He was being asked to write it out. He was being provided with a copy that did not have that strong identifying feature that's on the note. And it is a revision. It is a slip back into what is some what of a normal manner for him to write florist. You see it here, capital "F", capital "L", printed form.

Another circumstance. Another thing that shows a reversion to away of peculiarity.

You could look at these, ladies and gentlemen, from now until the cows come home and you can see

that what you have is an attempt on the part of this defendant to disguize his writing in some what of a fashion to the naked eye of the untrained observer. But there are some things that even to the untrained eye that you or I have that screams out to the professional. There are things on these papers that scream out under the microscope. And that "confirm delivery," that wording that the defendant used to insure that the paid gun would get into the apartment, screaming out to you from all ten exhibits, I am here, I am the writer, you want to see my hand, look at my printed "C", look at the way I write my script "F", look at my backward form, look at the way I write my "D" in printed fashion and script out the rest of it.

And while you're looking at that, look at what I did unconsciously. I underlined every "S" and "T", every "S", "T" that I wrote on these ten exhibits, I underlined them, even though the sample did not have it.

I used the plus symbol, the same way this writing is, rather than use the and symbol that this one has.

Now, no one is asking you to convict a man of

these heinous charges merely based upon a plus symbol or merely based upon an "S", "T". Barry Goldwater used to say, you spend a million here, you spend a million there and after a while it adds up. Well, you got a circumstance here, you got a circumstance there and after a while you start looking over to the other side of the room and you say, it's all here, I can see it, I don't have to rely on what Detective Giorgio told me. I don't have to rely on what Mr. Rodriguez may have seen or not seen when he accepted a money order that was postdated for two months. I can look at it and I can tell you, I can see your movement here, Dominic Franza, I can see your action and I don't like what I see. I don't like what I observe. Because I see the hand of a man who wants to kill his family. I see the hand of a man who not only wants to wreak havoc on his family, but isn't even man enough to do these heinous acts himself; a man who tries to make sure that he's got his alibi in place at a time when his wife and his mother-in-law are being riddled with bullet holes and I don't like it. And you can see that.

Detective Breslin told you and showed you that

that writing was compared under microscope and he told you that is his hand, that is his writing.

We went one better and showed you that you could look not only to the writing on the note, but you could harken it back to writings taken at a time when this defendant did not know that the spector of this trial was in the horizen. And that this defendant wrote the same way. This evidence, ladies and gentlemen, is devastating in its nature. This evidence shows that this man wrote this, that his writing from ten years ago was as consistent with his writing as the day he sent that person to shoot his wife and mother-in-law.

At one point - - give me a second.

At one point counsel, in questioning Mrs. Franza, went off on a line of questioning as to Mrs. Franza stating back in June, early June, that she wanted her mail being sent to a postal box. And the defense in that case tried to get your attention to its questioning off of the events and off on to a far beaten path of, well, didn't you send him a letter back in 1990, in June, '90, that you wanted your mail sent to that address? What was that whole line of questioning about? Because Mrs. Franza told

you, I moved out after the June 25th beating. I wanted a couple of days and then I moved out.

What does the defendant say in his statement to Detective Giorgio as to when his wife moved out? Basically, he says to you in the statement, given on July 17th - - basically he said to you in the statement that he gave to Detective Giorgio and the one that he signs on July 17th, my wife moved out about three weeks ago. And about three weeks ago, from July 17th, comes some where up about June 28th. So, where was that whole line of questioning headed? I submit to you it was nothing more than an attempt to divert your attention from Mrs. Franza's compelling testimony, in which she stated that letter was written in July, I put the wrong date on it.

How do you know she put the wrong date on it? Because Dominic Franza, the guy over there, told Detective Giorgio, on July 17th, my wife moved out about three weeks ago. About three weeks ago comes out to June 28th. About three weeks ago does not translate into June, '90.

And Mrs. Franza's testimony to you, I read from the statement, this exhibit in evidence, during this period of separation, in parenthesis, three weeks,

three weeks, not June, '90. I submit to you that her testimony to you that she sent the defendant the letter in July and mistakenly put down the wrong month by number, same error that Mr. Rodriguez kind of made when he took 4/4 rather than 2/4. I submit to you that in July, about the 9th or 10th, she told the defendant, it's over. This is gone. I want a divorce.

And at that point the powder keg started to erupt. At that point the person who sits over there became incited to the extent that he now moved to kill his wife and mother-in-law.

Compare statements given within days of each other. July, 1990, the 17th, he had been married to his wife about three years. Well, we know that. You heard Mrs. Franza. And he talks about his wife. He says my wife wanted to move out, conveniently leaving out on this whole scenario, I beat my wife. She went for an order of protection. And that's why she went with her family.

But maybe in counsel's argument that it's nothing outrageous. I leave that for your judgement.

He says that the cops started to focus in on the defendant that night. Ask yourself, as you sit

there, police officers respond to the scene, they find one woman, some where in her mid to late '60's, bullet riddled with five holes from a .38 through her body, they find her daughter, as Leo, the next door neighborhood, said, crawling around like a child on all fours, and immediately she starts scribbling husband sent, husband sent someone. I submit to you, ladies and gentlemen, that the cops focusing in on the defendant at that point is no great mystery from the beyond; that the cops looking at the defendant at this point, it's the reasonable response that a person would have.

As you get back and get in the back, as I say, you got the wife crawling around saying that she had been shot by the hus - - someone that the husband sent, what are the cops to do at this point, start walking from every building to another saying, did you send someone? Did you send someone? You go to the victim over here, with a bullet hole in her face, that it comes out on the back of her head, and she says it's the husband.

But don't convict the defendant based upon that circumstance any more than you should decide that the circumstance of the arguing between hus-

band and wife showed an inflamed situation.

We then go to another circumstance. The same way you look to other circumstances surrounding what their relationship was. The defendant gets to the scene and immediately Nelson DaCosta goes over and decks the defendant. You can't convict a man based upon the fact that his brother-in-law may believe that he's involved in this any more than you could convict him based upon the fact that the wife said husband sent someone.

Now look at something else. Who knew that Myra Franza could be reached at the Mendez' apartment? Who knew that Nelson DaCosta's brother, Carlos, lived in the rear of the building? Who knew the information that is contained on that half-baked attempt to make out a re - - response? This fellow over there, the fellow over there knew the information that was on that receipt. He knew it because he had lived out these events a year earlier.

I told you, intimate knowledge of a close family member. Before I said, maybe a friend. But what did the landlord who lives right below Mrs. Mendez' apartment know? She did not know that Myra was staying upstairs. Remember. You heard

from Mrs. Ferraro and you heard from her daughter, Victoria Tese. And Miss Tese said that when she went into the first floor of the building the night of the shooting she said this she called down to her mother and said, mom, you better call Myra, something has happened to her mother. And she said that, she called Myra, because she was unaware that Myra was staying with her mother. The landlady's own daughter did not know that Myra was staying with the mother.

The landlord then calls up Barker Avenue and the landlord, not knowing what had transpired upstairs, now leaves a message, Myra, Myra, this is Vicky, you should - - this is Hilda, come quick, something happened to your mother.

Even the landlord did not know that Myra was upstairs. She didn't know that Myra was the recipient of a bullet to the face.

Leo, the next door neighbor, the fellow who came over, you can recall his testimony better than I. But he was unaware that Myra was staying with the family during this time. So, the person two doors down, on the first floor, the landlord and landlady's daughter, who knew?

Another circumstance. Another thing that points and says, you knew about that and I can see it and I can reason it. I can see it because I look at your writing and I can reason it because I know that this information on this receipt is of such an intimate nature that only a family member or close friend would have it. So, another circumstance.

His writing is determined by Detective Breslin to be that of the document on the box, the question document. Who wrote the note? You know it now because you heard from Detective Breslin, the defendant wrote the note. And he came to that decision sometime in September.

I want to go into that in a few moments. But one of the things I want to go over with you first, you have heard from Tracey and Wayne Frances, the next door neighbors. You have heard testimony from them where Mrs. Frances, Mrs. Wayne Francis, Tracey Francis, she says to you, I saw the defendant and he told me he had to go to the drug store.

What does he tell Detective Giorgio in the statements? He went to drug store.

She says he came back and she even mentioned

something about seeing him carrying something in his hand. She says he then went in inside and after he went inside he came running out. When he came running out, he said something about Myra. What it was, I don't remember what he said, but I was shocked. I was shocked when I heard that.

Her husband, he can tell you exactly what the defendant said. He tells you that the defendant came flying out of the house and he said, either his wife or Myra, but the reference was to Mrs. Franza, and the statement was to the effect that she had been shot and that he was now going to his mother-in-law's to find out.

That is the tape that you have before you as to what Hilda left on his fax machine.

Now, another circumstance in and of itself, I'm not telling you that that in and of itself is sufficient to convict the defendant. But now you got a statement on his part, where he goes flying out of the neighborhood and he says, my wife or Myra has been shot. I'm going to my mother-in-law's. Another thing that points the barometer of guilt towards the table across from you.

The defendant says, in his statement to Detec-

tive Giorgio, that, no, I left with my friend Tracey Jenkins that night. Ladies and gentlemen, the only evidence, and if you searched through everything that this gentlemen and his predecessors have taken down, the only testimony that you have from an eye witness as to what happened the night the defendant came flying out of his house is Tracey and Wayne Francis. The only evidence you have is the next door neighbors; where the defendant met Tracey Jenkins, where he picked him up. You know right now he did not pick him up in the driveway because when last seen he was flying out to come to Manhattan, saying, shot, been shot, Myra or my wife has been shot.

And I further submit to you, Mrs. Francis is placed in a very difficult position. You have to judge her credibility. But she's placed in a very awkward position, that the next door neighbor heard something and you're going to have to decide whether or not she heard, like her husband, or she didn't. But the best that she will offer to you is whatever it was that this defendant told me that night, I was shocked by it. And I submit to you that a person who hears the next door neighborhood

say my wife has been shot would be shocked and I submit to you that those statements were made by this defendant on the night of July 17th, 1990.

When counsel got up before you and told you, well, what do they got? They got nothing. That's not so. What we've got and we'll keep pointing to the defendant are a host of circumstances and a host of evidence that shows that the author of this unholy design, the author of these events sits and breaths the same air that you do, sits a few feet from you and it's the guy over my right shoulder. It is the defendant in this case. Because what you have, you have the defendant's handwriting, blown up so that you can compare it. You have the samples of his writing so that you can look at it. And you've got the defendant offering some grudging samples to Detective Giorgio.

You know what happened in this case? The defendant spoke to Detective Giorgio and Detective Giorgio then continued his investigation and spoke with the defendant once more. And Detective Giorgio did not come out point black and say, Mr. Franza, did you do it or didn't you do it? Okay, you didn't didn't sign right here; good day. But he did very

skilled detective work. He now started to draw on information that he had gathered during the course of his investigation and analyzing what had transpired. And he now got from the defendant, about a week later, information that his wife told him, I believe it is July 10th; the subject, the defendant, he recalls, he got emotional, started crying on Tuesday, July 10th, during a phone conversation with his wife Myra. Myra told him in the conversation she was filing for divorce. She tells him on the 10th, and I submit to you that her testimony of sending him the letter on the 9th, the one that's dated the 16th, I submit to you it is really 7/9. She tells him, I want out. I do not want to be married to you.

Ask yourself, given the fact that your wife, who has left you on previous occasions, says, I want out, send my mail to this post box, I want out, I'm filing for divorce, I want out, I don't want to live with you any more, why the defendant would go flying into Manhattan from the Bronx if something happened to his mother-in-law? What did he know at the time happened to his mother-in-law? What did he know? The slip of saying, been shot.

And I submit to you that it is not reasonable to assume that this defendant, having been told by his wife that she wants no part of him a week before this shooting, saying, I'm filing for divorce, I submit to you it is not reasonable to believe that this defendant would come into Manhattan if he truely believed that just something had happened to Myran's mother. It's not in the nature of common sense.

But, again, don't convict based upon that one circumstance. Because, you say, it is just one thing. But you got that, you got the handwriting, you goting fact that they didn't get along, you got the fact that there are the threats and that she's leaving him and that she had gone to stay with family members before.

One of the things, I said to you that the defendant slipped up here. The defendant gave handwriting samples. I want to touch this point because I believe that when you look at this in the context of all these events, I believe that you'll see what happened.

The defendant goes and speaks to Giorgio the night of the shooting. He then goes back to his

apartment. Now, counsel tells you that he asked for a receipt. Ask yourself, is it within the relm of the husband who knows that his wife is shot in the face and may be dying, in the face, is it in the relm of common sense that the husband would say, give me a receipt for this tape? It is a cassette tape. There is nothing extraordinary about it. It is a cheap tape. You saw it. Give me a receipt for it. Give me a receipt for it because that will boster what I said. That will boster why I came into Manhattan.

I submit to you that the defendant's asking for a receipt at that point runs contrary to the grain of the common experience. I submit to you it runs contrary to what the defense would paint the husband, the defendant, out to be at the time that he came into Manhattan.

Another circumstance for your consideration.

What happened here, he thought, the defendant thought, that he was a little too smart for everybody. And I say that in the sense that if this defendant had walked out the door, never to return when Giorgio asked him for his handwriting sample, you wouldn't have the opportunity to make this com-

parison. If he - - because you wouldn't have that file recovered from his apartment. If he had walked out the door, you wouldn't have had a chance to see the "confirm delivery" with the backward "F" and the rounded "D", the printed capital letters followed by the script. You wouldn't have had a chance to see how he very nicely underlines the "S", "T" and he wrote the plus sign. You wouldn't have had that chance.

But he was smart enough, smarter than the other guy, that once he walked out, and you know this because, ladies and gentlemen, at this point what you have to do to understand the rest of this case, you have to view this not from twelve people sitting impassively and watching and observing. At this point one must understand these event by going into the mind of the defendant. And you have to understand that at this point the defendant believed that he could some how disguize his writing. The defendant believed, I can give that to you, Giorgio, and nothing will come of it. I can give it to you.

And so he first walks out and says, I'm not doing anything. But the person that's within him, the imagination of the person himself doesn't permit

that, the same way it doesn't allow Myra to leave on her terms, the person within the defendant comes back and says, you want sample, I'll give you a sample. And that was about the most fatal move that this defendant could have made. That was about the most fatal move because even though the defendant attempted to deflect attention from himself by putting a pipebomb - - by having a pipebomb placed outside of Nelson DaCosta's apartment, their exhibits, I've given them in evidence, I have from my own hand, everything that I took careful attention to watch, to cover my tracks, I allowed myself to make a big mistake. I gave evidence which is going to bite me in the end.

And so at the end of August, at the end of August, even though he had spoken to Giorgio twice, he knows and Mr. Brenner, in his very persuasive way, Mr. Brenner is right when he says that from what the defendant is being asked it's clear, the focus is on me here. The focus is on me. I've spoken to him twice. I can't get this guy, I can't get this guy Giorgio away from me now. I can't get him to leave me because now he's asking me about my wife, my family, he's asking me about sending

flowers. I duplicated action here and that is what had happened. The defendant, the defendant, through his own lips, stated, you know, one time I did send some up to Myra's apartment. During the course of the investigation, during the questioning, the defendant had come across, yeah, I did send someone with a box of flowers. I sent the - - I sent the guy, I gave him an address and I sent him up. Damn, I did it. I'm giving them something here. I should keep my pen in my pocket. I shouldn't write anything. But he allowed himself to give writing samples.

And so, given that he spoke to Giorgio on the 17th, given that he speaks to Giorgio on the 23rd of July, he then tries to deflect attention by placing a pipebomb outside of Mr. DaCosta's apartment, this person at 644 West 187th Street.

One of the things that the defense in their summation to you can't hide around, he says, well, it is a circumstance that they have powder used for reloads in that pipebomb. And you know what's another circumstance of some what momentum proportion? The defendant, a thirty-three year old man, had in his apartment a bag, four packages of fire-

crackers. And you you look at the firecracker that came from Mr. DaCosta's pipebomb, you look at this firecracker, and it is identical in size, it is identical in wrapping to the firecrackers found in the defendant's apartment in February. This was in August. That was in February.

And you heard Miss Gonzalez testify? And there came a point where she would not readily admit to you that these things were there. And I submit to you that her response to you, hear testimony to you deflected her knowledge about that shows, from one of the defendant's own witnesses, that this is a key piece of evidence. Because of all the things in the world, a firecracker that was in the pipebomb, the same firecrackers are found in the defendant's apartment in February, that the powder that is used for that pipebomb is for reloading equipment, for reloads, and that the defendant does his own reloads are, again, other circumstances.

And now, now you got the scale and on one side you start pounding on top, one on top of another, the circumstance of the shooting, and you compound that with the defendant now giving conflicting statements, and he expanded as to sending someone,

and you now compound that with - - that you got the pipebomb outside of the brother-in-law's which we know the defendant well knew because here it is, give him his height, give him his weight. What was he writing this for at that time? What was the height and weight put down for? For what purpose? The firecracker in the pipebomb. But, again, another circumstance. They start to add up after a while. They started to move to the point that you look and you say, I know what happened here, Dominic Franza, I see you're moving and I see you at every turn.

The question that you're being asked to consider today, you're not being asked to consider whether or not the defendant is guilty or not guilty of that pipebomb. The question that you're asked to consider today is whether or not the defendant authored the events of July 17th, 1990. You're asked to consider today whether or not the defendant is responsible for that pipebomb to Puerto Rico. The defendant, through his questioning of the witnesses, took you to a side of that pipebomb outside of Mr. DaCosta's apartment and we all road to that side. And when we road to that side we found and we heard,

all of us here in court, that there are some striking similarities in that that pipebomb had a firecracker fuse similar to, the same paper, the same size, as the firecrackers found in this defendant's apartment; that the gun powder used in that pipebomb had a very striking similarity to gun powder that the defendant used for re-loads. It was gun powder that was used to re-load bullets. What does the defendant do? He re-loads his own bullets.

This is not a case where plutonium or some other precious metal or element is being used. It is something which the defendant told himself through his lawyer, through his lawyer in summation says to you, well, they are going to tell you that he had access to gun powder.

You listen to the defendant's first forty-five 450 minutes of his summation and I submit to you, ladies and gentlemen, that the defendant does a very good job of compounding circumstance upon circumstance which in and of themselves might give you pause. But when taken collectively it speaks better than any eye witness can speak. It speaks better than the person who claims, I was walking down the subway, somebody came from behind, put a gun in my

back, I turned around, I saw for three seconds and three week later I went to a line-up and I picked somebody out and that's the guy. Because now you keep saying to yourself, did you have a chance to see what you were looking at? What were you focused on? Were you focused on the gun, on his face, on the jacket? But here you don't have to rely on those pitfalls. Here all you have to do is view the evidence in its entirety and you can see his handwriting, his where with all to do what he did, his threat to do what he said he would accomplish.

Let's move from that pipebomb at Mr. DaCosta's apartment and let's go to the events in February.

Now, I told you to understand this case, I told you you have to go into the defendant's mind. Ladies and gentlemen, to understand, to understand - - understand the person that he puts out there for you, understand through his actions, the old saying, the old saying in literature about the guy who's going to impersonate a man and he says, come and enter into my imagination and see him. And I'm not trying to be literal with you. I'm not trying to engage in though as a trick. But to understand

that guy, go into his mind as to what transpired between August 11th and February. And understand that what happened here was that Franza now had another girlfriend. The defendant, who on the one hand would have you believe he is the husband who tries to see his wife on July 17th, now understands reality and says, well, I got to make go of it. So I now have another girlfriend. And understand that always in the back is that I slipped up along the way. I slipped up because I gave handwriting. I slipped up because I went even so far as to say I had sent someone in the same manner on a previous occasion. And it's still lingering out there. The investigation in this case continued. And you know what continued? And at one point the defendant had even been in contact with the detectives in this case. And it's out there and tha handwriting is just not going away.

So, to understand this man, understand that now he wants to make a clean break with his wife and he wants to make this break because now he's got a girlfriend. But he can't make a clean break because he knows the detectives are continuing the investigation. He knows he slipped up a couple of

ways. So, what he now does is he sends a pipebomb to Puerto Rico.

And follow this. The letters that were sent to the family, at one point you got the translation of those letters and you'll remember at one point we had to engage the services of the official court interpreter and she translated these letters to you. These letters, as Mr. Sheindlin one time said, provide, provide the sign in the road with two arrows, this is the past and this is the present. You want to understand what has happened, read the letters. You want to understand what is happening, read these letters. Because these letters, think about it, the man who now had, through his own witness, he had a girlfriend, they had spent weekends together, they were now back to where they were four years before, everything with his wife, everything is sent, it is all over, why would I do that? I don't want her back. That's correct. That is correct. Because going to the imagination of this defendant, what he does at this point, to deflect attention from himself, he creates the straw man. And the straw man is Julio Ortiz, 75 West 181st Street. Not the person who testified here. The People's contention

is not that he was involved in the shipment. But the name, the address provide the straw person. And they provide the straw person so that now you no longer look to me.

He sends these letters. I'm going to read a portion of these letters to you. In one of the letters that was sent to Nelson DaCosta, care of Josephine Mendez, in this envolope, and that envelope there is a letter that translates, I will kill kill all your family here and in Puerto Rico. And it is in poor Spanish. As Mrs. Mendez stated, that the defendant could not speak Spanish fluently. In effect, when you translate this it says, I, to send your grandmother a gift, that gift is the bomb. Go into the management, the bomb was sent in Federal Express. It was put into Federal Express on February 4th. February 4th. When it's gotten there through Federal Express. That's the saying. This bomb did not get there on February 8th. There is testimony in this record that supports that that bomb was there on February 5th, when the postman left a note on the gate for Mrs. Lamboy. And it says, you got a package. It made it overnight.

But what this does, February 6th, the post-

mark, the defendant took an additional step because the person who opened that bomb is going to get blown to bits. There may be a fire that results from opening that. So, all of the information - - give me the bill - - all of the information on the bill that has Julio Ortiz, 75 West 181st Street, it may or it may not be destroyed. So, he sends something to the family on the 6th that talks about death, talks about destruction, talks about sending something to the grandmother. It's a yell from the defendant, if it went off in Puerto Rico, it is from Julio Ortiz and it is from Julio Ortiz at this address, the strawman.

Is it likely that if there was a real Julio Ortiz he would give his correct address?

Is it likely that he would go so far as to give the zip?

Is it likely that he would have the mother-in-law's direct address?

The person who sent this, like the person who authored the note, knew that Franza could be reached at Mendez and could be reached at this address. The person who wrote this knew of the relationship between Franza and Mendez, DaCosta and

Mendez. Intimate knowledge. Intimate knowledge of a family member.

And that the defendant, it is not an accident that these are postmarked on the 6th. These are sent as aninsurance policy. An insurance policy.

If you'll fellow me for a moment? The insurance policy is to say, look at my letter, I am the one who sent the bomb to Puerto Rico. I am the person who sent this.

And so now you have to look and see the criminal mind in action. Not the brilliant criminal mind. Not the criminal of the century. But look at the defendant's criminal action. He can't help himself when he has to put in the letter to Myra and Josephine, reading from the record, something, Myra, this is a letter to Josephine and Myra, something, Myra, your husband, he is asking and investigating too much. This is in February.

What investigation? The defendant, through his own witness, puts before you, yeah, I gave up my wife, I gave her up and I now started a knew relationship with another woman. And we were staying together on weekends and through the testimony of his own witness he puts in front of you, I'm at

another stage of my life, I'm not going back to those days.

But he can't help himself. If he's not going back to those days, he puts in the gratuitous statement, oh, he's investigating too much. He is asking too many questions.

He can't help himself in this regard in that he's got to say, I am a victim here, I am the person who may come under some harm. And he looks in his mind and looks at his actions. He's now setting up the strawman that says, Julio sent it.

And you know how you can discount Dominic? Do you want to know how you know as a police officer, as a juror, you know how you can discount Dominic? Because in the letter it says, Myra, your husband is asking too much. Well, that's in direct contradiction to his own testimony of his witness, when his witness says, we had new life, we were spenting weekends together, that was over with.

I submit to you it was over. But he couldn't help himself and he had to put himself in a good light. So, he colored himself as the person who is trying to inquire. And there is nothing in all the testimony here before you that shows any inquiry.

There is nothing in all the evidence that you've heard on the People's case and in the defendant's case that shows that this defendant was up there beating the bushes looking for the guy. Because he now had a different woman. And he was living with her. But he can't help himself.

The sign says, go this way and you got the past and go this way and you got the future. Well, you got the letters. So, who sent the letters in this case?

Ladies and gentlemen, if there was only hand-writing in this case, if there was only handwriting you would have enough evidence before you to convict this defendant of these crimes. If there was only that. But you have so much more than that. You have not only the handwriting on the box of flowers, you have the handwriting on the Federal Express bill.

Detective Breslin has told you, after microscopic examination of this defendant's samples, together with these two items on the right that he examined under the microscope, as compared to the writing on the Federal Express bill, that's the defendant's handwriting.

Don't take my word for it. It is in the record. Don't take Detective Breslin's word for it because you could look at it.

But what you see in Mr. Franza's file is you see a host of situations where the name Janice is spelled with an extremely distinctive J. An extremely distinctive J that has some what of a tree on a side-type top. You have it in the file where the name Janice is spelled. You have it in the two page exhibit that Detective Breslin extracted these two words. And you have it in the Federal Express air bill.

This J is a signature mark of the defendant in large proportion. When you look at this, the same way you look at this, you can see circumstance upon circumstance building up against this defendant. When you look at this "J", against the Janice in that file, you see that this defendant is as good as saying, I am here, I'm Dominic Franza, look at me. Because this is the most distinctive "J."

The Federal Express bill had 75 West 181st Street. Another circumstance.

What was the name of the company? U.S.A. Electronics. What was the name of the card recover-

ed from the defendant's apartment? U.S.A. Electronics. He incorporated in his own demented way the name of a company that he had familiarity with and he used it as the company on the Federal Express bill. He incorporated a name that he had familiarity with, Julio Ortiz, and he incorporated it on to the bill.

But his big mistake was that he wrote the name on the box. He wrote the name on the air bill. And you don't have to take my word for it. You can look at it and you can see that.

And you can see that when he has to give exemplars, he gives it using a printed "J", when you know that his written "J" is a most distinctive one. And you got that in Mr. Franza's file. And you got that writing of the "J" in such a beautiful way, in a beautiful form, the tree on the side, present here and here. You can see it opened here and you can see it over here. And it is a beautiful "J". It is his own signature card. It is him telling you in another way, look at me, I'm here.

If you just had that, together with the writing, you would have enough. But you got more. You got the writing on the American Express money order.

The writing on the money order, Julio Ortiz, look at it in comparison to the others.

Remember what Detective Breslin told you? He told you about how he - - how the defendant makes his "Z" where he brings the line down and across. Look at the "Z" on the top. Look at it over here. Here. Here.

He tells you, look at the big "T" between the "R" and the "I."

Remember DaCosta on the envelope? The big "D", between the "S" and the "A". Same way. The "D". The "D".

And look at the "Julio" here in comparison. You've had expert testimony that, ladies and gentlement, if you look at the record, that expert testimony is of such a devastating proportion that you heard what Breslin - - you saw not only what he showed you in the exhibits, but you heard of what he examined under the microscope. And there is nothing in that record that shows that Breslin did not see what he saw. There is nothing in that record and in these exhibits that say anything other than the writer is there and he sits here with you.

If you just had that, the writing on the bill,

the writing on the money order and the writing on the note, you would have enough to convict this defendant of both of these instances. But you have way more than that. You have more than that in that we now get to one of the last things in this case, the stamps.

This is the sheet of three cent stamps taken from the defendant's apartment. And you have heard that Detective Breslin got that sheet of three cent stamps and took a photo of it. This is the sheet from the apartment.

And you have this hole over here in the top of the stamp that is unsevered.

There came a point during the defense summation to you that counsel said, well, you know, Breslin is talking about moving the hole and looking and aligning them up, and there was some point -- there was some point that the defendant said, well, if they are in alignment, why is this hole like that? And the defendant tried to tell you, through summation, that Breslin is not giving you a fair shake when he tells you about this hole because why is that intact and allthe other ones are moved? That hole is not lined up.

That hole is this hole. This hole is not severed. On this exhibit, this hole is intact. It is in either entirety.

Another strange circumstance. And believe me, I'm mindful of the time and I'm mindful of the heat in here. But please bear with me.

Another strange circumstance. All holes severed, save one. On the envelope to Nelson DaCosta, this stamp, number 2, as you read from the left, all holes severed, save one, which is not there. It's not there on the stamp. There is a tearing.

Circumstance of all, of all the things that could have been in this case, the person who sent this letter sent a stamp that was a three cent stamp. Three cent stamps are recovered from the defendant's apartment. Of all the things that could have been, the same stamp is the same impression on this three cent sheet of stamps. Same face.

Of all the things that could have been, this stamp has every hole severed, except one, and that hole is not present there. There is a tearing. And that tearing, ladies and gentlemen, is what this is. This hole in its entirety.

What Breslin did with this exhibit, Number 73,

which the defense tried to walk through with you today, Detective Breslin took this stamp - - hold that up - - he took this sheet of stamps and this hole, which is not severed, is the back of this hole which is not severed. And Breslin, when he put the stamps side-by-side, you see hole, hole, hole. All these holes are severed. But when you get down to this one over here, there is no corresponding severance. There is a tear. Not a severance, but a tear. And that tear in its entirety fits in here.

He didn't play black magic with you. He didn't play games through the eye of photography. He put it out there for you to look at so that you can see that this opening over here is where this flap on the three cent stamp fits in. And that in and of itself is a devastating piece of evidence. That, in and of itself, shows that this defendant sent this envelope, which tells about sending a gift to the grandmother in Puerto Rico, which tells about harm to the family.

That stamp, if you had nothing else, you have that stamp. But you have more than that single stamp. Because what you have is you have that,

another one of the stamps on that envelope, this one here, has a boarder to it. You look very carefully and you - - I'm sorry - - you can see that on the boarder has not been ripped off of the stamp. And you see it right here. That boarder was meant to be torn off. It wasn't - - it is late in the day. We're all starting.

That boarder was taken off of this pad and placed on that envolope. And you know that because this is the other stamp from the DaCosta envelope.

And look at the boarder. See?

Postmarking.

And this is the one that when you push them side-by-side, now let your eyes make the connection. Now let your eyes see that not only do you have this hole on the top stamp that's not severed, that fits in like two fingers into one in a locking motion, but you now have the boarder that fits in this fashion.

(Pause.)

MR. BRANCATO: And you can see it for your own eyes. You can see with your own eyes how it matches up so wonderfully You can see with your own eyes how they come together.

You look at the back and you got a back view of it. And you can see. Look at the crowing type effect down here and over here. Look when there's a movement to the right on one stamp, how there is a retraction on the other side. Look how they go together like hand and glove. Look at the way they fit together. Look at that.

A circumstance. Another circumstance. A most persuasive circumstance. A most persuasive circumstance in that these two stamps, taken off of this envelope, come together on this sheet of three cent stamps, as you can see. A most persuasive circumstance in that one of them has the boarder left on and when you look at it you can see how it goes together. One of them has all holes torn, save one.

And so Breslin did not push those stamps, as counsel would have you believe, in order to make that look like a full hole. What Breslin did was, he got the piece that was torn and he matched the other so that you can see this is the first hole, second hole and when you work your way across and you get to what the corresponding hole is on the other side, there is a piece that is missing. There

is a piece that is torn out. And when you put them together, they fit like I'm using with the inverted "V" with my index finger through it. They come in so you can see.

You look at it, you say, hey, I might be able to believe that, you know, I might be able to believe that when you say, well, he said or he didn't say to the next door neighborhood. I might be able to believe that firecracker may or may not, but now you're starting to push, you're starting to push reason over here and you're starting to push common sense. And now you're asking me not only to forget about everything that's above, you're asking me to forget about the handwriting, you're asking me to forget about it, what I can see, and you're asking me to forget about the fact that you have three cent stamps of the same kind, Paul Dudley White. You're asking me to forget that one of the stamps looks so wonderfully next to the other that I can line it up and you're asking me to believe that all of the things that could have happened, all of the holes, with the except of the one that remains in place and that when that one comes together with the other, you have a perfect match. And now I'm not at

that point. And you say to yourself, you're not at that point because now you have to consider a host of circumstances that run contrary to your good sense and reasoning. You're asking to disregard the - - what you're asking to disregard, which you can see and what you could reason out with your own mind.

You want to see the stamps in their form? Look at them.

And as I told you, hold them, ladies and gentlemen, allow me to bend it back so you can see the hole that appears on the stamp "K". And you can see this hole. And look to the other side. You don't see the corresponding hole. You see a tear. And look when you put them together.

(Pause.)

MR. BRANCATO: And with your own naked eye how that hole in its entirety sits on that stamp. And look with your naked eye how it doesn't have a corresponding hole. Look.

Look with your naked eye how they come together and so that you can see how all these holes, save one, show that that stamp, at one point, was part of that sheet.

Look with your naked eye as to how that lower stamp, Q-4-1, fits next to the other. And you can see the line.

Don't take my word for it, look at it. And you see the boarder and you see the jagged-like motion through the stamp and sheet of paper.

And you can see that in addition to this circumstance over here, you have this one down here, where this stamp has the bottom, this one has the bottom.

This stamp over here has a cut so that when it's put up to the other one, you can see how they go together.

Ladies and gentlemen, I have about five more minutes and then I'll sit down. But let me just say this. This whole case comes together not because the defendant wanted his wife back in February, of 1991. This whole case comes together because the defendant, who had started a different relationship, was still aware that there was an investigation going on. He had given statements. He had given handwriting and the defendant in some fashion had to deflect attention from himself and deflect. And the deflecting agent in this case was

to construct Julio Ortiz; the deflecting agent in this case was to send the pipebomb to Puerto Rico; and, the deflecting agent was to follow it up so that the letter, announcing the bomb, the letter announcing the destruction of the family, the letter which gratuitously states, oh, by the way, Myra, your husband is asking too many questions. You remember that husband, you remember that husband whose girlfriend said to you, we had a new life, we put it beside and we were now together weekends and week out. And that's the way it was.

There was no investigation on his part in this record. There was nothing to show that anyone had anything in for him in this record. And what you have is a gratuitous statement, you want something to say, not Dominic. Well, we'll say in the letter, Myra, your husband is asking questions.

Again, leave your common sense at the door because because to bring it in with you you're going to say, wait a minute, Mr. Defendant, your testimony through - - the testimony through your witnesses tells about how you put this relationship with your wife behind; your wife had told you that she wanted a divorce; your wife told you she wanted

no more part of you, she couldn't make it any clearer. Is that what counsel said? She couldn't make it clearer, she wanted no part.

So, what is this nonsense? You're asking me to accept this portion of the letter which deals with you're investigating too much? That's a self-serving statement there. That's an attempt by the sender of the letter to say, no, not Dominic, he's not involved here. That's an attempt by the defendant to make you go off the path to Julio Ortiz.

And you have to ask yourself, if there were really a Julio Ortiz, would he give his address and zip code and spell his name so that you could come find him? If there really were a Julio Ortiz, would he tell you that had he really worked at U.S.A. Electronics? The card found in the defendant's apartment?

If there really were a Julio Ortiz, would he broadcast where he you might find him?

And I submit to you, of course not. Of course not. Because the person who came with the box of flowers did not leave a name as to the sender of the flowers. The person who came with the box of flowers just had the intimate family knowledge of

where to find and who to find.

And so that statement of go and look for Julio Ortiz is nothing more than an attempt to put you on the path looking for someone who never existed. It is an attempt to get you so far off his scent when he screams to you, I'm here, come and find me.

One last thing before I sit down.

The information on the Federal Express air bill, I spoke of intimate family knowledge before. Julio Ortiz, better yet, the person who wrote his name on the bottom of that Federal Express air bill, that person knew that you could reach Roman at a certain address in Puerto Rico. What is Josephine Mendez' maiden name? It is roman. The person who sent that Federal Express bill did not use the name of the person living at that address, Lamboy, the person used the maiden name of Mrs. Mendez. That is intimate family knowledge.

Harken to your own experience and harken to your own knowledge of the world. You know your friends, you know who their parents are. How many do you know the name of - - the maiden name of the mother? That is intimate family knowledge.

The person who wrote that express bill knew

the maiden name of Mendez. The person who wrote that Federal Express bill had the address down to the street and number, that's intimate family knowledge.

The person who wrote that bill knew what the telephone number was. That's intimate family knowledge.

And, ladies and gentlemen, there is only one person throughout this entire event, that took place between July and February, of 1990 - - 1991, the defendant, who goes by the name in this case as Julio Ortiz.

If you follow the trail that he sets out, after he puts himself under the gun, you can see how he tries to wiggle his way out by setting up the strawman. But if you think about what is said, if you look at what's there, if you think about what's on these packages and the intimate knowledge that the sender would have, it leads you to no place other than the defense table. It leads you to that position so that you can sit here in this warm room and you can scream out to him through your verdict; I know what you did, Dominic Franza; I saw it; I don't like it and you're guilty of these crimes.

Thank you very much.

THE COURT: Ladies and gentlemen, that completes the closing arguments, summations.

And in fairness to your own systems and ourselves, we'll have a short recess.

Do not discuss this case among yourselves or allow anyone to discuss it with you.

Don't reach any conclusion.

When you return from this very short recess the Court will charge you and then you'll retire for your deliberations.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

(Whereupon, the Court took a short recess in the proceedings.)

* * *

(Continued on the following page.)

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Bring in the jury panel.

COURT OFFICER: Jury entering.

THE COURT: All right.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorneys and the sworn jurors are present, your Honor.

THE COURT: Members of the jury, we've now reached that point in the trial where you are to assume your active function as jurors.

Basically, the Court will divide its charge in two parts. First I will give you the general

principles of law applicable to this and to all criminal cases, then I will instruct you with respect to the material, legal principles applicable to the crimes with which this defendant is charged. Briefly, I will explain the application of the law to the facts and all of this will be submitted for your consideration and upon which you will be required to deliberate and render your verdict as to the guilt or non-guilt of this defendant.

Now, I believe, despite the length of the trial, that each of you paid close attention to the testimony and I believe that it is just as fresh in your minds as it is in my own. However, during the course of the charge if I should refer to a fact which differs from your recollection, not that I intend to refer to any facts, but if I should, you must ignore my statement of the facts and substitute your own recollection, since under our law it is your recollection that controls and not mine.

I charge you that you must accept the principles of law as stated by me whether you agree with them or not. You have no discretion whatsoever to depart from the principles of law which I shall

annunciate.

You and I are sitting here together as judges, you as the judges of the facts and I as the judge of the law.

And first and most cardinal principle for the jurors to remember is that you are the sole and exclusive judges of the facts in this case. In that capacity you will decide the facts coolly, calmly, deliberately, without fear or favor or passion or prejudice or sympathy. As the sole and exclusive judges of the facts, it is your sworn duty to decide the guilt or non-guilt of this defendant solely on the evidence admitted during the trial and to pass judgement upon the evidence in the determination of all the issues.

You must not, under any circumstances, indulge in speculation or guess work, nor are you to consider anything outside of the evidence. In other words, ladies and gentlemen, don't try to be detectives and don't try to conjecture what you would do or what should have been done or what might have been done or what could have been done. It is your own recollection, understanding and evaluation of the facts presented by the evidence at this trial,

that's what controls and that's regardless of what counsel on either side may have said with respect to the facts. And that, of course, that would be regardless of anything I said with respect to the facts. And again, not that I intend to.

I wish to advise you at this time that you are not to consider anything that I have said during the trial or any questions that I may have asked nor anything that I may now say to you during the course of this charge as an indication that I have an opinion on this case one way or the other. I have no opinion whatsoever on this case.

And I have no power to tell you what the facts are or to tell you that one fact is more important than another fact or what witnesses were truthful and what witnesses were untruthful. These are all matters within your own and exclusive power as the judges of the facts.

You're not bound to accept the arguments of respective counsel. However, if you find that any argument urged by either of them are reasonable, logical and based upon the evidence as you recall it, and consistent with that evidence, you are free to accept that argument as your own and to give it

such weight as you may deem advisable.

On the other hand, if you find that any argument or conclusion is not based on the evidence or that it is unreasonable, illogical or inconsistent with the evidence, you must disregard it entirely.

As to the law of the case, however, you as jurors must not set up your own conceptions or preceived motions of what the law should be. You must accept the law as I give it to you, without reservation and you must apply the law as given to you as your guidance in your determination of the issues of the facts.

Under our system of juris prudence, all cases in this case are initiated by way of charges and the charges are contained in the indictment.

An indictment is merely a legal form by which a crime is charged. It is nothing more than an accusation and it has no evidenciary or probative value whatsoever. It is neither evidence of anything nor does it prove anything.

Under our system, trials are conducted by taking the testimony of witnesses who are examined under oath directly by the side that calls them and the adverse party has the right to cross examine the

witness. The sworn testimony elicited on both direct and cross examination, plus whatever exhibits the Court permitted to be received and marked in evidence is all the evidence that there is in this case. And it is only on this evidence that you are to make the final determination of the facts.

Testimony which was stricken from the record or exhibits which were marked for identification but not received and marked in evidence and the answers of witnesses which were stricken or which you were instructed to disregard are to be totally disregarded by you.

Each and everyone of you has it within his or her power to draw proper and reasonable and just inferences from the testimony and exhibits in evidence and to determine the probabilities arising from the case after carefully analyzing, weighing and considering the testimony of each witness that testified at this trial and all the exhibits in the case.

The defendant is entitled to every inference in his favor which can reasonably be drawn from the evidence. And where two inferences may be drawn from the evidence, one consistent with guilt and one

consistent with non-guilt, the defendant is entitled to the inference of non-guilt.

Other considerations that may cross your mind, such as, on the one hand, sympathy or, on the other extreme, vengence, bias or prejudice, these are to be completely disregarded by you since you are the exclusive judges of the facts.

You have a duty to evaluate the testimony. It is your duty to sort out the credible testimony and to disregard any testimony which is not credible.

Now, one of your chief functions as judges of the facts and in evaluating testimony is to determine the credibility of the witnesses because the facts depend on the testimony of witnesses. You and you alone have the power to say whether a witness is truthful or not truthful and what weight you should give to that particular witness' testimony. You should consider the witness' means of knowledge, the interest, motive for testifying, the probability or improbability of the testimony, intelligence, lack of intelligence, manner of testifying, the attitude of the witness. You should ask yourself was the witness truthful, friendly? Was the witness hostile? Was the witness frank, honest,

reliability and trustworthy in the recitation of the facts? Was the witness demonstrably bias or prejudiced or did the witness have a demonstrable reason to falsify?

There are many other aides in determining whether a person is telling the truth. You are to employ any of them that you know of and that you use in your every day life.

You've heard the witnesses in this case. You've heard them examined, cross examined. In deciding this case you are to consider their testimony just as you would if you heard it outside of this courtroom. There is no rule that a jury has to adopt fantastic or unnatural tests of credibility in the jury room.

In determining the credibility of any witness or the weight of that particular witness' testimony, you should apply the same test which you would apply in your daily activities as home or in your business.

What are some of those tests?

Consider the personality, the background of the witness, the demanor, bearing on the witness stand, the reasonableness or unreasonableness of the testi-

mony, means of knowledge, whether the testimony is supported or contradicted by other evidence, the interest or lack of interest in the outcome of the case, the motive to tell the truth or not to tell the truth, the probability or improbability of the testimony, and any other test which you have for determining whether a witness is or is not telling the truth.

You have a right to consider whether any witness was actuated by bias or prejudice or has an interest in the outcome of case which might permit that witness to testify to something other than the truth, whether to testify falsely or to testify by giving a half truth. There is no legal presumption that a interested witness tells lies and there is no legal presumption that a witness who has no apparent interest in the case tells the truth. The whole question of the interest of a witness and its affect upon the testimony is for you to decide from all the evidence in the case.

If in your deliberations you find that any witness has willfully testified falsely as to any material fact, you are at liberty to disregard that particular witness' entire testimony or you may

disregard so much of the testimony as you believe was untruthful and accept so much of the testimony as you find to have been truthfully given.

The quality of the testimony is controlling, not the quantity of the testimony or the number of witnesses that testified.

Questions by themselves are not evidence. It is the answers given to the questions that constitute evidence.

Inferences or suggestions contained in a question do not render such a fact when the answer negates the inference or suggestion contained in the question.

Whenever any inconsistencies appear in the testimony of a witness, it is your duty to reconcile them if you're honestly able to do so. You are not to reject arbitrarily testimony of any witness. You should consider the testimony of every witness carefully and determine whether you can accept it or reject it in whole or in part.

Whenever you find conflicting testimony which you are not able to reconcile, do not hesitate to cast aside that which you deemed exaggerated, mistaken or willfully false and accept only that por-

tion which you deem to be true.

In a arriving at your verdict, I charge you that you are not to consider or speculate concerning matters relating to sentence or punishment. Such matters are solely within the province of the Court as a matter of law and must not be permitted to have any bearing on your consideration of the guilt or non-guilt of the defendant in this case.

Now, our law accepts two categories of evidence. You have direct evidence and there is circumstantial evidence. I will now instruct you as to the meaning of these terms.

Direct evidence is either physical or testimonial evidence by a witness regarding what that witness actually saw, heard, smelled, tasted or touched which tends to prove that an act or occurrence took place.

Under the law, unless there is an eye witness or there are pictures or moving pictures of an alleged event the jury must consider other evidence to reach its conclusions. In this case there is no testimony by eye witnesses to seeing or hearing the defendant actually hire somebody to shoot Myra Franza or Josephine Mendez. Nor is there an eye

witness who saw the defendant actually fabricate a pipebomb or cause someone else to do so.

You will then consider what is known as circumstantial evidence. Let me give you an example of what circumstantial evidence is.

Suppose in a hypothetical trial one of the parties must proof that it was raining on a particular morning in order to prevail. To do this, a witness is called who testifies that on the morning in question the witness was walking to the subway and while walking the witness observed the rain falling from the sky, felt the rain striking the witness' face, clothing and heard it splashing on the sidewalk. This would be direct evidence. It is something the witness has seen, felt and heard with respect that it was actually raining that morning.

The only question for the jury would have is whether or not the witness was telling the truth or whether the witness was perhaps honestly mistaken.

Suppose, instead, the witness testified when the witness was approaching the subway and entered the subway that it was not raining, there was no sign of rain, but that later, while on the train,

at the various stops along the route, the witness saw passengers enter with umbrellas dripping wet, dripping wet clothing, goulashes and so forth. In that situation it would be reasonable to infer that it rained or the rain commenced while the witness was on the subway.

In other words, circumstantial evidence is evidence of facts which are inferred or deduced from the direct evidence. It is direct evidence for the witness to say that on the way to the subway it was not raining. It is also direct evidence for the witness to say that after entering the subway the witness observes people with wet clothing coming on the subway. Circumstantial evidence is the inference which can reasonably be drawn from direct evidence.

In our example a reasonable inference would be that it had begun to rain after the witness entered the subway.

In a trial, where circumstantial evidence is presented, the jury must perform two functions. First the jury must apply the usual tests of credibility to determine whether a witness has told the truth about what the witness saw, felt or heard.

If the jury accepts those facts as true, then it must use its powers of reasoning and logic to determine whether those facts support the inference beyond a reasonable doubt, which in our hypothetical case was, that it had begun to rain after the witness had entered the subway. In other words, does the fact that the passengers entered the subway subsequent to the witness getting on the train in the manner described lead to the conclusion that those passengers came in out of the rain from the street?

Now, without realizing it, all of us make vital decisions every day based solely upon circumstantial evidence, depending upon the facts and circumstances of each case, and the credibility of each witness. Circumstantial evidence can have the same value as direct evidence. The value of the inference or conclusion that one draws depends upon the facts of a given case. It may be a very strong inference or it maybe a very weak inference. This determination is solely yours to make as members of the jury. It is up to you, the jury, using your good common sense, to determine the strength of the inference.

The necessity of employing circumstantial evidence in certain cases is obvious. By its very nature crime and the decision to commit a crime is often done in secrecy, thus rendering direct evidence of its commission impossible. Circumstantial evidence may be used in any case. However, for such evidence to be valid the inference or conclusion to be drawn from it must flow naturally from and be consistent with the proving facts and must point to the guilt of the defendant.

In order for to you convict the defendant in this case it must appear that the inference of guilt is the only one which can be fairly and reasonably drawn from the facts and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis but guilt. If this is the case, then you must draw the inference of guilt. On the other hand, if an inference of non-guilt can also reasonably be drawn after consideration of all credible evidence in the case, then you must draw the inference of non-guilt.

Now, ladies and gentlemen, there has been testimony in this case by various police officers and special agents, people who are employed by the

Alcohol, Tobacco and Firearms Division of the Treasury Department. And I charge you that you must use the same yardstick in measuring the credibility and value of all the testimony, whether given by a police officer or an individual whose engaged in law enforcement, by that witness or any other witness. Give them all the same weight and credence, all things being equal. But you must not give greater or lesser probative value to their testimony because the testimony is from a law enforcement agent. The fact that a witness is a police officer or law enforcement agent does not disqualify that individual as a witness, for that witness is no better or, on the other hand,, no worse than any other witness in the case merely because the witness is a member of the police force or some other law enforcement agency. You must treat that testimony the same as that of any other witness, the testimony of a police officer or a law enforcement.

You may not be arbitrarily excluded or accepted testimony merely because the witness is a member of the respective forces, police or law enforcement.

So, weigh that testimony and credibility as you weigh the testimony and credibility of any other witness.

Now, the People have called in this case Detective Breslin, and they've also called other individuals who were qualified as experts. And I believe Mr. Czarnopys - - I'll probably never pronounce it correctly - - and Mr. Rosotti was called by the defense as an expert, I believe.

Is that correct?

Now, the law in this state permits an expert who is skilled in his particular science not only to testify to facts which the witness has personally observed, like any other witness, but to give opinions on matters of a scientific nature. This is allowed because an expert is supposed, from his experience, research and study to have a peculiar knowledge of the subject of the inquiry. And an expert is supposed to be more capable than an layman of drawing conclusions from facts and base his opinion upon them.

Such testimony is presented to you to assist you in your deliberations. No such testimony is binding upon you, however, and you may disregard

such testimony either in whole or in part.

I do not intend to instruct you that you are to disregard the testimony of an expert witness, but neither are you to accept such opinions without question, merely because the expert witness is an expert in his field.

If you accept the reasoning and opinion, you may adopt the expert's conclusion. If you do not accept the reasoning and opinion, then you may disregard the conclusion.

I charge you that the fact that the defendant choose not to testify is not a fact from which any inference unfavorable to the defendant maybe drawn.

Now, ladies and gentlemen, there are certain presumptions of law that apply to this case and to every criminal case to which I must call your attention and which you must keep in mind throughout your deliberations.

In this and in every criminal case the accused is presumed to be not guilty and that presumption remains with him throughtout the trial, until his guilt is proved beyond a reasonable doubt. That presumption goes right through the trial and it exists right now at this very moment and it accom-

panies you when you go into the jury room. The only way it can be destroyed is by all of you agreeing on the basis of the evidence that the defendant is guilty. You must start by saying the defendant is not guilty and only if the evidence which you accept and believe convinces you beyond a reasonable doubt, then the presumption must be discarded and a verdict of guilty returned. And only then is the presumption destroyed.

This burden of proving to your satisfaction guilt of the defendant beyond a reasonable doubt remains upon the prosecution throughout the trial. It never shifts to the defendant. No defendant is required to prove his innocence.

And each element of any of the crimes submitted to you, as I will define the elements, must be proved to your satisfaction beyond a reasonable doubt. As I explained to you, the rule of law is that the defendant's guilt as to each and every element of the crime submitted to you by the Court must be proved beyond a reasonable doubt by the prosecution. If this burden is not furfilled, you must acquit the defendant. If the that burden is furfilled, then you may convicted the defendant.

Having used that phrase several times, reasonable doubt, what is the meaning of the term reasonable doubt?

In order to understand the term, first I will tell you what a reasonable doubt is not.

A reasonable doubt is not just any kind of doubt, a mere whim, guess or surmise or feeling that an accused may not be guilty. The human mind can conceive of a doubt on almost anything. It is not a requirement of prove beyond all doubt. It is not prove to a mathematical or scientific certainty. On the other hand, it is not proof that the defendant is guilty by a mere preponderance of the weight of the credible evidence, as some of you who have sat in a civil case understand the rule to be in a civil case, for proof of a defendant's guilt by a mere preponderance of the credible evidence is not sufficient to prove the defendant's guilt in this or in any other criminal case.

Now, this rule of reasonable doubt is not to be used by any juror as an excuse or subterfuge to avoid performing what he or she may consider to be a disagreeable duty.

Having indicated to you what a reasonable

doubt is not, I shall now tell you what a reasonable doubt is.

A reasonable doubt is a doubt which you consciously have after the use of your powers of reasoning, which arises out of the credible evidence or the lack of credible evidence. It is a doubt for which you can give a reason. The standard of reason must prevail. And when you are convinced that you have no doubt and reason of a defendant's guilt, then that is sufficient and you must render a verdict accordingly. So that after fully, fairly and conscientiously considering and weighing all of the evidence, using the same power of reasoning, power of decision that you would apply and do apply to weighty and important matters relating to your personal and business affairs, if you then believe that each element of a particular crime submitted to you have been established beyond a reasonable doubt, you may find the defendant guilty of that crime beyond a reasonable doubt. On the other hand, if you have such a reasonable doubt arising out of the credible evidence or the lack of it as to any element of the particular crime submitted to you, the benefit of that doubt must be given to the

defendant and you're verdict must be not guilty.

We now come to the second part of the Court's charge, which I told you at the outset I would read to you the indictment and instruct you with respect to the material, legal principles appliable to the crimes with which this defendant is charged.

The first count of the indictment - - you'll pardon my voice, it has acquired some difficulty.

The first count of the indictment reads as follows:

The Grand Jury of the County of New York, by this indictment, accuse the defendant of the crime of an attempt to commit the crime of murder, in the second degree, in violation of Penal Law Section 110/125.25, subdivision 1, committed as follows:

The defendant, in the County of New York, on or about July 17th, 1990, with intent to cause the death of Josephine Mendez, attempted to cause the death of Josephine Mendez by shooting her.

The second count.

And the Grand Jury aforesaid, by this indictment, further accuse the defendant of the crime of an attempt to commit the crime of murder, in the second degree, in violation of Penal Law Section

110/125.25, subdivision 1, committed as follows:

The defendant, in the County of New York, on or about July 17th, 1990, with intent to cause the death of Myra Franza, attempted to cause the death of Myra Franza by shooting her.

The third count:

And the Grand Jury aforesaid, by this indictment, further accuse the defendant of the crime of an attempt to commit the crime of murder, in the second degree, in violation of Penal Law Section 110/125.25, subdivision 1, committed as follows:

The defendant, in the County of New York, and else where, on or about February 4th, 1991, with intent to cause the death of another, attempted to cause the death of Rosa Roman.

And the last count:

And the Grand Jury aforesaid, by this indictment further accuse the defendant of the crime of criminal possession of a dangerous weapon, in the first degree, in violation of Penal Law section 265.04, committed as follows:

The defendant, in the County of New York, on or about February 4th, 1991, possessed an explosive substance with the intent to use same unlawfully

against a person or property of another.

Now, let me just develop a little shorthand with you so I need not be repetitious. You have four counts. The first three counts deal with attempted murder. They are identical. The first and second count are identical only in the first count it refers to attempting the cause the death of Josephine Mendez and the second count refers to attempting to cause the death of Myra Franza. The third count refers to attempting to cause the death of Rosa Roman.

Now, the definitions that I give you apply to each of these counts.

Is that understood?

I don't have to repeat the definitions three times, but I assure you it is the same definitions.

Now, a person, according to the law, is guilty of murder, in the second degree, when, with the intent to cause the death of another person, he causes the death of such person.

Now, according to the law, a person intends to cause the death of another person when his conscious aim or objective is to cause the death of that person.

Now, the law defines the term intentionally as follows, and I quote:

A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

Intent is a secret, silent operation of an individual's mind and the mental purpose to do a particular act or to a achieve a definite result. From the very nature of things, it may be difficult to ascertain what goes on in a person's mind, except by what that person says or what that person does or a conbination of both. You cannot look into a person's mind. Intent is a mental operation, as a rule, known only to the person themselves. And the only possible way for human judgement to ascertain or determine the mental operation on the question of intent is by the declarations or acts of a defendant and the reasonable rationale and fair inferences from these declarations and acts. So that a person's intent, as a rule, can be proved only by what he said or does and the circumstances surrounding the act in question.

Such intent may be proved by direct evidence

or may be proved by circumstantial evidence from all the circumstances in the case or may be proved by a conbination of both.

Now, with respect to count 1, in order for you to find the defendant guilty of the crime of attempted murder, in the second degree, the People are required to prove to your satisfaction beyond a reasonable doubt the following elements:

That on or about July 17th, 1990, in New York County, the defendant sent an individual to kill Josephine Mendez and that that individual - - and, in fact, that individual did shoot Josephine Mendez.

And if you find that the People have proved these elements beyond a reasonable doubt, then you must convict the defendant.

If, on the other hand, if you find the People have failed to prove any or all of these elements beyond a reasonable doubt, then you must find the defendant not guilty.

With respect to the second count of the indictment, in order for you to find the defendant guilty of the crime of attempted murder, in the second degree, the People are required to prove beyond a reasonable doubt the following elements:

That on or about July 17th, 1990, New York County, the defendant send an individual to kill Myra Franza and that that individual did, in fact, shoot Myra Franza.

And if you find that the People have proved these elements beyond a reasonable doubt, then you must convict the defendant.

If, on the other hand, you find the People have failed to prove these elements to your satisfaction beyond a reasonable doubt, then you must acquit the defendant and find him not guilty.

The third count involves the sending of a pipebomb to Rosa Roman in Puerto Rico.

Now, it is not contested in this case that at the time that the pipebomb was received in Puerto Rico Rosa Roman had been deceased for sometime. A matter of months. Under our laws though it is not a defense to an attempted crime that under the given circumstances the crime was factually impossible to commit. The fact that Miss Roman had passed on did not make it impossible - - which would make it impossible to commit, but the law still recognizes that crime.

So, with respect to that third count, in order

for you to find the defendant guilty of that crime of attempted murder, in the second degree, the People are required to prove to your satisfaction beyond a reasonable doubt that on or about February 4th, 1991, in New York County, the defendant caused a pipebomb to be sent to the home of Rosa Roman in Puerto Rico, with the intent to kill her by means of an explosion and that at the time the defendant caused the pipebomb to be sent he believed that Rosa Roman was alive.

If you find that the People have proved these elements beyond a reasonable doubt to your satisfaction, you must convict the defendant.

If, on the other hand, you find that the People have failed to prove these elements beyond a reasonable doubt, you must acquit the defendant and find him not guilty.

Now, when I read to you each of these charges, in each of these charges, the three attempted murders, the word is attempt, attempt to commit the crime of murder, in the second degree. The defendant is not being charged with a completed act of murder. He's charged with an attempt to commit murder. This is a crime separate from a completed,

as a distinction between attempted murder and murder.

A person is guilty of an attempt to commit a crime when with the intent to commit a crime he engaged in conduct which tends to affect the commission of such crime.

Conduct means an act and its accompanying mental state.

Thus, before the defendant may be convicted of an attempt, the People must prove beyond a reasonable doubt; one, an act done or steps taken towards the accomplishment of the crime, namely, murder, in the second degree.

An intent to commit a crime, in this case murder, in the second degree, and act or acts tending towards its commission, all these elements must be present, unless there are no considerations for an attempt to commit the crime can be had as they have, of course, must be proved by the People beyond a reasonable doubt. The act must be an overt act, that is, a physical act as distinguished between an act of the mind. A physical act done pursuant to a formed criminal intent, designed or planned. There must be some physical act before mere - - because

mere intent is not enough. The intent required is a specific criminal intent to commit the crime.

I've already defined for you the term intent and that definition applies here as well.

Intent means to exert activity in a particular direction. You may say an act or acts in preparation to commit a crime may have a tendency towards accomplishment. However, the law tries to be practical and, therefore, considers only those acts as tending towards the commission of the crime which is so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for some timely interferance. In other words, the act must come or advance very near to the accomplishment of the intended crime.

And the defendant is charged in this case with the three counts, on the three individuals, the first one Mrs. Mendez, attempted murder, the second one Myra Franza, the attempted murder, and the last one, the pipebomb of Rosa Roman.

Is that understood?

Now, it is the People's theory in this case that the defendant was acting in concert with others in the commission of the crimes that I've

just charged you. And it becomes incumbent upon me to advise you what the law means by the phrase acting in concert.

The People claim that the defendant combined with another or others to commit these unlawful acts. Where an unlawful act is sought to be affected and two or more persons actuated by a common purpose of accomplishing that work together in anyway in furtherance of the unlawful scheme, each and everyone of the said parties becomes a member of such unlawful undertaking. All persons who intentionally participate in the commission of a crime and when acting with the mental culpability required are accomplices of each other and, therefore, are legally guilty for the commission there of the crime.

In this case connection, Section 20.00 of the C.P.L., criminal liability for the conduct of another, reads as follows:

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when acting with the mental culpability required for the commission thereof he solicits, requests, commands, importunes or inten-

tionally aides such person to engage in such conduct.

First of all, it is obvious that you can commit a crime in several ways. You may commit a crime first by doing it yourself, which is obvious. Under the statute you can commit it by soliciting, requesting, commanding or importuning someone else to commit it for you. You can also commit the crime by intentionally taking part in it along with someone else.

Now, a person acts intentionally with respect to a result or with respect to conduct when his conscious objective is to cause a result or engage in such conduct.

A person who intentionally commits acts in furtherance of a crime is responsible not only for his own acts but also for the acts of any person who takes part in its commission with him.

Under the statute, anything intentionally done by a person in furtherance of a particular crime, whether it contributes little or much to its consummation, makes that person in the eyes of the law guilty of the crime.

If you have two people and one only contributes

the plan, say one percent of the activity, and the actual doer contributes ninety-nine percent, in the eyes of the law they are equally guilty. The law does not aportion guilt on a percent basis.

Do you understand that concept?

One must have taken part in the preparation or the preparation of the crime with an attempt to assist. Mere knowledge of an intended commission of a crime is not sufficient. Mere presence at the scene of a crime is also insufficient.

To be guilty of the crime, within the meaning of Section 20 of the Penal Law, a person's presence at the place of occurrence must be accompanied by evidence that he in some manner solicited or assisted in the commission of the crime and that he engaged in this conduct with the mental culpability required for the commission of the crime.

So, on those three counts, just once again it is by way of a shorthand review, attempted murder, attempted murder, in the second degree, three named individuals, the two being shot, and the third individual a bomb was sent, and I've explained to you attempted and acting in concert and how the law does not aportion, if you find these facts, you

cannot apportion the response or guilt.

Now, we now come to the fourth charge, which I read to you and I guess I might well read it to you again.

And the Grand Jury, by this indictment, further accuse the defendant of the crime of criminal possession of a dangerous weapon, in the first degree, in violation of Penal Law Section 265.04, committed as follows:

The defendant, in the County of New York, on or about February 4th, 1991, possessed an explosive substance with the intent to use same unlawfully against a person and property of another.

This section, insofar as it is applicable to this case, reads as follows: I'm quoting to you from the law.

A person is guilty of criminal possession of a dangerous weapon, in the first degree, when he possesses any explosive substance with intent to use it unlawfully against a person or property of another.

In order for to you find the defendant guilty of this crime the People are required to prove from all the evidence in the case beyond a reasonable

doubt to your satisfaction each of the following elements:

That on or about February 4th, in the County of New York, the defendant possessed a certain object, which I believe was introduced as - - is that People's 54, the pipebomb?

That's what my notes tell me that but I may stand corrected.

No, it is not 54.

MR. BRANCATO: Yes, Judge, it is 54.

And then there was substitution of A through J.

THE COURT: All right.

Now, according to the law, to possess means to have physical possession or otherwise to exercise dominion or control over tangible property.

Now, in that connection I might also tell you that possession may also be constructive, when an individual at a given time exercised dominion or control or a weapon, either directly or through another person or persons.

Possession of property must be knowing possession, that is, the alleged possessor must be aware of his possession of the property and that what the

defendant possessed was, in fact, an explosive substance and that the defendant knowingly possessed an explosive substance.

According to the law, a person knowingly possesses an explosive substance when he is aware that he possesses that explosive substance and that the defendant possessed the explosive substance with intent to use it unlawfully against a person or property of another.

According to the law, a person intends to use an explosive substance unlawfully against another when his conscious aim or objective is to uses it unlawfully against another.

The fact of an intent on the part of a person who possesses an explosive substance to use such explosive substance unlawfully against the person or properties of another is again often the secret operation of a person's mind. Therefore, the law permits but does not require the jury to presume or infer intent in some circumstances.

According to the law, the possession by any person of an explosive substance is presumptive evidence of possessing such substance with intent to use the same unlawfully against the person or

property of another. This means that after consideration of all the evidence in the case you may presume from the defendant's possession of a explosive substance that he possessed it with intent to uses it unlawful against the person or property of another or you may rejected such presumption or inference.

However, the fact that you may infer such unlawful intent does not shift to the defendant any burden of proof whatsoever. The burden of proof remains on the prosecution throughout the case.

Therefore, with respect to this last counted of the indictment, if you find that the People have proved to your satisfaction beyond a reasonable doubt each of the elements that I've just explained them, that on or about February 4th, 1991, in the County of New York City, the defendant possessed a certain object, which was introduced by the People as People's 54, and there was subdivisions it, A through J or E?

I have through G, as a matter of fact.

And that the defendant - - and what the defendant possessed was, in fact, an explosive substance and that the defendant knowingly possessed the

explosive substance and the that the defendant possessed the explosive substance with the intent to use it unlawfully against the person or property of another, then you must find the defendant guilty of the crime of criminal possession of a dangerous weapon, in the first degree.

On the other hand, if you find that the People have failed to prove to your satisfaction beyond a reasonable doubt anyone or more of these elements, then you must find the defendant not guilty of the criminal possession of a dangerous weapon, in the first degree.

(Off the record discussion between Mr. Brancato and Mr. Brenner.)

THE COURT: Now, having alluded to one of the exhibits, and I will indicate to you in a moment that all exhibits you are entitled to and you can examine them in the jury room, however, anything which is contraband, the jury will be required to return to the courtroom and it will be exhibited in the courtroom.

But with respect to - - now, I want counsel to correct me because I want to make certain I'm referring to the correct exhibit. People's 41 in

evidence, and that's 41, is that also A through E?

MR. SHEINDLIN: Yes.

THE COURT: That exhibit and People's 45 in evidence refer to, quote, as the Franza file, those exhibits are being - - have been admitted and you may inspect them. You may inspect them for any purpose that you wish. However, you are not to consider the substantive content of those exhibits.

Do you understand?

I don't care if it talked about World War III in this, that's not the purpose of that exhibit, nor can it have any or may you have any consideration of the substance. You can look at it for whatever other purpose you wish, but not as to its substantive content, which has no relationship to the matter under your consideration.

Is that understood?

I merely give that you caveat with respect to those exhibits.

Now, ladies and gentlemen, when you enter the jury room to commence your deliberations you will find various opinions and conclusions amongst yourselves. You should make every effort to harmonize the various views expressed by the different

jurors and make every effort to come to an agreement as far as the facts in this case are concerned. You must not go into the jury room with a closed mind or refuse to listen to the opinion of other jurors or to decline to discuss the evidence with your fellow jurors. You should always be open to reason and listen to the opinion of other jurors in the jury room.

However, you have a right, if you believe you are right, to stick to your arguments and your conclusions. All I'm saying is that you should not close your minds so as to prejudice the conclusions to be arrived at without at least listening to the arguments advanced by your fellow jurors, who, I am sure, are just as much interested in coming to an honest decision in this case as you are.

Ladies and gentlemen, make every effort consistent with your conscience and the evidence in this case to harmonize your views and decisions in the interest of justice and fair play with the views of your fellow jurors. To the best of your ability I ask you to apply common sense and good judgement, to be impartial, fair in your judgement. Do not let sympathy or prejudice sway your minds in

anyway in analyzing the testimony. Decide this case on the evidence and under the law as I have given it to you.

You're verdict, as you know, in this case must be unanimous, that is, all twelve of the jurors must unanimously agree and your verdict will be announced through your foreperson.

At no stage of your deliberations should you send word out to me as to how you stand on the ballot, that is, unless you find yourself hopelessly deadlock and then, of course, send word out.

You may, however, ask for any re-reading of any portion of the testimony and you may ask any question with respect to the Court's charge on the law.

And once again, with respect to the exhibits, as I already indicated to you, you may have them all, except if it is contraband and that would have to be exhibited in the courtroom.

You will be given a verdict sheet.

Has counsel had an opportunity to see the verdict sheet?

MR. BRANCATO: Not yet, your Honor.

THE COURT: You'll be given a verdict sheet in

which you'll find those four counts that I've enumerated for you, the first three with respect to attempted murder and the last counts with the possession of of that dangerous weapon. Instrument.

Before I ask you to commence your deliberations, counsel and the reporter are invited to a sidebar.

(Whereupon, the Court and all counsel being present at the sidebar, out of the hearing of the defendant and the jury, the following proceedings commenced:)

THE COURT: First, any exceptions?

MR. BRENNER: Yes.

THE COURT: Okay.

MR. BRENNER: If I maybe heard, Judge?

THE COURT: Yes.

MR. BRENNER: First of all, I would like my submission marked as a court exhibit. I don't believe it has been done.

THE COURT: All right. You mean your request?

MR. BRENNER: My defense request to charge.

THE COURT: All right.

MR. BRENNER: If that will be done, then I will limit my exceptions for charges included in

that request to the degree that they were not charged by the Court.

That includes the failure to charge motive, which I believe is mandatory in a circumstantial evidence case of this nature.

To that end I cited several cases in the request to charge.

THE COURT: All right.

MR. BRENNER: In addition, I take exception to the Court's, forgive my directness, it is late in the day, the truncated nature of the circumstantial evidence charge.

THE COURT: Why was it truncated?

MR. BRENNER: The form that I submitted, which except for the sample was right out of the P.J.I., states certain aspects of the charge which the Court did not include. And to that extent I take exception.

THE COURT: Well, rather than take exception. if it is something I can agree with you, I can still give that addendum to the charge.

MR. BRANCATO: If I may, your Honor?

THE COURT: Here, Mr. Brenner. Is that yours?

MR. BRENNER: Yes.

THE COURT: Just allude to it directly so if it is something I can agree with I can correct it.

MR. BRENNER: P.J.I. Breaks down into a distinction into elaboration of what circumstantial facts are and directs the jury to all circumstantial facts must be proved by direct evidence.

THE COURT: Yes.

MR. BRENNER: Any circumstantial fact not so proved must be disregarded.

THE COURT: Incidently, the P.J.I. is not the only approved charge.

MR. BRENNER: Yes.

THE COURT: I just don't want you to think for a moment if it doesn't incorporate the precise language of the P.J.I. it is inherently -

MR. BRENNER: I don't take that position.

THE COURT: All right.

MR. BRENNER: In addition, in discussion of the inference of guilt, the form that I submitted says to justify you in inferring guilt from the circumstantial facts proved, such an inference must flow reasonably and naturally from the facts proved and each circumstantial fact must point in the direction of and be persuasive of guilt logically

and not by guess work.

THE COURT: All right.

MR. BRENNER: In addition, there is a charge that the circumstantial facts considered by you must point exclusively in the direction of guilt and are inconsistent with any rationale, where the Court did not so charge.

THE COURT: All right, any other exceptions?

MR. BRENNER: Yes, your Honor.

I believe that the Court, again, respectfully, mis-charged the entire concept of accessorial liability and the vis-a-vis the three counts of the indictment.

The way this stands now, it charged that if the People prove beyond a reasonable doubt that Dominic Franza sent a killer, they must find him guilty. That is not the law. The law is if at the time he sent the killer, did something along those lines, he had the requisite mental intent.

The Court did not put the elements of the counts together with the later charge. And it certainly did not include any direction that the People must prove accessorial conduct by - - beyond a reasonable doubt.

THE COURT: I believe I said that. But if I didn't, I'm going to repeat that.

What else?

MR. BRENNER: In addition, you charged that an inference may be drawn from the possession of the dangerous weapon, that the intent is to use it to harm.

THE COURT: Yes.

MR. BRENNER: I believe, your Honor, that that inference applies only if the possession has been proven by direct evidence. Because if not, then the jury is being asked, first, to infer that the defendant possessed the weapon and then. On top of that, to couple it with a second inference, piling one inference on top of another.

Therefore, I believe the law is the inference is only discharged in the instance where possession has been directly - - proven by direct evidence. Even constructive possession is proven by direct evidence.

THE COURT: All right.

MR. BRENNER: In this case it was not direct possession, direct evidence possession case. So, I believe it was improper to charge the inference.

THE COURT: All right. Mr. Brancato?

MR. BRANCATO: Mr. Sheindlin will answer, Judge.

THE COURT: Okay.

MR. SHEINDLIN: First of all, we have no objection to the charge, except I'm not sure that when you said that the acting in concert was charged.

THE COURT: Acting in concert?

MR. SHEINDLIN: He said was a mis-charge under acting in concert. I don't know about that.

If what he said was accurate, I'm sorry, I didn't pick up on it, then he's correct. But otherwise I don't have any exception to any of the other charges.

MR. BRENNER: I believe, your Honor, that the proper charge for that would be to say that the People must prove two elements beyond a reasonable doubt; first, that the defendant possessed the requisite mental culpability at the time; and, second, that he requested, importuned or solicited, all beyond a reasonable doubt. That's not the way this charge reads. The way the Court charged the jury is that if they find beyond a reasonable doubt

that Dominic Franza sent someone to kill Josephine Mendez, that's a special verdict, in effect, because from the prosecution's point of view if they found it was some other theory they could acquit him, which wouldn't be consistent with accessorial liability.

MR. SHEINDLIN: I'm not sure if that's different than what you were suggesting that he charge.

THE COURT: I'm looking for the language.

MR. BRENNER: Just in point of reference, this is what the C.J.I. charged on that. And I didn't do anything special to this. I took it out of the book.

THE COURT: You see, this is more confusing.

MR. BRENNER: I don't mean this, I mean this.

THE COURT: You mean the hightlight?

MR. BRENNER: Yes, the bottom.

THE COURT: Yes, but in order to do the highlight you have to repeat what's up here and this is confusing.

MR. BRENNER: You split the charge on the counts from your explanation of accessorial liability. You didn't charge them together.

THE COURT: I charged the substantive law and

then I charged accessorial liability.

MR. BRENNER: Okay. I take exception to the charge.

THE COURT: All right. I just want to make certain that there is no - -

MR. SHEINDLIN: Are you going to repeat the charge?

THE COURT: I might very well on accessorial.

THE COURT: Let me hold off. What do you have?

MR. SHEINDLIN: I have nothing to add.

THE COURT: I wouldn't do it until I discuss it.

Do you have anything to request?

MR. BRENNER: I just wish to have that marked.

MR. SHEINDLIN: Not to the charge, it is you said that if they have the two exhibits, 41 and the other one - -

THE COURT: They'll get all the exhibits.

MR. BRENNER: We have to redact that.

THE COURT: Anything has to be redacted?

MR. BRANCATO: The problem - -

THE COURT: Whatever has to be redacted, I will expect you will redact that.

MR. SHEINDLIN: I just want to make sure.

THE COURT: All right.

MR. SHEINDLIN: That's it.

THE COURT: I'm going to give them the part of the charge from the C.J.I. First element, second element and then I'll tell them if the People have proven the essential elements beyond a reasonable doubt, then they may find the defendant guilty as to the conduct of someone else.

MR. BRANCATO: They must.

THE COURT: They must.

But if you find. With respect to either or both, if you find with respect - - no. That's not what I want to give.

If the People prove all such elements to your satisfactory beyond a reasonable doubt, you may find this defendant guilty of the crime of attempted murder. On the other hand, if the People failed to prove all or any or more of the elements - - now we're talking here - - we're talking about the elements of acting in concert as opposed to the elements of the crime itself. They are two separate matters.

MR. BRENNER: Right.

THE COURT: What I'm really thinking about is

giving them another charge entirely which is to the affect that although it is alleged that the defendant acted with another, there is only one defendant on trial here. And that's what I'm prompted now to give the jury.

The People's theory is that the defendant acted with another in the commission of the crime. The defendant is the only person on trial here and then I'll charge the absence of the other person and the possible reason plays no role in the deliberations as to this defendant's guilt or non-guilt.

Then I have this concept.

I think that's what I'm going to do.

(Whereupon, the Court and all counsel returned to the open courtroom, the following proceedings commenced:)

THE COURT: Members of the jury, in the course of my charge I charged you with respect to acting in concert.

I charge you now also that, as I did before, that it is the People's theory in this case that the defendant acted with another, that is, he, the defendant himself, did not perpetrate at least the

shooting acts and that it is the People's theory that whether the defendant himself perpetrated these acts, he was acting in concert with another.

Now, the defendant is the only person on trial here and I charge you that the absence of any other person or any possible reason for that absence must play no role in your deliberation as to this defendant's guilt or non-guilt.

As I charged you, the defendant - - the People's position is that the defendant and another committed these crimes and are seeking to hold the defendant criminally responsible for his on acts and the acts of another. This concept of holding one person responsible for the conduct of the another is called the principle of accessorial conduct or acting in concert, accessorial responsibility.

I've already charged you that the law does not apportion responsibility. Each person would be equally liable.

Now, with respect to accessorial conduct or acting in concert, there are elements, there are two elements.

First element: The People must prove that

the defendant in this case acted with the mental culpability required for the commission of the crimes of attempted murder.

They must also prove, as an essential element, that Mr. Franza's, the defendant, solicited, requested, importuned or intentionally aided the shooter in the commission of the crime.

If the People prove both those elements, that he acted with the mental culpability required for the commission of the crimes and that he either solicited, requested, commanded or importuned or intentionally aided the shooter, if the People prove both essencial elements to your satisfaction beyond a reasonable doubt, then you must find the defendant criminally liable for conduct of the shooter and you may convict the defendant.

If, on ther other hand, the People failed to prove either or both of these elements beyond a reasonable doubt to your satisfaction, then you must find Mr. Franza is not guilty.

Do you understand that?

Those are the elements as to acting in concert, separate from the elements I gave you as to the crime itself.

Now, ladies and gentlemen, you now have the case.

And when the jury retires, the first thing I'll ask is for the two alternatives to return to the courtroom.

Ladies and gentlemen, you now have the case.

Take the jury out.

And the alternate jurors will return.

Counsel, back at the bench.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: All right, we'll mark the defense request to charge as a court exhibit.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

(Whereupon, the two alternate jurors returned to the open courtroom.)

THE COURT: Lady and gentlemen, we'll keep you separate from the other jurors, you'll be separated, except for when you eat.

(Whereupon, the two alternate jurors left the courtroom.)

(Whereupon, the Court took a recess awaiting the verdict of the jury.

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, bring in the jury panel.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorneys and the sworn jurors are present, your Honor.

THE COURT: Ladies and gentlemen of the jury, I have your most recent note, which is a addressed to me, and reads the jury requests a clarification of the fourth charge.

Please define the word possession.

Also, is the weapon, the pipebomb, sent to Puerto Rico?

Thank you very much.

Signed by your foreperson.

Now you'll recall, ladies and gentlemen, earlier this day or evening I charged you with respect to the fourth count of the indictment, criminal possession of a dangerous weapon, in the first degree.

Now, let me just answer briefly the second question that you posed: Is the weapon the pipebomb?

Yes. The answer to that is yes, in simple language.

But with respect to possession, as I charged you and I so charge you again, that section, 265.04 of the Penal Law of our state, insofar as it is applicable to this case, reads as follows:

A person is guilty of criminal possession of a dangerous weapon, in the first degree, when he possesses any explosive substance with intent to use it unlawfully against a person or property of another.

In order for you to find the defendant guilty of this crime the People are required to prove from all the evidence in the case beyond a reasonable doubt to your satisfaction each of the elements as I enumerated them; that on or about February 4th, 1991, in the County of New York City, the defendant possessed a certain object, which was introduced into evidence as People's Exhibit 54.

And then I charged you and so I do again, according to law possess means to have physical possession or to exercise dominion or control over tangible property.

I also told you about constructive possession. Now, with respect to constructive possession, I want to elaborate slightly for you so that you have, if that, in fact, addresses your question, a person who while not in physical possession knowingly has both the power and the intent at a given time to exercise dominion or control over the weapon, either directly or through another person or persons, is then in constructive possession of such weapon.

In other words, possession is constructive when the weapon is found not on the person of the

defendant but instead in a place or thing or person over which he had dominion and control. It could be anywhere.

And the proof establishes to your satisfaction that he, meaning the defendant, in fact, possessed the weapon to the extent that he had the authority to do it with it as he wished, whether to use it, keep it or otherwise dispose of it.

Thus, a person constructively possesses a weapon when he has such dominion and control over it that it remains available to him at all times for its use or other disposition in the place where he has stored it, concealed it, secreted it, whatever.

Whether the defendant in this case constructively possessed a weapon is an issue of fact for you to determine. The defendant is not required to prove that he did not constructively possess the weapon. The burden of proof is on the People to establish beyond a reasonable doubt that the defendant was, in fact, the unlawful possessor of the weapon.

Now, I can go on to charge you the rest of the charge with respect to criminal possession and the

elements, if that's what the jury wants. I can do that or have I been responsive on the issue of possession?

I have no way of reading beyond the note. Do you follow me? Unless there is some indication, I'll just re-charge you completely on that.

FOREPERSON: Okay.

THE COURT: That's sufficient for the jury?

FOREPERSON: Yes.

THE COURT: I'll ask you to retire and continue your deliberations.

Take the jury out.

(Whereupon, the sworn jurors and the alternate jurors left the courtroom.)

THE COURT: We'll mark this note as a court exhibit.

(Jury note, so marked Court Exhibit Number IX.)

MR. BRANCATO: Your Honor, can we have the notes from the jury that were previously received marked as Court Exhibit Number VII, number VIII, number X and number VI?

THE COURT: All right.

(Jury notes, so marked Court Exhibit Number

VI, Court Exhibit Number VII, Court Exhibit Number VIII and Court Exhibit Number X.)

(Whereupon, the Court took a recess awaiting the verdict of the jury.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

MR. BRENNER: Your Honor, may we approach, please?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Bring out the panel.

COURT OFFICER: Jury is entering.

THE COURT: Jury entering.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: We have another note. Does this clarify the first one?

(Pause.)

MR. BRENNER: May we step up, Judge?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen, before I get to your most immediate note, I have your previous note, in which I'm not certain that I can respond to unless I have some parameters set forth.

The notes reads as follows: Addressed to me. Please read back Detective Breslin's testimony that refers to the handwriting on the note on the flower box and the exemplars provided by the defendant to Detective Giorgio.

Now, in deciphering this note it is open to many possibilities. So, I'm trying to address myself without speculating.

Does the jury seek Detective Breslin's testimony in the first instance with respect to the handwriting on the note on the flower box?

FOREPERSON: Yes.

THE COURT: Now, is that in the conjunctive or disjunctive and the exemplar provided by the defendant to Detective Giorgio?

Do you seek Detective Giorgio's testimony or Detective Breslin's testimony as to the exemplars he received from Detective Giorgio?

FOREPERSON: Detective Breslin's testimony.

THE COURT: Detective Breslin's testimony as to the exemplars that he received from Detective Giorgio?

JUROR NUMBER 2: The identification.

FOREPERSON: The comparisons between the two handwritings.

THE COURT: Now, the exemplars as to any particular writing or?

FOREPERSON: The exemplars that were - -

JUROR NUMBER 2: The first one. Requested that he copy from the note, the ten.

FOREPERSON: That states the same thing.

THE COURT: Do you have those exhibits or do

we have them out here?

FOREPERSON: We have them.

How long would that take to be responsive to that?

The Court Reporter informs the Court that in order to isolate those portions is going to require that he search the record extensively. That's going to take considerable time.

So, I want to make certain though, because I'm not convinced that I understand.

Detective Breslin's testimony, you want it just as it relates to the handwriting on the flower box?

That's what the note says. Please read back Detective Breslin's testimony that refers to the handwriting on the note on the flower box.

So, it is that alone of Detective Breslin's?

MR. BRENNER: Judge, can we step up?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen, let me put

it to you once again. Does the jury seek Detective Breslin's testimony with respect to the note on the flower box and the first exemplars for comparison purposes or the use for comparison purposes, just as it relates to that, or is there something else?

I see nods and the shake.

JUROR NUMBER 11: Only the one on the box.

THE COURT: I think it is People's 11-A, B, C, D and 12 number, that one

Let's make sure now.

FOREPERSON: Could we bring the exemplars that we would like to have compared so you'll know what exhibits numbers they are exactly?

THE COURT: We're going to have to get the numbers from you. You'll send that out by note.

But once again, so the Reporter knows what he's looking for, you want Detective Breslin's testimony with respect to the note, the handwriting on the note on the flower box and the first set of exemplars provided by Detective Giorgio?

FOREPERSON: As they compare with each other. The notes that's on the flower box.

THE COURT: Right.

FOREPERSON: On our flowers, etcetera, and

then the handwriting provided by the defendant to Detective Giorgio, which has the same writings on it.

THE COURT: We gave that to - -

FOREPERSON: And those exemplars - -

THE COURT: Turned that over to Detective Breslin who made a comparison.

FOREPERSON: Exactly.

THE COURT: That's what you want, the testimony.

FOREPERSON: The comparison between those two writings.

THE COURT: You're going to get that tomorrow because it would take too long to get it tonight.

FOREPERSON: Judge,, there has also been a request, if it is possible, to have an answer to the other question that was just sent to you.

THE COURT: You mean the second?

FOREPERSON: Yes.

THE COURT: I'll read that into the record.

Addressed to me. Reads: If the intent is to kill one person, another person is shot in the process, is the shooting of the second person attempted murder?

The answer to you is yes.

FOREPERSON: Is it possible for us to deliberate further at this time?

THE COURT: You can deliberate further, but we will not be in a position to supply you with that which you want. So, we'd only be defeating the purpose of your deliberation.

And I do not want, in anyway want, to deprive you of anything you are entitled to have, such as testimony which you now called for.

JUROR NUMBER 2: Can we talk among ourselves and decide whether we still need it or not?

THE COURT: That's your determination. But we've got to make a determination.

If the jury or if any member of the jury requests it, then the Court has an obligation to have that sent and that the jury has that before them.

FOREPERSON: Could we have a discussion among ourselves for ten minutes?

THE COURT: Not in the box.

FOREPERSON: And - -

THE COURT: Take the jury out.

(Whereupon, the sworn jurors and the alternate

jurors left the courtroom.)

(Whereupon, the Court took a verdict recess awaiting the verdict of the jury.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: We have received another note from the jury.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Bring the jury panel out.

(Whereupon, the sworn jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Members of the jury, I have your

note addressed to me, which reads: Please re-read the testimony of Detective Breslin about his analysis that allowed him to make a positive identification of the defendant as the writer of the florist note.

And was Detective Breslin's report on the above entered into evidence?

If so, we would like to see it.

We're not going to get to that testimony tonight, ladies and gentlemen.

So under the circumstances, the jury is now directed to cease your deliberations. The jury will be sequestered for the evening. You'll be returned here tomorrow morning, following your breakfast, at which time you will resume your deliberations and hopefully we'll be able to call you in as quickly as we have the information which you requested.

So, have a pleasant night.

Take the jury out. The jury is sequestered.

The alternates remain.

(Whereupon, the twelve sworn jurors left the courtroom.)

THE COURT: I address the alternate jurors.

The hour is late and the Court has determined that you will not be called upon, like in the Miss America contest, I say that without gender, unless number 1 falls out the runner-ups don't have an opportunity to serve. But we do want to thank you for all this time and your patients and your good spirits.

Now, this has been a rather long trial and you were sort of isolated from the other members of the panel when the deliberations began. I'm sure that must have been particularly horrendous. But please appreciate our efforts and whatever courtesy. If we didn't entend them, it wasn't because we thought we were being discourtesy. It was impossible under the circumstances.

On behalf of all counsel and the Court, we thank you and you are discharged from further jury service.

Good luck to you both.

(Whereupon, the two alternate jurors left the courtroom.)

(Whereupon, the proceedings were adjourned until March 11th, 1992, at nine-thirty a.m.)

* * *

FEBRUARY 11th, 1992

INDICTMENT NUMBER: 11987/91

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 32

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOMINIC FRANZA,

Defendant.

111 Centre Street

New York, New York

B E F O R E :

HON. PAUL P.E. BOOKSON,

Justice,

and a jury.

A P P E A R A N C E S :

(Same as previously noted)

TRIAL CONTINUED:

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his attorney and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: Yes, Mr. Brenner?

MR. BRENNER: Your Honor, an incident has come to my attention which took place last night. Mr. Franza informed me, and I was able to confirm it with two of the officers, that when Mr. Franza was being escorted from the courtroom in the custody of the officers, there was an encounter between Mr. Franza in the company of the officers and the Juror Number 8, I believe. And I have information that the juror saw Mr. Franza in custody of the officers. I don't know for a fact whether he did. I know Mr. Franza saw the juror.

Your Honor, there have been incidences in which such events during the course of the trial have been grounds for a mistrial. I think that inquiry should be made of the juror as to what he saw.

THE COURT: Let me understand. What exactly took place?

MR. BRENNER: Judge, I wasn't there.

THE COURT: Nor was I.

MR. BRENNER: I explained it.

THE COURT: What I'm trying to determine, what took place. And I want to also determine for my own interest, so that such conduct never happens again whether in this trial or any other trial, I want to know where the fault lies.

MR. BRENNER: Your Honor, I'm not - -

THE COURT: All this is of interest to me. Therefore, I'm asking for as much precise information as you can deliver to the Court.

MR. BRENNER: Judge, I in no way mean to suggest that it was anyone's fault.

THE COURT: I'm not asking to you make that determination.

MR. BRENNER: I believe - -

THE COURT: I want the facts as you are best able to give.

MR. BRENNER: Mr. Franza was escorted from the courtroom at the conclusion of the business yesterday.

THE COURT: Yes?

MR. BRENNER: In the company, I believe, of two officers who were on duty here.

THE COURT: Yes?

MR. BRENNER: As they passed the, I believe, the jury room or room in which a juror was located, the door opened and Juror Number 8 immerged and there was, however brief, an encounter between Mr. Franza, who saw the juror in the custody - - while he was in the custody of these two officers, and that juror.

I believe that this juror saw Mr. Franza being escorted by two armed uniformed officers from the courtroom.

THE COURT: Well, that to me is such a gratuitous, meaningless statement. Armed court officers. They are always and they are always in the courtroom.

MR. BRENNER: And jurors don't always see the defendant in their company.

THE COURT: But what was happening is not because they were armed. We don't have unarmed court officers. We have no special catagories of court officers.

MR. BRENNER: Actually, your Honor, we do have unarmed court officer.

THE COURT: What is that?

MR. BRENNER: We do have unarmed court

officers.

THE COURT: In this courtroom?

MR. BRENNER: They exist. But maybe not this this courtroom.

THE COURT: I'm not aware of them.

What I'm saying, when they saw him in the company.

THE COURT: What does that mean? Did they see him being held? Did they see him being escorted?

Supposing they saw the court officers escorting me to the elevator, would that imply something to the jurors?

MR. BRENNER: Well, if you were the defendant in the trial?

Perhaps so, your Honor.

THE COURT: Not the defendant, but as an individual. I don't think - - you see, unless there is something more, the fact that they are court officers here, that's a given. That the defendant is here, it's a given.

Now, what transpired is what I'm interested in.

MR. BRENNER: Judge?

THE COURT: For what length of time? What was

exposed to these jurors? Was the door immediately closed? Did they merely see people walking through?

MR. BRENNER: I don't know, Judge.

THE COURT: I don't know. You see, unless I know something.

Who were the officers with Mr. Franza, the defendant?

What happened, Mike, if you have a distinct recollection of this incident happening last night?

COURT OFFICER: We walked through this door and through the pen door. Mr. Franza was in the lead. He was un-cuffed. No one had their hands on him. A juror, I believe, was taking a smoke break at the time.

THE COURT: And saw everybody walking through?

COURT OFFICER: Everybody walked through.

At that point I even walked into the pen armed, because of the time of night it was. It would have been permitted. So, I just walked in and we just kept on walking. Nobody stopped at all.

THE COURT: All right.

COURT OFFICER: If I didn't mention it, the

pen door was unlocked and Mr. Franza was in the lead.

THE COURT: No one was holding him physically?

COURT OFFICER: No one was holding him. As I said, the door was unlocked. Mr. Franza opened the door and walked in and I just followed.

THE COURT: Mr. Brenner?

MR. BRENNER: Well, your Honor, I mean, the context of this situation is that the jury in this case has arrived every day and sat out in the hallway, they have seen Mr. Brancato, Mr. Sheindlin, myself, members of the family. Jamie, various court officers. They have never - - your Honor - -

THE COURT: I know what you're leading to.

MR. BRENNER: Your Honor, you asked me to make a statement.

THE COURT: But.

MR. BRENNER: I'm making it.

THE COURT: All right.

MR. BRENNER: Whether it is gratuitous or not, it is my statement.

THE COURT: All right.

MR. BRENNER: They have never seen Mr. Franza.

They are taken through the courtroom in the morning to the back and they do not see Mr. Franza, although they see all other members of the parties of this trial.

Last night, at close to midnight, they see Mr. Franza heading in the direction that is not the one that leads out of this courtroom but leads into the back. It is not unreasonable to infer, for an inference to be drawn that Mr. Franza is, indeed, in custody.

And it is - - it is a conclusion that is generally guarded against during the course of a trial.

Indeed, this Court has made efforts to guard against it in this trial.

THE COURT: The fact remains, if I were to take by extension your remarks, absent the incident of last night, that the inference may be drawn that since they do not, the jurors do not see either Mr. Franza or I at an hour earlier than all the jurors, and he's within the courtroom or its environment or he's, in fact, in custody. So, one could argue that that same inference would obtain just by virtue of the attending four weeks of trial and

never once seeing Mr. Franza arriving through the public corridor.

In addition, I should observe that I don't think the jurors are architects and know the physical configuration of this building, where doors lead to what. They know this is one door out, but they know that's another door out. They have no knowledge whether or not there is another exist. Or for what purpose it is being used.

So that, again, is speculative. But if I were to accede to your theory, that jurors having observed, this is your words, all these works, unlike the court staff, counsel and other members who arrive through the public corridor, Mr. Franza has not arrived through that corridor, ergo he must be in custody or some special status.

Well, if that were so, then in every case, in every case where a defendant is either on a remand or is unable to make the bail conditions, what you're saying that's tantamount to transmitting to the jurors a statement that a particular defendant is in custody.

MR. BRENNER: No, your Honor. Actually my experience has been that jurors generally,

general-ly assembled in a non-public place at the beginning of the court day and then are brought into many courtrooms where the defendant is already seated. They are then escorted from the courtroom while the defendant is it still seated there. And that leaves - -

THE COURT: I didn't design this building and there is no physical way to do this, except with transport of jurors.

MR. BRENNER: Judge, you just made a statement about how in every case in which the defendant is in a remand status.

THE COURT: Right.

MR. BRENNER: Such a situation arises.

THE COURT: Right.

MR. BRENNER: I have merely responded that in many cases the logistics of the courtroom do not mandate such a conclusion.

THE COURT: Would you agree with me, Mr. Brenner, there are many cases where the so-called logistics do exactly what you said in this case?

MR. BRENNER: No, I would not agree with you.

THE COURT: All right.

MR. BRENNER: As for mister - - your request

for cases in which a mistrial has been granted - -

THE COURT: I didn't request anything.

MR. BRENNER: It is on the record, your Honor. Not your request.

THE COURT: Did you hear me make any request?

MR. BRENNER: I was referring to your law secretary, your Honor.

THE COURT: Stay out of the it.

What else?

MR. BRENNER: That's all.

THE COURT: Any response?

MR. BRANCATO: No, your Honor.

THE COURT: If need be, the Court will consider, and that's a different area if I were to consider, giving this jury any curative, so-called, charge that they need not concern themselves with anything other than the facts, nor can they speculate on anything beyond testimony, I am always reluctant because that may invite more focus on that area.

MR. BRENNER: I request that Juror Number 8 be brought out, inquiry be made as to weather saw Mr. Franza. If he says no, that's the end of it.

THE COURT: What if he says yes?

MR. BRENNER: Did he draw any conclusion and if he did did he discuss those observations or conclusions with any other juror this morning.

That's my request.

MR. BRANCATO: That might not be a bad idea.

THE COURT: All right, bring out Juror Number 8.

(Juror Number 8 entered the courtroom.)

THE COURT: Sir?

JUROR: Sir?

THE COURT: Good morning.

I hope you enjoyed a pleasant evening.

In connection with your activity last night, as late as we were, I understand you were in one of the public areas at the time when we were all moving around and concluding for the day, which was close to midnight.

Did anything come to your attention with respect to any of the participants in this trial which either created some question in your mind or created some doubt or you think you reached some conclusion by something that you either observed or heard?

JUROR: No, sir.

THE COURT: Now, was there anything that you observed or heard during that period - - I'm focusing in on the timeframe when you were just about concluding for the night, it was almost morning, because it was close to midnight, did you discuss anything with any other member of the jury subsequent to that in relation to what you either heard, observed or concluded?

JUROR: only while I was in the jury room. When we were deliberating.

THE COURT: Well, no, no, no. Perhaps my question is unclear.

As a juror you have that obligation to deliberate with respect to the facts, the testimony, the evidence, the exhibits in this case. But did you discuss with the juror something else, other than the testimony? Something that you may have observed outside the courtroom?

JUROR: No, sir.

THE COURT: Very well. You may return and continue your deliberations.

(Whereupon, Juror Number 8 left the courtroom.)

THE COURT: I did not want to open it up to

counsel to make further inquiry. Certainly not at this stage, if we were in an early stage in the trial, but when the jury is actually deliberating in a case, I didn't think that would be proper.

Is there anything further, gentlemen?

MR. BRANCATO: No, your Honor.

THE COURT: Bring in the panel.

COURT OFFICER: Jurors are entering.

THE COURT: All right.

(Whereupon, the twelve sworn jurors entered the courtroom and took their respec- tive seats in the jury box.)

COURT CLERK: Case on trial.

The defendant, his counsel, the assistant district attorney and the sworn jurors are present, your Honor.

THE COURT: Good morning, ladies and gentlemen.

I do hope you spent a pleasant evening and we welcome you back.

Having not yet responded to your last note, I already have a more updated note, which again addressed to me reads: Regarding Detective Breslin's report that we asked to see last night,

could you please tell us if that report was entered into evidence?

And if so, could we see it before the read back of the testimony requested?

Well, first off, the simple answer is no report, no report as such was admitted into evidence.

However, there was testimony regarding any reports that were made and both lawyers, I believe, inquired of the witness regarding those reports.

Now, is it a particular report? You see, that's what we don't like to respond in a very broad manner, we like to respond precisely to your inquiry.

FOREPERSON: We believe it is the first report that refers to the note on the flower box and compares the writings.

THE COURT: With the exemplars?

FOREPERSON: With the exemplars.

THE COURT: I believe the Reporter now has isolated those portions of the testimony.

FOREPERSON: All right.

THE COURT: Is that correct?

MR. BRENNER: May we step up, your Honor?

THE COURT: Yes.

(Whereupon, all counsel approached the bench, where there was an off the record discussion with the Court.)

(Open court.)

THE COURT: Ladies and gentlemen, once again in the interest of your interest, collectively, when we read back testimony, if we're reading back a portion that you believe is not responsive to your request, you'll stop us. If we read back too much,stop us. If you give us to little indication.

You see, it is our obligation to comply totally with whatever your request is. And we intend to do that with your cooperation.

The Reporter will read.

(Whereupon, the requested portion of the proceedings was being read aloud in open court, when the following proceedings?

FOREPERSON: Excuse me, your Honor.

THE COURT: Did you want to say something?

FOREPERSON: Could we have the exhibit that were - -

THE COURT: When he reads it.

FOREPERSON: The testimony he's referring to?

THE COURT: Are the exhibits back in the jury room now?

FOREPERSON: Yes, they are.

Is the exhibit that has "Franza," I believe, four times.

THE COURT: Does it have a number?

FOREPERSON: Sixty-two. I believe so.

THE COURT: Sixty-two?

FOREPERSON: I believe so.

THE COURT: Take a chance with that one.

Do you want that up on the easel so you can follow the read back?

FOREPERSON: Yes, please.

THE COURT: Very well.

(Pause.)

(Exhibit displayed.)

FOREPERSON: Your Honor, I have one further request?

That we have the re-reading begin again where the - -

THE COURT: References are made?

FOREPERSON: References are made to the down stroke of the "F" and two lines across.

THE COURT: All right.

FOREPERSON: So we can start.

THE COURT: The Reporter will go back a bit to the point where references are made by the witness to the exhibit.

(Whereupon, the requested portion of the proceedings was read aloud in open court.)

THE COURT: That completes that portion?

FOREPERSON: Okay.

THE COURT: Now, would you like more? I can't ask you if you'd like less because you heard what you heard.

FOREPERSON: I think we'd like to continue dis- cussing.

THE COURT: Take the jury out.

(Whereupon, the twelve sworn jurors left the courtroom.)

(Whereupon, are the Court took a recess await- the verdict of the jury.)

* * *

(Whereupon, the Court, Mr. Brancato, Mr. Sheindlin, Mr. Brenner and the defendant being present in the courtroom, the following proceedings commenced:)

COURT CLERK: Case on trial continued; People of the State of New York against Dominic Franza.

Present in the courtroom is the defendant, his counsel and the assistant district attorneys, in the absence of the jury in its entirety.

THE COURT: All right, bring in the panel.

COURT OFFICER: Jury entering.

THE COURT: Jury is entering.

(Whereupon, the twelve sworn jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Members of the jury, I have your most immediate note, which reads:

The jury has reached a verdict on all counts.

Mr. Friedman, make your inquiry.

COURT CLERK: Will the foreperson please rise?

How say the jury as to count 1 of the indictment, charing the crime of attempted murder, in the second degree?

FOREPERSON: We find the defendant guilty.

COURT CLERK: How say you as to count 2 of the indictment, charging the crime of attempted murder, in the second degree?

FOREPERSON: Guilty.

COURT CLERK: And how say you as to count 3 of the the indictment, charging the crime of attempted murder, in the second degree?

FOREPERSON: Guilty.

COURT CLERK: And how say you as to count 4 of the indictment, charging the crime of criminal possession of a weapon, in the first degree?

FOREPERSON: Guilty.

COURT CLERK: Be seated, ma'am.

Members of the jury, listen as your verdict is recorded. You say you find the defendant Dominic Franza guilty of counts 1 of the indictment, charging the crime of attempted murder, in the second degree; guilty of count 2 of the indictment, charging the crime of attempted murder, in the second degree; guilty of the count 3 of the indictment, charging the crime of attempted murder, in the second degree; and, guilty of count 4 of the indictment, charging the crime of criminal possession of a weapon, in the first degree and so say you all.

MR. BRENNER: Your Honor, I wish the jury polled.

THE COURT: Poll the jury.

COURT CLERK: Members of the jury, I will ask

a question of you each of you individually. At the conclusion of that question please answer me yes or no.

Each of you say individually that you find the defendant Dominic Franza guilty of count 1 of the indictment, charging the crime of attempted murder, in the second degree; guilty of count 2 of the indictment, charging the crime of attempted murder, in the second degree; guilty of count 3 of the indictment, charging the crime of attempted murder, in the second degree; and, guilty of count 4 of the indictment, charging the crime of crime of criminal possession of a weapon, in the first degree.

Juror Number 1, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 2, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 3, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror number 4, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 5, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 6, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 7, is that your verdict? Juror.

JUROR: Yes.

COURT CLERK: Juror Number 8, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 9, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 10, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 11, is that your verdict?

JUROR: Yes.

COURT CLERK: Juror Number 12, is that your verdict?

JUROR: Yes.

COURT CLERK: Members of the jury, listen as your verdict now stands recorded. After being individually polled, each of you individually say you find the defendant Dominic Franza guilty of count 1 of the indictment, charging the crime of attempted murder, in the second degree; guilty of count 2 of the indictment, charging the crime of attempted murder, in the second degree; guilty of count 3 of the indictment, charging the crime of attempted murder, in the second degree; and, guilty of count 4 of the indictment, charg the crime of criminal possession of a weapon, in the first degree, and so say each of you.

The jury has been polled, your Honor.

THE COURT: Very well. Ladies and gentlemen of the jury, the rendering of your verdict this, obviously, concludes your service. And I must tell you that it is really been remarkable under the circumstances where twelve citizens such as yourself stop your daily activities and make this great sacrifice to make certain that our system, as far as I know it is the finest criminal justice system or justice system, makes it work. Without your efforts, without your participation, without your

sacrifice, obviously, we could not go forward.

So, while various people serve on juries shorter lengths, greater lengths, your service has truely been remarkable and you have the thanks of the Court and all counsel for that service.

Now by way of explanation, but I just want to reiterate that at times when you thought we didn't start on time, because either matters were before the Court or there were motions before the Court or arguments, I don't mean arguments in the sense that people were fighting but legal arguments, which resulted in all these delays. I recall particularly one day, it was last Friday, where we had two hours of argument and I think the jury was just brought in for the purpose to be told to go home for the day.I know that's very disappointing. I know it is frustrating. I know at times you feel you're not privy to some information that's taking place or what the reason is, why there are so many benches conferences and counsel approach. And they have to discuss discuss matters which are designed legally so as not to affect your judgement, which must be legally isolated from anything which is discussed which would have impact, but it may not be relevant

to your consideration.

I just hope each of you benefited from this experience, not as a learning experience but it was truely an experience. This was a very involved case, it was a long case, it was a detailed case, it required extensive forensics.

You had the pleasure of enjoying counsel, and I say that respectfully of both counsel, both from the People, the prosecutor side, and the defense side, who were certainly able and did a true human job on behalf of their respective clients.

Again, you have our thanks on an individual basis and collectively and I do hope you'll remember this experience with some pleasure, despite the efforts that you had to make and the time that you took from your own personal lives.

Thank you all and good luck.

For last time, ladies and gentlemen, take the jury out.

(Whereupon, the twelve sworn jurors left the courtroom.)

THE COURT: April 1st?

COURT CLERK: April 1st, your Honor?

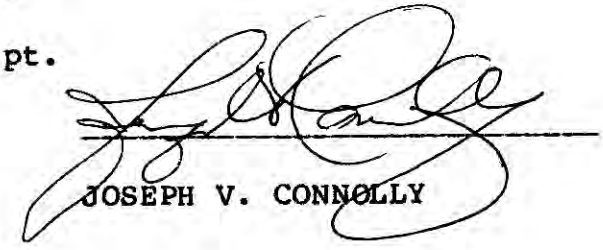
THE COURT: All right, make it April 1st.

Defendant is remanded.

(Whereupon, the proceedings were adjourned until April 1st, 1992, at nine-thirty a.m.)

* * *

Certified to be a true and accurate transcript.



JOSEPH V. CONNOLLY