COUNTY COURT
NASSAU COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK,

-v-

JESSE FRIEDMAN,

Defendant.

Indictment Nos. 67104, 67430, and 697830/1987

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**DEFENDANT'S MOTION TO RECUSE THE JUDGE, TO TRANSFER CONSIDERATION OF THE MOTION, AND FOR DISCLOSURE OF UNKNOWN FACTS RELATED TO RECUSAL**

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Defendant Jesse Friedman ("Friedman" or "Defendant") brings this motion under Article 14 of the Judiciary Law, and section 100.3 of the Rules of Judicial Conduct (22 NYCRR 100.3) to recuse Judge Teresa Corrigan ("Judge Corrigan") from hearing his petition for a new hearing under CPL 440.10, for disclosure of any facts unknown to Defendant related to recusal, and for transfer of consideration of this motion.

**Introduction**

Jesse Friedman first stood before this Court in 1987, charged with multiple counts of child abuse. He would eventually plead guilty before this Court, closing what the Second Circuit Court of Appeals would call a "troubling" prosecution leading to what was likely a wrongful conviction. Friedman v. Rehal, 618 F.3d 142, 158, 160 (2d Cir. 2010). That Court would further lament the Nassau County District Attorney's office refusal to allow a hearing on the evidence. Id. Unfortunately, despite being faced with staggering evidence of likely innocence, the DA's office has always refused to allow any "outsider" any view of that evidence.

The DA's office has denied Friedman evidence since the outset, even that which was irrefutably exculpatory, such as the hundreds of witness statements which reported nothing unusual or inappropriate taking place in the classrooms. See 440.10 Motion, People v. Friedman, June 24, 2014. That evidence has only

ever been available to "insiders" of the DA's office, whose perspective has been to deny any inspection of the original prosecution, and to close ranks around the assertion that Jesse Friedman was 100% guilty of the crimes of which he was accused, an assertion that fails the basic limits of possibility.

Since 1987, precisely one "outsider" has viewed the evidence against Friedman, the Honorable F. Dana Winslow of the Nassau County Supreme Court. That evidence, in his words, was full of "glaring discrepancies" (31:22-23), had "more recantations than affirmations" (32:19-20); was comprised of "numerous witnesses' statements, none of which were written by the witness him or herself, all of which were written by someone else", (31:18-19) and was characterized, importantly, by "no physical evidence, no photographs." (32:6-7). Order and Transcript of Hearing, Friedman v. Rice, Index No. 4015/13 (Nassau Cnty. Sup. Ct. Aug. 22, 2013), attached to the Aug. 11, 2014 Affirmation of Ronald Kuby ("Kuby Aff.") as Exhibit A.

The basis of this motion, and the fundamental issue that suggests to any even casual observer that the judge's impartiality might reasonably be questioned, is that she is an "insider" rather than an "outsider." For six of the last eight years, Judge Corrigan sat not on the bench, but as a top Assistant District Attorney to DA Rice. During those years, the DA's office successfully defended against multiple

attempts to hold a hearing on the case, to reveal the evidence against Friedman, or to reach the merits of the prosecution at all.

Judge Corrigan's relationship with DA Rice didn't begin in the Nassau County District Attorney's office, however. It began in Brooklyn in 1992, where the Judge and DA Rice worked together for seven years as assistant district attorneys. DA Rice left that office in 1999. Six years later she defeated incumbent Dennis Dillon in an election for District Attorney of Nassau County. She then immediately hired ADA Corrigan (now Judge Corrigan) out of Brooklyn to serve as an ADA and Bureau Chief in Nassau County. (2012 Voter Guide, Nassau County, Biography of Candidate Teresa Corrigan, Kuby Aff. Ex. B; Paul Larocca, "Kathleen Rice to Seek Carolyn McCarthy Seat in Congress", Newsday, January 29, 2014, Kuby Aff. Ex. C).

During those years together, the DA's office, despite overwhelming exculpatory evidence, opposed an appeal to the Court of Appeals, opposed a habeas petition in July of 2006, then opposed any hearings on that petition on procedural grounds, opposed any discovery on similar grounds, then opposed similar efforts before the Second Circuit Court of Appeals. The DA's extensive opposition to a fair hearing on the merits of Friedman's claims of innocence finally led to the Second Circuit's lament that they "too would have preferred if the facts and circumstances were developed at a hearing. Nevertheless, we could not order

a hearing over the objection of the District Attorney, who declined to waive the defense of the statute of limitations." Friedman v. Rehal, 618 F.3d 142, 161.

Later, at that Court's behest, DA Rice would undertake a review, to be done in secret, by ADAs who would have the sole powers to interview witnesses, determine witness credibility, and review evidence. To be sure, DA Rice appointed an austere panel to oversee the review, but now fully admits that they only saw selected, and redacted, witness statements, all of which supported her preconceived notion of the case. Even more telling, one of those panel members has since expressed a desire for a full public hearing, noting the "number of serious substantive errors" raised by Friedman in this case. (June 20, 2014 Affirmation of Barry C. Scheck, Kuby Aff. Ex. D).

The plain failings of that team to meaningfully review evidence, or even honestly characterize the evidence it did review, is detailed in Friedman's "Memorandum of Law in Support of Defendant's Motion to Overturn Conviction and Dismiss the Charges on Grounds of Actual Innocence and Unlawfully Coerced Testimony Before the Grand Jury, and to Overturn His Plea of Guilty Based Upon Unlawful Coercion." While that review obviously did not live up to the sort of review the Second Circuit intended, and its conclusions were contrary to its implied expectation, important here is that the identities of the ADAs who conducted the review, described by ADA Schwartz as "mostly senior prosecutors",

are unknown to the public. The only people who know what that review team reviewed, or had access to it, are the "insiders" of the DA's office from 2010 until mid-2013, of which Judge Corrigan is plainly one.

**Argument**

Section 14 of the Judiciary Code sets forth in mandatory terms that no judge shall sit "or take any part in the decision of, an action, claim, matter, motion or proceeding to which [s]he is a party, or in which [s]he has been attorney or counsel, or in which [s]he is interested, or if [s]he is related by…affinity to any part to the controversy." New York Judiciary Law, Art. 2, § 14. Title 22 of the New York Codes, Rules and Regulations further sets forth that a judge *"shall disqualify"* herself in a proceeding in which "the judge's impartiality might reasonably be questioned…" 22 NYCRR 100.3(E)(1). Those circumstances include ones in which the judge has personal knowledge of disputed evidentiary facts (22 NYCRR 100.3(E)(1)(a)(ii)); or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter (22 NYCRR 100.3(E)(1)(b)(ii)); but is not limited to enumerated circumstances.

Judge Corrigan plainly falls under the last stated category, and may fall into the first two. As stated above, Judge Corrigan served alongside the attorneys who have appeared thus far in this case, during their earlier opposition to Friedman's

appeals, and served as an assistant district attorney alongside DA Rice for six years in Nassau County, and seven more in Kings County.

## I. JUDGE CORRIGAN'S SERVICE AND ASSOCATION WITH THE NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE OVER A NUMBER OF YEARS DURING ACTIVE APPEALS AND REVIEW OF THIS MATTER DISQUALIFIES HER FROM HEARING THE CASE

The black-letter law of 22 NYCRR 100.3(E)(1)(b)(ii) is unambiguous and mandatory: a judge shall disqualify herself in a proceeding in which "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter." 22 NYCRR 100.3(E)(1)(b)(ii). Those rules by their terms apply to the Unified Court System, and under the New York Constitution, this Court falls within that system. N.Y. Const. Art. 6, § 1(a); 22 NYCRR 100.6(A). Judge Corrigan served as an assistant district attorney in Nassau County from 2006 until her election to the bench in 2012. Kathleen Rice hired her former colleague at the Kings County District Attorney's Office immediately upon her election, and appointed her as a bureau chief. (Kuby Aff. Ex. B). During those years, they appeared together on multiple occasions. For example, Judge Corrigan headed DA Rice's "Heroin Prevention Task Force", in response to several notable heroin overdoses. (Nassau County Press Release "County Executive Mangano and DA Rice announce new Heroin Prevention and Education Website for Teens, Parents and Educators, Oct. 7, 2010, Kuby Aff. Ex.

E; Ariella Monti, "Not my Child?", LI Herald March 12, 2009, Kuby Aff. Ex. F). The two appeared even appeared together on an ABC news special on related efforts.[1] She similarly represented the DA's office in other politically important causes for DA Rice throughout the years. (See Bruce Lambert, "Schumer Seeks Funds to Protect Local Witnesses", New York Times, April 4, 2006 Kuby Aff. Ex. G). In 2012, Judge Corrigan was the lead prosecutor appointed by Rice in the New Cassel corruption trial, a prosecution that resulted after a three-year investigation by DA Rice. (Emily Dooley, "New Cassel Corruption Trial Continues, Newsday, March 1, 2012, Kuby Aff. Ex. H).

That history does not even include the years in which the two served together in Kings County. Plainly, Judge Corrigan's service in association with DA Rice is not a mere nominal one, the two worked together extensively in legal practice, and as a bureau chief, Judge Corrigan was one of sixteen chiefs reporting to DA Rice. Moreover, the ADAs who have appeared in this case, Mr. Schwartz and Ms. Steinberg, were also in the DA's office during those years in which Judge Corrigan served.

The DA's office was actively defending appeals in this matter, the People v. Jesse Friedman, during Judge Corrigan's entire tenure at the Nassau County District Attorney's office. Though his initial appeal was defended by DA Dillon in

[1] That report was published online at (www.youtube.com/watch?v=cI2Dh_1et0).

his last term, Judge Corrigan was present in the DA's office during Friedman's *habeas* petition in the Eastern District of New York, which the DA's office successfully opposed on procedural grounds. Judge Corrigan was also present in the DA's office for the appeal of the case to the United States Court of Appeals for the Second Circuit, which was again successfully opposed on procedural grounds. Perhaps most importantly, Judge Corrigan was a top assistant DA to DA Rice during most of the 2010-2013 internal review of the Friedman conviction, during which unknown and unnamed senior assistant district attorneys reviewed evidence, interviewed witnesses, and filtered that evidence for select digestion by an advisory panel. Though Judge Corrigan has stated she has never been involved in this case, and the Defendant here does not question that assertion, she was plainly a trusted lieutenant to DA Rice.

The Rules of the Unified Court System prohibit a judge from hearing a case involving lawyers with whom she has previously practiced law, if they were doing so during their association. There is no question that this case involves DA Rice, ADA Schwartz, and ADA Steinberg. Judge Corrigan practiced law as an ADA herself from 2006 with 2012 with those attorneys, who were also actively involved on this matter then. Recusal in this case is mandatory.

## II. THE TOTALITY OF CIRCUMSTANCES IS SUCH THAT HEARING THIS CASE WILL CREATE AN APPEARANCE OF IMPROPRIETY, MANDATING RECUSAL

New York law broadly requires that a judge disqualify herself in any circumstances in which the "judge's impartiality might reasonably be questioned..." 22 NYCRR 100.3(E)(1). Such appearances of impartiality or impropriety may exist even absent conscious bias. Justice, Justice Felix Frankfurter said sixty years ago, "must satisfy the appearance of justice." Offut v. United States, 348 U.S. 11, 17 (1954). Justice Hugo Black soon elaborated, borrowing from Chief Justice Taft's 1927 opinion in Tumey v. Ohio, that "'every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused denies the latter due process.' Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy justice.'" In re Murchinson, 349 U.S. 133, (1955) citing Tumey v. Ohio, 273 U.S. 510, 532 (1927).

Judge Corrigan in this case may well hold no conscious bias against Jesse Friedman. The totality of circumstances here however, amount to a clear appearance of impropriety. There is no question that Judge Corrigan has a long relationship with DA Rice. They also share a political party, and DA Rice is

currently running for Congress. She has in effect staked her reputation on her review of this case. (Nassau County Press Release, "Report: 'Jesse Friedman Was Not Wrongfully Convicted'" June 24, 2013, Kuby Aff. Ex. I). Defendant is suing her in Nassau County for defamatory statements she made during announcement of that review. If this Court were to rebuke that review and overturn the conviction, which the evidence plainly demands, that would be a devastating news item to candidate Rice in the fall potentially close to Election Day. This Court could also delay hearings to avoid any such negative news cycle, or simply choose, even unconsciously, to dismiss otherwise compelling evidence with that possibility at the back of mind.

Regardless of actual conscious bias, the hearing of this case obviously presents, in Chief Justice Taft's words, a "procedure which would offer a possible temptation...not to hold the balance nice, clear and true between the state and the accused..." See Tumey, 273 U.S. 510 at 532. Recusal in such circumstances is, as the Court of Appeals has consistently held, "better practice." See In re Murphy, 82 N.Y. 2d 491, 495 ("Judges should strive to avoid even the appearance of partiality, and the better practice would be to err on the side of recusal in close cases."); see also Corradino v. Corradino, 48 N.Y.2d 894 (1979) (noting that the attorney for petitioner was associated with the same law firm as the trial Judge prior to the Judge's designation to the bench and not during the litigation of the matter at hand,

not mandating recusal, but it would have been "better practice for the court to have disqualified itself and thus (maintained) the appearance of impartiality.").

Personal knowledge by a judge that one can "be fair" is simply not enough for justice, regardless of the standards of review of such a decision. See People v. Banker, 1999 NY Slip Op. 4003U (Cnty. Court Sullivan Cnty. May 11, 1999) ("the essential fact that I know I can be fair is not enough. In light of the issues raised, a reasonable Appellate Court in Albany or Washington, D.C. might perceive that my former prosecutions of Mr. Banker might prejudice his trial. Although I may disagree, I certainly can and must respect that opinion."). In Banker, the judge discovered that he had previously prosecuted and defended the defendant on separate routine matters, which neither the defendant nor the judge recalled at all. Though in such circumstances, the law does not demand recusal *per se*, the judge determined that given the serious of the current crime, justice demanded every appearance of fairness, despite his own firm beliefs that he could be fair to the defendant. Id.

In this case, the risk of the appearance of impropriety is even greater than in Banker. First, all of the reasons stated above plainly create such an appearance. But beyond those, this case is likely to be heard not by a jury, but by a judge alone as trier of fact. When a judge will be both the "finder of facts as well as judge on the law and facts", recusal becomes even more important to avoid any "potential

for bias, prejudice, or the appearance of impropriety..." People v. Ventura, 851 N.Y.S.2d 73, *3, *8 (Jus. Ct. Westbury Vill. Nov. 15, 2007); see also Stampfler v. Snow, 290 A.D.2d 595, 596 (3d Dep't 2002) (even absent mandatory recusals, clashes of judicial roles create at least an appearance of impropriety, and warrant recusal.).

## III. THE LAW SUGGESTS THAT JUDGE CORRIGAN SHOULD TRANSFER CONSIDERATION OF THIS MOTION, AND REQUIRES DISCLOSURE OF ALL FACTS UNKNOWN TO DEFENDANT BUT RELATED TO THE ISSUE OF RECUSAL

Though plainly not mandatory, the law suggests that perhaps the judge whose recusal is requested is not best suited to hear that motion. Lawyers are justifiably "reluctant to make recusal motions for fear that by doing so their clients or their clients' interests may be jeopardized" or that their relationship with the Judge will be "adversely affect[ed]." People v. T&C Design, Inc., 680 N.Y.S.2d 832, *5, 178 Misc.2d 971, 974-975 (Jus. Ct. Westbury Vill. Sept. 9, 1988). Lawyers reasonably do not wish to create rift, but must do what their clients' best interest requires. Judges similarly do not wish to "send a message to other Judges that a lawyer and a Judge recusing herself or himself are enemies." Id. at *8, 976.

"Exemplary judges are careful not to blunt the advocacy of zealous lawyers"...and "recognize that the strength of our system of jurisprudence has its origins in robust advocacy where lawyers and Judges challenge each other through legal argument." Id. Judges therefore, "wherever possible"..."should act *sua*

*sponte* and refer the matter to their Administrative Judge for reassignment to another Judge, just for the question of recusal." Id. The Judge in that case determined that "if a judge is passing upon a question of his or her own recusal, then he or she is creating an appearance of impropriety by that act alone." Id. at *10, 977. Thus, this motion urges Judge Corrigan to transfer consideration of this motion.

Finally, this motion requests any information not presented herein on the question of recusal. "A judge's perception of the nature or seriousness of the subject matter of the litigation has no bearing on the duty to recuse or disclose a relationship with a litigant or attorney when necessary to avoid the appearance of bias or favoritism." Matter of George, 22 N.Y.3d 323, 328 (2013). In that case, the Judge failed to disclose a personal relationship with the defendant to the District Attorney's office. Id. at 324. Such failure, aggravated by another failure to disclose, warranted removal from office. Id. at 331.

Judge Corrigan has already made steps towards disclosure, noting on the record her emergence from the District Attorney's office to the bench. But it is well established that a Judge must inform a litigant of *any* potential basis for recusal. In re Roberts, 91 N.Y.2d 93, 96 (1997). Failure to do so evokes an impermissible appearance of impropriety. Id. Accordingly, Defendant requests disclosure of all unknown facts relating to the issue of recusal.

## Conclusion

For the foregoing reasons, Defendant requests that this Motion be granted, that Judge Corrigan recuse herself, or in the alternative transfer the motion and disclosure of any further facts that may be related to the issue of disclosure.

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