

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NASSAU: TRIAL TERM: PART 3

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3 In the Matter of
4 JESSE FRIEDMAN,

5 Petitioner,

INDEX NUMBER:
4015-13

6 - against -

7 KATHLEEN M. RICE, in her official
8 Capacity as the
9 NASSAU COUNTY DISTRICT ATTORNEY,

Respondent.

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Mineola, N.Y. 11501
June 28, 2013
APPLICATION

11 BEFORE:

12 HONORABLE F. DANA WINSLOW, JUSTICE

13 APPEARANCES:

14
15 LAW OFFICE OF RONALD KUBY
16 Attorney for Petitioner
17 BY: RONALD L. KUBY, ESQ.
18 BY: LEAH BUSBY, ESQ.

19 NASSAU COUNTY DISTRICT ATTORNEY
20 Attorney for Respondent
21 BY: ROBERT A. SCHWARTZ, ADA
22 BY: JUDITH R. STEINBERG, ADA

23
24
25

1 THE COURT: For the record, the first matter before
2 we begin is in the form of an announcement, and
3 congratulations as well. Our esteemed court reporter's son
4 has just been hired to start work in September by the
5 District Attorney's office. Does that present a problem for
6 the petitioner?

7 MR. KUBY: Only in a general idealogical sense, not
8 in terms of this case.

9 THE COURT: Was that a yes or a no?

10 MR. KUBY: It was a no, Judge.

11 THE COURT: I thank you so very much.

12 And with equal concern to the District Attorney's
13 office, do you have an objection or a comment with respect
14 to that particular issue?

15 MR. SCHWARTZ: Certainly not, your Honor.

16 THE COURT: The next item on the agenda is one that
17 is going to be, in large part, conducted by Mr. Bagnuola.
18 Mr. Bagnuola has received several applications. He's the
19 one who knows, because everyone is referred to him if they
20 ever tried to contact the Office of the Press. And I
21 understand that there have been some applications produced.

22 At this point, Mr. Bagnuola, would you kindly read
23 off and then present to me the applications, and then I will
24 get the positions of each of the parties.

25 MR. BAGNUOLA: Both media outlets that presented

1 these agreed to pool if anyone asked for that. They're
2 filming or, excuse my vernacular, shooting with a still
3 camera.

4 Mr. Drew Scott made an application to have a
5 camera. Uli Seit, from the New York Times, still
6 photographer, make a request to take still photographs in
7 the courtroom.

8 THE COURT: We will start off with those two.
9 Petitioner, any objections?

10 MR. KUBY: None.

11 MR. SCHWARTZ: No objection, your Honor.

12 THE COURT: Thank you. Without objection, we will
13 go through the process of setting it up. Mr. Bagnuola, do
14 you have any other applications?

15 MR. BAGNUOLA: If you could give me five minutes to
16 have them set up in the jury box.

17 THE COURT: Any other applications at all from
18 anyone? That is the extent of the applications?

19 MR. BAGNUOLA: That is the extent.

20 THE COURT: Anybody else in this courtroom have any
21 recording equipment or visual equipment, taking pictures,
22 cameras, anything that they wish to use? The Court does
23 have to be aware of the presence, and certain rules will
24 exist about how to proceed with the press. Anybody?

25 All-right. At this point I see cameras come

1 through the door. This is the News?

2 MR. BAGNUOLA: Correct.

3 VOICE FROM THE AUDIENCE: Correct.

4 THE COURT: You need about five minutes?

5 MR. BAGNUOLA: Five minutes, please.

6 THE COURT: If you would kindly start your setup.

7 I won't ask either the petitioner or the respondent to
8 provide us with entertainment for the next five minutes. I
9 think that thoughtful introspection may, in fact, be helpful
10 if you want to take advantage of it. Thank you.

11 I want to inform everybody here that someone from
12 the Daily News has appeared as well to take photographs
13 only. Any objections?

14 MR. KUBY: None.

15 MR. SCHWARTZ: None, your Honor.

16 MR. BAGNUOLA: There is only one other person.

17 Rather than exclude her I will bring her in.

18 VOICE FROM THE AUDIENCE: I am from the Associated
19 Press. I want to make sure we will have access to pooled
20 photography.

21 VOICE FROM THE AUDIENCE: I am with the Great Neck
22 Record. I am wondering if I can use a smart pen?

23 THE COURT: You may use a smart pen or a
24 not-so-smart pen, anything you would like to do to record,
25 except electronically. Then I would have to circumscribe,

1 or may have to circumscribe, because we have a court
2 reporter who is fully capable of recording every single
3 word.

4 MR. KUBY: Judge, since I am old I think didn't
5 know what a smart pen is. Is a smart pen actually a video
6 recording device?

7 THE COURT: It is a recording device. We use smart
8 pens here as well for other things but recording.

9 So you are intending to record; is that correct,
10 ma'am?

11 VOICE FROM THE AUDIENCE: Yes, sir. I was hoping
12 to.

13 THE COURT: All-right. You recognize that there
14 will be a recording available to you through the feeds that
15 are being established at this point?

16 VOICE FROM THE AUDIENCE: Yes, sir. And when, your
17 Honor, would those be available?

18 THE COURT: Pardon me?

19 VOICE FROM THE AUDIENCE: When would those be
20 available.

21 THE COURT: Mr. Bagnuola?

22 VOICE FROM THE AUDIENCE: After we are finished
23 here.

24 MR. BAGNUOLA: At the conclusion.

25 (A discussion was held off the record.)

1 THE COURT: You are satisfied with receiving the
2 feed that would be available. And I think, though you have
3 the smartest pen in the world, that you're going to find
4 proper recordation done as it has been set up by Mr.
5 Bagnuola.

6 There is something else, Mr. Bagnuola?

7 MR. BAGNUOLA: I was under the impression that we
8 were going to pool the still photography. The photographers
9 have to check with their editors first.

10 THE COURT: If you have, and this is the only
11 exception, so that is acceptable to you?

12 VOICE FROM THE AUDIENCE: I guess my question is,
13 is there a fee attached to this?

14 THE COURT: I'm not in charge of fees.

15 VOICE FROM THE AUDIENCE: As far as I know --

16 THE COURT: In fact, the Court can order that there
17 be no fee attached.

18 VOICE FROM THE AUDIENCE: Thank you, your Honor.

19 THE COURT: You are more than welcome, ma'am.

20 (A discussion was held off the record.)

21 THE COURT: The Associated Press, because of the
22 pooling requirement, maybe others as well, has withdrawn its
23 application to share the photographs and will not be using
24 them. But that doesn't mean they don't have access to
25 anything and everything else that is produced in the course

1 of this proceeding.

2 All-right. I think that the briefest overview
3 would be appropriate before we begin. I am not going to go
4 back to the mid '80's, '85, '86, '87, '88 and so on, except
5 to say that the Friedmans, both Arnold and Jesse, among
6 others, were in fact convicted and sentenced. In one case
7 in 1987 in the federal prison system, and then in 1988, in
8 December, with Jesse Friedman.

9 Thereafter, Jesse Friedman, who is the petitioner
10 in this case, served a sentence until 2001. Then he was
11 released. In 2003, thereabouts, a movie was made. And
12 then, thereafter, an application in the nature of a habeas
13 corpus proceeding was commenced in the United States
14 District Court for the Eastern District of New York. And
15 then that determination was in turn appealed, resulting in a
16 20-10 determination by the United States Circuit Court of
17 Appeals for the Second Circuit, which denied the application
18 for habeas corpus relief but did provoke certain reactions
19 from the public and from Mr. Friedman, as I understand it.
20 That, in turn, led to the district attorney at that time
21 establishing an integrity review panel, and the dates are
22 not exactly clear, and a case advisory panel. The Court
23 wasn't aware of the case advisory panel until recently.

24 The petitioner did make an application before this
25 Court commencing in December, approximately, going through

1 to April and the appeals. It was based upon a refusal by
2 the appeals board to permit a FOIL, Freedom of Information
3 Law review of the full records maintained in connection with
4 the Jesse Friedman case. Two letters were sent by counsel
5 for Mr. Friedman. And then, thereafter, when there was a
6 continual denial because of a exhaustion of remedies at the
7 time that the second letter was denied by the appropriate
8 board in Nassau County, the matter was brought to this
9 Court's attention.

10 And the Court's earliest view of this particular
11 case was in April of this year. It was in the nature of an
12 Article 81 proceeding to reverse and require -- reverse the
13 determination of the district attorney's office and the
14 police department, if there was overlap, and to have a
15 withdrawal of the plea that was entered by Mr. Friedman, as
16 an end result, being frustrated at that point in time
17 because there was insufficient information according to
18 petitioner.

19 The first time that this Court had the opportunity
20 to have a conference on the record with everyone was June
21 4th, at which time the Court was informed by Mr. Schwartz
22 that there would be available the report that was started in
23 2010. It would be a report made available by June 28th,
24 today. I asked for and received the report. I asked for it
25 at that time, and received the report on Monday, June 24th

1 of this year.

2 Since that time a great deal else has happened.
3 There has been communication to assure that there has been
4 adequate, appropriate communication between the petitioner
5 and the respondent with respect to timing, production of
6 documents, and other administrative matters. And there has
7 in fact been a call -- there had been two calls, one visit
8 by Mr. Schwartz of the district attorney's office to bring,
9 to make available certain documents. The documents that
10 were initially provided to the Court were provided
11 electronically and were taken directly off the Nassau County
12 District Attorney's website. However, the Court reached a
13 bit of an impasse when it saw that there would be close to
14 1,000 pages in the appendix, and did make the request that
15 might be overburdensome, could the district attorney work
16 out a more effective way? And Mr. Schwartz assisted, and I
17 thank Mr. Schwartz for his assistance in this matter and his
18 capable and rapid response.

19 So, from time to time the following were received
20 during this week. First, the electronic report that was
21 just mentioned. Second, was an un-redacted duplicate, hard
22 copy, excuse me a redacted hard copy of that report. And
23 that was by the following day. And that is, please don't
24 stand up and hold it up because it would put a strain on the
25 strongest of people, and I certainly put you in that

1 category but don't want to test your strength at this time.
2 We did receive, then, the appendix in redacted form.

3 Having looked at both the advisory panel report and
4 the report denominated as the executive summary by Miss
5 Rice, and the appendix that we received in multiple volumes,
6 the Court came to the conclusion there was very little that
7 it could do without an un-redacted portion of this report.
8 So it made its request. And, once again, the district
9 attorney's office complied immediately, and within a day did
10 provide a redacted portion, which except when actually used
11 by this Court has remained under lock and key.

12 Something else happened during this period of time
13 as well. It is going to be confined to a characterization
14 rather than a more explicit description. The Court received
15 three unsolicited letters from different people who may have
16 been involved in one fashion or another in this case. The
17 Court has temporarily placed that, as well, under seal and
18 has kept it under lock and key.

19 As of today the Court is extremely interested in
20 finding out certain issues, and is going to do it in reverse
21 fashion. Mr. Kuby, you're not going to have the first word
22 in this case. Mr. Schwartz, I would ask if, in fact, there
23 is a difference in the information that was supplied to the
24 integrity panel and the information supplied to the advisory
25 panel, could you enlighten us what that difference was?

1 MR. SCHWARTZ: Thank you, your Honor.

2 THE COURT: Thank you.

3 MR. SCHWARTZ: Before I answer that question
4 directly, I would just also like to add that we supplied the
5 Court, upon request, with un-redacted copies of all of the
6 witness statements in this case.

7 THE COURT: You did. And if it wasn't clear when I
8 said un-redacted appendix, these were witnesses who were
9 described with a number, number 2, 8, 12, 26, 25, whatever
10 it is, absolutely supplied, and the Court looked at it as
11 part of the appendices.

12 MR. SCHWARTZ: You assured the district attorney's
13 office that those too would absolutely remain under seal and
14 be kept confidential.

15 THE COURT: And they will be and are right now.

16 MR. SCHWARTZ: Okay.

17 With respect to your question of whether all the
18 materials that were seen by the advisory panel, that was a
19 subset of the records that were available and seen by the
20 review team. The review team, being the executives in the
21 district attorneys office that conducted the actual
22 investigation. They, of course, had access to the entire
23 Jesse Friedman file.

24 THE COURT: I have that reputation, I'm afraid well
25 deserved, of breaking in from time to time just for

1 clarification. I want to be sure that I understand what you
2 are saying. Are you saying that there is a difference
3 between the review panel and another panel that the district
4 attorney's office had, and they reviewed different
5 documents?

6 MR. SCHWARTZ: We like to refer to the members of
7 the district attorney's office that actually conducted the
8 investigation as the review team. I think it's easier to
9 remember it that way. The four independent experts that
10 guided the investigation, oversaw the investigation, gave
11 advice and counsel to the investigation, that is the
12 advisory panel.

13 THE COURT: Yes. So is this a question of
14 terminology? There were two or there were three separate
15 entities?

16 MR. SCHWARTZ: Two. One team, one advisory panel.

17 THE COURT: All-right. I didn't understand it
18 quite that way a minute ago but fine. Please continue.

19 MR. SCHWARTZ: Okay. The review team, which
20 consisted of members of the district attorney's office, had
21 access and saw more documents than the advisory panel did.
22 For example, there were literally several thousand pages of
23 letters that we received that Jesse Friedman had written.
24 Those were supplied to the review team, the district
25 attorney's office. They culled through all of these

1 letters. The vast majority of those letters did not contain
2 any information relevant to the re-investigation, and so
3 they were not shared with the panel. Some letters that were
4 relevant were, of course, shared with the panel, and they
5 were seen by the panel.

6 There are historical documents. There are legal
7 papers.

8 THE COURT: Historical documents? I am not quite
9 so sure --

10 MR. SCHWARTZ: I will explain, your Honor. There
11 are legal papers that have been filed in connection with the
12 original Article 440 motion in state court, things of that
13 nature. I don't know that the advisory panel has seen all
14 of those legal papers. I think they saw the bulk of them.
15 Surely everything that is referenced in the report and
16 everything that is in the appendix -- just to be clear, the
17 report refers to more documents than are in the appendix.

18 THE COURT: The Court noted that, and that was
19 going to be a question, because there was a seeming gap in
20 the numbering in a couple of places.

21 MR. SCHWARTZ: There was what we found to be a
22 logical reason for that. The appendix was just getting too
23 large. Documents that -- there were legal documents. The
24 original Article 440 papers that were filed, those were kept
25 out. Some of it was kept out for just the sake of keeping

1 the appendix within reasonable size. There were other
2 documents that were kept out because we felt that they would
3 be unduly salacious, your Honor. We didn't want to make
4 them available to the world.

5 THE COURT: Unduly salacious?

6 MR. SCHWARTZ: Yes. I am specifically referring to
7 a story that Mr. Friedman possessed and/or wrote while he
8 was in prison.

9 THE COURT: That was kept from them because?

10 MR. SCHWARTZ: Excuse me, your Honor, it wasn't kept
11 from the panel, it was kept out of the appendix.

12 THE COURT: But the panel saw it?

13 MR. SCHWARTZ: Yes. It's referenced in the report.
14 Everything referenced in the report the panel saw. That is
15 important, your Honor. Everything referenced in the report,
16 whether or not it's in the appendix, the panel saw.

17 THE COURT: Including witness statements and
18 affidavits in which the witnesses received numbers rather
19 than a name?

20 MR. SCHWARTZ: They saw redacted copies of the
21 witness statements.

22 THE COURT: All-right. And could you please just
23 inform us what you mean by redacted. Redacted in what way?

24 MR. SCHWARTZ: The identity of the victims was
25 blacked out.

1 THE COURT: Nothing else was blacked out except the
2 identity of the victim, as you have characterized it, right?

3 MR. SCHWARTZ: Do you have information, Mr. Kuby?

4 MR. KUBY: It's not my turn.

5 THE COURT: Exactly. I thank you very much for
6 helping me out, but please don't help me.

7 MR. SCHWARTZ: I don't believe Mr. Kuby would have
8 any idea what was redacted from those reports. The best I
9 can tell, your Honor, is that nothing of substance was
10 redacted from the reports. There may have been some other
11 information that would reveal the identity of the victim,
12 something other than their actual name. I have people here
13 in the courtroom that I could consult with and I could be
14 more explicit, but that is all I know standing before you
15 now.

16 THE COURT: Who made the determination of
17 substance?

18 MR. SCHWARTZ: That would have been the review
19 team.

20 THE COURT: Okay. And the review team consists of
21 senior district attorneys, ADAs?

22 MR. SCHWARTZ: Members of the district attorney's
23 executive staff, your Honor. All are very seasoned, very
24 experienced prosecutors.

25 THE COURT: And they were all prosecutors, or was

1 there at least one or more special investigators?

2 MR. SCHWARTZ: I believe the review team had
3 available to it investigators who work for the office to
4 help with various tasks. But they certainly didn't make any
5 substantive decisions about what the advisory panel would
6 see or what would be redacted from documents.

7 THE COURT: Who made that decision is where I
8 started the question. Who made that decision?

9 MR. SCHWARTZ: That would have been the members of
10 the review team. Most decisions were made jointly by all or
11 some of the members of the review team.

12 THE COURT: Okay. But not including the
13 investigators and others who were actually members of the
14 team as well, at least as the Court understood it, there was
15 one special investigator who was a member of the team who
16 was not an assistant district attorney. I just want
17 clarity, that is all.

18 MR. SCHWARTZ: My understanding, I don't want to
19 play a game of semantics, is that the review team consisted
20 of executive assistant district attorneys. They had the
21 resources of the whole office. That does include, of
22 course, non-ADAs. But certainly, Judge, no ADA or
23 non-executive made substantive decisions about what should
24 or should not be redacted from the report.

25 THE COURT: Either collectively or individually?

1 Collectively meaning with everybody else, or individually?

2 MR. SCHWARTZ: That is my understanding.

3 THE COURT: All-right, next. Go ahead.

4 MR. SCHWARTZ: I forgot the question now, your
5 Honor.

6 THE COURT: All-right. I wanted to be sure that
7 the record is very clear, and I'm clear, as to the
8 difference, if any, and I think we've seen some differences,
9 of the information that was provided to the review team and
10 the information that was provided to the advisory group, the
11 four members of the advisory group. What was the difference
12 in what they got? Because, quite frankly, and I'm sure that
13 you recognize that an advisory group, like any expert, and
14 you've seen that enough I know, Mr. Schwartz, is only as
15 good as the information that they have and are utilizing in
16 reaching determinations and opinions.

17 MR. SCHWARTZ: I want to reiterate that the
18 advisory panel's function was, had more to do with the
19 process, the standard of review that would be applied to
20 make sure that the investigation was moving in the right
21 direction, to offer suggestions about other areas of inquiry
22 too. I wasn't part of the review team, your Honor. I don't
23 know, frankly, but that is my understanding, to give
24 guidance, to give suggestions, to make sure that the
25 investigation was being conducted fairly. You can read from

1 their letter that --

2 THE COURT: I have.

3 MR. SCHWARTZ: -- that is what they did. The core
4 investigation, the fact finding, was done by the review
5 team. And they, of course, had access to the entire file.
6 Whether they utilized it all, I don't know.

7 THE COURT: Let me be sure that I understand that.
8 Are you saying that the advisory panel had access to all --

9 MR. SCHWARTZ: No, your Honor. In fact, the one
10 thing that they did not have access to was grand jury
11 minutes.

12 THE COURT: Anything else?

13 MR. SCHWARTZ: The review team did.

14 I would like to make a point, Judge, before we
15 continue down this line.

16 THE COURT: Certainly.

17 MR. SCHWARTZ: I think that this is an important
18 issue that is getting missed here. This is an Article 81
19 proceeding, to review the determination made by the district
20 attorney's office that we would not turn over the records
21 sought by Mr. Kuby pursuant to the Freedom of Information
22 Law, as we know it FOIL. That request from Mr. Kuby was for
23 records that were shown to the review panel. And that is
24 important, your Honor. I think that has gotten lost here.

25 That is all that was in that FOIL request, copies

1 of records that were shown to the review view panel. In
2 essence, Mr. Kuby wanted to be on the same footing as the
3 review panel. He wanted to see or have access to everything
4 that the review panel was seeing. He never asked for the
5 entire case file.

6 MR. KUBY: Excuse me, Judge, this is just
7 categorically wrong.

8 THE COURT: Thank you, Mr. Kuby. And I will say
9 that the application that I've seen from Mr. Kuby does seem
10 to go beyond what you say.

11 MR. SCHWARTZ: Yes, it does, your Honor. That is
12 an important part of this proceeding. He's asking for
13 things now that he never asked for in his FOIL request.

14 THE COURT: That you may blame on this Court to the
15 following degree. This Court felt that it was extremely
16 important to have the review panel's report in hand so that
17 it could be used as a basis for the district attorney's
18 office, and for Mr. Kuby to proceed further if they are
19 going to.

20 It may, in and of itself have been sufficient, and
21 it may not be sufficient. I haven't heard from Mr. Kuby
22 yet. But I know that there is a question, one way or the
23 other, insufficient or not. But until we have it, there is
24 no way that we could ever know. So, I did ask, and on
25 consent everybody agreed. We're not going to pursue some of

1 the particularity requested by Mr. Kuby until I get that, so
2 long -- until I get the report, so long as it doesn't exceed
3 June 28th. And I am commending you for making it earlier.
4 Thank you.

5 MR. SCHWARTZ: I have no issue with that, your
6 Honor. Where I am concerned we're getting far afield, is
7 that we're focusing on documents and records that were seen
8 by the review team. Those are documents that are being
9 requested now, but were not requested under FOIL.
10 Therefore, one of our arguments, among many, is that request
11 was never instituted and it's not properly before the Court.
12 Now, we haven't submitted a formal response yet.

13 THE COURT: And you have every right to, and I will
14 not ever consider a final determination in this case with
15 respect to the Article 78 issues until you have presented
16 your response.

17 MR. SCHWARTZ: I think it's until we submit our
18 response, and the Court can consider these issues, that
19 requesting additional disclosures is premature.

20 THE COURT: I will differ with you, and haven't
21 differed greatly so far, on this particular point. Because
22 in order for this Court, I'm assuming that Mr. Kuby will say
23 the same thing but he doesn't have to. This Court did need
24 to have as much information as it could that would lead to a
25 proper education, and therefore, a proper determination.

1 And that is why if we are to consider the advisory panel of
2 value, and their finding, then it's necessary to know what
3 it was that the advisory panel was looking at, and how they
4 reached their conclusion. And that is why we've spent the
5 time that we have, just trying to be sure that there isn't a
6 disconnect.

7 MR. SCHWARTZ: But, your Honor, the wisdom of the
8 underlying conviction here is not before this Court.

9 THE COURT: Absolutely correct.

10 MR. SCHWARTZ: The findings of the review team,
11 supported by the advisory panel, are not before this Court.
12 In an Article 81, brought after a FOIL denial, the issue is
13 whether, and it's solely whether we properly applied the
14 exceptions. That is the issue here.

15 THE COURT: You think it's a 78 issue entirely?

16 MR. SCHWARTZ: Article 78, that is the issue now.

17 THE COURT: Article 78 and the 78 exceptions
18 therein.

19 MR. SCHWARTZ: That is the sole issue, whether we
20 properly applied the exceptions. I understand Mr. Kuby has,
21 separate and apart from that, two other applications. One
22 is an application before this Court saying, under Civil
23 Rights Law 50-B, where I'm not entitled to see the identity
24 of sex crime victims, I can make a proper showing. And I'm
25 asking the Court to make an exception and allow me access to

1 these materials. That is separate and apart from the file.

2 In fact, what we do submit in our papers, it's an
3 oral motion, this is not even the proper court for that
4 application. It should be heard in County Court where the
5 criminal proceeding was heard.

6 The other application by Mr. Kuby is for grand jury
7 materials.

8 THE COURT: I am sorry. Has the jurisdiction of
9 this Court been appealed in some fashion that I'm unaware
10 of?

11 MR. SCHWARTZ: When we submit our papers we are
12 making an issue of the jurisdiction, not with respect to
13 Article 78 as it applies to the FOIL determination, but we
14 are saying the 50-B determination, and the grand jury issue,
15 should be heard across the street because that is what the
16 statute says.

17 THE COURT: I also many have to spend a great deal
18 of time on what appears to be semantics. This Court is
19 faced with, as the district attorney has herself said,
20 integrity, integrity of the process, the integrity of the
21 process, as demonstrated by the investigation of the panel,
22 as demonstrated by the advisory panel's seeming agreement
23 with the panel itself, with the review team itself. Those
24 are the things that this Court is supposed to examine. This
25 is part of the Article 78, not just yes or no, and then let

1 the Appellate Division decide. No. This is something that
2 this Court is undertaking, as it understood from everybody
3 from the very beginning, to determine whether or not there
4 is a basis to have disclosure of certain documents made to
5 Mr. Friedman.

6 MR. SCHWARTZ: Ultimately that is the issue
7 regarding the 50-B and the grand jury. But the reason why I
8 say it's better to be heard in County Court, is because that
9 is the Court where Mr. Kuby, Mr. Friedman's new 440 motion
10 will be brought. The motion to vacate the conviction, which
11 he has assured us is forthcoming, will be heard over there,
12 not before your Honor.

13 You look perplexed, your Honor.

14 THE COURT: The reason why I look perplexed is I
15 am. The reason why I am perplexed, is because this Court
16 has got to determine the Article 78 before the petitioner
17 proceeds further. Either they're going to get additional
18 information, which they hope is going to be supportive of
19 their contentions, or they're not going to get that
20 information.

21 MR. SCHWARTZ: What, in essence, you seem to be
22 doing is making a determination in deciding whether or not
23 you're going to turn over these documents. You seem to be
24 making a determination whether you believe the conviction
25 was sound or not sound. And, respectfully, I would submit

1 that is not the issue that is before this Court. An Article
2 81 on FOIL is to determine whether we correctly denied --

3 THE COURT: Mr. Schwartz, and then we can end this
4 and go on to another topic altogether. This doesn't sound
5 greatly different than the issue presented to the Second
6 Circuit Court of Appeals in which it made the determination
7 that the statute of limitations had run by 64 or 65 days,
8 and it would not allow for the withdrawal of the plea. And
9 went on from there to say it has serious questions about the
10 nature of the conviction. And it was the district attorney,
11 after receipt of that decision, who decided to establish
12 this very same review time, review process, including the
13 advisory panel. So that is why I am not deviating from what
14 has been presented to me in any fashion.

15 All-right, sir. Is there anything else that you
16 think should be clarified with respect to the documentation
17 that has been provided to this Court, redacted and
18 un-redacted?

19 MR. SCHWARTZ: I would like to reserve my right if
20 anything else comes to mind, but I think that is it for now,
21 your Honor.

22 THE COURT: Absolutely. You certainly have those
23 rights. You certainly have the opportunity, in your
24 response, in writing, to demonstrate what your position is
25 in the fashion you believe to be most effective.

1 Mr. Kuby, sir?

2 MR. KUBY: Thank you, Judge. Well, it was a long
3 and fascinating colloquy. I would like to go back to the
4 question, at least the question that I heard you asking,
5 which materials were presented to the -- I am going to call
6 them the outsiders versus the DA's office, if I may do that.
7 Which materials did the DA's office review that were not
8 provided to the outsiders?

9 From what I heard Mr. Schwartz saying, I think that
10 is absolutely correct, from what I know of the process and
11 after the process ended. I do have access to the outsiders.
12 I do know a bit about what happened out there. Mr. Schwartz
13 has stated, quite honestly, that the initial determination
14 of what the panel should see was made by the district
15 attorney's office. So you already had this very substantial
16 filter put in place, that whatever gets shown to the panel,
17 we're going look at it first and make a decision as to
18 whether or not the panel really needs to see this.

19 Mr. Schwartz said well, a lot of this is just
20 because there are so many pieces of papers and these folks
21 are really busy. To a certain extent that is true. What he
22 did not tell you is that the district attorney's office
23 invoked its rights, both under the grand jury section of the
24 CPL not to reveal the grand jury minutes, as well as their
25 50-B rights to not reveal to the panel anything that would

1 tend to identify sex abuse victims.

2 So the same screen that they're applying to me is
3 the screen they applied to the outsiders. There was no
4 court order ever sought to show good cause as to why the
5 outsiders should see this material. Although I did
6 specifically ask that the chief assistant district attorney
7 go to court and get an order so you can show it to the panel
8 and you can show it to us. If you come in and say there's
9 good cause, and we agree there's good cause, I can't imagine
10 that any judge is going to say no, I'm not convinced of
11 that. I think that in most cases the court would defer to
12 the parties on that determination, provided that there were
13 proper safeguards in place for no further disclosure. The
14 DA's office refused to do that.

15 The DA's office uses 50-B as a shield, has
16 consistently been used not just against our desire to have
17 some information, but also in determining what they think
18 the outsiders should see. I don't believe the Court used
19 the phrase garbage in garbage out, but certainly that
20 principle. A determination is only as good as the evidence
21 on which it's made, is certainly relevant here. If you look
22 at the advisory committee statement, they acknowledge that
23 they did not review the evidence. In fact, I think until
24 you got it, Judge, you are the first person in 25 years who
25 doesn't get a pay check from them who has ever taken a look

1 at it.

2 They're dancing around the question. But I suggest
3 a simple way of proceeding to the Court. They take
4 everything that was given to the review panel and they hand
5 it over with a little index. Then they take everything that
6 the DA's office reviewed, that is one pile. It is what the
7 outsiders saw. The other pile is what the insiders saw.
8 And I know that the insider pile will be substantially
9 larger and contain substantially more information of
10 precisely the type that will help us establish good cause.
11 The Court can then review that body of documents that the
12 DA's office decided they weren't going to bother the pretty
13 little heads of their advisors with. Because while I can't
14 know the details of what they fail to provide because, of
15 course, it's all opaque, I do know that many, if not most,
16 of the original police reports were not provided to the
17 members of the outside team. So that is one way to proceed.

18 Now, the DA's office made a shockingly disturbing
19 statement to the Court that in many ways, I think,
20 characterizes, better than I can, the flaws in this process
21 and, frankly, some of the disingenuousness. The DA's office
22 took the position that they were not going to include the
23 so-called salacious material. If the Court reads the
24 papers, even if the Court doesn't, the salacious material
25 they are referring to were eight pages of incest and

1 bestiality and child porn that they supplied to members of
2 the press this week in response to the press making a FOIL
3 request. So they weren't going to offend their tender
4 sensibilities, but as soon as the press say hey, we would
5 like bestiality and incest porn, they handed it right over.
6 So they're not sparing everybody's sensitivities here.
7 They're more than willing to hand it over.

8 The real reason they didn't include this has
9 nothing to do with the content of these documents. Because
10 we actually got these documents last night, after the New
11 York Post ran a huge story about Jesse Friedman writing
12 incest and child porn in prison based on the FOIL documents
13 they got. If the DA's office -- that was the fastest
14 turnaround for FOIL. We haven't gotten a single piece of
15 paper from them in two years. But the press said, please
16 send us some bestiality and torture porn, it's online within
17 48 hours. Amazing what they can do when they try.

18 What they did not include is the fact that they
19 left out the word "not" in their submission. That is to
20 say, we can now establish Jesse Friedman did not write that
21 pornography. The reason we know that is through a fairly
22 brief search, admittedly a somewhat unpleasant one, online.
23 We were able to determine this pornography exists online.
24 It is credited to a person with another biline, and has
25 nothing to do with Jesse Friedman's authorship. Moreover,

1 if you look at the document, I don't know if you have, they
2 wanted to spare your tender sensibilities, it was clearly
3 written on a fairly decent word-processing device. And
4 Jesse Friedman, in prison until 2000, had a crummy little
5 Smith Corona. So, accordingly, he didn't write it. The
6 DA's office could have figured it out if they cared to, as
7 could the outsiders.

8 Jesse Friedman did not possess it. The reason we
9 know Jesse Friedman did not possess it, is we have the
10 actual inmate misbehavior report that charged him with
11 possessing this material. And the disposition says "not
12 guilty". Here is a copy for the Court. Here's a copy for
13 the DA's office. That actually says not guilty in two
14 different places. Admittedly, Judge, this was done, the
15 original document was done on that triplicate thermal paper
16 of a generation ago or two generations ago.

17 It's not that easy to assume the Court has done
18 78's before on prisoner possessions. Jesse Friedman was
19 charged with possession of this pornography. He was also
20 charged with unlawful possession of inmate legal material,
21 and offering legal assistance in exchange for money or
22 favors. He was charged on July 13, 2000. He had a hearing
23 commenced on July 26, 2000 and July 27, 2000, and he was
24 found not guilty. The last page, which is the computer
25 printout of the DOC's inmate report, indicates that

1 adjudication. It shows he was, in fact, found guilty of two
2 charges relating to possession of another prisoner's legal
3 material, but makes no mention of pornographic bestiality,
4 incest pornography, because he was found not guilty of it.
5 He didn't possess it.

6 THE COURT: Hold it. You are saying that the
7 absence of a determination is equal to a negative
8 determination; is that right?

9 MR. KUBY: No, although I could because I think --

10 THE COURT: I am sure you could.

11 MR. KUBY: My Latin isn't good, but I think
12 inclusio -- by including this you exclude it.

13 THE COURT: I would suggest you stay away from
14 Latin.

15 MR. KUBY: What I will say is, if you actually
16 look, and admittedly it's difficult to see -- maybe the DA's
17 office in their investigative efforts may be able to get
18 another copy of the specific handwritten adjudication, which
19 contains the three charges, unauthorized assistance,
20 unauthorized possession of legal material of another
21 prisoner, which is the third one, and literature, which is
22 the charge referred to on 7-13.

23 There are handwritten notations from the hearing
24 officer. Guilty of the first count, which is unauthorized
25 assistance. Number three, guilty of giving another

1 prisoner, possessing his legal materials. As to the
2 literature, which is referenced in the 7-13 report, it is
3 written not guilty. In fact, the not guilty is written
4 twice. Now, when it goes to the computer system it doesn't
5 list all of the charges for which you were acquitted. The
6 computer disciplinary record just illustrates what the
7 primary document shows. This was just a complete and utter
8 and total falsehood that served no purpose whatsoever in
9 terms of what we are actually trying to find out here.

10 THE COURT: Why don't we then go to what we are
11 trying to find out?

12 MR. KUBY: Moving on to what we are actually going
13 to find out, our obligation is to show good cause as to why
14 we should have these documents under 50-B (2) (b).

15 THE COURT: Before you begin, under Civil Rights
16 Law 50-B, who is the victim? Who is a victim? Is a victim
17 a person who made a statement at one time or another to law
18 enforcement, recanted thereafter, and is willing to come
19 forward? Is that person a victim?

20 MR. KUBY: I think in the issues of the law,
21 although this doesn't help my position --

22 THE COURT: Go right ahead, because I have looked
23 at various cases and I haven't seen, in the eyes of the law,
24 the question. Go ahead.

25 MR. KUBY: I think that there are two arguments.

1 One is, I am sure the DA's office will make it, unless and
2 until the conviction is overturned by a court of competent
3 jurisdiction that person remains a victim.

4 Then there is the common sense interpretation,
5 which is somebody who allegedly made statements when he was
6 eight-years-old in response to improperly, admittedly
7 improper techniques used by the police at that time, and has
8 now come forward, as did Kenneth Doe, who fully recanted as
9 a grown man and says you know, I have always felt bad about
10 this. I didn't like what happened. But let me tell you
11 these things never happened, they never happened.

12 THE COURT: And is that person a victim on a common
13 sense basis?

14 MR. KUBY: Of course not on a common sense basis.

15 THE COURT: A legal basis you think he might be?

16 MR. KUBY: I think, you know, the prosecution can
17 make an argument certainly, and it's not incredible or
18 disingenuous, that you retain your status, your legal
19 status, unless and until the conviction is overturned, since
20 it was the conviction -- why should I argue against myself?
21 Ask them.

22 THE COURT: Because -- hold it.

23 MR. KUBY: Yes, sir.

24 THE COURT: Thank you very much. I'll do the
25 questioning. Thank you.

1 MR. KUBY: Okay.

2 THE COURT: The issue of the Alford or the modified
3 Alford plea was something that I probably spent more time on
4 than I had to but considered seriously. And it is the case
5 that I am interested in determining if there were, let's
6 say, 20 or 30 people who were questioned, is it the
7 questioning, is it the interrogation, is it the testimony
8 before the grand jury, is it something else from your
9 perspective? I can ask, I know that I will receive an
10 answer from the district attorney's office.

11 MR. KUBY: Let me both directly answer your
12 question, try to be as intellectually honest as I can to be
13 subject --

14 THE COURT: Please underline that, ma'am, as honest
15 as he can be. Okay?

16 MR. KUBY: If I'm going to take the position, which
17 I think is legally acceptable and supportable, you remain a
18 sex crime victim by virtue of the adjudication of guilt of
19 the offender. That is, if Jesse Friedman still stands
20 convicted of 13 counts involving 13 victims, I think that it
21 would certainly be consistent to say that what makes those
22 people victims is not what they've said subsequently or
23 whatever is said at other times, what makes them victims is
24 the fact there are criminal convictions against Jesse
25 Friedman.

1 Similarly, and by the same token, the fact that
2 many other, or some other people may have come forward, the
3 DA's office sort of opaquely refers to and says, me too. It
4 was terrible and awful. There were all these things going
5 on. Those things in issue are not victims. The total
6 number of victims that we are dealing with here are actually
7 16 people, because one of the charges was withdrawn.

8 THE COURT: That would mean 17 minus 1 is 16, or 14
9 minus 1 is 13, or some other figure altogether?

10 MR. KUBY: I think that their chance -- the
11 prosecution, when we had our very first conference and they
12 sort of oddly insisted that the people who they're trying to
13 protect the identities of, people they are trying to
14 protect, that we're not supposed to know. They insisted
15 that we have to serve all of those people which, of course,
16 completely undercuts the notion that we don't know their
17 identities. It's sort of an odd thing to insist in the
18 Article 78 proceeding brought to obtain these documents.

19 THE COURT: The Court rules, so the record is
20 clear, there is nothing in the 50-B that requires either
21 side, they just have to be served and notified. And that
22 was the ruling, correct?

23 MR. KUBY: That's exactly right, Judge. I said
24 they should do it. They said we should do it. I believe
25 the Court said Mr. Kuby, you brought this thing. So why

1 don't you serve the people you can serve. If there are any
2 people you can't serve, take it up with the DA's office.

3 We served everyone by name. We know their names,
4 addresses, where they work. The People are protecting
5 nothing at this point except the statements and other things
6 which are not protected under 50-B, except to the extent
7 they're there to protect the identities. Once we know the
8 identities, then they're really protecting nothing.

9 We went ahead and served those people, because we
10 all agreed at that conference the total size of the
11 community and universe. This was the first question the
12 Court asked, what is the size of the universe of people who
13 need to be given notice here? The prosecution said 14 is
14 the universe. When went back through the indictment we
15 realized there were another three people that testified
16 against Arnold Friedman, and those resulted in convictions.
17 We added those. You asked that. Three months ago you
18 answered it.

19 They cannot -- they can do whatever they want.
20 They should not be allowed to come back and say oh, there is
21 a whole bunch more other people that we have to spent
22 another like three or four months giving notice to. We will
23 delay further and maybe we will run out of Judge Winslow
24 before the hearing is over.

25 THE COURT: I am interested in hearing what you

1 think should transpire here, after knowing full well that
2 the district attorney's office has a right to respond to
3 your Article 78 request.

4 MR. KUBY: Thank you, Judge. First thing I would
5 like to do is just submit to the Court, and a copy for the
6 prosecution, a letter dated today. I actually finished
7 writing it much earlier today. I will give you the original
8 which briefly makes the, recapitulates the good cause
9 argument, tying it to the Second Circuit's decision, because
10 that is where the good cause comes from. I understand the
11 prosecution doesn't like what the Second Circuit said. They
12 want a rejoinder. Fine. It doesn't change what the Second
13 Circuit said. So this is for the Court.

14 (A document was handed.)

15 THE COURT: Thank you, sir.

16 MR. KUBY: There are some original documents in
17 there. That is not an exhaustive treatise. Out of
18 abundance of --

19 THE COURT: Caution?

20 MR. KUBY: -- caution, I make reference in this
21 submission to the November 30, 1988 letter, which
22 specifically states who the complaining, then complaining
23 witnesses were. And it lists them by the doe name. And
24 next to the doe name is the real name. We've had this since
25 November 1988. We never revealed these names, not because

1 we are not required to, but because there is no mandate
2 against us. It seemed like the decent thing to do. So to
3 the extent there is any question as to who and for how long
4 we have actually known the identities, the only thing that
5 they are allowed to protect, that letter illustrates that.
6 And so I think that the prosecution probably wants that copy
7 placed with the other un-redacted documents.

8 THE COURT: Speaking of redaction, the record will
9 reflect that this is a letter from the district attorney's
10 office dated November 30, 1988 to Mr. Peter Panero, which
11 the Court recognizes as counsel for Jesse Friedman on that
12 date, and thereabout that time. I don't have the second
13 page to it. I don't know whether or not there is something
14 more or less.

15 MR. KUBY: I don't either. I assume the DA's
16 office has it in their files. I assume it won't give it to
17 me because it will tell me the names of the people on the
18 front page that I have. But that -- it serves as further
19 confirmation. I promised the Court last time I would supply
20 the list of the affidavits of service.

21 THE COURT: Thank you.

22 MR. KUBY: Everybody who has been referenced by
23 name has been noticed. I do have a copy for the district
24 attorney's office.

25 (A document was handed.)

1 MR. KUBY: In terms of documents, the last one I
2 would like to submit is the un-redacted Kenneth Doe letter.
3 That has Kenneth Doe's actual name, Kenneth Doe's e-mail
4 address. The objection that I made was to the way Chief
5 Assistant District Attorney Singas dealt with Kenneth Doe,
6 the way that Mr. Doe perceived he was being intimidated.
7 The prosecution has this. I sent it to them on May 24th. I
8 would like the Court to have the un-redacted copy as well.

9 THE COURT: Are you talking about a contemporaneous
10 communication between Kenneth Doe and Miss Singas?

11 MR. KUBY: He is listening to Miss Singas' voice on
12 his office answering machine, then he responded to it
13 contemporaneously.

14 THE COURT: Contemporaneous today, within the last
15 few months, years?

16 MR. KUBY: I'm sorry, Judge, I didn't understand
17 what you were saying. Mr. Doe submitted his -- well when
18 the Court, when we had agreed on the procedure to serve the
19 common interest --

20 THE COURT: This was a pretty easy question I
21 thought. Can you give me some kind of a time frame?

22 MR. KUBY: May 20, 2013 he submitted this letter to
23 the conviction integrity team. A day later, in specific
24 violation of his specific request to not be contacted at
25 work, or at all except or through one e-mail address, Miss

1 Singas violated that specific request and called him at his
2 office and left a detailed message, within which she
3 explained that she needed to explain to him, more or less,
4 the consequences of his decision, not the consequences, the
5 implications of his decision to recant.

6 I would be happy to submit that to the Court under
7 separate cover. But this is my letter to Miss Singas, and
8 the original Kenneth Doe statement to the panel. The one I
9 submitted to the Court and the one that I've given to other
10 people has substantial redactions because they do tend to
11 identify him.

12 THE COURT: How do we proceed from here?

13 MR. KUBY: The People have had this since the
14 beginning of April. I know they were hoping the day would
15 come when they didn't have to answer. And I have been a
16 lawyer long enough to know I never want to do anything
17 before I have to. Presumably they had a good running start.
18 They, again, rephrased this jurisdictional argument, and
19 they want to tell a State Supreme Court Justice that he has
20 no jurisdiction here. I mean fine. It's not an argument
21 that I've ever felt particularly comfortable making,
22 particularly since I am making it to the person deciding it.

23 They have been talking about this for three months.
24 I think they should be given two weeks, maybe three weeks to
25 submit anything and everything they wish to submit to the

1 Court in response to our petition, and we be given a couple
2 of weeks after that to reply. And then the matter is sub
3 judice before you.

4 THE COURT: Submitted at least, is that what you
5 are saying, sir?

6 MR. SCHWARTZ: Your Honor, I feel compelled to
7 respond to some of the statements that Mr. Kuby made.

8 THE COURT: I knew you would.

9 MR. SCHWARTZ: He stood before your Honor and
10 insisted Mr. Jesse Friedman did not write and/or possess the
11 statement that was seized from him by correction officials.
12 And he indicates on a form that is illegible that he was
13 found not guilty of that offense. Whether or not he was
14 adjudicated not guilty, we have strong evidence supporting
15 our assertion that he did write and/or possess that
16 statement. And I would like to quote from a letter that Mr.
17 Friedman wrote to his uncle Howard:

18 "I wrote what turned out to be a short story. I
19 did not set out to write it as such. I was bored. I was
20 lonely. (I was horny.) I had an intriguing dream. Wanted
21 to put it on paper mostly because I could not get the idea
22 out of my mind and the only way to eject an idea is to put
23 it on paper. Then I forgot about it. Unfortunately, I
24 can't share what I wrote with anyone. In all honesty it is
25 pornographic, very pornographic. Hey, I was bored. I know

1 there are a lot of writers who can earn the dollars to eat
2 by selling pornography. And it gives them the freedom for
3 other writing. But I did not write it to sell. I wrote it
4 to get it out of my mind, and because some day I would like
5 to share it with Charles. Other than that, I doubt anyone
6 will ever read it. But I wrote it. What else was there to
7 do Friday with my life?"

8 MR. KUBY: I want to respond to that, of course.

9 THE COURT: Before we go any further, we're
10 starting to get more and more information as time goes on.
11 Has any of this information, from your perspective, been
12 shared? Maybe Mr. Kuby didn't share the information with
13 respect to the disposition of the internal disposition of
14 the inmate, but since there was a communication to you or to
15 someone else was that ever shared before this moment?

16 MR. SCHWARTZ: Shared with Mr. Kuby?

17 THE COURT: Yes.

18 MR. SCHWARTZ: I am not aware if it was or wasn't.
19 And I am not aware if this, where this letter came from,
20 whether we got it directly from the uncle or we got it from
21 someone else. I can get that answer to you if you want to
22 give me a moment.

23 THE COURT: In terms of giving you a moment, you're
24 going to have some time. But I think that we have taken the
25 global and made a microscope out of this particular

1 incident.

2 MR. SCHWARTZ: Your Honor, it was important.
3 Certainly aspersions were cast upon my office alleging that
4 we made allegations that Mr. Friedman possessed and/or wrote
5 this story and, in fact, it wasn't true. I felt it was
6 important to let the Court know that, in fact, we did have
7 strong, sound reasons for coming to the conclusion that Mr.
8 Friedman did, in fact, write and/or possess that.

9 MR. KUBY: I'm sorry, Judge.

10 THE COURT: No. Thank you very much, Mr. Kuby. If
11 you would kindly take a seat.

12 Mr. Schwartz, who on the review team, the advisory
13 panel, saw this packet, the actual, purported letter or note
14 written by Mr. Friedman? And then thereafter the follow-up,
15 which included the determination that was seemingly made by
16 the corrections department. And then after that the letter
17 that you have in your hand right now. Did any team or panel
18 ever see any of those documents?

19 MR. SCHWARTZ: The review team and the panel both
20 had the inmate's behavior report explaining that the story
21 was found in Mr. Friedman's, what they call a contraband
22 locker. And he was cited for violating directive 4572.

23 THE COURT: And the disposition, was that also
24 disclosed?

25 MR. SCHWARTZ: I want to answer it this way, your

1 Honor.

2 MR. KUBY: The answer is no.

3 THE COURT: Thank you.

4 MR. SCHWARTZ: The disposition was included. The
5 not guilty that Mr. Kuby refers to is not legible. Mr. Kuby
6 wrote that in. It may or may not, in fact, be accurate.

7 MR. KUBY: I'm sorry, Judge. Why don't you put me
8 under oath. He just accused me of forging a document.
9 They're the ones to do that, Judge, not us.

10 MR. SCHWARTZ: I made no such allegation.

11 THE COURT: Hold it. Neither one of you are going
12 to shout like this at each other in this courtroom. That is
13 it. There will not be outbursts such as this.

14 MR. KUBY: Apologies.

15 THE COURT: I thank you for that.

16 Now, it is the case that you have said that Mr.
17 Kuby was the person who wrote not guilty, right? Did I
18 misunderstand you?

19 MR. SCHWARTZ: I may have misspoken. What I meant
20 to say is, it is handwritten in. I don't know if it was Mr.
21 Kuby, someone from his law office, someone from the Friedman
22 team, but it's handwritten in because it's illegible in the
23 printed form. For whatever reason, I am not even saying
24 it's not accurate, but it's not legible. I read the
25 document this morning before coming to court. I never saw,

1 on my copy, the words "not guilty". The first time I saw it
2 was in a copy that Mr. Kuby handed to me.

3 MR. KUBY: May I just try to clarify what these
4 documents are? I'm not going to go back and forth on this.

5 THE COURT: For one minute. That is something that
6 took place in July, purportedly took place on July 13, 2000?

7 MR. KUBY: This?

8 THE COURT: Correct.

9 MR. KUBY: Correct, July 13th.

10 The inmate misbehavior report, which is the
11 accusation of unlawful or illegal activity in the prison,
12 it's the charge. What they did not show to the outsiders,
13 and have not disclosed, was the adjudication of the charge,
14 which was not guilty. That is found in several places.
15 It's found twice in the actual adjudication report. I know
16 that they don't know much about what goes on inside the
17 prisons they send people to but in 2000 --

18 THE COURT: And you do?

19 MR. KUBY: Unfortunately, I know a bit more than
20 they do.

21 THE COURT: They do from hearing it from others and
22 not from personally participating.

23 MR. KUBY: I have actually spent more than a couple
24 of nights, but let's not go into my youth, please.

25 THE COURT: I would avoid that in all cases, I can

1 tell you.

2 MR. KUBY: These forms are thermo triplicate forms;
3 that is to say, it was the step after carbon paper. And
4 there are three or sometimes four sheets. And they're
5 filled out by hand by the corrections staff.

6 And these findings are consistent with, in fact do
7 represent the determination of the hearing officer. I
8 suppose we could know that in a couple of different ways.

9 THE COURT: Mr. Kuby, I'm going to help both sides
10 out, because in your response, Mr. Schwartz, the Court has
11 an expectation that you're going to address this very issue.
12 And we're going to have a legible form of the disposition or
13 adjudication of the charges made. And you, because you're
14 going to have an opportunity to reply, will be able to do
15 so. So we don't have to go any further with surmise and
16 conjecture.

17 Next. Did you have something else that you needed
18 to say, Mr. Schwartz?

19 MR. SCHWARTZ: I was going to respond to a number
20 of other statements made by Mr. Kuby, your Honor.

21 THE COURT: That can't wait until you respond to
22 the Article 78; is that correct?

23 MR. SCHWARTZ: It can. I just wanted to make sure
24 that no other orders were going to be issued before that
25 time. If the next thing on board is for us to submit our

1 response, then I'm fine with sitting down, your Honor.

2 THE COURT: Now, have you seen any orders that were
3 issued sua sponte or were issued, in this case, in any
4 fashion? The answer to that is rhetorical because the
5 answer is no. All-right.

6 MR. SCHWARTZ: I did receive certain requests to
7 have materials brought by the end of the day.

8 THE COURT: Oh, yes.

9 MR. SCHWARTZ: I gave them.

10 THE COURT: I will say with a certain amount of
11 pride, that when this Court has ran into an impediment, in
12 that it could not make accurate determinations because the
13 information wasn't here, it did reach out with letters,
14 carbon copied to Mr. Kuby, saying please provide it. I have
15 to have it. This is the information that you have in one
16 particular form. And I thanked you for your immediate
17 response.

18 MR. SCHWARTZ: So, your Honor, if we can have three
19 weeks to submit our response, we will do so.

20 THE COURT: Two weeks for a reply?

21 MR. KUBY: Yes. Unfortunately I don't have my
22 calendar.

23 THE COURT: We have a calendar over here.

24 MR. KUBY: Okay. People's response by Friday, the
25 19th, or Monday the 22nd?

1 MR. SCHWARTZ: I would appreciate the 22nd.

2 MR. KUBY: I have no objection.

3 THE COURT: By the 22nd. And I'm assuming that
4 this is of July; is that correct?

5 MR. KUBY: Correct. We will have our reply in on
6 the 5th of August.

7 THE COURT: How close is that to Labor Day?

8 MR. KUBY: A few weeks.

9 THE COURT: Two weeks away from Labor Day. I don't
10 think --

11 MR. KUBY: I have my reply in by the 5th of August.

12 THE COURT: Oh, the 5th of August. Excuse me. I
13 stand corrected. The 5th of August it is. The 19th for the
14 DA's office, the 5th of August for the reply.

15 Is there anything else that this Court has to
16 address before we adjourn?

17 MR. SCHWARTZ: I believe you said July 19th and we
18 agreed to the 22nd.

19 THE COURT: The 22nd. You are absolutely right.
20 The 22nd. It was initially the 19th. And you preferred to
21 have that weekend that you could use to work, and of course
22 you can.

23 MR. SCHWARTZ: Thank you.

24 THE COURT: Anything else?

25 MR. KUBY: Is there some time you would like to see

1 us all again?

2 THE COURT: There may be some time. If you two, or
3 any combination thereof, wish to have a conference with the
4 Court, the Court would be more than happy to oblige
5 telephonically, electronically, in the courtroom. Just ask.

6 MR. KUBY: Fine. Thank you very much, Judge.

7 THE COURT: Absolutely.

8 MR. SCHWARTZ: Thank you, your Honor.

9 THE COURT: Thank you all very much. I thank you.
10 This matter is adjourned at this point.

11 Insofar as anybody speaking to the press, would you
12 kindly do so outside in about two minutes. Mr. Bagnuola is
13 taking over at this point.

14 (Whereupon, this matter was concluded.)

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16 C E R T I F I C A T E

17
18 I, Cheryl D. Chester, Official Court Reporter, Supreme
19 Court, Nassau County, N.Y., do hereby certify that the foregoing
20 is a true and correct transcript of the proceedings.

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Cheryl D. Chester, CSR, RPR
Official Court Reporter