SUPREME COURT, NASSAU COUNTY

CRIM. TERM: PART 44
Ind No. 67104/87, 67430/88
and 69783/88

PRESENT:

HON. TERESA K. CORRIGAN, AJSC

X

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

JESSE FRIEDMAN

Defendant, X

Defendant, via notice of motion filed August 11, 2014, moved for an Order of recusal from this Court. Thereafter, defendant filed a supplemental letter, dated August 27, 2014, detailing two additional reasons why the Court should recuse itself from this case. The People filed opposition papers on or about September 8, 2014, and the defendant filed a reply memorandum on or about September 22, 2014. The papers were marked "submit" on September 29, 2014. Below is the Court's decision on this matter.

The criminal case against Jesse Friedman dates back to 1987 when a search warrant was executed in the Friedman home. Thereafter, three separate grand juries handed up indictments against Jesse Friedman and others between December 1987 and November 1988. On December 20, 1988, Jessie Friedman pleaded guilty to seventeen (17) counts of sodomy in the first degree, four (4) counts of sexual abuse in the first degree, one (1) count of attempted sexual abuse in the first degree, one (1) count of use of a child in a sexual performance, and two (2) counts of endangering the welfare of a child in satisfaction of all three indictments. He was subsequently sentenced to concurrent upstate prison terms, the longest of which was six (6) to eighteen (18) years.

Jesse Friedman was released from incarceration in December 2001. In 2003, a movie entitled "Capturing the Friedmans" was released. This Court has never watched the movie. Thereafter, in January 2004, defendant filed his first motion to vacate his judgement of conviction, never having done so while incarcerated. The People filed their opposition in November 2004, and the motion was denied in January 2006. The Appellate Division, Second Department, denied defendant leave to appeal and his application for leave to appeal to the New York Court of Appeals was dismissed for lack of jurisdiction.

Thereafter, Jesse Friedman filed a petition for a writ of habeas corpus, in June 2006, before the United States District Court, Eastern District of New York. That Court dismissed the petition on timeliness grounds; however, the decision was

appealed to the Second Circuit Court of Appeals. The Second Circuit Court ruled against the defendant stating, [e]ven if the petition is deemed timely, petitioner's Brady claim fails on the merits." Friedman v. Rehal, 618 F.3d 142, 152 (2nd Cir., 2010). The Second Circuit, relying primarily on the movie "Capturing the Friedmans," encouraged the Nassau County District Attorney's Office (hereinafter, "NCDAO") to undertake a review of the defendant's case and evaluate his claims of actual innocence.

Justice Reena Raggi wrote a separate opinion concurring with the majority ruling related to Brady matters. She further stated, "[w]hile the acts alleged are disturbing and may well warrant further inquiry by a responsible prosecutor's office, I cannot predict whether the outcome of any such inquiry will be favorable to petitioner, whose conviction is based on a plea of guilty that he thereafter publicly confirmed." *Id.* at 161, 162.

The NCDAO began its review in 2010. In September 2012 a Freedom of Information Law (hereinafter, "FOIL") request was filed by defendant, denied by the People and subsequently heard, via an Article 78 proceeding before the Supreme Court, Nassau County. The ruling of the Supreme Court is pending appeal. In June 2013, the NCDAO released a report detailing the results of the investigation into defendant's conviction. In June 2014, the defendant filed a defamation lawsuit against the District Attorney (hereinafter, "DA") and two others in the office and also filed a CPL§440.10 motion seeking to vacate his judgement of conviction. The 440 matter was assigned to this Court as the County Court Felony Sex Offense Part and the Court asked for the attorneys to appear on July 8, 2014 so the Court could disclose, on the record, her prior employment with the NCDAO. This motion to recuse soon followed.

In his motion, Defendant moves for this Court to recuse itself under Article 14 of the Judiciary Law and §100.3 of the Rules of Judicial Conduct, namely 22 NYCRR 100.3. Moreover, defendant seeks transfer of the recusal decision to another judge relying on a 1988 decision from a Justice Court in Westbury Village for support of this request.

Defendant makes several arguments in support of his position. First, he points to the fact that this Court previously worked in the NCDAO in a supervisory position. He puts forth his belief of a personal relationship between the Court and the DA dating back to past employment in the Brooklyn District Attorney's Office. He hi-lights the public interaction between the Court and the DA. Second, he touts an "appearance of impropriety" based on the "totality of the circumstances" from his first argument again detailing what he believes is a "long relationship with DA Rice." Defense Motion, pg. 9. He argues that the Court is an "insider" incapable of passing judgement against its former employer. He then further argues that because this judge was named in a lawsuit from a time when she was at the Brooklyn District Attorney's Office, she can not and should not perform her judicial duties in this matter.

The People argue that there is no legal basis for this Court to recuse itself and no support for the request that the decision on this matter be transferred to another judge. They argue that there is no appearance of impropriety based on what defense put forth and that the Court should only recuse itself if it feels that it cannot be fair

and impartial in this matter.

This Court can be fair and impartial and for the following reasons, the defense motion is denied.

It is true that from 1989 to February 2006, I was an Assistant District Attorney in the Kings County District Attorney's Office and for some portion of that period, Kathleen Rice was also an Assistant District Attorney in that office as were some five hundred (500) attorneys. While I knew of Kathleen Rice while I was in that office, I was not assigned to any bureau of which she was a part and I did not otherwise work or socialize with her.

In or about November 2005, after Kathleen Rice was elected Nassau County District Attorney, I applied for a position in the office, went through the interview process, and was hired.

I entered the NCDAO as Bureau Chief of the Street Narcotics and Gang Bureau (hereinafter, "SNAG"). I initially reported to Meg Reiss, a person whose name I knew from Brooklyn but with whom I did not work. After she left the office, I reported to Chief Investigator Charles Ribando. Joseph Onorato was one of my deputy bureau chiefs. It was not until after his departure from the office in 2011 that I learned that he prosecuted Jesse Friedman. We never discussed the case.

I left the Office in August 2012 and ran for the position of County Court Judge. Many people supported my candidacy including the DA, Meg Reiss and Charles Ribando. As is ethically required of any judicial candidate, I did not make myself aware of the campaign contributions, if any, of those who supported me and in fact remained ignorant of the identity of many of those who actually donated to my campaign.

After winning election in November 2012, the Administrative Judge of Nassau County assigned me to the Family Court, effective January 2013. One year later, the Administrative Judge assigned me to this Part, effective, January 2014. I currently preside over the County Court Felony Sex Offense Part for Nassau County. It is through that designation, and only through that designation, that this case came to be assigned to this Court.

Turning first to whether there is support in the law for this Court to ask another court to decide this recusal motion; there is none. In fact, both the State Courts and the Federal Courts hold that such a decision is the sole province of the Court as no other judge can possibly know all that the sitting judge knows as to whether or not to recuse. *See,* People v. Moreno, 70 NY2d 403 (1987); Apple v. Jewish Hospital Med. Ctr., 829 F.2d 326 (2nd Cir., 1987). Defendant's reliance on People v. T&C Design, Inc, 178 Misc.2d 971 (Westbury Village Ct., 1998) is misplaced. As that Justice aptly pointed out, his actions were not supported by the current law of New York but rather based on his belief of how recusal matters should be handled. As such, the decision does not accurately reflect the current legal standards required to be followed in deciding a recusal motion and is not controlling on this Court.

The Court next turns to whether, under Judiciary Law §14, it is legally mandated to recuse itself from this matter. Judiciary Law §14 sets out four criteria that demand recusal. They are: (1) if the judge is a party to an action, claim, matter, motion or proceeding before it; (2) if the judge has been attorney or counsel in the

matter before it; (3) if the judge has an interest in the matter before it; or (4) if the judge is related by consanguinity or affinity to any party in the controversy within the sixth degree.

Under an analysis of these four criteria, it is clear that this Court is not mandated to recuse itself. This Court is not a party to the matter and is not related by consanguinity or affinity to any party therein. Moreover, the "interest" referred to under this law is one of a pecuniary or property interest. *See*, People v. Tiffany, 176 Misc.2d 271 (Weschester County Ct., 1998). In any event, this Court has no interest of any kind in this case and its ultimate outcome. Lastly, this Court has never been an attorney or counsel on this matter and her prior employment as an Assistant District Attorney does not mandate recusal. *See*, People v. West, 254 AD 2d 315 (2nd Dept. 1998).

Defense seeks recusal under various sections of 22 NYCRR section 100.3(E). It states, in pertinent part, that:

> (1) A Judge shall disqualify herself in a proceeding in which the judge's impartiality might reasonable be questioned, including but not limited to instances where:
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> (a)(i) the judge has a personal bias or prejudice concerning a party; or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
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> (b) the judge knows that (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.

This Court has no personal bias or prejudice concerning any party in this matter. As I previously stated to both parties, I do not have any knowledge about this case beyond what I have learned in the motion papers submitted to the Court. I did not reside in Nassau County at the time of the investigation and plea of guilty. In fact, I was enrolled in law school and did not work in Nassau County. I did not follow the story in the newspaper. I do not know Jessie Friedman. Moreover, although I had interactions with Ronald Kuby as an Assistant District Attorney in Kings County, I only know him as an intelligent, well-spoken and competent attorney. Although I worked in the same office as the Assistant District Attorneys assigned to this matter, I did not and do not socialize with them. As such, I have no personal bias or prejudice in favor of or against any party in this matter.

My lack of knowledge of the facts of this case is the reason why I sought complete transcripts and was not satisfied with excerpted transcripts that could easily be skewed to fit the submitting parties position. If this Court is going to make legal and factual decisions in this matter, it will be on a complete record, not on statements taken out of context, put forth by either side and certainly not on a movie that this court has never seen.

If this Court were to accept the argument of defendant related to recusal based on my having previously practiced law with other Assistant District Attorneys, it would be almost impossible for me to sit on any case within this County. Every County Court judge that has come from either the NCDAO or the Nassau County

Legal Aid Society would be in the same position as this Court.[1] The New York Advisory Committee on Judicial Ethics has provided extensive guidance to judges who were previously employed by the District Attorney's Office in the jurisdiction where they are sitting. Those opinions make clear that a judge is not required to recuse herself if she had no personal involvement in a case as an Assistant District Attorney that is currently before the Court. *See,* Advisory Comm. on Jud. Ethics Ops: 93-116; 14-10; 07-23. *See also*, People v. Mitchell, 137 Misc 2d 450 (Montogmery County Ct., 1987) and People v. West, *infra.*

Defense next argues that this Court's political party designation in addition to certain campaign contributions it received and the fact that the I was named in a lawsuit while an Assistant District Attorney in Brooklyn correlates with a need for recusal. None of those positions is supported in the law. There is no support for defense's position that because this Court shares a political party with the NCDA it must recuse itself. Nor is there support that a $1000 campaign contribution from this Court's prior boss, while seeking election to the County Court, likewise requires recusal. In fact, the Judicial Advisory Committee has held the exact opposite as long as the Court believes it can be impartial. *See*, Opinion 10-135. After the fact mention of a prior lawsuit is likewise not a reason for recusal. In fact, 22NYCRR 100.3 (B)(1) states that "A judge shall not be swayed by partisan interests, public clamor or fear of criticism." *See,* Advisory Comm. On Jud. Ethics Ops: 00-10, 13-44 n.2. *See also*, In re Drexal Burnham Lambert Inc., 861 F.2d 1307 (US 2nd Cir., 1988). Without re-litigating a matter already resolved, the lawsuit mentioned by defense has absolutely no bearing on the matter before this Court.

The Court does not find support for recusal as a matter of due process. The Court of Appeals, in People v. Alomar, 93 NY2d 239 (1999) stated that, "[r]ecusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion or where a clash in judicial roles is seen to exist". *Id.* at 246. As this Court has already stated, there is no direct, personal, substantial or pecuniary interest between the Court and the ultimate outcome in the Friedman matter. Contrary to what defense argues, this Court does not see any connection between it's role as Judge and either the DA's run for Congress, the shared political party, the campaign contributions received as disclosed by defense or any other argument posited to the Court. Moreover there is no clash in judicial roles. The defense in Alomar claimed that the judge in that matter was seeking to avoid embarrassment and preserve a criminal conviction over which the Court presided by participating in a reconstruction hearing. The Alomar Court held that the defense argument, "falls decidely short of the mark." *Id.* This defendant alleges a similar concern related to his conviction and the report released

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[1]It should be noted that of the thirteen County Court Judges currently hearing criminal cases, nine worked in either the NCDAO or the Legal Aid Society. One came from the Nassau County Attorney General's Office, one from the New York City Police Department and one from the Queens Legal Aid Society. Most lived in Nassau County at the time of the criminal acts for which this defendant was convicted.

by the NCDAO. He stated that, "[i]f this Court were to rebuke that review and overturn the conviction...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..." Defense motion, page 10.

Like in Alomar, this argument does not rise to the level of requiring recusal. This Court does not sit to protect anything done by the NCDAO (or for that matter, anyone else) in any case. This Court's ethical imperative and personal objective is to accord parties a fair opportunity to be heard and a fair determination of their claims.

There has been no delays in this matter. A motion schedule was set for both this recusal matter and the underlying matter. Those schedules are being adhered to by all parties and a hearing on the issue of "actual innocence" (agreed to on consent by the NCDAO) will be conducted at an appropriate time after the completion of this recusal matter. As such, this Court does not find any due process requirement to recuse itself.

Lastly, each statutory or legal requirement to recuse oneself has "the appearance of impropriety" as its umbrella consideration. This Court does not believe that such an appearance exists in this matter. There is nothing within this Court's prior work history or successful judicial campaign that leads to an appearance of impropriety in this Court presiding over the Jesse Friedman 440 motion. In fact, Judges who are appointed to the bench determine cases that involve the very person who was responsible for their appointment. That includes Judges of the United States Supreme Court and the New York Court of Appeals.

In sum, this Court has no outside knowledge of the Jesse Friedman case; this Court has no relationship with any of the parties in this matter that requires recusal; this Court has no pre-determined belief as to what the outcome of this case should be and has no interest in any outcome other than one based on the facts as proven to the Court applied to the law as stated in New York. This Court will be fair and impartial in deciding this case.

Based on all the above, Defendant's motion to have this Court recuse itself is denied.

SO ORDERED.

ENTER

Dated: October 24, 2014

Teresa K. Corrigan

TERESA K. CORRIGAN, AJSC