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March 21, 2016

Hon. Terence P. Murphy
County Court, Nassau County
262 Old Country Road
Mineola, New York 11501

Re: People v. Jesse Friedman, Ind. 67104, 67430, 69783

"I am granting discovery. They won't get the moon, but they will get some things . . . and if anyone has some quaint legal theory why they shouldn't, I don't want to hear it."

--Hon. Terence P. Murphy, approximate quote of chamber conference, Jan. 6, 2016

"I was in the Virgin Islands once. I met a girl. We ate lobster, drank piña coladas. At sunset, we made love like sea otters. *That* was a pretty good day. Why couldn't I get *that* day over, and over, and over..."

--Phil Collins [Bill Murray], *Groundhog Day*, 1993

Dear Judge Murphy:

On January 16, 2016, this Court sketched out a general framework for discovery and made itself quite clear. All persons present stated they understood the Court's thinking and apparently agreed to conform their actions therewith by providing obviously relevant discovery, while reserving the right to specific objections to specific requests on grounds other than the defense is not entitled to anything. The next day, the prosecution simply went back to "no" and subsequently refiled the same quaint (and wrong) legal objections they relied on last year.

Setting aside, for the nonce, the prosecution's repetition of the same general arguments this Court has previously rejected, the prosecution offers several objections with respect to several requests.

The prosecution asserts that our requests 2, 3, 4, 5, 6, 7, and 10 are overly broad because of the use of the words "any' and "all," as well as "documents," "statements," or "records," and it concludes from such words that the requests constitute unfettered access to records. March 4, 2016 Letter from ADA Daniel Bresnahan to Hon. Terence P. Murphy at 3 (herein "Opposition").

That conclusion is meritless. Such standard definitional terms merely ensure that the request is a complete request, and not subject to the inevitable quibbles about what constitutes a "document."

Next, the prosecution objects to the above-enumerated requests because the defense has not articulated "any theory of relevance." Id. at 3. The relevance of those requests really should be self-evident. Do we really need to explain to the Nassau County District Attorney's Office why Brady material (Request 7), is relevant to a claim of innocence? In any event, the relevance of this group of requests is discussed exhaustively in defendant's June 23, 2014 Memorandum of Law in support of the 440.10 petition, at pages 24-125, and more briefly in defendant's Memorandum of Law in Support of a Motion for a *Subpoena Duces Tecum*, at pages 15-20.

By means of summary, the indictments lack any detail or substantive accusations beyond bare recitations of criminal acts. Requests (2) and (3) merely seek the statements of those complainants. The purpose of the upcoming hearing is to prove innocence of accusations. The prior statements *are* the accusations. They are not merely relevant material, they are essential material. The 440.10 Petition sets forth through affidavits of students, and it need not be repeated here, that many students denied wrongdoing at length before relenting to police pressure. The factual predicate is well-established to disclose those statements and expose their evolution.

Seeking the truth of what transpired in the computer classes includes identifying witnesses to those classes. Requests (1) and (4) do that. Moreover, many witnesses denied witnessing abuse, and have come forth to say so. All of the records of witnesses who say they did not witness the daily abuse the indictments alleged are directly exculpatory and should be released.

That reasoning also applies to alleged co-actors, requests (5) and (6). One need look no further than the detailed letter submitted by Ross Goldstein to understand the manner in which the District Attorney's Office and Police Department worked to coerce accusations. They also coerced allegations against unnamed (but identified by police and the District Attorney's Office) co-assailants. The experience and testimony of those alleged co-assailants is directly relevant to the reliability of accusations against both them and Friedman.

The remaining requests, most of which encounter no specific objection from the prosecution, are documents deemed by the District Attorney's Office as relevant to the determination of guilt or innocence. They've been relied upon in the Rice Report, but never disclosed.

The prosecution specifically objects to request 14, on the ground that the referenced Guidelines were not in use at the time the children were questioned by the police, and that many sex offenders were convicted on the basis of less than "state-of-the-art" interview techniques. Id. at 3. The Opposition opposes the disclosure despite touting them in the Rice Report at page 76. The reliability of the accusations constructed by the police should be tested in light of the difference between what the detectives actually did, and what Nassau County now mandates they should do. The importance of certain precautions while interviewing children is also highlighted by the affidavit of Dr. Maggie Bruck, attached to the reply to the opposition to the motion for a

subpoena duces tecum, as well as the affidavit of Kenneth Lanning, attached to the 440.10 Petition as Exhibit T. Indeed, Mr. Lanning's Affidavit explains at length the importance of child witness statements, as well as the documents relied upon in the Rice Report. 440.10 Petition Ex. T at paras. 13, 17-20, 25-30, 39-40.

The prosecution objects to request (8), claiming the key to unlock the Rice Report's deliberate scrambling of all of the witnesses, omitting their Doe names, and inserting numerals to make it almost impossible to determine who actually said what, is "work-product." Id. at 3. Apparently relying on the protections of CPLR 3101(c), the prosecution leaves it up to the Court to actually determine how it could possibly be considered work-product, declining to even set forth a standard for privilege, let alone analyzing it under that standard. See Spectrum Sys. V. Chem. Bank, 78 N.Y.2d 371, 377 (1991) ("burden of establishing any right of protection is on the party asserting it"). That's because it fails basic analysis. At the outset, the "protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." Id. Not "every manifestation of a lawyer's labors" is, as the prosecution would apparently have this Court believe, attorney-work product. Hoffman v. Ro-San Manor, 73 A.D.2d 207, 211 (1st Dep't 1980). The exemption must be "limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy." Id., citing Richardson, Evidence (10th Ed.), § 422, citing 3 Weinstein-Korn-Miller, N.Y, Civ. Prac. §§ 3101.42-3101.55. Plainly, anyone can take thirty-three names, throw them into a bowl, and assign them arbitrary numbers. You cannot delete the names of witnesses from a document, assign them numerals, and claim that the numeric-name translation is "work product."

Nor is the key privileged by virtue of being prepared in preparation for litigation under CPLR 3101(d)(2). It was created in the process of creating the Rice Report, a purported voluntary investigation into a conviction. Even if it was with an eye towards trial, "the existence of a witness to an event, or to conditions bearing upon an event, is independent of and precedes any work done by an attorney. A witness and such incidentals as his address, as well as his knowledge, are not the creation of a party 'in preparation for litigation,' although the unearthing of the witness may well be the product of an attorney's labors." Id. at 211. Regardless of its obvious failure to qualify however, the material is still discoverable if the party seeking it (the defendant) has a substantial need of the materials in preparation of the case. Witness statements and identities, particularly those so important that the prosecution would rely upon them in its findings, are perhaps the only method of inquiry available in this truth-seeking hearing. The "search for truth is better served when the fullest range of disclosure is provided. Revealing the names of witnesses (does not) violate 'the general policy against invading the privacy of an attorney's course of preparation.'" Id. at 212, citing Hickman v. Taylor, 329 U.S. 495, 512 (1947); see also People v. Consolazio, 40 N.Y. 2d 446, 453 (1976) (rejecting argument that "witness statements in narrative form made in preparation for trial by an Assistant District Attorney" is exempt from disclosure). Finally, should the Court find that the key is privileged, the remedy is not to permit the prosecution to continue to rely on anonymous statements, but simply turn over the original documents cited.

Moving to the prosecution's claims that the defense is entitled to nothing, the prosecution asserts all discovery should be denied on the ground that witnesses may be harmed or intimidated, or at the least, do not wish to have their privacy invaded. Opposition at 3. We assume the prosecution is referring to the complaining witnesses whose accusations led to the counts of conviction. But there is no nexus between releasing the statements and any feared privacy invasion. We have had the names of the witnesses since November 30, 1988. See, Nov. 30, 1988, Letter from ADA Joseph Onorato to Peter Panaro.[1] We have always protected their privacy, although there is no legal reason for us to do so.

In 2013, following the commencement of the Article 78 proceeding, the prosecution insisted that *the defense* must serve each of the seventeen purported victims with a full set of papers so that they may exercise their right to be heard pursuant to Civil Rights Law Section 50-b(2)(b). We did so. Only three, Barry Doe, Edward Doe, and Gregory Doe, objected to disclosure of their statements. Barry Doe, who was the witness who retained counsel, is also the person appearing on videotape stating "[a]s God is my witness and on my two children's lives, I was never raped or sodomized...I never saw a kid get sodomized or molested...And if I said it, it was not because it happened, it was because someone else put those words in my mouth." May 21, 2012 Interview Statements of Barry Doe, 440.10 Petition Ex. E at 4. His attorney appeared in Court during the August 22, 2013 hearing on Mr. Friedman's Article 78 petition, and the following colloquy ensued:

> Mr. Kuby: Barry Doe is not alleging that Jesse Friedman committed a criminal act against him. That is something Mr. Schoer told me on behalf of his client. I put that in papers. I just want to confirm that Mr. Schoer stands by the statement that he made to me informally.
>
> Mr. Schoer: My client's memory would support that statement.

(Kuby Aff. Ex. G (Transcript of Hearing), at 4:1-10). Barry Doe's attorney did not allege any wrongdoing, of any kind, on the part of the defendant or the defense. Both Gregory Doe and Barry Doe did not claim they were worried about being harassed; indeed, Gregory Doe willingly appeared, extensively, in *Capturing the Friedmans*. If simply not wanting to be bothered were a valid basis to object to a subpoena, no one would testify.

The only documented instance of harassment in this case comes from a complaining witness who was being harassed by then ADA, now DA, Madeline Singas. In 2013, Kenneth Doe, a vice-president at an investment bank, submitted a letter disavowing his 1987 accusations and detailing the enormous pressure police put on him to lie. See, 440.10 Petition Ex. M. In that letter, he also provided an email address, and asked that if he is contacted, it be only through that

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[1] That letter was referenced in the June 2014 440.10 Petition, but not attached. The defense in that petition offered to file the letter under seal with the Court's request and permission, but it was not requested. It remains available upon request.

email address for the purposes of confirming his identity. Rather than go that route, then ADA Singas called the main line of his office, leaving a detailed voice message about the nature of his recantation in apparent retribution for his recantation. Indeed he sought this law office's help in protection from such exposure after that incident. Id. at 2.

The prosecution also responds with a re-hashed barrage of quaint legal theories in which they presume definite proscription of discovery not from the words of the legislature, but from the absence of them.[2] Moreover, the District Attorney's Office repeats the claim that the barring of a cause of action under Brady v. Maryland eliminates their ethical obligation to turn over exculpatory evidence (which it does not), and in fact *prohibits* them from doing so. See, Opposition at 5.[3] That interpretation isn't merely unsupported, it's flatly contradicted by countless authorities. See, e.g., Warney v. Monroe County, 587 F.3d 113, 125 (2d. Cir. 2009) ("The advocacy function of a prosecutor includes seeking exoneration and confessing error to correct an erroneous conviction. Thus prosecutors are under a continuing ethical obligation to disclose exculpatory information discovered post-conviction…any narrower conception would be truly alarming."). Indeed it's been denied by the Second Circuit Court of Appeals considering the facts of this very case. See Friedman v. Rehal, 618 F.3d 142, 159 (2d Cir. 2010) (the "focus on the impediment to legal relief, however, should not obscure the continuing ethical obligations of the District Attorney to seek justice."). Again the prosecution conflates the post-plea extinguishment of Friedman's Brady claim with the prosecution's continuing obligation to provide Brady material.

The opposition chooses in this case and in its earlier briefing not even to contend with the Court's inherent subpoena power. See, N.Y. C.P.L. § 610.20; N.Y. C.P.L.R. 2307; People v. Covalito, 87 N.Y.2d 423, 428 (1996) (noting availability of court issued subpoena *duces tecum* pursuant to C.P.L. 610.20(3)).[4] Rather, the opposition attempts to mislead the Court into believing that the lack of general open-file fishing discovery in post-conviction proceedings divests the Court of its other general powers. It does so not by presenting any rational argument as to why they don't apply. Rather, it merely ignores them, and hopes the Court will too. Please do not.

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[2] Those interpretations are particularly specious in light of the fact that the disclosure laws predate the cause of action under People v. Hamilton that gives rise to the instant action.

[3] See May 29, 2015 Reply to the Opposition to the Motion for the Issuance of a Subpoena *Duces Tecum*, at 15-17; see also Dabbs v. Vergari, 149 Misc. 2d 844, 847 (Sup. Ct. Westchester Cty. 1990) (it is "well established that notwithstanding the absence of a statutory right to post-conviction discovery, a defendant has a constitutional right to be informed of exculpatory information known to the state.")

[4] See also May 29, 2015 Reply to the Opposition to the Motion for the Issuance of a Subpoena *Duces Tecum*, at 2-8.

Sincerely,

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