

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

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In the Matter of JESSE FRIEDMAN,

Index No.
4015/13

Petitioner,

-against-

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

Respondent,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

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August 22, 2013
Mineola, New York

B E F O R E : HON. F. DANA WINSLOW,

Justice.

A P P E A R A N C E S :

LAW OFFICE OF RONALD KUBY

By: RONALD KUBY, ESQ.

LEAH BUSBY, ESQ.

LINDA TVRDY, ESQ.

For Petitioner

NASSAU COUNTY DISTRICT ATTORNEY

By: ROBERT A. SCHWARTZ, ADA

JUDITH R. STEINBERG, ADA

For Respondent

A L S O P R E S E N T :

GARY SCHOER, ESQ.

For Witness Number 14

Lisa M. Porteus, RPR
Official Court Reporter

1 THE COURT: All right. Let the record reflect
2 that this is a continuation of a hearing commenced at the
3 beginning of 2003 in one fashion or another. The last
4 time that we were here on June 28th, this was the date at
5 which certain things were scheduled to occur. I have an
6 outline generally that I wished to follow, but I'm going
7 to deviate from it immediately and probably will
8 consistently throughout the proceedings.

9 First thing is that I do understand that Mr.
10 Schoer is in the courtroom, and Mr. Schoer has forwarded
11 a letter that the Court wishes very much to have further
12 explained, and also to have his notice of appearance
13 noted on the record since he has officially appeared, as
14 the Court sees by his prior communication.

15 Mr. Schoer, sir.

16 MR. SCHOER: Good morning, your Honor. Gary
17 Schoer, S-C-H-O-E-R. 6800 Jericho Turnpike, Syosset, New
18 York.

19 THE COURT: Yes, please.

20 MR. SCHOER: Judge, I submitted an affirmation
21 in opposition to the petition which --

22 THE COURT: All right.

23 MR. SCHOER: -- which your Honor should have
24 received. I represent the person who's been identified
25 as witness number 14 in the District Attorney's report,

1 and my client's position is that he does not wish any of
2 the reports, any of the records that have been requested
3 by the petitioner to be released, that he would like his
4 privacy to be maintained, and that he supports the
5 District Attorney's position not to release any of the
6 police reports or the Grand Jury testimony.

7 THE COURT: All right. With respect to him.

8 MR. SCHOER: With respect to him.

9 THE COURT: Okay. You are, I know, very much
10 aware of Brady and its successors and the changes that
11 have taken place over the many years since 1988, and also
12 the recantations -- because that's what they're called --
13 by different parties in this case. In fact, at one point
14 or another both sides have utilized that term,
15 non-recantation or recantation. And I do want to be sure
16 that this is a privacy issue that is being asserted in
17 connection with the application that is now being made by
18 you. Is that correct?

19 MR. SCHOER: That's correct, your Honor.

20 THE COURT: All right.

21 Mr. Kuby, you wish to be heard?

22 MR. KUBY: Yes, thank you, Judge.

23 I've spoken to Mr. Schoer, and I submitted a
24 clarification of something Mr. Schoer said in his
25 affirmation, and the clarification I submitted was that

1 his client, witness 14, also known as Barry Doe for
2 purposes of our discussion, as he was named in the
3 original indictment, that Barry Doe is not alleging that
4 Jesse Friedman committed a criminal act against him.
5 That's something Mr. Schoer told me on behalf of his
6 client. I put it in papers. I just want to confirm that
7 Mr. Schoer stands by the statement that he made to me
8 informally.

9 MR. SCHOER: My client's memory would support
10 that statement.

11 MR. KUBY: Thank you.

12 MR. SCHOER: At this time.

13 MR. KUBY: Thank you.

14 The victims of a sex crime, if we're going to
15 apply that term to Barry Doe -- and I've suggested that,
16 notwithstanding his recantation, he probably is a victim
17 in the eyes of the law -- they get to be heard. They
18 don't get a veto on release of documents. But,
19 nonetheless, we are very, very, very cognizant of Barry
20 Doe's desire to make certain that his real name and
21 whatever allegations he actually made beyond those in the
22 indictment, that those do not come to public scrutiny. I
23 understand his situation, I understand his profession, I
24 understand his family situation. I actually understand
25 it really well, because he already spoke to the

1 filmmakers in this case, gave them extensive interviews
2 where he said, among other interviews, as God is my
3 witness he was never molested or seen anyone molested.

4 We've maintained out of discretion, not out of
5 compulsion, his identity and his anonymity. We've
6 maintained that privacy even though we're under no
7 constraints whatsoever to do so. We're not public
8 officials. 50B doesn't apply to us, although it does
9 apply to the DA's office. I could shout his name from
10 the rooftops. Wouldn't do it, haven't done it, not going
11 to do it. So in terms of protecting his privacy, we know
12 who he is.

13 The only issue is what were the specifics of
14 his various statements. And, of course, the statements
15 -- and this is a theme that perhaps I'll return to.
16 Perhaps you've heard it enough. But I'll say it this
17 time. The statements themselves are protected only to
18 the extent that they reveal the identity of the person.
19 That's the -- that is the singular and sole protection
20 provided by the Civil Rights Law.

21 We know the identity. Mr. Schoer doesn't deny
22 we know the identity. Certainly his client knows we know
23 his identity, because he sat down with us. So the only
24 thing that's being protected are the specific contents of
25 his statements, and that's not protectable except to the

1 extent that it conveys his identify, which we know
2 already.

3 Now, if the Court wants to actually give Barry
4 Doe more protection than Barry Doe has now, the Court can
5 do something, although I'm not wild about the idea, quite
6 frankly, but your power to condition disclosure upon
7 conditions appears by the statute to be plenary. I mean,
8 probably you couldn't exceed the bounds of the
9 constitution. You couldn't say, well, you can't disclose
10 it to anybody of a particular race or religion. But,
11 short of that, you can impose any condition you want.

12 And one condition you can impose is that, yes,
13 you will give us the Barry Doe documents, conditioned
14 upon everybody receiving them abides by an order of the
15 Court that Barry Doe's actual name will not be revealed
16 by us without further court order. And that actually
17 gives Barry Doe a legal protection that he does not have
18 right now.

19 Again, I would prefer that you trust our
20 discretion because we've proven ourselves to be
21 trustworthy. But if you elect to trust-verify you can
22 issue that order, and it's punishable by the Court's
23 contempt power.

24 THE COURT: All right.

25 And now, Mr. Schwartz, I'd very much like to

1 hear from you.

2 MR. SCHWARTZ: With all due respect, your
3 Honor, this was petitioner's application, and I believe
4 that they should be heard first. I have nothing to say
5 in response to Mr. Schoer's statement, but with respect
6 to the petition, I would ask that petitioner make his
7 application and we would respond to that.

8 MR. KUBY: I'm sorry, didn't I just speak? I
9 mean, am I --

10 MR. SCHWARTZ: Is that the --

11 THE COURT: Excuse me. Mr. Schwartz, I think
12 that the position that was taken by the petitioner was
13 one that was articulated maybe even more clearly than
14 usual. But at least, at least, it was understandable.

15 MR. SCHWARTZ: Okay, your Honor. If that was
16 the extent of their argument, then I'm obviously prepared
17 to go forward here.

18 THE COURT: All right.

19 MR. SCHWARTZ: I thought it was limited to the
20 statement that Mr. Schoer had made.

21 THE COURT: The limitation, as I understand it,
22 is that the petitioner would, in fact, consent to the
23 receipt of all of Barry Doe's -- we'll call him Barry
24 Doe -- information but never his -- but not his name.
25 His name will remain sacrosanct or will, more aptly,

1 remain confidential. Is that incorrect?

2 MR. KUBY: Correct.

3 THE COURT: Mr. Schwartz?

4 MR. SCHWARTZ: And I would object to that, your
5 Honor.

6 THE COURT: On what basis?

7 MR. SCHWARTZ: Well, because you know this
8 proceeding was brought to you because a FOIL request was
9 made, and the people, the DA's office, denied the FOIL
10 request. And now it seems that petitioner wants to
11 discuss everything but FOIL and everything but the Public
12 Officers Law. I know in their 34 page reply papers they
13 never once mentioned FOIL or the Public Officers Law, and
14 in our papers we rely heavily on the provisions of the
15 Public Officers Law to oppose disclosure of these
16 records.

17 What Mr. Kuby keeps ignoring, because he knows
18 he can't win if he addresses this issue, is that the 50B
19 is not the only provision that prohibits disclosure of --

20 THE COURT: You're talking about 2068 of the
21 Public Officers Law, correct?

22 MR. SCHWARTZ: I'm talking about section 87.2(e).

23 THE COURT: Excuse me, you're absolutely
24 correct.

25 MR. SCHWARTZ: 2(e)iii, which is one of the law

1 enforcement exemptions.

2 And, your Honor, Mr. Kuby keeps saying that
3 only the identity of the victim is protected. But
4 87.2(e)iii protects a confidential source or confidential
5 information relating to a criminal investigation.

6 Now, we cited an abundance of Appellate
7 Division case law discussing that provision. And all
8 those cases say, very simply, the statements of a
9 nontestifying witness are exempt from disclosure.

10 THE COURT: I'm sorry, Mr. Schwartz, but that's
11 precisely why I asked Mr. Schoer what the basis of his
12 position was, why was he taking this position on behalf
13 of his client. And Public Officers Law 87.2(e)iii is
14 confined, confined to something that is actually going on
15 at this point, divulging of a confidential source. There
16 is no confidential source -- because it has two aspects
17 to it. There's no confidential source because the name
18 is being withheld. It is the information that is
19 available through the institution involved, and not, and
20 not, the name that is at this moment -- because of Mr.
21 Kuby's waiver -- at issue.

22 MR. SCHWARTZ: Your Honor, with all due
23 respect, I think you're incorrect on the law there. I
24 would point out one case in particular, Esposito v. Rice.
25 It's a case in my papers. It's a case that went to the

1 Second Department. It was similar to this case. It was
2 a 20-year-old conviction on a homicide case. The
3 defendant said, I need this witness statement to prove my
4 innocence. This was a person that gave a statement to
5 the police and never testified at trial. We argued
6 87.2(e)iii, and the Court again reiterated, statements of
7 nontestifying witnesses are exempt. It doesn't matter if
8 there's a pending criminal investigation. It protects
9 the people that have come forward and have spoken to the
10 police, whether it's last year or 20 years ago or 25
11 years ago.

12 If they want their statement released, that's
13 fine. But they don't want their statements released.

14 THE COURT: As I heard, Mr. Schoer, there is no
15 request on your part to withhold statements so long as
16 they don't identify your client; correct?

17 MR. SCHOER: No, Judge. I don't think I said
18 that.

19 THE COURT: All right.

20 MR. SCHOER: You asked me whether or not the
21 basis of my client's --

22 THE COURT: Was privacy.

23 MR. SCHOER: Was privacy. And I said yes. But
24 I also said that my client supports the non-release of
25 any documents and supports the position of the District

1 Attorney's Office.

2 THE COURT: All right. So I then -- I thank
3 you for your clarification.

4 I turn back to you. 87 is Public Officers Law.

5 MR. SCHWARTZ: Yes.

6 THE COURT: It has nothing to do with the
7 individual involved that is being represented by Mr.
8 Schoer. Does it?

9 MR. SCHWARTZ: It absolutely does. That's
10 what's protected. Again, it's a provision in the Public
11 Officers Law. That's the statute that governs FOIL.
12 That's the statute that says everything gets disclosed
13 unless it falls within one of these categories. And one
14 of the categories is, if I can paraphrase the Appellate
15 Court decisions, statements made by a witness to law
16 enforcement when the witness hasn't testified. Of
17 course, if the witness testifies at trial, the
18 confidentiality of that statement is lost, that statement
19 is disclosed, and we can't rely on that. But it protects
20 statements of witnesses, and it's not just -- I think I
21 cited another case, Johnson v. Heinz. It says it's not
22 just the identity, it's the content of the statement.

23 THE COURT: You may have cited cases, Mr.
24 Schwartz. I will say, however, that the cases are
25 distinguishable in many respects. So it is your

1 position, so that we don't spend the rest of the day on
2 this particular aspect, it is your position that there is
3 nothing that should be released, even though there's an
4 assertion of a privacy right. That is the nature of the
5 concern in the case of Mr. Schoer. Correct?

6 MR. SCHWARTZ: Judge, I'm asserting --

7 THE COURT: I'm saying it for clarification
8 purposes.

9 MR. SCHWARTZ: I'm asserting that various
10 records are exempt for various reasons. Right now we're
11 talking about the statements of witnesses to law
12 enforcement. And those are exempt.

13 Now, Mr. Schoer talks about privacy, and he's
14 not limiting his privacy right to 87.2(e)iii or 50B, he's
15 saying, my client gave a statement to the police, I don't
16 want it released under any circumstances. And I'm sure
17 his client would rely on any and all statutes that avail
18 him of that privacy.

19 THE COURT: The Court does have a number of
20 cases that it has seen in this particular area and, as I
21 said, I wish to proceed on. But before I do, I want to
22 respond to Mr. Kuby's letter. This is a little bit out
23 of order, because he asked that the three, the three
24 letters forwarded to the Court be made available to him
25 and, of course, to you. And I said that will be

1 addressed at this hearing.

2 The Court is taking the following position with
3 respect to those letters because they fall into certain
4 categories. We know basically what Mr. Schoer's position
5 is. As to the other two, those letters were sent to the
6 Court -- no carbon copies were sent anyplace else, as far
7 as the Court is aware -- with the singular request that
8 their name not be disclosed or information be used.

9 Now, that is a question that the Court has to
10 consider in its balancing, the balancing that even
11 District Attorney Rice agrees exists, that we -- that
12 there be a consideration given to the victims, as you
13 have identified them at times, or the complainant, or the
14 complaining witnesses, because they have had multiple
15 identifications. They have to be protected. And on the
16 other side, Mr. Friedman has to be protected, depending
17 upon the facts.

18 So this, in effect, is a fact determination
19 that is before this Court. Is there the disclosure of
20 facts that have been requested under FOIL that would
21 allow the petitioner the opportunity to do a few things?

22 Before I get there, unfortunately I think that
23 one aspect has been neglected in this case for both
24 sides, and it's not in the nature of a criticism or even
25 of an oversight. It is that there have been two sides,

1 warring sides, 180 degrees apart. The petitioner did it,
2 the petitioner should be punished. Other side; the
3 petitioner didn't do it, the complaining witnesses have
4 to be properly protected.

5 But the third side, which hasn't been
6 addressed, is the side that if, if, only if -- and you'll
7 see why I say it in this particular context -- if, in
8 fact, the complaining witnesses were mistaken or
9 misstated a position, gave statements, provided
10 information to the District Attorney, to the Nassau
11 County Police Department, they have also been living for
12 25 years with that knowledge.

13 MR. SCHWARTZ: May I be heard on that, your
14 Honor?

15 THE COURT: You certainly may.

16 MR. SCHWARTZ: I've said this before, and if
17 your Honor disagrees --

18 THE COURT: Not in this context, sir.

19 MR. SCHWARTZ: What I'm about to say I've said
20 before.

21 THE COURT: Okay.

22 MR. SCHWARTZ: If your Honor disagrees with me,
23 that's --

24 THE COURT: I will clearly let you know if I
25 do.

1 MR. SCHWARTZ: That's obviously your right.
2 But I feel like I have to emphasize this for the
3 umpteenth time.

4 This is here because of a FOIL request. We are
5 not here relitigating petitioner's guilt. That may or
6 may not occur sometime in the future.

7 THE COURT: I'm going to stop you right there,
8 as I always do both of you, when we come to a point that
9 I need clarified or I would like to clarify myself.

10 Of course I'm aware of that fact. The problem
11 with taking that position in vacuum or isolation is that
12 there is a great deal of information, and we're becoming
13 more and more aware of it as time progresses, but there's
14 a great deal of information that can be used in a couple
15 of different ways.

16 As I know you are very much aware, not only was
17 Mr. Jesse Friedman pleading in 1988, not only was there a
18 sentence, or, more aptly, a portion of a sentence, a
19 portion of a sentence imposed, it is the plea and the
20 sentence that collectively constitutes a conviction or
21 judgment. If you plead or you're convicted after trial,
22 until the sentence there is no -- there isn't finality
23 with respect to that particular Court. That need not
24 even be said in this courtroom, except to those who may
25 not be as conversant as you are, Mr. Schwartz, with the

1 procedures.

2 You also know that in 2002, after Mr. Friedman
3 had been released from prison -- he was released in 2001,
4 December of 2001. In December of 2002 he was determined
5 to be a Level 3 Sexual Offender. Is that correct?

6 MR. SCHWARTZ: Yes.

7 THE COURT: Now, two things. First, that was
8 really the first conviction. I want you to think about
9 it, because in effect his jail sentence didn't end when
10 he left Cossackie, his jail sentence continued to this
11 very day. That's not to indicate that for one moment
12 this Court has any sympathy for Mr. Friedman or for
13 anyone in that matter. And I notice the smile on your
14 face, Mr. Schwartz, and I suggest that you remove it
15 rather quickly, because it is very clearly the case that
16 this Court is going to hold both parties to the highest
17 degree possible. I have had the fortune, misfortune, of
18 reading thousands of pages of Social Science. I enjoy it
19 immensely. But it was an intricate part of your
20 presentation and it was an intricate part of the
21 petitioner's presentation. In fact, you even used some
22 of the same sources.

23 So I get to the point that I was raising with
24 you, sir, and that is that the Court believes that under
25 that particular provision of the law, the Sexual Offender

1 Law, that was part of the conviction process.

2 By the way, never once has another Court
3 decided this in the United States, as far as I know.
4 This would be the first determination anywhere, but I
5 don't want to stop there, because of the implications of
6 that law.

7 MR. SCHWARTZ: Judge, can I --

8 THE COURT: No.

9 You understand also under the Sexual Predators
10 Law or offender -- rather, the Sexual Offenders Law, that
11 there is an annual application available to the sexual
12 offender. So a sexual offender can go from a level 3 to
13 a 2, to a 1, to a zero, not a sexual offender. It
14 provides a need for this case to look closely at every
15 single aspect that was used in the conviction process.

16 I will show this austere, this august -- maybe
17 austere, too, but august group the reason why there are
18 so many multiples that look at this as necessitating the
19 release of information not formerly.

20 In connection with that, and addressing your
21 letter, Mr. Schwartz, in response to Mr. Kuby's letter
22 that was sent to the Court about the three letters that
23 were sent directly to the Court, this Court wrote a
24 letter that is going to become an exhibit, and will be
25 available to any, in which it will fill in the blanks,

1 and essentially provides the following: Do you wish to
2 have any information made available? I suggest in this
3 letter that the recipient even speak with the therapist
4 or anyone, get any help that he or she may desire.

5 The notation at the bottom of this letter I
6 think is the most important one for our immediate
7 discussion: Your answers may affect this Court's
8 determination of the release of any information regarding
9 you.

10 That's what I would be telling them, that it
11 may, not that it will. I have said throughout I have an
12 obligation, I have to look at your -- the case law, I
13 have to look at the facts, I have to balance the two
14 warring interests in this case and come to a conclusion.

15 All right.

16 MR. SCHWARTZ: May I please respond to just
17 something your Honor said?

18 THE COURT: You may, certainly.

19 MR. SCHWARTZ: You commented a moment ago about
20 a smile on my face, and it certainly was not my intent to
21 disrespect this Court in any way. And if I had a smile,
22 I apologize, your Honor.

23 THE COURT: You never have.

24 MR. SCHWARTZ: And I certainly don't take light
25 of the fact that Mr. Friedman has to register as a sex

1 offender. That's a tremendous burden.

2 But what I will say is this. And you compared
3 it to being a form of continued incarceration. Even if
4 Mr. Friedman were still in prison, as was the petitioner
5 in Esposito v. Rice, it doesn't change the FOIL issue one
6 iota. Because the Court of Appeals has said not once,
7 not twice, not three times, the status of the person
8 making a request for records under FOIL is irrelevant.
9 And it doesn't matter if they're an incarcerated prisoner
10 who says I desperately need the information to prove my
11 innocence. The status of the person making the request
12 is as a member of the general public. And it doesn't
13 matter that they know the identity of the persons whose
14 reports they're seeking.

15 THE COURT: I'm going to stop you, because you
16 had a moment's pause.

17 Does it make any difference that at one point
18 in time the District Attorney's Office, in 1988 -- '87,
19 '88 -- sent a full and complete list of all of the -- by
20 the way, 17 complaining witnesses. We've been dancing
21 around these figures all along. But I have 17 affidavits
22 of service which were made on 17 people around the world
23 in order to comply with the provisions of the Civil
24 Rights Law.

25 MR. SCHWARTZ: I could answer that question

1 very simply, your Honor.

2 THE COURT: Good.

3 MR. SCHWARTZ: The answer is no. And I just
4 want to quote for you one sentence from Fabiano versus
5 New York City Police Department. That's a Court of
6 Appeals case from 2001.

7 Nor does the fact that petitioners already know
8 the identity of their victims provide a basis for
9 disclosure. The original goal of Civil Rights Law 50B,
10 which is to protect the privacy of sex crimes victims,
11 cannot be negated by a litigant's assertion that he knows
12 the identity of the victim.

13 That's a Court of Appeals case, your Honor.
14 And it's been repeated over and over again.

15 THE COURT: No, it has not been repeated over
16 and over again. Portions of it have been used many times
17 for many purposes. But it is not something that the
18 Court of -- the Appellate Division has adopted wholesale.
19 It has interpreted and has decided that, I think at long
20 last, that Brady material consists not only of
21 substantive material that may tend to show that the
22 defendant did not commit the crime, but also impeachment.

23 MR. SCHWARTZ: Your Honor, I don't disagree
24 with that. But --

25 THE COURT: Thank you.

1 MR. SCHWARTZ: But Brady comes up in the
2 context of a criminal trial. It doesn't come up in the
3 context of a FOIL request. And that's why the courts say
4 your need for the records, even if you claim it's Brady
5 material, is irrelevant.

6 THE COURT: Thank you, sir. Because if, in
7 fact, you're saying there is no criminal aspect to this
8 matter, then there cannot be a finding of sexual offender
9 level 3. That is a criminal matter, as well. It is a
10 prohibition against the petitioner having contact, living
11 close to, being in the proximity of children and others,
12 including his own. He can't have his own.

13 Now, that being the case, it is -- and maybe we
14 should herald back to Tony Soprano. There is a time when
15 Tony Soprano and Junior and others walk around with
16 bracelets in their house. They were far freer than Mr.
17 Friedman was, because they had the house, they could make
18 the telephone calls, they could make a call and leave.
19 But they weren't free to -- they weren't free, and
20 neither is Mr. Friedman free, to go where he wished, when
21 he wished, so long as it didn't constitute a criminal
22 act.

23 But what we're looking at is the notice of the
24 petition, and the petition is requesting the records with
25 response to the September 19, 2012 request, all of the

1 records, and directing respondent to provide petitioner
2 with the entire case file of its prior investigation, and
3 granting the release to petitioner of the records and
4 minutes of Jesse Friedman.

5 Now, since you are there, I am most anxious to
6 receive from you the Department of Corrections violation
7 that was the topic for far too long, in my view, in our
8 last hearing, in which the Court ordered a certified copy
9 so it knew, was there a violation. And the Court
10 believed that it -- there may not have been any
11 overriding need other than the Court needing to see that
12 piece of information because, Mr. Schwartz, you
13 considered it so important, Mr. Kuby, you considered it
14 so important, but more particularly, all of the written
15 submissions considered it important, so important. Every
16 single one of the submissions made, all of the affidavits
17 in opposition, affidavits in support, memorandum or
18 memoranda of law contain references to it.

19 Do you have that, the official records of a
20 violation that occurred on June 28th, 2013, that the
21 Court requested?

22 MR. SCHWARTZ: I don't have any records
23 regarding that beyond what Mr. Kuby provided on the last
24 court appearance.

25 THE COURT: Let me just refresh your

1 recollection, then. You said that Mr. Kuby wrote in, no,
2 or did something -- maybe it wasn't Mr. Kuby himself, but
3 it was somebody from his office if it wasn't Mr. Kuby.
4 That's what I'm asking. Remember that part?

5 MR. SCHWARTZ: Yes, your Honor. And I did have
6 someone from my office call the Department of Corrections
7 and make inquiry. They did confirm that he was found not
8 guilty of that charge.

9 MR. KUBY: Thank you.

10 MR. SCHWARTZ: But they couldn't provide any
11 additional information regarding the circumstances.

12 THE COURT: So all of the information contained
13 in the report and the advisory report, with references
14 that would appear to rely on it because it used it, has
15 to be questioned. Is that right?

16 MR. SCHWARTZ: Well, I stand by what I just
17 said. He was found not guilty --

18 THE COURT: No, Mr. -- no.

19 MR. SCHWARTZ: But, your Honor --

20 THE COURT: One of the things that I know that
21 you know, you have to answer my question. It was a
22 perfect deflection. I congratulate you for that. But
23 the congratulations end there.

24 That was an important part of the totality of
25 the submissions, whether it should or should not have

1 been, because he's a bad guy is the best way to say it.
2 He's a bad guy. Look at what he did. And the Department
3 of Corrections -- let the record reflect that the
4 District Attorney's Office is nodding his head, and I
5 assume that it is in agreement, or at least tacit
6 agreement. Fair enough, sir?

7 MR. SCHWARTZ: I don't know that I was nodding
8 my head intentionally, your Honor. So I can't agree to
9 that statement.

10 THE COURT: Do you agree that it was used in
11 some fashion in making determinations in this case?

12 MR. SCHWARTZ: It was included in the report,
13 but I think it was actually a very small part of the
14 report.

15 THE COURT: Oh, how small? On a scale of one
16 to ten, was it a one, two, five, six, eight? Tell me the
17 number if you can.

18 MR. SCHWARTZ: In the scheme of the whole 150-
19 something page report, I would say it's probably a one or
20 a two.

21 THE COURT: One or two. I will accept the two,
22 and say to you, then, under those circumstances this
23 Court has the right to remove any two or three pages it
24 wants until it reaches what figure? 90 percent? 95
25 percent?

1 We can't, we can't, function in the judicial
2 system in this fashion. This is a country that at this
3 point has no -- and I emphasize that -- has no feeling of
4 credibility towards its institutions. That starts with
5 the lowest and goes to the highest. We don't trust our
6 institutions. You have to show, you have to prove, and
7 that's what the country is saying. If it isn't saying it
8 in a loud voice, it's saying it by staying out of the
9 fray.

10 All right. The material that was provided --
11 this is a real problem, Mr. Schwartz, for the Court -- do
12 you recall that counsel for the petitioner in 1987 and
13 1988 requested Brady material and the ADA said there is
14 none, none at that time?

15 You asked Mr. -- and I will use his name -- Mr.
16 Panaro to trust you, trust that there is no Brady
17 material. At this point in time I don't believe that
18 you're saying that there is nothing in the 17,365 pages
19 that this Court has received in the form of documents
20 that doesn't have some Brady material, and I'm talking
21 about the unredacted portion, the portion that Mr. Kuby
22 didn't see. But even in the redacted portion there is
23 some material.

24 MR. SCHWARTZ: Your Honor, I think this is an
25 important point.

1 THE COURT: Oh, thank you.

2 MR. SCHWARTZ: Well, what you said was
3 obviously important. I hope what I'm about to say is
4 important, as well.

5 The issue of Brady has come up time and time
6 again over the years. It was raised in 2004, in
7 petitioner's motion to vacate his judgment. And that was
8 heard by a Judge. And the Judge found there was no --

9 THE COURT: You know why I'm holding up three
10 fingers?

11 MR. SCHWARTZ: No, Judge.

12 THE COURT: I think you do, because what the
13 Court said was, Mr. Friedman, you missed by three months.

14 MR. SCHWARTZ: No, Judge, that's not -- that's
15 not -- that's not the motion I'm talking about.

16 THE COURT: Oh, a different motion. You're
17 talking about not the one that came out of the Court of
18 Appeals in which they said this should bear further
19 scrutiny?

20 MR. SCHWARTZ: No, Judge, I'm not referring to
21 that at all. I'm going to get to that, though, if you
22 just give me a chance, please.

23 THE COURT: Well, chances are for those who are
24 either permitted or taken. Go ahead.

25 MR. SCHWARTZ: Judge, before this case went to

1 Federal Court it started -- the post-conviction
2 litigation started in County Court, Nassau County Court.

3 THE COURT: Yes, sir.

4 MR. SCHWARTZ: And they raised the Brady claim.

5 THE COURT: Yes.

6 MR. SCHWARTZ: And the Judge reviewed it and
7 rejected it. Okay.

8 They took that case to Federal Court. And the
9 Second Circuit, yes, they found the petition untimely.
10 But they also reviewed the Brady claim. And if you read
11 the Second Circuit decision -- I know you have. I'd ask
12 you to read it again -- they found the Brady claim
13 meritless because you don't have a right to Brady
14 material if you don't go to trial.

15 THE COURT: In the Second Circuit. But not
16 every circuit agreed, and there have been changes with
17 respect to Brady material and when it must be provided.

18 If I had the opportunity at this moment, I
19 would very much like to hear -- but we're not going to do
20 it now -- I would very much like to hear your position as
21 to whether or not in a serious case, at least, pre-plea
22 in response to a demand by the defendant, exculpatory or
23 Brady material should be provided. The Court does think
24 that some of the circuits are getting it right.
25 Unfortunately, they're closer to the Mississippi than we

1 are.

2 So at this point, your point, sir?

3 MR. SCHWARTZ: My point is the issue of Brady
4 has been litigated. It's been litigated in the County
5 Court, it's been litigated in the Second Circuit. It has
6 no business in this proceeding, your Honor.

7 And I've said this and I'll say it again.
8 Whether or not Brady material -- whether or not the
9 material requested under FOIL would or could be Brady
10 does not change their entitlement to it. We're not in a
11 criminal proceeding. We're not in a criminal trial.
12 This was a FOIL request. And the nature of the material,
13 the Brady material, is irrelevant.

14 THE COURT: All right. At this point in time
15 the Court most respectfully disagrees and does find that
16 under these peculiar circumstances -- they may not be
17 peculiar in the fact that they are -- they have occurred
18 with infrequency, but peculiar in the sense of it being
19 brought to the attention of a Court.

20 The next question the Court asked before, and I
21 did not get a position from you, is regarding Correction
22 Law 18602, any sex offender required to register may
23 petition the sentencing Court to modify the level of
24 notification, and that could be done on an annual basis.

25 Does that, in fact, extend the criminal

1 aspects? At least arguably, doesn't it extend the
2 criminal aspects of this case beyond what you
3 characterized as civil, meaning FOIL? The Court has a
4 question as to whether or not FOIL is civil or criminal
5 or quasi-criminal. But whatever it turns out to be, that
6 will be determined in another Court or by a legislature.

7 Please.

8 MR. SCHWARTZ: No, Judge, it doesn't extend the
9 criminal case. It's no different, as I said before,
10 whether the petitioner was still incarcerated. It
11 doesn't extend the criminal case.

12 And the Court of Appeals says it, again
13 frequently, a guilty plea marks the end of a criminal
14 case. It's not a gateway to further litigation.

15 THE COURT: But you know that they didn't mean
16 it in the context that that's the end of the case, you're
17 not going to sentence him, the case is over, you're
18 guilty, you took a plea, good-bye, have a good life.

19 MR. SCHWARTZ: The context in which they meant
20 it -- and I didn't finish the quote -- was that the issue
21 of factual guilt is removed from the case. And that's
22 what we're doing here, we're revisiting the factual
23 guilt. And that's gone.

24 THE COURT: But Ms. Rice wanted to do precisely
25 that. She said, following the determination made by the

1 United States Circuit Court of Appeals for the Second
2 Circuit, I want to get to the bottom of this, too, I want
3 to look at it and I'm using the Brady standard, the Brady
4 standard, as a lower standard to look at the entire case.

5 Now, I think that most of you have gotten a
6 flavor for what has transpired in the past, and it is
7 important now to move on from this Court's perspective to
8 the following.

9 First. There was a letter sent, received by
10 this Court, which came from the law secretary to Abby
11 Boklan. That letter effectively requests that the Court
12 allow the petition to proceed. It was the case that the
13 author of that letter did read -- in fact, he's one of
14 the few people who did read the Grand Jury transcripts.
15 He did voice some concern at one point or another. The
16 Court was very much concerned that he did not, however,
17 follow that up with any additional action. But he did
18 send this Court a letter, a copy of which all of you
19 have. And those of you who don't have it, I don't have
20 to provide a copy because it's on the internet.

21 So at this point we know what the only living
22 person who was involved to the intimate degree that the
23 Judge herself was has to say about the facts and
24 circumstances surrounding the 19 -- December 1988 plea.

25 But the Court is also in receipt of a letter

1 from Arlene -- from one person who I understand is
2 present, and who may wish to say something one way or
3 another. And I am not going to inhibit that, certainly.
4 Does the person who wrote the letter, copy of which was
5 sent to the District Attorney and to the petitioner, wish
6 to say something?

7 MR. KUBY: Judge, Ms. Epstein -- she's
8 consented to the use of her name -- Ms. Epstein is not
9 present. She said what she had to say in writing and --

10 THE COURT: All right. That's what the Court
11 was here to find out, either way.

12 The letter that she sent was to say -- at least
13 a letter that this Court found to be compelling to the
14 degree not that it accepts word for word what was said,
15 but that it creates the -- and supports the argument that
16 there is insufficient information.

17 The Court, after reading numerous witnesses'
18 statements, none of which were written by the witness him
19 or herself, all of which were written by someone else,
20 finds that even the people -- and they are people, no
21 longer children -- who took the position that they did
22 not want their name disclosed, had some glaring
23 discrepancies in parts of the statements given. Most
24 particularly what comes to mind is a statement given at
25 one point in time and then -- to one detective and then

1 later given to another detective thereafter. There was a
2 rather substantial difference.

3 The Court also finds something else. First,
4 what everybody who has been involved with this matter has
5 seen -- but until there is a greater emersion it may not
6 have the same effect -- that there was no physical
7 evidence, no photographs. Yes, I understand that there
8 are reasons why there may not be physical evidence. Yes,
9 I understand that there may be reasons why there are no
10 photographs. But instead of just saying there aren't any
11 and that's enough, it means that we have to look closer
12 and not further away. We have to start using a
13 microscope instead of a telescope to look at the facts in
14 order to see whether or not they truly make sense, the
15 timeline makes sense, the fact that so many of the
16 complaining witnesses say time and again everybody in the
17 classroom was present when certain things happened, and
18 total denial.

19 What the Court has seen also is that there are
20 more recantations than there are affirmations of the
21 statements previously made. If we go on the balancing
22 basis, if we hold hearings with each and every one of the
23 individual complainants, we may not progress any further
24 than we are now. If everything is open as was intended
25 by FOIL, everything is open to the petitioner.

1 Now, the Court still maintains that it owes the
2 duty to the three parties that have communicated with it,
3 one who filed an affirmation in opposition. I have
4 serious reservations, as you know, Mr. Schoer, about the
5 privacy right being invoked on these circumstances, but I
6 will give you the benefit of that doubt for the moment.
7 And I have every intention of sending the letters to the
8 two who sent letters to the Court.

9 In conclusion -- and I am going to ask for a
10 response from both -- because I'm a clock watcher, but I
11 watch the person who works harder than anybody else, our
12 court reporter. I am giving the conclusion now, subject
13 to something that somebody may say that will change the
14 dynamics as I have outlined them already.

15 It is hereby ordered that the District Attorney
16 of Nassau County provide all documents, records of all
17 kinds including the Grand Jury minutes, redacting only
18 the names of the complaining witnesses that I will, in
19 fact, provide, work out with counsel, who have previously
20 contacted this Court, that's -- those are the only names.
21 We sent out 17, we served 17. Some were served pursuant
22 to -- and even Mr. Kuby learned something about the CPLR.
23 We served some pursuant to CPLR 308(1), we served some
24 pursuant to the Hague Convention, and we served them all
25 over -- in all different ways to assure that actual

1 service was effected.

2 If the District Attorney wishes to appeal this
3 order, I want the District Attorney, who has made an
4 outstanding presentation -- no one can ever doubt that
5 this was done with great fervor. If they wish to appeal
6 the order, it should be noted that this Court will not
7 stay it. Any stay that occurs will have to be obtained
8 by the Appellate -- from the Appellate Division by 2:00,
9 August 30th. That's Monday. That's only if it chooses
10 to proceed in such a fashion.

11 During such time, no document of any kind may
12 be moved re-filed or in any way handled, touched by
13 anyone in the District Attorney's Office. This is a
14 stay-away for that. I want to be sure that there is
15 preservation, just as the District Attorney wanted the
16 same kind of assurance from the Court. We have locked
17 everything up, we've made sure that all non-redacted or
18 unredacted material is locked up tight.

19 Please be further advised that this Court has
20 requested the original stenographic notes that were taken
21 in the proceeding -- I held this off to the very end --
22 the stenographic notes that were taken of the proceedings
23 regarding the petitioner in 1988 at the plea. Let me
24 give you the history, just for a moment.

25 Stenographic notes were taken by the Gregg

1 method or one of the methods of taking stenographic
2 notes. They were then transcribed and then utilized by
3 the parties. In this particular case, since on the
4 record -- wherever that record may be -- on the record
5 there is purportedly a waiver of any right to appeal, and
6 that's why I had some of the other concerns that I just
7 didn't voice before. Since there was no appeal, there
8 was no transcription. But that doesn't mean destruction,
9 as we keep hearing about. The stenographic notes were
10 sent to Albany and then maybe Utah and maybe Taiwan. I
11 have no idea. They are being tracked at this very
12 moment, and I hope to have and will, of course, share
13 with the parties such stenographic notes or materials as
14 this Court receives.

15 At this point is there anything that you wish
16 to say, Mr. Kuby?

17 MR. KUBY: Only this, Judge. That in order to
18 expedite this process, we will conditionally agree to
19 redact the three names of the three people who have
20 requested that redaction, subject to the Court retaining
21 jurisdiction. And after you send your letter and after
22 they respond, which is going to take a period of time,
23 the Court may change its order and release the names to
24 us. But in order to get this moving we're happy to agree
25 preliminarily to those redactions, so in the absence of

1 an appeal we can proceed to inspect these documents on
2 September 1st. And I'm calendar-challenged. August 30th
3 is --

4 THE COURT: August 30th.

5 MR. KUBY: Is a Monday or a --

6 THE COURT: A Friday. It's -- excuse me, then
7 it would be the 2nd, isn't it? What's Monday? Today's
8 Thursday. What's Monday?

9 THE CLERK: This Monday is the 26th.

10 THE COURT: The 26th.

11 MR. KUBY: Thank you, Judge.

12 MR. SCHWARTZ: Your Honor?

13 THE COURT: Yes, sir? Please, Mr. Schwartz.

14 MR. SCHWARTZ: Just so there's no -- there
15 certainly is some confusion on my part regarding the
16 Court's order. I would ask that if the Court could put
17 it in writing so that I have it, so there is no miss --
18 there is no confusion on my part as to what exactly
19 you're ordering us to disclose.

20 THE COURT: If there is a doubt on your part,
21 it is every aspect, every part, every piece of paper that
22 has been generated in the matter of People against Jesse
23 Friedman, the 1987, 1988 case. Except that there may be
24 redaction of two, and -- a total of three, including Mr.
25 Schoer's client. And that is on consent. And the Court

1 will be pleased to give you the names of the three
2 complaining witnesses for which redaction is appropriate.
3 Otherwise every single document.

4 MR. SCHWARTZ: I would ask, your Honor, that we
5 get an order in writing so that if we do file a notice of
6 appeal we have a written order from which to appeal from.

7 THE COURT: All right. As I know that you are
8 well aware, being such an astute advocate, there is no
9 longer an obligation by the Second Department to have a
10 written order, that the transcript itself is sufficient.
11 And if, in fact, there is a need for a conference call, I
12 think you have all of my telephone numbers, both of you.
13 And, if not, then you can certainly obtain them after
14 this proceeding is concluded.

15 I do want to note for the record that this must
16 be one of Mr. Kuby's most succinct responses in his long
17 history of advocacy.

18 MR. SCHWARTZ: Your Honor, please, I just have
19 one more request. In lieu of the fact that you're not
20 giving us a written order, and I need to get the
21 minutes --

22 THE COURT: Yes.

23 MR. SCHWARTZ: -- to file a notice of appeal,
24 and you've only given us until Monday, I'm kind of
25 hamstrung here.

1 THE COURT: Would you like it at 5:00 instead
2 of 2?

3 MR. SCHWARTZ: I would like an additional week,
4 if that's possible, your Honor, and it would depend on
5 how quickly the court reporter can get me the minutes.

6 THE COURT: This Court reporter is known for
7 her accuracy and speed. She can have those notes
8 available within minutes of your departure from the
9 courtroom.

10 MR. SCHWARTZ: In any event, your Honor, if I
11 could have to August 30th, which was the original date
12 you mentioned.

13 THE COURT: That was an accident.

14 MR. SCHWARTZ: I understand, but I would ask
15 for that anyway. I don't know that there's that much
16 urgency in a few days.

17 THE COURT: The reason why is because of the
18 nature of this case. First, it's affecting somebody on a
19 daily basis. Second, the Second -- the Appellate
20 Division Second Department is clearly short-staffed and
21 is behind. The sooner we get it there, with the sense of
22 urgency that we wish to have it decided one way or
23 another because of the effect that it might have on other
24 similarly-situated cases, the better for the entire
25 judicial and legal community.

