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October 2, 2015

Hon. Donald Williams
Ulster County Court
285 Wall Street
Kingston, NY 12401
VIA EMAIL AND U.S. MAIL

Re: People v. Ismail Shabazz

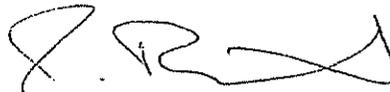
Dear Judge Williams:

Enclosed for filing please find Defendant's Motion for Judicial Recusal, which, in accordance with the scheduling order you placed on the record at the last court appearance, has been made returnable next Friday, October 9, 2015.

As you directed at the last appearance, we will contact the Court in advance of October 9 to determine whether personal appearances should be made on that date.

Thank you so much for your attention to this matter.

Very Truly Yours,



Joshua Povill

Cc: District Attorney Holley Carnright (via fax and mail)

STATE OF NEW YORK : COUNTY OF ULSTER

ULSTER COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

NOTICE OF MOTION

ISMAIL SHABAZZ,

Defendant.

PLEASE TAKE NOTICE, that upon the annexed affirmation of Joshua Povill, Esq., duly affirmed on the 2nd day of October 2015, and upon all the papers and proceedings heretofore had herein, the defendant will move this court at a term thereof to be held at the Ulster County Courthouse, 285 Wall Street, Kingston, New York on the 9th day of October at 9:00 a.m., or as soon thereafter as counsel can be heard, for an order recusing the Honorable Donald A. Williams from presiding over this matter.

Dated: October 2, 2015
Goshen, New York

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STATE OF NEW YORK : COUNTY OF ULSTER

ULSTER COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ISMAIL SHABAZZ,

Defendant.

AFFIRMATION IN SUPPORT
OF MOTION FOR JUDICIAL
RECUSAL

JOSHUA H. POVILL, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following:

I am of counsel with the firm of Sussman & Watkins, attorneys of record for Defendant Ismail Shabazz, and am familiar with the facts and circumstances of this case.

Defendant Ismail Shabazz hereby moves for the recusal of the Honorable Donald A. Williams as presiding judge in this matter.

As pertinent here, the canons of judicial conduct provide:

“A judge shall avoid impropriety **and the appearance of impropriety** in all of the judge's activities.”

“A judge shall respect and comply with the law and **shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.**”

“A judge **shall disqualify himself** or herself in a proceeding in which **the judge's impartiality might reasonably be questioned**, including but not limited to instances where . . . the judge has personal knowledge of disputed evidentiary facts concerning the proceeding.”

New York Rules of the Unified Court System on Judicial Conduct; 22 NYCRR §§ 100.2, 100.3(E)(1)(a)(ii) (emphasis added).

We respectfully submit that, under these aforesaid standards, the recusal of the Honorable Donald A. Williams in the present matter is required. It is clear from these ethical proscriptions that the law is concerned not only with actual fairness to all litigants, but also with ensuring that all litigants, and the public at-large, have the utmost faith in that fairness. As described in more detail herein, because of Your Honor's significant history of dealings with the defendant, Ismail Shabazz, and the publicity attendant to this trial, the broader concern of the law with removing any potential appearance of unfairness is implicated in this case.

In this instance, the defense has announced its intention to employ the affirmative defense of Entrapment, as provided for in Penal Law § 40.05. The defense requires a showing that a government agent induced Mr. Shabazz to engage in the proscribed conduct, in this case, selling guns, and that the agent did so with the intention of obtaining evidence against him in a criminal prosecution. More importantly, entrapment also requires the defense to demonstrate that "the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it." Penal Law § 40.05. The examination of this issue necessarily injects the issue of Mr. Shabazz's own criminal predispositions into the proceedings.

As the Court of Appeals has explained, in judging an entrapment defense, "[w]hether a defendant is predisposed to commit an offense or was induced to commit the offense is a question of fact." People v. McGee, 49 N.Y.2d 48, 61 (1979). Thus, the defendant's own criminal proclivities will become a "disputed evidentiary fact" in these proceedings. See 22 NYCRR § 100.3(E)(1)(a)(ii). The defense expects that there will be significant evidence regarding the discussions that occurred between the government agent and Mr. Shabazz and that there is likely to be disputed evidence regarding these interactions. Mr. Shabazz intends to

demonstrate that he, an otherwise law-abiding citizen, was induced into the alleged criminal acts by the persistently exploitative methods employed by the government's agent. Because Mr. Shabazz is a well-known critic of law enforcement, his state-of-mind, that is, his personal beliefs and willingness to violate the law will very likely, in essence, become the issue. See, e.g., People v. Minor, 69 N.Y.2d 779 (1987) (defendant's "state of mind" is relevant to entrapment defense because it goes to his contention that he engaged in criminal conduct because he was induced or encouraged to do so). The People are likely to place Mr. Shabazz's own criminal history and his avowed anti-law enforcement beliefs into evidence in an attempt to demonstrate that the government agent merely afforded Mr. Shabazz the opportunity to engage in criminal conduct in which he was likely to engage anyway. The dispute over this key issue is likely to be the crux of the entire trial.

And it is because of the primacy of this disputed evidentiary issue that Your Honor's personal knowledge of Mr. Shabazz's past, both his criminal behavior and his public work regarding the enforcement of our laws (including from direct conversations in community working groups), is rendered inappropriate. As indicated at our bench conference at the last court appearance, defense counsel does not contend that Your Honor cannot be impartial in presiding over Mr. Shabazz's trial. But, the rules of judicial conduct require a judge to also disqualify himself in instances in which his impartiality "might reasonably be questioned." In light of Your Honor's extensive statements on the record at arraignment, and again at the last appearance, regarding your familiarity with Mr. Shabazz both as a criminal defendant and as a community member focused on issues of criminal justice,¹ your personal knowledge of

¹ Local press coverage, which is highly relevant to how the local public forms its opinions as to propriety of the workings of this Court, has reported that Your Honor disclosed a "decades-long relationship with the defendant, both prosecuting Shabazz as district attorney and chief assistant district attorney for 'at least misdemeanors' but also

evidentiary facts which are sure to be disputed in the trial of this matter cannot be gainsaid.

Accordingly, the public might reasonably question the impartiality of Your Honor presiding over a trial in which these questions are at the heart of the defense.

The questioning of the Court's impartiality would become even more acute if Mr. Shabazz chose to waive his right to a jury trial and asked this Court to decide this hotly contested factual question itself. The defense has a right to choose a bench trial in which the judge would assume the normal duties of the jury as an impartial factfinder whose knowledge of the defendant should be derived solely from the evidence presented in the courtroom. In this case, a potential juror with Your Honor's extensive extrajudicial knowledge of the defendant would likely be promptly removed from the jury pool during voir dire on a challenge for cause (or, at the urging of the Court, on consent) because of a presumption as to their questionable fairness. For the same reasons that would render Your Honor unfit to sit as a juror in his trial, Your Honor's service as the factfinder in a bench trial would cause the defendant and the public to reasonably question the Court's impartiality.

Even if the defense did not elect a bench trial, and Your Honor simply presided over a jury trial, the Court's prior knowledge of Mr. Shabazz's past makes it reasonable for one to question its impartiality in deciding many of the issues arising in a trial such as this including, but not limited to, evidentiary rulings and deciding the question of whether the entrapment defense has been sufficiently placed in issue to charge the jury on that defense. The canons of judicial conduct exist so that interested observers of the criminal justice system -- and there are many closely watching this case -- will never be in the position of questioning the Court's rulings

as part of a group of community leaders." See "Ulster County Court: Defense wants different judge in Ismail Shabazz weapons case" by Patricia Doxsey; Daily Freeman, September 9, 2015; attached hereto.

and reasonably wondering if a judge's prior dealings with a criminal defendant affected the outcome.

It should be noted that this is not a simple case in which a judge in a relatively small town has prior knowledge, through the criminal justice system, of a defendant's previous criminal history. If that kind of situation required recusal, then every defendant in a small town could disqualify the local magistrate by raising the specter of the entrapment defense. Rather, in this case, Your Honor has made clear in your public comments that you have "history" with Mr. Shabazz that extends far beyond the simple knowledge of his previous appearances in criminal court. Because of these interactions, and the publicity attendant to the Court's comments on these prior interactions, the public's questioning of the Court's impartiality under these particular circumstances would be reasonable.

In addition, the defendant's own faith in the impartiality of the Court which presides over his trial, which could subject him to a deprivation of his liberty for the rest of his natural life, is obviously an important interest. As one court has observed: "Next in importance to the duty of rendering a righteous judgment is the desirability that the parties to the litigation have the utmost confidence in the court's impartiality and freedom from bias." Van Schaick v. Carr, 159 Misc. 873, 880 (Sup. Ct. N.Y. Cty. 1936). In deciding to recuse himself in Van Schaick, even though he found no legal disqualification, Judge Frankenthaler explained: "Faith that justice is being done is secondary only to the actual dispensation of justice." Id. Other judges have also recused themselves simply to avoid any possible appearance of impropriety. See, e.g., People v. Rowley, 48 Misc. 2d 26, 27 (Fulton County Ct. 1965) (judge decided to recuse himself because "there should not be the slightest impression in [defendant's] or anyone else's mind that the court's decision might be swayed by anything other than the merits of the case").

The issues brought to light by the Court's frank discussions on the record, and the filing of this motion, highlight the importance of prophylactic action by this Court to ensure that faith in the dispensing of justice not be undermined by the manner in which this criminal prosecution proceeds. The fairness of the law enforcement apparatus will be called into question by the entrapment defense expected to be presented in this matter. The whole of the criminal justice system must not fall under a similar cloud of impropriety. The judiciary must continue to be trusted as a fair and impartial arbiter in the battle between individuals' rights and the overreaching activities of their government. The presiding judge's motivations and his impartiality must be beyond question. To that end, Your Honor is urged to recuse himself from presiding over this matter.

Dated: October 2, 2015
Goshen, New York



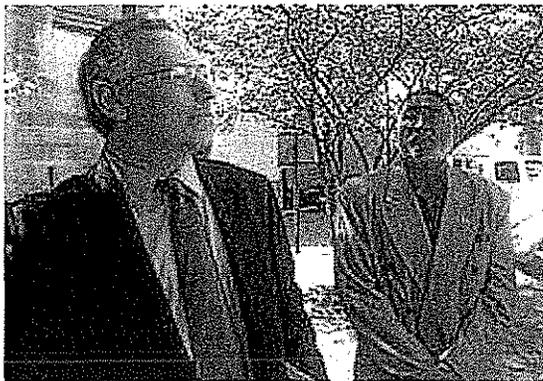
Joshua H. Povill, Esq.
Sussman & Watkins
Attorneys for Defendant

The Daily Freeman (<http://www.dailyfreeman.com>)

ULSTER COUNTY COURT: Defense wants different judge in Ismail Shabazz weapons case

By Patricia Doxsey, Daily Freeman

Wednesday, September 9, 2015



KINGSTON >> The attorney for Ismail Shabazz on Wednesday asked Ulster County Judge Donald Williams to recuse himself from presiding over the weapons case against the community activist.

“Under the rules of ethics that govern courts, a judge should not hear a matter if a judge has an actual conflict of interest or if it appears that a court might have a conflict with a particular case,” attorney Michael Sussman said. “The judge indicated previously that he has a knowledge of Mr. Shabazz [and] working with Mr.

Shabazz in the community.”

Sussman said that because an element of the defense’s claim of entrapment is the history of the accused, “the nature of Mr. Shabazz’s involvement over many years becomes relevant.”

Shabazz, whose given name is Gary Faulkner, has pleaded not guilty to six counts of selling weapons to an FBI informant, nine counts of criminal possession of a weapon and one count of endangering the welfare of a child during the alleged sale of one illegal weapon.

During Shabazz’s arraignment in July, Williams spoke at length about his decadeslong relationship with the defendant, both prosecuting Shabazz as district attorney and chief assistant district attorney for “at least misdemeanors” but also as part of a group of community leaders.

Williams said during the arraignment that despite his knowledge of Shabazz, he could treat the case objectively. But Sussman said Shabazz is concerned there could be at least the appearance of impropriety if Williams remained on the case.

“Mr. Shabazz has indicated to me ... that he feels the prior history between them could create an appearance of impropriety and therefore he feels it would be best to have a judge who does not know him and would be therefore looking at this based simply based on the record in the case,” Sussman said.

The prosecutor and defense attorneys discussed the issues surrounding the defense request during a conference at the judge’s bench Wednesday before roughly 40 spectators, including community activists, ministers and Shabazz family members and friends.

Ulster County District Attorney Holley Carrnright has said Shabazz became a person of interest in a federal investigation in 2013, when information was developed that he had recruited members of the Bloods street gang into the New Black Panthers Party in Kingston and was advocating violence against

police officers.

Over the course of about a year, authorities allege, undercover agents bought six illegal weapons from Shabazz in his home at 80 Prospect St. in Kingston. Allegedly purchased from Shabazz were two assault rifles, two loaded handguns, an unloaded revolver and a sawed-off shotgun that had its serial number defaced.

Carnright has said federal agents also intercepted a Shabazz conversation about training members of the New Black Panthers Party to disarm police officers and use the firearms against them.

Shabazz, who is chairman of the Kingston chapter of Black Panthers for Justice and a past president and vice president of the Ulster County Chapter of the NAACP, is a frequent critic of police and has participated in recent local demonstrations regarding attacks on black suspects by white officers in other cities. In the weapons case, he has claimed he was targeted by police and set up for arrest.

Sussman on Wednesday also asked the judge to force the prosecutor to turn over specific evidence related to the confidential informant to whom Shabazz is accused of selling weapons.

Sussman said the prosecution submitted a request to the judge that it not be required to hand over video and audio recordings of Shabazz and an informant and of Shabazz and a federal agent, as well as the criminal history of the informant and the agreement between the informant and the federal government. He said the prosecution has further requested that if the defense is allowed to view the videos that viewing take place at the District Attorney's Office.

Williams said he would rule on that issue once he's decided whether to continue to preside over the case.

The case was adjourned until 11 a.m. Oct. 9 for either a decision by Williams or arguments by the attorneys.

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Related stories

["Kingston activist and weapons suspect Ismail Shabazz claims life has been put in danger by police entrapment." Aug. 3, 2015](#)

["Kingston civil rights activist Shabazz out of jail after posting \\$100K bond." July 21, 2015](#)

["Ismail Shabazz arraignment draws dozens of supporters. some comments of praise from Ulster County judge." July 17, 2015](#)

["Kingston civil rights activist Ismail Shabazz indicted in weapons case." July 1, 2015](#)

["Ulster County grand jury hears evidence against activist Ismail Shabazz in weapons case." June 30, 2015](#)

["Kingston civil rights activist Ismail Shabazz arrested in weapons probe." June 26, 2015](#)

["Kingston candidate for Ward 4 alderman says his criminal history gives him insight." Aug. 24, 2013](#)

10/1/2015

ULSTER COUNTY COURT: Defense wants different judge in Ismail Shabazz weapons case

URL: <http://www.dailyfreeman.com/general-news/20150909/ulster-county-court-defense-wants-different-judge-in-ismail-shabazz-weapons-case>

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October 2, 2015

Hon. Donald Williams
Ulster County Court
285 Wall Street
Kingston, NY 12401
VIA EMAIL AND U.S. MAIL

Re: People v. Ismail Shabazz

Dear Judge Williams:

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
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Joshua Povill

From: Joshua Povill <jpovill_sussman1@frontier.com>
Sent: Friday, October 02, 2015 12:23 PM
To: 'williamschambers@nycourts.gov'
Subject: People v. Ismail Shabazz; Motion for Judicial Recusal
Attachments: Motion for judicial recusal.pdf

Please see attached for filing.

Yours,

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