Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

JESSE FRIEDMAN, by and through his counsel, hereby moves the Court for a "so-ordered" subpoena *duces tecum* pursuant to N.Y. C.P.L.R. § 2307 and N.Y.C.P.L. § 610.20(3), for disclosure of all documents the Nassau County District Attorney's Office or Nassau County Police Department currently possess related to the prosecution and reinvestigation of the conviction of, Jesse Friedman, including but not limited to the following:

1. All written statements made by Defendant while in custody of Nassau County.
2. All written statements made by Defendant at any point.
3. All records or recordings of any kind, made by anyone, and reflecting statements made by Defendant.
4. Any records or recordings constituting summaries, impressions, or reflections upon statements made by Defendant.
5. Any books, papers, photographs, objects, or other items collected by the Nassau County Police Department, the District Attorney's Office, or any other person or agency, in the course of the investigation of Jesse or Arnold Friedman, and in the custody or control of Nassau County.
6. Any document, record, object, book, paper, or other item that the People intend to introduce at any future hearing on the innocence of Defendant.

7. Any paper, document, record, photograph, object or other item which was presented to the grand juries in indictment numbers 67104, 67430, or 69783.
8. Any paper, document, record, photograph, object or other item which relates to any allegation made in indictment numbers 67104, 67430, or 69783.
9. Any summaries or compilations of records, objects, books, papers or other items prepared by the People for presentation to the grand juries in indictment numbers 67104, 67430, or 69783.
10. Any summaries or compilations of records, objects, books, papers or other items prepared by the People for presentation to a petite jury would it have been convened.
11. A written list of any witnesses, including names and addresses, the People intend to call at any future hearing on the innocence of Defendant.
12. A written list of any expert witnesses the People intend to call at any future hearing on the innocence of Defendant, and all reports prepared of their intended testimony. In the case that no such report has been prepared, a summary of their opinion and the subject matter of that opinion.
13. Any communication, whether written, oral, or otherwise made to the prosecution or its agents, by any person the People intend to call as a witness, which are in any way contrary to the expected testimony of the witness. This request includes verbal and non-verbal communications.

14. A written list of the students and parents of students of the Friedman Computer Classes interviewed by the Nassau County Police, any other law enforcement agent, any agent or representative of a law enforcement agent, the Nassau County District Attorney's Office, any agent or representative of the Nassau County District Attorney's Office, or any other person in the investigation of Jesse Friedman or Arnold Friedman.

15. The record, in whatever form, of the statements made by any of the students listed in request No. 14. If no statement was recorded in any manner, state so.

16. All notes, papers, recordings, documents, or evidence of any kind which constitutes a record of the interviews made of students or parents of students by any person listed in request No. 14.

17. A written list of any parents of students, family members, acquaintances, or any other person interviewed by the Nassau County Police, any other law enforcement agent, any agent or representative of a law enforcement agent, the Nassau County District Attorney's Office, any agent or representative of the Nassau County District Attorney's Office, or any other person in the investigation of Jesse Friedman, Arnold Friedman, or Ross Goldstein.

18. State whether any agreement, promise, understanding, or other arrangement, whether formal or informal, exists between the People or any of its agents or

representatives and any person whom the People intend to call at any hearing on the innocence of Defendant.

19. Any document, recording, paper, or other record of any such arrangement referenced in request No. 18.

20. A written list of the names and addresses of any person whom the People know, suspect, or otherwise believe have any relevant knowledge or information regarding the allegations set forth in indictment numbers 67104, 67430, or 69783.

21. All papers, documents, records, objects or other items related to any communications between the Nassau County Police Department or Nassau County District Attorney's Office and any parents of students.

22. All papers, documents, records, objects or other items related to any presentations, sessions, or other gatherings between Nassau County Police or members of the Nassau County District Attorney's Office and parents.

23. All papers, documents, records, objects or other items related to any presentation to the press by any Nassau County agency or office, including notes or other documents made in preparation of said presentation that was in any way related to the Friedmans or Ross Goldstein.

24. All Press Releases made in connection with the Prosecution of the Friedmans or Ross Goldstein.

25. All papers, documents, records, objects or other items related to the providing or use of any therapists, counselors, psychologists, psychiatrists, or other persons by any Nassau County office or agency in relating to any Friedman computer class student, parent of those students, or any other person related to the Friedman prosecution or that of Ross Goldstein. This request includes notes of witnesses who testified as to the existence of the use of hypnosis before the team reviewing the conviction of Jesse Friedman, as noted, for example at page v of the executive summary of that report.[1]

26. Any and all photographs, films, and/or videotapes taken in connection with this case.

27. Any and all photographs, films, transcripts, recordings, diagrams, charts, or other demonstrative evidence the People intend to or may introduce at any future hearing on the innocence of the Defendant.

28. State for each witness the People intend to call at any hearing on the innocence of the Defendant whether that person ever underwent any sort of

[1] The Conviction Integrity Review of Jesse Friedman, referred to herein as the "Rice Report," is before this Court as Exhibit B to the June 2014 Affirmation of Ronald Kuby in Support of Defendant's Motion to Overturn Conviction and Dismiss Charges on the Grounds of Actual Innocence and Unlawfully Coerced Testimony Before the Grand Jury, and to Overturn his Plea of Guilty Based upon Unlawful Coercion. Exhibits to that Petition cited herein are labeled "Exhibit __" or "Ex. __", with the exception of the Rice Report, which is cited to as such, or as "RR at __." Exhibits unique to this motion are cited herein as exhibits to the February 23, 2015 Affirmation of Ronald L. Kuby.

therapy, including but not limited to memory recovery therapy, in the process of gathering their testimony at any point between 1987 and 2015.

29. All documents, papers, records, books, photographs, transcripts, tapes, videotapes, or audio or visual media recorded in any format which the Nassau County District Attorney's Office or Nassau County Police Department received, gathered, referenced, or considered in preparation of the June 2013 Rice Report.

30. Sufficient documentation to identify Assistant District Attorneys who were assigned to or otherwise engaged with the "Review Team," whose review gave way to the Rice Report.

31. The training history and other employment records of Det. Sgt. Frances Galasso, Det. Patricia Brimlow, Det. Lloyd Doppman, Det. William Hatch, Det. Wallene Jones, Det. Anthony Fiore, Det. Nancy Myers (now Line), Det. Larry Merriweather, Det. Peter Reihing, Det. Anthony Squeglia, Officer Charles Whiddon, and Officer Mary Ann Durkin.

32. All documents provided to the Nassau County District Attorney's Office during its conviction integrity review by Defendant.

33. Any and all records regarding the arrest of, any investigation into, any other alleged co-conspirators or actors who at any point were suspected of committing criminal acts in concert with Jesse Friedman, Arnold Friedman,

or Ross Goldstein. This request includes witness statements and any other records of interviews or interrogation.

Preliminary Statement

The documents in question in this motion were created between 1987 and today. In that time, only one person outside of the Nassau County District Attorney's Office has viewed them. That person, Judge F. Dana Winslow of the Nassau County Supreme Court, found them to contain exculpatory evidence and to be riddled with inconsistencies.

He ordered their complete disclosure, finding good cause for their release to overcome the constraints of Civil Rights Law 50-b, and in the case of the grand jury minutes and materials, a compelling and particularized need for the documents. Transcript of Hearing, Friedman v. Rice, Index No. 4015-13 (Sup. Ct. Nassau Cnty. Aug. 22, 2013) (Ex. G). In doing so he joined an ever-growing chorus demanding their release in issuing the order. That chorus includes the United States Court of Appeals for the Second Circuit, who lamented the lack of a full evidentiary hearing (Friedman v. Rehal, 618 F.3d 142, (2d Cir. 2010)), a prominent member of the advisory panel to the Conviction Integrity Report review team (See Affirmation of Barry Scheck, submitted in conjunction with the June 2014 Motion to Overturn the Conviction), Newsday, the most prominent local newspaper (Editorial, *Release Friedman Papers, but Protect Victims*, NEWSDAY,

Aug. 23, 2013) (attached as Exhibit 1 to the February 23, 2015 Affirmation of Ronald L. Kuby), a longtime FBI investigator and one of the nation's most experienced and highly regarded experts in child sexual abuse, Kenneth Lanning (Aug. 4, 2013 Affidavit of Kenneth Lanning, Ex. T), the New York Times (Jesse Wegman, Editorial, *After a Guilty Plea, a Prison Term and a Movie, a Sex Abuse Case Returns*, THE NEW YORK TIMES, Feb. 9, 2015) (attached as Exhibit 2 to the February 23, 2015 Affirmation of Ronald L. Kuby), Scott Banks, the law clerk to the original judge in this case (Aug. 18, 2013 letter from Scott Banks to Justice F. Dana Winslow, Ex. A) and even alleged victims and their parents. (See, e.g., Aug. 19, 2013 letter from Arline Epstein to Justice F. Dana Winslow, Ex. D).

The case for disclosure has only grown stronger in the eighteen months since the order was issued. Though the good cause shown was ultimately Friedman's likely innocence and a generalized need to pursue proving that innocence, the Second Department created a direct pathway to demonstrating that innocence in People v. Hamilton, 115 A.D.3d 12 (2d Dep't 2014), exponentially strengthening the good cause argument by establishing a direct cause of action for vindication.

The People would prefer justice in this case be illusory. Rather than a full hearing on the merits, as conceived by Hamilton and demanded by justice, the People demand that Friedman prove his factual innocence without the benefit of viewing the evidence against him, or being able to put that evidence in the context

of the reams of evidence a Supreme Court Justice has already stated was plainly exculpatory. That is not justice. It is farce.

Statement of Facts

The Nassau County Police Department seized the class rosters, computers, and other evidence related to the Friedman family computer classes in November of 1987. Almost immediately, they began their interviews of scores, even hundreds, of computer class students. Since that time, they have characterized that evidence, made numerous accusations based on it in formal indictments, the 2013 Rice Report, and ancillary court proceedings. They have also steadfastly refused access to outside eyes. The first denial came in 1988. Friedman's then attorney, Douglas Krieger, made a broad request in April of that year for numerous documents, including that evidence available under Brady v. Maryland. (April 11, 1988 Demand for Discovery, Ex. PP). The DA's office replied not just by denying the request, but denying the existence of any Brady material. (April 18, 1988 Reply to Demand for Discovery, Ex. QQ). Repeated requests would meet the same result. Such denials led in part to Friedman's 1989 guilty plea.

In 2004 Friedman challenged his conviction on the grounds that he had discovered new evidence of his innocence, and the People had withheld Brady evidence. This Court in 2006, focusing on evidence of manipulative interviewing techniques, ruled that the withheld information was not necessarily Brady material,

but rather impeachment material. Order, People v. Friedman, Ind. Nos. 67104, 67430, 69783 (Cnty. Ct. Nassau Cnty. Jan. 6, 2006). A challenge to that order would ultimately find itself in the Second Circuit Court of Appeals, who lamented any distinction between exculpatory evidence and impeachment evidence, noting the Supreme Court's decisions in United States v. Bagley, 473 U.S. 667, 676 (1985) and Giglio v. United States, 405 U.S. 150, 153-4 (1972). Friedman, 618 F.3d at 154. Nonetheless, the challenge was untimely, and denied on those grounds. Id.

The decision did find, however, that the numerous affidavits, expert testimony, and other evidence before it suggested a "reasonable likelihood that Jesse Friedman was wrongfully convicted. Id. at 161. It thus stated its "hope" that the DA would undertake "a reinvestigation of the underlying case or the development of a complete record," the "kind of complete review of the underlying case suggested in the Comment to Rule 3.8." Id. at 160.

The kind of reviews that comment envisions are developing across the country. They entail certain benchmarks to ensure transparency and reliability. Those are 1) the availability of the complete record; 2) a review unit willing to investigate leads proposed by the party claiming innocence; 3) permission granted to lawyers for the party claiming innocence to pursue leads; 4) a close working relationship with the Public Defender's office; 5) leadership by a well-respected

attorney experienced in criminal defense. (Barry Scheck, *Professional and Conviction Integrity Review Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 Cardozo L. Rev. 6, 2215, 2248 (2010)[2]). It need not be restated here that the review that resulted in the Rice Report failed on all five benchmarks. For the purposes of this motion, the most important failure was on point (1).

Friedman made numerous overtures to the DA's office for access to those files. They included the good faith gesture of handing over reams of documents that could potentially be helpful, including both Friedman's personal files and those of his former attorneys. The DA's office response was to deny access, and even deny return of the documents they were given. Those denials led in 2012 to a request under New York's Freedom of Information law. By letter dated October 12, 2012, Chief Assistant District Attorney Singas (now District Attorney Singas) summarily denied any such disclosure under Civil Rights Law § 50-b, Public Officers Law §§ 87(2)(a), (e)(i), and (e)(iii). New York law, of course, forbids "blanket exemptions for particular types of documents" and requiring "particularized and specific justification" for non-disclosure. Gould v. New York City Police Dep't, 89 N.Y.2d 267, 274-75 (N.Y. 1996). The denial was thus insufficient and contrary to New York law on its face. Beyond that, none of the

[2] Available at http://cardozolawreview.com/Joomla1.5/content/31-6/SCHECK.31-6.pdf.

stated exemptions apply broadly. The Public Officer's Law exemptions were for confidential informants and information that would interfere with a law enforcement investigation. But there is no suggestion that there are any such confidential informants (not to mention, the suggestion that all documents could reveal the identity of a confidential informant is nonsense), and of course, § 87(2)(e)(i)'s protection of investigations ceases to apply after judicial proceedings and enforcement investigations have run their course. See Lesher v. Hynes, 19 N.Y.3d 57 (N.Y. 2012).

Civil Rights Law § 50-b may apply to some of the documents at issue absent a court-ordered finding of good cause, but it certainly does not prohibit providing redacted documents, and it obviously does not apply to, for example, the scores of reports of students who were not complainants. Even if every document did, they still failed to meet their burden, which requires them to show that "each requested document contained identifying information." Fappiano v. New York City Police Dep't, 95 N.Y.2d 738, 748 (N.Y. 2001).

The DA's office's steadfast refusal to allow **any** insight into their original investigation or reinvestigation eventually led to a petition under Article 78, seeking an order compelling disclosure of the documents. That prompted Justice Winslow of the Nassau County Supreme Court to order an *in camera* review of thousands of pages of documents contained in the Friedman file. He thus became

the first person outside of the Nassau County DA's office or police department to review those documents at all.

He found precisely what many outsiders to the office believed he would, that statements were inconsistent, self-contradictory, and contained Brady evidence. (Ex. G at 25:17-23, 31:17-32:18). He ordered their complete release. Id. Rather than comply with the order that relieved them of all legal barriers to release of the documents, the DA's office appealed it to the Second Department, where it awaits decision.

The insistent secrecy, despite no legitimate legal barriers, reveals a fear of uncovering an investigation that was conducted contrary to any reliable practice, that gathered no real evidence, and led to the unjust incarceration of a teenaged, innocent, Jesse Friedman. Due Process demands, and this Court has ordered, a hearing on the merits to determine whether Friedman is, as he and many witnesses have long insisted, in fact innocent. If such a hearing is conducted with full discovery and disclosure, that hearing will grant finality to the issue. If conducted without it, it will simply add to the growing suspicion that Nassau County will never permit a real opportunity for justice to be done.

Argument

THE COURT MUST ISSUE THE AFFIXED SUBPOENA *DUCES TECUM*

This Court granted an evidentiary hearing on a motion pursuant to C.P.L. § 440.10 on December 23, 2014. That granting confers upon a defendant the right to secure witnesses through subpoena, and relevant documents through a subpoena *duces tecum*, pursuant to C.P.L. § 610.20. See, e.g., People v. Collins, 847 N.Y.S.2d 904, at *27 (Sup. Ct., Kings Cty., 2007) (Once a court orders an evidentiary hearing on a §440.10 motion, the defendant has the right to subpoena documents and witnesses pursuant to §610.20(3)); People v. Diaz, 195 Misc. 2d 337, 340-341 (Sup. Ct., Bronx Cty., 2003) (no authority to use Article 610 subpoena "where no evidentiary hearing has yet been ordered....").

The standard for issuance is whether the sought-after materials may be relevant and material to the scope of the hearing. People v. Covalito, 87 N.Y.2d 423, 428 (Ct. App. 1996) (discovery not authorized by § 240.20 can be obtained by subpoena *duces tecum* to "locate and secure" relevant evidence). Those records include those of a police department or district attorney's office given a factual showing that those documents might bear relevant and exculpatory evidence. People v. Johnston, 2002 N.Y. Misc. LEXIS 648, at *12 (Cty. Ct. Putnam Cty. 2002). The Court of Appeals, on surveying cases, found that standard to mean that the defendant does ***not*** have to make a showing that the "record actually contains

information that carries a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends." People v. Gissendanner, 48 N.Y.2d 543, 548 (1979). Rather, a defendant must merely put forth "some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw." Id.

This Court has ordered a hearing as to Friedman's actual innocence, therefore a factual predicate that the requested documents may bear fruit falls within that rule. First, a showing has already been made on his innocence, which the People here do not deny. (See Sept. 8, 2014 Affirmation in Opposition to Defendant's Motion to Vacate His Judgment of Conviction at p. 2, para. 5.). A hearing having been granted, the above listed documents further meet that standard for various reasons.

Disclosure of witness statements and the documents seized from the Friedman household will permit reliable identification of children who were present together in specific classes. That measure is critical to a fair evaluation of witness statements. The People concede that many students interviewed in 1987 and 1988 witnessed none of the acts for which Friedman was indicted. (See, e.g. Rice Report at 28). The People's response to that fact is those students may have been absent, or were not in the same class. (Rice Report at 64). The class rosters

that did exist were seized in 1987 and never returned. Plainly, however, absences could not account for all such incidents of abuse, particularly in the case of some complainants, such as those of Fred Doe, which constitute dozens of counts in the indictments. Fred Doe's statement (one of the few documents from the investigation ever disclosed) contains the redacted names of at least five students present in the class and describes their spatial relationship in the classroom to Fred Doe. (See Defendant's Motion to Overturn Conviction, June 2014, at 41-42, 118-119). Indeed, of the 41 police interviews summarized in the Rice Report, 38 mention witnessing abuse in plain sight of others or witnessing the abuse of other children.

Another document, the "Victim Questionnaire," (Ex. I), revealed in the Rice Report, confirms that children were asked who was in their class, and lists as a question to ask every child "[h]ave you ever seen anyone else in the classroom being touched?" Id. Kenneth Lanning, an expert in mass sexual abuse who has submitted an affidavit in this case, describes this form of "corroboration" as the essential tool in the investigation of such cases:

> It is not the job of law-enforcement officers to believe a child or any other victim or witness. The child victim should be carefully interviewed. The information obtained should be assessed and evaluated, and appropriate investigation should be conducted to corroborate any and all aspects of a victim's statement.

(Ex. T at para. 34). There is no doubt that many of the students who sat alongside complainants witnessed no abuse. Many of them have submitted statements swearing to that effect, or have otherwise stated so. Indeed, the Rice Report reveals for the first time they did so in 1987 and 1988 as well:

> Each student reported that all such games were played in the classroom, rather than behind closed doors, and detectives attempted to verify these accounts by compiling lists of other students in the class, who would have (necessarily) either observed or participated in the games. One student specifically denied seeing anything of the sort; while other interviews were conducted, no statements were taken, leading the Review Team to conclude that these subjects did not disclose similar conduct to the police.

(Rice Report at 28). The Rice Report further reveals discrepancies between the current and past testimony of students with whom Friedman has had no contact. According to the People, Witness 11 (who the best information available suggests is James Doe) claimed in 1988 that he had been abused by multiple people. During the course of the reinvestigation, he claimed only the Friedmans. (Rice Report at 104). Revealing current witness statements and statements to the reinvestigation panel would illuminate the distinction and allow investigation into their veracity.

Witness 11 is not alone in the notion that "other abusers" would pop in and out of the picture. Indeed, police identified three "potential accomplices" never seriously pursued by the Nassau County District Attorney's office. (Rice Report 28). After repeated interrogation, four students named three additional rapists

during a single week, seven months after the interviews began. Id. According to Lanning, "valid cases tend to get *better* and false cases tend to get *worse* with investigation." He "get[s] concerned when as an investigation progresses, the number of alleged offenders keeps growing and the allegations get increasingly more bizarre and atypical." (Ex. T at para. 19). There's no doubt that that was the case for at least some witnesses, and taking the indictments at face value, broadly true. The only meaningful way of examining the issue however, is through broad disclosure of witness statements.

Disclosure of the statements will also permit a forensic textual analysis to determine whether statements were written by police, or by the complainants themselves. Of the fourteen detectives who questioned the scores of students who took the very classes during which the People claim hundreds of instances of abuse took place, only four ever produced complaining witnesses. As cited in the June 2014 Petition before this Court, the limited statements we do have bear strikingly similar language that the same detectives produced in a separate case. See Defendant's Motion to Overturn Conviction at 43-44. If demonstrated to be broadly true, it would continue to undermine the credibility of the investigatory process, and of the statements recorded by the officers.

THIS COURT SHOULD ORDER DISCLOSURE OF VARIOUS DOCUMENTS UNDER CPL 440.10(1)(g) BECAUSE THE EVOLUTION OF SCIENTIFIC AND LEGAL UNDERSTANDING OF THEM RENDERS THEM NOW EXCULPATORY

In 1987 and 1988, the general understanding of child psychology was far less advanced than it is now. At the time, many believed that a child could "suppress" memories of abuse, systematically and broadly not remember or report it, but that it could later be "drawn out" through memory recovery techniques. No study has ever been able to demonstrate any such repression, and indeed the scientific consensus on the topic is that the opposite is true. Memories cannot be "repressed" then "drawn out". Rather, suggesting to someone that something happened to them, insisting upon it, and telling them that others claim it to be so can in fact create a false memory. Children are particularly susceptible to this, but not uniquely susceptible. See, Elizabeth F. Loftus & Deborah Davis, *Recovered Memories*, 2 Annu. Rev. Clin. Psychol. 469, 477 (2006)[3]; Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways Children Tell?*, 11 Psychol. Pub. Pol. & L. 194, 213 (2005); see also Friedman v. Rehal, 618 F.3d 142, 156-159 (2d Cir. 2010).

The People have long denied the use of hypnosis in drawing out the testimony of the complaining witnesses. The evidence for its use includes one

[3] Available at https://webfiles.uci.edu/eloftus/LoftusDavisAnnualReview06.pdf.

complaining witness that the People count among its "reaffirmers" who has stated that he had no memory of abuse before being hypnotized and transcripts from seminars in which therapists heralded its use to produce repressed memories in the students in this case. (See Defendant's Motion to Overturn Conviction at 123). It also includes an article from the summer of 1988, in which Detective Galasso is quoted as stating that additional allegations of abuse were gleaned from memory-recovery techniques during therapy. (Van Haintze, Bill and Bessent, Alvin, "New Arrest in Child-Sex Case", NEWSDAY, June 23, 1988, pg. 21, Ex. AA). Strong as that may be, the debate over whether it was used is misdirection at best. The detectives and the District Attorney's office admit that detectives told students that others had seen them being abused, used suggestive questions to ask how they had been abused (without first establishing that any abuse had indeed taken place), rewarded students who produced testimony and were cooperative, punished students with repeated visits when they were not cooperative, and asked and re-asked questions repeatedly when the answers alleged no abuse. (See Defendant's Motion to Overturn Conviction at 50-52).

In the late 1980s those techniques may well have been considered good detective work. Public statements since by several detectives who employed them suggested they certainly believed so. But, it's not merely believed but ***known*** today that they can induce false reports. See Sena Garven et al., *More Than*

Suggestion: The Effect of Interviewing Techniques From the McMartin Preschool Case, 83 J. Applied Psychol. 347, 347 (1998)[4]; Rehal, 618 F.3d at 156-157. That's not just true when they are deployed as a package either, any of them can induce a false report used alone. See Thomas D. Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions,* 65 Law & Contemp. Probs. 97, 106 (2002)[5]. When deployed as a package however, as the evidence shows so far in this case that they were, they have their "greatest impact." Rehal, 618 F.3d at 157; citing Garven, 83 J. Applied Psychol. at 350. Dr. Garven, the Senior Research Psychologist at the U.S. Army Research Institute for Behavioral and Social Sciences, found that by exposing children to the techniques Nassau County detectives used, they could elicit false reports in nearly 60% of subjects, in less than five minutes. Garven, 83 J. Applied Psychol. at 354. There's no legitimate dispute that the few detectives who elicited hundreds and hundreds of counts over time employed these techniques. There's also no dispute that the vast majority of students refused to comply with their demands. But the DA's office has long refused to disclose the documents that demonstrate that, while tacitly admitting their existence. (See Rice Report at 28).

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[4] Available at http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1012&context=james_wood.

[5] Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1239&context=lcp.

So too will records of the therapeutic methods deployed to groups at a time and coordinated by the District Attorney's office and police department. As will records of the presentations made by County officials in conjunction with the schools and hospitals to parents. Though none of that may have then been considered exculpatory, courts now accept the conclusions of social science and psychology that the methods at issue in this case verifiably create false testimony. Rehal, 618 F.3d at 156; Rock v. Arkansas, 483 U.S. 44 (1987); Borawick v. Shay, 68 F.3d 597 (2d. Cir. 1995) (surveying scientific literature and affirming summary judgment rejecting testimony procured post-hypnosis therapy). Indeed, courts in New York expressly accept that interview techniques shape the responses of children. People v. Michael M., 162 Misc. 2d 803, 808-809 (Sup. Ct. Kings Cnty. 1994). Evidence that was once not discoverable, or not considered exculpatory, becomes so when in the intervening time our scientific understanding of it evolves. People v. Callace, 151 Misc.2d 464, 466 (Cty. Ct. Suffolk June 27, 1991). Though most of these materials are similarly available in this hearing pursuant to Brady v. Maryland or the above cited authority for issuance of the subpoena, they are additionally now discoverable as in effect, new evidence. The court in Callace found the authority in CPL 440.10(1)(g) to treat the evidence, long known but not necessarily understood or discoverable, as "newly discovered evidence", since the new scientific understandings of it gave it new meaning. Id. at 465-466; see also

Jud. L. Sec.2-b(3); People v. Griffin, 138 Misc.2d 279 (Sup. Ct. Kings Cty. 1988). Here too, the records of methods used to elicit testimony, be it witness statements, records of the recruitment of therapists, merely identification of therapists, etc. are all viewable in a new light given the change in scientific understanding of the behavior of child witnesses.

The threshold for the exculpatory potential of the evidence is not high. Courts ought not to speculate as to what conclusions experts may be able to draw from the evidence until an expert can actually examine that evidence. Dabbs v. Vergari, 149 Misc. 2d 844, 849 (Sup. Ct. Westchester Cty. 1990). Here the basic techniques used to elicit testimony by certain detectives are not in dispute. Nor are the scientific conclusions that such techniques produce false testimony. It is for an expert to decide whether the evidence in this case suggests that the testimony produced was indeed false.

ALL WITNESS STATEMENTS, POLICE RECORDS, AND OTHER MATERIALS RELATED TO THE INVESTIGATION OF THE FRIEDMANS MUST BE DISCLOSED UNDER BRADY V. MARYLAND

This motion further seeks all material available to the Defendant under Brady v. Maryland, 373 U.S. 83 (1963) and the Due Process Clause of the United States and New York Constitutions. The Defendant first requested such material in 1988 through a series of demands. The People responded by denying the existence

of any such material. There is no legitimate dispute now nearly twenty-seven years later that such material does indeed exist.

Further, there is no doubt that the Due Process rights that Brady encapsulates extend to these proceedings in New York. Indeed, it is "well established that notwithstanding the absence of a statutory right to postconviction discovery, a defendant has a constitutional right to be informed of exculpatory information known to the State." Dabbs v. Vergari, 149 Misc. 2d at 847, citing Brady v. Maryland, 373 U.S. 83; People v. Robinson, 133 A.D.2d 859 (2d Dep't 1987); People v. Lumpkins, 141 Misc. 2d 581, 587 (Sup. Ct. Kings Cty. 1988). That ongoing and perpetual right derives from the fundamental right to a fair trial, mandated by the "*Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution*, and imposes a constitutional duty on the prosecution to disclose to the defense evidence favorable to the defendant that is material to either guilt or punishment." Dabbs, 149 Misc. 2d at 847 (emphasis in original). It ensures that a miscarriage of justice does not occur, and once the possibility of innocence is established, concern for ensuring the "finality of convictions" is of no moment. Id. at 847, 850.

Thus, this motion demands as a matter of right:

- All statements or records of statements by any computer class student or parent, including investigatory interviews. This includes those "handwritten notes from detectives" mentioned at page 8 of the Rice

Report. It further includes the "48 signed statements" identified at page 8, footnote 37 of the same report, and all other records.

- All documentation and records of the visits to "104 households" during the process of investigation noted at page 9 of the Rice Report.

- All documentation and records of the 262 reports and lead sheets of the "many students" for whom "the Friedman Classes were nothing more than what they were advertised to be" identified at page 10 of the Rice Report. This request includes the "handwritten notes listing the interviewee's name, characterizing the interview as negative, and sometimes, explaining that designation" noted at page 9 of the Rice Report. It further includes the notecard of the one interview from February, 1988 that "police documented with only a single word, negative" as well as "handwritten notes from detectives, several undated, non-incriminating witness interviews" noted at page 17, footnote 94 of the Rice Report.

- The identity of the person who stated "that he attended only one class session, that he was never abused, and that he never witnessed any abuse" mentioned at page 130 of the Rice Report.

- All documentation and records regarding the "twelve boys who told police about illegal sexual conduct" prior to November 25, 1987 noted at pages 12 and 13 of the Rice Report.

- All documentation and records of the "eleven victims" who made statements during the second phase of the investigation between the initial arrest and December 17, 1987 noted at page ESii, iv and pages 17-20 of the Rice Report.

- All documentation and records of statements of and interviews of the "thirteen boys" who "gave detectives detailed statements outlining Jesse (Friedman's) criminal conduct and the additional "who would eventually testify against Jesse Friedman before a grand jury" noted at pages ESiii and 9 of the Rice Report.

- The list of names of local children seized by postal inspectors identified at page 6 of the Rice Report.

- The "primary source documents" that were "omitted from the public appendix" identified at page 1, footnote 2 of the Rice Report.

- The "forty-eight signed statements" within the "Review Team's Record" identified at page 8, footnote 37 of the Rice Report.

- The identities of the children as well as the places, dates, interviewing detectives, and all other records part of the "identification procedures" noted at page 8 of the Rice Report.

- The identities of the children as well as all records of the "checklists to indicate which pornographic videogames, if any, they had seen during the class" noted at page 8 of the Rice Report.

- All documentation and records of the "discussion between Arnold, David, Elaine, Jesse and Seth Friedman" dated March 24, 1988 and mentioned at page 23, footnote 88 of the Rice Report.

- All documentation and records of the interviews of Ross Goldstein on September 8, September 20, September 21, October 5, October 17, and October 27 1988 identified on page 31, footnote 107, page 29, ESiii, and page 32, footnote 116 of the Rice Report.

- All documentation and records of any other interview of Ross Goldstein conducted at any time.

- All documentation and records of the line-ups conducted June 16, 1988, June 22, 1988, November 17, 1988 and noted at pages 30-31.

- The notes "obtained directly from Dr. Pogge" noted at footnote 148 of page 38 of the Rice Report, as well as any other notes from Dr. Pogge.

- The videotape of Jesse and David Friedman in a supermarket dated Fall of 1988 and noted age pages 40 and 41 of the Rice Report.

- The interview notes by Stanley R. Berg dated July 25, 1989 identified at footnote 229 of page 49 of the Rice Report.

- The interview notes by William S. Berk dated December 1990 identified at page 50, footnote 230 of the Rice Report.

- All documentation and records of the "police and prosecutors files" containing partial student rosters, plus reconstructed information compiled by the Review Team noted at pages 62 and 123 of the Rice Report.

- All documentation and records supporting the statement that "only two classes may be reconstructed with any precision" contained in the Rice Report at page 125.

- The guidelines for the Nassau County Multidisciplinary Team, rules of adherence for the Child Advocacy Center involving interviewing children identified at page 76 of the Rice Report.

- The supporting documentation or other evidence that led to the conclusion within the Rice Report at page 72 that police used tactics that were "unprofessional, unfair, and cruel."

- The supporting documentation or other evidence that led to the conclusion within the Rice Report at page 72 that children were told that failure to disclose abuse would affect their future sexuality, cause them to become "homosexual" or become abusers themselves.

- The supporting documentation or other evidence that led to the conclusion within the Rice Report at page 71 that police warned children that they would suffer "lasting psychological consequences later in life if they do not disclose abuse."

- The supporting documentation or other evidence that led to the conclusion within the Rice Report at page 66 that police gave some boys rewards to gain their cooperation.

- The supporting documentation or other evidence that led to the conclusion within the Rice Report at page 62 that "some witness interviews were conducted entirely off the record, with no attempt made to reduce to writing what was learned from the visit, or why the visit was made."

- The supporting documentation or other evidence that led to the conclusion within the Rice Report at page 87 that detectives "might have said something along the lines of, 'Jimmy said Arnold was not nice,' a strategy that in some cases produced results."

All of the above documents exist in the possession of the District Attorney's office, according to the District Attorney's office. Many of them are exculpatory on their face, such as the records of the scores of students who denied both being abused and witnessing any abuse. The rest of the documents may once have appeared inculpating, but several factors over the years have since made inevitable the conclusion that they are factually exculpatory.

First, our understanding of psychology and the interviewing of child witnesses has evolved considerably in the intervening years. As certain methods are proven to create false testimony (and in many cases, false memories), records of the use of such methods become exculpatory, even if they could have arguably been considered not so in 1988. Of course, the existence of multiple eye witnesses directly contradicting the testimony of complaining witnesses could never have been considered not-exculpatory. Second, and of utmost importance to this Court's decision, is that the only Judge to ever consider the question specifically found the files to contain Brady material. Justice F. Dana Winslow reviewed much of the 17,365 pages of documents the People consider their "Friedman file", and told Mr. Schwartz of the DA's office that:

> I don't believe that you're saying that there is nothing...that this Court has received ...that doesn't have some Brady material, and I'm talking about the unredacted portion, the portion that Mr. Kuby didn't see. But even in the redacted portion there is some.

(Ex. G at 26). He went on to make specific findings on the nature of the materials:

> The Court, after reading numerous witnesses' statements, none of which were written by the witness him or herself, all of which were written by someone else, finds that even the people – and they are people, no longer children – who took the position that they did not want their names disclosed, had some glaring discrepancies in parts of the statements given. Most particularly what comes to mind is a statement given at one point in time and then – to one detective and then later given to another detective thereafter. There was a rather substantial difference.

Id. at 31-32.

Even the narrowest reading of Brady could not be so restrictive as to suggest that records of witness statements, *the sole evidence of guilt in existence* which are self-contradictory, non-sensical, and the product of questioning known to elicit false testimony, would not "tend to exculpate" the defendant. Brady, 373 U.S. at 88. The material at issue here are records of potentially *hundreds* of witnesses who saw nothing inappropriate in the classroom, and specific statements which would elucidate for the first time the actual allegations against Friedman. When "the reliability of a given witness may well be determinative of guilt or innocence, evidence affecting credibility falls within this general rule" requiring disclosure. Giglio v. United States, 405 U.S. 150 (1972).

Indeed, the law firmly treats this material as exculpatory. First, there is no difference under the Due Process clause of the United States Constitution, between exculpatory evidence and impeachment evidence prior to trial. Bagley, 473 U.S. 667, 683-684 (1985). Second, it is well-established both among New York courts

and nationally that in child-abuse cases, interview techniques "can shape the child's responses." People v. Michael M., 162 Misc. 2d 803, 808-809 (Sup. Ct. Kings Cty. 1994). Children are susceptible to suggestion, and highly suggestive techniques can "distort a child's recollection of events, undermining the reliability of the statements and subsequent testimony concerning such events." Id., citing State v. Michaels, 136 N.J. 299, 312 (1994). Thus evidence of those techniques bears directly on the validity of the statements.

Moreover, at least some children in this case originally denied being abused. See, Dec. 23, 2003 Affidavit of Brian Tilker (Ex. H) at 8. There is overwhelming evidence that was broadly true. For example Detective Jones described in detail one case in which the "victim" denied being so for hours. See Jan. 6, 2004 Affirmation of David Kuhn (Ex. L) at 9. New York courts expressly consider initial denials of abuse Brady material. People v. Ramos, 201 A.D.2d 78, 84 (1st Dep't 1994). And of course, there is no dispute in this case that the vast majority of the children interviewed broadly denied abuse, despite sitting next to students claiming to have been abused in every single class session. Dan Aibel, Jamie Forrest, and Ron Georgalis all sat alongside original complainants and submitted *sworn affidavits* reaffirming what they told police years ago. See June 27, 2013 Affidavit of Dan Aibel (Ex. SS) at 6-9; Dec. 29, 2003 Affidavit of James Forrest (Ex. VV); Dec. 30, 2003 Affidavit of Ron Georgalis (Ex. WW). Of course,

numerous other students have similarly so stated. See Defendant's Motion to Overturn Conviction at 80-94. The Rice Report's bafflingly disingenuous response to this fact is simply, maybe they were absent that day. (Rice Report at xii).

The only evidence in this case was testimony, no physical evidence existed. The People expressly conceded that the techniques used to elicit that testimony was "unprofessional, unfair, and cruel." (Rice Report at 72, see also Defendant's Motion to Overturn Conviction at 26-34). Under People v. Hamilton, binding law in this forum, once a hearing on actual innocence is granted, *all reliable evidence, including evidence not admissible at trial based upon a procedural bar...should be admitted.* People v. Hamilton, 115 A.D.3d 15, 26 (2d Dep't 2014) (emphasis added). The only judge to ever review the materials at issue made specific findings that it was riddled with inconsistencies, and contained Brady evidence.[6]

Denial now of exculpatory or potentially exculpatory material, either that the witness statements and other materials constituting the People's Friedman file do not fall under Brady or that Friedman is not entitled to material under Brady would not just stand in stark opposition to prior judicial findings. It would render a hearing on his innocence, and the judicial process Due Process demands, a farce.

[6] The factual findings of Justice Winslow's order referenced herein were not expressly challenged on appeal, rather it challenged the relevance of Brady violations when they had been denied for untimeliness years earlier. See, Appellant's Brief, Friedman v. Rice, A.D. No. 2013-08373, Index No. 13-4015, at 45. Of course, since a new hearing has been granted, timeliness is no longer at issue.

THIS MOTION FURTHER DEMANDS DOCUMENTS PURSUANT TO CPL 240.20

This motion further seeks discovery pursuant to CPL 240.20, which makes available for disclosure 1) all written statements by defendant or codefendants (in this case, Arnold Friedman, Jesse Friedman, and Ross Goldstein); 2) any written reports or documents related to examinations of witnesses; 3) any photographs or drawings relating to the criminal action or proceeding made or completed by a public servant engaged in a law enforcement activity regardless of whether it is to be introduced at trial; 4) any property obtained from the defendant or co-defendant; 5) any recordings or tapes that the prosecutor intends to introduce at trial; and anything else required to be disclosed by the New York Constitution or the United States Constitution. New York CPL 240.20(1). In the case that the People oppose disclosure, this motion demands an order pursuant to CPL 240.40 compelling it.

CPL 240.20 contemplates discovery prior to a trial, and the Appellate Division in People v. Hamilton equated a hearing on actual innocence to a new trial, thus rendering it applicable here. See Hamilton, 115 A.D.3d at 28 (successful innocence hearing renders new trial unnecessary). Moreover, Hamilton expanded the evidence available at trial beyond that of CPL 240.20 to *all reliable evidence*, doing away with procedural bars to its consideration. Id. at 27-28. A constrained hearing on the limited evidence available decades later without discovery (however compelling) simply does not satisfy Hamilton's mandate.

CIVIL RIGHTS LAW 50-b IS NO BARRIER TO DISCLOSURE

Civil Rights Law 50-b permits the withholding from general disclosure of "any portion of a police report, court file, or other document, which tends to identify such a victim (of a sex crime) except as provided in subdivision 2 of this section." It forms an exception to the general rule in New York that "all government records are...presumptively open for public inspection..." Gould, 89 N.Y.2d 267, 274-275. Those exceptions are "narrowly construed, with the burden resting on the agency to demonstrate that the requesting materials indeed qualifies for exemption." Id. at 275, quoting Matter of Hanig v. State of New York Dep't of Motor Vehicles, 79 N.Y. 2d 106, 109 (1992). Civil Rights Law 50-b is no different. Fappiano, 95 N.Y.2d at 748.

The DA's office has consistently excised the word "portion" from its interpretation of the law, instead insisting that every piece of paper in its file is shielded by the law. No law or case provides any support for that plainly controverted position. More importantly, subdivision 2 of the section permits disclosure with good cause shown under 50-b(2)(b), and without good cause shown where the supposed victims have consented under 50-b(2)(c). The good cause requirement is not particularly stringent. In Tonia E.-A. v. Kathleen K., 12 Misc. 3d 828 (Family Ct., Orange Cnty., 2006), a custody case, the mother of the child applied for the records related to sexual abuse cases involving the child's

father. Family Court concluded that the privacy protections of those child victims were far outweighed by the need to obtain relevant information as to the father's custody request, and granted the request. In Application of Radio City Music Hall Productions, 126 Misc. 2d 197, 198 (Sup. Ct. N.Y. Cnty. 1984), the court found good cause where the documents may be relevant to defending a civil suit.

A properly constituted hearing pursuant to a §440.10 motion certainly meets the "good cause" standard for disclosure. Indeed, State Supreme Court has already determined that good cause exists to release the documents pursuant to the Freedom of Information Law, even without the direct legal path to vindication that now exists. Plainly, it can be no barrier here.

Conclusion

For the foregoing reasons, the motion should be granted, and disclosure of all the requested documents should be ordered.

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