08-0297-pr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JESSE FRIEDMAN,
Petitioner-Appellant,

v.

JOE REHAL, Parole Officer, ROBERT DENNISON, Chairman of the New York State Division of Parole, ANDREW CUOMO, Attorney General of the State of New York,
Respondent-Appellee.

On Appeal From a Final Order Dismissing
Petition for Writ of Habeas Corpus
United States District Court, Eastern District of New York
Hon. Joanna Seybert

SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT JESSE FRIEDMAN

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Dated: New York, New York
July 20, 2009

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STATEMENT OF SUPPLEMENTAL ISSUE PRESENTED

Whether Petitioner raised a claim of actual innocence as a "gateway" to a potentially procedurally defaulted *Brady* claim.

And whether Petitioner demonstrated that in light of new evidence revealing that alleged complainants (none of whom manifested physical symptoms or spontaneously complained of any abuse) only disclosed that they were sexually abused after being subjected to high pressure, coercive, and widely discredited investigative and therapeutic techniques, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt had Petitioner proceeded to trial.

ARGUMENT

Because Jesse Friedman Consistently Asserted His Factual Innocence In Every Pleading Filed After His Guilty Plea, And The Record On Appeal Demonstrates It Is More Likely Than Not That No Reasonable Juror Would Have Convicted Friedman Had The Jury Heard Exculpatory Evidence Revealing That Investigative Methods Used By Law Enforcement And Therapists Likely Produced False Allegations Of Abuse From Complainants, Friedman Is Entitled To Have His *Brady* Claims Decided On The Merits. Alternatively, The Matter Must Be Remanded So That Friedman Is Provided With An Opportunity To Demonstrate His Actual Innocence.

In every pleading filed by Petitioner in pursuit of collateral relief from his state court conviction, Petitioner has alleged that he is completely innocent of the charges to which he pled guilty. Although Petitioner has failed to raise a free-standing, independent claim of actual innocence, the record below demonstrates that Petitioner satisfied the applicable actual innocence "gateway" standard as articulated in *Schlup v. Delo,* 513 U.S. 298 (1995). Accordingly, this Court should find that Petitioner's actual innocence showing justifies the untimely filing of his Petition for a Writ of Habeas Corpus and remand the cause for an evidentiary hearing on Petitioner's underlying constitutional claims. Should this Court conclude that the record is simply not developed enough to find that Petitioner has made a sufficient showing of actual innocence, this Court should remand the cause to provide Petitioner with the opportunity to do so.[1]

[1] Significantly, the record below consists of supporting documentation that was culled by Petitioner *without* the benefit of discovery or an evidentiary hearing. Petitioner is confident that

A. Even though Friedman's Habeas Petition Does Not Allege A Discrete, Free-Standing Claim Of Actual Innocence, Friedman Has Consistently Maintained His Actual Innocence And This Court May Review The Record On Appeal To Determine Whether Friedman Has Satisfied The Applicable Actual Innocence "Gateway" Standard.

At the outset, Friedman concedes that he did not raise a discrete and independent claim of actual innocence in his original habeas petition. However, Friedman's failure to raise "actual innocence" as a separate and discrete claim does not preclude this Court from considering the issue where the record below shows that Friedman has consistently maintained his actual innocence and every court below was on notice that Friedman claimed that he was the victim of false child abuse allegations.

A cursory review of the argument headings in Petitioner's habeas petition plainly reveal that Friedman claimed his actual innocence.[2]

- A man making a movie about clowns uncovered **obviously critical exculpatory evidence** that was never disclosed by the prosecution violating Jesse Friedman's right to due process.

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with access to discovery and an evidentiary hearing, he will be able to further bolster his already compelling claims of actual innocence and *Brady* violations.

[2] In addition to the pleadings filed in federal court, Petitioner's motion to vacate his conviction pursuant to N.Y. Criminal Procedure Law 440.10, contained extensive argument explaining that Petitioner's guilty plea did not evince his guilt and that he pled guilty as a result of factors wholly unrelated to his guilt. *See* Memorandum of Law in Support of Motion to Vacate Defendant's Conviction at pp. 70 - 77.

- Eyewitness statements to the prosecution **exculpating** Jesse Friedman of any wrongdoing whatsoever were never disclosed to the defense.

- A crucible of suggestion, intimidation, and falsification: the prosecution failed to disclose **exculpatory** evidence showing that the police utilized aggressively suggestive and coercive interrogation techniques they knew, or should have known, would yield **false** allegations.

- Innocent until hypnotic trance: the state's failure to disclose that children were hypnotized in order to **manufacture** allegations against petitioner.

In Petitioner's habeas petition and supporting memorandum, Petitioner advanced his factual innocence over and over again.[3] Petitioner further provided an affidavit in support of his habeas petition which clearly asserted that he pled guilty to crimes that he was innocent of committing. Friedman avers, "On December 20, 1988, I made the painful decision to plead guilty to the charges against me. This was a desperate decision that I reached only after realizing that

[3] By way of example, on the second page of his habeas petition, Friedman asserted that if he was apprised of the *Brady* material that was suppressed by the prosecution "he would not have pled guilty to crimes of child sexual abuse that **he did not commit**." *See* Petition for a Writ of Habeas Corpus, ¶ 7. In fact, Petitioner's predominating argument centered on the state court judge's mis-characterization of the undisclosed *Brady* material as impeachment evidence rather than **exculpatory** evidence. *See* Memorandum of Law In Support of Petitioner's Habeas Petition at pp. 5-13. As Petitioner underscored, exculpatory evidence is evidence that negates guilt. *Id.* at 7. Petitioner argued directly "evidence that police produced fabricated complaints against Jesse Friedman through an aggressive pattern of brow-beating complainants – through repeated questioning, rewards, and even humiliation – would not merely impeach the children's testimony. Rather this evidence directly negates Jesse Friedman's guilt." *Id* at 19. Again at page 31 of the memo, Petitioner stated, "If the statement of eyewitnesses – present when these orgiastic mass-sexual Olympics were said to have occurred – u**nequivocally negating Jesse Friedman's guilt** were handed over to the defense, the result in this case would certainly have been different."

there was no way I could win at trial. In my view, if I lost trial I would go to prison for life **for something I did not do**. . . ." Affidavit of Jesse Friedman ¶ 35.

Petitioner in no way abandoned his claims of innocence in his brief before this Court, although he admits that he did not raise a free-standing claim of actual innocence. In his statement of facts, Petitioner painstakingly identified all of the exculpatory information gathered thus far that demonstrates that he is innocent of the charges. He writes at page 99, "Jesse Friedman did not do – and physically could not have done – the things he was charged with doing."

In short, Friedman's habeas petition in conjunction with supporting documents and affidavits, revealing that suggestive techniques used by the police in interviewing the children likely elicited their false accusations, placed the District Court on notice that Friedman was alleging actual innocence. As such, even without a specific request to do so, the Court should have considered Friedman's actual innocence claim prior to dismissing his petition on statute of limitations grounds. *See Doe v. Menefee*, 391 F.3d 147, 161 (2d Cir. 2004)(instructing district courts faced with untimely petitions in which the petitioner asserts his or her actual innocence to determine, in each case, whether

the petitioner has presented a credible claim of actual innocence. . . ."[4] *Id.* citing *Whitley v. Senkowski*, 317 F.3d 223, 225 (2d Cir. 2003).

Assuming *arguendo* this Court finds that Petitioner's claim of actual innocence was not raised in the District Court or on appeal, it is well-established that this Court has the discretion to overlook such a failure and address the claim. *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 54 (2d Cir. 2004) (holding failure to raise a claim before the district court does not defeat the claim on appeal; "[t]his Court retains 'broad discretion to consider issues not timely raised below'"); *Green v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) (Declaring that "[e]ntertaining issues for the first time on appeal is discretionary with the panel hearing the appeal); *Booking v. General Star Management Co.,* 254 F.3d 414, 419 fn. 5 (2d Cir. 2001) (stating that courts are more likely to exercise their discretion to consider an issue raised for the first time on appeal "when failure to do so would cause 'manifest injustice'"). This Court made clear in *Ashcroft* that although the general rule is that an appellate court will not consider an issue not passed upon

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[4] The language used by the Second Circuit with respect to when the district courts should consider the actual innocence exception is telling. The Second Circuit directs district courts to determine whether actual innocence has been demonstrated before dismissing a petition as untimely in each case where the petitioner "**asserts** his or her actual innocence" in the petition. *Menefee*, 391 F.3d at 161 (emphasis added). The Court's choice of words indicates that a petitioner need not expressly state a claim for actual innocence, rather the issue is considered to have been raised in the district court whenever actual innocence is "asserted" in the habeas petition. As such, Petitioner's claim of actual innocence may properly be considered by this Court on appeal, as it was raised in the court below.

below, "[t]his 'waiver' rule is one of prudence . . . and [is] not jurisdictional." 374 F.3d at 54.

Historically, this Court has reviewed issues raised for the first time on appeal where failure to do so "involves a possible miscarriage of justice." *Adato v. Kagan,* 599 F.2d 1111 (2d Cir. 1979). The Supreme Court has consistently linked the "fundamental miscarriage of justice" with cases involving "a constitutional violation [that] has probably resulted in the conviction of one who is actually innocent." *See Schlup v. Delo*, 513 U.S. 298 (1995); *Bousley v. United States*, 523 U.S. 614 (1998). Here, Petitioner claims that the prosecution's *Brady* violation denied him Due Process and resulted in his being convicted of crimes which he did not commit. In such a case, as the Supreme Court has expounded, there is an "overriding 'interest in obtaining [Petitioner's] release from custody'." *Schlup*, 513 U.S. 298, 321, *quoting Carrier*, 477 U.S. at 496.

In conclusion, Petitioner alerted the District Court that he was alleging actual innocence by repeatedly arguing that he pled guilty to crimes he did not commit because the prosecution suppressed exculpatory evidence. Accordingly, Petitioner properly *raised* a claim of actual innocence irrespective of his failure to set forth a discrete, free-standing actual innocence claim. However, even if Petitioner failed to allege actual innocence below or on appeal here, this Court has the authority to consider whether Petitioner meets the actual innocence "gateway"

standard and should exercise its authority in the interests of justice. This is simply one of those extraordinary and rare instances where the legitimate values of finality must yield to the interests of justice. Minimally, the cause must be remanded for an evidentiary hearing on the questions of whether Petitioner can establish his actual innocence.

B. Friedman Has Satisfied The Applicable Actual Innocence "Gateway" Standard.

Although Friedman was denied discovery in the state post-conviction proceedings and the proceedings in the District Court below, Friedman nonetheless managed to cull new, compelling evidence of his actual innocence. Because it is more likely that not that no reasonable juror would have convicted Friedman with the benefit of the extensive exculpatory material supporting Friedman's habeas petition, this Court should relieve Friedman of his procedural default and consider the merits of his *Brady* claim. In the alternative, this Court should remand the cause to provide Petitioner with the opportunity to demonstrate actual innocence in an evidentiary hearing.

1. Applicable Law

Under AEDPA, a petitioner's habeas corpus petition must be filed within one year of the date on which the judgment against the petitioner became final. 28 U.S.C. § 2254(d)(1)(A). Although AEDPA does not provide that its limitations

period may be tolled for any reason other than the pendency of a state post-conviction petition, the United States Supreme Court has recognized that in "rare and exceptional circumstances," a petition may invoke the courts' power to equitably toll the limitations period. *Doe v. Menefee*, 391 F.3d 147, 159 (2d Cir. 2004). One such exception arises when a constitutional violation has probably resulted in the conviction of one who is actually innocent. *See Schlup v. Delo*, 513 U.S. 298, 321-322 (1995); *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

The Supreme Court in *Schlup* held that if a petitioner presents evidence of innocence so strong that the court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free from non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims. *Schlup*, 513 U.S. at 316. *House v. Bell*, 547 U.S. 518, 537 (2006). Put another way, when a petitioner has procedurally defaulted a constitutional claim, he may rely on a claim of actual innocence, as a "gateway," or mean of excusing his procedural default, that enables him to obtain review of his constitutional challenges to his conviction. *Id. See also Doe*, 391 F.3d at 161. Actual innocence may also be used as a "gateway" that enables review of a constitutional challenge when a claim is procedurally barred because it was untimely filed under AEDPA. *Doe*, 391 F.3d at 161 (holding that because the interests that must be balanced in creating an exception to the statute

of limitations are identical to those implicated in the procedural default context, the holding of *Schlup* should apply).

To prevail on a gateway actual innocence claim, a petitioner must support his claim with "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup*, 513 U.S. at 324. *Doe*, 391 F.3d at 161. Once a reviewing court determines that the new evidence is reliable, it must consider a petitioner's claim in light of the evidence as a whole, including evidence that might have been inadmissible at trial. *Id.* If the court then concludes that, in light of all the evidence, "it is more likely than not that no reasonable would have found petitioner guilty beyond a reasonable doubt," a petitioner may invoke the actual innocence gateway and obtain review of the merits of his claims. *Schlup*, 513 at 327. *Doe*, 391 F.3d at 162.

Although *Schlup* involved a petitioner who was convicted after a jury trial, the United States Supreme Court has held that even a petitioner who has pled guilty can avail himself of the actual innocence gateway exception to procedurally defaulted claims. *Bousley v. United States*, 523 U.S. 614 (1998). In *Bousley*, the petitioner pled guilty to "using" a firearm in violation of federal law. *Id* at 616. He later filed a habeas petition, claiming that his guilty plea was not knowing and intelligent because he was misinformed by the District Court as to the nature of the

charged crime. *Id.* By failing to previously challenge the validity of his plea, petitioner procedurally defaulted his underlying constitutional claim. *Id.* at 621. However, the Supreme Court held that a petitioner's claim may still be reviewed if he can establish that the constitutional error in his plea colloquy "has probably resulted in the conviction of one who is actually innocent." *Id.* Finding *Schlup* applicable, the Court remanded the cause to provide petitioner with an opportunity to make an actual innocence showing which would entitle him to have his defaulted claim of an unintelligent plea considered on the merits. *Id.* at 624. Critically, the Court remanded the cause, instructing the district court to conduct a *Schlup* inquiry despite the fact that petitioner had failed to raise a claim of "actual innocence" in his original petition. *Id.* at 623.

2. Demonstration Of *Schlup* Standard Of Actual Innocence.

In the present case, petitioner attacks the validity of his guilty plea on the grounds that the State violated his Due Process guarantees under *Brady v. Maryland,* 373 U.S. 83 (1963). Assuming this Court concludes that petitioner's *Brady* claims were untimely filed, this Court should nonetheless remand the cause for a hearing on those constitutional claims because Petitioner has shown that he is probably actually innocent thereby undermining confidence in his guilty plea. If this Court concludes that the record is not developed enough to determine whether Petitioner satisfies the actual innocence "gateway" standard, this Court should

follow the holding of *Bousley* and remand the cause to the District Court to allow Petitioner to demonstrate his actual innocence.

First, Petitioner's petition sets forth new reliable, exculpatory evidence that was never presented to a jury and never disclosed to the defense prior to Petitioner's guilty plea. Petitioner demonstrated that children complainants had not complained about any alleged abuse until after being subjected to aggressive interrogation tactics that police know or should have known would produce false accusations. *See* Transcript of Interview with "Gregory Doe" (A-692); Affidavit of David Kuhn ¶ 9; Affidavit of Richard Tilker ¶ 5; Affidavit of Ron Georgalis ¶ 5; Squeglia (A445-446). As set out extensively in Petitioner's habeas petition as well as the statement of facts in Petitioner's brief, new evidence obtained by Petitioner reveals that the police engaged in persistent, coercive, and suggestive questioning of children, despite adamant denials from those children that no abuse occurred. *See* Petitioner's Habeas Petition pp. 26-42; Petitioner-Appellant's Opening Brief pp. 34-52. In at least one case, investigating detectives interviewed a child complainant fifteen times before eliciting the desired response. Affidavit of David Kuhn ¶¶ 9-12. On at least one other occasion, a child-complainant did not recall

any abuse until undergoing widely discredited therapeutic hypnosis. *See Transcripts of Gregory Doe* (A-692)[5].

Additionally, new reliable evidence has revealed that numerous child eyewitnesses maintained that they had not been abused and that no one else had been abused, even in the face of high-pressure police interrogations. *See* Affidavit of Ron Georgalis ¶ 5; Affidavit of James Forrest ¶ 4; Affidavit of Hal Bienstock ¶ The discovery of evidence that eyewitnesses to the alleged panoply of pedophiliac sex categorically denied any abuse is powerful evidence negating Friedman's guilty plea and bolstering Friedman's claim that those children who did complain of abuse were likely brainwashed to do so by intense police pressure. *See* Memorandum in Support of Petitioner's Habeas Petition at pp.4-5.

Second, if a jury had learned of the aforementioned new reliable evidence, it is more likely than not that no reasonable juror would have convicted Petitioner. In the context of a guilty plea, the reviewing court has the added challenge of determining what the State's evidence *would* have been in addition to whether no reasonable juror would have convicted in light of the totality of the evidence[6].

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[5] For a more thorough examination of the scope and impact of this exculpatory evidence, this Court should refer to Petitioner's opening brief at pp. 29-52 and Petitioner's Petition for a Writ of Habeas Corpus, pp. 26-41.

[6] The challenge is exacerbated here where the minutes from Friedman's guilty plea are simply unavailable. Because Friedman did not directly appeal his guilty plea, transcripts from that plea were never prepared. Friedman, and his attorneys, made exhaustive efforts to obtain

That being said, it would appear in this case that Friedman's indictment was based solely on the testimony of the complainants – all of whom presumably underwent the same debilitating and high pressure interrogations described in supporting affidavits. Critically, not a single complainant spontaneously complained of any abuse. No parent had ever reported any physical or psychological signs that would be associated with sexual abuse. And even the district attorney in charge of the case allowed that there was a dearth of physical evidence corroborating that a crime even occurred. *See Capturing the Friedmans* (A-316). Because the only evidence against Friedman was statements of complainants that would have been exposed as falsehoods had Petitioner proceeded to trial and been permitted to present evidence revealing the rampant police abuse that led to those statements, it is more likely than not that no juror would have convicted Friedman.

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those transcripts subsequent to his release from prison but have been repeatedly told that the transcripts are unavailable because the stenographer is no longer employed by Nassau County and did not leave behind notes from Friedman's guilty plea proceedings.

CONCLUSION

Accordingly this Court should find that equitable tolling justifies the untimely filing of Petitioner's petition and remand the cause to the District Court for an evidentiary hearing on Petitioner's *Brady* claims. Alternatively, if this Court finds that the record is not developed enough to show that petitioner has met the *Schlup* gateway standard of actual innocence, this Court should remand the cause, as the Court in *Bousley* did, so that petitioner may have an opportunity to make that showing in an evidentiary hearing.

Dated: New York, New York
July 20, 2009

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of the State of New York,

Respondent-Appellee.

AFFIRMATION OF SERVICE

JENNIFER BONJEAN, an attorney duly admitted to practice before the courts of the State of New York, and a member of the bar of this Court, hereby affirms under the pains and penalties of perjury that on July 20, 2009, she caused to be served two true copies of the Supplemental Brief of Petitioner-Appellant Jesse Friedman upon ADA Judith R. Sternberg, Office of the District Attorney, Nassau County, 262 Old Country Road, Mineola, NY 11501 and one copy of the Supplemental Brief upon Petitioner-Appellant

Jesse Friedman by pre-paid, first class United States mail. A PDF version of the Supplemental Brief of Petitioner-Appellant Jesse Friedman was sent by email to ADA Judith R. Sternberg at judith.sternberg@nassauda.org and by facsimile on July 20, 2009.

Dated: New York, New York
July 20, 2009

JENNIFER BONJEAN