SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of JESSE FRIEDMAN,

Petitioner,

vs.

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

Respondent.

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

Index No. _____

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Jesse Friedman, by and through his counsel, hereby petitions this Court, based upon Article 78 of the New York Civil Procedure Law and Rules, Sections 50-b(2)(b)-(c) of the New York Civil Rights Law, and Section 190.25(4) of the New York Criminal Procedure Laws, to order: 1) the release of all documents withheld under Section 50-b from disclosure by the Nassau County District Attorney's Office in its re-investigation of the conviction of Jesse Friedman, 2) the entire case file of its prior investigation of Jesse Friedman, and 3) the minutes and records of the Friedman grand jury.

PRELIMINARY STATEMENT

Nassau County police arrested Jesse Friedman ("Friedman" or "Petitioner"), 18, and his father ("Arnold Friedman") on November 25, 1988 on a felony complaint alleging child sexual abuse. Nassau County charged him with two hundred and forty-three counts of sexual abuse in three separate indictments in the ensuing year. *Friedman v. Rehal*, 618 F.3d 142, 146 (2d Cir. 2010). The indictments included allegations from fourteen complainants, ranging in age from eight to twelve. *Id.* Despite the overwhelming number of counts and alleged victims, there was no physical evidence, no complaint of abuse prior to police interviews, and no report that any parent had ever raised suspicion. *Id.* The volume of charges and surrounding circumstances left Friedman with no choice but to plead guilty. More than two decades later, in what was to the best of Petitioner's knowledge a unique admonishment, the United States Second Circuit Court of Appeals went out of its way to detail innumerable shortcomings in the investigative, prosecutorial, and judicial conduct surrounding the case. *Id.* at 146-161. It then discussed the ethical obligations of a public prosecutor, inviting the District Attorney's Office of Nassau County to live up to its obligations, recommending a complete review of the Friedman case.

In reviewing a *Brady* motion that the Second Circuit deemed untimely, the Court declined to end its analysis there. *Id.* at 154-155. Rather, it examined the record and concluded that there was a "reasonable likelihood that Jesse Friedman was wrongfully convicted." *Id.* at 160. Though powerless by law, it concluded that:

> an appellate court faced with a record that raises serious issues as to the guilt of the defendant and the means by which his conviction was procured, yet unable to grant relief, is not obligated to become a silent accomplice to what may be an injustice.

Id. at 161.

The decades following Friedman's guilty plea have eroded, if not eviscerated, the supposed piles of evidence against him. First, testimony was gleaned from "memory recovery" techniques now known to create false memories. *Friedman*, 618 F.3d at 160, *see also* Royal College of Psychiatrists, *Reported Recovered Memories of Child Sexual Abuse,* 21 THE COLLEGE OF PSYCHIATRIC BULLETIN, 663-665 (1997) (attached as Exhibit 1 to the Affirmation of Ronald Kuby ("Kuby Aff."). At least one of the complainants refused to assert any abuse until he was subjected to hypnosis, acknowledging "I just remember that I went through hypnosis, came out, and it was in my mind." *See* interview statements of Gregory Doe III, *Capturing the Friedmans* (transcript, page 97) (Kuby Aff. Ex. 2). That child was the source for thirty-five separate sodomy counts against Petitioner.

Second, misconduct by the investigating officers created false evidence. That misconduct included assuming the guilt of Petitioner during the interviews, which Detective Sgueglia freely admitted:

> Well, if you talk to a lot of children, you don't give them an option, really. You just – be pretty honest with them. You – you have to tell them pretty honestly that

> we know you went to Mr. Friedman's class, we know how many times you've been to the class. You know – we go through the whole routine. We know there was a good chance that he touched you or Jesse touched you or somebody in that family touched you in a very inappropriate way.

Interview statements of Detective Sgueglia, *Capturing the Friedmans*, (transcript page 93), *see also* March 5, 2013 reel at 2:42-3:10 and 4:01-4:19 (Kuby Aff. Ex. 3). Parents such as Richard Tilker described the police as having "already formed their opinion of what happened in the computer classes and that they were just trying to get [his son] to agree with their story." R. Affidavit of Richard Tilker at para. 5 (Kuby Aff. Ex. 4). The detectives admonished children that Arnold Friedman had already confessed to sodomizing numerous children in the class, asking them why he would lie. *See* Transcript of Taped Interview of Gary Meyers at 1 (Kuby Aff. Ex. 5).

But that presumption was not enough in interviewing the children who often refused to confirm the officers' stories. The police interviewed the children for hours, and visited them repeatedly (in one case fifteen separate times), telling them they would continue to do so "for as long as it takes." Affidavit of David Kuhn, Esq. at para. 10 (Kuby Aff. Ex. 6). One complainant, "Dennis Doe", described it thusly:

> What I do remember is the detectives putting me under a lot of pressure to speak up, and at some point, I kind of broke down. I started crying. And when I started to tell them things, I was telling myself it was not true. I was telling myself, 'Just say this to them to get them off your back.'

Interview Statements of Dennis Doe, *Capturing the Friedmans* (transcript pages 94-95). That student was responsible for 67 counts of sodomy against Friedman. Another student, Ron Georgalis, recalled telling the police repeatedly that nothing inappropriate had happened to him. During a second interview, the detectives asked to speak to his parents privately. He

eavesdropped, and heard the detectives tell his parents that Arnold Friedman had been interviewed in prison, and described him as "his favorite." Affidavit of Ronald Georgalis at para. 5 (Kuby Aff. Ex. 7).

One mother described the interview of her son thusly:

> I let them ask Chrissy all these questions. And they kept at it and at it and at it. And they kept rephrasing the questions and asking the same questions over and over again, in different ways. ... After I heard this questioning, I always say to, I said to my friends, I said to my husband, I said to everybody 'I wanted to confess'. I mean I, they hammered this kid into, and I just seemed like a, a less strong child would say something that maybe didn't happen.

See *Filmed Interview with Joan Blaha*, 5/23/12, March 5, 2013 Reel at 03:18-04:00 and 04:20-04:41.

Finally, police used reinforcement and punishment to obtain desired answers. They pressured students with psychological threats. Detective Hatch of the Nassau County Police told one student that his failure to admit being the victim of a pedophile could lead to distress later, including becoming a pedophile himself. Gary Meyers Interview at 2. Detectives also told Meyers repeatedly that many other students had stated that they had seen him be abused. *Id.* Students who cooperated by confirming the detectives' statements were rewarded with pizza parties and police badges. Richard Tilker Aff. para.'s 8, 11.

The third aspect of the record reviewed demonstrated that Friedman's plea was plainly coerced. Justice Boklan, who presided over the case, has on numerous occasions stated "[t]here was never a doubt in my mind as to [Jesse Friedman's] guilt." Hon. Abigail Boklan, *Capturing the Friedmans* (transcript page 32). Justice Boklan told Peter Panaro, Jesse's attorney, that "if Jesse were to go to trial she intended to sentence him to consecutive terms of imprisonment for

each count that he was convicted on." Affidavit of Peter Panaro at para. 11 (Kuby Aff. Ex. 8). Every court to consider such threats has found them to be impermissibly coercive. *See People v. Richards*, 17 A.D. 3d 136 (1st Dep't 2005); *People v. Santiago*, 71 A.D. 3d 703, 704 (2d Dep't 2010).

During the pendency of Friedman's case, she also read portions of the Grand Jury testimony into the record during the sentencing of a defendant in a related case, Ross Goldstein, and violated the plea agreement by imposing a two to six year sentence, later vacated on appeal. Justice Boklan also made the Friedman case the first in the history of Nassau County in which television cameras were allowed in the courtroom. *See Capturing the Friedmans* (transcript page 22). The case, and its extraordinarily inflammatory accusations, was well known to the public long before the jury pool could be selected.

Beyond Justice Boklan's conduct, the Nassau County police detectives threatened Friedman with continuing arrests not only of Petitioner, but of his brothers Seth and David Friedman. Friedman's mother worked to persuade Jesse to plead guilty, which she believed was his only hope of avoiding life in prison. Indeed, she even wrote a letter to Friedman's attorney, offering ways he could convince Friedman to do so. Despite his oft-stated desire to stand by his innocence, Friedman was convinced by the sole sources of guidance in his life that he would be a perfect candidate for early release, and that the plea was the only way to avoid life in prison.

The sum of evidence weighing against Friedman's guilt and the voluntariness of his plea, the disintegration of the little evidence against him, and what District Attorney Onorato called a "dearth of physical evidence" against Friedman compelled the Second Circuit to state that a "further inquiry by a responsible prosecutor's office is justified despite a guilty plea entered

under circumstances which clearly suggest that it was not voluntary." *Friedman v. Rehal*, 618 F.3d at 161.

New York Rule of Professional Conduct 3.8 was the basis for that direction. It forbids a prosecutor from maintaining a criminal charge that is not supported by probable cause, and obligates one to "make timely disclosure" to a defendant of the "existence of evidence or information known to the prosecutor "that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence..." Rules of Professional Conduct, 22 NYCRR 1200.00, rule 3.8. Comment 6B to Rule 3.8 explains that a prosecutor's obligations are not merely to avoid wrongful convictions, but to take remedial action when it "appears likely that an innocent person was wrongly convicted." *Id.* at comment 6B.

The New York Rule is identical to the American Bar Association's Model Rule 3.8, which has in turn given birth to "conviction integrity programs," most notably in Dallas, Texas and New York, New York. *See*, Barry Scheck, Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them, 31 Cardozo L. Rev. 6, 2215, 2248 (2010) (Kuby Aff. Ex. 9). Chief Judge Lippman of the New York Court of Appeals also reiterated his belief that New York "must tackle the scourge of wrongful convictions," in his 2012 State of the Judiciary Address, and such programs are a positive step in that direction.

Though no such program existed in Nassau County, the District Attorney's Office announced the convening of a panel consisting of well-qualified individuals to "re-examine" Friedman's conviction (the "Panel"). Ann Givens and Alfonso Castillo, "Rice: Committee to probe Jesse Friedman Prosecution", Newsday, Aug. 17, 2010 (Kuby Aff. Ex. 10). In the absence

of clear rules for such a review (such as here), there are best practices that have emerged from these programs. First, if a "plausible claim of innocence" is presented, the prosecution's "entire file, including work product, is made available." *See* Scheck, 31 Cardozo L. Rev. at 2250. Second, the unit that makes up the conviction integrity program is "willing to investigate leads proposed by the party claiming innocence…" *Id.* Third, the unit "is willing to allow" lawyers for those who have presented plausible innocence claims "to investigate leads they are uniquely situated to pursue." *Id.* Fourth, there is a "close working relationship with the Public Defender's office that permits a free exchange of ideas and joint investigations." *Id.* Fifth, the unit is led by well-respected attorney who has experience in criminal defense. *Id.* at 2250-51. The investigation is not performed necessarily as an adversarial proceeding; rather the unit should take the neutral stance an administrative agency would. *Id.* at n. 102. This is logical because the inquiry does not involve punishment—here the sentence has been served.

The conduct of the review thus far has failed to live up to these practices in any meaningful way. Petitioner has had no insight into the process, no meaningful opportunity to participate, no access to any of the documents the Panel is currently reviewing, nor any documents created by the investigation more than 20 years ago. Moreover, the District Attorney's office has conducted its review outside the view of the Panel, only presenting select evidence to it. That conduct has forced Petitioner to file a series of requests, and ultimately this Petition, to gain any insight into the review of his conviction.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. JESSE FRIEDMAN TODAY

Jesse Friedman entered the New York State prison system at age 19, serving his time in severe institutions like Dannemora and Cocksackie. He was denied parole at every hearing because of his refusal to "accept" and restate his guilt, and served thirteen years of his six-to-eighteen-year sentence. After his release, Jesse was unable to obtain employment because of the nature of his conviction. He returned to college and worked toward his undergraduate degree until his finances were exhausted. He eventually found temporary work, while adhering to onerous parole restrictions, including curfew and mandatory sex-offender therapy three times a week. Jesse was repeatedly forced to move from rental apartments when landlords learned of his sex-offender status. Four times, religious congregations that he had joined asked him to leave once they learned of his history.

Following his release from prison, Jesse was diagnosed with Post-Traumatic Stress Disorder ("PTSD"). He sought help through the Veterans Administration and, after completing twelve months of sessions, his PTSD score decreased from a "critical" 72 to an almost asymptomatic 24.

Despite having spent his entire young adulthood behind bars and the stigma of being universally known as Long Island's most notorious rapist of young boys Jesse Friedman has, over the past decade, managed to create for himself a modest but respectable life. On January 2, 2007 he married Elisabeth Walsh, an articulate and self-assured young woman working toward a degree in cognitive psychology. Over the past seven years, Jesse (later with Elisabeth's help) has created a fully operational web-based bookstore. Having started from nothing, the company

has grown and now provides Jesse and Elisabeth with a modest living. To deal with the problem of repeated eviction, the couple pooled their resources with Jesse's brother David and purchased a small house in Connecticut. The couple has a close circle of good friends who are aware of Jesse's past. His ability to have lived an exemplary post-incarceration life, and to maintain friendships and business relationships undermines the notion of a young man so demented and damaged that he sadistically raped dozens of children. It is a testament to the ability of the human spirit to endure public revilement and severe punishment and yet emerge intact.

Jesse continues to face a difficult future as a "Level-3 Violent Sexual Predator" under the Sex Offender Registration Act ("SORA"). While Jesse and Elisabeth hope to one day have a child, this possibility is overshadowed by his conviction and SORA restrictions. Jesse and Elisabeth would live in constant fear of child welfare social services rending the family apart due to Jesse's conviction. His prohibition from being within 1,000 feet of a school would make it impossible to perform the simplest parenting tasks such as attending parent-teacher meetings, or bringing his child to school. His children would harbor a fear that people would find out they have a parent who is a registered sex offender. Even inviting a friend to visit would never be an option for Jesse and Elisabeth's child.

For the nearly twenty-five years Jesse has spent either in prison or living under the suspicious eyes of parole authorities, he has been denied much of what we take for granted. Many of life's normal joys, such as simply having a family, will be denied to him forever if this conviction -- built on a tapestry of lies and admitted misconduct and on a foundation of mass hysteria and now-debunked pseudo-science -- is permitted to stand.

II. PROCEDURAL HISTORY OF DOCUMENT REQUESTS

After numerous informal overtures were rebuffed, Petitioner first requested of the Nassau County District Attorney's Records Access Officer two categories of documents on September 19, 2012. *See* September 19, 2012 Letter from Ronald Kuby to Madeline Singas (Kuby Aff. Ex. 11). Under the New York Freedom of Information Law, Article 6 of the Public Officers Law, Friedman requested the documents provided by Nassau County District Attorney to the entity known as the "Friedman Case Review Panel," as well as all records that embody or reference to any determination that the members of the Friedman Case Review Panel are or are not "members of the general public" for purposes of the New York Freedom of Information Law and Civil Rights Law §50-b. *Id.* The letter noted that if the Panel stands on the same footing as the general public, the materials shared with it are *a fortiori* available to Petitioner, as a member of the general public. In the event of a denial of the request, the letter also specifically requested the reasons for denial in writing.

The request was summarily denied. By letter dated October 12, 2012, Chief Assistant District Attorney informed Petitioner through his counsel that the Panel had reviewed the "majority" of the case file, or at least that it had been available to them, but that they have not reviewed grand jury minutes. *See* October 12, 2012 Letter from Madeline Singas to Ronald Kuby (Kuby Aff. Ex. 12). Attorney Singas stated that the Panel did not act as members of the general public, though she did not identify any special status granted them, other than to equate them with consultants or other retained experts. Regarding the documents sought, Attorney Singas cited Civil Rights Law §50-b, which under certain circumstances restricts the production of documents that tend to identify a victim of a sex crime. *Id.* Attorney Singas also cited Public

Officers Law § 87(2)(a), which permits an agency to withhold from publication records that are specifically exempted from disclosure by state or federal statute; §87(2)(e)(iii), which permit withholding of documents which identify a confidential source or disclose confidential information relating to a criminal investigation, and § 87(2)(e)(i), which permit the withholding of documents which if disclosed would interfere with a law enforcement investigation or judicial proceedings. *Id.*

Thus Petitioner appealed that determination to the FOIL Appeals Officer in Nassau County, by letter dated November 7, 2012. The letter noted that blanket, unparticularized claims of exemption under § 50-b have been considered inadequate by every court to which they have been presented. November 7, 2012 Letter from Ronald Kuby to Robert A. Schwartz (Kuby Aff. Ex. 13). Nonetheless, Petitioner was denied again. By letter dated December 3, 2012, Mr. Schwartz replied that the claim of exemption was not "general" or "unparticularized", but rather cited four specific categories: "redacted witness statements, summaries of witness interviews, [the District Attorney's Office's] analysis of these interviews and other evidence, and inter-and intra-agency communications." December 3, 2012 Letter from Robert Schwartz to Ronald Kuby (Kuby Aff. Ex. 14). The broad categories of course belied the argument made. The District Attorney's office, by its letter, continued to rely upon blanket exemptions, contrary to New York Law, in order to avoid *any* insight into its investigative process.

ARGUMENT

I. THE COURT MUST ORDER DISCLOSURE OF THE DISTRICT ATTORNEY'S CASE FILE UNDER NEW YORK'S FREEDOM OF INFORMATION LAW

Under New York law, "[a]ll government records are…presumptively open for public inspection unless they fall within one of the enumerated exemptions." *Gould v. New York City Police Dep't.*, 89 N.Y.2d 267, 274-75 (1996). Exemptions should be "narrowly construed, with the burden resting on the agency to demonstrate that the requesting material 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). In this matter, the District Attorney's denial of disclosure wrongfully applied those exemptions, and failed to demonstrate that the requested material qualified for exemption.

A. The District Attorney's Denial Under Section 50-b Is Overbroad

Section 50-b of the New York Civil Rights Law provides such an exemption, permitting the withholding of "any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision 2 of this section." Neither § 50-b nor any other relevant New York law permits however public officers or employees to deny access to the entirety of a case file by blanket assertion of a 50-b prohibition. Indeed, the Court of Appeals made clear in *Fappiano v. New York City Police Dep't*, 95 N.Y.2d 738 (2001) that the principles cited in *Gould* and *Hanig* (cited above) remain true for the 50-b exemption. It rejected a general assertion that requested documents would tend to identify a victim of a sex crime and noted that "the police departments here made no attempt to show that each requested document contained identifying information. *Fappiano*, 95 N.Y.2d at 748. The agency denying access

must "bear the burden of making a particularized showing as to why [each document] should not be disclosed." *Id.*

The denials, both by Mr. Schwartz and Ms. Singas, fall plainly short of this standard. The District Attorney's office in this case must read the term "document" narrowly. *See Gould*, 89 N.Y.2d 275. What it may not do is claim exemption for "every document in a law enforcement agency's criminal case file…simply because [it is] kept there." *Lesher v. Hynes*, 19 N.Y.3d 57 (2012). Yet that is precisely what the Nassau County District Attorney's Office has done. Neither Mr. Schwartz's nor Ms. Singas's letters do anything beyond list types of documents in general terms, the types any case file might contain. Moreover, neither even attempt to argue, even in general terms, that every document of every type would "tend to identify" the victim of a sex crime, as they must under New York law.

Ms. Singas's denial is riddled with qualifications on the documents' qualifications under 50-b. For example, the blanket statement "many or most of the documents that were provided to the panel consist of witness statements or summaries of witness statements and they either identify or tend to identify the victims in this case" by its own terms disqualifies the blanket exemption the letter claims. Even giving total deference to the District Attorney's belief that the documents would identify a victim, by the denial's own text such documents do not make up the entirety of the file that has been withheld.

B. The District Attorney's Reliance on Public Officers Law § 87 Is Unavailing

The District Attorney's Office, in its denial to Petitioner, also relied on Public Officers Law §§ 87(2)(a), which permits an agency to withhold from publication records that are specifically exempted from disclosure by state or federal statute; (2)(e)(iii), which permits the

withholding of documents which identify a confidential source or disclose confidential information relating to a criminal investigation, and (2)(e)(i), which permits the withholding of documents which if disclosed would interfere with a law enforcement investigation or judicial proceedings. *Id.*

The reliance on § 87(2)(a) is dependent on § 50-b, which fails for the reasons stated above. The reliance on § 87(2)(e)(iii) is similarly unavailing. The October 12 denial cited *Esposito v. Rice*, 67 A.D.3d 797 (2d Dep't 2009) and *Johnson v. Hynes*, 264 A.D.2d 777 (2d Dep't 1999), which exempted under (2)(e)(iii) statements by those witnesses who did not testify at trial. Of course, in this case, there was no trial. Beyond that, "conclusory statements are insufficient to deny access…" and there's no argument here that the witnesses are "confidential informants or that they requested or were promised anonymity." *Carnevale v. City of Albany*, 68 A.D.3d 1290 (3d Dep't 2009), *see also Cornell University v. City of New York Police Dep't*, 153 A.D.2d 515, 517 (1st Dep't 1989) ("NYPD has not alleged that anyone was promised anonymity in exchange for his cooperation in the investigation so as to qualify as a 'confidential source' within the meaning of the statute."). The District Attorney's Office has pointed to none of the traditional concerns related to this section, such as fear for the safety of witnesses, the ongoing use of confidential informants, undercover police officers, or fear of retaliation. *See, e.g. Grajales v. Lungen*, 15 A.D. 3d 789 (3d Dep't 2005) (denying access by state prison inmate to records of depictions of confidential and undercover police sources).

To withhold documents under § 87(2)(e)(i), an agency must "identify generic kinds of documents for which the exemption is claimed, and the generic risk posed by the disclosure of these categories of documents." *Lesher v. Hynes*, 19 N.Y.3d 57 (2012). Neither the October 12

nor the December 3 letters do anything of the sort. Neither letter offered any sort of risk, generic or otherwise, other than the fear of "disclosure of information that might compromise its integrity." December 3 Letter from Schwartz to Kuby at 3. Beyond that failing however, the threshold matter that no "law enforcement investigation" for the purposes of a FOIL exemption is taking place. The Court of Appeals held explicitly that:

> Public Officers Law §87(2)e)(i) ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course. Thus the exemption does not bar disclosure of records compiled for law enforcement purposes in a criminal matter where the prosecution has been completed, absent some unusual circumstance such as the prospect that disclosure might compromise a related case.

Lesher, 19 N.Y.3d at 68. There is certainly no criminal proceeding pending against Petitioner or anyone else related to his case. *See Pittari v. Pirro*, 258 A.D.2d 202 (2d Dep't 1999), *leave denied* 94 N.Y.2d 755 (1999). Without any further appeal permitted, nor any available collateral review in any court, and with Petitioner having served his prison sentence, no judicial proceeding is even potentially pending. *Matter of Moreno v. New York County Dist. Attorney's Office*, 38 A.D. 3d 358 (1st Dep't 2007). Indeed, the sole "proceeding" is the review by the District Attorney, and its presentation of evidence to the Panel. But neither the District Attorney nor the panel has promulgated any sort of procedure or rules, neither operate under any sort of judicial review, the review does not exist pursuant to any law or statute beyond the obligations of the Professional Rules, and there is no potential further prosecution of Petitioner. The review operates within a proverbial black box. No one with an even passing familiarity with the principles of Due Process with confuse the current review with a judicial proceeding or criminal investigation.

Because the District Attorney's Office's denials do not fit within the narrow exemptions provided by law, section 84 *et seq* of the Public Officers Law controls, and disclosure must be ordered.

II. THIS COURT SHOULD ORDER DISCOVERY OF THE FRIEDMAN CASE FILES UNDER CIVIL RIGHTS LAW SECTION 50-B(2)(B)

Under § 50-b(2)(b), this Court has jurisdiction to order disclosure of the case files of the prosecution of Jesse Friedman after notice to the victim and the public officer or employee charged with the duty of prosecuting the offense, with good cause shown. New York Civil Rights Law § 50-b(2)(b). No good cause is required for those documents which tend to identify a victim who has consented to the release of the documents under 50-b(2)(c).

Courts have rejected "broader construction of Civil Rights Law § 50-b" that "flatly mandate[e] denial of public access to court documents in all sex offense" since such denial would "raise serious constitutional questions under the First Amendment." *People v. Burton*, 189 A.D.2d 532, 534-35 (3d Dep't 1993). In *Burton*, the Third Department reversed the lower court's denial for failure to "properly identif[y] and weigh[] all relevant factors." *Id.* at 536. Here many of the victims are already known to Friedman and those seeking reinvestigation of the case, indeed numerous so-called victims have since recanted their statements to the police, and flatly rejected the statements attributed to them in the three indictments of Friedman. *See* March 5, 2012 Reel at 16:15-20:18. Though the requesting party's knowledge of the identities of the victims does not negate the exemption (*Fappiano*, 95 N.Y.2d 738); it is a relevant factor. *Burton*, 189 A.D.2d at 532 (reversing denial of access where victim had died and her identity previously disclosed).

Other courts have rejected the applications of 50-b where it was "highly unlikely that the requested disclosure would have a chilling effect with respect to the future reporting of crimes" and where the "Town's argument that the disclosure would have a chilling effect upon the manner in which future criminal investigations are conducted (was) vague and conclusory." *Doe v. Riback*, 788 N.Y.S.2d 590, 595 (Sup. Ct. Jan. 25, 2005). The "good cause" standard is not a stringent one. In *Application of Radio City Music Hall Productions*, 126 Misc. 2d 197, 198 (Sup. Ct. N.Y. Cnty. Oct. 30, 1984) the court found good cause where the documents may be relevant to the defense of a civil suit.

The list of misconduct in the prosecution of Jesse Friedman is so long, and the pile of evidence against him so short, that the Second Circuit found a "reasonable likelihood" that Friedman had been wrongfully convicted. Though Friedman has run out of traditional remedies and served his time in prison, his punishment continues. He is denied many of the freedoms that accompany United States citizenship, and his constraints are actually tightening with the passage of time. *See* Michael Schwirtz, "In 2 Trailers, the Neighbors Nobody Wants", The New York Times, page A1, Feb. 5, 2013 (Kuby Aff. Ex. 15). Behind his personal interests are the universal interests of the judicial system, to punish the guilty, and spare the innocent. Here, the likelihood that the judicial system did what it abhors is great. The appropriate response to that, as well as the public's general interest in broad disclosure records, is not concealment, but disclosure.

Put simply, there are few interests served by continued denial of access to the case files of Petitioner. But even if such interests exist, the best "way to balance the competing interests of open disclosure of agency records and protection of the safety and privacy rights of witnesses" is not blanket denial of access, but rather "in-camera review of the documents in question…"

Matter of McKelvey v. Bailey, 2011 N.Y. Slip. Op. 30700 (N.Y. Sup. Ct. Jan. 24. 2011). The Court may also find that the sealing of records is not appropriate, but that the use of pseudonyms or redactions is. *Doe v. New York University*, 786 N.Y.S.2d 892 (Sup. Ct. N.Y. Cnty. Dec. 8, 2004). "Embarrassment, damage to reputation and the general desire for privacy do not constitute good cause to seal court records." *Id.* at 902.

III. THIS COURT SHOULD UNSEAL THE MINUTES OF THE FRIEDMAN GRAND JURY UNDER CPL 190.25

This Court is also empowered under New York Criminal Procedure Law 190.25(4)(a) to order the release of the minutes and records of the Friedman Grand jury, upon a showing of a "compelling and particularized" need. *People v. Fetcho*, 91 N.Y. 2d 765, 769 (1998). Upon such a finding, the trial court must then "balance the public interest for disclosure against the public interest favoring secrecy." *Id.* Such a showing must "overcome the presumption of confidentiality." *Matter of the District Attorney of Suffolk County*, 58 N.Y. 2d 436, 444 (1983)

Since the debut of the documentary *Capturing the Friedmans*, which brought Jesse Friedman back into the public eye for the first time since the 1980's, several of the children who were witnesses to the grand jury have recanted their prior statements to the investigating police officers. *See* March 5, 2013 Reel at 16:15-20:18. Even more relevant to the question of grand jury testimony, at least one grand jury witness expressed shock at the text of the grand jury indictment which described actions by Friedman towards that witness that the witness neither

recalled describing or experiencing.[1] This new evidence brings the conduct of the Friedman grand jury into question, and raises a particular need for the minutes of the grand jury.

Scott Banks, Judge Boklan's legal secretary during the pendency of the case and one of the few to review the minutes of the grand jury testimony, had this to say:

> The lack of time specificity in the indictments, because if I recall the indictments was "on or about" and there would be a range of times and I remember thinking geez, it bothered me, thinking geez this can't be right? I mean how are you supposed to, how do you even present an alibi for defense? I know that no medical evidence was presented in the grand jury. I think I later learned that there was no medical evidence at all in the case.

March 5, 2013 Reel at 13:11-14:08.

The potentially exonerating evidence of the grand jury minutes may help Friedman demonstrate actual innocence. "A compelling public interest exists in assisting those who have been defrauded, and in deterring others who might engage in fraudulent conduct in the future." *Aiani v. Donovan*, 98 A.D.3d 972, 974 (2d Dep't 2012). While *Aiani* considered a petitioner

---

[1] *See* March 5, 2013 Reel at 09:07-10:41: Keith Doe: "So I am a little bit surprised to hear that I was actually one of the main complainants. You're suggesting that I'm one of these fourteen people." Jarecki: "Yeah, you are." Keith Doe: "These are pages and pages of stuff." Jarecki: "Are you surprised that you are listed so many times with - - " Keith Doe: "Yeah. Sure. Absolutely." Jarecki: (reading from indictment) "Jesse Friedman…subjected Keith Doe, a person less than eleven years old, to sexual contact, to wit: the defendant did touch his penis to the victim's back." Keith Doe: I think what they asked me was 'did he ever come into close contact with me.' And I think I probably told them that he did. Because he needs to lean over you in order to type on the keyboard. So, you know, that's probably what I told them. And you know they may have asked me if he was ever aroused when he did that. And I probably responded, you know, 'well what does that mean?" Jarecki: "Do you remember ever seeing anybody else being abused?" Doe: "I don't think so." Jarecki: (reading from indictment) "The victim observed the defendant's penis being touched by several boys." Doe: (laughs) "I don't think so. It's a little disturbing that I'm actually one of the primary complainants, because they way it was framed was that you're not, you know, a main party to this. You know I went through the last, you know, however many years with the understanding that, that I was a peripheral, a peripheral element to all this."

who had been defrauded financially, Friedman's defrauding (which the Second Circuit found to be likely) was of his liberty, and is ongoing.

Upon the showing of a particularized need, the court then balances that against the traditional reasoning for secrecy. Those reasons are essentially that the "grand jury is only as strong and effective as the evidence which is made available to the grand jury by witnesses, and their co-operation should not be inhibited by erosion of the rule which traditionally asserts that their testimony will remain confidential." *People v. DiNapoli*, 27 N.Y.2d 229 (1970). Those interests are simply not served in this case where there is overwhelming evidence that the testimony from child witnesses was coerced at best, and forced upon unwilling child witnesses at worst. Indeed, reveal of the grand jury testimony and minutes in this case serves the public interest by cautioning prosecutors from directing witness testimony, and using trumped up and facially implausible indictments to coerce guilty pleas.

Nor are any other reasons for grand jury secrecy invoked here. There is no risk of flight of witnesses, no risk of perjury by witnesses, no risk of further unfair accusations against innocent persons, or any other fear traditionally associated with the release of grand jury minutes. *See e.g. Application of FOJP Service Corp.*, 463 N.Y.S.2d 681, 684-85 (Sup. Ct. N.Y. Cnty. April 21, 1983) (ordering disclosure where grand jury minutes were the only source of information needed to prosecute civil action).

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court order: 1) the release of all documents withheld under Section 50-b from disclosure by the Nassau County District Attorney's Office in its re-investigation of the conviction of Jesse Friedman, 2) the production of the entire case file of its prior investigation of Jesse Friedman, and 3) the release of the minutes of the Friedman grand jury.

Dated: April 3, 2013
New York, New York

By: _____
Ronald L. Kuby
Law Office of Ronald L. Kuby
119 West 23rd Street, Suite 900
New York, New York 10011
(212) 529-0223
Attorney for Petitioner Jesse Friedman

_____
John P. O'Brien
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500
Of Counsel