SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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In the Matter of JESSE FRIEDMAN,

Petitioner-Appellee,

vs.

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

Respondent-Appellant

Appellate Division Docket No. 2013-08373

Index No. 13-004015 Nassau County

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AFFIRMATION IN RESPONSE TO RESPONDENT-APPELLANT'S MOTION FOR A STAY, AND IN SUPPORT OF PETITIONER-APPELLEE'S CROSS MOTION TO VACATE THE AUTOMATIC STAY, AND FOR ALTERNATIVE RELIEF.

> We can't . . . function in the judicial system in this fashion. This is a country that at this point has no – and I emphasize that – has no feeling of credibility toward its institutions. . . .
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> --Hon. F. Dana Winslow, Tr., August 22, 2013, at 25 (Commenting on false statements made in the Rice Report).

RONALD L. KUBY, an attorney duly admitted to practice as such in the Courts of the State of New York, hereby affirms, under the pains and penalties of perjury, as follows:

1. This affirmation is submitted in response to Respondent-Appellant, Kathleen M. Rice's (hereinafter "Rice") Motion for a Stay Pending Appeal, and in support of Petitioner-Appellee Jesse Friedman's (hereinafter "Friedman") Motion to Vacate the Automatic Stay, or for the alternative relief of:

a. An expedited briefing schedule requiring that Rice file her brief no later than September 30, 2013, and an Order

b. That the time period from August 23, 2013, up to and including the date this appeal is decided, may not be used by Rice in any forum to support an assertion that Friedman has failed to use "due diligence after the discovery of such alleged new evidence," as those terms are construed under C.P.L. §440.10(1)(g).

2. This affirmation is based upon personal knowledge and upon information and belief, the sources of such information include the records of the Friedman litigation, and the submissions of the parties in the court below. The documents and materials on which the information and belief are based have been provided to Rice.

I. RICE'S APPLICATION FOR A STAY AND C.P.L.R. §5519(a)(1)

3. On August 23, 2013, Rice timely filed her Notice of Appeal in this matter.

4. On August 26, 2013, the Hon. Peter B. Skelos granted a stay of the judgment pending this Court's decision on Rice's Motion for a Stay Pending Appeal. Upon consent of the parties, Justice Skelos set September 13, 2013 as the date by which Friedman must file response to Rice's Motion for a Stay, and to file any Cross-Motion to Vacate the Stay. Rice's opposition to the cross-motion must be filed on or before September 20, 2013.

5. The District Attorney's status as a State officer has been confirmed by the recent case of Matter of Hoerger v Spota, --N.Y.3rd--, 2013 Slip. Op. 5708 (2013). Accordingly, she may avail herself of the automatic stay provision of C.P.L.R. §5519(a)(1). Friedman recognizes that by operation of law, a stay currently exists.

II. FRIEDMAN'S CROSS-MOTION TO VACATE THE STAY

A. INTRODUCTION, RELEVANT FACTS, AND PROCEDURAL HISTORY

6. A motion to vacate an automatic stay is addressed to this Court's sound sense of "discretion, prudence and justice." Bethlehem Baptist Church v. The Trey Whitfield School, 2003 N.Y. Misc., slip op. 50927 (Civ. Ct. Kings Cty. May 13, 2003. See also, Clark v. Cuomo, 105 A.D.2d 451 (3d Dept. 1984)(Weiss, J., dissent from opinion while agreeing with standard of review).

7. Friedman commenced an action under C.P.L.R. Article 78 to review a denial of his request under New York's Freedom of Information Law, for an Order directing that he be provided documents that reveal the names of alleged victims of a sex offense under the "good cause" provision of Civil Rights Law 50-b(2)(b), and for an Order releasing grand jury minutes pursuant to C.P.L. § 190.25. From April 3 to August 22, 2013, the court below engaged in a meticulous review of thousands of pages of documents. It entertained extensive argument during two court sessions. (Transcript, June 28, 2013; Exhibit A). In extensive discussions of the facts and the law, the court below correctly found that there was an overwhelming public interest in disclosing the documents to Friedman. Indeed, the court below excoriated Rice for public damage done by the false statements in her Report, commenting:

> We can't, we can't function in the judicial system in this fashion. This is a country that at this point has no – and I emphasize that – has no feeling of credibility toward its institutions. That starts with the lowest and goes to the highest. We don't trust our institutions.

(Tr., Aug, 22, 2013, at 25). The court below also noted that the former ADA in charge of the Friedman prosecution was not being truthful in his assertion that the DA did not possess any Brady material (Tr., August 22, 2013, at 25-27). Rice

asserted below that "the nature of the material, the Brady material, is irrelevant." (Tr., August 22, 2013, at 28). But the court below was certainly on sound footing when it found that the withholding of such material was not merely a private grievance of Friedman's but imperiled the integrity of the justice system.

8. The court below also correctly found that Friedman had a strong private interests in obtaining these materials that included challenging is conviction and his sex offender registration status. The court below carefully considered the objections of three of the seventeen alleged victims who objected to disclosure, and directed that their names be redacted from the materials provided to Friedman. The decision of the court below was manifestly correct.

9. Over three years ago, in an extraordinary ruling, the United States Court of Appeals for the Second Circuit issued a scathing denunciation of the practices and participants in the conviction of Jesse Friedman, strongly suggested that Friedman had been wrongfully convicted, and called upon Rice to assess "the means by which his conviction was procured." Friedman v. Rehal, 618 F.3d 142, 161 (2d Cir. 2010). Instead, Rice spent the next three years engaged in a re-justification of the original misconduct and a vindication of the officials who had

engaged in it. The report that emerged was a lengthy screed attacking the Second Circuit, and its arrogant and admonitory tone has continued in this litigation.[1]

10. Indeed, in its application for a stay of the order of the court below, Rice continues to declare that no one understands this case except Rice herself. In Rice's opinion, the Second Circuit's judgment was clouded by having viewed the film *Capturing the Friedmans,* and the court below was befuddled and "failed to perceive or contemplate the relevant issues in this civil matter, accompanied by a failure to apply relevant law." (Affirmation of Robert A. Schwartz in Support of Respondent-Appellant's Motion for a Stay Pending Appeal ("Schwartz Stay Aff., at ¶38). Both the Second Circuit and the court below recognize that substantial evidence exists that Friedman was wrongfully convicted. Yet, despite Rice's ethical obligation to remediate wrongful convictions, and despite its claim that it would conduct Friedman's re-investigation with transparency and cooperation,

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[1] See, e.g., Respondent's Memorandum of Law in Support of its Verified Answer, at 2 (Respondent incorrectly claims the Second Circuit "assumed the truth and accuracy of the facts presented in the movie…."); id. at 4 ("And while some who should know better have mistaken a movie for legal evidence, it is not.").

Rice dug her heels in ever further, requiring Friedman to seek, successfully, court intervention to obtain access to documents that should have been made available to him as part of the re-investigation process.

11. The basic flaws in the report Rice released at the conclusion of her reinvestigation, submitted as Exhibit 1 to Rice's Verified Answer to Friedman's Petition, ("Rice Report"), are clear. When young adult men, many of whom are successful professionals, came forward to explain the things the police reported they said when they were eight years old were false and products of coercive and persistent interrogation techniques, Rice chose to exclusively credit the versions given by the eight-year old frightened boys, even while acknowledging that the techniques used to obtain their statements were "at a minimum, unprofessional, unfair, and cruel." (Rice Report, at 72). Rice chose to ignore the statements of the many student eyewitnesses who sat alongside the alleged victims in the very same classes in which abuse was alleged to have occurred in plain view of the other class

members,[2] and who insisted no abuse ever took place. Ironically, Rice even dismissed the exculpatory account provided by one of her own Assistant District Attorneys, who coincidentally was himself a student in the Friedman computer classes. Rice arrogated to herself the exclusive right to make all credibility determinations, and consistently chose to accept without question the unsworn recollections of police and prosecutorial officials while deeming incredible the former students and parents who came forward and contradicted the police accounts. Rice appointed a special Advisory Panel to ensure a fair and thorough review, but then chose to withhold from them the evidence most essential in a case based upon child testimony, including the unredacted witness statements, police interview notes, records of when and how the statements were taken, in addition to the grand jury testimony that formed the basis for the indictments.

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[2] The nomenclature used herein refers to the 13 individuals whose testimony resulted in counts for which Friedman was convicted as "alleged victims." The word "complainants" is used to refer to those other individuals who claimed abuse to the police and investigators, but for unknown reasons were not presented to the grand jury. All of the persons referred to as "Doe" fit within the former category. The Rice Report, for unknown reasons, sows even more confusion by assigning a number to each person whose statements are in the Report, making it difficult to distinguish among those students who testified against Friedman, those who made complaints but did not testify, non-complainant witnesses, and those who did neither but appeared at some point in the re-investigation.

12. Although the validity of the Rice Report is not before this Court or the court below, Friedman submitted a short report to the court below (entitled "Supplement") documenting several of the crucial falsehoods most loudly trumpeted by the Rice Report, her Executive Summary, and her press release. Since that time, Friedman's defense team submitted additional materials that were relevant to the task of the court below. These documents are in the record below and are attached as Exhibits hereto. They include:

13. Exhibit B is the Affidavit of Kenneth V. Lanning, one of the leading authorities on child sex abuse rings and a former Special Agent at the Behavioral Sciences Unit of the FBI ("Lanning Aff."). His work was distorted by the Rice Report, making it falsely appear that he supported certain conclusions that he in fact does not. SA Lanning also discusses, at length, the indispensable need to see the original witness statements, and police reports as to how and under what circumstances they were generated.

14. Exhibit C is an updated DVD, containing interviews with witnesses, including many of the alleged victims in Friedman case. All of this information was provided to Rice, though it is mentioned, if at all, in distorted and unrecognizable form in the Rice Report. Although certain to be derided by Rice as

only a “movie,” videotaping witness statements is widely regarded as an important, and sometimes vital, investigatory tool.

15. Exhibit D is the only statement by an alleged victim from the original Friedman investigation in Petitioner’s possession, and one of the several statements attributed to alleged victim Fred Doe. (“Fred Doe Statement”).

16. Exhibit E is a letter from Arline Epstein, a mother who met extensively with Rice’s Review Team, and provided hundreds of pages of contemporaneous documents from the Friedman case to assist in their review. Ms. Epstein’s son is a Friedman computer student Michael Epstein, a witness cited repeatedly in the Rice Report. Ms. Epstein originally believed the allegations against Friedman, until last year, when her son informed her that he had never been abused by the Friedmans and had lied to her and to his therapist to end the pressure put on him to “disclose” abuse. Because Ms. Epstein had been one of the mothers deeply engaged in the Friedman case, and who had even assisted the police at the time, she had contemporaneously made detailed, legible notes of her experiences, meetings, and phone calls with police, prosecutors, therapists, community members, fellow parents, and her own son. These notes appear to be the only contemporaneously created notes by someone other than police or prosecutorial officials, and Ms.

Epstein certainly had every motivation to be accurate. The Rice Report attempts to discredit her and her observations, especially when the latter conflict with the post-hoc police narrative ("Epstein Letter").

17. Exhibit F is the recently released report by the National Center for Reason and Justice, an academic and advocacy organization that specializes in mass sex abuse cases, responding to the Rice Report.

18. Exhibit G is a letter from attorney Scott Banks, the former law clerk to the late Justice Boklan, who is the only living person outside of Rice's office, who has seen the grand jury minutes in the Friedman case ("Banks Letter.").

19. Exhibit H is the correspondence involving Kenneth Doe in connection with Friedman's service on him of the Article 78 Petition ("Kenneth Doe Correspondence.").

20. Since the filing of Friedman's first 440.10 motion in 2004, the consistent legal position taken by both Rice and her predecessor, Denis E. Dillon, is that Friedman should never be entitled to view any of the documents that

comprised the case against him and should never be entitled to any evidentiary hearing.[3] The Second Circuit specifically criticized this stance:

> Moreover, we too would have preferred if the facts and circumstances were developed at a hearing. Nevertheless, we could not order a hearing over the objection of the District Attorney, who declined to waive the defense of the statute of limitations and permit such a hearing to be held.

Rehal, 618 F.3d at 160.

21. Notwithstanding this critique, Rice continues in her determination to make sure that the only eyes that see these materials belong to people who are her employ. Such a review system, as held by the court below, engenders no "feeling of credibility toward its institutions." (Tr., August 22, 2013, at 25).

B. NO HARM CAN POSSIBLY ACCRUE TO ANY OF THE ALLEGED VICTIMS BY RELEASING THE DOCUMENTS. THE PROSECUTION REVEALED THE ALLEGED VICTIMS NAMES TO FRIEDMAN 25 YEARS AGO AND FRIEDMAN, AT RICE'S INSISTENCE, SERVED ALL OF THE VICTIMS WITH THE ARTICLE 78 PETITION

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[3] Rice correctly notes that had Friedman gone to trial, he would have been entitled to all of these materials. Presumably such access would not have caused the sky to fall or presented any other of the parade of horribles repeatedly cited by Rice a quarter century later to maintain secrecy.

22. Rice asserts that *every* document provided to the Case Review Panel is exempted from disclosure under Civil Rights Law §50-b, and *every* document created in the course of the original Friedman investigation and prosecution, none of which were provided to the Panel, are similarly exempt. But Rice's current assertion that release of the identities would be "disrupt the lives of many. . ., be humiliating to some [and] may have catastrophic effects on the lives of others," (Schwartz Stay Aff. ¶44) is absurd on its face.

23. It is undisputed that Friedman knows these identities—he obtained them first from Rice. A letter from District Attorney Joseph Onorato, dated November 30, 1988, provides 17 names of alleged victims (Rice Appendix, at 344), together with their "Doe" names in the indictment. When the court below requested that each of the complaining witnesses be served with notice of the proceedings and a copy of the petition, Rice, not wanting to incur the expense and inconvenience of completing service, insisted that Friedman do it. Friedman complied, and fully executed affidavits of service on all seventeen; fourteen of whom testified against Jesse Freidman and three of whom testified against Arnold. Thus, Rice has no legal basis to protect anything. Under the guise of protecting identities (long since

revealed), Rice now wishes to protect the dubious integrity of its original investigation and so-called reinvestigation—which are entitled to no protection.

24. By its own term, Civil Rights Law § 50-b protects the *identities* of sexual abuse victims. N.Y. Civil Rights Law §50-b(1) (McKinney's 2009). It does not provide independent protection to the contents of their statements or the methods the police used to obtain these statements, *except* to the extent that these materials tend to reveal identities. <u>People v. Burton</u>, 189 A.D.2d 532, 534, 597 N.Y.S.2d 488 (3rd Dep't. 1993) ("there is nothing in the statutory language of *Civil Rights Law § 50-b* or its legislative history suggesting any legislative intent to create statutory rights beyond the personal right of a sex offense victim to confidentiality of his or her identity.")

25. Further, it is undisputed that Friedman, as well as those working with him, have taken great pains to minimize the intrusion into the lives of the alleged victims, consistently refusing to make their names public, although nothing prevents them from doing so. One of the victims, Kenneth Doe, provided a full and detailed written recantation to the District Attorney (at Mr. Kuby's request), and then sought Mr. Kuby's assistance when the *District Attorney's misconduct* threatened to intrude into his work life. (Kenneth Doe Correspondence, attached

hereto as Exhibit H). Numerous other victims were interviewed at length by filmmaker, Andrew Jarecki, although they were under no obligation to speak to him.

26. It is also instructive to review, as did the court below, the responses of the seventeen alleged victims who were given notice of the application by Friedman. Only three responded at all. Fourteen of the seventeen persons on whose behalf Rice is alleging waging this fight for secrecy made no objection to disclosure; indeed, they did not respond at all. Of the remaining three who wrote to the court below requesting it to not disclose their names to Friedman, two of them, Gregory Doe and Barry Doe, spoke at length with filmmaker Andrew Jarecki. Only one individual, Edward Doe, requested that his name not be made public.[4] The court below, although it was not required to do so, ordered that the names of these three individuals be redacted from the documents provided to Friedman.

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[4] The court below granted counsel on both sides access to Edward Doe's letter pursuant to a non-disclosure order to counsel and for "attorney eyes only."

27. To the extent that Rice objects to *public* revelation, a remedy that has not been sought and is not requested, this objection can and should be addressed through this Court's plenary power under Civil Rights Law § 50-b(3) to "order any restrictions upon disclosure . . . as it deems necessary and proper to preserve the confidentiality of the identity of the victim," as well this Court's power under C.P.L.R. § 5519(c). These provisions give this Court more control over Friedman's revelations than it now has. That is, this Court can order disclosure of the relevant documents conditioned upon Friedman not making public any of the names of the alleged victims; even though there is no current impediment to Friedman releasing the names. In other words, this Court's power to order "any" restriction could impose a *quid pro quo*—in exchange for granting Friedman materials that he does not have, he is prohibited from releasing information that he has gathered independently of the Court's process. The same restriction could be placed upon Mr. Jarecki, who also has never disclosed this information despite the absence of any prohibition on his doing so. Indeed, if Rice genuinely were interested in making certain the names of the victims were kept from public view, she would endorse this suggestion. Instead, she has consistently ignored it in

favor of making unsupported and unsupportable assertions that informing Friedman of what he already knows would create "catastrophic" harm.

28. Rice continues to misconstrue the holdings in People v. Fappiano, 95 N.Y.2d 738 (Ct. App. 2001), then castigates the court below for not following her into error. (E.g., Schwartz Stay Aff., at para. 38, asserting the court below failed "to perceive or contemplate the relevant issues in this civil matter, accompanied by a failure to apply relevant law."). In fact, the court below recognized that Fappiano stands for several principles, most notably that under 50-b(2)(a), a person convicted of a sex offense is not a person "charged with commission of an offense…." Therefore, Fappiano was not entitled to obtain the witness' statements under this subdivision.

29. The Fappiano Court, however, carefully noted that the petitioner "did not attempt to obtain the documents they seek through any of the other provisions in Civil Rights Law §50-b(2); accordingly, the discussion here is limited to the applicability of Civil Rights Law §50-b(2)(a)." Id. at 748, n.*. Friedman, of course, did not seek relief under this subsection; instead, he sought relief under the "good cause" and "notice" provision of subsection (b). Thus, the court below was completely correct in its analysis that Fappiano has no relevance to the task of

establishing good cause and to the task of weighing various countervailing interests.

C. THE COURT BELOW PROPERLY FOUND THAT FRIEDMAN HAS SHOWN GOOD CAUSE FOR A DISCLOSURE ORDER UNDER 50-b(2)(b), THAT BOTH PUBLIC AND PRIVATE INTERESTS REQUIRED DISCLOSURE THAT OUT WEIGHED ANY COUNTERVAILING INTERESTS IN SECRECY.

30. The showing required to constitute "good cause" pursuant to 50-b(2)(b) is not unnecessarily stringent. Rather, it is meant to balance the realistic need for privacy against the need for disclosure in a particular case, and the interests of justice--which have been appropriately demonstrated in this case. In Tonia E.-A. v. Kathleen K, 12 Misc.3d 828 (Family Ct., Orange Cty., 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. Similarly, in Doe v. Riback, 7 Misc.3d 341(Sup. Ct., Albany Cty. 2005), the Supreme Court held that a civil defendant's request for documents identifying infant victims of sexual abuse outweighed any potential impact on the infant plaintiffs, as well as the "vague and conclusory" invocation of the confidential source exception. Id., at 345. As set

forth more fully below, Friedman has shown "good cause" for receiving the requested documents.

1. Limited Disclosure of the Statements Will Permit Review by an Expert in Child Sex Ring Cases.

31. In the absence of any physical or medical evidence, the witness statements elicited by police were the only evidence in the case. For this reason, the contents of these statements, their evolution over time, and the interrogation methods used to elicit this testimony are of paramount importance. The Second Circuit concluded that detectives had applied tactics "designed to force children to agree with the detectives' story" and stated that "*In this case, the quality of the evidence was extraordinarily suspect....*" Rehal, 618 F.3d at 159. The Rice Report now confirms that police used tactics on children that were "unprofessional, unfair, and cruel." (Rice Report, at 72). Boys were told that unless they cooperated they would become homosexuals or child abusers, and would "suffer lasting psychological consequences later in life if they do not disclose abuse." (Id., at 71). Beyond these punishments threatened for non-cooperative children, police offered rewards such as metal police badges and pizza parties to children who did disclose abuse (Id., at 66). Yet the Report inexplicably concludes there is "no reason to

believe such interviews resulted in unreliable information," (Id., at 71), and that these investigative deficiencies "did not prevent the Review Team from reaching the conclusions with full confidence." (Id.)

32. The confidence that Rice has in her own conclusions cannot be disputed. But the bases for this confidence are not apparent or non-existent. Kenneth V. Lanning is one of the nation's foremost authorities on child sex rings, the type of abuse alleged in the Friedman case.[5] Lanning was a Special Agent with the FBI for over thirty years, 20 of which were spent at the FBI Behavioral Science Unit (BSU) in Quantico, Virginia (1981-2000), where he conducted training, research, and case consultation on thousands of cases concerning the sexual victimization of children. Lanning has testified seven times before the U.S. Congress, numerous times as an expert witness in state and Federal courts, and authored more than 30 articles, monographs, and book chapters about understanding the behavior of sex offenders and their child victims and analyzing criminal cases. Since his retirement from the Bureau, he has worked as a consultant to police and

[5] The term "child sex ring" is used to denote acquaintance sexual abuse with multiple child victims simultaneously. (Lanning Aff., at 2).

prosecutors about child sex ring cases. (Lanning Aff., at 1). The Rice Report acknowledges him as expert, and cites his research (incorrectly[6]) in support of its conclusions. (Rice Report, at 132-35).

33. Lanning highlights the failure of Rice's office, during the original Friedman investigation or the reinvestigation process, to consult with an expert on child sex rings:

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[6] The Rice Report claims Lanning's work validates the conclusion that the bizarre games alleged by the Friedman accusers were part of "grooming techniques" and "accord with the observed behavioral patterns of pedophiles." (Rice Report, at 132). In fact, as Lanning notes, the allegations of games are *inconsistent* with the allegations that the Friedmans used and threatened physical violence against the alleged victims:

15. The concept in the Report that certain pedophiles use fun, games, and play as a premise to make children comfortable before progressing to sex acts was accurately taken from one of my publications, but was used to imply as typical something that is not. The specific "complicated" or "outlandish" games victims described in the Friedman case as a cover for violent sexual activity do not appear to be consistent with the fun and common games I was describing in my publication as part of grooming techniques to lower inhibitions. In my experience, such games are usually part of non-violent manipulation and not violent sexual acts.

16. One primary purpose of the grooming process as used by child molesters is to control child victims without the need for threats and violence, which typically increase the likelihood of discovery and disclosure. Grooming and violence tend to be incompatible. Violence, threats of violence, and blackmail if used are more likely applied by acquaintance offenders when pushing a victim out or attempting to hold onto a still-desirable victim who wants to leave...

(Lanning Aff., at 3, para. 15-16). See also, Id. at para. 18 ("I saw no indication in the Report of any attempt to evaluate or reconcile these apparent victim control inconsistencies.").

> As a less common and more complex acquaintance *child sex ring* case, however, both the original investigation and the current Conviction Integrity Review should have included at least some input and guidance from experts with specialized knowledge and experience with this specific type of case. From the Report, I could see no indication that anyone involved, including the impressive Advisory Panel, had such specialized expertise….

(Lanning Aff., at 2, para. 13). The expertise required is highly specialized and is different from general expertise involving sexual abuse of children:

> The investigation of acquaintance-exploitation cases requires specialized knowledge and techniques. The protocols, policies, and procedures for addressing one-on-one, intrafamilial, child sexual abuse have only limited application when addressing multiple-victim, extrafamilial, child sexual exploitation cases."

(Id., para. 10)

34. A vital part of any investigation, or reinvestigation, of these rare cases is access to the original source materials. Lanning states:

> One of the most important victim patterns of behavior investigators need to identify and document is the disclosure process. Investigators should verify, through active investigation, the exact nature and content of each disclosure, outcry, or statement made by the victim…To whatever extent humanly possible, the investigator should determine exactly when, where, to whom, in precisely what words, and why the victim disclosed.

(Lanning Aff., at 3, para. 20). Notably, the largest concern in the Friedman-type cases is that investigators evaluate all possible contagion:

35. Consistent statements obtained from different interviews and multiple

> victims are powerful pieces of corroborative evidence – that is as long as those statements were not "contaminated." Investigation must evaluate both pre- and post-disclosure contagion and both victim and intervener contagion carefully. Are the different victim statements consistent because they describe common experiences/events or reflect contamination or shared cultural mythology? …Contamination can occur quickly even before any or after only a few victim interviews.

(Lanning Aff., at 5, para. 28-29). This averment by Lanning directly disputes *the* fundamental conclusion most essential to the Rice Report—that five weeks was an insufficient time period for the acknowledged improper police work to have contaminated the results. (Rice Report, See Generally Section III A. "Claims of Inappropriate Police Questioning are Exaggerated").

36. Lanning notes that likely sources of contagion include alleged victims communicating with each other, "interveners" (such as parents) communicating with each other, and investigators contaminating each other. (Lanning Aff., at 5, para. 29). All of those phenomena were present in the Friedman investigation.

37. Lanning acknowledges that without access to the original case materials, he cannot offer any definitive opinion, but reiterates that access is crucial:

> Any attempt to review Jesse's conviction should include competent and objective professionals documenting the disclosure process, evaluating potential contamination, and assessing interview procedures with access to any analysis of the most detailed and contemporaneous notes, reports, statements, records, transcripts, documentation, and evidence available.

(Lanning Aff., at 7, para. 40).

38. However, based upon what is contained in the Rice Report, Lanning offers a number of cautionary notes. Cases involving allegations like those in the Friedman case are extremely difficult to investigate. Lanning has found that "apparent victims often alleged crimes and provided details that did not necessarily happen. Causes include overzealous interveners influencing children's allegations and the phenomenon of contagion in which community members spread and reaffirm each other's stories." (Lanning Aff., at 3, para. 26). As a general guideline, "[i]nvestigators should apply the "template of probability." (Id., para. 30). Moreover, [a]ccounts of child sexual victimization that are more like books, television, news accounts, movies, or the exaggerated fear-mongering of zealots and less like documented cases should be viewed with skepticism, but thoroughly investigated." (Id.)

39. Finally, Lanning notes:

> [a]s a general principle valid cases tend to get *better* and false cases tend to get *worse* with investigation. I get concerned when as an investigation progresses, the number of alleged offenders keeps growing and the allegations get increasingly more bizarre and atypical. The Report seems to support the fact that such progressions did take place over time in the Friedman case investigation but it sets forth no detailed or plausible

explanations of their significance.

(Lanning Aff., at 3, para. 19).

40. Lanning's general observations are illustrated by the process that led to the disclosures by "Fred Doe," the *one* alleged victim for which the defense has *one* of his several statements. The Fred Doe Statement, attached hereto as Exhibit D, is heavily redacted, and must be read in *para materia* with additional information provided about this witness in the Rice Report. On November 19, 1987, detectives conducted interviews with Fred Doe, denominated in the Rice Report as Witness 17. At that time, Doe allegedly stated to Detective Merriweather and Police Officer Durkin that Arnold gave him "bad hugs" that hurt, and that Arnold would hug him from behind and rest his head on his back, and also reported seeing a Polaroid camera in the Friedman home, in a big room with a couch. (Rice Report, at 13).

41. On December 3, in his first statement reduced to writing, during a second documented interview, Witness 17 allegedly described to Detective Merriweather and Police Officer Durkin sexual criminal acts performed by Arnold and Jesse Friedman. According to Detective Merriweather, Fred Doe said that Jesse anally sodomized him and another child, exposed himself, and invited

children to touch his penis. The child further said that Arnold Friedman put his hand down Witness 17's pants, touched his penis, and anally sodomized him twice in class. Witness 17 said Arnold Friedman did the same to other students. After one such incident, he saw "sticky white stuff." He also described being shown pornographic magazines and videogames, some of which were pre-loaded on the computers when the children sat down. (Rice Report, at 18).

42. In January 1988, Witness 17 was given the name "Fred Doe" and cited in a second grand jury indictment against Jesse Friedman. In March 1988, Detective Merriweather's assembly of various Fred Doe statements was attached as an exhibit to Arnold Friedman's federal pre-sentence report, which is how it became available to Jesse Friedman.

43. Yet Detective Merriweather was not yet done with Fred Doe. On April 29, 1988, during his fourth interview with police, he gave another statement reduced to writing by Detective Merriweather reporting that he saw Arnold and Jesse Friedman anally sodomize other children while in class. (Rice Report, at 24).

44. On June 9, 1988, Fred Doe gave another statement that was reduced to writing by Detectives Merriweather and Squeglia. He *added the presence of three of Jesse's friends*, stating that they would hold him down while Jesse anally

sodomized him. He also stated that Jesse made him perform oral sex on Jesse, and that he was anally sodomized [redacted] —as were the other children. Additionally, he stated that [three lines of redaction]. (Rice Report, at 26).

45. In a lineup conducted on June 22, 1988, Fred Doe identified Ross Goldstein and another individual. For reasons that are unknown to Friedman and not explained in the Rice Report, Fred Doe was not called to testify in the grand jury that indicted Goldstein.

46. Limited disclosure of the original case materials will permit an expert in this field (rather than attorneys or police), to offer definitive conclusions about what went right and what went wrong in the interrogation of the Friedman accusers, and the ways in which investigative shortcomings and failures may have affected the final result. In light of the fact that Lanning is an expert acceptable to both the defense and Rice, this Court may consider extending any limited disclosure of these statements that may be ordered to Lanning as well.

2. Limited Disclosure of the Witness Statements Will Permit Reliable Identification of Children Who Were Present Together in Specific Computer Classes.

47. The need for an expert in child sex ring cases to review the witness statements and the methods by which they were procured—a need unmet in two

Friedman investigations over the past quarter century—is "good cause" enough to order the disclosures. But there is specific, additional information that these records contain: information that cannot be obtained through any other source.

48. The Fred Doe Statement asserts that "everyone" in the class was abused, and the vicious anal rapes were conducted in full view of "everyone" in the class. According to the detectives involved in the case, this was a common theme—everyone in the class had been abused, and the abuse took place in front of the entire class. Unlike most cases of actual child abuse, which take place in isolation, the abuse charged in the Friedman case all took place in full view of the other students, as well as a shifting number of other adults.

49. The Fred Doe Statement provides the names of at least five other students (whose names have been redacted in the copy that the Freidman team has) who were present in the class, describing in detail where specific students sat in relationship to him. In addition, analysis of the Rice Report reveals, for the first time, that of the 41 police interviews summarized (not every interview resulted in a written statement); only three do not mention witnessing the abuse of other children or being abused in plain sight of others. Indeed, the document suggestively entitled "Victim Questionnaire," which was revealed in the Rice

Report and was one of the basic investigatory tools, specifically directs investigators to ask the following classically suggestive questions: "Who else goes to the class?," "Any friends you know of that go?," and "Have you ever seen anyone else in the classroom being touched?" There is every reason to think the other alleged victims were asked these questions and provided this information.

50. A basic investigative technique would be to reconstruct, to the extent possible, rosters or partial rosters of the computer classes in which the alleged victims were in attendance, determine who was present with the alleged victims, then interview these children to ascertain what they did or did not see and hear, and what did or did not happen to them. If an alleged victim's allegations are overwhelmingly contradicted by eyewitnesses who sat alongside him in the same computer classes (which the defense believes to be the case based on the contemporary interviews conducted with now-grown Friedman computer students), then it is difficult to credit such allegations. In a case such as this, with no medical or physical evidence, evidence that tends to corroborate or refute the complainant's allegations is crucial. (Lanning Aff., at 28).

51. Friedman's defense team and the filmmakers provided Rice and the court below with partially reconstructed class rosters in which non-complainants

who sat alongside alleged victims state unequivocally that (a) nothing inappropriate ever happened to them, and (b) nothing inappropriate ever happened to the complainants in the relevant classes. The court below was properly struck by the paradox created by "the fact that so many of the complaining witnesses say time and again everybody in the classroom was present when certain things happened" while other witnesses stated that absolutely nothing happened. (Tr., August 22, 2013, at 32).

52. Rice discredits this entire area of inquiry on the specious ground that it is difficult to accurately reconstruct the computer class rosters:

> …at the time of Jesse Friedman's guilty plea, neither the police nor the prosecution had yet compiled a full list of the membership of each of Arnold Friedman's classes. Though the police and prosecution files contain some partial rosters, there is no way of ascertaining whether those were made based on information from the victims themselves, from their parents, or from some other unnamed source. Indeed, to the knowledge of the Review Team, a reliable roster has never existed. (Rice Report, at 62).

53. If Rice chooses to discount the class rosters she states are in her files, and to discount the rosters reconstructed by the filmmakers (who provided a detailed source list identifying the source of data on each class), she need not discount the entire idea of using partial rosters of the relevant classes to corroborate or discount claims made by alleged victims. But the original

investigators placed little credence in the students who stated that no abuse took place, and Rice simply ignores them now that they have come forward as young men. However, the reconstruction of reliable class lists is a necessary and fundamental task that cannot be accomplished without the original statements of the alleged victims. The original witness statements will provide Friedman the names of other witnesses whom Rice chose not to interview and Friedman's team could not interview.

3. Limited Disclosure of the Original Witness Statements Will Reveal Which Complainants Made Baseless Claims of Abuse Against Other Uncharged Assailants, and the Circumstances Under Which Such Accusations Were Made.

54. It seems both undisputable and obvious that if a complaining witness claims he was simultaneously attacked by Peter, Paul, and Bill, then it is learned that Peter and Paul have ironclad alibis, this information would raise significant questions about the remaining claim against Bill. These questions may or may not be answered or answerable; that is the stuff of which basic criminal prosecution and defense is made. But no one can seriously question that when a witness simultaneously makes an accusation Rice knows is false in conjunction with one she believes to be true, it raises a serious credibility problem.

55. The Rice Report reveals that these issues arose repeatedly in the police interrogation of the alleged victims, with multiple alleged victims claiming an ever increasing number of different assailants who participated in or were present for the molestation. The Rice Report, commencing on page 28, under the subheading "Police Identify Three Potential Accomplices," notes that after repeated interrogations, four students, in one week, named two additional rapists who participated in the abuse. Various children then dutifully picked out these and possibly additional attackers from photo arrays, yearbooks, and lineups. (Rice Report, at 28-30). The Rice Report unhelpfully explains that these individuals were not prosecuted due to "insufficient evidence," (Rice Report, at 30), and the source document cited in the Appendix is equally non-illuminating. (Rice Appendix, at 293).

56. But the nature of the evidence against these accused rapists—multiple victim accounts elicited after intense and repeated interrogation—does not appear to differ in any material respect from the nature of the evidence used to indict Friedman and obtain his guilty plea. There must be specific factual reasons why the accusations against other suspects were discounted and deemed insufficient, yet the same type of allegations made by the same alleged victims against the

Friedmans were fully credited—then and now. It is likely the actual witness statements, in their various iterations, will explain this otherwise baffling discounting of the statements of alleged victims.

57. Looking again at Fred Doe (witness 17), for example, he was interrogated at least five times over five months by Detective Merriweather. It was only in the fifth round of questioning that Merriweather elicited a new and important admission: that Fred Doe had neglected to mention in four prior interviews the presence of three additional violent teenage assailants in the room, friends of Jesse's previously unmentioned, including Ross Goldstein. (Rice Report, at 26). That Fred Doe was not presented to the grand jury, and that the two other child rapists he described were never prosecuted, suggest that investigators recognized that at least some parts of Fred Doe's account simply could not be true.

58. Similarly, the Rice Report reveals that Witness 11 (James Doe), one of the three alleged victims who apparently still claim Jesse Friedman abused them, was untruthful with investigators when questioned in 1988. Rice's report explains that there was "an additional individual he had specifically named as an abuser in 1988." When speaking to the Review Team, however, he claimed that he was abused by the Friedmans only. (Rice Report, at 104). Rice ascribes no significance

to this, and mentions it only as a small factual detail, but it is actually exceedingly important: it confirms that James Doe either lied to police about the crimes he alleged, or that his interrogator did not accurately record the boy's statements. Either way, it is a major inconsistency that warrants examination, as do the numerous additional witness statements in which child rapists appear to inexplicably pop in and out of existence.

4. <u>Disclosure of the Original Statements and Police Reports Will Permit A Forensic Textual Comparison Revealing the Statements Were Created by the Police.</u>

59. In the Friedman case, none of the alleged victims came forward with allegations outside of interviews with detectives. Every assertion in this case emerged from an interview, and was composed into statement form by detectives. The Fred Doe Statement, for example, was taken by Detective Larry Merriweather, who claims his reconstruction of Fred Doe's statements is true to the boy's interview. This assertion is called into question by events that took place a year after the Friedman prosecution, in the case involving school bus driver Robert Izzo. The Izzo case was a strikingly similar mass sex abuse case in which dozens of children were said to have been raped by a bus driver and his assistant on a

school bus in broad daylight. Like the Friedman case, the Izzo case suffered from the absence of any physical or medical evidence of the alleged abuse. The Izzo case was investigated by most of the same detectives who worked on the Friedman case, under the direction of Detective Sergeant Frances Galasso, the same head of the sex crimes division of the Nassau County Police Department who investigated the Friedman case.

60. In an unusual twist, because Izzo's accusers filed a civil lawsuit,[7] the witness statements were made public. The statements taken by the various detective teams are strikingly similar to those procured in the Friedman case. Below is a comparison of just one such statement, showing that the same detectives, Detective Merriweather and his partner Detective Nancy Meyers, elicited identical statements from eight-year-old Fred Doe in the Friedman case and a seven-year-old girl in the Izzo case:

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[7] Izzo plead guilty, then subsequently moved to withdraw his plea on the ground that he was innocent. Before his application was finally decided, he died in prison. The subsequent civil jury declined to award damages to the accusers, notwithstanding the judgment of conviction, because it did not believe that the abuse took place. See, Pete Bowles, "Sex Abuse Felon Wins Civil Case," *Newsday*, July 27, 1996.

Exhibit 1: Statement from eight-year-old Fred Doe in Friedman Case (Nassau County, 1989).

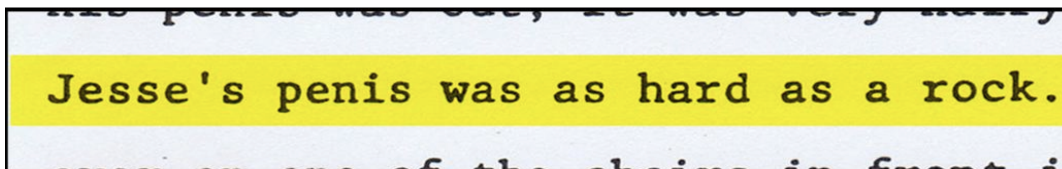
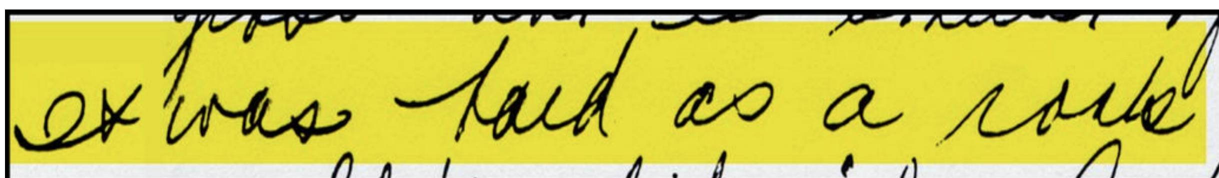

Jesse's penis was as hard as a rock.

Exhibit 2: Statement from seven-year-old girl in Izzo Case (Nassau County,1989).


ex was hard as a rock

61. It is possible, but unlikely that two different children in two different cases, having only detectives in common, would provide the same, decidedly adult, somewhat abstract simile to describe an erect penis. In cases involving allegations that police manufactured inculpatory statements, textual comparisons of the statements for word and phrase choices tied to specific investigators is an increasingly common and accepted technique. See, e.g., Frances Robles, "Several Murder Confessions Taken By Brooklyn Detective Have Similar Language," *N.Y. Times*, June 12, 2013.

62. Though Rice had access to all the relevant witness information to allow her to utilize this powerful investigative technique, she chose not to do so.

Friedman's defense team is willing to do this essential work, though Rice continues to withhold the original witness statements that would need to be examined.

63. In summary, the record establishes that the interests of privacy that existed *ab initio* have disappeared over the many years that have passed in this case; by the actions of the District Attorney in providing the names of the alleged victims to Friedman and by the changed and expressed sentiments of many of the alleged victims. Even more important, they are overwhelmed by the overriding interests of justice which require that the mission outlined by the Second Circuit opinion be properly carried out for all of the reasons the opinion expressed.

D. THE ORDER OF THE COURT BELOW TO UNSEAL THE GRAND JURY PROCEEDINGS UNDER C.P.L. § 190.25 WAS NOT AN ABUSE OF DISCRETION

64. The task of the court below with respect to the grand jury records Friedman requested is not in dispute. The decision whether to order disclosure was within his discretion. People v. DiNapoli, 27 N.Y.2d 229, 234 (1970). The decision required two findings. First, it required that Friedman demonstrate a "compelling and particularized need" for the grand jury materials. Id., People v.

Fetcho, 91 N.Y.2d 765, 769 (1998). Second, it required that the public interest in disclosure outweighed the public interest in secrecy. Matter of the District Attorney of Suffolk County, 58 N.Y.2d 436, 443-4 (1983). The court below was not confused by either the law or facts on this issue. He made careful and detailed determinations that Friedman met his requirement to show a compelling and particularized need and that disclosure served the public interest. Indeed, Friedman's need to prove his innocence and the public interest in correcting wrongful convictions are mutually reinforcing.

65. The court below found persuasive the letter written to it by Scott Banks, the law secretary to the trial judge in the original criminal proceeding against Friedman. As the court below noted, Banks was one of the few people to read the grand jury transcripts. Banks, as the court below noted, supported the release of all the original case materials, not just the grand jury records. (Tr., August 22, 2013, at 29). In his letter to the court below, Banks expressed concern that the grand jury witnesses almost exclusively answered "yes" or "no" to leading questions by prosecutors. Banks found troubling the lack of specificity and detail in the indictments the grand jury produced. But he presumed at the time - wrongly as it turned out – that the prosecution, during the pre-trial process, provided Friedman

the "witness statements and police investigative reports" to enable him to "determine the strength, or lack thereof, of the prosecution's case. . ." (Banks Letter, attached hereto as Exhibit G.).

66. While not discussing it at length, the court below also found Arline Epstein's letter to the court below "compelling." (Tr., August 22, 2013, at 31, and Epstein Letter, attached hereto as Exhibit E.). Arline Epstein wrote to the court below to detail the ways in which the Rice Report either ignored or distorted the information she provided to the Review Panel. Arline Epstein is the mother of one of the alleged victims, who just last fall revealed to her that he had never been molested. Until very recently, Epstein was part of a "Friedman lunch group," a group consisting of the mothers of other alleged victims. The shock of learning from her son that he had never been molested motivated her to review the detailed notes she had kept at the time of the original investigation. She reached out to some of the parents whose children were also alleged victims and she contacted the filmmakers of *Capturing the Friedmans,* Andrew Jarecki and Marc Smerling. The court below was careful to note that he did not necessarily accept Epstein's letter word for word, but it did determine that it supported the argument for disclosure of additional information. (Tr., August 22, 2013, at 30-31).

67. The court below also expressed concerned that there was no physical or medical evidence in the case against Jesse Friedman. Instead, the case depended entirely on the witnesses' statements, "none of which were written by the witness him or herself" and which had some "glaring discrepancies." (Tr., August 22, 2013 at 31). In stating "[w]e have to start using a microscope instead of a telescope to look at the facts in order to see whether or not they truly make sense, the timeline makes sense, the fact that so many of the complaining witnesses say time and again everybody in the classroom was present when certain things happened, and total denial," the court below simply acknowledged the obvious. (Tr., August 22, 2013 at 32). When one witness said abuse took place repeatedly in full view of everyone in a classroom and other witnesses who were in the classroom say no abuse occurred, the allegations of abuse require more scrutiny than just accepting them at face value. Far from being confused by the facts and the law, the court below quite clearly found that Friedman had a compelling and particularized need for the grand jury documents.

68. The court below recognized the "peculiar circumstances" (Tr., August 22, 2013 at 14) surrounding Friedman's petition and his quest to establish that he was wrongfully convicted. Rice argued that the question of Friedman's guilt had

been forever decided by his guilty plea 25 years ago. But the court below understood that Rice's so-called reinvestigation was entirely about Friedman's guilt or innocence and that Friedman was entitled to participate in that determination in a meaningful way. In response to Rice's statement that the "issue of factual guilt is removed from the case," (Tr., August 22, 2013, at 30) the court below stated, "But Ms. Rice wanted to do precisely that. She said, following the determination made by the United States Circuit Court of Appeals for the Second Circuit, I want to get to the bottom of this, too, I want to look at it and I'm using the Brady standard . . . as a lower standard to look at the entire case." (Tr., August 22, 2013 at 30-31).

69. However instead of making a sincere effort to uncover the truth, Rice chose to operate under a veil of secrecy, denying all Friedman's informal requests for information and forcing him to petition Rice under law for the opportunity simply to observe his conviction review. While careful not to explicitly criticize the Rice Report, the court below recognized that the reinvestigation was conducted in an adversarial manner, rather than in the open, transparent manner Rice promised. ("[T]here have been two sides, warring sides, 180 degrees apart." (Transcript, at 13-14). The adversarial manner in which Rice conducted the

reinvestigation not only created Friedman's current need for all the records in the case, including the grand jury records, but gave rise to the public's interest in its ability to find "credibility towards its institutions." (Tr., August 22, 2013, at 25).

70. Finally, the court below discussed the burdens of being a registered sex offender, not because he mistook the within action as an ongoing criminal proceeding, but as an additional example of Friedman's need for disclosure. As a registered sex offender, Friedman and his wife are denied some of the most basic rights we all take for granted, not the least of which is the ability to have a family. The court below merely acknowledged the fact that Friedman needs to see the grand jury documents because at least some of the charges appear implausible even with the limited information available to him. This information would allow him to petition under Correction Law § 168-o to modify his registration status.

71. As the court below noted below, some complaining witnesses claimed violent abuse occurred in full view of everyone in the classroom. Yet students who attended those same classes say nothing of the sort ever occurred. At the very least, if Friedman were able to prove that some of the worst allegations logically could not be true he could use that information to reduce his registration status from that of a violent sexual predator to one less severe and with fewer restrictions on where

Friedman is allowed to live, work and worship. Of course, the very real probability exists that, as the Second Circuit acknowledged, Friedman is actually innocent, and could prove it with the help of the grand jury records.

72. After finding that Friedman met his burden, the law required that the court below next "balance the public interest for disclosure against the public interest favoring secrecy." People v. Fetcho, at 769. The court below found that the public interest required disclosure as well. Rice denigrates the court below, claiming it confused this Article 78 civil suit with an ongoing criminal proceeding. Rather, the court below expressed its opinion that the public's faith in its institutions required that they correct their mistakes, no matter how unintentional the mistakes may have been or how far in the past they may have occurred, especially when those mistakes continue their ill effects.

73. To that end, it disturbed the court below that Friedman's trial counsel asked for exculpatory or impeaching witness statements before deciding whether to accept a guilty plea and was told there were none. The Banks letter corroborates that the prosecution's behavior was "questionable" under the circumstances of the case. The court below was also troubled that Friedman's motion to vacate his conviction on the grounds that this material should have been produced to him was

time-barred by a scant three months. (Tr., August 22, 2013 at 26). These facts persuaded the court below that public interest in the integrity of its governmental institutions outweighed the standard reasons for secrecy in grand jury proceedings, which were not present in any event.[8] The court below did not confuse the Article 78 petition as a motion to compel Brady material in a criminal case.

74. Rice's claim that Friedman is not entitled to the grand jury records because they are available to him from a different source is disingenuous in the extreme. It is true that Friedman has been able to contact some of the witnesses upon whose statements Rice fashioned numerous charges against him. It is also true that he found many of them stunned to learn that anything they said could have supported charges of abuse against Jesse Friedman. But this only enhances Friedman's need for the documents, it does not obviate it. The *only* evidence

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[8] The reasons for grand jury secrecy are well-established and often cited:
(1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely. People v. Di Napoli, 27 N.Y.2d 229, 235 (Ct. App. 1970).

against Friedman is the statements of children most of whom now, as adults, distinctly recall never having made the statements attributed to them. Friedman needs not only the statements of the witnesses who have been willing to come forward as adults, but the statements attributed to them as children during the grand jury process.

III. ALTERNATIVE RELIEF

75. Should this Court deny Friedman's motion to vacate the stay, he requests two forms of alternative relief.

76. First, this Court should expedite the appeal of this matter, requiring Rice to file her brief no later than September 30, 2013. Rice has shown herself to be particularly expert at using every possible procedural device to delay substantive justice. Indeed, Friedman commenced his §440.10 motion on January 7, 2004. Rice finally completed her "re-investigation" of the case on June 24, 2013. The passage of that decade, most of which was spent by Rice opposing any evidentiary hearing for Friedman, certainly contributed to the difficulty of re-creating the events that led to Friedman's conviction.

77. The issues raised in Rice's appeal have been thoroughly briefed in the

court below. There is no reason that this Court should countenance an additional period of delay, likely to span a year from the filing of the notice of appeal, before this case is resolved.

78. Second, any stay should be conditioned upon the entry of an order that the time period from August 23, 2013, up to and including the date this appeal is decided, may not be used by Rice in any forum to support an assertion that Friedman has failed to use “due diligence after the discovery of such alleged new evidence,” as those terms are construed under C.P.L. §440.10(1)(g). Litigants pursuing §440.10 motions based upon new evidence that is still being acquired face a difficult choice between the Scylla of prematurity and the Charybdis of delay. A defendant who acquires a new piece of exculpatory evidence on day “x” must risk filing a collateral attack on his conviction sooner, (which may result in piecemeal litigation and possibly preclude him from filing a second motion based on subsequently-discovered evidence), or later when additional evidence is acquired (which will result in the prosecution claiming lack of due diligence under §440.10(g)(1)). For this reason, Rice should be precluded from using the period from stay-to-decision on the appeal that she has sought as a sword against any of Friedman’s subsequent motions.

Respectfully submitted,

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Ronald L. Kuby

Dated: New York, NY
September 13, 2013