COUNTY COURT
NASSAU COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK,

-v- Ind. 67104, 67430, 69783

Hon. Terence Murphy

JESSE FRIEDMAN,
Defendant.
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO RECONSTRUCT THE RECORD OF CONVICTION OR, IN THE ALTERNATIVE, FOR SUMMARY DISMISSAL OF THE CHARGES AGAINST HIM

JESSE FRIEDMAN, by and through his attorneys, moves this Court for an order to Reconstruct the Record of Conviction, or in the alternative, for Summary Dismissal of the Charges against Him.

Preliminary Statement

Some measure of mystery has always shrouded the People's case against Jesse Friedman (herein "Friedman," "Defendant," or "Petitioner"). When he first stood to be arraigned on Indictment # 67104, he had no idea of what charges he was being accused. The nature of the text of the indictments, indefinite as to time, place, victims or witnesses, offered little help. A year passed and brought with it two more indictments. They exponentially expanded the breadth of accusations against Friedman, but offered little clarity.

Circumstances described in detail in Defendant's June 2014 Motion to Overturn his Convictions and Dismiss the Charges on the Grounds of Actual Innocence and Unlawfully Coerced False Testimony Before the Grand Jury and to Overturn his Plea of Guilty Based Upon

Unlawful Coercion (herein the "440.10 Petition") eventually forced Friedman to plead guilty to twenty-six of the two-hundred and forty-four charges levied in the three indictments. In 2004 he challenged his conviction on a plea of guilty on various grounds. He discovered then that the mystery extended even to his plea allocution, the record of which either the court reporter or the People had lost. After his appeal found its way to the Second Circuit, that Court pointed to the Nassau County District Attorney's Office, noting that it had ethical obligations to look again at Friedman's case, given what it called the "reasonable likelihood Jesse Friedman was wrongfully convicted." Friedman v. Rehal, 618 F.3d 142, 158 (2d Cir. 2010).

When then DA Rice took up the task to review the case, she chose to further keep the case cloaked in mystery. Indeed, to this day, the People have successfully avoided disclosing all but a scintilla of the various witness statements they claim condemn him. DA Rice made bold pronouncements about the depth of the investigation, heralding a panel of outside experts who would oversee it. The truth (revealed later only upon Court compulsion) is that Rice did not permit the panel to view police reports, witness statements, or any other essential evidence, nor to interview witnesses. Rather she permitted them only narrow distillations of statements a secret group of assistant district attorneys prepared. After being presented with some of the profound misstatements of testimony and misrepresentations of evidence in the report, the most prominent of those experts withdrew his support of its conclusions and called for an evidentiary hearing. (See, June 2014 Scheck Affidavit, submitted in conjunction with Defendant's June 2014 Motion under CPL 440.10).

DA Rice described the reinvestigation as "exhaustive" and its conclusions "comprehensive." (June 2013 Statement of DA Rice released with June 24, 2013 Conviction Integrity Report on Jesse Friedman, (440.10 Petition Exhibit B (herein the "Rice Report" or

"RR")). ADA Robert Schwartz, in Court on this proceeding, admitted the truth: "We know the charges to which Mr. Friedman pled guilty, we don't have a way to correspond them to the actual counts in the indictments." Transcript, People v. Friedman, Ind. Nos. 67104, 67430, 69783 (Cty. Ct. Nassau Cty. Jan. 13, 2015) at 8:13-15. During the "exhaustive" and "comprehensive" reinvestigation, no one at the Nassau County DA's office bothered to perform the literal first step in conviction integrity review: determine the charges of which the defendant was convicted.

Jesse Friedman has a right under the law of this case, New York Law, and the constitutions of New York and the United States to a hearing to determine whether he is actually innocent of the crimes of which he was convicted. See, Order, People v. Friedman, at 10 (Dec. 23, 2014), see also People v. Hamilton, 115 A.D.3d 12, 27 (2d Dep't 2014) (ordering actual innocence hearing on motion to set aside conviction and finding standing conviction of an innocent person violates Due Process Clauses of New York and United States Constitutions); CPL 440.10(h). His burden at that hearing is proof by clear and convincing evidence. Hamilton, 115 A.D.3d at 27. The People contend that he should have to prove by that standard his innocence of the more than two hundred counts for which he was indicted. It is axiomatic that he need not prove his innocence of more than 200 counts on which he was indicted but never convicted. The People's suggestion that Friedman should carry a stricter burden in disproving claims the People only proved by a probable cause standard is more Kafkaesque fantasy than sound legal thought. The Court should not entertain it.

This motion therefore seeks a hearing to reconstruct the DA's lost record of Jesse Friedman's conviction to determine the charges of which he was convicted, and therefore of

which he must prove his innocence at the coming hearing. In the alternative, if no record can be reconstructed, this motion seeks summary dismissal of his conviction.

Statement of Facts

The history of Jesse Friedman's prosecution originates in the early 1980s, in the midst of a national hysteria surrounding false accusations of mass child sexual abuse. Jesse Friedman's father, Arnold Friedman, was a teacher in Great Neck, New York. He also taught after-school computer classes at his home. Mostly school children, but some adults, attended the classes in his home where they learned the basics of computer usage and programming. His son, Jesse Friedman, then aged 13-17, assisted his father in teaching some of the classes between 1984 and September 1987, when he left for college.

In July of 1984 customs agents at Kennedy Airport intercepted a package from Europe addressed to Arnold Friedman that contained a catalog depicting nude models under the age of eighteen. The catalog was commercially available in Europe, but illegal to transmit by mail in the United States. That began a two-year operation, in which a postal inspector posed as a collector of underage pornography, and corresponded with Arnold Friedman in an attempt to cause Arnold to send the inspector material the inspector could use to prosecute Friedman. Arnold Friedman eventually sent the inspector a similar commercially-available European magazine. On November 3, 1987, the inspector, posing as a letter carrier, returned the magazine to Arnold Friedman, and then disclosed a search warrant. He and other inspectors searched the Friedman home, and eventually found behind a piano a small pile of commercially-made "pamphlets, booklets, and brochures" that contained similar illicit pictures. They also seized rosters and class lists of students who had attended computer classes at the Friedman home.

2. The Nassau County Police Investigation

Given the material Arnold Friedman possessed, and knowledge that children had taken classes in the Friedman home, the Nassau County police department -- led by Detective Sergeant Fran Galasso, head of the sex crimes unit -- began to investigate Arnold Friedman almost immediately, and quickly targeted his son Jesse (then 18) as an "accomplice." The nation at the time was in the midst of a vast moral panic over what was then believed to be a proliferation of sex-abuse cults in which groups of adults were thought to have violently sexually assaulted groups of children in scores of pre-schools and day care centers. The country would realize only decades later that the panic was fueled entirely by false reports drawn out by misguided police efforts. Hundreds of children had taken computer classes at the Friedman home since 1982, and not one had ever complained of any sort of inappropriate conduct, none had ever shown physical or psychological symptoms of abuse, and no parent had ever noticed anything out of the ordinary. Parents regularly entered the classroom unannounced to transport their children, even picking up children early and dropping them off late, never noticing anything amiss. See Dec. 30, 2003 Affidavit of Margalith Georgalis at para. 4 (440.10 Petition Ex. YY), see also May 24, 2012 interview transcript of Cookie Blaha (440.10 Petition Ex. Q at 8), see also Nov. 8, 2012 interview transcript of Arline Epstein (440.10 Petition Ex. P at 3-4).

Later that November 1987, Nassau County police searched the Friedman home again, collecting computers, printers, class rosters, computer programs, and other materials. No additional illicit material, nor evidence of any abuse, was discovered. Detectives then set out to interview the students who had participated in the classes, using a document presumptively titled "victim questionnaire" to guide them. (440.10 Petition Ex. I). The evidence is clear that while no child independently recalled having seen or experienced any abuse, police used a variety of

now-discredited techniques to extract testimony from the students. Those techniques are well documented on pages 24 through 34 of the 440.10 Petition. Those techniques are also widely-known to create false testimony, and have led in numerous cases to wrongful convictions. See Friedman v. Rehal, 618 F.3d at 156-58 (noting that the techniques used by detectives in this case were highly similar to those known to have created false testimony in numerous other cases, including the McMartin preschool case). The fact that police and prosecutors used these inappropriate techniques is not in serious dispute. See *infra* at p. 17. However, the Nassau County District Attorney's office claims there is "no reason to believe such interviews resulted in unreliable information." Rice Report at 64. Multiple interviewees have since claimed that these inappropriate questioning techniques did in fact lead to their making false accusations against the Friedmans. However, in former District Attorney Rice's view, that is not a reason to consider them unreliable.

2. The Three Indictments

Over the year of questioning by police, during which Jesse Friedman vehemently refused to plead guilty, the charges leveled against the Friedmans escalated dramatically both in number and severity. Jesse Friedman was arraigned on the first indictment, #67104[1], on December 9, 1987, a little more than a month after postal inspectors first arrived at the house. It alleged fifty-two counts of child abuse involving five children. Ten of the least serious charges were against Jesse Friedman. The second indictment, #67430, dated February 1, 1988, alleged ninety-one counts of child sexual abuse, and increased the number leveled at Jesse Friedman to thirty-five. Both Friedmans were arraigned on that indictment on February 9, 1988. Despite the controversy and attention surrounding the case, Judge Boklan allowed television cameras to film the

[1] The three indictments are available as Exhibit S to the June 2014 440.10 Petition.

arraignment. It was the first time cameras were permitted in the courtroom in the history of Nassau County, adding to the media circus and stoking public rage against the Friedmans.

On February 8, 1988 Arnold Friedman pleaded guilty to one count of mailing of illegal pornography, satisfying his federal charges. On March 25, 1988, in exchange for a sentence of ten-to-thirty years, to run concurrently with his federal sentence, Arnold Friedman pleaded guilty to every count with which he was charged on the first two state indictments. In order to approve the plea agreement, Arnold Friedman was forced to give a lengthy "closeout statement" in which he accepted guilt and the "truth" of every allegation in the indictments. Despite Arnold's oft-stated hope that by stating he had committed the alleged crimes, he could reduce the consequences for Jesse, no formal deal guaranteed that. To the contrary, the indictments alleged that every action he took was part of a "common scheme and plan" with Jesse. Several of the charges alleged that father and son committed the offenses "aiding and abetting and being aided and abetted by each other." See Indictment #67430, 440.10 Petition Ex. S. In summary, Arnold's guilty plea was a disaster for his son's defense.

As 1988 went on and Jesse Friedman maintained his intention to go to trial, prosecutors turned up the pressure on him to plead guilty, and in turn increased the pressure on children to "disclose more abuse." Detectives used the "closeout statement" they had told Arnold Friedman was confidential to try and elicit further charges against Jesse Friedman, and even convince more children that they had somehow "forgotten" scores of episodes of violent abuse. For example, Detective Sergeant Galasso returned to the home of one student, Ron Georgalis, who had been interviewed multiple times, and had each time insisted that no abuse had occurred. Police told Ron's mother that Arnold Friedman had described her son in his closeout statement as one of his "favorite" victims, and described other details from the closeout statement, so she would

encourage her son to disclose abuse. 440.10 Petition Ex. YY at para. 5; see also interview transcript of Margalith Georgalis at 11, 440.10 Petition Ex. ZZ. Mrs. Georgalis, who today believes nothing happened to her son, stated that the police were doing this to other families too, to "really enrage us against Jesse and try and come up with something against him." Id. Arline Epstein, mother of computer student Michael Epstein, describes a similar experience, which she contemporaneously recorded in her notes, in which Detective Sergeant Galasso told her that she was "getting the task force back together" because they "want to go back out & re-interview kids to be sure of the case against Jesse." Notes of Arline Epstein, 440.10 Petition Ex. W, at 9. Ms. Galasso referred repeatedly to the closeout statement during the call, telling her that Arnold Friedman had "named hundreds of kids" in it. Dennis Doe similarly recalled the detectives bringing a "huge book" to his house, labeled "Confession from Arnold Friedman" that strongly influenced his belief that the crimes had been committed. Interview Transcript of Aug. 6, 2001 Interview of Dennis Doe, 440.10 Petition Ex. CC, at 17.

At the same time, prosecutors told Jesse Friedman that if he didn't plead guilty, they would similarly prosecute both of his brothers, Seth and David, and a number of his friends. They claimed at the time to have evidence against them all. They then followed through and arrested his friend Ross Goldstein with 18 counts of child sexual abuse on June 22, 1988, despite having no evidence linking Goldstein to the computer classes (other than statements written by police officers on behalf of children). The same day, Newsday reported that police expected to arrest four more acquaintances of Jesse Friedman, and that there were allegations that Arnold and Jesse Friedman had sodomized each other in full view of all of the classes. At least two other boys were arrested but released.

Goldstein, who had never been an assistant in the computer classes in the Friedman home, had maintained his innocence for weeks while police threatened him and his parents with the same jail term they were pursuing for Jesse. However, approaching trial with no evidence other than the testimony of young children, police increased pressure on Goldstein to become the only adult witness against Jesse Friedman. They offered Goldstein a series of progressively more lenient sentences in return for his much-needed testimony, culminating in a promise of six months in county jail, Youthful Offender status, and probation. With these conditions, Goldstein finally signed a cooperation agreement in September of 1988 and agreed to testify against Jesse Friedman before the grand jury and at trial. See March 8, 2013 Letter from Ross Goldstein to Friedman Review Panel, 440.10 Petition Exhibit KK. After years of terrified silence, and with nothing to gain and much to lose from publicly associating himself with this case (his Youthful Offender status had for twenty-five years protected him from scrutiny) Goldstein now describes that process as a:

> result of tremendous and unrelenting pressure and intimidation by the police and district attorneys' office in which I was eventually coerced to lie about crimes taking place in order to try to save myself and be granted the youthful offender status deal that was being offered to me.

Id. at 1. He was told that he would have to stand trial alongside Jesse Friedman to face charges that he could not comprehend, and of which he had no knowledge. Id. Goldstein described the weeks leading up to his grand jury appearance, in which he was "coached, rehearsed and directed by the prosecutor and Detective William Hatch for hours on end." Id. He was told it was his "role to confirm what the complainants had said when they testified about what had happened to them during the computer classes." Id. They told him they feared none of the younger kids "would be willing to take the stand at trial" so they needed him to make the "evidence stick at trial." Id.

As Goldstein describes the process of being manipulated by ADA Joseph Onorato, Goldstein would refuse to confirm or admit allegations, or refuse to state that he saw Jesse doing anything to any complainant, because he "truly had no knowledge or participation or witnessed anything of the sort." Id. The prosecutor would then, in his words, "threaten me by placing the youthful offender status off the table. This happened repeatedly. This was like being tortured and treated like a puppet." Id. For him it was the "trauma of having actual memory stamped out and erased from history, and replaced by new, violent images of incidents that never took place." Id.[2]

That process was instrumental in preparing the third indictment, #69783, dated November 7, 1988. Combined with the detectives' renewed pursuit of accusations, it was an exponential increase in the charges: 302 counts of child sexual abuse against seven children, 198 against Jesse. (Indictment #69783). The counts were increasingly bizarre and nearly impossible to comprehend.[3] The third indictment alleged that the Friedmans led a mass sex ring in which various adults violently abused the children en masse and in plain view of the entire class. (Indictment 69783). It further alleged that all the children were led in sex games in which the class was forced to participate, involving the sodomy of every student. The sheer volume of the

[2] DA Rice refuses to acknowledge the validity of Goldstein's story, dismissing it as "self-serving," though she offers no explanation as to why the very private Goldstein would choose to associate himself publicly with such a damaging case, other than to set the record straight about having lied about a friend he believes never committed these crimes. Separately, in her report, she claims that Ross and Jesse had a homosexual relationship based on a comment by Goldstein's ex-girlfriend. (RR at 135, 32). That false claim, even if true, obviously has no probative value as to the validity of Goldstein's statements.

[3] Kenneth Lanning, a noted expert in the field of child sexual abuse, has offered certain comments in this case. Namely, he notes that generally, true accusations of sexual abuse tend to get "better" (or more believable) as the investigation goes on, whereas "bad" cases (or false ones) get "worse" (or less believable). See, Aug. 4, 2013 Affidavit of Kenneth Lanning, 440.10 Petition Ex. T at para. 19.

charges is indicative of their implausibility. One complainant alleged 104 counts of oral and anal sodomy in the first degree, in 72 separate incidents over two classes. (Indictment 69783, counts 49-153). According to the indictment, the student would have been abused three times per week (during a single hour and a half class per week), for ten weeks. The student then, according to prosecutors, then chose to re-enroll for the advanced class, where he was abused more than four times per class (once for every 22 minutes of class time) over another ten weeks. That student, as with all students, never complained once, and never displayed any physical sign of abuse, despite the horrific and repeated abuse alleged.

3. Jesse Friedman Pleads Guilty

Jesse Friedman now faced more than 200 counts of various forms of child abuse that were vaguely-defined and indefinite in time and place. Even if he successfully showed his innocence of the vast majority of them, he faced an extraordinary likelihood of spending most of the rest of his life in prison. He had been denied access to all evidence favorable to him, his father had been tricked into giving evidence against him, and his friend forced to do so under withering threats. The public who would comprise the jury also widely believed that he was guilty, largely due to the repeated outrageous claims in the media by police and prosecutors. DA Onorato had voluntarily appeared on television, describing the case as "the worst case I have ever seen in my 20 years as a prosecutor." Moreover, he faced ongoing threats to arrest his two brothers if he didn't plead guilty. On December 20, 1988, Jesse Friedman pleaded guilty to twenty-six separate counts (23 felony counts and 3 misdemeanor counts) within the three indictments against him in exchange for a six-to-eighteen-year sentence. Within a few years similarly outlandish mass sex ring cases, such as the now-infamous McMartin preschool and

Kelly Michaels cases began to unravel on appeal, but Jesse Friedman remained incarcerated (having no recourse to appeal) for 13 years.

4. Post-Conviction Proceedings

Friedman was denied parole four times over his years in prison, for his continued refusal to "accept" and "reaffirm" his guilt. Finally, on December 7, 2001, he was released from prison to supervised parole. Friedman filed a motion under CPL 440.10 in January of 2004 for failure to disclose Brady evidence. It was then that he also discovered, in seeking to challenge his plea, that the record of the plea allocution had been lost. The people opposed, and his motion was denied on January 6, 2006 without a hearing. Friedman then took his case to the United States District Court for the Eastern District of New York, seeking *habeas corpus* relief. Judge Seybert denied relief on January 4, 2008, for timeliness.

He then appealed that decision to the United States Court of Appeals for the Second Circuit. That case was argued on July 8, 2009. A supplemental motion for an actual innocence petition was filed twelve days later. The Second Circuit affirmed Judge Seybert's ruling, but, in its words, refused to "become an accomplice to what may be an injustice." Friedman v. Rehal, 618 F.3d 142, 161 (2d Cir. 2010). The Court, despite ruling the claim procedurally barred, reviewed the evidence and found a "reasonable likelihood that Jesse Friedman was wrongfully convicted." Friedman, 618 F.3d at 160. The Court was deeply skeptical of the validity of Jesse Friedman's guilty plea, noting:

> [W]ith the number of counts in the indictments and Judge Boklan's threat to impose the highest conceivable sentence for each charge, petitioner faced a virtually certain life sentence if he was convicted at trial. And the likelihood that any jury pool would be tainted seemed to ensure that petitioner would be convicted if he went to trial, regardless of his guilt or innocence. Nor could he have reasonably expected to receive a fair trial from Judge Boklan, the former head of the Nassau County District Attorney's Sex Crime Unit, who admitted that she never had any doubt of

> the defendant's guilt even before she heard any of the evidence or the means by which it was obtained. Even if innocent, petitioner may well have pled guilty.

Friedman, 618 F.3d at158. It also expressed concern about the basis of the testimony, noting the "consensus within the social science community" that "suggestive recovery tactics can create false memories" and that "aggressive investigation techniques like those employed in (Friedman's) case can induce false reports." Friedman, 618 F.3d at 160. It concluded that the evidence against Friedman was "extraordinarily suspect." Id. at 161.

Lacking a legal basis to act, it directed the District Attorney in Nassau County to do so, noting her obligations under New York Rule of Professional Conduct 3.8. It quoted comment 6B that states that when a "prosecutor comes to know of new and material evidence creating a reasonable likelihood that a person was wrongly convicted" that prosecutor must "examine the evidence and undertake such further inquiry or investigation as may be necessary to determine whether the conviction was wrongful." Id. at 159-160, *citing* Professional Rule 3.8, comment 6B. DA Rice did so, convening a review panel in November of 2010.

There is some history nationally of such reviews, notably in Dallas, Texas and New York City. *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). Observers have long been somewhat skeptical of the possibility of a prosecutor's office fairly reviewing the integrity of its own work in achieving a conviction, given the "natural unwillingness" to do so. Jonathan Kirshbaum, *Actual Innocence after Friedman v. Rehal*, 31 Pace L. Rev. 627, 649-654 (2011). The concern is that a prosecutor will perform a purely illusory investigation that is neither thorough nor meaningful. Id.

To alleviate those concerns, there are best practices that ensure actual reviews, not the illusory rejustifications warned of by Kirshbaum. Best practices include: 1) if a "plausible claim

of innocence" is presented, the entire criminal file, "including work product" is made available. Scheck, 31 Cardozo L. Rev. at 2250. 2) The unit that makes up the conviction integrity program must be "willing to investigate leads proposed by the party claiming innocence." Id. 3) The unit must be willing to allow lawyers for those presenting the claim to "investigate leads they are uniquely situated to pursue." Id. 4) They must have a "close working relationship with the Public Defender's office that permits a free exchange of information and joint investigations." Id. And 5), the unit should be led by a well-respected attorney who has experience in criminal defense. Id. at 2250-51.

Unfortunately, despite "reviewing" Jesse Friedman's conviction for two-and-one-half years, DA Rice's review was exactly the illusory process of which Kirshbaum warned. First, the celebrated "Advisory Panel[4]" she announced she had appointed to oversee the review did not actually conduct a review. (Transcript, Friedman v. Rice, Index No. 4015/13 (Sup. Ct. Nassau Cty. June 28, 2013) at 10-13, (440.10 Petition Ex. C). Rather, it reviewed biased distillations of evidence prepared and selected by a secret group of assistant district attorneys who actually conducted the "review." Jesse Friedman, despite making himself available and offering reams of his own notes and records, was never given access to the evidence being reviewed, and the District Attorney's office now refuses to return even the notes he himself contributed. There was never any sort of free exchange of information between the parties. In fact, witnesses were barred from speaking to the Advisory Panel, leaving their statements to be translated or "summarized" by the Review Team. One witness was so shocked to see the gross

[4] There are two relevant groups within the review of Friedman's conviction, which are herein referred to as the "Advisory Panel" and the "Review Team." The Advisory Panel was made up of four experts outside the District Attorney's office and announced by DA Rice. The Review Team, who actually had access to evidence and witnesses was comprised of assistant district attorneys within Nassau County. (440.10 Petition Ex. C at 12:6-12).

mischaracterization of her testimony by the Review Team that she wrote a public letter disavowing the statements and detailing her actual statements. See Aug. 19, 2013 Letter from Arline Epstein to Hon. F. Dana Winslow, 440.10 Petition Ex. D.

In June 2013 the Review Team published its "Conviction Integrity Review," reaffirming its faith in the conviction in an astoundingly disingenuous document filled with absurd reasoning (such as the conclusion that recanting witnesses' statements are by definition self-serving and unreliable), bizarre and irrelevant ad hominem attacks on Jesse Friedman (referencing possible marijuana use, accusations of homosexual behavior, frequent use of epithets like "psychopath," "pansexual," "deviant," etc.), persistent reliance on the contents of documents it refused to disclose, such as Grand Jury testimony, and demonstrably mischaracterized testimony.

Perhaps the most notable deficiency in the case against Jesse Friedman is that prosecutors and police had been unable to get classmates of the allegedly abused students to corroborate the abuse that was said to have happened to other students who sat alongside the alleged victims in the very same classes in which the abuse allegedly occurred. Challenged to explain how they were unable to find corroboration witnesses, the DA's report claimed that no class rosters exist (which is untrue, since they were in fact seized by the Nassau County Police in 1987 and since kept secret), and reconstructing them to corroborate would be too difficult. (RR at 123).

DA Rice revealed her true intentions with one accusation, not even relevant to the question of Jesse Friedman's guilt. The Report claimed that while in prison, Jesse Friedman "wrote," "penned," "possessed," and "distributed" shocking pornography involving incest, bestiality, and child rape, and had been punished for it. (RR at 50). DA Rice did not merely include these false accusations in her report, but highlighted it in press releases to poison the well of public opinion against Jesse Friedman. Within a few days of releasing the report, the DA's

publicity officer John Byrne distributed copies of the alleged stories to the New York Post, causing sensational headlines. The claim was of course, completely untrue. When asked to substantiate the claim that Jesse Friedman had written such stories, Byrne replied that "It's telling that Friedman's principal defense to a 155-page report documenting the integrity of his conviction is his quibbling over a few paragraphs concerning the degree of his involvement in possessing this material." June 28, 2013 Email from John Byrne, 440.10 Petition Ex. F. When challenged on the statement in a later court hearing, rather than admit the mistake, the DA's representative accused Friedman's counsel of forging the documents that disproved it. (440.10 Petition Ex. C at 43:4-6). After finally, and apparently for the first time, investigating the claim, the DA's office later apologized for the accusation, and conceded that Friedman did not possess the pornography, could not possibly have written the pornography, and had never been punished for it in prison. Transcript, Friedman v. Rice, Index No. 4015/2013 (Sup. Ct. Nassau Cty. Aug. 22, 2013) at 23:5-8 (440.10 Petition Ex. G).

By way of example of the mischaracterization of testimony and evidence, the review highlighted a letter from Scott Banks, Judge Boklan's law clerk, and one of the few living people to ever see the Grand Jury testimony. He wrote a two page letter, noting that:

> The grand jury testimony of child witnesses, largely elicited with leading questions by the prosecutor, demanding a "yes or no" responses, provided absolutely no detail…I recalled being troubled by the complete lack of medical testimony or medical evidence substantiating the allegations of extreme violent sexual abuse…the prosecution did not disclose witness statements, statements of children who denied being abused by Jesse Friedman, the children were subjected to 'counseling' arranged by law enforcement or the District Attorney's Office during the investigation of Friedman case, and some children may actually have been pressured by police investigators to get statements against Mr. Friedman. These questionable tactics, never presented to the court by the District Attorney's Office, are troubling to me, as they were to the Second Circuit, and raise substantial questions regarding the fairness of the proceedings…

Aug. 18, 2013 Letter from Scott Banks to Hon. F. Dana Winslow, 440.10 Petition Ex. A.

Rather than accurately describing Banks' grave concerns about the case against Jesse Friedman, the Review Team totally mischaracterized his statements as follows: "Judge Boklan's own law secretary, Scott Banks, a former public defender, confirmed that nothing in the lead-up to Jesse Friedman's plea bargain offended his sense of fairness." (RR at 86).

An even more galling illustration of their mischaracterization, can be seen in the case of complainant Barry Doe. In 2012, Doe totally recanted his alleged testimony, stating that:

> As God is my witness, and on my two children's lives, I was never raped or sodomized...I remember the cops coming to my house, and the cops being aggressive, and people wanting you to say almost what they wanted to hear. And, and I, I'll tell you I never said I was sodomized or, you know, I was never raped or, you know, molested. And I can't honestly tell you what other things I might have said....I never saw a kid get sodomized or molested. I was never sodomized or molested. And if I said it, it was not because it happened. It was because someone else put those words in my mouth.

May 21, 2012 Interview Transcript of Barry Doe, at 4, 440.10 Petition Ex. E. In her report, DA Rice argues that Doe's unequivocal recantation cannot be credited. First, she argues that because his testimony now is different than it was in 1987, his current statements are unreliable. Second, she claims, contrary to his statements, that "he actually believes that Jesse Friedman is guilty." (RR at 109).

Despite its glaring inaccuracies, the Rice Report does contain certain key facts. It acknowledges that the techniques used to elicit testimony from children were "unprofessional, unfair, and cruel." (RR at 72). It admits that boys were told that failure to disclose abuse would affect their future sexuality, or cause them to become "homosexuals" or abusers themselves. Id. It admits that police warned children would suffer "lasting psychological consequences later in life if they did not disclose abuse." Id. It also admits that police gave boys rewards for cooperating such as deputy badges and pizza parties. Despite these disturbing admissions, DA

Rice nonetheless concludes that there was no reason to think that those interviews could have resulted in unreliable information.

After the DA's office rebuffed Friedman's efforts to assist in the "review" numerous times, and two years after it began, Friedman filed a Freedom of Information Act ("FOIA") request for the documents being reviewed. The request was denied. Friedman appealed to the appeals officer, who similarly denied the request. Friedman then challenged that determination under Article 78 of the Civil Procedure Law and Rules, New York Civil Rights Law 50b, and Criminal Procedure Law § 190. Judge Winslow of the Nassau County Supreme Court requested the documents at issue, which had never before been revealed to Friedman. After multiple hearings, and after reviewing the documents himself, Judge Winslow conveyed his grave concerns about inconsistencies in the documents, and the exculpatory nature of the materials withheld from Friedman, ordering the disclosure of "every piece of paper" with Friedman's name on it. (440.10 Petition Ex. G at 36:21). The DA appealed, and that decision is awaiting decision at the Second Department of the New York Appellate division.

Shortly before the Second Department heard argument on that motion, the People revealed at a conference before Judge Corrigan in this Court that the DA's office, despite its supposedly exhaustive review, did not know the literal first thing about Jesse Friedman's conviction. They were unable to locate his record of conviction.

Argument

1. The Record of Conviction is a Critical Foundational Aspect to this Appeal

Under New York law, defendants have an "absolute and fundamental right to appeal a conviction. The denial of that right constitutes as much a failure of due process as would the denial of the right to a trial itself." People v. Rivera, 39 N.Y.2d 519, 522 (1976), citing Griffin v

Illinois, 251 U.S. 12, 18, People v. Montgomery, 24 N.Y. 2d 130, 134. In pursuing an appeal, every defendant has an absolute right to a record of "sufficient completeness." People v. Pride, 3 N.Y. 2d 545 (1958). Friedman has already firmly established his right to an appeal in this case. Setting aside the dispositive fact that a hearing on his actual innocence has been ordered, he has clearly demonstrated the case for his actual innocence under People v. Hamilton, a fact the People do not deny. Under that case, binding law in this department, if a defendant makes a *prima facie* showing of actual innocence he is entitled to a hearing on that innocence under the Due Process Clause of the Fifth and Fourteenth Amendment, as well as the cruel and unusual punishment clause of the Eight Amendment. Hamilton, 115 A.D. 3d at 28.

Logic dictates that the first step in determining whether Friedman is actually innocent of the crimes of which he was convicted is determining of what he was convicted. There is some overlap between those crimes of which he was accused and not convicted and those of which he was convicted. That is, Friedman has already demonstrated through sworn affidavits and witness testimony that he did not commit many of the crimes of which he was accused. See, 440.10 Petition at 78-124. If he cannot be said to have committed crimes against those students, and those students confirm they witnessed no criminal acts, it renders it unlikely that he committed crimes against those students' classmates. Indeed, more than *forty* eyewitnesses to the classes insist they witnessed no criminal activity, and refuse to corroborate the charges, rendering the contents of the indictments extraordinarily suspect. But recanting testimony and eyewitnesses, even in the strongest of terms, do not necessarily "zero" out all of the more than 200 charges of which he was indicted, though it makes them extraordinarily unlikely to have occurred. For example, indictment number 69783 accuses Jesse Friedman of 126 counts of Sodomy in the first degree. Friedman was convicted of 13 of those counts. The DA's office has never informed

anyone, and indeed apparently has no idea, which 13. Without identifying which 13 counts, alleging which acts on which days against which students constituted his crimes, Friedman is effectively left to disprove 113 counts of which he was never convicted.

The State is mandated by several laws to maintain the records of conviction, and it admits it has failed to do so here. First, Judiciary Law § 295 requires that complete stenographic notes are taken. Jud. L. § 295. This apparently did not happen. Second, the law charges the Division of Criminal Justice Services of New York with maintaining criminal records and other information. N.Y. Exec. Law § 837(6)(c). Moreover, it is required to make them available to local prosecutors. Id.§ (4-a). That information is not available to defendants. N.Y. Exec. Law § 837(6); see also People v. Buckley, 131 Misc. 2d 744, 747 (Sup. Ct. Monroe Cty. 1986). Despite these multiple mandates, the State is apparently unable to determine the crimes of which Jesse Friedman was convicted. No hearing on his innocence of those crimes can commence until it is determined what they are.

2. The Record of Conviction Should Be Reconstructed

Reconstruction hearings are generally available to defendants who "set forth appealable grounds." People v. Parris, 4 N.Y.3d 41 (2004). Typically, the requirement applies to defendants who seek to reconstruct a lost part of the record, because that lost part of the record would contain a basis for appeal. Id. Reconstruction is appropriate for a broad spectrum of records, including plea allocutions, *voire dire* minutes (People v. Harrison, 85 N.Y. 2d 794 (1995)), or the loss of records of a photo array (People v. Herndon, 216 A.D. 2d 918 (4th Dep't 1995)).

In this case, there is no question of Friedman's right to appeal. The record to be constructed is more fundamental than any record previously considered by courts. Friedman has

made the *prima facie* case that he is innocent of **all** the charges ever levied against him, but of course to undo his convictions, he must prove only that he is innocent of those charges of which he was convicted.

Here, it should be possible to reconstruct the record. Friedman is alive and in good health. ADA Onorato, who prosecuted Friedman, is also alive and, to the best knowledge of Defendant, in good health. Presumably, he has access to his notes of the case from 1987-1989. Friedman's attorney at the time is similarly alive and in good health. See Rivera, 39 N.Y. 2d at 524 (finding reconstruction impossible where defendant did not speak English, the prosecutor had suffered a paralytic stroke, the judge was deceased, and the defendant's attorney had been disbarred and could not be located). Justice Winslow of the Nassau County Supreme Court has expressed hope of locating the allocution minutes, noting in 2013:

> ...I had some of the other concerns that I didn't voice before. Since there was no appeal, there was no transcription. But that does not mean destruction, as we keep hearing about. The stenographic notes were sent to Albany and then maybe Utah and maybe Taiwan. I have no idea. They are being tracked at this very moment, and I hope to have and will, of course, share with the parties such stenographic notes or materials as this Court receives.

(440.10 Petition Ex. G at 35:5-14). Even if those notes, or the record of conviction, cannot be located, enough information should be available to reconstruct the record assuming the cooperation of the District Attorney's office.

3. If Reconstruction Proves Impossible the Convictions Should be Summarily Reversed

New York Courts have set forth three situations in which summary reversal is the appropriate record for a missing records: 1) when reconstruction of the missing record is impossible (see e.g. People v. Jacobs, 286 A.D.2d 404 (2d Dep't 2001)); 2) when necessary records are completely or substantially missing (see e.g., People v. Natal, 56 A.D.2d 589 (1st Dep't 1977); or 3) when the loss is due to the active fault of the People (see People v. Helsel, 303

A.D.2d 1040, 1041 (4th Dep't 2003). Under the Court of Appeals' mandate, there "must be a reversal" when "lapse of time," "unavailability of participants," or some other "similar circumstance" renders the reconstruction impossible. People v. Harrison, 85 N.Y.2d 794 (1995).

The Court may well determine later that so many records are missing that dismissal is warranted, or that the People are actively at fault for losing the records of conviction. This motion seeks summary reversal if reconstruction proves impossible. There is no doubt in such circumstances dismissal is warranted. The Court in Rivera could not reconstruct missing records given the death of the judge, the disappearance of defense counsel, the disability of the prosecutor, and the fact that the defendant did not understand the proceedings due to a language barrier, and thus could be of no help reconstructing them. But if they cannot be reconstructed with sufficient reliability to allow the appeal to proceed, New York law mandates summary dismissal.

Conclusion

For the foregoing reasons, the Court should order a reconstruction hearing to reconstruct Friedman's record of conviction. If the record cannot be reliably reconstructed, the Court should summarily reverse Friedman's convictions.

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