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Questions Presented

1. Does Public Officer Law art. 6, § 87(2)(e)(iii), which exempts from FOIL records that identify confidential informants, create a presumption that any witness who does not testify at trial is a confidential informant, regardless of whether, as every department of the Appellate Division but the Second Department requires, the witness was promised confidentiality or other circumstances indicate confidentiality?

2. Does the above cited exemption create a blanket exemption from FOIL for all documents and records created in a criminal investigation or reinvestigation, regardless of whether they relate to a witness?

3. May a state agency, given this Court's ruling in Fappiano v. N.Y. City Police Dep't, 95 N.Y. 2d 738, 724 N.Y.S.2d 685 (2001), avoid disclosure of any records within a demand merely by reciting the language of statutory exemptions without particularizing the applicability of the exemption or identifying the documents withheld?

4. Did the Second Department of the Appellate Division err in overturning and dismissing Supreme Court's factual finding that Friedman had stated good cause for disclosure of documents under Civil Rights Law 50-b(2)(b)?

5. Did the Second Department of the Appellate Division err in overturning and dismissing the Supreme Court's factual finding that Friedman had identified and particularized and compelling need for disclosure of grand jury minutes?

Appellant Jesse Friedman ("Friedman" or "Appellant"), by and through his counsel, hereby submits this brief in support of his appeal to the Court of Appeals of New York, seeking to reverse the order of Appellate Division, Second Department, and reinstate the order of Supreme Court, Nassau County.

Introduction

Appellant Jesse Friedman seeks to bring Appellate Division, Second Department's jurisprudence in line with the rest of the State of New York and the federal practice in its interpretation of the Public Officers Law Section 87(2)(e)(iii). N.Y. Pub. Off. Law § 87(2)(e)(iii) (Consol. 2016). In 2013 then-petitioner Friedman sought and was granted an order under CPLR Article 78 disclosing the investigatory files of Friedman's 1989 criminal case and the factual materials acquired in the course of the District Attorney's "reinvestigation" of the case. The District Attorney[1] appealed the entirety of the order, which at Supreme Court centered on whether Friedman had "good cause" to acquire the documents under Civil Rights Law 50-b(2)(b). N.Y. Civ. Rights Law § 50-b(2)(b) (Consol. 2016). That question is now largely settled in the affirmative. But Appellate Division reversed, finding that the District Attorney's Office could retroactively characterize its entire case file as documents relating to confidential informants

[1] Respondent Kathleen Rice, as District Attorney of Nassau County is a party in name only. The current District Attorney is Madeline Singas. Within this brief, the terms "District Attorney," the "DA," "District Attorney's Office," or "Rice," all refer to the Respondent.

under Public Officers Law Section 87(2)(e)(iii), thus shielding them from disclosure. A. 2304. Appellate Division relied on case law unique to the Second Department. Those cases deem *any* witness or source of information who does not testify at a trial to be a "confidential informant," regardless of whether they asked to be or were promised to be treated as such, and even in the case of complaining witnesses, who by definition could not be confidential informants. No other department of the Appellate Division has such a rule. The Second Department decision expanded this exception to FOIL even further, deeming every document in the case-file to be protected by the exception without any factual showing of what the documents are and how they fit into the exception.

Six years ago, in an extraordinary ruling, the United States Court of Appeals for the Second Circuit conducted a painstaking examination of the available record of the Friedman conviction. Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010). It then issued a scathing denunciation of the practices that led to Friedman's conviction. It noted that Nassau County had been caught up in a "moral panic" that characterized many false mass-child-sexual abuse cases in the late 1980s, and strongly suggested that Friedman was wrongfully convicted. Id. at 158-160. The Second Circuit called upon Rice to assess "the means by which his conviction was procured;" and found there were State avenues open to Friedman to vindicate himself, including an actual innocence claim, and a claim to overturn the judgment

of conviction based upon the bias of the trial judge. Id. at 158-161. The Second Circuit was deeply troubled by the absence of a developed factual record, and Rice's continuing opposition to an evidentiary hearing. Id. at 160-161.

In response, Rice commissioned a "re-investigation" of the Friedman case, and three years later issued a report attacking Friedman and reaffirming her belief in his guilt. In addition to being filled with demonstrable falsehoods and factual errors, and excluding key evidence, the Rice Report was a lengthy screed against the Second Circuit.[2] Supreme Court, Judge F. Dana Winslow presiding, expressed concern for Rice's failure to honor the Second Circuit's direction, and ordered Rice to provide it with many of the primary documents in question and tens of thousands of pages of unredacted materials, long withheld from any eyes independent of the prosecution. A. 1873. Following this careful review, Supreme Court found that Friedman had shown good cause to obtain these documents, so that he could continue to pursue his claims of wrongful conviction, obtain relief from the legal disabilities of being designated a sexual predator, and otherwise clear his name. A. 2285. Supreme Court also found a compelling public interest

[2] That report, hereinafter referred to as the "Report" or the "Rice Report" was included in the appendix filed with Appellate Division at page A. 0283. For reasons unknown to Friedman, the District Attorney redacted the entire Report from version served on Friedman. Appellant cites to the form of the Report contained as an exhibit to the District Attorney's August 2013 opposition to the Petition below which begins at A. 1977. Respondent also relied below on witness statements, contained in their appendix at A. 1378-1827. Those too were withheld from Appellant as "confidential." Respondent relied below on an appendix that is more than 600 pages longer than what it ever provided Appellant.

in releasing these documents to Friedman, including the need to restore public trust in the integrity of the justice system. This latter finding was made after the most sensational allegations in Rice's Conviction Integrity Review were shown to be false in open court, (A. 1891, A. 2275-77), and the Assistant District Attorney representing the Respondent doubled-down on this falsehood by baselessly accusing Friedman's counsel of forgery. A. 1907.

Supreme Court was deeply troubled by its review of these long-suppressed documents which it found contained Brady material never shared with Friedman (which the District Attorney does not deny), and which tended to cast doubt on whether these crimes had occurred at all. A. 2277. After carefully balancing the interests favoring disclosure against the unique diminishing of genuine privacy concerns in this case, Supreme Court agreed that disclosure was required.

Supreme Court's findings were manifestly correct. Armed with the evidence Rice has fought so long to conceal, Friedman could pursue the options available to him, including a petition to alter his status under the Sex Offender Registration Act ("SORA") or an application for Pardon. Even absent these documents, Friedman has made a sufficient showing of his innocence to be granted an order for a hearing on his actual innocence claims in County Court, Nassau County. But regardless of the utility of the documents, Supreme Court's order should be reinstated. Appellate Division's order does not merely constitute rogue jurisprudence among

otherwise unanimous departments, it flies in the face of the legislature and this Court's consistent admonition of what FOIL is, and how FOIL should be read. More importantly, it conceals, rather than illuminates, a deeply flawed investigation and prosecution that even the District Attorney admits was "at a minimum, unprofessional, unfair, and cruel." A. 2072.

Statement of Facts

On November 25, 1987, in the midst of a national hysteria regarding false accusations of mass child sex abuse in schools and day care centers, Nassau Country police arrested Jesse Friedman, 18, and his father Arnold Friedman on a felony complaint alleging that they had sexually abused children in after-school computer classes conducted in the Friedman home. Nassau County charged Jesse Friedman with two-hundred and forty-three counts of sexual abuse in three separate indictments in the ensuing year. Rehal, 618 F.3d at 146. The indictments included allegations from fourteen complainants, ranging in age from eight to twelve. Id. The charges against Friedman, described by the Second Circuit as "bizarre, sadistic, and even logistically implausible" (id. at 148-149) were as implausible as those described in over 70 other mass-hysteria cases of the period including the McMartin case, virtually all of which later unraveled. Id. at 156 ("at least seventy-two individuals were convicted in nearly a dozen major child sex abuse and satanic ritual prosecutions…almost all…have since been reversed.").

The charges – described in the Rice Report as "realistic" (A. 2064) – included accounts of mass sexual games with names like "Leapfrog" in which up to five adults would attack a classroom full of children, lining them up and serially sodomizing them by "leaping" from one to the next. Rehal, 618 F.3d at 148, see also A0181 at 11:09-12:16. Charges included one child having been sodomized every fifteen minutes over the course of ten 90-minute classes, and even more frequently in special "make-up" classes. Despite the overwhelming number of counts and alleged victims:

- There was no medical or physical evidence of such violent sexual abuse. Rehal, 618 F.3d at 146, A0181 at 14:00-14:20.
- There were no complaints of abuse for years by any student prior to police interrogations. Rehal, 618 F.3d at 146.
- No parent had ever raised suspicion. Id. at 148.
- Many students who sat alongside complainants in classes in which abuse was alleged did not corroborate the complainants' recollections of abuse. See, infra at pp. 52-59; A. 0181 at 16:00-20:30.

No child in the Friedman case wrote his own statement. Every statement was composed by a detective, usually after multiple interviews, and many contain decidedly adult language. Before each of the three indictments in the case, each child testified before a grand jury. This grand jury testimony is equally suspect. In a letter to Judge Winslow, Scott Banks, law secretary to Judge Boklan in the Friedman case writes:

> The grand jury testimony of child witnesses, largely elicited with leading questions by the prosecutor, demanding "yes or no" responses, provided absolutely no detail….I recall 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 actions and 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…

A. 2230. It is a challenge to even imagine such crimes taking place, and especially without a shred of medical evidence or murmur of complaint from any child or parent over the course of five years during which the Friedman computer classes occurred. A. 0181 at 11:25-12:16, 16:00-20:30. However, the presiding judge, who described herself as "outraged" (A. 0092) at the allegations, threatened that if Friedman went to trial she intended to sentence him consecutively on every count (tantamount to life in prison). A. 0204, 0181 at 35:50-36:20. The Second Circuit found that these circumstances clearly suggested that Friedman's guilty plea was coerced. Rehal, 618 F.3d at 158. The volume of charges, coupled with the community hysteria surrounding the case, threats of a 50-year sentence by the presiding Judge, and other circumstances left him with no real choice but to plead guilty.

More than two decades later, in what was to the best of Petitioner's knowledge a unique admonishment, the United States Second Circuit Court of Appeals went out of its way to detail both the implausibility of the allegations and the numerous shortcomings in the investigative, prosecutorial, and judicial conduct in the case. Id. at 146-161. It then highlighted the ethical obligations of a public prosecutor, and invited the District Attorney's Office of Nassau County to live up to its obligations by undertaking a complete review of the Friedman case, noting also that the evidence before it suggested that Friedman may still have claims to pursue before the State courts. Although the Second Circuit denied habeas corpus relief, it examined the record and concluded there was a "reasonable likelihood that Jesse Friedman was wrongfully convicted." Id. Powerless, it nonetheless averred that:

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

Id. at 161.

In response, rather than fulfill its obligations, the District Attorney's office trivialized the Second Circuit's judgment, and waged an attack on Justice Winslow, as well as the filmmakers who produced "Capturing the Friedmans," the documentary film that brought the prosecutorial misconduct to the attention of the public.

In the decades following Friedman's guilty plea, the evidence unearthed by Friedman and advances in the social science of mass child sexual abuse cases and their investigation has eviscerated the case against him. As the Second Circuit found:

> "The quality of the evidence was extraordinarily suspect."
>
> "Police, prosecutors, and the judge did everything they could to coerce a guilty plea and avoid a trial."
>
> "Detectives generally entered an interview with a presumption that a child had been abused and refused to accept denials of abuse."
>
> "This strategy was designed to force children to agree with the detectives' story."
>
> "Aggressive investigation techniques like those employed in [Friedman's] case can induce false reports"
>
> "The tactics were so aggressive that several former students admit that they responded to them by falsely alleging instances of abuse."
>
> "The allegations also grew increasingly bizarre, sadistic, and even logistically implausible."
>
> "Prosecutors have an obligation to curb police overzealousness. In this case, instead of acting to neutralize the moral panic, the prosecution allowed itself to get swept up in it."

Id. at 158, 146, 147, 160, 147-48, 158.

Testimony was gleaned from police bullying tactics used on children as young as eight, including assuming the guilt of Friedman during interviews, which Detective Sgueglia freely admitted. A. 0151, 0181 at 3:00; A. 2206 at 4:00-7:00, 13:30-16:22, 18:22-23:50. Parents describe the police as having "already formed

their opinion of what happened in the computer classes and that they were just trying to get his son to agree with their story." A. 0185, 0181 at 3:00-6:00; 2:00-7:00, 2206 at 4:00-7:40; see also A. 2206 at 18:22. The police interrogated for hours those who refused to admit sexual abuse, visiting their homes repeatedly (in at least one case fifteen separate times, and in another five times), telling them they would stay "for as long as it takes." A. 0194. Indeed, Detective Merriweather told Arline Epstein, a mother of a computer student, that he had just questioned a child for seven hours before the child disclosed abuse. A. 0181 at 5:37.

In recent years, a number of the original fourteen complainants have fully recanted their stories of abuse. See e.g. A.2206 at 12:40 (Stephen Doe), 13:30 (Barry Doe); 14:40 (Keith Doe); 16:22 (Kenneth Doe). One complaining witness, "Kenneth Doe," whose testimony was responsible for 15 charges to which Friedman plead guilty, issued a written statement asserting "the police repeatedly told me that they knew something had happened, and they would not leave until I told them. . . . I guess I just folded so they would leave me alone."[3] Mr. Doe, now a successful young businessman, has acknowledged that "none of the events allegedly described by or attributed to Kenneth Doe ever took place . . . . I did not observe Arnold or Jesse Friedman engage in anything even remotely akin to sexual

[3] The documents cited are part of the record of this case, and submitted below at A. 0265. They were withheld, however, from the version of the Appendix served on Appellant (then-Respondent), which differed from the version filed with Appellate Division.

conduct, and I have no reason to believe such events occurred." See n. 3; see also A. 2206 at 16:22. Kenneth Doe only came forward after he was provided with notice of the Article 78 Petition.

Another cause of false testimony was statements gleaned using "memory recovery" techniques now known to create false memories. See Rehal, 618 F.3d at 156, 160 ("memory recovery procedures…have great potential to induce false memories"); A. 0055-58; 0155. The District Attorney often narrows such techniques to hypnosis,[4] and vociferously denies it was used. The DA has never explained the witnesses who continue to report it having occurred, nor the presentations by Friedman case detectives and therapists reporting its "successful" use. At least one complainant refused to assert any abuse until he was subjected to hypnosis, stating "I just remember that I went through hypnosis, came out, and it was in my mind." A. 0155, 0181 at 24:50-25:50. That child was the source for thirty-five separate sodomy counts against Friedman. He is one of a small number of complaining witnesses who still states that he believes he was molested, though according to the Rice Report, he has substantially altered his accusations and that it would be "perilous to rely on" him. A. 2079.

[4] While ample evidence exists for the use of hypnosis, it is merely a distraction. The memory recovery techniques used go far beyond hypnosis, and there is no debate they were used immediately. A. at 34:15-44:15. Indeed, the escalation in charges from zero counts of sodomy in the first indictment to hundreds in later indictments suggests this. That Nassau County in 1988 pointed to the use of therapy as the source of those allegations in later indictments confirms it. Id.; see also A. 0181 at 20:40-21:50; see also *infra* at p. 50 (Fred Doe example).

Judge Boklan, who presided over the case, had on numerous occasions stated that there "was never a doubt in my mind as to [Friedman's] guilt." A. 0091, 0181 at 37:45-38:05. Further, she told Peter Panaro, Jesse's Attorney, that "if Jesse were to go to trial she intended to sentence him to consecutive terms of imprisonment for each count he was convicted on." A. 0204. Every court to consider such threats has found them to be impermissibly coercive. See People v. Richards, 17 A.D.3d 136, 792 N.Y.S.2d 79 (1st Dep't 2005); People v. Santiago, 71 A.D.3d 703, 894 N.Y.S.2d 904 (2d Dep't 2010).

During the pendency of Friedman's case, Judge Boklan also read portions of the Grand Jury testimony into the record during the sentencing of a defendant, Ross Goldstein, in a related case, and violated the plea agreement by imposing a two-to-six year sentence, later vacated on appeal. Justice Boklan also made the Friedman case the first in the history of the County to allow television cameras in the courtroom. A. 0081. The public were not just aware of the case and the extraordinarily inflammatory accusations, they had been told repeatedly there was no issue of doubt long before a jury pool could be selected.

Beyond Judge Boklan's conduct, the Nassau County police detectives threatened Friedman with continuing arrests not only of Friedman, but also of his two brothers. Adding to the community hysteria, Detective Sergeant Galasso publicly proclaimed she intended to arrest up to four of Friedman's friends for their

alleged participation. Rehal, 618 F.3d at 159; see also A. 2206 at 47:30-51:22. Friedman's mother worked to persuade Jesse to plead guilty, since she believed it was his only hope of avoiding life in prison, and to save the rest of her family. She even wrote a letter to Friedman's attorney offering ways he could convince Friedman to do so. A. 0907, 0181 at 35:50-36:50. Despite his oft-stated desire to stand by his innocence, Friedman was convinced by the sole sources of guidance in his life that he would be a candidate for early release, and that the plea was the only way to avoid life in prison.

The sum of evidence weighing against Friedman's guilt and the voluntariness of his plea, the disintegration of the little evidence against him, and the absence of any physical evidence that these crimes ever took place (described by former District Attorney Onorato himself as a "dearth of physical evidence" against Friedman) (A. 0181 at 14:20) compelled the Second Circuit to state that a "further inquiry by a responsible prosecutor's office is justified despite a guilty plea entered under circumstances which clearly suggest it was not voluntary." Rehal, 618 F.3d at 161.[5]

[5] Respondent below devoted considerable energy to arguing the finality of a guilty plea, without explaining how such finality for the prosecution in 1989 extends to New York's policy of open government and document disclosure decades later, or how it negates the District Attorney's ethical obligations today. It is certainly true, as Respondent argued, that had Friedman not been coerced into pleading guilty, all of the sought-after records would have been made available to him. This assertion cuts heavily against Respondent's invocation of the complaining witness' privacy rights, which would have been cast aside by Respondent in order to prosecute Friedman.

The Second Circuit based its direction to re-examine Friedman's conviction on New York Rule of Professional Conduct 3.8. The rule forbids a prosecutor from maintaining a criminal charge that is not supported by probable cause, and obligates one to "make timely disclosure" to a defendant of the "existence of evidence or information known to the prosecutor that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence…" N.Y. Rules of Professional Conduct, N.Y. Comp. Codes R. & Regs. 22, § 1200.00, Rule 3.8. Comment 6B to Rule 3.8 explains that a prosecutor is obligated not merely to avoid wrongful convictions, but to take remedial action when it "appears likely that an innocent person was wrongly convicted." Id. at comment 6B.

The New York rule is identical to the American Bar Association's Model Rule 3.8, which has in turn given birth to "conviction integrity programs," most notably in Dallas, Texas and New York, New York. A. 0225. Though no such program exists in Nassau County, the District Attorney's Office announced the convening of an advisory panel to "oversee" the District Attorney's conviction review. A. 0238. In the absence of clear rules for such a review (as here), best practices have emerged from these programs. First, if a "plausible claim of innocence" is presented, the prosecution's "entire case file, including work product, is made available." A. 0225. Second, the unit that makes up the program is "willing to investigate leads proposed by the party claiming innocence. " Id.

Third, the unit is "willing to allow" lawyers for those who have presented plausible innocence claims to "investigate leads they are uniquely situated to pursue." Id. Fourth, there is a "close working relationship with the Public Defender's office that permits a free exchange of ideas and joint investigations." Id. Fifth, the unit is led by well-respected attorney who has experience in criminal defense. A. 0225-227. The investigation is not performed necessarily as an adversarial proceeding; rather the unit should take the neutral stance an administrative agency would. A. 0225. This is logical because the inquiry does not involve punishment – here the sentence has been served.

The "Review Team" charged by Rice with the Friedman conviction review failed to abide by any of these recommended practices. Respondent had no insight into the process, no meaningful opportunity to participate, and no access to any of the documents created by the investigation. Moreover, the District Attorney's office conducted its investigation outside the view of its own advisory panel, filtering all the evidence seen by panel members and excluding thousands of pages of documents including the most important ones: the original witness interviews, statements, police reports, and grand jury testimony (A. 1875-82), a fact that was deeply troubling to the court below. Surprised to learn how much had been withheld from the advisory panel, Judge Winslow admonished the District Attorney:

> What was the difference in what they got? Because, quite frankly, and I'm sure that you recognize that an advisory group, like any expert, and you've seen that enough I know Mr. Schwartz, is only as good as the information they have and are utilizing in reaching determinations and opinions.

A. 1881.

The re-investigation was so opaque that after the DA published her report, the most prominent member of her Advisory Panel, Barry Scheck, issued an affidavit that acknowledged the lack of transparency and called for all relevant documents to be released to Friedman's counsel. Scheck averred:

> Members of the Advisory Panel did not interview witnesses, except, under limited circumstances, Ross Goldstein and Jesse Friedman, nor did we personally review grand jury minutes, original copies of police reports, or the District Attorney's file. The Advisory Panel did not make credibility determinations. Such determinations were the exclusive province of the District Attorney.
>
> I have now read the post-conviction application submitted by counsel for Jesse Friedman, and have had the opportunity to review some of the evidence on which those claims are based. The defense raises very specific claims that there are a number of serious substantive errors in the Rice Report. The parties to this litigation have drawn starkly different conclusions about the credibility of witnesses who did come forward.
>
> I believe it would be desirable for the court and the parties, utilizing whatever procedural mechanisms the court deems suitable, to review materials not available to the Advisory Panel, such as grand jury minutes, the original case file, and the results of the re-investigation to aid in finally resolving, to the extent it is possible, the issue of Jesse Friedman's guilt or innocence.

All such admonitions went unheeded by the District Attorney. Friedman was forced to file a series of requests, and ultimately the Petition appealed here, to

obtain the primary documents he requires to pursue, *inter alia*, the avenues of State relief suggested by the Second Circuit.

1. Jesse Friedman Today

Jesse Friedman entered the New York State prison system at age 19. He was first held in the Nassau County Jail, where he was viciously assaulted by guards and prisoners alike. Later he spent his sentence in such severe institutions as Dannemora and Coxsackie. He was denied parole repeatedly because of his refusal to "accept" and restate his guilt, serving thirteen years of his six-to-eighteen year sentence. After his release, Jesse was unable to obtain employment because of the nature of his conviction. He returned to college and worked toward his undergraduate degree until his finances were exhausted. He eventually found temporary work, while adhering to onerous parole restrictions, including curfew and mandatory sex-offender therapy three times per week. He was repeatedly forced to move from rental apartments when landlords learned of his sex-offender status. Four times religious congregations he had joined asked him to leave after learning of his history.

He was diagnosed with Post-Traumatic Stress Disorder after his release from prison, and underwent therapy for years to treat it, eventually lowering his "critical" diagnosis to being almost asymptomatic. Despite those considerable obstacles, Friedman has managed to create a respectable life. He married his now

wife, Elisabeth Walsh, on January 2, 2007. In the last seven years, he has created a fully operational web-based store, which now provides them with a modest living. To deal with the problems of repeated eviction, the couple pooled their resources with Jesse's brother to purchase a modest house in Connecticut. His ability to have lived an exemplary post-conviction life, and to maintain friendships and business relationships undermines the notion of a young man so demented and damaged that he sadistically raped dozens of children.

Jesse continues to face a difficult future as a "Level-3 Violent Sexual Predator" under the Sex Offender Registration Act ("SORA"). N.Y. Correct. Law § 168 *et seq.* (Consol. 2016). While Jesse and Elisabeth hope to one day have a child, this possibility is overshadowed by his conviction and SORA restrictions. Jesse and Elisabeth would live in constant fear of child welfare services rending the family apart due to Jesse's conviction. His prohibition from being within 1,000 feet of a school would make it impossible to perform the simplest of parenting tasks. His children would inevitably harbor a fear that people would find out they have a parent who is a registered sex offender. Even inviting a friend to visit would never be an option for Jesse and Elisabeth's child.

For more than twenty-five years Jesse has spent either in prison or living under the suspicious eyes of parole authorities, he has been denied much of what we take for granted. Many of life's normal joys, such as simply having a family,

will be denied to him forever if this conviction – built on a tapestry of lies and admitted misconduct and on a foundation of mass hysteria now debunked pseudo-science – is permitted to stand.

2. Procedural History of the Document Requests

After Appellant assembled her review staff, Friedman complied with every request they made for interviews, waivers, and document production. Documentary filmmaker Andrew Jarecki, though not within Friedman's control, provided full access to all of his investigatory materials, including unredacted tapes and complete transcripts of witness interviews. After the District Attorney rebuffed numerous requests for case documents, Respondent first requested of the Nassau County District Attorney's Records Access Officer two categories of documents on September 19, 2012. A. 0001. Under the New York Freedom of Information Law ("FOIL"), Article 6 of the Public Officers Law, Friedman requested the documents provided by Nassau County District Attorney's Office to the entity known as the "Friedman Case Review Panel." In the event of a denial, it requested the reason. Friedman requested the records so he could contribute to the evaluation of this evidence in a meaningful way, and to confront evidence (if it existed) that he had never seen before. This request for transparency was made in accordance with the best practices of conviction integrity reviews. A. 0225.

The request was summarily denied. By letter dated October 12, 2012, Chief Assistant District Attorney Singas based the denial on Civil Rights Law §50-b, which under certain circumstances restricts the production of documents that tend to identify a victim of a sex crime, Public Officers Law §87(2)(a), which permits an agency to withhold from publication records that are specifically exempted from disclosure by state or federal statute; §87(2)(e)(iii), which permits withholding of documents which identify a confidential source or disclose confidential information relating to a criminal investigation, and §87(2)(e)(i), which permits the withholding of documents which if disclosed would interfere with a law enforcement investigation or judicial proceeding. N.Y. Pub. Off. Law §87(2) *et seq.* (Consol. 2016); A. 0007.

Thus Friedman appealed that determination to the FOIL Appeals Officer in Nassau County by letter dated November 13, 2012. A. 0011. The appeal noted that blanket, unparticularized claims of exemption as used by the District Attorney are inadequate under New York law. Id. Nonetheless, Friedman's request for documents was denied again. By letter dated December 3, 2012, ADA Robert Schwartz argued that the claim of exemption was not "general" or "unparticularized," but did not provide any particularization—it merely described four broad categories of exemptions into which fell the materials: "redacted witness statements, summaries of witness interviews, [the District Attorney's

Office's] analysis of these interviews and other evidence, and inter-and intra-agency communications." A. 0015. The District Attorney's office, by its letter and today, continues to rely on blanket exemptions, contrary to New York Law, to avoid *any* insight into its investigative process.

Friedman then instituted the instant action in April, 2013, seeking disclosure of the case file. A. 0018. Out of an abundance of solicitude for possible privacy interests, Judge Winslow wanted to determine if any of the complainants had any objections to the requested relief, although the statute does not require the court to conform its behavior in accordance with such objections. A. 0028; N.Y. Civ. Rights Law §50-b (Consol. 2016). Of the seventeen original complainants, fourteen failed to respond, strongly suggesting that they simply did not care. Of the three who objected, *viz.,* "Barry Doe," "Edward Doe," and "Gregory Doe," none provided a legally-cognizable reason to withhold the documents from Friedman and his legal team, who have known their actual identities for decades. A. 1874, 0804. On November 25, 1988, Friedman's defense was given the complete names of all of the complaining witnesses, together with their corresponding "Doe" names.

Of the three who did object, "Barry Doe" fully recanted the allegations the police attributed to him in 1988 to filmmaker Jarecki[6], and repeated this recantation, though counsel, to the court below. A. 2255-56, 1848. Gregory Doe was the complainant who made the most florid allegations that appeared on camera in the film "Capturing the Friedmans," stating that he did not remember anything about sexual abuse until he was hypnotized. None of the three made any claim that they were promised or expected confidentiality when they provided their statements to the police in 1988. Indeed, as evinced by the November 25, 1988 letter disclosing their identities to counsel, no such promise was possible.

Judge Winslow then requested to see for himself the witness statements withheld, which the District Attorney provided. A. 1874-75. After further briefing, an extensive hearing on the merits, and his own review of some of the documents withheld, Judge Winslow found good cause for disclosure, as well as a compelling and particularized need for the grand jury testimony, and ordered its production as well. In recognition of the three of the seventeen complainants who objected, he further ordered the redaction of their names from the statements. A. 2285-86.

[6] Barry Doe's recantation was unequivocal: "I can tell you, 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." A. 0181 at 8:00-8:45, see also A. 2206 at 13:30.

The District Attorney immediately moved to stay, and appealed to Appellate Division, Second Department. Appellate Division heard argument in February, 2015 and issued the appealed-from order on December 9, 2015. Appellate Division's deeply flawed decision, that highlights its stark departure from the other Departments and is wholly unjustifiable under the law of New York, should be reversed, and Supreme Court's order reinstated in full.

Argument

Supreme Court ordered the disclosure of two categories of documents. First, the "case file" on Friedman, which witness statements and other material reviewed by Justice Winslow constitute. The second is grand jury minutes. Appellate Division overruled Supreme Court as to the first category citing its case law on Public Officers Law § 87(2)(e)(iii). A. 2305. That section hides from disclosure documents that identify confidential informants and are compiled for law enforcement purposes. N.Y. Pub. Off. Law § 87(2)(e)(iii) (Consol. 2016). Appellate Division overruled Supreme Court's order as to the second category of documents based on its deeply flawed interpretation of Criminal Procedure Law §190's "compelling and particularized need" requirement. A. 2305.

Appellate Division's interpretation of the confidential informant exception to New York's FOIL is obviously flawed and out-of-step with the rest of the State's jurisprudence. It is equally flawed because the District Attorney's office

has never made a factual showing of what the file contains or why any piece of paper in it fits into the exception, let alone every piece of paper. Clearly, the members of the District Attorney's office have the file in hand, and the law obligates them to make such a showing. Appellate Division's reasoning in reversing the disclosure order of grand jury minutes has an equal but opposite flaw. Appellate Division reversed that part of the order because Appellant had failed to make a specific factual showing as to what the grand jury minutes would contain. A. 2305, see also A. 2312. Appellant, of course, does not have those minutes in hand. But those minutes, as Appellant *has shown*, contain significant quantities of testimony that the witnesses now disavow and claim to have been actively coerced.

This brief first addresses New York's FOIL and the relied-upon exception to it. It next addresses the Criminal Procedure Law's mechanism for the release of grand jury minutes, and why it is justified in this case. Finally, the brief addresses the Civil Rights Law, under which Supreme Court found good cause to release the documents. Though Appellate Division did not address that section, it merits addressing why Supreme Court's order was correct and should be left undisturbed.

I. THE SECOND DEPARTMENT'S ORDER UNJUSTIFIABLY EXEMPTS A BROAD NEW CATEGORY OF DOCUMENTS FROM FOIL.

A. The Order Deviates from the Other Departments and the Federal Analogue.

The New York Freedom of Information Law ("FOIL"), Public Officers Law Art. 6, §§ 84-90 (Lexis 2015), "provides the public with broad 'access to the records of government.'" Matter of Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 462, 849 N.Y.S.2d 489 (2007), citing N.Y. Pub. Off. Law § 84. "Public disclosure laws are liberally construed to allow maximum access," and "exemptions narrowly construed." Miracle Mile Associates v. Yudelson, 68 A.D.2d 176, 181, 417 N.Y.S.2d 142 (4th Dep't 1979). Any agency seeking to avoid disclosure must "claim a specific exemption," but "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government." Matter of Data Tree, 9 N.Y.3d at 462, citing Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367 (1987).

In every department of the Appellate Division except the Second, records that are compiled for law enforcement purposes and fit into one of four narrow categories are exempt from FOIL. See N.Y. Pub. Off. Law § 87(2)(e). Section 87(2)(e)(iii) exempts records identifying a confidential informant. Id. at § 87(2)(e)(iii). The appellate divisions of the First, Third and Fourth Departments apply the § 87(2)(e)(iii) exemption like any other – narrowly. That is to say,

records exempted are those of sources for whom there is evidence that they are in fact confidential. All require a witness to either have been assured confidentiality, or for there to be some evidence that confidentiality was implied. See Matter of Exoneration Initiative v. New York City Police Dep't, 114 A.D.3d 436, 440, 980 N.Y.S.2d 73 (1st Dep't 2014) (no protection from disclosure "in the absence of any evidence that this person received an express or implied promise of confidentiality"), Matter of Gomez v. Fischer, 74 A.D.3d 1399, 1401, 902 N.Y.S.2d 212 (3d Dep't 2010) ("statements by a witness must be disclosed absent a showing that he or she was a confidential informant or requested or was promised anonymity, or that his or her life or safety would be endangered by disclosure"); Matter of Johnson v. New York City Police Dep't, 257 A.D.2d 343, 348, 694 N.Y.S.2d 14 (4th Dep't 1993) ("information imparted in confidence…and in reliance that such confidentiality will be respected, should be exempt from FOIL"… but an "attempt to apply such exemption to *all* information imparted by *all* witnesses under *any* circumstances is overly broad.") (emphasis in original).[7] That codifies the public interest exemption for "confidential communications to public officers in the performance of their duties where the public interest would

[7] See also Matter of Carnevale v. City of Albany, 68 A.D.3d 1290, 1292, 891 N.Y.S.2d 495 (3d Dep't 2006) (respondent failed to show that witnesses were confidential informants or that they requested or were promised anonymity); Matter of John H. v. Goord, 27 A.D.3d 798, 799, 809 N.Y.S.2d 682 (1st Dep't 1999) (record failed to show that any participating witnesses qualified as confidential sources).

be harmed by removal of the protection of confidentiality." Doe v. Riback, 788 N.Y.S.2d 590, 594 (Sup. Ct. Albany Jan. 25, 2005). What it does not do, contrary to the position of the Respondent, is enable District Attorneys to avoid Brady obligations or otherwise hide records under a false assumption of confidentiality.

The legislature, this Court, and the courts of those departments are in harmony in the admonition that state records are available under FOIL unless they fit into a narrowly defined exception. The sole discordant authority is the Second Department, whose interpretation of the confidential informant exception swallows the rule entirely and broadly exempts *any* documents relating to a criminal investigation or prosecution. It does so by reversing the normal analysis of FOIL, presuming all records related to a criminal investigation unless the witness to whom they relate testifies in open court, at which point the "cloak of confidentiality" is removed. A. 2305, citing Matter of Moore v. Santucci, 151 A.D.2d 677, 679, 543 N.Y.S.2d 103 (2d Dep't 1989). The Second Department is following a line of cases that the 1977 amendments to the New York Foil abrogated. See, A. 2308 (Barros, J. dissenting); see also Matter of Miracle Mile Assoc. v. Yudelson, 68 A.D.2d 176, 181, 417 N.Y.S.2d 142 (4th Dep't 1979) (the 1977 amendments "broadened the reach of the statute by making all records presumptively subject to disclosure, rather than certain enumerated categories.").

The Second Department's definition of confidential informant is also an outlier to federal jurisprudence construing the same language. The 1977 amendments to New York's FOIL law generally and this exemption specifically "were patterned after the Federal analogue." Lesher v. Hynes, 19 N.Y.3d 57, 64, 945 N.Y.S.2d 214 (2012). Federal case law is thus instructive. Id. The federal courts, following U.S. Code, tit. 5, § 552(b)(7)(D), protect the confidentiality of a source where there is "an express assurance of confidentiality" or "in circumstances from which such an assurance could be reasonably inferred." Dep't of Justice v. Landano, 508 U.S. 165, 172 (1993), see also, Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 814 (9th Cir. 1995) (source's identities protected under express promise of confidentiality), Wiener v. FBI, 943 F.2d 972, 986 (9th Cir. 1991) (informant's identity protected where FBI established that informant was told his name would be held in confidence). That approach is effectively identical to the approach the First, Third and Fourth Departments take. Only the Second Department of the Appellate Division applies a "presumption of confidentiality" to all sources furnishing information in the course of criminal investigations, a presumption the Supreme Court of the United States has specifically rejected. See Landano, 508 U.S. at 175.

The other departments and Federal courts approach the exemption correctly. Members of the public who have information but also a legitimate fear of

retaliation or other harm can come forward and seek assurance of confidentiality. Law enforcement can then make the decision as to whether such confidentiality will be granted, fully recognizing that such a promise will preclude them from calling that informant as a witness. In such a case, the law protects that confidentiality. But in all other circumstances, and with all other records not falling into a category of exemption, the presumption of availability of government records applies.

B. The Second Department Misinterprets FOIL and Reverses Its Presumption of Availability of Documents.

The Second Department's approach to the confidential source exemption rejects the statute itself. It excises the word "confidential" from the exemption and finds that all statements by witnesses in criminal investigations are "inherently confidential." A. 2305. Here, the Second Department went further, and found that every record relating to the criminal investigation and reinvestigation was protected from disclosure. Id. This Court has stated expressly they are not. See Matter of Gould v. New York City Police Dep't, 89 N.Y.2d 267, 275-76, 653 N.Y.S.2d 54 (1996). Indeed, there is absolutely nothing in § 87(2)(e)(i-iv) to suggest, as Justice Barros points out in dissent, that "all pretrial investigatory materials are confidential." A. 2309.

Disclosure does not require proof of non-confidentiality—it requires proof of confidentiality to protect. See e.g. Matter of Gould, 89 N.Y.2d at 275, 653

N.Y.S.2d at 57 (burden rests on the agency to demonstrate that the requested material qualifies for exemption). The majority's reasoning in this case is that a trial is the only potential indicator of whether a witness was promised confidentiality or not, and without a trial, one must presume all witnesses were actually confidential informants. The Second Department's interpretation swallows the rule and undoes FOIL's presumption that all records of the government are available unless they fall "squarely within the ambit of one of (the) statutory exemptions." Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467 (1979).

Throughout this litigation, Respondent has tried to suggest otherwise by making clear that the records demanded would have been available had Appellant gone to trial, rather than pleaded guilty, through his rights as a defendant. See, CPL § 240.20; People v. Rosario, 9 N.Y.2d 286 (1961); Brady v. Maryland, 373 U.S. 83 (1963). This Court also rejected precisely that argument in Matter of Gould, refusing to read a categorical exemption into a statute that did not contain one. Matter of Gould, 89 N.Y.2d at 274, 653 N.Y.S.2d at 57.

Indeed, Appellate Division's order does not merely presume all witnesses are confidential witnesses. It makes that presumption irrebuttable. Because even if indicators of non-confidentiality were required to make a record available (which they are not) they are present here. Many of the statements that the DA's office

seeks to conceal are of complaining witnesses. Complaining witnesses, by definition, cannot be confidential informants. Criminal defendants have a constitutional right to confront their accusers at trial. N.Y. Const., art. I, § 6; People v. Hill, 9 N.Y.3d 189, 191, 849 N.Y.S.2d 13 (2007). One simply cannot be an anonymous, confidential informant and a complaining witness. The law is generally intolerant to rules without an exception, as it is here. One need not imagine all the possible exigent circumstances that would plainly overwhelm the concerns addressed by confidential informant exemption to realize that the rule as Appellate Division interpreted it here is untenable.

Yet setting aside any inquiry into whether the witnesses could have been promised confidentiality, we know confidentiality is not a concern here. Seventeen complaining witnesses (including the fourteen witnesses originally against Jesse Friedman) were served notice of the petition below and given the opportunity to object, only three did, and Justice Winslow fashioned a limited protective order to protect their identities, but not their statements. A. 2285, 2292. Of course, this was somewhat mechanical, as the District Attorney disclosed all of their identities in 1988, two of the three objectors voluntarily spoke with filmmaker Jarecki, and one appeared in his film. The Second Department's position is that in no case, may any records, relating to any witness, be disclosed absent a trial. A. 2304,

citing Matter of Esposito v. Rice, 67 A.D.3d 797, 888 N.Y.S.2d 178 (2d Dep't 2009).

This case proves why such a rule is nonsensical and unworkable. Clearly, complaining witnesses cannot be confidential informants. But those statements are only a fraction of the records. Most of the records are statements of *other* students. And the Respondent does not even claim that any requested confidentiality in giving those statements. Police came to their homes and questioned them repeatedly just as they did complaining witnesses. But those students denied abuse and refused to corroborate the complaining witnesses' allegations. See e.g. A. 0181 at 35:00, A. 2206 at 19:45, 29:20. Their directly exculpatory statements are not being withheld to uphold a promise of confidentiality, merely to avoid adding more evidence of innocence to the already sizeable pile. The content of their statements are simply not *confidential*, they told no secrets. They said (and the DA admits this), that nothing happened.[8] The DA wants to hide that, not protect their confidentiality.

Indeed, Respondent's oft-stated claim that they focused on obtaining a guilty plea to avoid disclosure of identities does not mean anyone was promised

[8] Notably, the DA's office has not always admitted this. In 1988 while pressuring Friedman to plead guilty, Friedman's attorney, Peter Panaro, was led to believe that every child interviewed had reported witnessing abuse. A. 2206 at 1:00:40-55. Of course, the opposite was true, all of the other children, hundreds, reported they had not.

confidentiality, it proves the opposite. Any statements obviously came with the understanding that they would be used at trial. That claim does, however, raise questions about the means through which the District Attorney's Office obtained the guilty plea. This Court has long recognized the imperfections of the judicial process, and that innocent people confess or plead guilty. See e.g. People ex. rel. Jordan v. Martin, 152 N.Y. 311, 318-319 (1897). The Court has also recognized that the "phenomenon" of false confessions is not only "genuine," it is nearly "common knowledge." People v. Bedessie, 19 N.Y.3d 147, 156, 947 N.Y.S.2d 357, 362 (2012). In Bedessie, this court recognized the need for more information, noting that in certain circumstances an expert should be permitted to testify on the existence of false confessions. Bedessie, 19 N.Y.3d at 161. Similarly, in the face of evidence of actual innocence, the remedy should be more information, not less. The policy of New York's FOIL is more disclosure, more transparency, not less. That was the New York legislature's stated intention in passing the FOIL:

> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions…The people's right to know the process of governmental decision-making and to review the documents leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

N.Y. Pub. Off. Law art. 6, § 84. The Second Department's approach not just to this case but to the confidential informant exception to FOIL in all cases repudiates

that approach. It shrouds nearly everything generated in a criminal investigation in secrecy, except that which is revealed at trial. This Court should not allow such an approach to continue to thwart the legislature's intent or the law of the rest of the State of New York.

C. Appellate Division's Creation of a "Blanket Exemption" Requires Reversal.

The Second Department's assumption of confidentiality was not limited to witness statements. Appellate Division interpreted the confidential informant exemption to protect from disclosure the entire case file, regardless of its contents. This Court has repeatedly rejected a "blanket exemption" approach to FOIL that would allow state agencies to claim broad exemptions for categories of documents. See Matter of Gould, 89 N.Y.2d at 275 ("blanket exemptions for particular types of documents are inimical to FOIL's policy of open government"). Instead, agencies must make a "particularized showing" that documents fit within a "narrowly construed" exemption. Fappiano v. N.Y. City Police Dep't, 95 N.Y.2d 738, 746, 724 N.Y.S.2d 685 (2001). The Second Department's order endorses just such an approach by permitting the District Attorney's office merely to assert that "every piece of paper" in their file relating to Jesse Friedman is protected variously by either the Public Officers Law or Civil Rights Law 50-b.

The District Attorney's office has never attempted to show that each (or any) particular document meets their burden. Instead, they have relied entirely on

blanket assertions, riddled with qualifications such as "many or most of the documents…consist of witness statements or summaries of witness statements and they either identify or tend to identify the victims in this case." A. 0008. That flies in the face of this Court's admonishment that no agency may claim exemption for "every document in a law enforcement agency's criminal case file…simply because [it is] kept there." Lesher, 19 N.Y.3d at 57.

This case demonstrates why no agency may withhold records in such a manner. Justice Winslow's August 2013 order, from which the District Attorney's Office appealed, directed the office to turn over "every piece of paper that has been generated in the matter of People against Jesse Friedman, the 1987, 1988 case." A. 2288. The Second Department reversed that order and dismissed the proceeding, based on a blanket assertion of the protection of the Public Officers law. Such an assertion strains credulity.[9] Every piece of paper could not possibly reveal confidential informants or identify victims in an impermissible manner. Setting aside the innumerable witness interview records that state they witnessed no abuse all concede to be present, surely many "pieces of paper" are notes of interviews of Friedman himself, or are blank victim questionnaires, or rosters of officers

[9] The Second Department Order even flies in the face of its own precedent, which makes clear that agencies claiming an exemption must show that it "falls squarely within the ambit of one of the statutory exemptions," and must articulate a "particularized and specific justification for denying access." Matter of Madera v. Elmont Public Lib., 101 A.D.3d 726, 727. 957 N.Y.S.2d 129 (2d Dep't 2007).

assigned to the case, or various other potential information generated in such a large investigation that have nothing to do with confidential witnesses.

Moreover, until Jesse Friedman sought his own records, Respondent never believed the law to create such an exception. In 1998 and 2001 other parties sought many of the records Respondent now claims sacrosanct. In those cases, numerous documents were available, subject to limited redaction.[10]

II. THE SECOND DEPARTMENT ERRONEOUSLY DISTURBED SUPREME COURT'S FACTUAL FINDING THAT APPELLANT HAD MADE A PARTICULARIZED AND COMPELLING NEED FOR THE MINUTES OF THE GRAND JURIES.

The Second Department's majority opinion states that Friedman "failed to sufficiently demonstrate how examination of the grand jury minutes and records will support his claim of innocence." A. 2305. The order sets a bar for disclosure that is untenable for the workings of CPL 190.25, since it in effect requires the petitioner seeking the minutes to prove what the minutes contain in order to discover what the minutes contain. See, A. 2312 (Barros, J. dissenting) ("The majority's rationale … is circular, since it, in essence, faults the petitioner for not having the very evidence sought by his petition."). The underlying petition and papers before the Second Department lay out in detail the extraordinary escalation of charges that the Second Circuit called "increasingly bizarre, sadistic, and even

[10]Those letters from the Respondent, public documents, will be sent under a separate letter requesting that the Court take judicial notice of them.

logistically implausible." Friedman v. Rehal, 618 F.3d at 158. It provided statements of witnesses before that grand jury who now claim unequivocally that their testimony was not truthful. A. 0182. Moreover, the submissions provided expert testimony on exactly how the minutes could be used in reconstructing witness testimony and evaluating their veracity. A. 2205. The bar the Second Department's order sets is such that no factual circumstances can reach it.

More fundamentally, the most cynical view of the record must concede that the crimes as alleged in the grand jury indictments did not take place. Multiple witnesses have since stated that crimes of which they were the alleged victims never happened.[11] A. 0265, 2256, 0181 at 8:00-10:40, 26:50-27:10, A. 2206 at 12:00-18:22 (four separate complaining witnesses disclaiming testimony before grand jury).[12] Supreme Court, in reviewing the minutes, found "glaring discrepancies" in their statements. A. 2283. He also credited the letter of Scott Banks, the law secretary to Judge Boklan and one of the few other people who ever read the grand jury minutes, who stated that the "[t]he grand jury testimony of child witnesses, largely elicited by leading questions by the prosecutor, demanding

[11] The record on this matter was more limited in 2013 when originally considered than it is today. More witnesses have disavowed their statements, and described being coerced into being untruthful before the grand jury. Many apparently recanted testimony long before that. One psychiatrist who worked with the children stated some recanted shortly after their grand jury testimony. A. 2206 at 1:01:15-25.

[12] For example, one complainant stated unequivocally: "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." A. 0181 at 8:00-8:45.

'yes or no' responses, provided absolutely no detail." A. 2230. Mr. Banks wrote to Justice Winslow at Supreme Court that "questionable actions and 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…" A. 2230. Moreover, there's no question prosecutors deliberately sought as many counts as possible in order to coerce a guilty plea. This grand jury process was deeply flawed, and that is a reason to illuminate it, not conceal it.

That is particularly true where, like here, none of the countervailing harms that support secrecy have any relevance. Grand jury secrecy is based on five separate concerns: (1) prevention of flight by a soon-to-be indicted defendant, (2) protection of grand jurors from interference, (3), prevention of witness tampering, and (4) protection of innocent subjects of a grand jury investigation from unfounded investigation should no indictment be returned, and (5) to permit witnesses to testify freely. People v. Di Napoli, 27 N.Y.2d 229, 235 (1970); see also A. 2313. None of those are in play here. The grand jury was discharged more than a quarter-century ago. There is no defendant to flee, no trial with which to interfere, the innocent accused is seeking to undo that wrong, not fearing undue accusation.

And just as grand jury secrecy protects those concerns, when they are absent or dramatically diminished, the policy against non-disclosure must similarly yield. In the relatively recent case of Ostroy v. Six Square, LLC, 29 Misc.3d 470, 906 N.Y.S.2d 882 (Sup. Ct., N.Y. Cty., 2010), for example, the court permitted disclosure of the grand jury minutes on the grounds that "many of the reasons for keeping the proceedings secret in an ongoing proceeding no longer exist," and thus the "the integrity of the proceeding cannot be compromised." Id. at 472.

Similarly, in a recent Suffolk County case, the Supreme Court released the grand jury minutes on similar grounds. Matter of Druker, 2012 N.Y. Misc. LEXIS 2342, 2012 N.Y. Slip Op. 31298(U) (Sup. Ct., Suffolk Cty, May 8, 2012). In coming to this conclusion, the court wrote:

> There is no risk that a defendant who is about to be indicted will take flight, and the grand jury has long finished its work in this matter, meaning there is no risk of interference from those under investigation, or of subornation of perjury and tampering with prospective witnesses.

Id. at *10. In addition, the individuals seeking the grand jury minutes were the accused under the indictments in question, and thus the court found that "they require no protection from unfounded accusations." Id. Perhaps most applicable to the case at bar is the court's finding that "if it is established that [the witnesses] testified falsely before the grand jury, the [witnesses] cannot claim that they relied on secrecy in exchange for their willingness to testify freely." Id.

In People v. Driscoll, 165 Misc.2d 245 (Sup. Ct., Suffolk Cty. 1995), the court discussed its "duty" to release grand jury minutes under certain circumstances:

> As a matter of public policy the court has a duty, where no counterbalancing evil or inequity will ensue, to remove any artificial barriers standing between these parties and the evidentiary resources needed to bring about an expeditious and just conclusion to the litigation between them.

Id. at 248.

In its analysis of the public policy factors governing disclosure of grand jury minutes, the court noted that "there is no risk" that the defendant who seeks disclosure of the minutes will flee. Id. at 247. The court also reasoned that "[t]he Grand Jury which held these proceedings has long been disbanded. There are no possible future actions of this former Grand Jury upon which to work any influence." Id. Particularly relevant to this case, the court notes that releasing the minutes "may allow witnesses with failed memories to have their memory refreshed and avoid the perception that they have intentionally testified at variance to their previous testimony, with the attendant risk of criminal prosecution." Id.

In Friedman's case, all of the factors supporting release of the minutes are present. There is obviously no risk that Friedman will flee, he has nothing from

which to flee.[13] The grand jury has long since disbanded and there is no investigation or risk of tampering with the witnesses. Friedman knows the names of the witnesses, their addresses, and the inculpatory nature of their testimony. Even the District Attorney's generalized, institutional concern with preserving the secrecy of the grand jury proceedings is unavailing to her--the identities of the witnesses were disclosed by the prosecution in 1988. Had Friedman gone to trial, the contents of the statements would also have been disclosed; the witnesses could not have been relying on a promise of secrecy. The District Attorney cannot credibly claim that future witnesses will be discouraged from coming forward to testify when the prosecution itself provided their identities as part of the regular course of a criminal prosecution.

III. THIS COURT SHOULD AFFIRM SUPREME COURT'S FINDING OF "GOOD CAUSE" PURSUANT TO CIVIL RIGHTS LAW 50-B, ALTHOUGH THE SECOND DEPARTMENT DID NOT CONSIDER THIS CLAIM.

Separate from Friedman's requests under FOIL, the petition also sought case files and investigatory files under New York Civil Rights Law § 50-b(2)(b) based on a demonstration of good cause. See, e.g., Tonia E.-A. v. Kathleen K., 12 Misc. 3d 828, 819 N.Y.S.2d 419 (Family Ct. Orange Cty., 2006), Doe v. Riback, 7 Misc.

[13] Indeed, under the newly enacted "International Megan's Law," H.R. 4573, 42 U.S.C. § 16901, et seq. (Consol. 2016), Friedman is for all practical purposes banned from travelling internationally.

3d 341, 788 N.Y.S.2d 590 (Sup. Ct. Albany Cty. 2005). Such relief is only available through Court order. As Judge Barros noted in dissent:

> The Supreme Court properly determined that the petitioner established good cause for the requested materials. In support of his petition, he submitted numerous exhibits, including film footage of interviews of complainants, witnesses, and detectives, as well as affidavits from complainants and other witnesses, showing, inter alia, that several complainants, who testified before the grand jury, recanted their accusations against the petitioner, and that the detectives investigating the claims of violent sexual abuse against children implemented aggressive, suggestive, and otherwise flawed interview techniques in order to obtain statements inculpating the petitioner. The petitioner's evidence also showed that the investigators did not pursue any forensic evidence, including medical evidence, that would confirm the complainants' allegations of violent sexual abuse. One complainant who testified at the grand jury, and who has not recanted his testimony, admitted that he was hypnotized prior to making accusations against the petitioner. Indeed, after reviewing many of the same exhibits attached to the instant petition, the United States Court of Appeals for the Second Circuit commented that the petitioner came forward with "substantial evidence that flawed interviewing techniques were used to produce a flood of allegations, which the then-District Attorney of Nassau County wrung into over two hundred claims of child sexual abuse against [the] petitioner," and that "the police, prosecutors, and the judge did everything they could to coerce a guilty plea and avoid a trial" (Friedman v Rehal, 618 F.3d 142, 158 (2d Cir.2010).
>
> The petitioner also submitted an affidavit from an expert in the field of investigation of crimes against children, particularly with respect to "child sex rings." The expert averred, in effect, that in order to establish whether flawed police tactics produced false or inaccurate information, a complete review of the details of the child interviews was required. Although the District Attorney's reinvestigation report, which was generated in response to the aforementioned Second Circuit opinion, concluded that the petitioner's claims of improper police tactics were exaggerated, it also acknowledged that "[i]n hindsight, the investigation was not ideal," and that since the time of the investigation nearly 28

> years ago, "methodologies for interviewing child witnesses have evolved."

A. 2311-12. The majority opinion doesn't merely rely on a flawed analysis of FOIL, it ignores this cause of action entirely. In doing so, it ignores Supreme Court's "good cause" finding, the basic showing of innocence Friedman had already made, Supreme Court's analysis of the materials sought:

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

A. 2283-84. Indeed, other proceedings have vindicated Justice Winslow's finding. County Court has since ordered a hearing after Appellant successfully made a *prima facie* showing of actual innocence. Order, People v. Friedman, Ind. Nos. 67104/87, 67430/88, 69783 (Cty. Ct. Nassau Cty. Dec. 23, 2014).

By failing to even address the good cause disclosure under § 50-b(2)(b), an analysis wholly separate from FOIL (see e.g. Fappiano v. New York City Police Dep't, 95 N.Y.2d 738, 748, n. 1, 724 N.Y.S.2d 685 (2001) (noting distinction of availability of documents through different provisions of Civil Rights Law § 50-b(2)), the Second Department failed to actually dispose of the causes of action presented it, though the order purports to.

A. Civil Rights Law § 50-b Authorized Supreme Court to Order Disclosure.

1. Supreme Court Correctly Found Good Cause.

Friedman's good-cause argument is based primarily on both the evidence of his innocence that exists outside of Respondent's obfuscation, and the evidence of the deeply flawed investigation and prosecution that resulted in his conviction. 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, 819 N.Y.S.2d 419 (N.Y. Fam. 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. Id. Similarly, in Doe v. Riback, 7 Misc.3d 341, 788 N.Y.S.2d 590 (Sup. Ct., Albany Cty. 2005), 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. Respondent has demonstrated, and

Judge Winslow agreed, that in this case the need for disclosure and interests of justice outweigh whatever privacy concerns may nominally exist.

a. The Witness Statements.

> *[T]here is no way to evaluate the past investigation and conviction with confidence without understanding the dynamics of this specific type of case and having access to all relevant material…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 and analysis of the most detailed and contemporaneous notes, reports, statements, records, transcripts, documentation, and evidence available.*

--Kenneth V. Lanning, SA, FBI (Ret.), Behavioral Sciences Unit, Quantico. Affidavit, August 4, 2013, at para. 38-40 (A. 2205).[14]

In the absence of any physical or medical evidence, the witness statements elicited by and written down by the police allegedly reflecting the statements of young children were the only evidence in the case. For this reason, the contents of those statements, their evolution over time, and the interrogation methods used to elicit this testimony are of paramount importance. The Second Circuit concluded

[14] In support of his Petition, Friedman submitted a detailed Affidavit from former Special Agent Lanning, whose work and expertise are favorably cited (but misstated) in the Rice Report, at 133, footnote 496. A. 2133. Lanning was a Special Agent with the FBI for more than thirty years, twenty of which were spent at the FBI Behavioral Science Unit (BSU) in Quantico, Virginia, 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 in state and Federal courts, and authored more than thirty 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 prosecutors about child sex ring cases. A. 2199. He agreed to be retained as a "defense" expert based upon the deficiencies in the Rice Report and Rice's misstating of Lanning's research. A. 2200.

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; see also A. 0181 at 3:00-8:45, A. 2206 at 4:00-7:40. The Rice Report acknowledges the statements obtained from the children were products of questioning that was "at a minimum, unprofessional, unfair, and cruel." A. 2072. The Report also concedes such tactics as:

- Telling boys that failure to disclose would affect their future sexuality, cause them to be "homosexual," or to become abusers themselves. A. 2072.
- Warning children that they would "suffer lasting psychological consequences later in life if they do not disclose abuse." A. 2071.
- Rewarding cooperation with such things as pizza parties and police badges. A. 2066, see also A. 2206 at 21:27-22:17.
- Conducting some interviews "entirely off the record, with no attempt made to reduce to writing what was learned from the visit, or why the visit was made." A. 2062.

The questioning further involved suggestive questions, falsely telling the child that the interviewer already received the information elsewhere, re-asking the child a question he or she already unambiguously answered multiple times, and other manipulative methods. A. 0184-87, 0189, 0199, 2206 at 4:00-7:00. In briefing before the Second Department, Respondent reduced these deformities to

"missteps" in the investigation. Inexplicably, the Report concludes there is "no reason to believe such interviews resulted in unreliable information." A. 2071.

It is thus necessary, as Supreme Court recognized, to peel back behind Rice's denial and concomitant unilateral insistence that her conclusions be credited. Supreme Court pointedly refused to accept the District Attorney's "trust us, no one needs to look here" argument and recognized that verification requires documents. Respondent (as appellant below), rather than challenging the merits of whether cause exists to open the black box that is the Friedman investigation, accused Judge Winslow instead of "misapprehend[ing] the nature and scope of the proceeding before it" in ordering the disclosure. To the contrary, it is Respondent who misapprehends her ability to continue the quarter-century campaign of secrecy and suppression.

b. Limited Disclosure will permit Review of Witness Statements by an Expert in Child Sex Ring Cases.

It is impossible for anyone, prosecution or defense, to adequately review the integrity of Friedman's conviction without the input of an expert in acquaintance child sex ring cases. This was not done by the District Attorney during the original Friedman investigation, or the reinvestigation. A. 2200.[15] As the Lanning

[15] As a less common and more complex acquaintance child sex ring, 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. . . . The investigation of acquaintance-exploitation cases requires specialized knowledge and techniques. The protocols, policies, and procedures for addressing one-on-one,

Affidavit made clear to the court below, "a vital part of any investigation, or reinvestigation, of these rare cases is access to the original source materials." Lanning went on to aver:

> 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.

A. 2202.

Lanning offered several cautionary notes, based upon what is contained in the Rice Report, all of which speak directly to the need to obtain the original documents. Lanning noted that allegations like those in the Friedman cases are "among the most complex and difficult cases to investigate." A. 2203. He 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.

A. 2202. As a general guideline:

> [i]nvestigators should apply the 'template of probability.' Moreover, accounts of child sexual victimization that are more like books, television, news accounts, movies, or the exaggerated fear-mongering

intrafamilial, child sexual abuse have only limited application when addressing multiple-victim, extrafamilial, child sexual exploitation cases. A. 2200.

> of zealots and less like documented cases should be viewed with skepticism, but thoroughly investigated.

Id.

> Finally, Lanning notes:
>
> As 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.

Id. In addition to Lanning's experiential and scientific knowledge, other recent research proves how these sort of false cases grow so much larger. New studies prove that through a process of "social contagion," parents and law enforcement become convinced of sinister, organized abuse, share those convictions throughout the community, and draw out more and more false (and outrageous) accusations.[16] Rehal, 618 F.3d at 158 ("This was a 'heater case' – the type of 'high profile case' in which 'tremendous emotion is generated by the public'…in heater cases, the criminal process often fails."); see also A. 0181 at 20:40-24:30, 30:30-32:50 (testimony regarding parental groups and community hysteria).

[16] *Forensic Interviews Regarding Child Abuse: A Guide to Evidence Based Practice*, William T. O'Donohue and Matthew Fanetti, eds. (Springer 2009).

c. The Fred Doe Example.

Those observations are borne out by the disclosures regarding "Fred Doe," the *one* alleged victim for which the defense has *one* of his several statements. The statement is heavily redacted,[17] and must be read in *para materia* with additional information provided about this witness in the Rice Report. Though the police described the statement as a single, comprehensive story, the boy was visited five times over a period of weeks and his charges radically evolved over that time.

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. He did not allege any abuse. A. 2013.

It wasn't until two weeks later on December 3, 1987 that Detective Merriweather drafted a written statement in which Fred Doe allegedly recalled being anally raped by Arnold and Jesse Friedman. A. 2226. Thereafter, he testified before the grand jury. But Fred Doe's recollections didn't end there. After Jesse Friedman refused to plead guilty, Fred Doe re-emerged.

[17] In March 1988, an 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.

Five months after Merriweather drafted Fred Doe's original "written statement," Merriweather submitted a new statement on behalf of Fred Doe, in which the boy recalled having seen both men anally sodomize other children during the class. A. 2024. Five weeks later on April 29, 1988, Detectives Merriweather and Sgueglia submitted yet another statement on Fred Doe's behalf: "that three of Jesse's friends, also present in the class, had held him down while Jesse sodomized him." A. 2207; 2026.

When Fred Doe was later taken to a police lineup containing a single suspect (alongside others who had nothing to do with the case), the boy identified two young men in the lineup: Ross Goldstein and another boy who inexplicably was never charged. Surprisingly, Doe's false identification of a second assailant clearly did not undermine the District Attorney's confidence in the boy's credibility in charging Jesse Friedman or identifying Ross Goldstein. A. 2207, 2142.

From the redactions in the Fred Doe statement, it appears that he also made accusations against multiple adults other than Jesse and Arnold Friedman and Ross Goldstein. Despite crediting Doe's charges against Friedman (and Goldstein), the District Attorney obviously did not believe his accusations about other adults. Surprisingly, Doe's false accusations against these other adults did not undermine the District Attorney's confidence in his credibility in charging Friedman and Goldstein. It is worth noting that Fred Doe's classmates, two of whom were

complainants who have since recanted, do not corroborate any of the alleged abuse reflected in Fred Doe's written statements. A. 2206 at 30:45.

In addition to the manner in which the statement was procured, the content of Doe's statement is equally suspect. Here is just one example: "Jesse had told me if I didn't take my pants down that I would never be allowed to come back again to computer class." A. 2222. Lanning points out that it is illogical that a child victim of violent and repeated rape would be motivated to remain silent because of a threat of not being allowed to return to the very computer class in which the rapes were occurring. A. 2204-05.

Beyond sharing this single statement with Friedman's attorney in 1988, the District Attorney never permitted an expert in the area of child sex abuse rings to review any of the primary evidence in this case, such as the original witness statements that can provide insight into the manner in which these disclosures were made. Limited disclosure of the original case materials to Petitioner's expert will finally allow definitive conclusions about what went right and what went wrong in the interrogation of the Friedman accusers, and the ways in which investigative failures and misconduct affected the final result.

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

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.

The statement attributed by police to Fred Doe 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 sexual abuse, which take place in isolation, the abuse charged in the Friedman case all allegedly took place in full view of the other students, as well as a shifting number of other adults. See A. 2206 at 35:43. 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. A. 2000-2156.

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: "[w]ho else goes to the class?," "[a]ny friends you know of that go?," and "[h]ave you ever seen anyone else in the classroom being touched?" A. 0745; see also A. 2206 at 18:22. There is every reason to think the other alleged victims were asked these questions and provided this information.

Kenneth Lanning has described "corroboration" as the essential tool in the investigation of mass sexual abuse claims:

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

A. 2204.

The most obvious and effective way to test whether other computer students corroborate the charges against Friedman would be to reconstruct 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.

The little information gleaned in recent years by Friedman's lawyers and the filmmakers of "Capturing the Friedmans" indicates the likelihood that many students in classes where abuse was alleged did not corroborate the complainants' recollections of abuse. Though the District Attorney in 1988 shared no exculpatory information with Friedman's attorney at any time, the Rice Report quietly reveals that police interviewed multiple children who sat alongside complainants in the same classes in which abuse had been alleged and all of them directly contradicted the complainants' accounts. Further, after the first such exculpatory interview, police failed to document subsequent ones. In the words of the Rice Report:

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

A. 2028.

To assist the DA in analyzing whether the complainants' stories could be corroborated, Friedman's defense team and the filmmakers provided the District Attorney, as well as the court, 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 District Attorney discredits this entire area of inquiry on the specious ground that it is difficult:

> …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.

A. 2062.

If the DA 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 recollections of students who stated unequivocally that no abuse took place, and the DA simply ignores them now that they have come forward as

young men. 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 the DA chose not to interview and Friedman's team could not interview.

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

If a complaining witness claims to have been simultaneously attacked by Peter, Paul, and Bill, then it is learned that Peter and Paul have ironclad alibis and his claims against them are false, it would call into question the veracity of all the witness's claims (including his 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 the DA knows is false in conjunction with one she believes to be true, it raises a serious credibility problem.

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, under the subheading "Police Identify Three Potential Accomplices," notes that after repeated interrogations, four students, in

one week seven months after the interviews began, named three additional rapists who participated in the abuse. Various children then dutifully picked out these and possibly additional attackers from photo arrays, yearbooks, and lineups. A. 2028-30. The Rice Report unhelpfully explains that these individuals were not prosecuted due to "insufficient evidence," (A. 2030), and the source document cited in the Appendix is equally non-illuminating. A. 0753.

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 cherry-picking of the complainants' claims.

Looking again at Fred Doe 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. A. 2026. That the two other child rapists Fred Doe described were never prosecuted suggests that investigators recognized that at least some parts of Fred Doe's account simply could not be true.

Similarly, the Rice Report reveals that Witness 11 (James Doe), one of the three alleged victims who according to the District Attorney still claim Jesse Friedman abused them, was untruthful with investigators when questioned in 1988. The DA'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. A. 2104. The District Attorney ascribes no significance to the admission that as a child James Doe (or the detective who wrote his statement) lied, falsely accusing at least one adult of sexual abuse, and simply accepts this radical departure from his statement to police and grand jury testimony. James Doe didn't merely include the other adult in a single charge. He accused that adult of twenty-one separate counts of sexual abuse. Moreover, twenty-eight counts of abuse for which James Doe is the complaining witness accuse Friedman and another adult of engaging in the act together.

That again reflects the fact that testimony then, on some level, was not truthful. It may indicate that the police officers who composed his statement did not accurately reflect his beliefs at the time. Since many other child witnesses

appear to have given statements in which rapists pop in and out of existence, all these statements require examination, which will require access to the original investigative materials Friedman seeks.

f. Disclosure of the Original Statements and Police Reports Will Permit A Forensic Textual Comparison Revealing the Statements that Were Created by the Police.

In the Friedman case, none of the alleged victims made allegations outside of interviews with detectives. Every assertion in this case emerged from an interview, or series of interviews initiated by a detective or police officer, and was composed into statement form by detectives. Moreover, no students made any allegations absent a detective coming to their door and eliciting them. There are zero examples of students coming forward and alleging abuse before or after Arnold Friedman's arrest. Every allegation came during in-home interrogation by a detective or police officer.

For example Detective Larry Merriweather, who composed the Fred Doe statement, 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 a strikingly similar mass sex abuse case investigated by many of the same detectives who investigated the Friedman case, and led by the same head of sex crimes, Detective Fran Galasso. In the Izzo case, dozens of children were said to have been raped by a bus driver and other adults on

a school bus in broad daylight. As in the Friedman case, there was no physical or medical evidence of the alleged abuse.

In an unusual twist, because Izzo's accusers filed a civil lawsuit[18], the witness statements were made public. The statements taken by the various detective teams are similar to the only statement made available in the Friedman case, that of Fred Doe. In one stark example, 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. A. 2185. In the Friedman case, in 1988 the detectives reported Fred Doe as stating that "Jesse's penis was as hard as a rock." A. 2185. More than a year later, the same detectives would elecit an identical statement from a seven-year old girl in the Izzo case. Id.

While it is highly unlikely a seven or eight year old would use the decidedly adult phrase "_____'s penis was as hard as a rock," it would be a remarkable coincidence for two children of that age to volunteer the phrase, and to the same detective. In cases involving allegations that police manufactured inculpatory statements, textual comparisons of the statements for word and phrase choices tied

[18] 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 conviction, because it did not believe that the abuse took place. See, Pete Bowles, "Sex Abuse Felon Wins Civil Case," *Newsday*, July 27, 1996.

to specific investigators is an increasingly common and accepted technique. See, e.g., Frances Robles, "Several Murder Confessions Taken By Brookyn Detective Have Similar Language," *N.Y. Times*, June 12, 2013.

Though Respondent 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 the District Attorney continues to withhold the original witness statements that would need to be examined.

2. No Facts Support Sufficient Privacy Concerns to Militate Against Disclosure.

At the outset, any privacy concerns asserted by Respondent are void given County Court's trial order on Friedman's actual innocence claim. Respondent does not dispute (and of course cannot) that Friedman has the power to call witnesses, and will call complaining witnesses (as well as other students) as witnesses at trial. So protecting the privacy of *prior* statements does nothing to protect their privacy, if anything it simply denies Friedman the ability to limit and tailor questioning.

Nonetheless, Respondent (then Appellant) below devoted considerable argument to the notion that disclosing any documents in any form would be a devastating invasion of privacy. But that assertion is baseless. The identities of the witnesses are known to Appellant: indeed it was the District Attorney who

demanded that *Friedman* serve each and every one of them in accordance with CPLR §308. Appellant has never disclosed the identities over the decades he has known them. A. 0804, 2257. Notably, Appellant is under no restriction from doing so. Moreover, Appellant agreed to the imposition of a non-disclosure order under Civil Rights L. §50-b(1)(c)(3), which is specifically designed to permit a court to restrict access of documents to those who have shown good cause for their release.

Respondent does not dispute these facts. Instead, Respondent appeared to argue that Fappiano v. New York City Police Department, 95 N.Y.2d 738, 724 N.Y.S. 2d 685 (2001), prohibits this sensible, narrowly-tailored method of preventing the identities of the complaining witnesses from being made available to the public at large. Respondent then made the peculiar argument that disclosure cannot be limited by the court, and therefore, Friedman should not obtain the documents for which he has shown good cause. Respondent then accused Judge Winslow of "blatantly rejecting" Fappiano.

Fappiano, of course, says no such thing. The Fappiano Court expressly limited its holding to applications brought pursuant to Civil Rights L. §50-b(2)(a), which governs applications by persons "charged" with a crime. The Court held that such disclosure provision was no longer operative and hence "petitioners do not fit within the exception for persons charged in Civil Rights Law §50-b(2)(a)

and must be treated in the same manner as any other person seeking access to these records. [footnote]" Id. at 748. Appellant consistently refuses to look down the page at the Fappiano footnote, which states: "Petitioners did not attempt to obtain the documents they seek through any other provision 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. The one of the two "other provisions" noted by the Fappiano Court is, of course, the "good cause" provision of §50-b(2)(b), under which Appellant has made his claim. Under Fappiano, therefore, a request under subsection (b) may be made separate from the public at large, and the protective order provision could be imposed. Fappiano, 95 N.Y.2d at 748. Respondent was simply unable to persuade Judge Winslow to ignore Fappiano's clear distinction between applications made under subsections (a) and (b). Nor is Respondent likely to offer any reason for this Court to do so.

Respondent also ignores the statutory difference between protecting the identities of sexual abuse victims and protecting their statements. Civil Rights Law §50-b on its face protects only the identities. N.Y. Civ. Rights Law §50-b(1) (Consol. 2016). 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. It cannot be plausibly argued that release of the identities would be any significant intrusion into the lives of the

complainants since Appellant and those working with him have long had every one of the names and have never made them public or otherwise caused them any concern. One of the complainants, 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. A. 0265. Numerous other complainants were interviewed at length by filmmaker Jarecki, although they were under no obligation to speak to him. A. 0181; 2206 at 12:00 (Dennis Doe), 12:40 (Stephen Doe), 13:30 (Barry Doe), 14:40 (Keith Doe), 16:22 (Kenneth Doe). Barry Doe, for example, who was one of the three to object to the release and whose attorney appeared at the hearing before Judge Winslow, does not stand by the statements attributed to him in the grand jury indictments, he merely wishes to avoid public disclosure of his identity. And his identity is well known to Petitioner because, *inter alia*, he provided an audio-taped recantation. A. 2256-57; A. 1848; A. 0181 at 8:00-8:40.

It seems apparent that the District Attorney's office is not concerned with privacy nearly to the same degree they are concerned with keeping from the public eye a shameful record of prosecutorial and police misconduct. Respondent's long-time assertions that disclosure will have a "devastating effect" on the people who gave testimony years ago are not supported by a shred of evidence; "intrusion" is

an empty word. Respondent understandably fears an undermining of the very legitimacy of the criminal justice institution in Nassau County. But continuing to hide documents does not bolster its credibility. There is a profound public interest in whether the Rice Report is true and whether the Office of the District Attorney, both then and now, have properly carried out their duties. The evidence strongly suggests that is not the case. There is a public interest in justice being served.

Conclusion

There is no question of the paucity of actual evidence against Mr. Friedman and that such evidence that exists is, in the words of the Second Circuit, "extraordinarily suspect." Rehal, 618 F.3d at 158. There is no question that the witness testimony was elicited using a host of techniques now known to cause false testimony, is internally inconsistent, and largely since recanted by witnesses upon whom the indictments depended. The District Attorney claims she wishes to hide documents and statements upon which Friedman's conviction was based in order to protect the identities of the witnesses. But the District Attorney concedes that they will be called as witnesses at an upcoming trial. The District Attorney further concedes that those identities have long been known to, and protected by, Friedman. Despite that feigned concern, the District Attorney's true goal is to continue to avoid scrutiny of her office's and her predecessor's extraordinary misconduct.

The Second Department's rogue jurisprudence on FOIL does not expose that misconduct, as it is designed to do. Rather, it perpetuates it, and ensures that such misconduct will be concealable in the future. This Court should bring the Second Department in line with the rest of the departments and its own jurisprudence, reverse Appellate Division and reinstate Supreme Court's order in its entirety.

Respectfully Submitted,

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