No. 20-

In the United States Court of Appeals
for the Second Circuit

Jesse Friedman,

Petitioner-Movant,

v.

Michael C. Green, Executive Deputy Commissioner, New York State Division of Criminal Justice Services,[1] Letitia James, Attorney General of the State of New York

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF JESSE FRIEDMAN'S MOTION UNDER 28 U.S.C. § 2244 FOR AUTHORIZATION TO FILE A SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

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1 The New York State Division of Criminal Justice Services is responsible for maintaining the New York State Sex Offender Registry and is therefore the proper Respondent in this case. *See* https://www.criminaljustice.ny.gov/nsor/ (*last accessed,* October 26, 2020); *see also,* Rumsfeld v. Padilla, 542 U.S. 426, 438 (2004) ("a habeas petitioner who challenges a form of 'custody' other than present physical confinement may name as respondent the entity or person who exercises legal control with respect to the challenged 'custody'").

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PRELIMINARY STATEMENT

Petitioner Jesse Friedman ("Jesse") seeks authorization from this Court pursuant to 28 U.S.C. § 2244(b)(3) to file a second petition for writ of habeas corpus, in order to assert new claims based on facts not discoverable at the time of his prior petition, that underlie two Fourteenth Amendment Due Process violations, but for which Jesse would not stand convicted. Jesse does so in order to make one final attempt to clear his name of crimes for which he is actually, factually innocent; his is one of the last major convictions of the Satanic Panic era that remains intact despite more than a decade of re-investigation and litigation.

The likelihood of Jesse's innocence and the need for newly discovered evidence in order to vindicate it were acknowledged by this Court, the last time Jesse came before it. See Friedman v. Rehal, 618 F.3d 142 (2d. Cir. 2010) (finding that the case was "unlike other appeals", finding that there was "a reasonable likelihood" that Jesse Friedman was wrongfully convicted, and directing the District Attorney of Nassau County to reinvestigate the case). Subsequently, then-Nassau County District Attorney Kathleen Rice undertook a 2.5-year-long re-investigation of Jesse's conviction that concluded with the issuance of a 181-page affirmance; her Office's refusal to disclose any of the materials reviewed in the course of the re-investigation gave rise to five years of subsequent litigation pursuant to New York State's Freedom of Information Law ("FOIL").

That re-investigation and subsequent litigation has provided the defense with newly discovered, newly available evidence that proves that the indictments returned against Jesse were done so on the sole basis of testimony that was false; coerced; perjurious. These new facts include proof that the Nassau County Police Department Sex Crimes Unit a) employed suggestive questioning when gathering statements from children who would later become witnesses at the Grand Jury; b) authored witness' statements on their behalf in curated summaries of multiple, lengthy, hostile interviews; c) utilized the now discredited and abandoned 'recovered memory' approach to allegations of abuse; and d) coerced the cooperation of Jesse's teenage friend Ross Goldstein — the only complaining witness who can credibly be called anything but a child — in the prosecution against Jesse Friedman. These new facts explain the increasingly incredible, fantastical charges which the Grand Jury returned against Jesse — charges for which the trial court promised him a life sentence were he to exercise his right to go to trial (at which Mr. Goldstein would have testified against him) and to which he thus entered a coerced plea of guilty.

These new facts demonstrate two distinct violations of Jesse's constitutional rights: (1) that Jesse's plea was coerced and (2) that the State relied upon coerced, false testimony in order to acquire the indictment to which he ultimately entered his coerced guilty plea — both, Fourteenth Amendment Due Process violations. Jesse also asserts a claim of actual, factual innocence that is far from freestanding, and is

instead, deeply interrelated to his claims of plea and Grand Jury coercion. But for these constitutional violations, there would have been no indictments; no guilty plea; no conviction after trial.

Based on the newly discovered facts summarized above, and for the reasons set forth in this memorandum, this Court should authorize the district court to consider Jesse's new claims in a successive petition for writ of habeas corpus such that he might finally get that which he has always proved elusive: a full and fair evidentiary hearing; a real day in court.[2]

APPLICABLE LAW

Under the Antiterrorism and Effective Death Penalty Act of 1996, a second or successive habeas corpus petition may be filed in district court only if an applicant obtains authorization from the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A). A second or successive habeas corpus petition may be filed in the district court upon a showing by the applicant that:

> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable

[2] For the full factual and procedural background of this case, see the Declaration of Rhidaya Trivedi in Support of Jesse Friedman's Application for Authorization to File a Successive Habeas Petition at ¶¶ 9-53.

factfinder would have found the applicant guilty of the underlying offense.

[28 U.S.C. § 2244(b)(2)(B).]

To obtain authorization from a court of appeals, an applicant must make "a *prima facie* showing that the application satisfies the requirements of [§ 2244(b)]." 28 U.S.C. § 2244(b)(3)(C). A "prima facie showing" of these requirements is "not a particularly high standard. An application need only show a sufficient likelihood of satisfying the strict standards…to 'warrant a fuller exploration by the district court." Bell v. United States, 296 F.3d 127, 128 (2d Cir. 2002) (quoting Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997)).

ARGUMENT

I. THE FACTUAL PREDICATE FOR JESSE'S CLAIMS COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE.

The factual predicate for Jesse's claims — of false and coerced testimony at the grand jury; of the coercion of his plea; of his actual, factual innocence — could not have been discovered previously through the exercise of due diligence. There is perhaps, no better proof of this, than the fact that the overwhelming majority of the evidence discussed *herein* was *not* discovered through the due diligence exercised by the *Capturing the Friedmans* team.

Indeed, as the indictments were returned in 1987 and 1988 (prior to which all of Arnold and Jesse's class rosters were seized by law enforcement), and therefore armed only with the names of the fourteen "Doe" witnesses, Arnold and Jesse attempted to reconstruct the make-up of the computer classes in which abuse was alleged. It would be these rough reconstructions upon which the *Capturing the Friedmans* team would rely, in their early 2000's attempts to contact each and every complaining witness, computer class student and parent thereof who could confirm or deny the occurrence of abuse. See "Victims Say Film on Molesters Distorts Facts", https://www.nytimes.com/2004/02/24/movies/victims-say-film-on-molesters-distorts-facts.html (*last accessed,* October 13, 2020) (describing Andrew Jarecki stating that he attempted 500 times to contact 100 former computer class students).

As a result of their efforts — hamstrung by the generic names of the students, the fact that the witnesses could live anywhere on the planet, the reality of the internet being only in its earliest stages, and the requirement that complaining witnesses who wished to recant admit to *perjury* — only the recantations of two complaining witnesses — Dennis Doe and Steven Doe (Brian Tilker) — were acquired, in addition to the exculpatory statements of three non-complainant students — David Zarrin, James Forrest and Ron Georgalis —, of three parents — Richard Tilker (Steven Doe's father), Ralph and Margalith Georgalis —, and of

Jesse's friend Judd Maltin. Dozens of witnesses — complaining and not — outright refused to speak to the team.

Today, an additional three complaining witnesses — Barry Doe, Keith Doe, and Kenneth Doe — have recanted; Ross Goldstein has recanted; nine more students who affirmatively deny the existence of any abuse have come forward; the only parent to take contemporaneous notes during the investigation has been persuaded of Jesse's innocence; the reliability of Gregory Doe and Richard Doe has been questioned by the District Attorney herself; a mountain of evidence of interrogation techniques and investigative methods that explain each and every false allegation at the Grand Jury have become newly available.

Matter cannot be created or destroyed. But truth is not matter; in order for lies to be exposed as such — particularly lies told by fearful children amidst a local and national hysteria — opportunities to discover the truth must be *created*. As argued *herein*, the prior decision of this Court created those very opportunities. But for this Court's direction of the District Attorney to re-investigate the conviction; but for the District Attorney's engaging a review process utterly devoid of transparency and integrity; but for the defense's efforts to secure the underlying, withheld, investigative materials through the Freedom of Information Law; but for the motivation that *Capturing the Friedmans*, the Rice Review, and the prior decision of this Court would together provide to witnesses to come forward and either admit

to perjury or tell a story of Jesse's innocence long decried in Nassau County — the evidence upon which Jesse's claims are based simply would not have become available.

A. The Rice Report directly disclosed new, previously unavailable evidence of the techniques which coerced the Grand Jury testimony of the fourteen child witnesses and Ross Goldstein and disclosed one recantation of an original complaining witness and evidence that undermined the credibility of two more.

Without question, the coercive investigatory techniques described in the Rice Report, Trivedi Decl. at ¶¶ 55-85, including the pattern of repeatedly interviewing children and authoring their statements intermittently and inconsistently, Trivedi Decl, at ¶¶ 86-103, the recantation of complaining witness James Doe, Trivedi Decl. at ¶¶ 102, 120-122, and the District Attorney herself questioning the reliability of Gregory Doe and Richard Doe, Ex. E at 79, 103, could not have been discovered previously through due diligence.

First, the investigatory techniques. Criminal procedure dictates that, had Jesse gone to trial, the defense would have had an opportunity to question law enforcement and complaining witnesses as to the investigative techniques that had been utilized in the course of their interrogation(s). But because of the prosecution's year-long declination to provide Brady material to the defense between 1987 and 1988— to disclose the dozens, if not hundreds, of interviews that yielded no allegations of abuse —, Ex. DDD, the defense's inability to know that complaining witnesses had

been interviewed on at least ten occasions that yielded no written statements, Ex. XX, Decl. of Grace Gill, at ¶¶ 10-11,[3] and the undisputed fact that the 14 complaining witnesses had to be asked leading questions at the Grand Jury to which they gave "yes" or "no" answers, Ex. BB, August 18, 2013 Letter from Scott Banks to Justice F. Dana Winslow, **it remains eminently possible that the defense would never have known which questions to ask; which interrogation techniques had yielded which inculpations of Jesse, and how.**

Of course, in the course of making *Capturing the Friedmans*, individual members of law enforcement and individual complaining witnesses and their parents would reference individual interrogation techniques. *See, e.g.,* Ex. II, May 18, 2001 Excerpts of Recorded Interview Statements of Detective Anthony Squeglia (admitting that when interrogating children, you "don't give them an option, really…"); *see also,* Ex. FF, February 21, 2001 Interview Statements of Fran Galasso. **But there was no way to know that these techniques were used in a persistent, unrelenting, and uncompromising pattern, and that without them, the children outright failed to inculpate Jesse.** Only the release of the Rice Report and the interviews with witnesses it facilitated, *see infra*, would reveal the extent to

[3] To be clear, even if Jesse had gone to trial, and the prior statements of testifying complaining witnesses turned over as Rosario material, the defense may not have known, and indeed not told, that nine of the complaining witnesses had been interviewed at least once on an occasion that yielded no written statement. Ex. XX at ¶ 10-11.

which each and every inculpatory statement about Jesse elicited at the Grand Jury was tainted by the coercive techniques of law enforcement and the overall lack of integrity of the original investigation.

There is perhaps no greater evidence of this last proposition than the Affidavit of Kenneth Lanning, included *herein* as Ex. Y. Detective Lanning reviewed the Rice Report, and noted the *absence* of multiple best practices, known to ensure integrity, transparency and honesty in child sex crime investigations. Trivedi Decl. at ¶ 104; *see also,* Ex. Y at ¶¶ 12-39. Detective Lanning's observations are only possible because of the release of the Rice Report — the release of a systematic summary of the multi-phase investigation into Jesse Friedman.

The recantations of James Doe could also not have been discovered prior. James Doe, wishing to only recant allegations made against Ross Goldstein, has always refused to speak with the defense. The burial of James Doe's recantation of 60% of his prior allegations, Ex. XX, Decl. of Grace Gill at ¶ 17, in a *single sentence* of the Rice Report is no matter; fundamentally, it became available solely as a result of the Conviction Review Process.

Lastly, the Rice Report's questioning of the reliability of Gregory Doe — described as "unreliable" and "perilous to rely on", and his interview, as "fraught with inconsistencies" — and of Richard Doe — for whom no medical evidence

could be found by the District Attorney to corroborate his allegations — constitutes newly discovered evidence. Trivedi Decl. at ¶¶ 125-126; Ex. E at 79, 103.

B. This Court set in motion a series of events that would draw out previously unavailable, inaccessible witnesses, whose testimony would raze the prosecution's case against Jesse Friedman.

"The impetus and motivation for coming forward to speak about it now was a direct result of the announcement of a transparent and honest review of the case by an independent panel…."

– Ross Goldstein's March 8, 2013 Letter to the Conviction Review Team at Ex. H.

Ross Goldstein's 2013 recantation to the Friedman Case Review Panel, Ex. H is perhaps the best example of the mountain of newly discovered evidence made available by way of this Court's direction that the Nassau County District Attorney undertake a thorough, transparent, honest re-investigation of the case against Jesse Friedman.

Mr. Goldstein specifically described not wanting to share his story with *Capturing the Friedmans* but **wanting to share it with a 'transparent and honest…independent panel.'** Ex. H at 8-9. Not only did Mr. Goldstein fully recant any inculpatory statements he made about Jesse prior, but he explained in painstaking detail the coercive techniques employed by law enforcement to elicit his entry into a cooperation agreement. *Id.* at 2-6.

Mr. Goldstein is but one of several witnesses to whom access was gained as a result of the announcement of the Rice Review and events subsequent (Keith Doe, for example, would sit for an interview with the defense for the first time, in 2012, after the Rice Review as announced, offering a total recantation. Ex. U, Nov. 13, 2012 Taped Interview with Keith Doe). 'Events subsequent', however must be emphasized — the newly discovered evidence is as much the result of what the Conviction Review team affirmatively did, as much as it is the result of what they did not do (and what the defense undertook as a result).

Indeed, though a smattering of non-complaining student witnesses appears to have spoken with the Conviction Review Team, the Team made no attempt to systematically reconstruct the class rosters or interview the only people who could corroborate or refute the allegations of abuse. They utterly failed to document those allegations that, by definition could be corroborated — either because they involved other alleged victims or referenced physical evidence. Ex. XX at ¶15. This, despite the fact that the indictments allege acts of abuse occurring in a public environment with a room full of witnesses. Ex. XX at ¶16. Of the fourteen original complaining witnesses, the Rice team spoke only to *five*, and mischaracterized the submissions of individuals with direct knowledge of relevant events like Arline Epstein and Scott Banks. See generally, Ex. E.

Ultimately, because of what the prosecution said they *would do* — conduct a transparent, honest re-investigation process — and because of what they *did do* — willfully fail to conduct a re-investigation centered around principles of integrity, honesty and transparency — the defense pursued disclosures through FOIL, in a manner, resuming an investigation that had been dormant since the release of *Capturing the Friedmans*. During the FOIL litigation, the defense was ordered, at the prosecution's request, to serve each and every original complaining witness, Trivedi Decl. at ¶ 46, fn. 6; the FOIL litigation would thus create an opportunity for individuals to come forward and express their discontent with representations made in the Rice Report.

Barry Doe, for example, spoke with the *Capturing the Friedmans* team on May 21, 2012, offering an absolute, unequivocal, and thorough recantation. Ex. P, May 21, 2012 Interview Statements of Barry Doe. Upon submission of Barry Doe's interview statements, the Conviction Review team would elect to interview him (it does not appear that they wished to do so prior to his recantation). Trivedi Decl. at ¶ 120. Barry Doe would offer the final word, through counsel, after being served with Jesse's Article 78 seeking FOIL disclosures of the documents underlying the Rice Report. Ex. Z at 4:1-10 (confirming that Barry Doe's memory supports a total exculpation of Jesse).

Many disclosures followed this utterly unpredictable trajectory whereby, after speaking with the defense, witnesses would then speak with the District Attorney's Office. Michael Epstein, for example, sat for an interview with the *Capturing the Friedmans* team on August 1, 2012, and after, spoke to the DA's office and immediately recanted to his mother. Trivedi Decl. at ¶ 59. As a result of Michael's disclosures, Ms. Epstein then came forward and shared her notes with the defense. She was, and remains, the only parent known to have taken notes contemporaneous to the original investigation into Arnold and Jesse Friedman; she would go on to write directly to Judge Winslow, presiding over Jesse's FOIL litigation, because the Rice Report "ignore[d], discount[ed], and mischaracterize[d] much of [her] evidence." Ex. AA, August 19, 2013 Letter from Arline Epstein to Judge F. Dana Winslow.

Scott Banks would, in order to (in a fashion similar to Arline Epstein) rebut the mischaracterization and misinformation of the Rice Report, write a letter to Judge Winslow making clear his lack of faith in Jesse's Grand Jury process. Ex. BB, August 18, 2013 Letter from Scott Banks to Justice F. Dana Winslow.

Kenneth Doe would come forward with his recantation directly as a result the defense being forced to serve all fourteen complaining witnesses with Jesse's FOIL Article 78. See Ex. I, May 20, 2013 Letter from Kenneth Doe to Friedman Case

Review Panel (describing being served as a "collision" of worlds he had previously kept separate).

Similarly, the nine non-complainant computer class students described at Trivedi Decl. at ¶¶ 131-132 would come forward. At least one of them was enrolled in each class in which abuse was alleged. See Ex. XX at ¶¶ 17-20.

II. JESSE HAS MADE A PRIMA FACIE SHOWING THAT, BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACTFINDER WOULD HAVE FOUND HIM GUILTY OF THE UNDERLYING OFFENSE.

Once newly discovered evidence has been presented, the gate-keeping issues are whether Jesse has identified a constitutional error (exhausted and cognizable), and, if so, whether he has shown by clear and convincing evidence that but for that error no reasonable jury would have found him guilty. See Quezada v. Smith, 624 F.3d 514, 521–22 (2d Cir. 2010).

A. Jesse Raises Three Constitutional Errors, All of Which Have Been Exhausted and Are Cognizable on Federal Habeas Review.

i. Fourteenth Amendment Due Process Claim

In Friedman v. Rehal, the Second Circuit wrote, of Jesse's decision to plead guilty,

> With the number of counts in the indictments, Judge Boklan's threat to impose the highest conceivable sentence for each charge, petitioner faced a virtually certain life sentence if he was convicted at trial. And the likelihood that any jury pool would be tainted seemed to ensure that

> petitioner would be convicted if he went to trial, regardless of his guilt or innocence. Nor could he have reasonably expected to receive a fair trial from Judge Boklan, the former head of Nassau County District Attorney's Sex Crime Unit, who admitted that she never had any doubt of the defendant's guilt even before she heard any of the evidence or the means by which it was obtained. Even if innocent, petitioner may well have plead guilty.
>
> [Friedman, 618 F.3d at 158.]

Jesse's 2014 motion pursuant to CPL § 440.10 correspondingly sought vacatur of his conviction based upon the argument that his plea had been coerced in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution.[4] Ex. A, Notice of Motion dated June 23, 2014 at ¶ 3.

"It is a settled principle of federal constitutional law that a guilty plea violates due process and is therefore invalid if not entered voluntarily and intelligently." Brady v. United States, 397 U.S. 742, 748 (1970). "[T]he agents of the state may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." Id. at 750; see Waley v. Johnston, 316 U.S.

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[4] The citation to the Sixth Amendment was erroneous. Jesse brought on 440 motion — the denial of which he sought and was denied leave to appeal —a Fourteenth Amendment Due Process claim that his plea was coerced, specifically by the conduct of the trial court. Jesse's claim was adequately 'constitutionalized' for federal habeas purposes; he cited the specific provision of the constitution and presented extensive facts in support of his argument. Ex. A at ¶ 3; Picard v. Connor, 404 U.S. 270, 278 (1971) ("Obviously if the petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis to the state courts.") (internal citations omitted). The requirement that the state court have been given a reasonable opportunity to pass on the federal habeas claim is satisfied if the legal basis of the claim made in state court was the "substantial equivalent" of that of the habeas claim. Id.; see also Ulster County Court v. Allen, 442 U.S. 140, 147-48 n. 5 (1979).

101, 104 (1942) (per curiam) (guilty plea coerced by federal law enforcement officer inconsistent with due process). The plea is void if it is "induced by promises or threats which deprive it of the nature of a voluntary act… A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive." Machibroda v. United States, 368 U.S. 487, 493 (1972). Jesse's coerced plea claim is thus cognizable and has been adequately exhausted such that its presentation to this Court is proper.

ii. Fourteenth Amendment Grand Jury Misconduct Claim

Jesse additionally brings a claim that the indictments to which he ultimately pleaded guilty were procured with evidence that was knowingly coerced, perjurious, unreliable and untrue, in violation of the Fourteenth Amendment Due Process guarantee.[5] In Mooney v. Holohan, 294 U.S. 103 (1935), the Supreme Court of the United States wrote,

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as

[5] Below, Jesse not only relied upon People v. Pelchat, 62 N.Y.2d 97 (N.Y. Ct. App. 1984) — itself a case that relied upon the jurisprudence of the Due Process Clause of the Fourteenth Amendment — but clearly stated that the claim was raising more than procedural defect; it was raising "violations of fundamental constitutional rights." Memorandum of Law at 124. In order to satisfy the preservation requirements of federal habeas review, the claim must have been presented in state court in a manner sufficient to alert the court to the claim's federal nature. Daye v. Attorney Gen. of State of N.Y., 696 F.2d 186, 192 (2d Cir. 1982). Jesse's grand jury coercion claim was thus, adequately preserved.

> inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers.'
>
> [(internal citations omitted).]

In United States v. Agurs, 427 U.S. 97, 103 (1976), the Supreme Court summarized its Mooney line of cases as "consistently [holding] that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair", citing Pyle v. Kansas, 317 U.S. 213 (1942), Alcorta v. Texas, 355 U.S. 28 (1957), Napue v. Illinois, 360 U.S. 264 (1959) (("it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment), Miller v. Pate, 386 U.S. 1 (1967) ("More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); Giglio v. United States, 405 U.S. 150 (1972), and Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The line of cases dealt specifically with a conviction obtained *after trial* through the use of false evidence.

In People v. Pelchat, 62 N.Y.2d 97 (N.Y. Ct. App. 1984) the New York State Court of Appeals specifically addressed whether a prosecutor could rely upon knowingly false or perjured testimony at the grand jury stage, after which a

defendant pleaded guilty. The Court wrote, relying upon the federal jurisprudence described *supra,*

> It is familiar doctrine that a prosecutor serves a dual role as advocate and public officer. He is charged with the duty not only to seek convictions but also to see that justice is done. In his position as a public officer he owes a duty of fair dealing to the accused and candor to the courts, a duty which he violates when he obtains a conviction based upon evidence he knows to be false. Such misconduct may impair a defendant's due process rights and require a reversal of the conviction (see, e.g., People v. Robertson, 12 N.Y.2d 355 (1963); People v. Savvides, 1 N.Y.2d 554 (N.Y. Ct. App. 1956); People v. Creasy, 236 N.Y. 205, 221 (N.Y. Ct. App. 1923); **Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957).** It goes without saying that this duty also rests upon the prosecutor during pretrial proceedings (see, e.g., People v. Geaslen, 54 N.Y.2d 510 (N.Y. Ct. App. 1981); People v. Cwikla, 46 N.Y.2d 434 (N.Y. Ct. App. 1979) and the proceedings relating to indictment both at presentment and afterwards.
>
> [62 N.Y.2d at 106 **(emphasis added)**.]

A Pelchat claim is thus cognizable on federal habeas review as a Fourteenth Amendment Due Process violation. See, e.g., Hernandez v. Kuhlmann, 14 F. App'x 90, 91–92 (2d Cir. 2001) (dismissing Pelchat claim not because the claim was not cognizable on federal habeas review, but instead, because there was no showing that "the prosecutor acted in bad faith by knowing, but failing to disclose, that false testimony had been presented to the grand jury."); Nordahl v. Rivera, No. 08-CV-5565 KMK LMS, 2013 WL 1187478, at *6 (S.D.N.Y. Mar. 21, 2013) (citing Pelchat as an example of the kind of prosecutorial egregiousness that goes to the "heart of the process" such that it can survive a guilty plea); Graves v. Schriver, No. 9:98-CV-

0532, 2001 WL 1860887, at *2 (N.D.N.Y. Jan. 9, 2001) ("For example, a party may challenge a conviction based upon a guilty plea to an accusatory instrument which is void because the prosecutor knew that the only evidence to support the charge was false" and citing People v. Pelchat, 62 N.Y.2d 97, 107, 108 (1984) as reversing conviction where "Grand Jury had no evidence before it worthy of belief that defendant had committed a crime"); U.S. v. Hogan, 712 F.2d 757, 759 (2d. Cir.1983) (Due Process considerations prohibit government from obtaining an indictment based on known perjured testimony)"); c.f. Jordan v. Dufrain, No. 98 CIV. 4166 (MBM), 2003 WL 1740439, at *4 (S.D.N.Y. Apr. 2, 2003) (finding that Pelchat "rested on state, not federal grounds" but without reasoning of any kind).

As already noted, the New York State Court of Appeals' decision in Pelchat itself rested in part upon federal constitutional jurisprudence. The Court cited, as support for the proposition that grand jury misconduct may require reversal of the *conviction*, two Mooney progeny cases decided on Fourteenth Amendment grounds: Napue v. Illinois, 360 U.S. 264 (1959) and Alcorta v. Texas, 355 U.S. 28 (1957). For the specific proposition that the indictment may be attacked and dismissed after conviction when a witness's testimony was perjured, the Court of Appeals cited United States v. Basurto, 497 F.2d 781 (9th Cir. 1974). The Pelchat Court then ruled that the conviction before them "must be reversed and the indictment dismissed because the evidence before the Grand Jury failed to meet legal standards and the

prosecutor knew that when he permitted the court to take the defendant's plea to the full indictment." 62 N.Y.2d at 107. The Court reiterated that "just as [the prosecutor] could not sit by and permit a trial jury to decide a criminal action on evidence known to be false, he could not permit a proceeding to continue on an indictment which he knew rested solely upon false, citing, again, Napue v. Illinois, 360 U.S. 264 (1959). Jesse's Grand Jury misconduct claim is thus also, cognizable and exhausted.

iii. Actual Innocence

Where a petitioner seeks to file a successive habeas petition alleging a claim of actual, factual innocence, the claim of innocence must not be freestanding, and instead, tethered to a cognizable federal constitutional violation. See Cosey v. Lilley, 2020 WL 2539065 at *11 (S.D.N.Y., May 19, 2020) (adopting the Tenth and Eleventh Circuits' reasoning that AEDPA's requirements for successive petitions make clear that Congress intended for actual innocence claims to require constitutional error); see also, In re Davis, 565 F.3d 810, 824 (11th Cir. 2009) ("The statute undeniably requires a petitioner seeking leave to file a second or successive petition to establish actual innocence by clear and convincing evidence *and* another constitutional violation."); Case v. Hatch, 731 F.3d 1015, 1037 (10th Cir. 2013). Here, as demonstrated *infra*, Jesse's actual innocence claim is inextricably linked to his Grand Jury and coerced plea claims.

B. But for these constitutional errors, no reasonable factfinder would have found him guilty of the underlying offense.

Jesse's claims meet the second element required to authorize the district court to consider a second habeas corpus petition, because Jesse has made a *prima facie* showing that the facts underlying his claims, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying offense. See 28 U.S.C § 2244(b)(2)(B)(ii). This Court has defined the "prima facie" standard of section 2244(b)(3)(C) to mean, "as the phrase normally does, that the applicant's allegations are to be accepted as true, for purposes of gate-keeping, unless those allegations are fanciful or otherwise demonstrably implausible." Quezada v. Smith, 624 F.3d 514, 521–22 (2d Cir. 2010).

The question is thus: in the absence of the coercive techniques used to procure the grand jury testimony of the fourteen child witnesses and Ross Goldstein, and in the absence of the coercive threat not only of Ross Goldstein's live inculpatory testimony at trial but consecutive sentencing at the hands of Judge Boklan, whether any reasonable factfinder would have convicted Jesse. Unequivocally, the answer is no.

Not a shred of testimony provided by the fourteen child witnesses at the Grand Jury remains free of the taint of coercion by law enforcement. The District

Attorney's own recitation of the investigation makes clear that children's denials were ignored; they were interrogated in lengthy, hostile, and repeated interrogations replete with positive reinforcement for allegations of abuse and negative consequences when they denied it. See e.g., Ex. E at 87; see also Ex. II at 65; Ex. G. In numerous, lengthy interrogations, law enforcement gaslit children into believing that abuse "could" have happened; ignored fantastical allegations of fictional abusers while selectively crediting the rest, no matter how illogical; asked questions that had already been answered, while children repeatedly "remembered" the most egregious, violent conduct in the latter stages of the investigation. Trivedi Decl. at ¶¶ 54-108. Multiple interviews with primary complaining witnesses were undocumented, Ex. XX at ¶¶ 11-12; those that were, were documented in statements concocted by law enforcement, in the language of adults. Trivedi. Decl. at ¶ 94.

Scott Banks' memory is clear: the children were asked "yes" or "no" questions in order to return the three indictments; their testimony was troublingly devoid of details as to who had abused them, what abuse had occurred, when it occurred, and how it occurred. Ex. BB (describing the answers provided by the child witnesses at the grand jury as "providing absolutely no detail"). Keith Doe recollects being asked not about abuse, but about his life generally. See Ex. U at 8 ("When I went to the Grand Jury, they didn't ask me about any of this stuff… I think my recollection is they asked me how old I was and what favorite activities were. … and I remember

the Mineola courthouse actually being a very intimidating place to go when you're that age."). But for this coercion — this deliberate elicitation of perjury — no such indictments could have been returned; there is perhaps, no better support for this proposition than the fact that law enforcement knew they could not rely upon these witnesses at trial. <u>See</u> Ex. H, discussed *infra*.

It is equally true that but for the coercion of Ross Goldstein, and the threats of Judge Boklan, Jesse Friedman would not have entered a coerced plea of guilty. Ross Goldstein's cooperation was *specifically* elicited out of fear that not a single child witness was fit to testify at trial, and thus, to coerce Jesse into pleading guilty — an outcome he had previously refused. Ex. H ("the prosecutor and the police believed there was a good chance that none of the younger kids would be willing to take the stand at trial.). Judge Boklan's threat that Jesse, if convicted at trial — a certain outcome, once Ross Goldstein's cooperation was secured — would never be a free man, ensured that Jesse had no option but to give up. <u>See</u> Ex. H; Ex. LL at ¶11; Ex. UU; Ex. VV.

But for these constitutional errors, no reasonable factfinder would have rendered a verdict of guilty. The prosecution would have presented a case with no physical evidence — no medical testimony, no photographs, no videos; witness testimony would have come from all, some, or none of the fourteen child witnesses. The defense, armed with the statements of all of the witnesses who denied the

occurrence of abuse, the adult-authored statements of the testifying witnesses, and the testimony of parents troubled by the lengthy, hostile interrogations, would have impeached the credibility of each and every one.

The defense would separately be able to call as witnesses parents who had dropped off and picked up their children, re-enrolling them for session after session without concern, in addition to dozens of non-complaining students who attended the same classes in which abuse was alleged to describe their experience of the classes. There would, at minimum, be reasonable doubt, cast by the dozens of students and parents who saw nothing; remembered nothing; feared nothing, in the Friedman home.

Today, nothing remains of the case against Jesse Friedman; the testimony of each and every complaining witness has been razed. Seven main elements dictate this conclusion: 1) the complainant has completely repudiated the testimony he provided when he was a child, explaining that it was a product of coercion, 2) other eyewitnesses who were in the same classroom as the complainant assert that no abuse took place, 3) the complainant lied in material respects, claiming he witnessed sexual abuse against others that did not take place, 4) the complainant lied in material respects by falsely claiming that other perpetrators sexually abused him, 5) the complainant radically altered his testimony in material respects or cannot remember even basic aspects of his testimony, 6) the complainant made assertions that were so

implausible and contradicted by the physical evidence, or obviously fantastic that they cannot be credited, and 7) the complainant's accounts of sexual abuse dramatically expanded after each round of police interrogation.

Of the fourteen original complainants, five have completely repudiated; one has recanted 60% of his allegations; another six have been undermined by the unambiguous testimony of individuals who were their classmates and peers; the remaining two have been deemed unreliable by the District Attorney herself in part because they remember being abused by fictitious characters. Ross Goldstein has offered a recantation that not only rescinds any allegation that Jesse ever abused anyone but offers a credible narrative as to how and why he entered the cooperation agreement and inculpated his friend. The defense has spoken with a total of twelve students who attended each and every class in which the abuse allegedly occurred, in many cases who were alleged to have been abused by others, all in the plain view of the small classroom. All of these witnesses, one of whom is now a Nassau County Assistant District Attorney, deny they witnessed any abuse. ***One or more of these students was present in each class in which abuse was alleged by others and each states that he did not witness any abuse.*** Exhibit XX, Declaration of Grace Gill at ¶¶ 15-20.[6]

[6] Even a cursory examination of the six complaining witnesses with whom neither the defense nor the prosecution have spoken, indicates that nothing remains of the case against Jesse.

Daniel Doe: Witness accounts, most of which are newly discovered, conclusively refute Daniel Doe's charges. Keith Doe was also in the class from which his allegations arose, and when asked whether he witnessed any abuse he replied "I don't think so…I'm surprised to see that." Ex. U at 5. So too was Steven Doe (Brian Tilker), who stated "I don't remember any bad experiences except for maybe not liking computers, you know?" He can "state without reservation that nothing untoward ever happened to me and that I never witnessed anything untoward happening to anyone else in the classes that I attended." Ex. OO at 13. David Zarrin, another eyewitness to classes with Daniel Doe, agrees that no abuse ever took place. Ex. JJ at 3. Ross Goldstein's recent recantation echoes both of their sentiments. Ex. H.

Patrick Doe: Patrick Doe's allegations are conclusively refuted by Kenneth Doe, Michael Epstein, Michael Kanefsky, and Barry Doe. Moreover, Michael Epstein's mother, Arline Epstein, can confirm that parents freely entered the classroom without ever seeing any sort of sign of abuse. Ex. J; Ex. W. There is no plausible basis to maintain the charges from Patrick Doe.

Lawrence Doe: Numerous other students in that class are unanimous in their observations that no such conduct like that alleged by Lawrence Doe, solely in the third indictment, ever occurred. Michael Epstein, Kenneth Doe, Barry Doe, and Michael Kanefsky were all in the class with Lawrence Doe, and none ever witnessed anything of the sort. Kenneth Doe specifically denies ever being shown pictures of nude people, within the same class that Lawrence Doe alleges they were displayed. Ex. I. All are sure, they never were sexually abused in that class themselves, and they never witnessed any sort of abuse. And Michael Epstein explains: "I really can't imagine that anything untoward was happening on the other side of the room that I didn't notice." Ex. T at 6. The remaining charges by Lawrence Doe (numbers 3294-3296) are similarly baseless as they relate to Jesse Friedman.

Edward Doe: The first class, which accounts for most of the charges, is the same class in which Daniel Doe alleges he was sodomized multiple times each session, and in which the games "Leap Frog" and "Simon Says" were commonly played. Edward Doe alleges isolated incidents of differing abuse, but nothing like those kinds of allegations. Even his reduced allegations, however, stand in stark contrast to multiple witnesses who saw nothing of the sort. Keith Doe was in this class, and doesn't recall seeing anyone abused. Ex. U at 5. So too was Steven Doe, who "did not witness anything inappropriate in the computer classes at any time." Ex. OO at 12. Ross Goldstein has also been variously accused of being present in this class and is adamant that he never saw any sort of abuse. Ex. H.

The charges of Edward Doe are an excellent example of the sort of internal inconsistencies that fatally plague the indictments. Daniel Doe alleges in this class widespread constant sodomy of every student in the class. Edward Doe also alleges serious crimes, but mostly isolated incidents of bizarre sexual acts or violence. Keith Doe alleged still somewhat less serious acts, and now concedes that those words and acts were manipulations by the investigating officers. In the same vein Steven Doe alleged crimes inconsistent with those alleged by the others, and now admits he only stated those things under tremendous police pressure. Ex. OO.

Because he has satisfied both prongs of the demands of § 2444(b)(2)(B)(ii), this Court should authorize Jesse Friedman to file a successive petition for writ of habeas corpus in District Court.

CONCLUSION

The question before this Court is whether Jesse Friedman has made a *prima facie* showing of newly discovered evidence of constitutional violations — neither fanciful or demonstrably implausible — but for which no reasonable factfinder

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Fred Doe: Under repeated, extensive, and well-documented police questioning, Fred Doe's allegations grew from a claim that Arnold Friedman gave him "bad hugs" to assertions that he was anally raped by Arnold and Jesse while three of Jesse's friends held him down. *See supra* at Ex. E at 12-13; Trivedi Decl. at 89-93. He falsely identified one of these "helpers." *Id.* His statement, composed by Detective Merriweather contained the "penis was as hard a rock" language, identical to the language Detective Merriweather used in an unrelated case with a different complainant. Trivedi Decl. at ¶ 93. Fred Doe's claim that he submitted to sexual abuse only because he was told he would never be allowed to come back again to computer class" is fantastical and illogical. Ex. Y at ¶¶ 16-17. Fred Doe's claims are refuted by three eyewitnesses who assert that no sexual abuse took place: Steven Doe, Keith Doe, and Ross Goldstein.

William Doe: Nearly all of William Doe's charges involve multiple students and class-wide sexual games. Yet in the Spring 1986 Gamemaker class William Doe was one of just two complaining witnesses. More damningly, the best information available shows that Rafe Lieber and Gary Meyers were also present in this class among other non-complaining student witnesses. Gary Meyers had this to say: "nothing odd or inappropriate happened at all." Rafe Lieber stated: "nothing ever happened." William Doe is the only complaining witness to bring charges at all in the Fall 1986 Music class, raising immediate doubts about whether the public sexual acts describes could possibly have occurred. Beyond such concerns, he shared the class with Rafe Lieber and Gary Meyers, who, as previously stated, did not corroborate the charges. The earlier, first indictment charges were from the Spring 1985 class. William Doe shared that class with Ron Georgalis, who has been adamant about the lack of abuse, and Dan Aibel, who wonders "what could have gone on there that I should have known about?"…and witnessed no such abuse. Ex. X. Rafe Lieber too was in that class, along with numerous other students who refused to disclose abuse. Can we just remove the "gamemaker" and "music" class qualifiers here. "Music class" sounds like violin lessons, and those labels are really only something that my dad and I understood in regards to the more advanced classes. "The Spring 1986 class" should be sufficient for designating the class.

would have convicted him at trial. Nothing Jesse sets forth *herein* is fanciful or demonstrably implausible; everything is instead, deeply consistent with the Satanic Panic era, and of law enforcement's desperation to convict those they believed to be responsible for allegations that can be described as fantastical and implausible.

This Court has once proclaimed the likelihood of Jesse's innocence; recognized the institutional failures he has suffered time and time again; expressed concern as to the injustice that has gone covered up. In the near decade since, Jesse has only further demonstrated his innocence; suffered numerous additional institutional failures; encountered an intentional effort on the part of the prosecution to obscure and cover up the truth. This Court was the first to truly and sincerely acknowledge the probable injustice of the case against Jesse Friedman; we ask that you be the last.

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Respectfully submitted,

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