To Be Argued By:
Robert A. Schwartz
(15 minutes)

NEW YORK SUPREME COURT

Appellate Division - Second Department

In the matter of JESSE FRIEDMAN,

Petitioner-Respondent,

A.D. No. 2013-08373
Index No. 13-4015

-against-

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

Respondent-Appellant.

APPELLANT'S BRIEF

KATHLEEN M. RICE
District Attorney, Nassau County
262 Old Country Road
Mineola, New York 11501
(516) 571-3800

Robert A. Schwartz
Judith R. Sternberg
Assistant District Attorneys
of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES AND STATUTES

Page

CASES

STATUTES and Other Materials

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

----------x

In the matter of JESSE FRIEDMAN,

Petitioner-Respondent,

-against-

A.D. No. 2013-08373
Nassau Index No. 13-4015

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

Respondent-Appellant.

----------x

STATEMENT PURSUANT TO CPLR § 5531

1. The index number in the Supreme Court, Nassau County, is 13-4015.

2. The full names of the parties are Jesse Friedman and Kathleen M. Rice, in her official capacity as the Nassau County District Attorney.

3. This action was commenced in the Supreme Court, Nassau County.

4. The action was commenced by the filing of a verified petition in the Supreme Court, Nassau County, seeking relief pursuant to CPLR article 78. Petitioner sought an order directing the District Attorney to supply him with: records he had requested pursuant to the Freedom of Information Law; "the entire case file" of the District Attorney's "prior investigation" of petitioner; "the records and minutes of the Jesse Friedman grand jury"; and such other relief as the court deemed appropriate.

5. This appeal is taken from a judgment of the Supreme Court, Nassau County (Winslow, J.), entered August 23, 2013, that granted petitioner's application in its entirety, but for a provision that the District Attorney could redact the names of three complainants who had contacted the court during the pendency of the article 78 proceeding. The Supreme Court ordered the disclosure of "every aspect, every part,

every piece of paper that has been generated in the matter of People against Jesse Friedman."

6. This appeal is taken by the appendix method.

QUESTIONS PRESENTED

1. Did the Supreme Court err in entertaining petitioner's unexhausted request for material that could have been sought in his Freedom of Information Law request, but was not?

2. Was it error and an abuse of discretion for the Supreme Court to order the disclosure of records that would reveal the identities of sex-crimes victims, which are confidential pursuant to Civil Rights Law § 50-b, and statements and summaries of statements of witnesses who did not testify at trial, which are exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(iii)?

3. Did the Supreme Court err in finding that petitioner had a compelling and particularized need for grand jury minutes containing the testimony of sex-crimes victims?

Preliminary Statement

Kathleen M. Rice, District Attorney of Nassau County, appeals from a judgment of the Supreme Court, Nassau County (Winslow, J.), entered August 23, 2013, which granted a petition filed pursuant to CPLR article 78 and ordered appellant to provide petitioner with "every piece of paper that has been generated in the matter of People against Jesse Friedman." Proceedings on the order have been stayed.

Introduction

In 1988, petitioner Jesse Friedman admitted that he had committed sex offenses against children who had been students in computer classes taught by his father (Arnold Friedman) in the family's home, and he pleaded guilty to multiple charges that arose from that conduct. Shortly after he was sentenced on those charges, petitioner appeared on a nationally televised talk show and again admitted his criminal conduct.

In 2003, a film entitled Capturing the Friedmans was released. That film purported to reflect the police investigation that eventually led to the indictments against petitioner and his father and the circumstances that led to their guilty pleas. In fact, through editing and otherwise, the film distorted and misrepresented crucial facts.

Following the release of this "documentary," and in substantial reliance upon it, petitioner commenced state and federal litigation through which he sought to establish that his indictments and guilty plea were the products of unconstitutional state action. Petitioner's arguments were rejected in each court that entertained them. Nonetheless, in 2010, in response to the suggestion of the United States Court

of Appeals for the Second Circuit, which assumed the truth and accuracy of the facts presented in the movie, the District Attorney of Nassau County undertook a voluntary investigation to determine whether, notwithstanding his guilty plea, and his subsequent public proclamation of guilt, petitioner was wrongfully convicted. To that end, the District Attorney assigned a team of senior prosecutors (the "Review Team") to conduct the investigation and appointed an advisory panel of four independent experts (the "Advisory Panel," "Panel," or "Review Panel") to render advice and offer expertise to the Review Team.

During the pendency of the extensive re-investigation, petitioner made an informal request for copies of the records being reviewed by the Panel. When that was denied on the constraint of Civil Rights Law § 50-b and for other reasons, petitioner filed a formal request for information pursuant to the Freedom of Information Law (FOIL) (Public Officers Law [POL] §§ 84-90). Petitioner sought disclosure of the documents provided to the "Friedman Case Review Panel," as well as records clarifying the status of the members of the Panel and demonstrating that they were not "members of the public" for purposes of the Freedom of Information Law and Civil Rights Law § 50-b. Information pertinent to the latter request was

provided, but petitioner's request for disclosure of the material provided to the Advisory Panel was refused, and his administrative appeal from that refusal was denied.

Petitioner then instituted a proceeding pursuant to CPLR article 78, seeking an order requiring the District Attorney to disclose the material that petitioner had requested, as well as significantly more. The District Attorney responded, as she had in her letters denying petitioner's FOIL request, that the refusal to disclose the material before the Advisory Panel was based on established statutory and case law. Specifically, disclosure was refused because it would have disclosed the statements of witnesses who did not testify at trial, in contravention of Public Officers Law § 87(2)(e)(iii), and because it would have violated the provisions of Civil Rights Law § 50-b, which requires that the identities of sex-crime victims be kept confidential. Petitioner did not dispute the general validity of these exemptions from disclosure. He argued, rather, that the exemptions should not be applied to him because he had good cause for seeking these records.

In addition to the material previously sought in his FOIL request, petitioner sought: an order requiring the District Attorney to disclose the entire contents of the prosecutor's

files concerning the original investigation into petitioner's crimes and an order pursuant to Criminal Procedure Law § 190.25(4), directing the District Attorney to disclose grand jury testimony and records related to the indictments filed against petitioner.

The District Attorney released her conviction integrity report during the pendency of the article 78 litigation. Petitioner disputed the report's finding that he was not wrongly-convicted. According to petitioner, that report was flawed and subject to attack on numerous grounds.

It has been petitioner's position that the prosecutor's files might provide him with the material he needs to prove his innocence. This is the good cause and compelling need that he claims overcomes the confidentiality provisions set forth in Civil Rights Law § 50(b), POL § 87(2)(e)(iii), and CPL § 190.25(4). But, petitioner was not convicted on the testimony or statement of any victim who, according to petitioner, was inappropriately and suggestively questioned. He was convicted on the basis of his own words, in his own guilty plea. In the words of the Court of Appeals, that plea, and petitioner's admissions of guilt, "render[] irrelevant his contention that the criminal proceedings preliminary to trial were infected with

impropriety and error." People v. DiRaffaele, 55 N.Y.2d 234, 240 (1982). This, alone, is sufficient to defeat petitioner's claims of good cause and compelling, particularized need for the release of material that is confidential on numerous bases.

Petitioner would undoubtedly have been entitled to most of the material he demanded, had he chosen to go to trial. He did not. He could have attempted to establish a meritorious ground for overturning his guilty plea, had he filed a direct appeal. He did not. He would have been entitled to have his conviction vacated, had he presented a meritorious argument in the course of his protracted state and federal litigation. He did not. He did not go to trial, or file a direct appeal, or succeed in undermining the validity of his plea in any court that entertained his litigation, because his claims lacked merit or did not survive his guilty plea.

Nonetheless, after evincing a concern that petitioner had a right to these records under Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court granted petitioner's article 78 application in its entirety. It ordered that the District Attorney deliver to petitioner "every piece of paper" in her office's records "generated in the matter of People against Jesse Friedman, the 1987, 1988 case," except that the court

permitted redaction of the names of three complainants who had contacted the court during the pendency of the article 78 proceeding. This appeal ensues.

In its insistence that the civil proceeding before it was a continuation of the criminal prosecution that had long since ended, and in its attempt to re-open the issue of defendant's guilt, the Supreme Court failed to focus on the issues appropriate to petitioner's application. The court failed to properly apply the law relevant to FOIL, the law relevant to the disclosure of grand jury minutes, and the law relevant to the privacy rights of sex-crime victims. For the multiple reasons discussed herein, the Supreme Court's order should be reversed.

Statement of Facts

The Criminal Investigation and Prosecution[1]

In November 1987, after a years-long investigation into child pornography, federal agents executed a search warrant at the Great Neck home of Arnold Friedman. Child pornography was found during the search, as was a list of children who were students in an after-school computer class taught by Arnold Friedman in his home (A0311-12). Arnold Friedman's son, petitioner Jesse Friedman, helped teach these classes between 1984 and 1987.

Arnold Friedman was indicted on federal child pornography charges, and the Nassau County Police Department undertook an investigation to determine whether he had abused any of the children in his classes. Evidence of such abuse was quickly uncovered. The first child interviewed by the police reported that Arnold Friedman showed him pornography and touched him inappropriately. Other children and their parents were

[1] Historical facts regarding petitioner's arrest, conviction, and post-conviction litigation are largely taken from the conviction integrity review report issued by the Nassau County District Attorney. That report is included in appellant's appendix at pages A0284-0460. Confidential items that were sealed by the court below are omitted from the appendix and are included only in a sealed appendix provided to the Court. (References preceded by A are to both appendices.)

questioned, and more children reported being shown pornographic material and being touched inappropriately. Other children reported far more serious abuse and implicated petitioner in some of the acts (A0316-17, 0458).

On November 25, 1987, the Nassau County Police executed their own search warrant for the Friedman home. Pornographic videogames, sexual paraphernalia, photographs of nude children, movie and Polaroid cameras, pornographic movies, and an advertisement for "homosexuality with boys" were found in the home. Both Arnold and Jesse Friedman were arrested and the investigation continued with other children being interviewed (A0319).

On December 7, 1987, based on the testimony of some of these witnesses, the grand jury handed down indictment 67104, charging Arnold Friedman with multiple counts of sodomy, sexual abuse, and other charges. Petitioner was charged with three counts of sexual abuse in the first degree, five counts of endangering the welfare of a child, and two counts of using a child in a sexual performance (A0325-26).

On February 1, 1988, a different grand jury handed down indictment 67430, based on the testimony of witnesses who had

not testified before the first grand jury. That indictment charged Arnold and Jesse Friedman with multiple counts of sodomy, sexual abuse in the first degree, and attempted sexual abuse in the first degree (A0326).

On March 25, 1988, Arnold Friedman pled guilty to forty-two counts of child sex abuse in satisfaction of both Nassau County indictments. On March 29, 1988, he pled guilty to federal charges pending against him (A0328).

In June 1988, after further investigation, Ross Goldstein, a friend of petitioner, was arrested based on statements implicating him in some of the crimes committed by Arnold and Jesse Friedman. Goldstein cooperated with the prosecution in the case against petitioner in exchange for a favorable plea. Goldstein ultimately pled guilty to sodomy and other charges and, after an appeal (People v. Ross G., 163 A.D.2d 529 [2d Dept. 1990]), was adjudicated a youthful offender (A0335-37).

On November 7, 1988, a third indictment (69783) was handed down against petitioner based on evidence discovered since his second indictment. Some of the witnesses had previously given grand jury testimony against either Arnold or Jesse Friedman. The third indictment charged petitioner with 127 counts of

sodomy, nine counts of sexual abuse in the first degree, and other charges (A0338-39). The charges against petitioner from all three indictments emanated from fourteen complaining witnesses (A0314). Over twenty charges were dismissed by the court, including the sole charge involving one complainant, leaving thirteen complaining witnesses.

In preparation for trial, petitioner's attorney was given the names of the complaining witnesses (A0346). In the course of his investigation, counsel met with one non-complaining witness and his mother. The mother showed counsel a videotape she had taken of the police interviewing her son (A0345).[2] Defense counsel also had petitioner meet with mental health professionals to be evaluated. One doctor's report described petitioner as a "psychopath" and a "pansexual" who was capable of committing the crimes with which he was charged (A0343).

On December 20, 1988, petitioner pled guilty to seventeen counts of sodomy in the first degree, four counts of sexual abuse in the first degree, one count of attempted sexual abuse in the first degree, one count of use of a child in a sexual

[2] The videotape no longer exists; only counsel's handwritten notes about the videotape survive. Petitioner's typed version of those handwritten notes (A0189-90) should not be mistaken for a transcript of the videotape.

performance, and two counts of endangering the welfare of a child, in satisfaction of all three indictments (A0347). He was sentenced to concurrent indeterminate terms of incarceration, the longest of which was six to eighteen years.[3] Shortly after his sentencing, petitioner appeared on television, on the Geraldo Rivera Show, where he admitted fondling the children, posing naked with them for photographs, and engaging in oral sex with them (A0349-51, 0923).

Petitioner was released from prison in January 2002, and was adjudicated a level-three sex offender (A0356).

Capturing the Friedmans and Post-conviction Litigation

In 2003, two filmmakers released a film they produced, titled Capturing the Friedmans. The film was critical of the investigation and prosecution of the Friedmans and suggested that they were innocent of the charges against them. The filmmakers interviewed a number of the students who had attended

[3] Because petitioner never appealed from his judgment of conviction, the minutes of his plea and sentencing were never transcribed. In 2004, the People attempted to obtain a transcription of the plea proceedings and were advised by the chief court reporter for the County Court, Nassau County, that the stenographer assigned to Friedman's proceedings had died, that his records could not be located, and that it was no longer possible to obtain a transcription of his plea or sentencing proceeding.

Arnold Friedman's computer classes and other individuals involved in the case. They presented a skewed version of the events leading up to petitioner's guilty plea and made it appear that the complainants were led to give false statements by overly aggressive detectives using unreliable interviewing techniques. The film falsely alleged that one complaining witness was placed under hypnosis before remembering that he was abused by the Friedmans. The film implied that petitioner's guilty plea was a product of coercion by a biased judge who threatened him with a lifetime in prison if he were convicted after trial (A0357).

In January 2004, petitioner filed a motion to vacate his judgment of conviction. He alleged that witnesses against him and his father had been subjected to hypnosis before remembering that they were abused and that the police used suggestive and subsequently discredited techniques when interviewing the computer students. This, he contended, was material to which he was entitled pursuant to Brady v. Maryland, 373 U.S. 83, and the failure to disclose this information prior to the entry of his guilty plea was, according to petitioner, a violation of his constitutional rights. He further argued that the judge was biased against him (A0357). Attached as an exhibit to the

motion was a copy of Capturing the Friedmans, and petitioner relied heavily on that "evidence" to support his motion.

Following the release of the film and filing of the post-judgment motion, and the publicity they generated, four students who testified in the grand jury retained counsel for the purposes of protecting their privacy. Other witnesses wrote to the judge who had presided over the criminal case, reaffirming their testimony and asking that their privacy be protected (A0402-03).

In January 2006, petitioner's motion was summarily denied. The County Court found that no hearing was necessary as to any issue of fact because the material allegedly withheld from petitioner was impeachment material to which he was not entitled prior to the entry of a guilty plea. This Court denied petitioner leave to appeal from that denial, and his application for leave to appeal to the New York Court of Appeals was dismissed.

In June 2006, petitioner filed a writ of habeas corpus in federal court, alleging the same claims that he raised in his motion to vacate judgment. That court dismissed the petition on

timeliness grounds, but granted a certificate of appealability. Friedman v. Rehal, 2008 WL 89625 (E.D.N.Y. 2008).

On appeal to the Second Circuit Court of Appeals, petitioner continued to maintain that witnesses were subjected to hypnosis and that he had been denied Brady material because the People did not reveal that alleged fact. The Second Circuit agreed with the District Court that the petition was untimely. While it noted that a claim of actual innocence could excuse the late filing of the petition, it concluded that it did not have to decide whether the petitioner had established actual innocence because, regardless of whether the Court excused petitioner's late filing, his underlying Brady claim was meritless. Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010).

Nonetheless, relying largely on the transcript of Capturing the Friedmans and materials obtained and created in preparation for the film (id. at 145), the Second Circuit said that the "record . . . suggests a 'reasonable likelihood' that Jesse Friedman was wrongfully convicted." Id. at 159-60. The court acknowledged that the People's opposition to the petition focused primarily on the timeliness of the petition (which was the issue addressed by the District Court and the ground for its dismissal of the petition), rather than the merits, but it

nevertheless made broad assumptions about the truth of petitioner's allegations. In her concurring opinion, Judge Raggi wrote that it was unnecessary for the court to reach the conclusions it did regarding the facts leading to petitioner's conviction, "much less assume the truth of those facts or the misconduct of police officers, prosecutors, defense counsel, and the presiding state court judge . . . ." Id. at 161.

Based on the court's concerns, its observation that this case arose during a period when sex crimes were sensationalized by the media, and a comment to the New York Rules of Professional Conduct, stating that a prosecutor should take "'remedial measures when it appears likely that an innocent person was wrongly convicted'" (id. at 159 [quoting New York Rules of Professional Conduct 3.8, Comment 6(B)]), the court suggested that the Nassau County District Attorney undertake a review of petitioner's case. Id. at 160.

The District Attorney's Investigation

In 2010, the Nassau County District Attorney voluntarily commenced a comprehensive re-investigation of the Friedman case, the primary purpose of which was to determine whether, notwithstanding his guilty plea, petitioner was wrongfully convicted. The District Attorney assigned three high-ranking

prosecutors (the "Review Team") to conduct the investigation. To assist in that endeavor, she appointed a panel of independent experts to render advice and offer expertise in the investigation. The Advisory Panel consisted of:

- Mark F. Pomerantz, retired litigation partner at Paul, Weiss, Rifkin, Wharton, & Garrison, LLP, and former Assistant United States Attorney in the Southern District of New York and head of its Criminal Division;

- Patrick J. Harnett, 32-year veteran of the New York City Police Department, served as commanding officer of the Major Case Squad, and as Chief of the Hartford Police Department;

- Susan Herman, professor in the Department of Criminal Justice at Pace University and former executive director of the National Center for Victims of Crime;

- Barry Scheck, professor of law at Benjamin Cardozo School of Law, co-founder and director of the Innocence Project, where he focuses on the exoneration of wrongly convicted individuals, and member of the State's Commission on Forensic Science.

All the Panel members signed an oath of confidentiality and agreed not to disclose any of the documents they reviewed in connection with this re-investigation (A0359-61).

During the course of the re-investigation, several of the victims who came forward expressed grave concerns about maintaining their privacy. The abuse they suffered was, and continued to be, humiliating, and in some cases they had not

told even close family members about what had happened to them. Some made it clear that although they were willing to assist in the District Attorney's efforts to re-investigate this case, they did not want to be publicly identified.

In June 2013, the District Attorney completed her investigation and issued a 155-page report. Accompanying that report was an appendix of over 100 documents that the Review Team had examined and considered in arriving at its determination that there was no reasonable probability that Jesse Friedman was wrongfully convicted (A0284-1377). Members of the Advisory Panel reviewed documents in the appendix and others, but did not review, or have access to, every record available to the Review Team. Some records (i.e., grand jury minutes) were deemed confidential, and some were not relevant to the investigation. Names of victims were redacted from witness statements reviewed by the Panel members (A1875-82).

Petitioner's FOIL Request and the Ensuing Litigation

On September 19, 2012, in the midst of the re-investigation, petitioner made a FOIL request seeking two sets of documents. He requested copies of all records that were provided to the "Friedman Case Review Panel" and all records relevant to whether the members of the Panel "are or are not

'members of the general public' for purposes of the New York Freedom of Information Law and Civil Rights Law § 50-b" (A0001).

By letter dated October 12, 2012, the District Attorney denied petitioner's first request in its entirety and gave detailed reasons for that denial. The letter to petitioner explained that, pursuant to Civil Rights Law § 50-b, any records that would tend to identify a victim of a sex crime are confidential and may not be released to the public, and that, pursuant to Public Officers Law § 87(2)(e)(iii), confidential witness statements compiled for law enforcement purposes are exempt from disclosure, unless those witnesses testified at trial (A0007-09). The District Attorney also relied on Public Officers Law § 87(2)(e)(i) as a basis for denying the request. Because the re-investigation was not yet complete, premature release of records would have interfered with that investigation.

In response to petitioner's second request, for records addressing the Panel members' status, petitioner was offered a copy of the confidential agreement that the members signed. It was explained that the Panel members' standing was similar to that of any other experts or consultants who assisted the district attorney's office in an investigation or prosecution.

While acting in that role, they were not functioning as members of the general public (A0009-10).

On November 13, 2012, petitioner filed an administrative appeal from the denial of his FOIL request (A0011-14). Although petitioner took issue with the District Attorney's application of the FOIL exemptions discussed above, he did not expand the scope of his request. No request was made for the "entire case file" of the original Friedman investigation. In a letter dated December 3, 2012, the District Attorney affirmed her denial of petitioner's FOIL request for documents provided to the Friedman Advisory Panel (A0015-17).

By notice of petition dated April 3, 2013, petitioner filed a proceeding pursuant to CPLR article 78. He sought the records previously requested in his FOIL request and, for the first time, requested disclosure of the entire Jesse Friedman case file, without regard to the nature or subject of the records therein. Petitioner also sought an order under Civil Rights Law § 50-b(2)(b), directing the District Attorney to disclose records that are confidential under that statute because they would tend to identify the victim of a sex crime. Lastly, petitioner sought an order pursuant to Criminal Procedure Law § 190.25(4), directing the District Attorney to disclose grand

jury testimony and records related to his indictments (A0018-0053).

Subsequent to this filing, the court called the parties to a conference in chambers. During the course of this conference, the court ordered petitioner's counsel to serve his petition on each of the fourteen complainants in the original prosecution, pursuant to Civil Rights Law § 50-b(2)(b). Three complainants later responded directly to the court, two by letter and one through counsel. All invoked their right to confidentiality and were insistent that they did not want their identities revealed. The complainants who sent letters to the court emphatically reaffirmed that they were victims of abuse by the Friedmans (A2254-55, 2293-95).

The District Attorney's conviction integrity review report was published in June 2013. Judge Winslow immediately instructed the District Attorney to provide him with unredacted copies of the report and appendix. That material was provided. In response to an additional request by the court, the District Attorney provided unredacted witness statements (A1378-1826) and a chart, identifying by name the witnesses who were identified

only by number in the report and by "Doe" in the indictments (A1827).[4]

In a supplemental submission dated June 27, 2013, petitioner alleged five "deficiencies" in the District Attorney's report (A1828).

The District Attorney then filed papers opposing the petition on the grounds that had been discussed in the denial of the FOIL request and other grounds. The District Attorney argued that petitioner's request for the entire Jesse Friedman file was unexhausted and his request for records protected by Civil Rights Law § 50-b and grand jury secrecy should be heard by the court having jurisdiction over the criminal charges. Moreover, the District Attorney argued that the statements of non-testifying witnesses made to law enforcement officials were exempt from disclosure under FOIL, and that petitioner had not shown good cause for disclosure of records identifying sex-crimes victims or a compelling and particularized need for the release of grand jury minutes (A1938-75).

[4] The sealed appendix provided to the Court contains the unredacted report, witness statements, naming chart, and other confidential records that are part of the record on appeal.

Petitioner filed a reply, attacking the District Attorney's report and specifying, for the first time, the manner in which he claimed he could use the material he hoped to find in the District Attorney's files. Petitioner's reply included an affidavit by Kenneth Lanning, a consultant concerning crimes against children. Lanning, who was quoted in the report, took issue with some of the report's statements (A2199-205).

On August 22, 2013, the parties appeared before the Supreme Court. During lengthy argument, the court expressed doubts as to petitioner's guilt of the crimes to which he pled guilty and its belief that petitioner had been denied Brady material prior to the entry of that plea, and that these were relevant considerations in the determination of the petition (A2255, 2277, 2279-80). It further made clear its belief that petitioner's status as a registered sex offender, and the restraints imposed on him as a result of that status, were relevant to the issues of whether there were criminal aspects to the current litigation and to whether otherwise-confidential material should be disclosed (A2268-69, 2273). The court ordered that the District Attorney provide petitioner with "every piece of paper that has been generated in the matter of People against Jesse Friedman" redacting only the names of the three complainants who had contacted the court (A2288).

P O I N T I

PETITIONER'S FOIL REQUEST DID NOT SEEK DISCLOSURE OF "THE ENTIRE CASE FILE" OF THE INVESTIGATION THAT LED TO HIS INDICTMENTS; THAT REQUEST, FIRST MADE IN THE COURSE OF PETITIONER'S ARTICLE 78 PROCEEDING, WAS UNEXHAUSTED AND SHOULD NOT HAVE BEEN ENTERTAINED BY THE SUPREME COURT.

Pursuant to the Freedom of Information Law, petitioner filed a request seeking the disclosure of materials from the District Attorney's Office. Petitioner's request was specific. He sought the documents provided to the "Friedman Case Review Panel," as well as records clarifying the status of the members of the Panel and demonstrating that they were not "members of the public" for purposes of FOIL and Civil Rights Law § 50-b (A0001). Petitioner's FOIL request for the documents provided to the Panel was refused, his administrative appeal from that refusal was denied, and he then sought an order from the Supreme Court, requiring the District Attorney to disclose the material he had requested.

As to the material petitioner identified in his FOIL request, appellant did not, and does not, question the propriety of a CPLR article 78 proceeding to review the denial of his request for disclosure. That is not the case, however, with that part of the petition that sought an order compelling the District Attorney to provide him with the "entire case file" of

the prosecution's initial criminal investigation. Putting aside the question of the merits of petitioner's request for the "entire case file," that request was not properly the subject of petitioner's article 78 application because there had been no agency or administrative decision for the Supreme Court to review. Never before the filing of his article 78 application had petitioner demanded these materials. For that reason, his sweeping application had never been administratively reviewed, was unexhausted, and was not properly before the Supreme Court. See POL § 89(4)(b); Doe v. Lake Grove School, 107 A.D.3d 841, 842-43 (2d Dept. 2013)(FOIL requestor must exhaust administrative remedies before seeking judicial redress); Carty v. New York City Police Dept., 41 A.D.3d 150 (1st Dept. 2007)(motion to amend petition to seek additional material not previously requested was "properly denied for petitioner's failure to exhaust administrative remedies"); Taylor v. New York City Police Dept. FOIL Unit, 25 A.D.3d 347 (1st Dept. 2006)(with respect to petitioner's FOIL request, "the petition was properly dismissed for failure to exhaust administrative remedies"); Colon v. State of New York, 2006 WL 4007556 (Sup. Ct. New York County 2006)(same).

Appellant does not suggest that, had petitioner's FOIL request sought the prosecutor's "entire case file," that request

would have been granted in its entirety. Indeed, it is likely that some of the material in the file would have been withheld on many of the same grounds discussed later in this brief. But the probability that a FOIL request would not have been entirely fruitful was not a justification for petitioner's complete failure to comply with statutory procedural requirements. It did not entitle petitioner to by-pass the FOIL provisions, which would have resulted in an appropriate record for review, and, instead, immediately seek judicial intervention. Indeed, because the entire case file was never requested, there was no administrative determination for the Supreme Court to review, and no way for the court to determine if the records were subject to disclosure under FOIL. For that reason alone, the Supreme Court should have dismissed the portion of the petition that sought disclosure of appellant's "entire file" of the initial investigation of Jesse Friedman. Because the Supreme Court did not take that appropriate action, this Court should now reverse that part of the lower court's order that granted disclosure of appellant's entire file.

P O I N T II

BECAUSE PETITIONER FAILED TO ESTABLISH "GOOD CAUSE" FOR THE DISCLOSURE OF MATERIAL THAT IS CONFIDENTIAL PURSUANT TO CIVIL RIGHTS LAW § 50-b, AND BECAUSE NON-TESTIFYING WITNESSES' STATEMENTS TO LAW ENFORCEMENT ARE EXEMPT FROM DISCLOSURE EVEN UPON A SHOWING OF "GOOD CAUSE," THE SUPREME COURT ERRED IN ORDERING THAT THESE MATERIALS BE DISCLOSED.

The matter before the Supreme Court was civil in nature -- not, as the Supreme Court characterized it, "a continuation of a hearing commenced at the beginning of 2003" (A2254), apparently a reference to petitioner's post-conviction motion filed pursuant to CPL § 440.10.[5] The issue was whether the District Attorney properly applied the appropriate statutes and case law in denying petitioner access to certain materials he had requested pursuant to FOIL -- not, as the Supreme Court seemed to view it, the propriety of "every single aspect [of] the conviction process" (A2269). Nonetheless, the court treated the proceeding as if it were, in fact, "a continuation" of the long-closed criminal proceedings because petitioner, as a level-three sex offender, was not, in the court's view, "free" (A2273), and "his jail sentence continued to this very day" (A2268).

[5] Petitioner's CPL § 440.10 motion was actually filed in January 2004. Appellant is unaware of any litigation pending in 2003 involving petitioner.

But a FOIL request by a petitioner who was once a criminal defendant does not transform a subsequent article 78 proceeding into a continuation of the closed criminal matter, and the registration requirement of an adjudication under the Sexual Offender Registration Act is not a criminal sentence. People v. Belliard, 20 N.Y.3d 381, 386 (2013); North v. Board of Examiners of Sex Offenders of State of New York, 8 N.Y.3d 745, 752 (2007)(citing Doe v. Pataki, 120 F.3d 1263 [2d Cir. 1997]). This misperception of the nature of the litigation before it, and the issues relevant to a proper determination of that litigation, as well as the disregard of relevant case law, render the Supreme Court's determination erroneous.

Petitioner's FOIL Request

Petitioner's FOIL request sought disclosure of the documents provided to the Panel appointed to oversee and advise the prosecutors conducting the investigation of petitioner's conviction. That request was denied in a letter from the chief assistant district attorney, and the appeal from that request was denied in a letter from the District Attorney's FOIL appeals officer. As explained to petitioner in response to both his request and his appeal, the records provided to the Panel consisted of redacted statements of sex-crimes victims, summaries of interviews conducted with fact witnesses, analyses

of evidence and interviews with witnesses, and inter- and intra-agency communications -- all of which were exempt from disclosure pursuant to multiple statutes and case law. Indeed, the District Attorney was absolutely precluded by law from disclosing much of the information petitioner sought to have released.

The Standard of Review

In the context of an article 78 proceeding seeking review of the denial of a FOIL request, the party claiming exemption from disclosure of a particular document "carries the burden of demonstrating that the exemption applies." Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 462 (2007)(citing POL § 89[4][b]). The bases for exemptions must be specified and exemptions must be narrowly construed. See Gould v. New York City Police Dept., 89 N.Y.2d 267, 275 (1996); Capital Newspapers v. Burns, 67 N.Y.2d 562, 566 (1986). Appellant satisfied those standards. In detailed letters to petitioner -- first in reply to his FOIL application, and then in reply to his appeal from the denial of much of his request -- the District Attorney generally identified the materials provided to the Panel, and specifically identified the exemptions that prevented her from disclosing those records to petitioner.

Those relevant FOIL exemptions do not lose their applicability because a petitioner claims, as petitioner here does, that the materials he seeks might support future litigation to attempt to overturn his conviction. It is well established that "access to government records does not depend on the purpose for which the records are sought." Bellamy v. New York City Police Dept., 59 A.D.3d 353, 355 (1st Dept. 2009)(error to order disclosure of material statutorily exempt from FOIL mandates on the ground that petitioner was "fighting for his freedom," i.e., attempting to reverse his 22-year-old conviction)(quoting Gould v. New York City Police Dept., 89 N.Y.2d at 274); accord Greene v. Hynes, 2004 WL 1095029 at *3 (Sup. Ct. Kings County 2004). Rather, "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced nor restricted because he is also a litigant or potential litigant." John P. v. Whalen, 54 N.Y.2d 89, 98 (1981)(internal citations omitted); accord Fappiano v. New York City Police Dept., 95 N.Y.2d 738, 748 (2001). Thus, petitioner stands as would any member of the public, entitled to disclosure of that which is not exempt pursuant to statute, but with no special entitlement to material which may not be disclosed pursuant to the law. His status and reason for wanting exempt materials may be relevant in other settings, but they are irrelevant under FOIL.

Moreover, as discussed below, most of that which petitioner sought was not confidential solely pursuant to the statutory and case law relevant to FOIL requests, but was presumptively non-disclosable in any setting other than a criminal proceeding because it would identify victims of sex crimes. See Civil Rights Law § 50-b. In any event, under numerous provisions of the law, the District Attorney met her burden of establishing that the requested material was exempt from disclosure.

The materials provided to the Panel were exempt from disclosure under the Public Officers Law and Civil Rights Law.

Members of the Panel were provided statements of witnesses or summaries of witnesses' statements. They were also given summaries and analyses of interviews with witnesses, and analyses of evidence. These documents identified or tended to identify the victims in this matter and, therefore, were confidential pursuant to Civil Rights Law § 50-b(1). That statute provides that "[t]he identity of any victim of a sex offense . . . shall be confidential" and that no public officer or employee shall disclose any document "which tends to identify such a victim." For that reason, these documents were also exempt from disclosure pursuant to FOIL. See POL § 87(2)(a); Karlin v. McMahon, 96 N.Y.2d 842 (2001); Lesher v. Hynes, 80 A.D.3d 611, 613 (2d Dept. 2011), aff'd, 19 N.Y.3d 57 (2012).

Indeed, as was explained in the District Attorney's letter to petitioner, even if the Review Team were to have found it likely that petitioner was not guilty of the offenses to which he pled guilty, the complainants in this matter would continue to be considered "victim[s] of a sex offense" under Civil Rights Law § 50-b, and would be entitled to that statute's confidentiality provisions, by virtue of Arnold Friedman's conviction alone -- a conviction that has never been challenged.

Significantly, even if this were not a sex-crimes case, the statements would still be exempt from disclosure under FOIL. These documents reflect statements made to law enforcement officials by witnesses who did not subsequently testify at trial. They are, therefore, exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(iii). See, e.g., Esposito v. Rice, 67 A.D.3d 797 (2d Dept. 2009)("statements of nontestifying witnesses are confidential and not disclosable under FOIL")(quoting Johnson v. Hynes, 264 A.D.2d 777 [2d Dept. 1999], and citing POL § 87[2][e][iii]); Spencer v. New York State Police, 187 A.D.2d 919, 922 (3d Dept. 1992); Moore v. Santucci, 151 A.D.2d 677, 679 (2d Dept. 1989). Given the nature of the statements and clear provisions of both the Civil Rights and the Public Officers Laws, the victims who made statements were reasonably entitled to believe that those statements would

remain private and that the law would protect them from the catastrophic invasion of privacy that the Supreme Court's order, if allowed to stand, will effect. Indeed, the letter from one of the victims who wrote to the court after receiving notice of the petition (A2294-95) speaks to this issue more loudly than any words respondent can put to paper. The Court is urged to read that letter.

It is, moreover, of no import that petitioner is already aware of the identities of and contact information for the complainants, as well as other witnesses who were interviewed. Disclosure of the identities of the witnesses (which was made to petitioner during the pendency of his criminal charges) is vastly different in kind from disclosure of those witnesses' statements (some or all of which petitioner would have been entitled to, had he chosen to go to trial), and knowledge of the witnesses' identities does not entitle petitioner to disclosure of their statements. See DeOliveira v. Wagner, 274 A.D.2d 904, 905 (3d Dept. 2000)(notwithstanding petitioner's claim that he knew identities of people interviewed by police, records of police communications with those people were exempt from disclosure under FOIL's privacy exemption); Johnson v. New York City Police Dept., 257 A.D.2d 343, 348 (1st Dept. 1999)("Merely because petitioner knew that someone was a witness does not mean

that he knew what such witness told the police, which could well have been information imparted in confidence.").[6]

Nor is it significant whether those interviewed were expressly promised confidentiality. Id. Indeed, appellant knows of no case in which it has ever been held that an explicit promise of confidentiality is necessary to trigger the exemption established by Public Officers Law § 87(2)(e)(iii). In Johnson v. Hynes, 264 A.D.2d 777, for example, the petitioner, who had been convicted of murder, sought the statements of non-testifying witnesses. Without reservation and without a specific finding that the witnesses had been promised confidentiality, this Court affirmed the denial of his request. The Court stated: "Contrary to petitioner's contention, the statements of non-testifying witnesses are confidential and not disclosable under FOIL." Id., accord, Esposito v. Rice, 67 A.D.3d 797. And while an express promise of confidentiality is clearly not a prerequisite to the FOIL exemption concerning the statements of non-testifying witnesses, the nature and circumstances of the statements here permits a reasonable

[6] Although this Court's decision in Esposito v. Rice, 67 A.D.3d 797, does not speak to the issue, in that case, too, the witness was known to the petitioner, a former criminal defendant. In fact, they had been close friends. Nevertheless, because the witness did not testify, his statement to the police was exempt from disclosure under FOIL.

assumption of an expectation of privacy. See Johnson v. New York City Police Dept., 257 A.D.2d at 348 ("Nor do we find that NYPD must be able to show, in order to warrant exemption, that a witness was specifically promised confidentiality, if the circumstances give rise to the clear inference that such a promise was assumed."). The statements petitioner seeks were of an extremely sensitive and personal nature, and the victims were entitled to rely on statutory provisions affording them privacy. As noted above, it is clear from one of the letters sent to the Supreme Court that that victim has lived his life believing that this matter was closed when petitioner took his plea (A2294-95).

Of course, nothing prevents a victim who made a statement either to the police in the course of the original investigation, or to the Review Team that re-investigated petitioner's conviction, from obtaining a copy of his own statement, provided that no other victims were identified in that statement. See Civil Rights Law § 50-b(2)(c). Any such person could choose to release records identifying himself to petitioner or anyone else. But petitioner has never provided appellant with any such person's authorization for the release of his statement. Even though petitioner is aware of the victims' identities and contacted them to inform them of the article 78 proceeding, and even though, according to petitioner,

"numerous" victims have recanted their prior allegations, not one has asked the District Attorney to provide a copy of his statement to petitioner. Indeed, even where petitioner claimed that a victim authorized the disclosure of his statement, that appeared not to be so, as in the case of "Kenneth Doe."

Upon receiving notification of the instant action, Kenneth Doe provided petitioner a letter to forward to appellant (A267-69). In that letter, Doe denied being victimized by petitioner. Petitioner's counsel provided the District Attorney and the court with copies of that letter (A1902). Counsel's cover letter accompanying Doe's letter (A0265-66), requested that counsel be provided with "all the documents in [the District Attorney's] files that are relevant to Kenneth Doe." That, however, was far beyond anything Doe authorized in his letter. Indeed, Doe's letter only reinforces the conclusion that he wants desperately to protect his privacy and the confidentiality of the statements in the files of the District Attorney.

Doe explained that he was making this statement following the delivery to his office of papers notifying him of the instant litigation. The papers were opened by Doe's firm's legal department, which notified Doe's superiors, who then explored the matter -- first on the internet, and later with

Doe. To make certain that there were "no further intrusions into [his] work or family life," Doe contacted petitioner's counsel, who urged him to "come forward in whatever fashion he felt comfortable, and explain what had happened to the [sic] Case Review Panel" (A0268). Doe stated that he was acting on counsel's assurance that his name would not become public. But, significantly, Doe specifically invoked the provisions of Civil Rights Law § 50-b(2) to protect his identity. Doe stated, "Obviously, this provision does not extend to [counsel], and you are free to discuss this letter, and the process leading up to it, with him" (A0268) (emphasis added).

That was the extent of Doe's authorization. He did not authorize the wholesale release to counsel of "all the documents in [the prosecution's] files that are relevant to Kenneth Doe," as counsel suggested below (A0265-66). Indeed, he took pains to invoke the law that would preclude precisely this disclosure.

Similarly, three other complainants -- one through an affirmation submitted by counsel and two in letters written to the court -- strenuously asserted their right to privacy and asked that their statements not be disclosed to petitioner (A2254-55, 2262-63, 2293-95).

As is evident from these submissions, the complainants -- even those willing to speak to petitioner's counsel -- adamantly want to maintain their privacy concerning this matter and are relying on the law's promise of confidentiality to protect them.[7] They have a right to rely on the promise that their lives will not be subject to the upheaval that would be caused by the disclosures petitioner seeks.

Petitioner has not overcome the confidentiality provisions found in the Public Officers Law and Civil Rights Law.

Although records that would tend to identify the victim of a sex crime are confidential and, concomitantly, exempt from disclosure under FOIL, Civil Rights Law § 50-b(2)(b) provides that disclosure may be made to one who establishes "good cause." In the court below, petitioner claimed "good cause" based on his assertions that the circumstances that led to his guilty plea rendered it unreliable; that he is, in fact, not guilty; and that the materials he seeks may advance his attempt to establish his innocence. A three-year investigation conducted by a Review Team of experienced prosecutors, working in conjunction with a panel of independent experts (described by petitioner's counsel

[7] Others, too, have previously asserted their privacy rights. Following the release of Capturing the Friedmans, four ex-students retained counsel to assist them in protecting their privacy. Each described to counsel events consistent with their prior statements to the police and prosecutors (A0402).

as a "distinguished" group that "would not be a rubber stamp for anyone's agenda" [A0360]), led to the conclusions that petitioner's guilty plea was not coerced and that he was not wrongfully convicted. While petitioner disagrees with that conclusion and believes the report is flawed, its conclusions are compelling and supported by overwhelming evidence. As discussed below, petitioner's belated claim of innocence does not establish "good cause" for the extraordinary relief he seeks.

Even if petitioner could make a showing of "good cause" under Civil Rights Law § 50-b, that would allow him to overcome but one hurdle, not all, in his attempt to obtain the statements of those he admitted abusing. While that showing might allow him to get past the confidentiality provisions of 50-b -- which apply whether or not the victims testified at trial -- it does not provide a basis for obtaining records pursuant to FOIL, where they are exempt from disclosure under Public Officers Law § 87(2)(2)(iii). As noted earlier, that exemption applies notwithstanding petitioner's purported need for the records.[8]

[8] It is not suggested that a court could never order disclosure of records covered by Public Officers Law § 87(2)(e)(iii). That statute applies only where records are requested under FOIL, as was the case here. If petitioner had a pending substantive action or proceeding, other than one seeking to enforce his FOIL

(Continued...)

Petitioner failed to establish good cause for the disclosure of records protected by Civil Rights Law § 50-b, and the Supreme Court's Order requiring the release of those records was contrary to law.

The District Attorney's Review Team filed a 155-page report, examining each of petitioner's allegations of innocence, coercion, and misconduct. The report did not shy away from acknowledging missteps in the police investigation and inconsistencies in some of the computer students' statements. On the other hand, the investigation and report completely refuted petitioner's claims -- made for years and, again, in his article 78 petition -- that at least one of the complainants refused to assert any abuse until he was subjected to hypnosis and that the judge presiding over his prosecution demonstrated her pre-judgment of petitioner, and it largely discredited petitioner's claim that many victims had recanted their statements to the police. It concluded, and the Advisory Panel agreed, that none of the evidence, and none of petitioner's claims of wrongdoing, raised any credible doubt concerning the propriety of his conviction.

These findings, and petitioner's claims regarding them, were discussed at length in the District Attorney's response

---

request, the rules governing discovery and subpoenas would apply, not the Public Officers Law.

filed below (A1957-62). But, in what was surely a rare moment of accord between petitioner and appellant, appellant agreed with petitioner's observation in the court below that "the validity of the Rice Report [was] not before the Court" (A2166). Nor is the validity of the report the issue here. Indeed, even if that report had not debunked petitioner's oft-repeated claims concerning judicial misconduct, and hypnosis of complainants, and coercion of witnesses, and even if it did not overwhelmingly support its conclusion concerning the propriety of petitioner's conviction, petitioner's FOIL application would still have been properly denied, and the article 78 application should still have been dismissed.

Regardless of petitioner's claims of innocence, and regardless of his complaints concerning the validity of the conclusions of the District Attorney's report, he is not entitled to the disclosure of records that would identify, embarrass, and humiliate the complainants in petitioner's criminal case, because he has made no persuasive showing of necessity. Absent a compelling showing that the disclosures in issue are necessary for petitioner to establish his claim of innocence -- and there was no such showing -- his request for records identifying these sex-crimes victims should have been denied by the court below.

Nonetheless, proceeding on its perception that the civil proceeding before it was a "continuation" of petitioner's long-concluded criminal prosecution (A2254), and determined to delve into Brady-violation allegations that were long ago rejected by multiple courts, the Supreme Court refused to recognize that a guilty plea "generally marks the end of a criminal case, not a gateway to further litigation." People v. Hansen, 95 N.Y.2d 227, 230 (2000). In its misapprehension concerning the nature and scope of the proceeding before it, the court appears to have determined that petitioner was entitled to otherwise-confidential material because of some perceived impropriety in the criminal proceedings prior to the entry of petitioner's guilty plea. That was not an appropriate consideration here.

Petitioner came before the Supreme Court, and comes before this Court, a convicted felon. That conviction was the result of a guilty plea. It was not the result of trial testimony by any person who defendant now attacks as unreliable or any evidence that he now suggests was suspect. His conviction was, rather, the result of his own words, admitting his guilt. Those words -- petitioner's plea -- signaled his "intention not to litigate the question of his guilt." People v. Lynn, 28 N.Y.2d 196, 201-202 (1971). Thus, his plea was "meant to mark the end of a criminal case, not a 'gateway' to further litigation."

People v. Prescott, 66 N.Y.2d 216, 219 (1985)(citing People v. Taylor, 65 N.Y.2d 1, 5 [1985]). And so, this Court has said that "a defendant may not seek to review issues of factual guilt following an admission of factual guilt." People v. Torres, 171 A.D.2d 825 (2d Dept. 1991).

Of course, petitioner came before the Supreme Court not as a criminal defendant, but as a litigant in a civil matter. But the entitlements he claimed were those he waived as a criminal defendant, and the disclosures he sought in his article 78 proceeding were the disclosures he chose to forego when he pled guilty. Had petitioner chosen not to avail himself of a plea bargain, but to, instead, proceed to trial, he would have been entitled to the statements and grand jury testimony of any witness who testified against him, and he could have used that material to attempt to impeach the testimony and evidence that would have been presented against him. He chose not to do that then. He chooses to do it now, decades too late. Petitioner admitted his guilt and entered a plea, the sufficiency of which he has never questioned. Having had the benefit of his plea, it is too late to have the trial he waived. It is, moreover, profoundly unfair to the victims who came forward twenty-five years ago, to now permit an invasion of their privacy in this manner, when the law clearly intended to prevent this result.

In short, an assertion of fair-trial rights, decades after a trial and its attendant rights were waived, is not "good cause" for the disclosures ordered below.

In his petition, petitioner gave lip service to his claim of good cause, but ultimately offered nothing other than his claim of innocence to justify disclosure of the confidential records in issue. For the first time, in his reply brief, petitioner attempted to demonstrate good cause for disclosures that would otherwise be prohibited by Civil Rights Law § 50-b. He asserted that, were he granted access to the victims' statements, he could submit them for forensic analysis to determine "what went right and what went wrong in the interrogation" of his accusers (A2177) and to attempt to establish that the students' statements were "created by the police" (A2183); he could use them to reconstruct class rosters in order to interview witnesses (A2178-80); and he could use them to identify other suspects who were not prosecuted, and thereby exculpate himself (A2181-92).

What petitioner described was a fishing expedition -- a wholesale foray into sensitive, confidential material on the grounds that it might appear to his expert to be suspect, and it might supplement information he claims to already have, and it

might lead him to people who were not indicted, and somehow, therefore, render his own indictment suspect. But petitioner's conviction did not rest on any testimony -- suspect or otherwise. And it did not rest on the investigative procedures leading to petitioner's indictment. It rested "directly on the sufficiency of his plea, not on the legal or constitutional sufficiency of any proceedings which might have led to his conviction after trial." People v. DiRaffaele, 55 N.Y.2d at 240. And the chance that confidential statements of sex-crimes victims might, possibly, contain material with which petitioner might, possibly, attack the sufficiency of pre-plea proceedings, is not good cause for the disclosure of those statements.

All of this notwithstanding, the Supreme Court ordered disclosure of all of the witnesses' statements, unredacted but for the names of three complainants who had contacted the court, requesting that their privacy be protected.[9] In reaching that

[9] Petitioner has suggested that the nondisclosure requirements of Civil Rights Law § 50-b(1) can be avoided through redactions. The Court of Appeals has said that, insofar as requested records are confidential pursuant to the Civil Rights and Public Officers Laws, there is no obligation to redact identifying information in order to satisfy a request for disclosure. Karlin v. McMahon, 96 N.Y.2d at 843. There was certainly no justification for ordering such measures here, where petitioner failed to establish good cause for disclosure of the victims' statements. Moreover, whether or not the victims' statements are redacted, permitting a convicted sex abuser access to the

(Continued...)

decision, the court considered petitioner's status as a registered sex offender and concluded that the proceeding before it was, therefore, a continuation of the criminal proceeding (A2254, 2268, 2273) -- which, of course, it was not. The court stated its concern that there had been a Brady violation in the criminal proceeding (A2277, 2280) -- discounting the fact that that claim had been found meritless in both the state and federal courts, and observing that "not every circuit" agreed with the Second Circuit Court of Appeals' interpretation of the law (A2279). It considered relevant that petitioner had been provided with the names of the complainants during the course of his criminal prosecution (A2271) and blatantly rejected the Court of Appeals' holding in Fappiano v. New York City Police Dept., 95 N.Y.2d 738, to the contrary.[10]

---

statements of the children he abused, recounting that abuse, is, frankly, an abhorrent invasion of privacy. See Edwards v. New York State Police, 44 A.D.3d 1216 (3d Dept. 2007) (denying convicted murderer crime-scene photographs of victim's body, notwithstanding his status as defendant and his purported need for photographs). And, in any event, that is not what the Supreme Court ordered. The court precluded the redaction of any information whatsoever, but for the names of three complainants who had notified the court and requested that their privacy be protected (A2288).

[10] During oral argument, appellant argued that the fact that petitioner already knew the complainants' identities was irrelevant and quoted from Fappiano, 95 N.Y.2d at 748: "Nor does the fact that petitioners already know the identity of their victims provide a basis for disclosure. The original goal of Civil Rights Law § 50-b, which is to protect the privacy of

(Continued...)

On the other hand, the court gave no apparent serious consideration to the letters received by it in response to the notification requirement of Civil Rights Law § 50(b)(2)(b). The court received two letters from petitioner's victims. Each of those victims reaffirmed that they had been abused by petitioner. One recounted specific conduct and threats, and stated his disgust that this matter had been opened again, inflicting new pain on the victims. It was clear that the victim had lived with the impression that his cooperation with the police and his testimony before the grand jury would be kept private. Acknowledging the letters sent to it, the court stated: "[T]his Court wrote a letter that is going to become an exhibit, and will be available to any, in which it will fill in the blanks, and essentially provides the following: Do you wish to have any information made available? I suggest in this letter that the recipient even speak with the therapist or anyone, get any help that he or she may desire" (A2269-70). This was the extent of the consideration the court gave to the

---

sex-crimes victims, cannot be negated by a litigant's assertion that he knows the identity of the victim" (A2272). The court responded that that "is not something that the . . . Appellate Division has adopted wholesale" (A2272). Regardless of what that may have meant, decisions of the Court of Appeals are binding on the Supreme Court, Nassau County. See Mountain View Coach Lines v. Storms, 102 A.D.2d 663, 664 (2d Dept. 1984).

intensity of the letters it had received and the anguish they reflected, or the privacy they begged for.

Even when counsel for one complainant appeared in court and expressed his client's desire to keep his statements confidential (A2254-55), the court mischaracterized that application as applying only to the complainant's name (A2262). Counsel reiterated that that was not the case (A2262-63). Neither did the court consider the specifics of the information that might be included in the court's order. Even if disclosure could be countenanced in some measure or form, it cannot be countenanced without any regard whatsoever to the content of the records. The court ordered sweeping, indiscriminate release of records, with no provision for redaction and no consideration or concern for the disclosure of personal information of no value to petitioner, not to mention highly personal, potentially shaming disclosures regarding the crimes committed against them, made by victims who were entitled to expect privacy.

The court below misconstrued the nature of the proceeding and ignored or rejected established law. It took upon itself the role of a criminal court entertaining and reviewing a criminal proceeding. The Supreme Court's order was contrary to law, wholly unjustified, devoid of any exercise of discretion

that might in any way be characterized as reasonable, and should be reversed.

Statements of non-testifying witnesses were exempt from disclosure under FOIL regardless of need or good cause; the Supreme Court's disregard for the relevant law mandates reversal of its order that those statements be released.

Even if petitioner had made a showing of good cause for records covered by Civil Rights Law § 50-b, he would still not have been entitled to copies of statements that victims and witnesses gave to the police during the course of the underlying investigation, and the Supreme Court's order in regard to those statements was in error. The statements in issue, sought solely under FOIL, are exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(iii), and petitioner's purported showing of good cause does not overcome that exemption.

Public Officers Law § 87(2)(e)(iii) specifically exempts from disclosure under FOIL records that "identify a confidential source or disclose confidential information relating to a criminal investigation." That exemption has repeatedly been held to apply to witnesses' statements obtained during a criminal investigation. See, e.g., Esposito v. Rice, 67 A.D.3d 797; Johnson v. Hynes, 264 A.D.2d 777; Williams v. Erie County District Attorney, 255 A.D.2d 863, 864 (4th Dept. 1998); Spencer

v. New York State Police, 187 A.D.2d at 922; Moore v. Santucci, 151 A.D.2d at 679.

In contexts other than a FOIL request, this may not be so. Such statements may, for instance, be disclosable pursuant to discovery requirements or subpoenas, where litigation is pending. They may be disclosable pursuant to constitutional fair trial requirements. See Brady v. Maryland, 373 U.S. 83. And, if witnesses testify at trial, their statements must be disclosed to the defense pursuant to CPL § 240.45(1) and People v. Rosario, 9 N.Y.2d 286 (1961). Only then do they lose their cloak of confidentiality and are they subject to disclosure under FOIL. See Williams, 255 A.D.2d at 864; Moore, 151 A.D.2d at 679.

But unlike Civil Rights Law § 50-b, which is not limited to FOIL requests and which recognizes that there may be circumstances where the confidentiality provided victims of sex crimes must give way, when a request is made solely under FOIL, the stated need for records is irrelevant. In case after case, it has been stated that when a request is made under FOIL, the requestor's status as a litigant (or a potential litigant) and his purported need for the records is irrelevant. The requestor stands in the same shoes as any member of the general public.

This is true even when the requestor has been convicted of a crime and claims to need the records to prove his innocence. In other words, allegations of good cause do not provide a basis for disclosing exempt records. See Fappiano v. New York City Police Dept., 95 N.Y.2d at 748; Gould v. New York City Police Dept., 89 N.Y.2d at 274; John P. v. Whalen, 54 N.Y.2d at 98; Bellamy v. New York City Police Dept., 59 A.D.3d at 355. Thus, here, where petitioner seeks under FOIL statements of witnesses who never testified at trial, his purported need for those statements is irrelevant. Those statements are exempt from disclosure. See Esposito v. Rice, 67 A.D.3d 797.

The Supreme Court ignored this dispositive body of law. Instead, it determined that Public Officers Law § 87(2)(e)(iii) is "confined to something that is actually going on at this point" (A2261). But that is not so. In Esposito v. Rice, 67 A.D.3d 797, this Court affirmed the dismissal of Esposito's article 78 petition which sought any statements made to law enforcement officials by a person who refused to testify at Esposito's murder trial -- a trial which had taken place more than twenty years prior. This Court did so notwithstanding the petitioner's claim that the statements contained Brady material that he needed to overturn his conviction.

The court below further observed that petitioner "has to be protected, depending upon the facts," and posed the question, "Is there the disclosure of facts that have been requested under FOIL that would allow the petitioner the opportunity to do a few things?" (A2265). This was an apparent reference to petitioner's protestations of innocence and his assertion that the material he sought would advance his attempts to establish that innocence. But "access to government records does not depend on the purpose for which the records are sought" (Gould v. New York City Police Dept., 89 N.Y.2d at 274; accord Bellamy v. New York City Police Dept., 59 A.D.3d at 355), and petitioner's status as a convicted felon, seeking to vindicate himself, was not a valid consideration for the court below in determining the material petitioner requested was exempt from disclosure.

The law concerning Public Officers Law § 87(2)(e)(iii) is well established and clearly exempts from disclosure the statements here sought. Indeed, in petitioner's reply papers submitted below, he made extensive arguments trying to demonstrate good cause for records protected by Civil Rights Law § 50-b, but never once mentioned the exemption set forth in Public Officers Law § 87(2)(e)(iii) or demonstrated that that FOIL exemption is inapplicable. Because petitioner offered no

reason that that exemption should not apply, and because the Supreme Court ignored, misapprehended, or misapplied the controlling law, this Court should reverse that part of the lower court's order that would require the District Attorney to disclose statements of non-testifying witnesses.

P O I N T III

PETITIONER FAILED TO DEMONSTRATE A COMPELLING AND PARTICULARIZED NEED FOR GRAND JURY TESTIMONY, AND THE COURT BELOW ERRED WHEN IT ORDERED DISCLOSURE OF THOSE MINUTES.

Petitioner's FOIL request sought disclosure of the materials provided to the Advisory Panel. Grand jury minutes and records were not provided to the Panel, and petitioner never requested that the district attorney's office provide them to him. Then, in his article 78 proceeding, petitioner asked the Supreme Court to order the release of the minutes and records of the grand juries that indicted him. Petitioner's application fell far short of satisfying his burden to overcome the well-established principle that grand jury minutes are secret and are not to be disclosed absent a demonstration of compelling and particularized need.

"As a threshold matter, a party seeking disclosure of grand jury minutes must establish a compelling and particularized need for them. Only then must the court balance various factors to assess, in its discretion, whether disclosure is appropriate under the circumstances presented." People v. Robinson, 98 N.Y.2d 755, 756 (2002)(citing People v. Fetcho, 91 N.Y.2d 765, 769 [1998], Lungen v. Kane, 88 N.Y.2d 861, 862-863 [1996], and Matter of District Attorney of Suffolk County, 58 N.Y.2d

436, 444 [1983]). To meet that demanding standard, the party requesting the minutes must demonstrate that the information he seeks cannot be obtained from other sources. See Aiani v. Donovan, 98 A.D.3d 972, 974 (2d Dept. 2012). Petitioner has not established a compelling and particularized need for the grand jury minutes, and he has himself demonstrated that he can obtain the information he seeks without access to those records.

Petitioner has been insistent that he is not guilty of the crimes to which he pled guilty, that the information he is requesting might assist him in establishing his claim, and that he has, therefore, satisfied his burden and is entitled to materials that would otherwise remain confidential. In support of his request for grand jury records, he claimed in his original petition that "[t]he potentially exonerating evidence of the grand jury minutes may help [him] demonstrate actual innocence" (A0051). But he did not explain how or why that might be the case, as was required to meet his burden, and speculation alone was simply not enough to warrant the disclosure he sought. See Ruggiero v. Fahey, 103 A.D.2d 65, 70-71 (2d Dept. 1984)(conclusory statement that grand jury testimony is needed for impeachment, refreshing recollection, or preparation for trial are insufficient as these claims can be made in any case); see also Matter of District Attorney of

Suffolk County, 58 N.Y.2d at 446; People v. Marante, 237 A.D.2d 130 (1st Dept. 1997); People v. Bonelli, 36 Misc.3d 625, 627 (Sup. Ct. Richmond County 2012).

Petitioner's initial request for grand jury minutes spoke of the "potentially exonerating evidence" he might find, which "may" help him demonstrate innocence (A0051). This claim -- speculative and nonspecific -- could be made by any person seeking to vacate a conviction (see Ruggiero v. Fahey, 103 A.D.2d at 70-71). It failed to articulate any specific facts establishing a "compelling and particularized need" for the grand jury testimony (Robinson, 98 N.Y.2d 755). Indeed, petitioner's very language -- referring to "potential" evidence that "may" further his cause -- suggested nothing more than a fishing expedition. Cf. People v. Robinson, 87 A.D.2d 877, 878 (2d Dept. 1982)(subpoena may not be used "as a fishing expedition for purposes of discovery or to ascertain the existence of evidence, but rather to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding").

Then, in his reply memorandum below, petitioner attempted to establish a compelling and particularized need for the grand jury records, stating that he could use those records as he

could use the victims' statements to law enforcement officials, i.e., he could submit them for forensic analysis in the hope that his expert consultant would find evidence of unreliability; he could use them to attempt to reconstruct class rosters and find and interview witnesses; and he could use them to attempt to identify other suspects who were not prosecuted, and thereby exculpate himself. Petitioner seeks to invade the secrecy of the grand jury, as he seeks to defeat the privacy provisions of Civil Rights Law § 50-b, so that he may rifle through the entirety of the grand jury minutes, searching for information that "may" be there, that "may" supplement information he claims to already have, and that "may" assist him in his attempt to establish claims that have already been rejected. This is not a particularized and compelling need. Indeed, any convicted person who intends to contest his conviction could make this same claim. See Ruggiero v. Fahey, 103 A.D.2d at 70-71.

As noted earlier with respect to the victims' statements to law enforcement, it bears emphasizing that petitioner was not convicted on testimony -- false, tainted, or otherwise -- of any witness. He was convicted on his plea of guilty. The time to examine grand jury testimony and to try to impeach witnesses with their prior testimony would have been at trial. But petitioner forewent a trial and the People consented to his

guilty plea to spare the victims from having to testify and disclose their grand jury testimony. Now, decades later, after defendant received the benefit of a plea bargain, he also wants the rights afforded a person who goes to trial. The issue is not whether his expert could find some "problems" with the testimony -- that is what he is paid to do -- it is whether petitioner should have the right to have him do so. Petitioner's conviction is final, and weaknesses in the grand jury evidence are not a basis for overturning a guilty plea (see People v. Hansen, 95 N.Y.2d 227).

Petitioner's request was, in addition, wildly overbroad. He requested that the court simply throw open all the grand jury minutes and records. He requested complete disclosure of confidential material, without explaining why such wholesale disclosure was necessary or appropriate. His request included the testimony of every witness and every exhibit, regardless of whether it related to the charges against him or had any relation to his allegations of misconduct. His request was so broad because he does not know what he needs or wants, or how it will help him. And the Supreme Court granted that request -- overly broad and nonspecific as it was -- because defendant claimed he was innocent. That claim is insufficient to establish compelling need because the conviction is based on a

guilty plea, and the sufficiency of the evidence before the grand jury is, therefore, no longer an issue. In any event, petitioner has himself demonstrated that he has been able to obtain substantial evidence which he deems "exonerating," without access to confidential grand jury minutes.

As petitioner's investigation would seem to suggest, he does not need these records. From the inception of the litigation disputing the legality of petitioner's plea, he has had the cooperation of the maker of Capturing the Friedmans, and petitioner has consistently relied on the statements made in the film in his attempts to establish that he is innocent and that his plea was invalid. Indeed, petitioner provided the court below with two discs (A0181, 2206) produced by the maker of Capturing the Friedmans. Those discs include segments of Capturing the Friedmans, supplemented with selected portions of interviews more recently conducted with men who were children in Arnold Friedman's computer school, and who express surprise at the allegations attributed to them in the indictments, as well as doubt that they actually made those allegations. In addition, there are parts of an interview with the law secretary who reviewed the grand jury minutes during the pendency of petitioner's criminal case, and who states that he was "bothered" by the "lack of time specificity in the indictments"

and the lack of medical evidence.[11] Petitioner has also procured a statement from Kenneth Doe, who stated that, after being notified of the instant article 78 proceeding, he spoke to petitioner's counsel and, after reviewing the accusations attributed to him in the indictments, he denied that he was subjected to, or witnessed, sexual abuse in Arnold Friedman's classes (A0267-69).

In addition to this "evidence," petitioner knows the names of all of the complaining witnesses, as well as their home and business addresses (A1899). From the film, as well as the report, he knows the names of the officers who investigated the case. He knows who prosecuted the case. Just as a filmmaker acting on petitioner's behalf was able to speak to these people, so may petitioner attempt to do so. And if any of these people chooses to speak to petitioner or his representative, and if any of them denies the allegations he previously made, or admits to conduct which casts a pall over the reliability of the allegations made against petitioner during the original criminal investigation, that may be evidence that would support petitioner's claim of innocence. But it would be the

[11] That law secretary also submitted to the court a letter recalling, twenty-five years after reviewing the grand jury testimony, that although the evidence was legally sufficient, it was weak and was elicited by leading questions (A2230-31).

recantations of the allegations made in the indictments, or the statements reflecting improprieties in the original investigation, that would provide petitioner with exculpatory evidence -- not the testimony that resulted in the indictments. Petitioner will not be exonerated by the evidence before the grand jury and need not have the complainants' testimony before the grand jury to advance his cause.

Because the testimony before the grand jury cannot exonerate petitioner or invalidate his plea, he does not have a compelling and particularized need for this material. And because petitioner has himself demonstrated that he can obtain purportedly exculpatory material without access to the grand jury minutes, his application should have been denied.

But even a compelling and particularized need for grand jury material does not, alone, entitle a petitioner to that testimony. A court must then balance the need for the minutes against the public's strong interest in maintaining grand jury secrecy. See Fetcho, 91 N.Y.2d at 769. The court below failed to properly balance these interests.

There are multiple reasons for maintaining the secrecy of grand jury proceedings, some of which are not pertinent here, as

petitioner pointed out in the lower court (A2186-89). For instance, there is obviously no need here to prevent flight by a defendant who is about to be indicted or to prevent interference with the grand jurors or prospective witnesses at a trial resulting from an indictment the grand jury may return. See People v. DiNapoli, 27 N.Y.2d 229, 235 (1970). And there is surely no need "to protect an innocent accused from unfounded accusations if in fact no indictment is returned." Id. But there is a compelling reason to protect the "venerable and important policy" of grand jury secrecy in this matter, and that is "encouraging free disclosure of information by witnesses." Fetcho, 91 N.Y.2d at 769; see People v. DiNapoli, 27 N.Y.2d at 235 (confidentiality of grand jury testimony is necessary as an "assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely") (emphasis added); Ruggiero v. Fahey, 103 A.D.2d at 71 (court must consider effect disclosure will have on future grand juries).

Petitioner below argued that that interest is outweighed here because there is "overwhelming evidence" that the complainants' testimony was "coerced" (A0052). There is no significant or persuasive evidence of coercion -- just conjecture. The minutes were reviewed by the court presiding

over petitioner's criminal case. The review was thorough -- twenty-three counts were dismissed -- and even the reviewing judge's law secretary, who has now offered support to petitioner, has not asserted that any witnesses were coerced (A2230-31).

On the other side of the equation, publication of grand jury testimony will have a devastating effect on the people who offered that testimony decades ago and whose parents permitted them to give that testimony in accord with laws that reasonably guaranteed those then-children that their privacy would be protected. It does not require significant argument to establish that victims of sex crimes, testifying in the grand jury concerning highly personal and possibly humiliating events, do not expect that testimony to be made public if the case does not go to trial. Indeed, it is for that very reason -- sparing sex-crime victims the embarrassment of testifying in public -- that a significant percentage of sex-crime cases, particularly those involving children, are resolved by guilty pleas, even when it means reduced sentences for the abusers.

In his dissent in People v. DiNapoli, Judge Scileppi said that "[t]he grand jury system is only as strong and effective as the evidence which is made available to the grand jury by

witnesses, and their co-operation should not be inhibited by erosion of the rule which traditionally asserts that their testimony will remain confidential." DiNapoli, 27 N.Y.2d at 239 (Scileppi, dissenting).[12] One can imagine no greater inhibition to witnesses' cooperation in sex-crimes investigations than the fear that their testimony will be disclosed even if there is no trial. Petitioner claims to have credible recantations. He claims to have a body of proof establishing improprieties. He has the names of, and has demonstrated access to, the complainants. He does not need, and cannot justify, access to grand jury minutes that are presumed, and are statutorily decreed, to be confidential. That confidentiality is of overwhelming importance to the people who were statutorily promised secrecy when they testified and the people who may rely on that secrecy in the future. See Fetcho, 91 N.Y.2d at 769.

The Supreme Court addressed none of this. It made no finding of a compelling and particularized need for disclosure of grand jury minutes. It did not consider petitioner's ability to proceed without the grand jury minutes. And nothing said by

[12] Judge Scileppi agreed with the majority's premise that the secrecy of grand jury minutes is not "an absolute" and that "the question of secrecy versus disclosure is often a balancing proposition." His dissent was based on his disagreement with the majority's balancing equation in that particular case. DiNapoli, 27 N.Y.2d at 239-40.

the court suggests that it ever considered the reasons behind the secrecy afforded grand jury proceedings or the significance of secrecy and privacy in these particular grand jury proceedings. Indeed, the court's insistence that the District Attorney disclose "every piece of paper" associated with this matter -- unredacted, but for the names of the three complainants who wrote to the court -- leads to the conclusion that it never considered the appropriate factors relevant to a determination of whether grand jury records should be disclosed. The court's insistence on viewing this case as a criminal reinvestigation of the validity of petitioner's conviction (A2284) led it away from the case law and statutory provisions relevant to petitioner's request, and resulted in a decision that was contrary to both.

By pleading guilty, petitioner forfeited his right to challenge the evidence in the grand jury (see People v. Devodier, 102 A.D.3d 884 [2d Dept. 2013]) and to confront his accusers with their prior testimony (Williams v. Erie County District Attorney, 255 A.D.2d 863; Bonelli, 36 Misc.3d 625). His decades-late change of heart is not a basis for breaching grand jury secrecy and affording him access to those records now. He has no compelling and particularized need for the grand jury records. And the weighing of interests here -- should the

Court reach that analysis -- leads to the conclusion that the compelling interest of confidentiality in the grand jury, especially where the witnesses were child victims of sex crimes, has not been overcome.

* * *

In 1988, petitioner admitted that he sexually abused multiple children, and he pled guilty to multiple sex offenses. He now denies any misconduct and effectively seeks the trial he did not want -- complete with discovery. Had he gone to trial, petitioner would have been entitled to much of the material he now seeks, pursuant to Rosario and Brady and discovery statutes. But he did not go to trial, and he is no longer a defendant. He is, rather, a member of the public, entitled to no more than would be disclosable to any member of the public who filed a FOIL request. The Supreme Court failed to appreciate the crucial difference between a defendant facing trial and a member of the public filing a FOIL request. Indeed, it made clear that it viewed the civil article 78 proceeding before it as an extension of petitioner's long-completed criminal case. It was not.

Petitioner's guilt is not in issue here; that was long ago determined. Whether there was a Brady violation in the course of petitioner's criminal prosecution is not in issue here; that argument was long ago deemed meritless. What is now in issue is whether the Supreme Court properly applied the law that prohibits the FOIL disclosure of non-testifying witnesses' statements, regardless of cause; whether it properly assessed petitioner's claim of "good cause" for the disclosure of records identifying sex-crimes victims; and whether it properly assessed petitioner's claim of "compelling and particularized need" for grand jury records, as well as the reasons for grand jury secrecy.

The breadth of the Supreme Court's order, let alone its rationale, is evidence that that court did not reasonably consider or address the issues before it. The court ordered the release of the entirety of the District Attorney's file, without redaction of even the most sensitive material or identifying information. It did this without addressing the relevant and controlling legal standards. It did this with a misperception of the nature of the proceeding before it and the appropriate issues. It appears to have completely ignored the letters from complainants, reaffirming the abuse inflicted by petitioner, and imploring the court to protect their privacy. The Supreme

Court's order should be reversed and the petition should be dismissed.

C O N C L U S I O N

THE SUPREME COURT'S ORDER SHOULD BE REVERSED AND THE PETITION SHOULD BE DISMISSED.

Dated: Mineola, New York
October 31, 2013

Respectfully submitted,
Kathleen M. Rice,
District Attorney, Nassau County
262 Old Country Road
Mineola, New York 11501

By: Judith R. Sternberg
Judith R. Sternberg
Assistant District Attorney

Robert A. Schwartz
Judith R. Sternberg
Assistant District Attorneys
Of Counsel

CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. 670.10.3(f)

JUDITH R. STERNBERG does hereby certify as follows: This brief was prepared by computer; the body of the brief is double-spaced and utilizes a monospaced typeface (Dark Courier) of 12-point size; the footnotes are single-spaced and utilize the same typeface and point size; and, according to the word count of the word processing system used (Microsoft Word 2010), the brief contains 13,857 words, exclusive of the table of contents, proof of service, and certificate of compliance.

Dated: Mineola, New York
October 30, 2013

Judith R. Sternberg
JUDITH R. STERNBERG
Assistant District Attorney