COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

JESSE FRIEDMAN,

Defendant.

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AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION FOR A SUBPOENA DUCES TECUM AND RELATED RELIEF

Ind. Nos. 67104, 67430, and 69783
Hon. Teresa K. Corrigan

AMES C. GRAWERT, an attorney admitted to practice in the State of New York, and an Assistant District Attorney of counsel to the Honorable Madeline Singas, Acting District Attorney of Nassau County, affirms under penalty of perjury the factual allegations below:

1. The factual allegations set forth below are based upon information and belief, the source of said information and the basis for said belief being defendant's motion papers, and the records of the Office of the District Attorney, including the conviction integrity report concerning defendant released by the District Attorney's Office on June 24, 2013.

2. This affirmation is submitted in opposition to defendant's motion for a subpoena duces tecum and for related relief (hereinafter "discovery motion").

3. Defendant filed this motion in an attempt to locate information that might support his pending motion to vacate his 1989 judgment of conviction. As the Court is familiar with that application, the facts underlying it are summarized here only briefly.

4. On December 20, 1988, defendant pleaded guilty to twenty-five counts of sexual abuse and related crimes for his role in the sexual victimization of young students enrolled in an

after-school computer class held in the basement of his family home.[1] On January 24, 1989, defendant was sentenced to an aggregate, indeterminate term of six to eighteen years' imprisonment (Boklan, J., at plea and sentence).

5. No notice of appeal was ever filed. After his release from prison, however, defendant pursued post-conviction relief in state and federal courts, culminating in his unsuccessful appeal from the denial of a habeas corpus petition. See Friedman v. Rehal, 618 F.3d 142, 151-52 (2d Cir. 2010) (summarizing defendant's post-release litigation history). Though the Second Circuit ultimately held that defendant's sole surviving post-conviction claim was both meritless and time-barred (see id. at 151-55),[2] the court urged the District Attorney to re-examine the question of defendant's factual guilt (id. at 155-60).

6. The People, per then-District Attorney Kathleen M. Rice, agreed to do so, and on June 24, 2013, the District Attorney released the results of that investigation in a lengthy formal report ("Rice Report"), accompanied by an approximately 900-page appendix. The Report identified some flaws in the underlying police investigation, but ultimately concluded that defendant was not wrongfully convicted.

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[1] Specifically, defendant pleaded guilty to seventeen counts of first-degree sodomy (Penal Law § 130.50), four counts of first-degree sexual abuse (Penal Law § 130.65), one count of attempted first-degree sexual abuse (Penal Law §§ 110.00/130.65), two counts of endangering the welfare of a child (Penal Law § 260.10), and one count of the use of a child in a sexual performance (Penal Law § 263.05). The crime of sodomy has since been renamed criminal sexual act. See L. 2003, Ch. 264, §§ 18-20.

[2] Defendant's surviving claim alleged that some of the grand jury testimony against him was the product of "memory recovery" techniques, such as hypnosis—a theory the Rice Report would later refute at length—and that he should have been provided with that information prior to entry of his guilty plea. The Second Circuit concluded that defendant was not entitled to that information before he pleaded guilty, whether it was characterized as impeachment or exculpatory evidence. See Friedman, 618 F.3d at 151-55 (citing United States v. Ruiz, 536 U.S. 622, 629-32 [2002]).

7. While the re-investigation was underway, defendant sought disclosure of records from the original prosecution pursuant to the Freedom of Information Law ("FOIL"). Defendant's request was denied. In April 2013, defendant commenced a proceeding, under Article 78 of the C.P.L.R., to compel the People to release the requested documents. He also sought an order pursuant to Civil Rights Law § 50-b(2)(b), allowing him access to records identifying victims of sex crimes, and an order granting him access to grand jury testimony. The petition was assigned to Justice F. Dana Winslow of the Supreme Court, Nassau County, and at Justice Winslow's request, the People provided the court with an unredacted copy of the Rice Report, an unredacted copy of the appendix that accompanied the report, and copies of witness statements and other documents given to police during the original prosecution. These documents, which totaled approximately 1,500 pages, were all filed under seal. Justice Winslow did not request, and did not review, the entire prosecution file.

8. On August 22, 2013, in an oral order, Justice Winslow directed the People to provide defendant with the information he had sought in his FOIL request, and much more (see Def. Ex. G [hereinafter "Article 78 Transcript"], at 36). Specifically, the court ordered the People to turn over every piece of paper in their file (id.). During that proceeding, Justice Winslow claimed to have received "17,365 pages" of documents (id. at 25). Upon information and belief, this was either a misstatement or transcription error, as the quoted figure exceeds by a factor of ten the number of pages actually provided to the court by the People.[3]

9. Justice Winslow also opined that the Article 78 proceeding was an extension of defendant's criminal case (see, e.g., id. at 14-17, 28-29), and questioned whether the non-disclosure of witness statements in the underlying prosecution contravened the rule in Brady v.

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[3] Even counting defendant's submission, the reference to 17,365 appears to be an error or misstatement.

Maryland, 373 U.S. 83 (1963). During oral argument on the issue, Justice Winslow seemed to express his disagreement with the Second Circuit's decision on the Brady issue, but also appeared to acknowledge that the issue was not before him (see Article 78 Transcript at 25-28). Justice Winslow also directed the People to preserve their files during any appeal (id. at 34 ["no document of any kind may be moved, re-filed, or in any way handled"]).

10. The People timely appealed from Justice Winslow's order granting defendant access to the entire file. On August 27, 2013, Justice Peter B. Skelos of the Appellate Division, Second Department issued a temporary stay of Justice Winslow's order. At defendant's request, Justice Skelos also reminded the People of their obligation to preserve evidence pending resolution of the appeal. On October 1, 2013, the Appellate Division, Second Department, entered an order confirming that Justice Winslow's order was stayed by operation of law pending determination of that appeal.

11. On February 10, 2015, the Second Department heard oral argument on the merits of the Article 78 appeal. The case remains sub judice.

12. On June 23, 2014, defendant filed a motion to vacate his judgment of conviction, arguing that he was "actually innocent" of the crimes he pleaded guilty to committing, and therefore entitled to relief under the Second Department's recent decision in People v. Hamilton, 115 A.D.3d 12 (2d Dept. 2014). In support of this claim, defendant cited "recantation" statements by several complaining witnesses, and contended that recent interviews with non-complainants conclusively established that none of the complainants was ever sexually abused. Defendant also contended that the indictments against him were jurisdictionally defective, because the prosecutor knowingly presented false evidence in the grand jury, and that his guilty plea was the product of judicial coercion and bias.

13. The People consented to an evidentiary hearing on defendant's innocence claim, but argued that the remaining claims should be summarily denied. On December 23, 2014, this Court determined that an evidentiary hearing would be held on defendant's innocence claim, and dismissed the other claims as procedurally barred in part, and meritless in their entirety.

14. Now, despite his prior claim that the facts marshaled in his motion presented compelling evidence of his actual innocence, defendant seeks unfettered access to the People's prosecution file to search for evidence supporting his claim. No such relief is warranted, and the various theories defendant raises in support of his motion are all misguided. First, the right to compulsory process by subpoena does not entail the right to employ that device as a discovery tool to fish through the People's files. Moreover, there is no constitutional right to general post-conviction discovery, and though the New York Legislature has provided for post-conviction discovery in some limited cases, none of those statutes authorizes discovery here. Moreover, none of the theories advanced by defendant would justify the kind of broad-ranging, directionless search that defendant proposes to undertake.

15. During the hearing, the People do expect to provide defendant with the information necessary to both effectuate his right to cross-examine witnesses the People might present, and allow him to respond to issues raised during the People's cross-examination of any witnesses he chooses to present. Production of any such information is premature at this juncture, though, and this Court's order granting the hearing did not amount to a license for defendant to engage in a "fishing expedition" through the People's files.

WHEREFORE, and for the reasons set forth in the accompanying memorandum of law, defendant's motion for a subpoena duces tecum and for related relief should be denied.

Dated: Mineola, New York
April 29, 2015

AMES C. GRAWERT

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Ind. Nos. 67104, 67430, and 69783
Hon. Teresa K. Corrigan

JESSE FRIEDMAN,

Defendant.

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MEMORANDUM OF LAW

Respectfully submitted,

Madeline Singas
Acting District Attorney,
Nassau County
262 Old Country Road
Mineola, New York 11501
(516) 571-3800

Sheryl Anania
Ames C. Grawert
Assistant District Attorneys
of Counsel

INTRODUCTION AND STATEMENT OF FACTS

This memorandum of law is submitted in support of respondent's affirmation in opposition to defendant's motion for a subpoena duces tecum and for related relief. Facts relevant to the determination of defendant's motion are set forth in that affirmation, in the conviction integrity report on defendant's case released by former District Attorney Kathleen M. Rice on June 24, 2013 (see generally Def. Ex. B [hereinafter "Rice Report"]), and in respondent's affirmation and memorandum of law in opposition to defendant's motion to vacate the judgment of conviction.

Defendant's motion seeks broad-ranging post-conviction discovery on three independent bases: (1) by way of a subpoena duces tecum; (2) through statute; and (3) based on his claimed constitutional entitlement. Considered together, and even in part, defendant's motion seeks disclosure of virtually every document in the People's file. That relief is unauthorized, unwarranted, and unnecessary to effectuate his right to a fair evidentiary hearing. Defendant's motion should be denied outright.

ARGUMENT

DEFENDANT'S MOTION FOR A SUBPOENA DUCES TECUM, AND FOR POST-CONVICTION DISCOVERY, SHOULD BE DENIED IN EVERY RESPECT.

Defendant's motion seeks unbridled access to virtually every document created, consulted, or reviewed throughout the twenty-eight year litigation history of this case. Though defendant claims that this relief is necessary to effectuate his right to an evidentiary hearing on his innocence claim, defendant fails, throughout his papers, to demonstrate any clear nexus between the discovery sought and the claim he will litigate at the hearing. Defendant's failure to make that showing defeats his request for a subpoena duces tecum and as shall be shown, defeats his remaining claims as well. The discovery motion should be denied accordingly.

I. No Statute Or Constitutional Right Entitles Defendant To The Discovery He Seeks. Moreover, Granting Defendant's Discovery Request Is Not Necessary To Effectuate His Right To An Evidentiary Hearing.

In advance of the evidentiary hearing, defendant demands access "as a matter of right" to twenty-nine overlapping categories of information, amounting to most if not all of the records from the original prosecution, and large portions of the re-investigation file (Def. Discovery Mem. at 24-27). Separately, defendant seeks all documents he would have received had he gone to trial (see id. at 32), and all "records of methods used to elicit testimony" in the underlying prosecution, including witness statements and interview records (id. at 23). Read together, these overlapping requests seek nothing less than the production of all records from the original investigation and prosecution, and many compiled during the re-investigation.

None of the varied theories contained in defendant's motion justifies such broad-sweeping relief. Though the Criminal Procedure Law permits post-conviction discovery in certain circumstances, none of those circumstances exists here, and the scattered cases relied upon by defendant, nearly all of which concern post-conviction DNA testing, do not counsel otherwise. Defendant's reliance on the constitutional principles underlying pre-trial discovery are equally unavailing, as this case is long-past pre-trial status. Because defendant has failed to demonstrate any legal entitlement to the information he seeks, his motion must be denied.

A. Post-Conviction Discovery Is Not Authorized By C.P.L. Article 240, And The Limited Post-Conviction Discovery Provisions In C.P.L. Article 440 Do Not Apply.

First, as defendant acknowledges (see Def. Discovery Mem. at 14), criminal discovery in New York State was unavailable at common law, and remains limited by statute today. See People v. Colavito, 87 N.Y.2d 423, 427 (1996); see also C.P.L. § 240.10. Accordingly, "[d]iscovery which is unavailable pursuant to statute may not be ordered based on principles of

due process because 'there is no general constitutional right to discovery in criminal cases.'" Pirro v. LaCava, 230 A.D.2d 909, 910 (2d Dept. 1996) (quoting Miller v. Schwartz, 72 N.Y.2d 869, 870 [1988]). On that basis, the Second Department has time and again issued writs of prohibition to restrain trial courts from granting discovery that exceeds statutory authorization. See Catterson v. Rohl, 202 A.D.2d 420, 423 (2d Dept. 1994) (restraining an order granting, among other things, pre-indictment discovery); Hynes v. Cirigliano, 180 A.D.2d 659, 659 (2d Dept. 1992) ("Discovery in a criminal proceeding is entirely governed by statute"); see also People v. Denham, 97 A.D.3d 691, 692 (2d Dept. 2012) (rejecting defendant's contention that he was entitled to production of handwriting exemplars under the discovery statute).

Critical to defendant's motion, C.P.L. Article 240, which sets out the rules for discovery in criminal cases, contains no provision authorizing discovery except during the pendency of a prosecution by indictment, superior court information, or other accusatory instrument. See, e.g., C.P.L. § 240.20(1) (requiring the prosecutor to produce information only "upon a demand . . . by a defendant against whom an indictment . . . is pending"); see also C.P.L. § 240.40(1) (authorizing court-ordered discovery only when an indictment, superior court information, prosecutor's information, information, or simplified information is pending). Notably, Article 240 does not use the much broader term "criminal proceeding" (C.P.L. § 1.20[18]) to delineate when discovery is authorized. Here, defendant has long-since pleaded guilty to the only indictments ever filed against him (see Aff. ¶ 4), placing him squarely beyond the reach of Article 240. His case is not in a pre-trial posture, and contrary to his contention, he is not entitled to pre-trial discovery as if it were (see Def. Discovery Mem. at 32). See Cirigliano, 180 A.D.2d at 659-60 (restraining pre-indictment discovery order "[s]ince the [defendant] is not a person described by C.P.L. § 240.20"); Washpon v. District Attorney of Kings County, 164

Misc. 2d 991, 993 (Sup. Ct. Kings County 1995) ("Absent statutory authority, there is simply no entitlement to request discovery in a postconviction framework."). Unless defendant is able to locate some alternate reservoir of authority, then, his motion for post-conviction discovery is foreclosed by C.P.L. Article 240's explicit limitations.

Defendant attempts to locate that authority in C.P.L. § 440.10 itself, and in Judiciary Law § 2-b(3), a catch-all provision providing courts with the authority to "devise and make new process and forms of proceedings" where necessary to effectuate their authority (see Def. Discovery Mem. at 22-23). Both theories are unavailing, and defendant's attempt to invoke these statutes relies upon an overly-broad reading of a few trial court decisions. Though some trial courts have construed Judiciary Law § 2-b(3) or C.P.L. § 440.10 to permit post-conviction discovery, all such cases concerned unique fact patterns and narrowly tailored, specific requests. See People v. Griffin, 138 Misc. 2d 279, 284-86 (Sup. Ct. Kings County 1988) (finding that the court had authority to direct the complainant to submit to a psychiatric examination, but declining to issue such relief on the facts of the case). Most concern the special case of post-conviction DNA testing. See People v. Callace, 151 Misc. 2d 464, 465-67 (Sup. Ct. Suffolk County 1991) (finding authority to order DNA testing in Judiciary Law § 2-b[3]); see also Dabbs v. Vergari, 149 Misc. 2d 844, 848 (Sup. Ct. Westchester County 1990) ("By a parity of reasoning, where evidence has been preserved which has high exculpatory potential [DNA], that evidence should be discoverable after conviction."). No court has read these cases, or construed the underlying statutes, to create a right to the far-reaching post-conviction discovery defendant seeks here. And as discussed below (see pages 8-11, infra), since these cases were decided, the legislature has carefully carved out detailed provisions for post-conviction DNA testing and general discovery in actual innocence cases. See C.P.L. § 440.30(1)(b), (1-a). Defendant does

not fall within the general discovery provision, however, because he was not convicted after trial—an explicit requirement of the statute—and he cannot rely on Judiciary Law § 2-b(3) to provide for relief that is specifically foreclosed by the statute. See People v. Ricardo B., 73 N.Y.2d 228, 232-33 (1989) (court may adopt new procedures that are "consistent" with those authorized by legislature); People v. Byrdsong, 33 A.D.3d 175, 177-79 (2d Dept. 2006) (because the legislature specifically provided for post-conviction DNA discovery after Callace, court refused to apply Judiciary Law to expand scope of disclosure); People v. Singh, 90 A.D.3d 1079, 1080 (2d Dept. 2003) (refusing to apply Judiciary Law § 2-b[3] because "it would be contrary to, rather than consistent with, existing statutory and decisional law").

Perhaps recognizing that the Judiciary Law may not be used to expand discovery beyond what the legislature has provided, and that the legislature has limited post-conviction discovery in guilty plea cases to DNA testing (see C.P.L. § 440.30[1-a][a][2]), defendant seeks to equate his request to one seeking DNA evidence. He contends that new developments in social science would allow him to prove his innocence if he were permitted to examine the People's file (see Def. Discovery Mem. at 19-21). This argument should not be taken seriously. DNA testing is a unique forensic tool with extraordinary probative value. Properly used, it can exclude a suspect or identify the perpetrator of an offense to a scientific certainty. Social science research shares none of that precision, and the research that defendant relies on here, which concerns the "suggestibility" or impressionability of child witnesses, is especially ill-suited to retrospective application.

Child suggestibility research does not have the same probative value as DNA evidence. It is contentious even within academic circles, and defendant's perfunctory, simplistic summary of that field (see id. at 19-21, 23) elides continuing academic debate about its practical value.

For example, the chief article defendant relies upon analyzed the effect of suggestive questioning on children between three and six years of age, and though the researchers posited that their findings might apply to older children, they themselves recommended further study. See Sena Garven et al., More Than Suggestion: The Effect of Interviewing Techniques from the McMartin Preschool Case, 83 J. APPLIED. PSYCHOL. 347, 350, 355 (1998).[1] Considering that the victims in this case were much older, and indeed at a different phase of life than the children studied in the Garven paper, this is not a trivial limitation (see generally Rice Report at 92-93 & nn.424-32 [analyzing suggestibility research]).[2] Defendant may believe that child suggestibility research is as reliable and universally applicable as DNA science, but he is alone in that assertion, even among experts. See Stephen J. Ceci & Maggie Bruck, How Reliable Are Children's Statements? It Depends, 43 FAMILY REL. 255, 257 (1994) (observing that while "robust" as a general theory, the ramifications of child suggestibility research for a particular case "are rarely as straightforward as one might wish"). As one of defendant's own sources acknowledges, "[s]imple statements about young children's unreliability when questions are repeated . . . are more likely to mislead than to educate." Thomas D. Lyon, Applying Suggestibility Research to

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[1] Garven also cautioned against generalizing from the findings in her paper, saying that "the interviewing techniques from the McMartin case should not be viewed as typical of the practice in most child protection and law enforcement agencies." Garven at 354-55.

[2] As discussed at greater length in the Rice Report, most if not all suggestibility studies focus on pre-school age children, and scholars who have studied the issue conclude that suggestibility varies with age, such that older children are less susceptible to suggestive questioning. See Maggie Bruck & Stephen J. Ceci, The Suggestibility of Children's Memory, 50 ANN. REV. PSYCHOL. 419, 434-37 (noting the continued salience of age distinctions in suggestibility studies). Additionally, some scholars dispute whether memories can be "planted" by questioning at all, or whether the suggestibility effect merely refers to an interviewer's ability to shape an already existing memory through questioning. See Kathy Pezdek & Chantal Roe, The Suggestibility of Children's Memory for Being Touched: Planting, Erasing, and Changing Memories, 21 LAW & HUMAN BEHAVIOR 95 (1997). Defendant's theory, that suggestive questioning can implant traumatic memories in older children, lacks broad academic support.

the Real World: The Case of Repeated Questions, 65 LAW & CONTEMP. PROBS. 97, 126 (2002). Though defendant has elected to ignore this warning, it is one worth noting.

Setting these academic debates to one side, the relevance of child suggestibility research has little or no bearing on defendant's actual innocence claim. Defendant contends that the victims in this case were subjected to suggestive questioning (see Def. Discovery Mem. at 21, 23), but even if true, that does not establish his actual, factual innocence of the crimes with which he was charged. Defendant admitted his guilt in open court and elsewhere. He was not convicted on the testimony, tainted or otherwise, of any witness. This is simply not a case where the People's file contains DNA-type evidence capable of resolving defendant's innocence claim; accordingly, it is not analogous to the limited cases where courts have stretched Judiciary Law § 2-b(3) to permit discovery of evidence with "high exculpatory potential." Dabbs, 149 Misc. 2d at 848. No court has ever construed Judiciary Law § 2-b(3) or any provision of C.P.L. Article 440 to authorize general discovery following a guilty plea, and this Court should not break new ground to account for defendant's fanciful reading of academic journals.

B. The Legislature Has Specifically Excluded Post-Conviction Discovery in Guilty Plea Cases.

Defendant is only entitled to rely on "gap-filler" arguments, such as the implied statutory right discussed in Dabbs and Callace, to the extent that the legislature has not clearly spoken on the matter. See People v. Diaz, 195 Misc. 2d 337, 338-39 (Sup. Ct. Bronx County 2003) (declining to follow Callace in light of 1994 amendments to C.P.L. § 440.30). Where the legislature intentionally omits something from the statutory scheme, courts should not fill that gap by implication. For example, in 1994, the legislature enacted C.P.L. § 440.30(1-a), which specifically provided for a right to DNA testing in C.P.L. § 440.10 proceedings, but only where the conviction occurred after trial. See Ch. 737, § 2, 1994 N.Y. Session Laws 1833 (McKinney).

On that basis, the Appellate Division rejected a defendant's motion seeking testing of DNA evidence after his guilty plea, saying that "[a]rguments as to whether defendants who plead guilty should be permitted to seek [DNA testing] . . . should be addressed to the New York State Legislature." Byrdsong, 33 A.D.3d at 179-80.[3] Where the legislature has enacted laws governing a particular issue, the parties should be constrained to operate within that framework, subject to the rules of statutory construction. See Singh, 90 A.D.3d at 1080.

Here, the legislature has created a comprehensive, detailed framework for discovery in post-conviction motions premised on claims of actual innocence. See C.P.L. § 440.30(1)(b). However, that statute authorizes discovery only in connection with a motion to vacate the judgment of conviction brought by a defendant who was "convicted after trial." C.P.L. § 440.30(1)(b). It does not allow discovery for defendants who, as in this case, were convicted by their own guilty plea.[4] See id. That omission, which is duplicated in the sponsor's introductory memorandum (see Introducer's Memorandum in Support, Bill Jacket, L. 2012, ch. 19, at 10), evidences the legislature's belief that defendants in plea cases should not have access to general discovery in connection with a C.P.L. Article 440 hearing. Comparison with other subsections of C.P.L. § 440.30 supports this construction of the statute. Since 2012, C.P.L. § 440.30(1-a), the discovery statute on DNA testing, has distinguished between defendants convicted after trial, and those convicted after a guilty plea, and offered the former greater access

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[3] In 2012, the legislature amended C.P.L. § 440.30(1-a) to provide for post-plea discovery of DNA evidence in some cases. See C.P.L. § 440.30(1-a)(a)(2).

[4] The statute contains other conditions as well. For example, it limits discovery to material that would have been discoverable under C.P.L. § 240.10(3). It also requires a nexus between the information sought and an actual innocence claim; imposes a time limit for such requests; carves out non-felony cases; allows the court to deny or limit disclosure where there is a risk of harm, intimidation, or embarrassment to any person; and further excludes discovery requests where the information sought could be obtained by other means. See C.P.L. § 440.30(1)(b). The significance of these additional limitations is discussed below.

to post-conviction DNA testing than the latter. See C.P.L. § 440.30(1-a)(a)(1), (2). Moreover, that distinction was enacted simultaneously with C.P.L. § 440.30(1)(b) itself. See Ch. 19, §§ 1-2, 2012 N.Y. Session Laws 290-92 (McKinney). Evidently, the legislature knew how to draft a statute covering all defendants, regardless of whether they went to trial or pleaded guilty, and chose to express a consistent policy preference for affording trial defendants greater post-conviction rights than plea defendants. See People v. Tychanski, 78 N.Y.2d 909, 911-12 (1991) (omission in accusatory instrument statute presumed intentional); Brown v. N.Y. State Racing & Wagering Board, 70 A.D.3d 107, 116-17 (2d Dept. 2009) (legislature's failure to include veterinary dentistry in definition of regulated medical practice evidenced intention to leave the field unregulated); see also Statutes § 240 ("where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded"). Indeed, it has long been the case that defendants who plead guilty cannot avail themselves of specific post-conviction remedies, such as the newly-discovered evidence provision set forth in C.P.L. § 440.10(1)(g). See People v. Phillips, 30 A.D.3d 621, 622 (2d Dept. 2006).

Accordingly, this Court should effectuate the legislature's policy choice by denying defendant's motion for post-conviction discovery. See Statutes § 74 ("A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."). Were the Court to grant discovery despite the statute, whether pursuant to C.P.L. § 440.30(1)(b) or based on some implied statutory right, it would exceed its authority. See Pirro, 230 A.D.2d at 910; Catterson, 202 A.D.2d at 423; see also North Mariana Islands v. Canadian Imperial Bank of

Commerce, 21 N.Y.3d 55, 60 (2013) ("failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended"); Morales v. County of Nassau, 94 N.Y.2d 218, 224 (1999) ("This Court has repeatedly declined to interfere with the Legislature's policy choices as beyond the realm of judicial authority. Where the Legislature has spoken, indicating its policy preferences, it is not for courts to superimpose their own." [internal citations omitted]). If defendant believes that this result is unfair, his arguments "should be addressed to the New York State Legislature." Byrdsong, 33 A.D.3d at 180.

Even if C.P.L. § 440.30(1)(b) were applicable here, it would not authorize the discovery defendant is seeking. That statute allows discovery only where the "property" sought "would be probative to the determination of [the] defendant's actual innocence," and where the request for that property is "reasonable." C.P.L. § 440.30(1)(b). Defendant's blanket requests for broadly-described categories of information can hardly be described as "reasonable." They are grossly overbroad and unconnected to his claim of actual innocence. Additionally, his surviving requests are subject to C.P.L. § 440.30(1)(b)'s further limitations, which make non-discoverable any request that entails "a risk of harm, intimidation, embarrassment, reprisal, or other substantially negative consequences," as well as any document that if disclosed would jeopardize "the confidentiality of informants." C.P.L. § 440.30(1)(b). As the People have argued in opposition to defendant's FOIL request and Article 78 application, disclosure of witness statements would risk those very harms. See Civil Rights Law § 50-b (records identifying victims of sex offenses confidential). This concern is neither speculative nor hyperbole: defendant's victims have spoken out, on multiple occasions and through whatever means were available to them, to ask that their privacy rights be protected. In 2004, four students retained an attorney to ensure that the release of *Capturing the Friedmans* would not thrust them back into

the spotlight. One student also wrote a letter to Judge Boklan, the judge who presided over defendant's case, with the specific hope of "prevent[ing] [his] further exposure" (see Rice Report at 97-102). More recently, one of the witnesses defendant counts as a "recanting witness" expressed incredulity and concern at being dragged back into the case (see id. at 109 [Keith Doe]; see also Def. Ex. HHH at 1 ["To be perfectly honest with you, I really don't want to get involved in this stuff."]). Two victims also wrote letters to Supreme Court Justice F. Dana Winslow, the judge who presided over the Article 78 proceeding, asking that their privacy be protected (see Def. Ex. G [hereinafter "Article 78 Transcript"] at 13).[5] Still another, speaking through his counsel in the same proceeding, asked Justice Winslow to protect his privacy (Def. Ex. G [hereinafter "Article 78 Transcript"] at 2-3, 10-11). In earlier conversations with the District Attorney's office, that witness even explained that he "had not told his wife or his children anything about his involvement" in the case (Rice Report at 112-13 [Barry Doe]), such that release of his name and the details of his involvement would be especially damaging. Lastly, another recantation statement relied upon by defendant comes from a witness who expressed grave concern that his privacy be respected going forward (see Def. Ex. M at 2-3; see also Rice Report at 114-15 [Kenneth Doe]. This Court need not take the People's word that disclosure would risk "intimidation, embarrassment, reprisal, or other substantially negative consequences." C.P.L. § 440.30(1)(b). The witnesses' statements insisting on their privacy, whether contained in defendant's own exhibits or elsewhere, speak for themselves.

In conclusion, the C.P.L. does not authorize defendant's request for post-conviction discovery, and a plain reading of C.P.L. § 440.30(1)(b) demonstrates that this was no accident, as the legislature specifically limited general discovery in post-conviction litigation to cases where

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[5] Both letters were sealed by the court, but one made especially clear the witness's concern that release of his information would be personally and professionally damaging.

the defendant went to trial rather than pleaded guilty. This statutory structure vindicates strong public policy concerns, and should not be circumvented. Though defendant may believe that discovery is necessary to effectuate his right to a hearing, the legislature, which had innocence claims in mind when drafting the recent amendments to Article 440, evidently disagreed. See C.P.L. § 440.30(1)(b)(i) (discovery only authorized in connection with actual innocence claim). And, as explained below, this limitation does not render defendant's right to an evidentiary hearing illusory.

C. The Due Process Clause Does Not Provide For Discovery In This Case.

Due process does not permit the open-file discovery defendant seeks, and his argument to the contrary mistakenly relies upon cases concerning the right to pre-trial discovery. Due process is a flexible concept, not a fixed entitlement (see Dabbs, 149 Misc. 2d at 848), and in this context, it confers upon defendant no discovery right independent of the statutory framework.

1. *Brady v. Maryland*

Defendant contends that he is entitled to a broad range of material—including witness statements, all records compiled by police during the original investigation, specific documents relied upon by prosecutors during the re-investigation, and the basis for specific conclusions in the Rice Report (see Def. Discovery Mem. at 23-27)—under the due process right to disclosure of exculpatory information announced in Brady v. Maryland, 373 U.S. 83 (1963). Brady, however, did not create a right to general criminal discovery, and defendant's attempt to characterize the information he seeks as Brady material does not make it so.

As recently as 2009, the Supreme Court, in denying a defendant's motion for post-conviction DNA testing, rejected the notion that Brady creates a right to post-conviction discovery. "The task of establishing rules to harness DNA's power to prove innocence without

unnecessarily overthrowing the established criminal justice system," the Court observed, "belongs primarily to the legislature." District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52, 69 (2009). In New York, the legislature has taken up the issue of post-conviction discovery, and outside of DNA testing, it has declined to authorize such relief for defendants who pleaded guilty (see pages 8-11, supra). In keeping with Osborne, defendant cannot use Brady to fill that gap. Brady is a trial right, under which "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." United States v. Bagley, 473 U.S. 667, 675 (1985). Accordingly, the Brady doctrine is not violated when a defendant pleads guilty without having received material that might have allowed him to impeach witnesses had he gone to trial. See United States v. Ruiz, 526 U.S. 622, 628-29 (2002). With even greater clarity, the Appellate Division, Second Department has consistently held that a defendant waives his right to Brady information when he pleads guilty. See People v. Leach, 115 A.D.3d 677, 678 (2d Dept. 2014) People v. Philips, 30 A.D.3d 621, 621-22 (2d Dept. 2006); People v. Knickerbocker, 230 A.D.2d 753, 754 (2d Dept. 1996); People v. Day, 150 A.D.2d 595, 600 (1989) ("By pleading guilty, the defendant . . . waived his contention that the prosecution failed to timely turn over certain Brady material to him."). For those reasons, defendant's own claims premised on the alleged withholding of Brady evidence have consistently failed. See People v. Friedman, Ind. Nos. 67104, 67430, 69783, Motion No. C-11 (Nassau County Court Jan. 6, 2006) (La Pera, J.), lv. denied A.D. No. 2006-1594 (2d Dept. Mar. 10, 2006); Friedman v. Rehal, 618 F.3d 142, 154-55 & n.5 (2d Cir. 2010) (state courts reasonably denied defendant's claim premised on the alleged withholding of Brady material). That result should guide the Court's analysis of defendant's current claims. If defendant had no constitutional right to Brady

material prior to his guilty plea, he has no Brady right to that information today, decades after his conviction. Once convicted, a defendant has fewer rights to discovery, not more. He "does not have the same liberty interests as a free man," and the right to due process in that setting "is not parallel to a trial right." Osborne, 557 U.S. at 68-69. And defendant has not, by winning an evidentiary hearing on his "actual innocence," somehow restored himself to pre-trial status, with all attendant trial rights. See People v. Hamilton, 115 A.D.3d 12, 26-27 (2d Dept. 2014) (noting procedural distinctions between a Hamilton hearing and a trial).

Nevertheless, defendant raises two arguments in support of his theory that post-conviction discovery is needed today to correct for past Brady violations. Both are wrong. First, defendant points to the Article 78 proceeding, in which he challenged the People's denial of a FOIL request targeting many of the documents at issue here, and argues that the presiding judge in that case "specifically found the [People's] files to contain Brady material" (Def. Discovery Mem. at 28).[6] To the extent that Justice Winslow made any such "finding," however, it was dicta, based on his disagreement with controlling precedent, and his mistaken belief that the Article 78 proceeding was part of a continuing criminal case (see Article 78 Transcript at 27-28). In light of the abundance of case law holding that a defendant pleading guilty has no right to Brady material (see, e.g., Leach, 115 A.D.3d at 678), defendant's reliance on Justice Winslow's contrary understanding of that entitlement is not persuasive. Defendant also seeks to avoid Ruiz's complete bar to his Brady argument by characterizing the documents he seeks as

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[6] It bears noting that Justice Winslow did not, in fact, review the entire prosecution file for this case. The only documents provided by the People to the court were the unredacted witness statements, the unredacted Rice Report, and the unredacted appendix (see Aff. ¶¶ 7-8). Defendant's reliance on the transcript, wherein Justice Winslow claims to have reviewed "17,365 pages" (see Def. Discovery Mem. at 28), is mistaken, as that claim was either a misstatement or a transcription error. Regardless, the People are unaware of what other records the court could have reviewed to account for that inflated figure.

exculpatory, rather than impeaching (see Def. Discovery Mem. at 29-31), but the distinction is irrelevant. In resolving defendant's own habeas corpus appeal, the Second Circuit noted that the logic of Ruiz would likely preclude all post-plea Brady claims, including those premised on the alleged withholding of exculpatory information. See Friedman, 618 F.3d at 154 & n.5. Though defendant argues that Ruiz does not compel that result (see Def. Discovery Mem. at 29), this Court need not weigh in on the matter to resolve his motion. It is enough that Second Department and Supreme Court precedent foreclose defendant's attempt to wield Brady as a post-plea discovery tool. See Philips, 30 A.D.3d at 621 ("By pleading guilty, the defendant forfeited his right to seek review of any alleged Rosario or Brady violation."); see also Osborne, 557 U.S. at 69 (holding that "Brady is the wrong framework" for post-conviction discovery).

Defendant argues that Brady also entitles him to documents uncovered during the re-investigation, but even where a defendant goes to trial, the Brady disclosure right does not extend to material discovered post-conviction.[7] See Seri v. Bochicchio, 374 Fed. Appx. 114, 116-17 (2d Cir. 2010) (dismissing part of a 42 U.S.C. § 1983 action premised on the alleged suppression of Brady information, where the material at issue was discovered by the prosecution only after conviction); People v. Garrett, 23 N.Y.3d 878, 891 (2014) (hypothetical impeachment evidence was not suppressed within the meaning of Brady where the prosecution "had no actual knowledge of the allegations until after trial when their Brady obligations had ceased"). Defendant's authorities (see Def. Discovery Mem. at 24), which discuss only the withholding of

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[7] Of course, the prosecutor's ethical obligation to do justice does continue after conviction. See N.Y. RULES OF PROF'L CONDUCT R. 3.8(c) (requiring prosecutors to investigate "new, credible and material evidence" creating a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted). But the People complied with that obligation by conducting the conviction integrity review recommended by the Second Circuit. See Friedman, 618 F.3d at 159-60. As a result of that review, the People concluded that there was no reasonable probability that defendant was innocent, satisfying Rule 3.8's mandate.

information known to the prosecution and suppressed at the time of trial, do not show otherwise. See People v. Robinson, 133 A.D.2d 859 (2d Dept. 1987) (suppression of exculpatory statement by fact witness uncovered during original investigation was Brady error, despite prosecution's apparent belief that the witness was not reliable); Dabbs, 149 Misc. 2d at 847 (citing Brady to justify DNA testing of physical evidence that was presented at trial); People v. Lumpkins, 141 Misc. 2d 581, 587 (Sup. Ct. Kings County 1988) (Brady error based on non-production of investigative report prepared by police witness who testified at trial). When evaluating defendant's claimed entitlement to any of the documents underlying the Rice Report or discovered during the re-investigation (see Def. Discovery Mem. at 25-27), Brady affords him no relief. As the Osborne Court explained, "Brady is the wrong framework." Osborne, 557 U.S. at 69. If a defendant is convicted after trial, and it is discovered that Brady material was improperly withheld, he certainly has a post-conviction remedy. But that is not the posture of this case. Defendant never went to trial, suffered no Brady violation, and cannot use the Brady doctrine to obtain discovery he is otherwise not entitled to receive.

2. *Procedural Due Process*

To the extent defendant contends that he has some other due-process process right to pre-hearing discovery, that claim is also meritless. See Medina v. California, 505 U.S. 437, 443, 446 (1992) (holding that courts should balk at expanding the rules of criminal procedure under the "open-ended rubric of the Due Process Clause"). Due process could expand defendant's right to discovery in only two ways: if existing state procedures were inadequate to vindicate his interest in a protected right ("procedural due process"), or if due process required the Court to recognize an independent constitutional right to discovery ("substantive due process").

The Supreme Court's 2009 decision in Osborne addresses both points. In Osborne, an Alaska defendant claimed that the Due Process Clause entitled him to post-conviction re-testing of DNA evidence that had been used against him at trial. See Osborne, 557 U.S. at 57-59. Rejecting the defendant's initial contention that Brady compelled that relief on its own (id. at 68), the Court proceeded to evaluate defendant's rights under the "procedural" aspect of the Due Process Clause. First, the Court acknowledged that where state law creates a protected liberty interest—such as, a right to post-conviction relief—state procedures must allow meaningful access to that right. See id. at 68. However, the Court held that the standard for satisfying due process is not rigorous. A reviewing court should uphold state procedures so long as they do not "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress[] any recognized principle of 'fundamental fairness.'" Id. at 69 (quoting Medina, 505 U.S. at 446, 448). This deferential standard, the Court found, was especially appropriate when evaluating state post-conviction procedures. See Osborne, 557 U.S. at 69 ("Federal courts may upset a State's post-conviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights involved."); see also Medina, 505 U.S. at 446 ("it is appropriate to exercise substantial deference to legislative judgments").

Applying these principles, the Court acknowledged that Alaska law created a liberty interest in post-conviction relief (see Osborne, 557 U.S. at 68), but concluded that there was "nothing inadequate about the procedures Alaska ha[d] provided to vindicate" that right. Id. at 69. Alaska's allowance for post-conviction DNA discovery was broadly consistent with those created by federal law, and the laws of other states, and though Alaska's procedures were limited, "the federal statute and all state statutes impose conditions and limits on access to DNA evidence." Against that background, the Court held, the defendant "cannot show that available

discovery is facially inadequate, and cannot show that it would be arbitrarily denied to him." Id. at 71-72. Therefore, the defendant was constrained to assert his right to post-conviction DNA testing through the procedures enacted by the state legislature. Subsequent decisions have expanded on this holding, observing that "[f]undamental adequacy" under the Due Process Clause "does not mean that State procedures must be flawless or that every prisoner may access the DNA evidence collected in his case." Newton v. City of New York, 779 F.3d 140, 148 (2d Cir. 2015). In other words, procedural due process requires that state procedures be fair, free from arbitrary restrictions, and consistent with the "'traditions and conscience of our people.'" Osborne, 557 U.S. at 70 (quoting Medina, 505 U.S. at 446, 448). It does not upend state procedures by mandating unrestrained access to the underlying right. See McKithen v. Brown, 626 F.3d 143, 152-54 (2d Cir. 2010) (finding that New York State's then-existing DNA discovery right "constitutionally adequate").

Turning back to defendant's case, the Second Department has recognized that a criminal defendant who can prove his innocence by clear and convincing evidence has a liberty interest in being relieved of his conviction upon a proper showing. See People v. Hamilton, 115 A.D.3d 12, 26-27 (2d Dept. 2014). The precise contours of that right are still developing, but Hamilton itself recognizes that it is a narrow one. See id. at 26 ("Mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty."). A defendant seeking to take advantage of this right has a number of procedural tools at his disposal. The Criminal Procedure Law creates a statutory right of access to potentially exculpatory DNA evidence. C.P.L. § 440.30(1-a). It also allows a defendant convicted after trial to obtain documentary evidence to support his claim, so long as the evidence

sought relates to a viable claim of actual innocence (C.P.L. § 440.30[1][b]). Both provisions are consistent with the limited nature of the liberty interest at stake. See Osborne, 557 U.S. at 69 (holding that the convicted defendant's "right to due process [was] not parallel to a trial right"). And the legislature's limitations on post-conviction discovery can hardly be called arbitrary. As this Court is aware, a guilty plea ordinarily evidences the defendant's decision not to litigate the question of his factual guilt. Taylor, 65 N.Y.2d at 5. Based on the state's interest in finality, the legislature reasonably chose to limit certain post-conviction rights following a guilty plea. Procedural due process requires no more. See Newton, 779 F.3d at 148 ("Fundamental adequacy does not mean that State procedures must be flawless or that every prisoner may access the DNA evidence collected in his case.").

Additionally, New York State's limitations on post-conviction discovery are comparable with those of other jurisdictions. Post-conviction discovery outside of DNA testing is not the norm. Very few jurisdictions permit "general" post-conviction discovery of documents or other information. See Laura L. Levenson, Searching for Injustice: the Challenge of Postconviction Discovery, Investigation, and Litigation, 87 S. CAL. L. REV. 545, 567 & n.97 (2014) (reviewing discovery statutes nationwide, and concluding that "what is lacking are statutes relating to general, non-DNA discovery in post-conviction cases"). By providing for DNA discovery in plea and trial cases, and limited general discovery in connection with an "actual innocence" claim raised after trial (see C.P.L. § 440.30[1][b], [1-a]), New York law conforms to this general trend. In light of the foregoing, it cannot be said that New York's post-conviction discovery regime "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Osborne, 557 U.S. at 69. Nor could defendant credibly argue that state procedures render the right to post-conviction relief illusory simply because he

cannot obtain the relief he seeks. See Newton, 779 F.3d at 148. New York law has given defendant a forum to present evidence and examine witnesses in an attempt to establish his "actual innocence." That proceeding does not become "a farce" merely because defendant no longer enjoys the discovery rights he renounced by pleading guilty. "Barring proof of fundamental inadequacy," Osborne requires deference to the legislature's judgment in how to craft post-conviction procedures. McKithen, 626 F.3d at 154. Here, that deference compels the conclusion that New York's procedures are constitutionally adequate, even if they fall short of affording defendant the relief he desires.

In the context of this case, the Court should be especially skeptical of defendant's claim that without discovery his hearing will be reduced to a "farce" (Def. Discovery Mem. at 31). Defendant claimed in his initial motion papers that he already possessed "overwhelming" evidence of his innocence (see Def. Vacatur Mem. at 126), including what he represented as the credible recantations of several complaining witnesses. Indeed, defendant argued to the Court that "[e]ach and every count to which [defendant] was forced to plead guilty has been refuted by clear and credible evidence" (id. at 124-25); that his arguments were backed by evidence drawn from "multiple forms and from multiple sources" (id. at 94); and that ultimately, there was "nothing left of the prosecution's case" (id. at 80). Defendant described to the Court the testimony of twelve non-complainants, "one or more" of whom "was present in each class in which abuse was alleged by others" and would testify that "he did not witness any abuse" (id. at 79). He claimed he could disprove (or had already disproven) the inculpatory testimony of each complaining witness (id. at 94-125). Based on that showing, the Court afforded defendant an evidentiary hearing where he would be entitled to prove these allegations. He should not now be heard to complain that he cannot go forward without further evidence, or that he needs unfettered

access to the People's file to search for information that might support his claim or undermine arguments the People may put forth in response. If defendant fails to satisfy his burden at the hearing, it will not be because procedural limitations frustrated his access to evidence. It will be because he cannot substantiate his claim that he has clear and convincing evidence of his actual innocence.

3. *Substantive Due Process*

In Osborne, the Supreme Court also declined to recognize a freestanding right to post-conviction DNA testing under the Due Process Clause. See Osborne, 557 U.S. at 72-74. The Court concluded that constitutionalizing a right to post-conviction DNA testing would both "short-circuit what looks to be a prompt and considered legislative response," and "force [the Court] to act as policymakers." Id. at 73-74; see also Newton, 779 F.3d at 147 ("the Court expressed its reluctance to expand the scope of substantive due process or to embroil the federal courts in questions of State-based policy"). Substantive due process, the Court continued, should not be used to create novel rights where the right at issue is a subject of broad-ranging legislative action and debate. See Osborne, 557 U.S. at 62, 72 (citing Washington v. Glucksberg, 521 U.S. 702, 719 [1997] and Reno v. Flores, 507 U.S. 292, 303 [1993]). The Court's due process analysis was further informed by its recognition that a convicted criminal "does not have the same liberty interest as a free man." Osborne, 557 U.S. at 68.

This logic applies equally to defendant's claim, and is fatal to it. As explained above (see pages 20-21, supra), though many states allow for post-conviction DNA testing, New York is one of a few jurisdictions to recognize any right at all to post-conviction discovery of non-DNA evidence. In this context, any substantive due process claim defendant could muster would be less persuasive than the one the Supreme Court rejected in Osborne. Though a right to post-

conviction DNA testing has existed in New York State for just over twenty years, the right to post-conviction discovery of non-DNA evidence is a recent legislative creation, and one that the legislature undertook only after a careful balancing of competing policy concerns (see Section I.A, supra). Where the right at issue is both "new" and a subject of legislative debate, Osborne holds that courts should not prematurely terminate the political process by constitutionalizing the issue. See Glucksberg, 521 U.S. at 719; Flores, 507 U.S. at 303; see also People v. Lingle, 16 N.Y.3d 621, 632 (2011). Hamilton, in which the Second Department first recognized the right to a freestanding "actual innocence" claim, does not mandate otherwise. Though the Second Department concluded in that case that "all reliable evidence . . . should be admitted" at an evidentiary hearing on an innocence claim, that line referred to evidentiary rules to be applied at a hearing. Notwithstanding defendant's imaginative interpretation (see Def. Discovery Mem. at 31-32), it did not also create a discovery right as a matter of state or federal substantive due process. See Hamilton, 115 A.D.3d at 26. Moreover, the defendant in Hamilton was convicted after trial. Hamilton did not address itself to guilty pleas, and convictions obtained after a guilty plea are different. Defendants who plead guilty forfeit discovery they would receive for trial (see People v. Cusani, 153 A.D.2d 574, 574 [2d Dept. 1989]), and the resulting conviction is premised on the "'solemn act'" of pleading guilty. People v. Conway, 118 A.D.3d 1290, 1290 (3d Dept. 2014) (internal citation omitted).

Notably, defendant would not prevail on this point even under the Osborne dissenters' broader view of substantive due process. Justice Stevens, and the three justices who joined his dissent, would have construed substantive due process to include a right to post-conviction DNA testing based on the unique probative value of forensic biological evidence. See Osborne, 557 U.S. at 95-100 (Stevens, J., dissenting). But the dissenters' proposed rule was a narrow one, and

did not extend to general post-conviction discovery. In formulating his view, Justice Stevens cited with approval (id. at 95-96) an opinion by Judge Luttig of the Fourth Circuit Court of Appeals, which distinguished DNA from non-DNA evidence, and found that due process required a right to discovery of the former but not the latter:

> [N]o one would contend that fairness, in the constitutional sense, requires a post-conviction right of access or a right to disclosure anything approaching in scope that which is required pre-trial. For instance, it could never be maintained that fairness requires that the convicted [defendant] be provided with any and all material, potentially exculpatory information that comes forth post-trial, as is required pre-trial.

Harvey v. Horan, 285 F.3d 298, 317 (4th Cir. 2002) (Luttig, J.). Evidently, Justice Stevens agreed with Judge Luttig that substantive due process requires post-conviction production of DNA evidence, but also agreed that the right to post-conviction discovery ended there. Reading this dissent alongside the majority opinion, it is evident that every member of the Osborne Court agreed that there is no substantive due process right to post-conviction discovery of non-forensic evidence. See id. at 317. In this case—where defendant waived his right to trial and the discovery that goes along with it, and was convicted on his own guilty plea—his right to post-conviction discovery should also be less, not more than the right described in Osborne and related cases. As defendant has so often reminded the Court, too, "the only evidence in this case was testimony, no physical evidence existed" (Def. Discovery Mem. at 31). As defendant knows, the People's file contains no information fitting even the narrow category of evidence that the dissenting justices in Osborne believed should be discoverable.

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Defendant is not entitled to the disclosure he seeks, whether as a matter of statute, or as a matter of constitutional law. New York law recognizes a right to post-conviction discovery where the relief sought is either DNA testing or information related to a post-trial claim of actual

innocence, and neither the Brady doctrine nor the Due Process Clause requires additional disclosure here.

II. Defendant's Subpoena Request Should Be Denied As Overbroad And Unwarranted.

As an alternative to discovery, defendant asks this Court to issue a lengthy subpoena duces tecum compelling the release of sixty-two overlapping categories of information. In essence, defendant is seeking through subpoena that which he cannot get through discovery; he is asking for virtually every piece of paper in the People's file. This branch of defendant's motion should also be denied. "[I]n general, the subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence." People v. Gissendanner, 48 N.Y.2d 543, 551 (1979); see also Matter of Terry D., 81 N.Y.2d 1042, 1045 (1993) (quashing subpoena, as compulsory process should not "expand the discovery available under existing law"); Matter of Javier V., 249 A.D.2d 314, 314 (2d Dept. 1998) (same). Nevertheless, a cursory review of defendant's proposed subpoena demonstrates that discovery-by-subpoena[8] is exactly what defendant seeks.

Defendant correctly notes (see Def. Discovery Mem. at 14-15) that, to prevail on his subpoena request, he need not conclusively establish that every document he seeks "actually contains information that carries a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends." Gissendanner, 48 N.Y.2d at 550. However, the same authority obligates him to identify, "in good faith," "some factual predicate which would make it reasonably likely that the file [being searched] will bear such fruit

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[8] Article 610 of the C.P.L. uses the term "subpoena" to refer both to a traditional subpoena, which compels the presence of a witness, and a subpoena duces tecum, which compels the production of information through a named witness. See C.P.L. § 610.10(3). In the interest of brevity, this memorandum too refers to the subpoena duces tecum by the shorthand "subpoena."

and that the quest for its contents is not merely a desperate grasping at a straw." Id. Defendant fails to satisfy this standard.

Contrary to defendant's contention (see Def. Discovery Mem. at 15), the forthcoming hearing on his actual innocence claim does not on its own supply the necessary factual predicate to support his subpoena. Though a pending evidentiary hearing is a prerequisite for the post-conviction exercise of subpoena power (cf. People v. Diaz, 195 Misc. 2d 337, 340-41 [Sup. Ct. Bronx County 2003]), it does not follow that, once a hearing is calendared, the defendant is entitled to subpoena all information even peripherally related to the subject of that hearing. Defendant's own authorities (see Def. Discovery Mem. at 14) actually bear this out: in People v. Johnston, 2002 WL 758165 (Putnam County Court Apr. 16, 2002), a County Court declined to order a subpoena "for records 'generated by [law enforcement personnel] to provide further evidence of substantial import to his pending 440 motion,'" based on the defendant's failure to demonstrate the necessary factual predicate for the request. Id. at *10.

Instead, even if it is related to a pending post-conviction hearing, a subpoena request must be crafted to target only "specific documents that are relevant and material to facts at issue in [that] pending judicial proceeding." People v. Robinson, 87 A.D.2d 877, 878 (2d Dept. 1982) (emphasis added). Applying that rule in County of Nassau v. Sullivan, 194 A.D.2d 23 (2d Dept. 1993), the Second Department quashed a subpoena "aimed at [an] internal investigation file maintained by the County of Nassau" (id. at 238), reasoning that the party seeking the subpoena had "offered nothing 'better than conjecture' that the County's civil file contain[ed] evidence which would be useful to him in defending his client in [a] criminal prosecution." Id. at 239 (quoting Gissendanner, 48 N.Y.2d at 550 [internal citation omitted]). By contrast, in another criminal case, but for a meritorious claim of privilege, the Court of Appeals would have upheld a

subpoena duces tecum aimed not at a "file," but at specific, identifiable statements within that file compiled by an outside law firm during the course of an internal investigation. People v. Kozlowski, 11 N.Y.3d 223, 242-43 (2008). Critical to the Court's determination that those statements were proper subpoena targets were its findings that (1) the requested statements were individually identified by reference to a privilege log, and (2) the statements bore directly on a disputed, pivotal issue in the underlying criminal case. See id.

The sixty-two overlapping requests contained in defendant's proposed subpoena bear no indication of that requisite careful targeting. For example, at least three of defendant's requests represent demands for the production of the entire prosecution file, entailing every document from the original investigation and (in two cases) every document from the re-investigation as well (see Subpoena ¶¶ 5, 8, 29). Nearly twenty other requests (see id. at ¶ 1-10, 13, 19, 21-27, 29, 33-34, 46, 62) read as unguided demands for "any" or "all" documents concerning broad topics of information, such as his request for all items "related to any communications" between law enforcement personnel "and any parents or students" (id. at ¶ 21). Another approximately ten queries are in the form of interrogatories, and ask for summaries, lists, or answers to specific questions (see id. at ¶¶ 11-12, 14, 17, 18, 20, 28, 30, 35, 42-43). Some of these concern matters of only peripheral relevance: one request asks for "[s]ufficient documentation to identify Assistant District Attorneys who were assigned to or otherwise engaged with the 'Review Team'" during the preparation of the Rice Report (id. at ¶ 30). But defendant's innocence claim does not stand or fall on the integrity or credibility of the re-investigation and Rice Report. He cannot establish his innocence by successfully attacking either. Only around ten of the sixty-two requests actually call for the production of specific, identifiable items (see id. at ¶¶ 25, 31, 32-34,

39-45, 47-54, 61),[9] but here too defendant paints broadly, requesting, in one representative case, the "training history and other employment records" of every government officer involved in the original investigation (id. at ¶ 31). At least five of defendant's requests even ask about the People's strategy at the upcoming evidentiary hearing (id. at ¶ 6, 11-13, 28).[10] Gissendanner may not require the subpoenaing party to mark his targets with laser-like precision, but it demands more than the scattershot approach defendant has employed here. See Matter of Ferro, Kuba, Bloom, Mangano, Gacovino & Lake P.C., 8 A.D.3d 563, 564 (2d Dept. 2004) ("Disclosure is not warranted based only on speculation that some unspecified information will be found with which to impeach the complaining witness in the underlying prosecution.").

Defendant's motion fails to articulate a theory of relevance broad enough to encompass these expansive requests, saying only that each category of information he seeks is relevant "for various reasons" (see Def. Discovery Mem. at 15). Of course, the Court is under no obligation to speculate as to what those reasons might be. Defendant's failure to explain himself dooms the majority of his requests. See Nassau County Police Department v. Judge, 237 A.D.2d 354, 355 (2d Dept. 1997) ("Apart from offering vague generalities and speculation, the respondent has offered nothing of a particularized nature which would support the claim that the requested materials will bear relevant and exculpatory evidence.").

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[9] Some requests ask for the return of information that defendant himself actually provided to the People, or for the production of information that he helped the People obtain (see, e.g., Subpoena ¶¶ 48, 61). Defendant should already be in possession of these files, or at least copies of them. Even if he is not, the only reason this information has not been returned to him yet, or to its originator, is that the People were directed to preserve evidence pending appellate review in the Article 78 proceeding (see Aff. ¶ 10). It is not being arbitrarily withheld, and defendant was informed of this by letter dated November 8, 2013.

[10] If the People present or cross-examine witnesses at the hearing, defendant will be provided with the material necessary to effectuate his own right to cross-examine the People's witnesses, and to respond to issues that arise during the People's own cross-examinations.

The only specific requests that defendant actually attempts to justify are those seeking witness statements and information about witness allegations (see Def. Discovery Mem. at 15-18; see also Subpoena ¶¶ 32, 34, 52-53 [representative corresponding requests]). Here too, though, defendant betrays a misunderstanding of the purpose and reach of the subpoena power. Defendant theorizes that "[d]isclosure of witness statements and the documents seized from the Friedman household will permit reliable identification of children who were present in specific classes" (Def. Discovery Mem. at 15). They will not. As defendant knows, the People do not possess any class rosters and they were unsuccessful in trying to create a reliable one by culling together evidence in the prosecution and police files (see Rice Report at 4, 62, 123-25). Notwithstanding defendant's apparent belief that he can do better, he cannot use a subpoena to compel the production of information that he merely hopes will lead to useful evidence. And the fact that defendant has no right to post-conviction discovery does not serve to expand his access to subpoena power. See Wahab v. Agris & Brenner, LLC, 106 A.D.3d 993, 994 (2d Dept. 2013) (subpoena not a substitute device for obtaining information not available through discovery); see also People v. Di Lorenzo, 134 Misc. 2d 1000, 1002-03 (Nassau County Court 1987) ("The subpoena duces tecum is not to be used to expand the normal use of discovery and inspection in criminal cases."). Indeed, in a similar case, the Second Department upheld an order quashing a subpoena issued by a tenured teacher during a disciplinary proceeding, where the teacher sought "the names, addresses, and telephone numbers of the students in the class on the day or days when his misconduct allegedly occurred." Board of Education v. Hankins, 294 A.D.2d 360, 360

(2d Dept. 2002). As in Hankins, defendant here seeks information that is not probative itself, but that might lead to probative information. That is not the purpose of a subpoena.[11]

More attenuated still are defendant's claims that he needs witness statements to analyze the evolution of complainant accounts, to have the statements reviewed by an expert, or to conduct a "forensic textual analysis" that, he claims, could lead to further revelations such as the use of "strikingly similar language" in witness statements from other abuse cases (see Def. Discovery Mem. at 17-18). This is a classic fishing expedition, and it is exactly what Gissendanner and its progeny forbid. "Disclosure is not warranted based only on speculation that some unspecified information will be found" (Ferro, Kuba, Bloom, Mangano, Gacovino & Lake, 8 A.D.3d at 564), and "a subpoena may not be used to 'fish for impeaching material.'" Judge, 237 A.D.2d at 355 (quoting Constantine v. Leto, 157 A.D.2d 376, 378 [1st Dept. 1990]).

The vast majority of the requests contained in defendant's proposed subpoena lack any nexus to the underlying criminal proceeding, and defendant does not even bother to argue otherwise. Where defendant attempts to justify his document requests at all, his theory still falls well short of the particularized showing required to sustain a subpoena duces tecum. This Court should not condone defendant's attempt to use subpoena power to circumvent the limitations imposed by the legislature on post-conviction discovery.

III. Even If Defendant Were Entitled To Some Post-Conviction Discovery In This Case, He Is Not Entitled To Grand Jury Records, Or Documents Tending To Identify The Victims Of a Sex Crime.

Even if this Court determines that defendant has a right to some post-conviction discovery, it should deny his request for grand jury records, and any records that tend to identify

[11] Notably, defendant has on various occasions claimed that he already has reliable information about which students attended which classes. Defendant's Brady argument in this very motion contains one example of that assertion (see, e.g., Def. Discovery Mem. at 30 ["Dan Aibel, Jamie Forrest, and Ron Georgalis all sat alongside original complainants"]).

the victim of a sex crime. As to the latter, where "any portion" of a record "tends to identify" the victim of a sex crime, it is confidential pursuant to Civil Rights Law § 50-b. Although a person charged with the commission of a crime has a right to those records (Civil Rights Law § 50-b[2][a]), that right is extinguished upon conviction. See Fappiano v. New York City Police Dept., 95 N.Y.2d 738, 748 (2001) (Civil Rights Law § 50-b prevents disclosure of records to convicted defendant planning to seek post-conviction relief).

Though Civil Rights Law § 50-b(2) authorizes disclosure of such records upon a showing of "good cause," defendant's claim, that his need for discovery in advance of the evidentiary hearing provides that "good cause" (see Def. Discovery Mem. at 33-34), lacks merit. This is not a case where, as in defendant's cited authorities (see id.), he will be unable to present his case without the protected records. Nor is it a case where the victims commenced a lawsuit, or where the "unique" setting of a child custody proceeding makes the documents particularly probative. See Matter of Radio City Music Hall Prods., 126 Misc. 2d 197, 198 (Sup. Ct. Bronx County 1984) (records disclosed in tort action brought by victim of sex offense); Tonia E.-A. v. Kathleen K., 12 Misc. 3d 828, 830 (Family Ct. Orange County 2006) (child custody proceeding presented "unique" facts warranting disclosure of probation records of prospective guardian). The confidential records sought here hold no comparable probative value.

Defendant's judgment of conviction rests on his own plea of guilty, not on the testimony of the children he admitted abusing, and attacking the methods by which the witnesses' statements were obtained will not establish his factual innocence. Even if some questioning was flawed, as defendant maintains and as the People have acknowledged (see, e.g., Rice Report at 76-77), it does not follow that defendant is innocent. A sexual abuse victim is no less a victim just because the investigating detective did not use state-of-the-art interviewing techniques.

Defendant must do more than show that he could have impeached his victims and the investigation if he had gone to trial. Defendant waived that opportunity to avail himself of a favorable plea. He must now show that he did not commit the crimes that he was charged with, not that the victims were poorly questioned.

Defendant's apparent hope that examination of the People's records will allow him to conduct an analysis that might potentially lead to other relevant evidence (see pages 6-8, 29-30, supra), also fails to justify disclosure of these confidential records. Defendant cites no authority for the proposition that Civil Rights Law § 50-b's concern for victim privacy should yield to such a vague and generalized assertion. And defendant's claim that he needs access to the protected records to establish his innocence is further undercut by his claim that he already possesses overwhelming proof of his innocence (see page 21, 30 n.11, supra).

To the extent that defendant seeks access to grand jury records—and several of his requests would encompass them (see Def. Discovery Mem. at 1, 25, 26; Subpoena ¶¶ 5, 8, 29)—the Court should also exclude grand jury records from any discovery ordered. "[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). Defendant's generalized claim that access to records, including grand jury minutes, might lead to probative evidence falls well short of justifying disclosure. See Ruggiero v. Fahey, 103 A.D.2d 65, 70-71 (2d Dept. 1984) (rejecting plaintiff's claim that grand jury minutes were needed to allow him to "impeach witnesses and to refresh their recollection" at trial, because that same claim can be made in any case involving prior grand jury testimony); see also Roberson v. City of New York, 163 A.D.2d 291, 292 (2d Dept. 1990) (failure to make threshold showing

defeats request for grand jury records) (citing Matter of District Attorney of Suffolk County, 58 N.Y.2d 436, 444 [1983]). Even if defendant could demonstrate a "compelling and particularized need" for grand jury records, his need would have to be balanced against the very real damage such an invasion of privacy would cause the witnesses who testified against defendant, expecting confidentiality if the case did not go to trial (see pages 11-12, supra), and against the chilling effect disclosure would have on prospective grand jury witnesses in future sex abuse cases, who might reasonably balk at testifying if confidentiality is so lightly set aside. See People v. Di Napoli, 27 N.Y.2d 229, 235 (1970). "[T]he presumption of confidentiality of Grand Jury proceedings is not of such gossamer strength as to be overcome by" defendant's desire to conduct an unguided foray through confidential material. Ruggiero, 103 A.D.2d at 71.

The applicability of both of these confidentiality provisions is currently being litigated by the parties in the context of the Article 78 FOIL appeal. Although defendant prevailed in the lower court, and he was granted access to witness statements and grand jury records, in addition to every other record in the People's file, the court's order granting that relief was stayed pending the People's appeal to the Appellate Division (see Aff. ¶ 10). Unless that order is affirmed, defendant should not be permitted to rest his good-cause argument in this proceeding entirely on Justice Winslow's stayed order.

* * * * *

Defendant moved this Court to vacate his judgment of conviction, claiming he was actually innocent of crimes he once admitted committing. In support of his motion, he supplied this Court with a movie and hundreds of pages of records, including affidavits and interview transcripts, which together he said amounted to overwhelming proof of that innocence. Now, after this Court has granted him an evidentiary hearing in which he can present and test that

evidence, he claims he needs access to the prosecution's entire file to make his case. That broad relief is not authorized by any statute—indeed, the legislature has specifically declined to provide it—or included in any constitutional entitlement. Were the court to grant defendant's motion regardless, it would be breaking new ground, ignoring the clear intent of the legislature, and compromising the privacy of victims of sex crimes, all on behalf of a defendant who knowingly forfeited his right to discovery and other trial rights when he pleaded guilty more than a quarter century ago, and who represented his ability to litigate the question of his innocence based on evidence he already has. Defendant's motion should be summarily denied.

CONCLUSION

DEFENDANT'S MOTION FOR A SUBPOENA DUCES TECUM AND FOR RELATED RELIEF SHOULD BE DENIED.

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Respectfully submitted,

MADELINE SINGAS
Acting District Attorney,
Nassau County
262 Old Country Road
Mineola, New York 11501
(516) 571-3800

Sheryl Anania
Ames C. Grawert
Assistant District Attorneys
of Counsel