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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did Supreme Court err in finding good cause to disclose twenty-five year old witness statements when many have been recanted, no confidentiality was promised, and only three of the seventeen witnesses notified objected?

2. Did Supreme Court correctly find that petitioner had a compelling and particularized need for grand jury minutes after reviewing the testimony?

3. Did Supreme Court correctly find no exhaustion requirement under the Freedom of Information Law where those materials could not be disclosed by the agency to which the request was directed?

Petitioner-Respondent Jesse Friedman ("Friedman" or "Respondent"), by and through his counsel, hereby submits this brief in opposition to the appeal by Respondent-Appellant District Attorney Kathleen Rice ("Appellant", the "District Attorney" or "Rice").

Introduction

Appellant District Attorney Kathleen Rice here seeks a ruling overturning Supreme Court's grant of Respondent Jesse Friedman's petition under CPLR Article 78, ordering the disclosure of the investigatory files of Friedman's 1989 criminal case and the factual materials acquired in the course of the District Attorney's "reinvestigation" of the case. At its core, the dispute is over whether Friedman has shown "good cause" to obtain these primary documents containing information that is crucial to the ultimate determination of whether his conviction was wrongful.

Three years ago, in an extraordinary ruling, the United States Court of Appeals for the Second Circuit conducted a painstaking examination of the available record of the Friedman conviction. Friedman v. Rehal, 618 F.3d 141 (2d Cir. 2010). It then issued a scathing denunciation of the practices that led to Friedman's conviction. It noted that Nassau County had been caught up in a "moral panic" that characterized many false mass child sexual abuse cases in the late 1980s, and strongly suggested that Friedman was wrongfully convicted. Id. at

158-160. The Second Circuit called upon Rice to assess "the means by which his conviction was procured"; and found there were State avenues open to Friedman to vindicate himself, including an actual innocence claim, and a claim to overturn the judgment of conviction based upon the bias of the trial judge. Id. at 161. The Second Circuit was deeply troubled about the absence of a developed factual record, and Rice's continuing opposition to an evidentiary hearing. Id. at 160-161.

In response, Rice commissioned a "re-investigation" of the Friedman case and three years later issued a report attacking Friedman and reaffirming her belief in his guilt. In addition to being filled with demonstrable falsehoods and factual errors, and excluding key evidence, the Rice Report was a length screed against the Second Circuit.[1] Supreme Court, Judge F. Dana Winslow presiding, expressed concern for Rice's failure to honor the Second Circuit's direction, and ordered Rice to provide it with many of the primary documents in question and tens of thousands of pages of unredacted materials, long withheld from any eyes independent of the prosecution. Appellant's Appendix, October 31, 2013 (hereinafter "A----") at A1873. Following this careful review, the court below

[1] That report, hereinafter referred to as the "Report" or the "Rice Report" is included in the Appendix at page A0283. For reasons unknown to Friedman, the District Attorney redacted the entire Report from the Appendix served on Friedman. Petitioner-Respondent cites to the form of the Report contained as an exhibit to Respondent-Appellant's August 2013 opposition to the Petition below which begins at A1977. Appellant also relies on witness statements, contained in the appendix at A1378-A1827. Those too were withheld from Respondent as "confidential." Appellant relies on an appendix that is more than 600 pages longer than what it provided Respondent.

found that Friedman had shown good cause to obtain these documents, so that he could continue to pursue his claims of wrongful conviction, obtain relief from the legal disabilities of being designated a sexual predator, and to otherwise clear his name. (A2285). The court below also found a compelling public interest in releasing these documents to Friedman, including the need to restore public trust in the integrity of the justice system. This latter finding was made after the most sensational allegations in Rice's Conviction Integrity Review were shown to be false in open court, (A1891, A2275-77), and the Respondent doubled-down on this falsehood by baselessly accusing Friedman's counsel of forgery. (A1907).

The court below was deeply troubled by its review of these long suppressed documents which it found contained Brady material never shared with Friedman (which Rice does not deny), and which tended to cast doubt on whether these crimes had occurred at all. (A2277). After carefully balancing the interests favoring disclosure against the unique diminishing of genuine privacy concerns in this case, the court below agreed that disclosure was required.

The findings of the court below were manifestly correct. Armed with the evidence Rice has fought so long to conceal, Friedman could pursue the options available to him, including a petition to alter his status under the Sex Offender Registration Act ("SORA"), a collateral attack on his conviction under provisions of New York law, or an application for Pardon. He can pursue an actual

innocence claim, which did not exist under New York law at the time he filed his original §440.10 action.[2] But regardless of the avenue he pursues, if any, Friedman has good cause in his pursuit to clear his name, and the public has an interest in ensuring that the last word on this case does not come from the prosecution.

Statement of Facts

On November 25, 1987, Nassau Country police arrested Jesse Friedman, 18, and his father ("Arnold Friedman") on a felony complaint alleging child sexual abuse. Nassau County charged Jesse Friedman with two hundred and forty-three counts of sexual abuse in three separate indictments in the ensuing year. Friedman v. Rehal, 618 F.3d 142, 146 (2d Cir. 2010). The indictments included allegations from fourteen complainants, ranging in age from eight to twelve. Id. The charges against Friedman, described by the Second Circuit as "bizarre, sadistic, and even logistically implausible" (id. at 148-149) were as implausible as those described in over 70 other mass hysteria cases of the period including the McMartin case, virtually all of which later unraveled. The charges – described in the Rice Report as "realistic" (A2064) – included accounts of mass sexual games with names like "leapfrog" in which up to five adults would attack a classroom full of children,

[2] The combination of the absence of a developed record in the Friedman case, the Second Circuit's admonition, Supreme Court's specific and detailed fact-bound inquiry, and the extraordinary amount of time that has passed make this case *sui generis*. Refreshingly, Rice appears to recognize this, eschewing any reliance on "floodgates" opening should this Court affirm.

lining them up and serially sodomizing them by "leaping" from one to the next. Rehal, 618 F.3d at 148. Charges included one child having been sodomized every fifteen minutes over the course of ten 90-minute classes, and even more frequently in special "make-up" classes. Despite the overwhelming number of counts and alleged victims:

- There was no medical or physical evidence of such violent sexual abuse. Rehal, 618 F.3d at 146.
- There were no complaints of abuse for years by any student prior to police interrogations. Id.
- No parent had ever raised suspicion. Rehal, 618 F.3d at 148.
- Police were unable to get any of the students who sat alongside complainants in classes in which abuse was alleged to corroborate the complainants' wild recollections of abuse. See, infra at pp. 27-32.

No child in the Friedman case wrote his own statement. Every statement was composed by a detective, usually after multiple interviews, and many contain decidedly adult language. Before each of the three indictments in the case, each child testified before a grand jury. This grand jury testimony is equally suspect. In a 2013 letter to Judge Winslow, Scott Banks, law secretary to Judge Boklan in the Friedman case writes:

> The grand jury testimony of child witnesses, largely elicited with leading questions by the prosecutor, demanding "yes or no" responses,

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

(A2230). It is a challenge to even imagine such crimes taking place, and especially without a shred of medical evidence or murmur of complaint from any child or parent. However, the presiding judge, who described herself as "outraged" (A0092) at the allegations, threatened that if Friedman went to trial she intended to sentence him consecutively on every count (tantamount to life in prison). (A0204). The Second Circuit found that these circumstances clearly suggested that Friedman's guilty plea was coerced. The volume of charges, coupled with the community hysteria surrounding the case, threats of a 50 year sentence by the presiding Judge, and other circumstances left him with no real choice but to plead guilty.

More than two decades later, in what was to the best of Petitioner's knowledge a unique admonishment, the United States Second Circuit Court of Appeals went out of its way to detail both the implausibility of the allegations and the numerous shortcomings in the investigative, prosecutorial, and judicial conduct

in the case. Id. at 146-161. It then highlighted the ethical obligations of a public prosecutor, and invited the District Attorney's Office of Nassau County to live up to its obligations by undertaking a complete review of the Friedman case, noting also that the evidence before it suggested that Friedman may still have claims to pursue before the State courts. Although the Second Circuit denied habeas corpus relief, it examined the record and concluded there was a "reasonable likelihood that Jesse Friedman was wrongfully convicted." Id. Powerless, it nonetheless concluded that:

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

Id. at 161.

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

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

"The quality of the evidence was extraordinarily suspect."

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

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

Testimony was gleaned from police bullying tactics used on children as young as eight, including assuming the guilt of Friedman during interviews, which Detective Sgueglia freely admitted. (A0151). Parents describe the police as having "already formed their opinion of what happened in the computer classes and that they were just trying to get his son to agree with their story." (A0185). The police interrogated for hours those who refused to admit sexual abuse, visiting their homes repeatedly (in at least one case fifteen separate times, and in another

five times), telling them they would stay "for as long as it takes" for them to disclose abuse. (A0194). In an interview with Detective Wallene Jones, she recounted one of those sessions:

> On one occasion, the boy jumped up and down, screaming "I have nothing to tell you! Nothing happened!" But by then, we already knew...so we kept coming back after that until he told us.

(A0194).

In recent years, a number of the original 14 complainants have fully recanted their stories of abuse. One complaining witness, "Kenneth Doe," whose testimony was responsible for 15 charges to which Friedman plead guilty, issued a written statement asserting "the police repeatedly told me that they knew something had happened, and they would not leave until I told them. . . . I guess I just folded so they would leave me alone."[3] Mr. Doe, now a successful young businessman, has acknowledged that "none of the events allegedly described by or attributed to Kenneth Doe ever took place . . . . I did not observe Arnold or Jesse Friedman engage in anything even remotely akin to sexual conduct, and I have no reason to believe such events occurred." (See n. 4). Kenneth Doe only came forward after he was provided with notice of the Article 78 Petition.

Testimony was also gleaned using "memory recovery" techniques now known to create false memories. See Rehal, 618 F.3d at 160; (A0055-58; A0155).

[3] The documents regarding Kenneth Doe were withheld from the version of the Appendix served on Respondent, but apparently available to the Court at A0265.

The District Attorney vociferously denies that hypnosis was used, although it has never explained the witnesses who continue to report it occurring, nor the presentations by Friedman case detectives and therapists reporting its "successful" use. At least one complainant refused to assert any abuse until he was subjected to hypnosis, stating "I just remember that I went through hypnosis, came out, and it was in my mind." (A0155). That child was the source for thirty-five separate sodomy counts against Friedman. He is one of a small number of complaining witnesses who still states that he believes he was molested, though according to the Rice Report, he has substantially altered his accusations and that it would be "perilous to rely on" him. (A2079).

Judge Boklan, who presided over the case, had on numerous occasions stated that there "was never a doubt in my mind as to [Friedman's] guilt" despite never having seen a shred of evidence at trial. (A0091). Further, she told Peter Panaro, Jesse's Attorney, that "if Jesse were to go to trial she intended to sentence him to consecutive terms of imprisonment for each count he was convicted on." (A0204). Every court to consider such threats has found them to be impermissibly coercive. See People v. Richards, 17 A.D.3d 136 (1st Dep't 2005); People v. Santiago, 71 A.D.3d 703 (2d Dep't 2010).

During the pendency of Friedman's case, Judge Boklan also read portions of the Grand Jury testimony into the record during the sentencing of a defendant in a

related case, Ross Goldstein, and violated the plea agreement by imposing a two to six year sentence, later vacated on appeal. Justice Boklan also made the Friedman case the first in the history of the County to allow television cameras in the courtroom. (A0081). The case, and its extraordinarily inflammatory accusations, was well known to the public long before the jury pool could be selected.

Beyond Judge Boklan's conduct, the Nassau County police detectives threatened Friedman with continuing arrests of not only Friedman, but of his brothers Seth and David. Friedman's mother worked to persuade Jesse to plead guilty, since she believed it was his only hope of avoiding life in prison, and to save the rest of her family. She even wrote a letter to Friedman's attorney offering ways he could convince Friedman to do so. (A0907). Despite his oft-stated desire to stand by his innocence, Friedman was convinced by the sole sources of guidance in his life that he would be a candidate for early release, and that the plea was the only way to avoid life in prison.

The sum of evidence weighing against Friedman's guilt and the voluntariness of his plea, the disintegration of the little evidence against him, and the absence of any physical evidence that these crimes ever took place (described by former District Attorney Onorato himself as a "dearth of physical evidence") compelled the Second Circuit to state that a "further inquiry by a responsible

prosecutor's office is justified despite a guilty plea entered under circumstances which clearly suggest it was not voluntary." Rehal, 618 F.3d at 161.[4]

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

The New York rule is identical to the American Bar Association's Model Rule 3.8, which has in turn given birth to "conviction integrity programs," most notably in Dallas, Texas and New York, New York. (A0225). Though no such program exists in Nassau County, the District Attorney's Office announced the

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

convening of an advisory panel to "oversee" the District Attorney's conviction review. (A0238). In the absence of clear rules for such a review (as here), there are best practices that have emerged from these programs. First, if a "plausible claim of innocence" is presented, the prosecution's "entire case file, including work product, is made available." (A0225). Second, the unit that makes up the program is "willing to investigate leads proposed by the party claiming innocence. " Id. Third, the unit is "willing to allow" lawyers for those who have presented plausible innocence claims to "investigate leads they are uniquely situated to pursue." Id. Fourth, there is a "close working relationship with the Public Defender's office that permits a free exchange of ideas and joint investigations." Id. Fifth, the unit is led by well-respected attorney who has experience in criminal defense. Id. at 225-227. The investigation is not performed necessarily as an adversarial proceeding; rather the unit should take the neutral stance an administrative agency would. Id. at 225. This is logical because the inquiry does not involve punishment – here the sentence has been served.

The "Review Team" charged by Rice with the Friedman conviction review failed to abide by any of these recommended practices. Respondent had no insight into the process, no meaningful opportunity to participate, no access to any of the documents created by the investigation. Moreover, the District Attorney's office conducted its investigation outside the view of its own advisory panel, filtering all

the evidence seen by panel members and excluding thousands of pages of documents including the most important ones: the original witness interviews, statements, police reports, and grand jury testimony (A1875-82), a fact that was deeply troubling to the court below. Surprised to learn how much had been withheld from the advisory panel, Judge Winslow admonished the District Attorney:

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

(A1881). That conduct forced Friedman to file a series of requests, and ultimately the Petition appealed here, to obtain the primary documents he requires to pursue, *inter alia*, the avenues of State relief suggested by the Second Circuit.

1. Jesse Friedman Today

Jesse Friedman, a bright, suburban teenager who graduated second in his class at the Village School in Great Neck, Long Island and had already begun college before his arrest derailed his life, entered the New York State prison system at age 19, serving his time in severe institutions such as Dannemora and Coxsackie. He was denied parole repeatedly because of his refusal to "accept" and restate his guilt, serving thirteen years of his six-to-eighteen year sentence. After his release, Jesse was unable to obtain employment because of the nature of his

conviction. He returned to college and worked toward his undergraduate degree until his finances were exhausted. He eventually found temporary work, while adhering to onerous parole restrictions, including curfew and mandatory sex-offender therapy three times per week. He was repeatedly forced to move from rental apartments when landlords learned of his sex-offender status. Four times, religious congregations he had joined asked him to leave after learning of his history.

He was diagnosed with Post-Traumatic Stress Disorder after his release from prison, and underwent therapy for a year to treat it, eventually lowering his "critical" diagnosis to being almost asymptomatic. Despite those considerable obstacles, Friedman has managed to create a modest but respectable life. He married his now wife, Elisabeth Walsh, on January 2, 2007. In the last seven years, he has created a fully operational web-based bookstore, which now provides them with a modest living. To deal with the problems of repeated eviction, the couple pooled their resources with Jesse's brother to purchase a small house in Connecticut. His ability to have lived an exemplary post-conviction life, and to maintain friendships and business relationships undermines the notion of a young man so demented and damaged that he sadistically raped dozens of children.

Jesse continues to face a difficult future as a "Level-3 Violent Sexual Predator" under the Sex Offender Registration Act ("SORA"). While Jesse and

Elisabeth hope to one day have a child, this possibility is overshadowed by his conviction and SORA restrictions. Jesse and Elisabeth would live in constant fear of child welfare services rending the family apart due to Jesse's conviction. His prohibition from being within 1,000 feet of a school would make it impossible to perform the simplest of parenting tasks. His children would inevitably harbor a fear that people would find out they have a parent who is a registered sex offender. Even inviting a friend to visit would never be an option for Jesse and Elisabeth's child.

For the nearly twenty-five years Jesse has spent either in prison or living under the suspicious eyes of parole authorities, he has been denied much of what we take for granted. His difficulties continue unabated. This past June after the Rice Report was issued and publicized, he and his wife were attacked a a local store and beer bottles were thrown at their house, forcing them to leave to protect themselves. Many of life's normal joys, such as simply having a family, will be denied to him forever if this conviction – built on a tapestry of lies and admitted misconduct and on a foundation of mass hysteria now debunked pseudo-science – is permitted to stand.

2. Procedural History of the Document Requests

After Appellant assembled her review staff, Friedman complied with every request they made for interviews, waivers, and document production. Filmmaker

Jarecki, though not within Friedman's control, provided full access to all of his investigatory materials, including unredacted tapes and complete transcripts of witness interviews. After the District Attorney rebuffed numerous requests for case documents, Respondent first requested of the Nassau County District Attorney's Records Access Officer two categories of documents on September 19, 2012. (A0001). Under the New York Freedom of Information Law ("FOIL"), Article 6 of the Public Officers Law, Friedman requested the documents provided by Nassau County District Attorney's Office to the entity known as the "Friedman Case Review Panel." In the event of a denial, it requested the reason. These records were requested so that Friedman could contribute to the evaluation of this evidence in a meaningful way, and to confront evidence (if it existed) that he had never seen before. This request for transparency was made in accordance with the best practices of conviction integrity reviews. (A0225).

The request was summarily denied. By letter dated October 12, 2012, Chief Assistant District Attorney Singas based the denial on Civil Rights Law §50-b, which under certain circumstances restricts the production of documents that tend to identify a victim of a sex crime, Public Officers Law §87(2)(a), which permits an agency to withhold from publication records that are specifically exempted from disclosure by state or federal statute; §87(2)(e)(iii), which permits withholding of documents which identify a confidential source or disclose confidential

information relating to a criminal investigation, and §87(2)(e)(i), which permits the withholding of documents which if disclosed would interfere with a law enforcement investigation or judicial proceeding. New York Public Officers Law §87(2) *et seq.* (McKinney's 2013); (A0007).

Thus Friedman appealed that determination to the FOIL Appeals Officer in Nassau County by letter dated November 13, 2012. (A0011). The appeal noted that blanket, unparticularized claims of exemption as used by the District Attorney are inadequate under New York law. Id. Nonetheless, Friedman's request for documents was denied again. By letter dated December 3, 2012, ADA Robert Schwartz argued that the claim of exemption was not "general" or "unparticularized," but did not provide any particularization—it merely described four broad categories of exemptions into which fell the materials: "redacted witness statements, summaries of witness interviews, [the District Attorney's Office's] analysis of these interviews and other evidence, and inter-and intra-agency communications." (A0015). The District Attorney's office, by its letter and today, continues to rely on blanket exemptions, contrary to New York Law, to avoid *any* insight into its investigative process.

Friedman then instituted the instant action in April, 2013, seeking disclosure of the case file. (A0018). Out of an abundance of solicitude for possible privacy interests, Judge Winslow wanted to determine if any of the complainants had a

bona fide objection to the requested relief, although the statute does not require the court to entertain such objections. (A0028); New York Civil Rights Law §50-b (McKinney's 2013). Of the seventeen original complainants, fourteen expressed no objection. Of the three who did, *viz.*, "Barry Doe," "Edward Doe," and "Gregory Doe," none provided a legally-cognizable reason to withhold the documents from Friedman and his legal team (who have known their actual identities for decades). (A1874; A0804). Indeed, "Barry Doe," fully recanted the allegations the police attributed to him in 1988, and repeated this recantation, though counsel, to the court below. (A2255-56; A1848). Gregory Doe was the complainant who made the most florid allegations that appeared on camera in the film "Capturing the Friedmans", stating that he did not remember anything about sexual abuse until he was hypnotized. None of the three made any claim that they were promised or expected confidentiality when they provided their statements to the police in 1988.

Judge Winslow then requested to see for himself the witness statements withheld, which the District Attorney provided. (A1874-75). After further briefing, an extensive hearing on the merits, and his own review of some of the documents withheld, Judge Winslow found good cause for disclosure, as well as a compelling and particularized need for the grand jury testimony, and ordered its production as well. In recognition of the three of the seventeen complainants who

objected, he further ordered the redaction of their names from the statements. (A2285-86).

The District Attorney immediately moved to stay, and now brings this appeal. For the forthcoming reasons, that appeal should be denied, the stay should be lifted, and Judge Winslow's order should be affirmed.

Argument

I. NEW YORK CIVIL RIGHTS LAW §50-b AUTHORIZES THE COURT BELOW TO GRANT DISCLOSURE OF THE REQUESTED DOCUMENTS

A. THE COURT BELOW CORRECTLY FOUND GOOD CAUSE EXISTS TO DISCLOSE THE DOCUMENTS

The showing required to constitute "good cause" pursuant to § 50-b(2)(b) is not unnecessarily stringent. Rather, it is meant to balance the realistic need for privacy against the need for disclosure in a particular case, and the interests of justice--which have been appropriately demonstrated in this case. In Tonia E.-A. v. Kathleen K, 12 Misc.3d 828 (Family Ct., Orange Cty., 2006), a custody case, the mother of the child applied for the records related to sexual abuse cases involving the child's father. Family Court concluded that the privacy protections of those child victims were far outweighed by the need to obtain relevant information as to the father's custody request, and granted the request. Similarly, in Doe v. Riback, 7 Misc.3d 341(Sup. Ct., Albany Cty. 2005), Supreme Court held that a civil defendant's request for documents identifying infant victims of sexual abuse

outweighed any potential impact on the infant plaintiffs, as well as the "vague and conclusory" invocation of the confidential source exception. Id. at 345. Respondent has demonstrated, and Judge Winslow agreed, that in this case the need for disclosure and interests of justice outweigh whatever privacy concerns may nominally exist.

1. The Witness Statements

> *[T]here is no way to evaluate the past investigation and conviction with confidence without understanding the dynamics of this specific type of case and having access to all relevant material...Any attempt to review Jesse's conviction should include competent and objective professionals documenting the disclosure process, evaluating potential contamination, and assessing interview procedures with access to and analysis of the most detailed and contemporaneous notes, reports, statements, records, transcripts, documentation, and evidence available.*

--Kenneth V. Lanning, SA, FBI (Ret.), Behavioral Sciences Unit, Quantico. Affidavit, August 4, 2013, at para. 38-40 (A2205).[5]

In the absence of any physical or medical evidence, the witness statements elicited by and written down by the police allegedly reflecting the statements of

[5] In support of his Petition, Friedman submitted a detailed Affidavit from former Special Agent Lanning, whose work and expertise are favorably cited (but misstated) in the Rice Report, at 133, footnote 496 (A2133). Lanning was a Special Agent with the FBI for more than thirty years, twenty of which were spent at the FBI Behavioral Science Unit (BSU) in Quantico, Virginia, where he conducted training, research, and case consultation on thousands of cases concerning the sexual victimization of children. Lanning has testified seven times before the U.S. Congress, numerous times as an expert in state and Federal courts, and authored more than thirty articles, monographs, and book chapters about understanding the behavior of sex offenders and their child victims and analyzing criminal cases. Since his retirement from the Bureau, he has worked as a consultant to police and prosecutors about child sex ring cases. (A2199). He agreed to be retained as a "defense" expert based upon the deficiencies in the Rice Report and Rice's misstating of Lanning's research. (A2200).

young children were the only evidence in the case. For this reason, as illustrated by Lanning above, the contents of those statements, their evolution over time, and the interrogation methods used to elicit this testimony are of paramount importance. The Second Circuit concluded that detectives had applied tactics "designed to force children to agree with the detectives' story" and stated that "*In this case, the quality of the evidence was extraordinarily suspect...*" Rehal, 618 F.3d at 159. The Rice Report acknowledges the statements obtained from the children were products of questioning that was "at a minimum, unprofessional, unfair, and cruel." (A2072). The Report also concedes such tactics as:

- Telling boys that failure to disclose would affect their future sexuality, cause them to be "homosexual," or to become abusers themselves. (A2072).
- Warning children that they would "suffer lasting psychological consequences later in life if they do not disclose abuse." (A2071).
- Rewarding cooperation. (A2066, A2207 at 21:27-22:17).
- Conducting some interviews "entirely off the record, with no attempt made to reduce to writing what was learned from the visit, or why the visit was made." (A2062).

The threats were paired with rewards for children who did disclose abuse, such as pizza parties and police badges. (A2066). The questioning further involved suggestive questions: rather than conducting open-ended interviews, detectives prepared a list (assumptively titled "Victim Questionnaire"), and a "checklist" both of which suggested answers to the children. Police falsely told children that other

children had already identified them as victims, repeatedly asked children questions they had already unambiguously answered multiple times, among other manipulative methods. (A0184-87; A0189; A0199). In briefing before this Court, Rice reduces these deformities to "missteps" in the investigation. Respondent-Appellant's Memorandum of Law in Support of the Appeal ("App. Br.") at 39. Inexplicably, the Report concludes there is "no reason to believe such interviews resulted in unreliable information." (A2071).

It is thus necessary, as the court below recognized, to peel back behind Rice's denial and concomitant unilateral insistence that her conclusions be credited. The court below pointedly refused to accept the District Attorney's "trust us, no one needs to look here" argument and recognized that verification requires documents. Appellant, rather than challenging the merits of whether cause exists to open the black box that is the Friedman investigation, accuses Judge Winslow instead of "misapprehend[ing] the nature and scope of the proceeding before it" in ordering the disclosure. (App. Br. at 41). To the contrary, it is Appellant who misapprehends her ability to continue the quarter-century campaign of secrecy and suppression.

a. Limited Disclosure Will Permit Review of Witness Statements by an Expert in Child Sex Ring Cases

It is impossible for anyone, prosecution or defense, to adequately review the integrity of Friedman's conviction without the input from an expert in

acquaintance child sex ring cases. This was not done by the District Attorney during the original Friedman investigation, or the reinvestigation. (A2200)[6] As the Lanning Affidavit made clear to the court below, "a vital part of any investigation, or reinvestigation, of these rare cases is access to the original source materials." Lanning went on to aver:

> One of the most important victim patterns of behavior investigators need to identify and document is the disclosure process. Investigators should verify, through active investigation, the exact nature and content of each disclosure, outcry, or statement made by the victim...To whatever extent humanly possible, the investigator should determine exactly when, where, to whom, in precisely what words, and why the victim disclosed.

(A2202).

Lanning offered several cautionary notes, based upon what is contained in the Rice Report, all of which speak directly to the need to obtain the original documents. Lanning noted that the allegations like those in the Friedman cases are "among the most complex and difficult cases to investigate." (A2203). He has found that:

> apparent victims often alleged crimes and provided details that did not necessarily happen. Causes include overzealous interveners

[6] As a less common and more complex acquaintance *child sex ring*, however, both the original investigation and the current Conviction Integrity Review should have included at least some input and guidance from experts with specialized knowledge and experience with this specific type of case. . . . The investigation of acquaintance-exploitation cases requires specialized knowledge and techniques. The protocols, policies, and procedures for addressing one-on-one, intrafamilial, child sexual abuse have only limited application when addressing multiple-victim, extrafamilial, child sexual exploitation cases. (A2200).

> influencing children's allegations and the phenomenon of contagion in which community members spread and reaffirm each other's stories.

(A2202). As a general guideline:

> [i]nvestigators should apply the 'template of probability.' Moreover, accounts of child sexual victimization that are more like books, television, news accounts, movies, or the exaggerated fear-mongering of zealots and less like documented cases should be viewed with skepticism, but thoroughly investigated.

(A2202).

Finally, Lanning notes:

> As a general principle valid cases tend to get *better* and false cases tend to get *worse* with investigation. I get concerned when as an investigation progresses, the number of alleged offenders keeps growing and the allegations get increasingly more bizarre and atypical. The Report seems to support the fact that such progressions did take place over time in the Friedman case investigation but it sets forth no detailed or plausible explanations of their significance.

(A2202).

b. The Fred Doe Example

Those observations are borne out by the disclosures regarding "Fred Doe," the *one* alleged victim for which the defense has *one* of his several statements. The statement is heavily redacted,[7] and must be read in *para materia* with additional information provided about this witness in the Rice Report. Though the police

[7] In March 1988, an assembly of various Fred Doe statements was attached as an exhibit to Arnold Friedman's federal pre-sentence report, which is how it became available to Jesse Friedman.

described the statement as a single, comprehensive story, the boy was visited five times over a period of weeks and his charges evolved over that time.

On November 19, 1987, detectives conducted interviews with Fred Doe, denominated in the Rice Report as Witness 17. At that time, Doe allegedly stated to Detective Merriweather and Police Officer Durkin that Arnold gave him "bad hugs" that hurt, and that Arnold would hug him from behind and rest his head on his back, and also reported seeing a Polaroid camera in the Friedman home, in a big room with a couch. He did not allege any abuse. (A2013).

It wasn't until two weeks later on December 3, 1987 that Detective Merriweather drafted a written statement in which Fred Doe allegedly recalled being anally raped by Arnold and Jesse Friedman. (A2226). Thereafter, he testified before the grand jury. But Fred Doe's recollections didn't end there. After Jesse Friedman refused to plead guilty, Fred Doe re-emerged.

Five months after Merriweather drafted Fred Doe's original "written statement," Merriweather submitted a new statement on behalf of Fred Doe, in which the boy recalled having seen both men anally sodomize other children during the class. (A2024). Five weeks later on April 29, 1988, Detectives Merriweather and Sgueglia submitted yet another statement on Fred Doe's behalf: "that three of Jesse's friends, also present in the class, had held him down while Jesse sodomized him." (A2207; A2026).

When Fred Doe was later taken to a police lineup containing a single suspect (alongside others who had nothing to do with the case), the boy identified *two* young men in the lineup: Ross Goldstein and another boy who inexplicably was never charged. Surprisingly, Doe's false identification of a second assailant clearly did not undermine the District Attorney's confidence in the boy's credibility in charging Jesse Friedman or identifying Ross Goldstein. (A2207, A2142).

From the redactions in the Fred Doe statement, it appears that he also made accusations against *multiple adults* other than Jesse and Arnold Friedman and Ross Goldstein. Despite crediting Doe's charges against Friedman (and Goldstein), the District Attorney obviously did not believe his accusations about other adults. Surprisingly, Doe's false accusations against these other adults did not undermine the District Attorney's confidence in his credibility in charging Friedman and Goldstein. It is worth noting that Fred Doe's classmates, two of whom were complainants who have since recanted, do not corroborate any of the alleged abuse reflected in Fred Doe's written statements. (A2207 at 30:45).

In addition to the manner in which the statement was procured, the content of Doe's statement is equally suspect. Here is just one example. "Jesse had told me if I didn't take my pants down that I would never be allowed to come back again to computer class." (A2222). Lanning points out that it is illogical that a child victim of violent and repeated rape would be motivated to remain silent

because of a threat of not being allowed to return to the very computer class in which the rapes were occurring. (A2204-05).

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

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

The need for an expert in child sex ring cases to review the witness statements and the methods by which they were procured—a need unmet in two Friedman investigations over the past quarter century—is "good cause" enough to order the disclosures. But there is specific, additional information that these records contain: information that cannot be obtained through any other source.

The statement of Fred Doe asserts that "everyone" in the class was abused, and the vicious anal rapes were conducted in full view of "everyone" in the class. According to the detectives involved in the case, this was a common theme—

everyone in the class had been abused, and the abuse took place in front of the entire class. Unlike most cases of actual child sexual abuse, which take place in private, the abuse charged in the Friedman case all took place in full view of the other students, as well as a shifting number of additional adults. The Fred Doe statement provides the names of at least five other students (whose names have been redacted in the copy that the Friedman team has) who were present in the class, describing where specific students sat in relationship to him. In addition, analysis of the Rice Report reveals, for the first time, that of the 41 police interviews summarized (not every interview resulted in a written statement); only three do not mention witnessing the abuse of other children or being abused in plain sight of others. (A2000-2156).

Indeed, the document suggestively entitled "Victim Questionnaire," which was revealed in the Rice Report as one of the tools used by Friedman case detectives in questioning children specifically directs them to ask the following classically suggestive questions: "[w]ho else goes to the class?," "[a]ny friends you know of that go?," and "[h]ave you ever seen anyone else in the classroom being touched?" (A0745). There is every reason to think the other alleged victims were asked these questions and provided this information.

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

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

(A2204).

The most obvious and effective way to test whether other computer students corroborate the charges against Friedman would be to reconstruct rosters or partial rosters of the computer classes in which the alleged victims were in attendance, determine who was present with the alleged victims, then interview these children to ascertain what they did or did not see and hear, and what did or did not happen to them. If an alleged victim's allegations are overwhelmingly contradicted by eyewitnesses who sat alongside him in the same computer classes (which the defense believes to be the case based on the contemporary interviews conducted with now-grown Friedman computer students), then it is difficult to credit such allegations.

The little information gleaned in recent years by Friedman's lawyers and the filmmakers of "Capturing the Friedmans" indicated the likelihood that many if not all non-complainant students in classes where abuse was alleged did not corroborate, and in fact contradicted, the complainants' recollections of abuse. Though the District Attorney in 1988 shared no exculpatory information with Friedman's attorney at any time, the recent Rice Report quietly reveals that *police*

interviewed multiple children who sat alongside complainants in the same classes in which abuse had been alleged and all of them directly contradicted the complainants' accounts. Further, after the first such exculpatory interview, police failed to document subsequent ones. In the words of the Rice Report:

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

(A2028).

To assist the DA in analyzing whether the complainants' stories could be corroborated, Friedman's defense team and the filmmakers provided the District Attorney, as well as this Court, with partially reconstructed class rosters in which non-complainants who sat alongside alleged victims state unequivocally that (a) nothing inappropriate ever happened to them, and (b) nothing inappropriate ever happened to the complainants in the relevant classes.

The District Attorney discredits this entire area of inquiry on the specious ground that it is difficult to construct complete rosters, which would not be necessary in any case:

> ...at the time of Jesse Friedman's guilty plea, neither the police nor the prosecution had yet compiled a full list of the membership of each of Arnold Friedman's classes. Though the police and prosecution files

> contain some partial rosters, there is no way of ascertaining whether those were made based on information from the victims themselves, from their parents, or from some other unnamed source. Indeed, to the knowledge of the Review Team, a reliable roster has never existed.

(A2062).

If the DA chooses to discount the class rosters she states are in her files, and to discount the rosters reconstructed by the filmmakers (who provided a detailed source list identifying the source of data on each class), she need not discount the entire idea of using partial rosters of the relevant classes to corroborate or discount claims made by alleged victims. But the original investigators placed little credence in the students who stated that no abuse took place, and the District Attorney admits detectives systematically declined to make a record of those statements, and the District Attorney simply ignores them now that they have come forward as young men. The reconstruction of reliable class lists is a necessary and fundamental task that cannot be accomplished without the original statements of the alleged victims. The original witness statements will provide Friedman the names of other witnesses whom the DA chose not to interview and Friedman's team could not interview.

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

If a complaining witness claims to have been simultaneously attacked by Peter, Paul, and Bill, then it is learned that Peter and Paul have ironclad alibis and his claims against them are false, it would call into question the veracity of all the witness's claims (including his claim against Bill). These questions may or may not be answered or answerable; that is the stuff of which basic criminal prosecution and defense is made. But no one can seriously question that when a witness simultaneously makes accusations the District Attorney knows are false in conjunction with one she believes to be true, it raises a serious credibility problem.

The Rice Report reveals that these issues arose repeatedly in the police interrogation of the alleged victims, with multiple alleged victims claiming an ever increasing number of different assailants who participated in or were present for the molestation. The Rice Report, commencing on page 28, under the subheading "Police Identify Three Potential Accomplices," notes that after repeated interrogations, four students, in one week period occurring *seven months* after the interviews began, named three additional rapists who participated in the abuse. Various children then dutifully picked out these and possibly additional attackers from photo arrays, yearbooks, and lineups. (A2028-30). The Rice Report unhelpfully explains that these individuals were not prosecuted due to "insufficient

evidence," (A2030), and the source document cited in the Appendix is equally non-illuminating. (A0753).

But the nature of the evidence against these accused rapists—multiple victim accounts elicited after intense and repeated interrogation—does not appear to differ in any material respect from the nature of the evidence used to indict Friedman and obtain his guilty plea. There must be specific factual reasons why the accusations against other suspects were discounted and deemed insufficient, yet the same type of allegations made by the same alleged victims against the Friedmans were fully credited—then and now. It is likely the actual witness statements, in their various iterations, will explain this otherwise baffling cherry-picking of the complainants' "true" claims from a field of false ones.

Looking again at Fred Doe for example, he was interrogated at least five times over five months by Detective Merriweather. It was only in the fifth round of questioning that Merriweather elicited a new and important admission: that Fred Doe had neglected to mention in four prior interviews the presence of three additional violent teenage assailants in the room, friends of Jesse's previously unmentioned, including Ross Goldstein. (A2026). That Fred Doe was not presented to the grand jury, and that the two other child rapists he described were never prosecuted, suggest that investigators recognized that at least some parts of Fred Doe's account simply could not be true.

Similarly, the Rice Report reveals that Witness 11 (James Doe), one of the three alleged victims who according to the District Attorney still claim Jesse Friedman abused them, was untruthful with investigators when questioned in 1988. The DA's report explains that there was "an additional individual he had specifically named as an abuser in 1988." When speaking to the Review Team, however, he claimed that he was abused by the Friedmans only. (A2104). The District Attorney ascribes no significance to the admission that James Doe lied as a child, falsely accusing at least one adult of sexual abuse, and simply accepts this radical departure from his statement to police and grand jury testimony. It may also indicate that the police officers who composed his statement did not accurately reflect his beliefs at the time. Since many other child witnesses appear to have given statements in which rapists pop in and out of existence, all these statements require examination, which will require access to the original investigative materials Friedman seeks.

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

In the Friedman case, none of the alleged victims made allegations outside of interviews with detectives. Every assertion in this case emerged from an interview, or series of interviews, and was composed into statement form by detectives.

For example Detective Larry Merriweather took the Fred Doe statement, and claims his reconstruction of Fred Doe's statements is true to the boy's interview. This assertion is called into question by events that took place a year after the Friedman prosecution, in a strikingly similar mass sex abuse case investigated by many of the same detectives who investigated the Friedman case, and led by the same head of sex crimes, Detective Fran Galasso. In the Izzo case, dozens of children were said to have been raped by a bus driver and his assistant on a school bus in broad daylight. As in the Friedman case, there was no physical or medical evidence of the alleged abuse.

In an unusual twist, because Izzo's accusers filed a civil lawsuit[8], the witness statements were made public. The statements taken by the various detective teams are similar to the only statement made available in the Friedman case, that of Fred Doe. In one stark example, Detective Merriweather elicited identical statements from eight-year-old Fred Doe in the Friedman case and a seven-year old girl in the Izzo case. (A2185).

Statement from eight-year old Fred Doe in Friedman Case (Nassau County, 1989):

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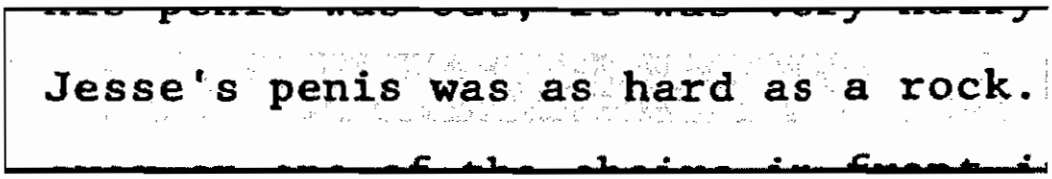
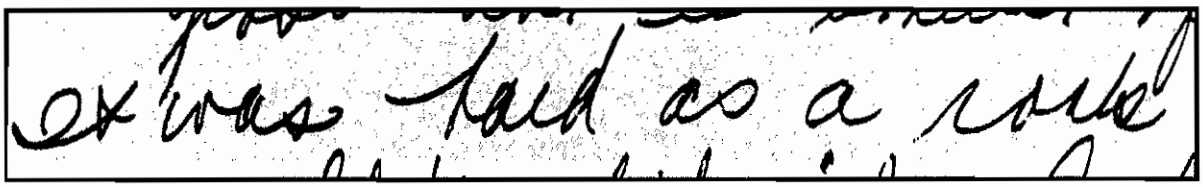
[8] Izzo plead guilty, then subsequently moved to withdraw his plea on the ground that he was innocent. Before his application was finally decided, he died in prison. The subsequent civil jury declined to award damages to the accusers, notwithstanding the conviction, because it did not believe that the abuse took place. See, Pete Bowles, "Sex Abuse Felon Wins Civil Case," *Newsday*, July 27, 1996.



Statement from seven-year-old girl in Izzo Case (Nassau County, 1989):



(A2185).

While it is highly unlikely a seven or eight year old would use the decidedly adult phrase "_____'s penis was as hard as a rock," it would be a remarkable coincidence for two children of that age to volunteer the phrase, and to the same detective. In cases involving allegations that police manufactured inculpatory statements, textual comparisons of the statements for word and phrase choices tied to specific investigators is an increasingly common and accepted technique. See, e.g., Frances Robles, "Several Murder Confessions Taken By Brookyn Detective Have Similar Language," *N.Y. Times*, June 12, 2013.

Though Respondent had access to all the relevant witness information to allow her to utilize this crucial investigative technique, she chose not to do so. Friedman's defense team is willing to do this essential work, though the District Attorney continues to withhold the original witness statements that would need to be examined.

B. UNDER THE UNIQUE FACTS OF THIS CASE, THERE ARE NO COUNTERVAILING PRIVACY CONSIDERATIONS MILITATING AGAINST DISCLOSURE

Appellant devotes considerable argument to the notion that disclosing any documents in any form would be a devastating invasion of privacy, but that assertion is baseless. (App. Br. at 40-45). The identities of the witnesses are known to Respondent: indeed it was Appellant who demanded that *Respondent* serve each and every one of them in accordance with CPLR §308. Respondent has known the identities of the witnesses for years, without ever disclosing them. (A0804, A2257). Notably, Respondent is under no restriction from doing so. Moreover, Respondent agreed to the imposition of a non-disclosure order under Civil Rights L. §50-b(1)(c)(3), which is specifically designed to permit a court to restrict access of documents to those who have shown good cause for their release.

Appellant does not dispute these facts. Instead, Appellant appears to argue that Fappiano v. New York City Police Department, 95 N.Y.2d 738 (Ct. App. 2001), prohibits this sensible, narrowly-tailored method of preventing the identities of the complaining witnesses from being made available to the public at large. Appellant makes the peculiar argument that disclosure cannot be limited by the court, and therefore, Friedman should not obtain the documents for which he has shown good cause. Appellant accuses Judge Winslow of "blatantly rejecting" Fappiano (App. Br. at 45).

Fappiano, of course, says no such thing. The Fappiano Court expressly limited its holding to applications brought pursuant to Civil Rights L. §50-b(2)(a), which governs applications by persons "charged" with a crime. The Court held that such disclosure provision was no longer operative and hence "petitioners do not fit within the exception for persons charged in Civil Rights Law §50-b(2)(a) and must be treated in the same manner as any other person seeking access to these records. [footnote]" Id. at 748. Appellant consistently refuses to look down the page at the Fappiano footnote, which states: "Petitioners did not attempt to obtain the documents they seek through any other provision in Civil Rights Law §50-b(2); accordingly, the discussion here is limited to the applicability of Civil Rights Law §50-b(2)(a)." Id. The one of the two "other provisions" noted by the Fappiano Court is, of course, the "good cause" provision of §50-b(2)(b), under which Appellant has made his claim. Under Fappiano, therefore, a request under subsection (b) may be made separate from the public at large, and the protective order provision could be imposed. Fappiano, 95 N.Y.2d at 748. Respondent was simply unable to persuade Judge Winslow to ignore Fappiano's clear distinction between applications made under subsections (a) and (b). Nor does Respondent offer any reason for this Court to do so.

Respondent also ignores the statutory difference between protecting the *identities* of sexual abuse victims with protecting their statements. Civil Rights

Law §50-b on its face protects only the identities. N.Y. Civil Rights Law §50-b(1) (McKinney's 2009). It does not provide independent protection to the contents of their statements or the methods the police used to obtain these statements, *except* to the extent that these materials tend to reveal identities. It cannot be plausibly argued that release of the identities would be any significant intrusion into the lives of the complainants since Respondent and those working with him have long had every one of the names and have never made them public. One of the victims, Kenneth Doe, provided a full and detailed written recantation to the District Attorney (at Mr. Kuby's request), and then sought Mr. Kuby's assistance when *misconduct by Chief Assistant District Attorney Madeline Singas* threatened to intrude into his work life. (A0265). Numerous other victims were interviewed at length by filmmaker Andrew Jarecki, although they were under no obligation to speak to him. Barry Doe, for example, who was one of the three to object to the release and whose attorney appeared at the hearing before Judge Winslow, does not stand by the statements attributed to him in the grand jury indictments, he merely wishes to avoid public disclosure of his identity. And his identity is well known to Petitioner because, *inter alia*, he provided an audio-taped recantation. (A2256-57; A1848).

It seems apparent that the District Attorney's office is not concerned with privacy nearly to the same degree they are concerned with keeping from the public

eye a shameful record of prosecutorial and police misconduct. Appellant's assertions that disclosure will have a "devastating effect" on the people who gave testimony years ago are not supported by a shred of evidence; "intrusion" is an empty word. Appellant understandably fears an undermining of the very legitimacy of the criminal justice institution in Nassau County. But continuing to hide documents does not bolster its credibility. There is a profound public interest in whether the Rice Report is true and whether the Office of the District Attorney, both then and now, have properly carried out their duties. There is a public interest in justice being served.

C. APPELLANTS HAVE UTTERLY FAILED TO DEMONSTRATE ENTITLEMENT TO THE PROTECTIONS OF 50-b

In New York "[a]ll government records are...presumptively open for public inspection unless they fall within one of the enumerated exemptions." Gould v. New York City Police Dep't, 89 N.Y.2d 267, 274-75 (1996). Exemptions should "be narrowly construed, with the burden resting on the agency to determine that the requested material indeed qualifies for exemption." Id. at 275, quoting Matter of Hanig v. State of New York Dep't of Motor Vehicles, 79 N.Y. 2d 106, 109 (1992). Further, "material" must not be interpreted broadly. Appellants must make a "particularized showing as to why [each document] should not be disclosed." Fappiano v. New York City Police Dep't, 95 N.Y.2d 738, 748 (2001).

There is no dispute between the parties on their burden, nor do they contest that it applies to documents individually. (App. Br. at 28). But Appellants have never even attempted to show that each (or any) particular document meets that burden. For example, they have not stated that a complainant's name or address appears on each page of the document and should be withheld or redacted. They have relied entirely on blanket assertions, precisely what the law forbids. In their brief, Appellants make passing mention to the letters in denial of the FOIL requests, referring to them as "detailed letters." (App. Br. at 18). They are no such thing. The first letter, by Ms. Singas, is riddled with qualifications such as "many or most of the documents that were provided to the panel consist of witness statements or summaries of witness statements and they either identify or tend to identify the victims in this case." (A0008). Moreover, neither even attempts to argue that every document would "tend to identify" the victim of a sex crime, let alone makes a particularized showing of the fact, as New York law requires. (A0007, 15).

No agency may claim exemption for "every document in a law enforcement agency's criminal case file...simply because [it is] kept there." Lesher v. Hynes, 19 N.Y.3d 57 (2012). But that is precisely the Appellants' position. Since their first denial, Appellants have insisted that every piece of paper would "tend to identify" and is therefore exempted from the disclosure requirement, without

specifying how, or what those documents might be. The Court of Appeals has emphatically rejected such blanket assertions of exemption. Fappiano 95 N.Y.2d at 748.

II. THE PUBLIC OFFICERS LAW IS ALSO NO BARRIER TO DISCLOSURE

Appellants further rely on two sections of the New York Public Officers Law §87 in denying disclosure. These sections provide no basis for their denial. The first cited is Public Officers Law §87(2)(a), which provides an exception to FOIL's general rule that agencies shall make all records available for public inspection for documents exempted from disclosure by state or federal statute. New York Public Officers Law §87(2)(a). But Appellant's exemption claim is based upon section §50-b(1), the exemption properly overruled by Judge Winslow's finding of good cause. This claim, therefore, simply dresses Appellant's dispute of "good cause" in different statutory clothing and should be rejected for the reasons stated supra, at pp. 18-33.

The second named section, Public Officers Law §87(2)(e)(iii), similarly provides no relief. Section 2(e)(iii) protects confidential witnesses and informants who do not testify at trial. Appellant argues that all of the witnesses who made statements were "confidential" and those statements would remain forever private. But Appellant does not even argue that the witnesses were promised confidentiality, because they were not. (App. Br. at 33). In the absence of an

express promise of confidentiality, circumstances must still give rise to a "clear inference" that there would be such confidentiality. Johnson v. New York City Police Dep't, 257 A.D.2d 343, 348 (1st Dep't 1999). Such circumstances were not present here. Indeed, they could not be present here.

All of the seventeen witnesses whose statements were ordered disclosed by Judge Winslow testified before the grand jury and were intended by the District Attorney to be trial witnesses in the prosecutions of Jesse and Arnold Friedman, as well as Ross Goldstein. As Civil Rights Law §50-b(2) expressly provides, and as Appellant concedes, their identities and statements were required to be provided to the defense. Indeed, that is the basis by which the District Attorney furnished all seventeen names to the defense on November 25, 1988. Had Friedman gone to trial, all of the original case documents Judge Winslow ordered disclosed would have been provided to the defense pursuant to CPL §240.20, People v. Rosario, 9 N.Y.2d 286 (1961) and Brady v. Maryland, 373 U.S. 83 (1963). The idea that the witnesses were "confidential informants" and promised confidentiality, when they were to testify at trial (had there been one), is nonsensical. Both the cursory opinions in Esposito v. Rice, 67 A.D.3d 797 (2d Dep't 2009) and Johnson v. Hynes, 264 A.D.2d 777 (2d Dep't 1999) stand for the proposition that those witnesses who were not called to testify at a trial can be considered "confidential," as the prosecution's failure to call them supported the assertion and clear inference

they gave their statements expecting confidentiality. No such inference can be drawn here.

Appellant does not directly argue that such an inference existed, rather she conclusorily mentions the sensitive and personal nature of the statements in conjunction with the discussion. But this is insufficient to create such an inference. Here the contents and nature of the statements and allegations were widely publicized, outlandish stories were printed contemporaneously with the investigation that revealed the nature and content of the statements. The only thing kept private was the identities of the speakers, which have long been known to Respondent.

Independent of the legal impossibility that the complainants were promised, or could have believed, their statements would be confidential is that the complaining witnesses themselves have never made such a claim, although they had ample opportunity to do so. All seventeen were served with notice of the underlying petition. Fourteen had no objection to the document release. Of the three who did object, *viz.*, Gregory Doe, Barry Doe, and Edward Doe, none of them claimed that they had been promised, been led to believe, or believed that their identities and or statements would be kept confidential. (A2292; 2285). Thus the court below correctly found that the complaining witnesses were not confidential informants. (A2261).

Finally, Appellant argues there are no exceptions to the Public Officers law that protects confidential informants. That is neither legally correct nor logical. Under the District Attorney's view, there is no good cause to disclose any file that qualifies (which these do not) however narrowly under the exception. But the confidential informant exemption is merely a codification of the public interest exemption for "confidential communications to public officers in the performance of their duties where the public interest would be harmed by removal of the protection of confidentiality." See Doe v. Riback, 788 N.Y.S.2d 590, 594 (Sup. Ct. Jan. 25, 2005). To maintain the exemption, of course, the withholding party still must "balance the needs of the litigant with the government's duty to try to prevent similar occurrences and to maintain the public peace and welfare." Id. at 595.

Riback disposes of the argument the District Attorney advances; that there is no balancing test and no exception to the exemption. The law is generally intolerant to rules without exception, as it is here. One need not imagine all the possible exigent circumstances that would plainly overwhelm the concern addressed by the confidential informant exemption to realize that the rule as the District Attorney interprets it is untenable at best.

The public interest here in maintaining secrecy is nonexistent. This is not the case imagined by the exemption where one must protect witnesses in active

criminal investigations, nor is there any threat of compromising investigations, or disclosing secretive police techniques. The investigation is decades old and the "techniques" admittedly flawed. The only interest the District Attorney cites is preventing a "devastating invasion," but as with her the argument against "good cause," she fails to make that case at all. None of the interests §87(2)(e)(iii) contemplates are served here.

III. RESPONDENT DEMONSTRATED BELOW A COMPELLING AND PARTICULARIZED NEED FOR GRAND JURY TESTIMONY

Respondent on the appeal recognizes that an application for grand jury minutes must demonstrate a compelling and particularized need for these minutes. See, People v. Robinson, 98 N.Y.2d 755 (Ct. App. 2002). The grand jury, however, was discharged more than twenty-five years ago, and there is little concern that the policies required for grand jury secrecy will be undermined. The reasons set forth above fulfill this more exacting standard, especially since the public policy reasons for grand jury secrecy in Friedman's case no longer exist, and there is ample reason to conclude that the grand jury testimony was false, including the statements of Scott Banks, the law secretary to Judge Boklan, one of the few people who has ever read the grand jury minutes, who has written to Judge Winslow that " [t]he grand jury testimony of child witnesses, largely elicited by leading questions by the prosecutor, demanding 'yes or no' responses, provided absolutely no detail." (A2230). He continues: "questionable actions and tactics,

never presented to the court by the District Attorney's Office, are troubling to me, as they were to the Second Circuit, and raise substantial questions regarding the fairness of the proceedings..." (A2230). The policy reasons grounding the provisions of grand jury secrecy are well-established and often cited:

> (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.

People v. Di Napoli, 27 N.Y.2d 229, 235 (Ct. App. 1970).

It is equally true that when these reasons are absent or dramatically diminished in a particular case, the policy against non-disclosure must similarly yield. In the relatively recent case of Ostroy v. Six Square, LLC, 29 Misc.3d 470 (Sup. Ct., N.Y. Cty. 2010), for example, the court permitted disclosure of the grand jury minutes on the grounds that "many of the reasons for keeping the proceedings secret in an ongoing proceeding no longer exist," and thus the "the integrity of the proceeding cannot be compromised." Id. at 472.

Similarly, in a recent Suffolk County case, the Supreme Court released the grand jury minutes on similar grounds. In the Matter of Druker, 2012 N.Y. Misc.

LEXIS 2342 (Sup. Ct., Suffolk Cty, May 8, 2012). In coming to this conclusion, the court wrote:

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

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

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

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

Id. at 248.

In its analysis of the public policy factors governing disclosure of grand jury minutes, the court noted that "there is no risk" that the defendant who seeks

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

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

IV. THERE IS NO REQUIREMENT OF ADMINISTRATIVE EXHAUSTION FOR A CIVIL RIGHTS LAW §50-b(2)(b) REQUEST WHEN THE AGENCY LACKS THE POWER TO GRANT THE REQUESTED RELIEF AND FURTHER REQUESTS WOULD BE FUTILE

Appellant insists that the entire request under Article 78 and §50-b(2)(b) is void because the Petition reviewed here was broader in some non-specified sense than the original letters, and such requests were not administratively exhausted. (App. Br. at 23-25). That argument merits no serious consideration.

First, requests made under §50-b(2)(b), one branch of the petition, have no exhaustion requirement. They are "applications" that *must* be made "to a court with jurisdiction over the offense." Civil Rights Law §50-b(2)(b). The subsection does not dictate the form the application must take, and the Court of Appeals has suggested that procedurally, such an application is best made in conjunction with an Article 78. Fappiano v. N.Y. City Police Dep't, 95 N.Y.2d 738, 748, n.* (Ct. App. 2001).

Second, because Appellant cannot provide documents that tend to identify a sexual abuse victim without a court order, the agency cannot grant the requested relief. When an agency is prohibited from granting the requested relief, exhaustion is not required. In Good Samaritan Hosp. v. Axelrod, 150 A.D.2d 775 (2d Dept. 1989), for example, the Good Samaritan Hospital commenced an Article 78 proceeding to review a determination by an insurance company and the Commissioner of the Department of Health denying certain relief. Id. at 775. The

respondents argued that the petitioner failed to exhaust administrative remedies. The Second Department noted that the agency's own regulations prohibited a grant of the requested relief, so exhaustion would be futile, and not required. The Court held: "[i]n the instant case, resort to the administrative appeal process would be futile because the Commissioner's own regulations do not permit a remedy which would afford the petitioner adequate relief...." Id. at 776-77.

Last, exhaustion would be factually futile, as Appellant has already demonstrated her commitment to deny Friedman *any* document that may be protected by 50-b, even when it could redact specific information to remove the victim's identity. (A0007) ("Any records that would tend to identify a victim of these crimes are confidential...most or all of the documents that were provided to the panel...tend to identify the victims...To the extent that your letter requests that this office redact records to avoid the confidentiality requirement of Civil Rights Law §50-b, that request is also denied.");[9] (A0015) (The 50-b exemption from disclosure "is well established and was properly applied....").

Exhaustion is not necessary when "resort to an administrative remedy would be futile." Town of Oyster Bay v. Kirkland, 19 N.Y.3d 1035 (Ct. App. 2012) (internal quotations omitted). Futility is established when, as here, there is no

[9] As argued in the administrative appeal and in the underlying Petition, the terms "most" and "all" are not synonymous. If "most" of the documents are exempted, then the DA should release those that are not.

question that the result of such exhaustion would be a denial of the remedy the petitioner seeks. Parkway Hosp. v. Axelrod, 178 A.D.2d 644 (2d Dept. 1991). In Parkway Hospital, the Second Department held that the petitioner hospital was not required to pursue further administrative remedies in an Article 78 proceeding "because the Commissioner has already demonstrated his commitment to deny the petitioner's application for reimbursement based upon the lack of a definitive statement as to the minimum number of nurses mandated by the New York State Hospital Code." Id. In Friedman's case, the one thing that the District Attorney has made clear for close to three years is her utter unwillingness to provide to Friedman any of the case materials.

Conclusion

There is no serious question of the paucity of actual evidence against Mr. Friedman and that such evidence that exists is, in the words of the Second Circuit, "extraordinarily suspect." Rehal, 618 F.3d at 158. There is no question that the witness testimony elicited using a host of techniques now known to cause false testimony, is internally inconsistent, and largely since recanted by witnesses upon which the indictments depended. Rice claims she wishes this Court to keep hidden the documents and statements upon which Friedman's conviction was based in order to protect the identities of the witnesses, which have long been known to, and protected by, Respondent. Despite her exhortations and feigned concern, Rice's

true goal is to continue to avoid scrutiny of her office's and her predecessor's extraordinary misconduct. That is not merely an insufficient concern to avoid disclosure, it is precisely why disclosure should be ordered.

For the foregoing reasons, Judge Winslow's order should be affirmed, and the stay vacated.

Respectfully Submitted,

Dated: New York, New York
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Ronald L. Kuby
Law Office of Ronald L. Kuby
119 West 23rd Street, Suite 900
New York, New York 10011
(212) 529-0223

John P. O'Brien
Wrongful Conviction Project
119 West 23rd Street, Suite 900
New York, New York 10011
(212) 529-0223

Attorneys for Petitioner-Respondent

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I hereby certify that this brief was prepared on a computer. The text is in fourteen point Times New Roman font, double spaced. Footnotes are in twelve point Times New Roman font, single spaced. The word count is 13,540 words.

John P. O'Brien
Wrongful Conviction Project
119 West 23rd Street, Suite 900
New York, New York 10011
(212) 529-0223