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January 24, 2008

Honorable Joanna Seybert
Alfonse M. D'Amato Federal Building
United States District Court
100 Federal Plaza, P.O. Box 9014
Central Islip, New York 11722-9014

Re: Jesse Friedman v. Rehal, et al.
06-CV-3136

Dear Judge Seybert:

Please accept this submission in opposition to petitioner's letter seeking a certificate of appealability from the Court's order of January 4, 2008.

On June 23, 2006, petitioner filed an application for a writ of habeas corpus. Respondent moved for dismissal of the petition on the ground that review of petitioner's three claims was barred by the statute of limitations. On July 20, 2007, this Court dismissed two of petitioner's claims on the ground that they were time-barred. The Court reserved decision on petitioner's third claim (the contention that the prosecution failed to disclose the hypnosis of at least one complainant) and ordered oral argument as to that issue (Friedman v. Rehal, decision of July 20, 2007, at 16). Following a hearing on October 3, 2007, the Court dismissed the petition in its entirety, finding that it was time-barred (Friedman v. Rehal, decision of January 4, 2008).

Petitioner now asks for a certificate of appealability from the Court's order of January 4, 2008. He argues not only that his claim concerning the allegation of hypnosis was filed within the statute of limitations, but also appears to argue that the Court

was precluded from even conducting a hearing on the issue. According to petitioner, respondent asked for, and was improperly granted, a "do-over" (to use petitioner's word) of the argument concerning the timeliness of petitioner's hypnosis claim (petitioner's letter of January 15, 2008, at 2). There is no meritorious issue here.

Following respondent's motion for dismissal of the petition, and the Court's dismissal of two of petitioner's claims on the ground that they were untimely, the Court ordered a hearing to address "why due diligence would or would not have led to the discovery of the hypnosis" (Friedman v. Rehal, decision of July 20, 2007, at 14). On August 14, 2007, respondent sought permission to file a response to both the timeliness and the merits of petitioner's one remaining claim. On August 21, respondent submitted to the Court its proposed response. On September 7, 2007, the Court rejected respondent's submission and adhered to its prior order calling for a hearing on the matter. Thus, contrary to petitioner's characterization of the proceedings, it is clear that the Court independently ordered a hearing (which the People opposed) and rejected the papers which the People sought to submit.

In any event, it cannot be seriously argued that a Court is without the authority to order argument from the parties concerning an issue which the Court deems potentially dispositive of pending litigation. Indeed, the Court has the inherent power and function to explore an issue critical to the proceedings before it.

Petitioner further argues that the Court's determination that his hypnosis claim was untimely should be reviewed because reasonable jurists could disagree with that conclusion. They could not.

Petitioner acknowledges that, on January 10, 2003, he saw the film "Capturing the Friedmans." In that film was an interview that he claims made him aware, for the first time, of the possibility that a complainant against him had been hypnotized prior to remembering the crimes to which he testified in the grand jury. That interview, regardless of its evidentiary value, was obviously the factual predicate of petitioner's subsequent claim concerning hypnosis and should have alerted him to seek out evidence to

support the allegation. Indeed, it did alert him. Thus, in April 2003, petitioner's then-counsel e-mailed the filmmaker, Andrew Jarecki, about the possibility of "start[ing] a dialog with certain of the individuals [Jarecki] contacted in the film . . . who might be helpful to Jesse for the purposes of obtaining helpful statements and/or affidavits" (see Friedman v. Rehal, decision of January 4, 2008, at 12-13). There was, moreover, information, publicly available in January 2003 (when petitioner first saw the film), "which would have alerted a duly diligent person in Petitioner's shoes to the possibility of hypnosis" (id. at 14). Petitioner himself supplied the Court with these newspaper articles and excerpts from lectures. Thus, no reasonable jurist could conclude other than that petitioner's time to file his application for a writ of habeas corpus began to run when he first saw the movie that alerted him to the possibility that a complainant was hypnotized. See Youngblood v. Greiner, 1998 WL 720681 at *4 n.4 (S.D.N.Y. 1998)(the period of limitation established in 28 U.S.C. § 2244[d][1][D] "runs from the date a petitioner is on notice of the facts which would support a claim, not the date on which the petitioner has in his possession evidence to support his claim").

And no reasonable jurist could agree with petitioner's argument that his time to file began to run in July 2003, when the filmmaker chose to make his source materials available to petitioner. While he states that the "heart" of his argument was "knowing the identity" of the witness (petitioner's letter of January 15, 2008, at 2), and that for this he needed Jarecki's source materials, this claim is disingenuous because nowhere in his petition, nor in any of the voluminous papers that he submitted in support of the petition, did he identify this particular complainant. Nor does his argument depend upon the specific identity of this complainant. If this information was not necessary for the filing of the petition itself, it could not possibly have been necessary to trigger the running of the statute of limitations for the filing of that petition.

Additionally, the Court should deny the application for a certificate of appealability because, even assuming arguendo that a complainant was hypnotized prior to testifying in the grand jury (an allegation that respondent continues to deny as false), the petition clearly fails to state a valid claim of the denial of a

constitutional right. See Slack v. McDaniel, 529 U.S. 473, 484 (2000)(upon dismissal of a petition on procedural grounds, a petitioner is entitled to a certificate of appealability only upon a showing that reasonable jurists would debate the propriety of the court's procedural ruling and upon a showing "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right"); accord Bethea v. Girdich, 293 F.3d 577, 577-78 (2d Cir. 2002).

Petitioner argues that the hypnosis of a witness is exculpatory information, and that the failure to advise him of this hypnosis prior to the entry of his guilty plea was a violation of his constitutional rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963). There is simply no constitutional support for this argument.

Brady established that prosecutors have a constitutional obligation not to suppress evidence that is favorable to defendants and material to the issue of guilt or punishment. The Court has made clear that this obligation is a product exclusively of the "fair trial" guarantees inherent in the fifth, sixth, and fourteenth amendments to the Constitution. See United States v. Ruiz, 536 U.S. 622 (2002). Accordingly, the Court has held that a defendant who pleads guilty, and thereby foregoes his right to a fair trial, also foregoes his right to disclosure of impeachment evidence. Ruiz, 536 U.S. at 625.

In order to avoid the obvious consequence of this holding, petitioner argues that evidence of hypnosis is exculpatory, rather than impeachment, material. Even assuming the correctness of petitioner's argument (which respondent does not concede), he does not establish a violation of a constitutional right that has previously been recognized by the Supreme Court.

In Ruiz, the Supreme Court addressed the issue of whether an accused is entitled to the disclosure of impeachment evidence prior to his entry of a guilty plea. That decision left open the issue of whether an accused is entitled to the disclosure of exculpatory evidence prior to the entry of a guilty plea, and the Supreme Court has not yet addressed that question. Upon a finding that his petition is timely, defendant would have this Court determine that

issue. It may not. A determination of this issue would constitute the announcement of a new rule of constitutional law, which is precluded in the context of a habeas proceeding. See Carey v. Musladin, 127 S.Ct. 649 (2006); Rodriguez v. Miller, 499 F.3d 136 (2d Cir. 2007).

Thus, if evidence of hypnosis is deemed impeachment material, Ruiz precludes the issuance of the writ. Or, if it is deemed exculpatory, Musladin precludes the issuance of the writ. In short, regardless of the manner in which petitioner phrases his argument, he cannot state a valid claim of the denial of a constitutional right. And so, on that ground, too, petitioner should be denied a certificate of appealability.

Very truly yours,

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