FRIEDMAN CASE REVIEW PANEL
NASSAU COUNTY, NEW YORK

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In the Matter of an Inquiry into

the Criminal Convictions of

Jesse Friedman

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SUBMISSION OF JESSE FRIEDMAN

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SUBMISSION OF JESSE FRIEDMAN

Jesse Friedman, by and through his counsel, respectfully submits this memorandum to outline the reasons why he believes that the inquiry by the Panel (and of course, the District Attorney) should conclude in a recommendation to vacate his conviction. To put the deliberations in a current context, we begin by addressing Jesse Friedman's situation today, then discuss the applicable standard of review and how the evidence should be assessed. Later, we apply that standard to the new and material evidence that the Panel should consider in its reinvestigation of the circumstances surrounding Friedman's guilty plea and the investigation that led to it.

I. JESSE FRIEDMAN TODAY

Jesse Friedman entered the New York State prison system at age 19, serving his time in severe institutions like Dannemora and Cocksackie. He was denied parole at every hearing because of his refusal to "accept" and restate his guilt, and served 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 a week. Jesse was repeatedly forced to move from rental apartments when landlords learned of his sex-offender status. Four times, religious congregations that he had joined asked him to leave once they learned of his history.

Following his release from prison, Jesse was diagnosed with Post-Traumatic Stress Disorder ("PTSD"). He sought help through the Veterans Administration and, after completing

twelve months of sessions, his PTSD score decreased from a "critical" 72 to an almost asymptomatic 24.

Despite having spent his entire young adulthood behind bars and the stigma of being universally known as Long Island's most notorious rapist of young boys Jesse Friedman has, over the past decade, managed to create for himself a modest but respectable life. On January 2, 2007 he married Elisabeth Walsh, an articulate and self-assured young woman working toward a degree in cognitive psychology. Over the past seven years, Jesse (later with Elisabeth's help) has created a fully operational web-based bookstore. Having started from nothing, the company has grown and now provides Jesse and Elisabeth with a modest living. To deal with the problem of repeated eviction, the couple pooled their resources with Jesse's brother David and purchased a small house in Connecticut. The couple has a close circle of good friends who are aware of Jesse's past. His ability to have lived an exemplary post-incarceration 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. It is a testament to the ability of the human spirit to endure public revilement and severe punishment and yet emerge intact.

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 social 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 parenting tasks such as attending parent-teacher meetings, or bringing his child to school. His children would 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. 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 and now-debunked pseudo-science -- is permitted to stand.

II. THE STANDARD OF REVIEW

A. IS THERE A REASONABLE BELIEF THAT FRIEDMAN WAS WRONGFULLY CONVICTED?

The starting place for this Panel's inquiry is the Second Circuit's extraordinary decision in Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010), in which it explicitly endorsed a post-conviction review that would conclude with a "reasonable belief" that Friedman had or had not been "wrongfully convicted" or that the conviction should or should not be "set aside." Id. at 159-160:

> In language particularly pertinent here, the Comment [N.Y. Rules Prof'l Conduct 3.8, cmt. 6B] goes on to say: [W]hen a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a person was wrongly convicted, the prosecutor should examine the evidence and undertake such further inquiry or investigation as may be necessary to determine whether the conviction was wrongful. The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation should be such as to provide a "reasonable belief". . . that the conviction should or should not be set aside.

Id. at 159. The "reasonable belief" standard is an objective one; the reasonableness of the belief, not the state of mind of the attorney, is determinative. Matter of Holtzman, 78 N.Y.2d 184 (1991). It is a standard similar to, and interchangeable with, the "reasonable probability"

standard recently reaffirmed by the Supreme Court, in cases involving suppression of Brady material:

> A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[] confidence in the outcome of the trial." Kyles v. Whitley, 514 U. S. 419, 434 (1995) (internal quotation marks omitted).

Smith v. Cain, 132 S. Ct. 627, 630 (2012).

In Jesse's case, the Second Circuit called for a re-investigation, using the objective standard to review several infirmities in the process used to obtain Friedman's conviction, as they were identified in Andrew Jarecki's award winning documentary film *Capturing the Friedmans*. *Capturing the Friedmans* (Hit the Ground Running 2003) (hereinafter "Capturing the Friedmans"). In its review, the Court noted substantial new and material evidence, confirmed by advances in the social sciences, that the Prosecutor's extensive use of suspect investigatory techniques can create false evidence; that there was no incriminating physical evidence; and that no alleged victims complained about violent abuse alleged to have persisted for years, until after repeated and false-testimony-inducing interviews by police. The Second Circuit concluded that "the quality of the evidence [against Friedman] was extraordinarily suspect." It then discussed substantial core problems surrounding Jesse's guilty plea, and found that the facts alleged would, if not refuted, be sufficient proof that the plea was not voluntary. Friedman, 618 F.3d at 161. It concluded that "[t]he record here suggests 'a reasonable likelihood' that Jesse Friedman was wrongfully convicted." Id. at 159-60.

The Court did not have authority to provide a remedy, but it refused to be a "silent accomplice" in what may be an injustice. For that reason, it stopped just short of making a definitive finding that the record "**created**" a likelihood of wrongful conviction, and instead it

made a "**suggestion"** in the strongest terms by writing an opinion to "make the case" that "a further inquiry" was justified. Id. at 161 (emphasis added).

B. THE MANDATE OF A REVIEW PANEL

The Nassau County District Attorney Kathleen Rice selected a Panel of Advisors to assist her office in reviewing Friedman's conviction. Understandably, the nature of the process has not been clearly defined as this kind of review is a relatively new phenomenon. In recent years, institutionalized reviews similar to the Panel's review of the Jesse Friedman case, referred to generally as "conviction integrity programs," have been developed in numerous locations, notably Dallas, Texas and New York, New York. *See*, Barry Scheck, Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them, 31 Cardozo L. Rev. 6, 2215, 2248 (2010). Chief Judge Lippman of the New York Court of Appeals, in his 2012 State of the Judiciary Address, reiterated his belief that New York "must tackle the scourge of wrongful convictions," and such programs are a positive step in that direction.

In districts where conviction integrity programs exist, there are clear procedures for undertaking such reviews. Where no such program already exists, however, those seeking to undertake such a review can look to the best practices that have emerged from these programs. Those are firstly, if a "plausible claim of innocence" is presented, the prosecution's "entire file, including work product, is made available." *See* Scheck, 31 Cardozo L. Rev. at 2250. Second, the unit that makes up the conviction integrity 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 information and joint investigations." Id. Fifth, the unit is led by a

well-respected attorney who has experience in criminal defense. Id. at 2250-51. The investigation is not performed necessarily as an adversarial proceeding; rather the unit should take the neutral stance an administrative agency would. Id. at n. 102. This is logical because the inquiry does not involve punishment—here the sentence has been served.

The American Bar Association has adopted Model Rule 3.8 which, together with its commentary, also guides these inquiries. *See* Rules of Professional Conduct (22 NYCRR 1200.00) rule 3.8. Not every case will receive a full-scale review—certainly those cases where new and material evidence creates a reasonable likelihood of wrongful conviction are worthy of full-scale review, but in situations where new exculpatory evidence is discovered but does not reach this high standard, it should not be ignored and some level of consideration is in order. See, infra sec. II(C) (discussion of Professional Rules and two-step review). In this case, however, unless the Panel disagrees with the Second Circuit, a full investigation is required to test the evidence that creates a reasonable likelihood of wrongful conviction.

To that end, the third "best practice" listed above is particularly important in fulfilling the requirements of a full investigation. Under the Rules of Professional Conduct, the scope of the inquiry will depend on the circumstances but it should be sufficient to form a "reasonable belief." Professional Rule 3.8, comment 6B. In this case, the Second Circuit called for a "complete review." Commentators have recognized that even though district attorneys' offices have access to the full investigatory file, and better access to all investigatory tools available, there can be a "natural unwillingness" to reopen a conviction, and for this reason there is an underlying concern that reinvestigations will be illusory because they may not be thorough or meaningful. Jonathan Kirshbaum, *Actual Innocence after Friedman v. Rehal,* 31 Pace L. Rev. 627, 649-654 (2011).

One of these investigatory tools is the use of experts to uncover the truth. Here, filmmaker Andrew Jarecki, who has volunteered to serve as an expert to assist the District Attorney and the Panel, is most familiar with the infirmities in the investigation. He has—to the best of our knowledge—personally interviewed more alleged victims, investigators, and other participants than any member of the Review Panel or any member of the District Attorney's office. It is likely that nobody possesses his expertise and ability to review the evidence, including the grand jury materials, and to potentially secure the cooperation of additional witnesses unavailable to the District Attorney. As Kirshbaum suggests, failure to use available tools will feed the view that post-conviction investigations are not as meaningful as they could be, and will undermine public confidence in the process. The District Attorney's investigators have apparently interviewed all witnesses who have been willing to provide information. Now is the proper moment to bring the qualities of transparency and dialogue to the process. The following are a series of steps the District Attorney can take to ensure this:

1. The District Attorney should file a motion to release the Friedman grand jury testimony (including but not limited to alleged victims, and Ross Goldstein) to designated counsel for Friedman and his designees, under such terms and protective orders as the Court may impose. N.Y. Crim. Pro. §190.25 subd 4. See, People v. DiNapoli, 27 N.Y.2d 229 (1970). Since the District Attorney's representatives have indicated to Mr. Jarecki that he is already in possession of the most complete list of names of alleged victims, and they would not be providing that level of identifying information, it is unlikely that the sharing of such information, especially under confidentiality, would violate any public policy.
2. The District Attorney should provide full "open-file" discovery, so that Friedman's representatives may review all other evidence gathered (whether exculpatory or

inculpatory) and make factual and legal submissions in response. This might include but not be limited to: any material regarding the testing of Panaro's affidavit; any denial by Judge Boklan of statements attributed to her; efforts made by the DA's office to procure any information related to the Nassau County police investigation of the Friedman case or interactions with the psychologists utilized by the police in the Friedman investigation, including their presentation entitled "Child Pornography and Extrafamilial Child Sexual Abuse," etc. With the opportunity to view prior testimony, current statements of witnesses and other information gleaned in the DA's investigation, Friedman's counsel and filmmaker Jarecki are in unique positions to contribute to the thoroughness and accuracy of this process. Such access also ensures that, whatever the outcome, Friedman has a full opportunity to respond to the allegations made against him.

3. The District Attorney's Office should confirm that it has made all this information equally available to the members of the Review Panel to ensure that the Panel is not hamstrung in its ability to evaluate the case and avoid the public perception that it might have been appointed as a mere "rubber stamp" to confirm the DA's findings.

C. THE REASONABLE LIKELIHOOD INQUIRY

The court recognized that the New York Rules of Professional Conduct mandate a two-step inquiry:

> First, does new and material evidence create a reasonable likelihood of a wrongful conviction? (The Second Circuit "made its case" that it does.)
>
> Second, if so, does re-investigation create a reasonable belief that the conviction should or should not be set aside?

In analytical terms, if the first step is undertaken and satisfies the test by "creating" a likelihood of wrongful conviction, then the next step must proceed under a rebuttable presumption that the

conviction should be set aside.[1] Said another way, in this case the Prosecutor could have chosen to reject the Second Circuit's assessment of "a reasonable likelihood of a wrongful conviction," but having accepted it by creating this Panel[2], this assessment becomes the Prosecutor's own initial "finding" (rather than the court's suggestion.) If the Prosecutor then finds nothing to dispel the finding of reasonable likelihood of wrongful conviction (e.g., if he or she finds that Judge Boklan did not make improper threats or that scientific findings regarding suggestive memory techniques are wrong), then the Prosecutor's duty to seek justice will require him or her to set aside the conviction. Berger v. United States, 295 U.S. 78, 88 (1935). Of course, if the Prosecutor does find evidence sufficient to reject the reasonable likelihood of wrongful conviction, it should be presented to Jesse Friedman so he has an opportunity to respond.

Indeed, there is no middle ground in this inquiry. Its purpose is not to determine if a conviction is defensible; rather, it directs the Prosecutor to look anew and conduct an investigation as the circumstances require in order to provide "a reasonable belief that the conviction should or should not be set aside." Professional Rule 3.8, comment 6B.

We submit that this inquiry should first focus on the facts and circumstances surrounding Friedman's plea, in light of the difficulty in re-creating the record so many years later and the

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[1] Presumptions are defined as "a rule of law 'which requires that a particular inference be drawn from an ascertained state of facts.'" In re Ives, 192 Misc. 2d 479, 481 (Surr. Ct. N.Y. cnty. 2002) citing Prince, Richardson on Evidence, sec. 3-101, at 53 (11th ed. rev.). In the circumstance of rebuttable presumptions, the "presumed fact (fact B) [here, wrongful conviction] is deemed established upon a proof of the basic fact (fact A) [here, new and material evidence that the investigation was based on false memories and reports] unless and until the existence of B [wrongful conviction] is adequately rebutted. At minimum, a rebuttable presumption shifts to the opponent the burden of producing sufficient evidence of the nonexistence of B [wrongful conviction], the presumed fact." 5 N.Y. Prac., Evidence in New York State and Federal Courts, sec. 3:18 (West 2011).

[2] See Andrew Keshner, *Rice Picks Advisors for Review of Friedman Child Sex Abuse Case*, N.Y. L. J., Nov. 9, 2010 at 1.

Second Circuit's powerful admonition that Judge Boklan's conduct and statements, standing alone, would vitiate the plea.

> Indeed, passing over all of the pressures described above that were brought to bear on petitioner, the threat Judge Boklan made to petitioner's counsel, Peter Panaro, that, "if Jesse were to go to trial, she intended to sentence him to consecutive terms of imprisonment for each count that he was convicted on" [Pet'r Aff. p. 26, A-156; Panaro Aff. p. 11, A-764] would be sufficient by itself to sustain a challenge to the plea if Panaro's affidavit is credited.

Friedman, 618 F.3d at 161.

If Judge Boklan's conduct is not sufficient to set aside the conviction, then in light of the assessment that "the quality of the evidence [against Friedman] was extraordinarily suspect," further inquiry would be required to examine the other coercive forces that compelled Friedman to plead guilty, including: the "moral panic" sweeping the community at the time; the tainting of the prospective jury pool; the collaboration between Jesse's other family members and attorney Peter Panaro to cause Jesse to plead guilty; and the use of memory-enhancement, suggestive interview, reinforcement techniques, and even hypnosis, all now widely-known to implant and solidify false memories and make them impervious to cross-examination.

D. USE OF THE "ACTUAL INNOCENCE" STANDARD IS IMPROPER.

The Second Circuit eschewed any use of the "actual innocence" standard in determining whether the conviction was wrongful and singularly inappropriate in this case, and the Panel should also do so. Friedman, 618 F.3d at 155.

First, "actual innocence" is neither a claim nor a standard; rather it is a "gateway through which a habeas petitioner must pass to have his otherwise-barred constitutional claim heard on the merits." Schlup v. Delo, 513 U.S. 298, 315 (1995), citing Herrera v. Collings, 506 U.S. 390, 404 (1993). It is a judicial exception to Congressional limitations on the writ of habeas corpus; limitations imposed to prevent *federal* threats to the finality of State court judgment, and to

preserve principles of comity and federalism. Murray v. Carrier, 477 U.S. 478, 487 (1986). Because these important state interests are jeopardized by otherwise-barred federal habeas corpus review, the actual innocence gateway has been held to be a necessarily very narrow passage indeed.[3] E.g. Dretke v. Haley, 541 U.S. 386 (2004) (These judge-made rules require courts to exercise restraint). Those principles have no application to this Panel's inquiry since it does not implicate questions of comity and federalism, and there is no concern about a federal challenge to the finality of Friedman's conviction.

New York no doubt has valid interests in the finality of the judgments of its own courts, regardless of whether the challenge comes from federal or state process, but the creation of this Panel and the investigation undertaken by it demonstrates that in this case finality is subordinate to justice. Moreover, Friedman's case differs from virtually all, if not all, "actual innocence" cases; in those cases, imprisoned individuals have sought release from actual confinement. Friedman, by contrast, served every day of his sentence until his conditional release date -- two times the minimum. "Finality" takes its virtue from society generally, and from the ability for victims of crimes in particular, to be able to rest with reasonable assurance that the perpetrator will not be released before his sentence is complete. In this case, all concerned remained in comfort during Friedman's hellish thirteen years behind bars. Given the liberty payment Friedman has made, the remaining value of finality is at this point diminished to nothing.

There are some classes of cases where a defendant, no matter how innocent, cannot prove it. This is not the kind of case in which physical evidence such as DNA conclusively establishes the innocence of the accused and, frequently, the guilt of another. Nor is it a case where the

[3] Thus, to make it through the gateway, a habeas petitioner must show new, reliable evidence, not presented at trial, that makes it more likely than not that no reasonable juror would find him guilty. Doe v. Menefee, 391 F.3d 147, 179 (2d Cir. 2004) (Pooler, J., dissenting).

defendant was convicted of a single wrongful act based upon the mistaken identification of a perpetrator who was later correctly identified. There is, quite simply, no method by which Jesse Friedman can prove he is innocent of the hundreds of counts of sexual molestation said to have taken place over a period of years against over a dozen "victims" some twenty-five years ago. In such a case, the effort to prove actual innocence can become an excuse to avoid doing justice.

E. COMPLAINANTS AND PARTICIPANTS WHO DO NOT COME FORWARD TO PROVIDE EVIDENCE SHOULD BE TREATED AS "MISSING WITNESSES."

The absence of subpoena power, and concomitant inability to compel the taking of an oath, is a critical weakness in the investigative process. We have been told informally that no alleged victims in the Friedman case have been willing to come forward and be questioned about the evidence uncovered since their grand jury testimony. Even Ross Goldstein, who while steadfastly maintaining his innocence in 1988 was offered a comparatively miniscule sentence and Youthful Offender status in return for his testimony against Jesse, has refused repeated entreaties to be interviewed.[4]

After deciding to reinvestigate the Friedman case and to assemble this Panel, those conducting this investigation thus far elected not to enlist the Attorney General, who could have provided subpoena power. See e.g. N.Y. Exec. L. § 63 sub. 8 (West 2012) (permitting the Attorney General, with gubernatorial approval, to appoint "such deputies, officers and other

[4]This refusal is not surprising given his experience with the justice system in Nassau County. After the District Attorney, following a year of threats and plea offers, finally made a deal with Goldstein giving him a brief jail term and Youthful Offender status in return for his testimony, Judge Boklan shockingly rejected the deal, reading portions of his confidential grand jury testimony into the record, sentencing Ross to a two to six year prison sentence (of which he served over a year) and abandoning his Youthful Offender status, ensuring that his photograph appeared in every local newspaper, reviling him as a child molester. Boklan was later reversed, but the damage she had done to Goldstein could not be undone. It is therefore not surprising that he would be reticent about re-engaging with the District Attorney's office at this time.

persons as he deems necessary" to "inquire into matters concerning…public justice" and granting power to subpoena witnesses and compel testimony). In addition, prior thereto all of Friedman's efforts since January 2004 to obtain an evidentiary hearing were successfully opposed. Accordingly, the evidentiary balancing should not permit prior grand jury testimony of the alleged child victims and Ross Goldstein to outweigh the exculpatory statements and evidence developed over the past quarter century. If the accusers, including Mr. Goldstein, decline now to be questioned, their prior statements, never subject to cross-examination, must be given very little weight. See e.g., N.Y. Crim. Pro. §670.10; Crawford v. Washington, 541 U.S. 36 (2004) (Without an opportunity to fully cross-examine unavailable witness, prior testimony may not be used).

This is in accordance with the "common sense" principles underscoring evidentiary rules regarding missing witnesses. As recently explained by the Court of Appeals:

> A missing witness instruction, as we explained in People v. Savinon (100 N.Y.2d 192, 196 (2003)), tells a jury that it may "draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events." . . . . (id. at 197)…. A missing witness instruction permits the jury to draw the common-sense inference that a failure to call a seemingly friendly witness suggests some weakness in a party's case. These witnesses would normally be expected to support the prosecution's view of the case.

People v. Hall, 18 N.Y.3d 122, 131-32 (2011) (citation omitted).

Applying these principles in the context of the Friedman case, one would expect alleged victims or accomplices to stand by or reaffirm prior statements. A refusal to do so creates the natural and logical inference that there is little confidence in the prior statements.

Similarly, the psychologists such as Dr. Sandra Kaplan and Dr. David Pelcovitz (described later in this brief) who were widely known to have provided therapy to and helped prepare the child witnesses for their appearances, have evidently also refused the DA's invitation

to voluntarily participate in the re-investigation of the Jesse Friedman case, just as they refused to speak with Jarecki when he contacted them over a decade ago. Unlike the child witnesses, who could argue that the case has some unique emotional resonance for them that might make them reluctant to participate today, the psychologists are professionals without such personal connections, charged with the delicate and important task of working with alleged abuse victims in Nassau County. What reason would they now have for refusing to cooperate with those investigating a case in which they played a crucial role? What reason would they give for refusing to share the presentation materials they proudly shared repeatedly in the late 1980s and early 1990s as they traveled the country with Sgt. Galasso to describe the methods they were using in the Friedman case? The silence of these therapists in the face of years of entreaties by the filmmakers and defense counsel and – presumably – members of the DA's office, must now be interpreted as evidence that as their methods have been exposed as primitive and unreliable, they are unwilling or unable to support their actions during the Friedman case.

Last but not least, there are detectives who were essential players in the original investigation (William Hatch was the detective who engaged in the questioning of 12 year-old Gary Meyers) but today refuse to come forward to defend their actions.

These therapists and detectives must now be seen as part of the long list of people swept up in this investigation in the late 1980s, who today retreat from the allegations they made and actions they then took.

III. THE COERCION OF THE PLEA

"There was never a doubt in my mind as to [Jesse Friedman's] guilt."

--Hon. Abigail Boklan, "Capturing the Friedmans"

A. JUDGE BOKLAN'S MISCONDUCT ALONE WARRANTS VACATION OF THE PLEA.

A guilty plea is invalid unless it is "knowing, voluntary, and intelligent." People v. Santiago, 71 A.D.3d 703, 704 (2d Dept. 2010). New York courts have consistently held that it is impermissibly coercive for a trial court to threaten or promise to impose a maximum sentence in the event of a trial and guilty verdict. Such conduct alone is enough to vacate a defendant's plea as involuntary. In People v. Fisher, 70 A.D.3d 114 (1st Dept. 2009), lv denied, 17 N.Y.3d 816 (2011), for example, the trial court made the following statement at the defendant's Sandoval hearing:

> [L]et me start off by saying on the record that it is my hope that Mr. Fisher gets a fair trial because frankly I believe in giving everybody a fair trial and *I also believe that when somebody commits a crime of this nature that if they are convicted that they should get the maximum sentence allowable by law* and so the last thing in the world I want to create is reversible error and I'm very careful about that and I have a record of getting reversed very few times so we're going to give him a fair trial. If he's acquitted, he is acquitted but *if he's convicted he will be a very old man when he gets out of jail because whatever is the maximum sentence allowable by law he will get it.*

Id. at 116-117 (emphasis in cited case). The Court further announced that the sentence range "was 8 to 25 years, but that the defendant was 'guarantee[d]' to get 20 to 25 years." Id. at 117. Days later, the defendant pled guilty with an agreement of a 17 year prison sentence. He was sentenced in accordance with the agreement, and subsequently appealed on the ground that his plea was involuntary. The First Department reversed the conviction and vacated the plea, holding:

> It is well settled that a threat to impose a maximum sentence if the defendant is convicted goes beyond a description of the possible sentencing exposure and has

> consistently been held impermissibly coercive. A defendant's exercise of his right to trial is wrongly burdened when a court expresses its intent to impose the maximum sentence after trial, but a significantly shorter sentence if he accepts a plea. Further, though allegations of coercion made off the record normally warrant an evidentiary hearing, where the coercive threat is in the record the defendant is entitled to withdraw his guilty plea.

Id. at 117 (internal citations omitted).

In People v. Richards, 17 A.D.3d 136 (1st Dep't 2005), the defendant moved to withdraw his plea alleging, through his attorney's affirmation, that "in an off-the-record conference, the judge had threatened to impose a maximum sentence of 15 years if defendant were convicted after trial." The First Department held that "[s]uch a threat, which goes beyond a description of the possible sentencing exposure, has repeatedly been held impermissibly coercive." Id. at 157. Of equal importance, the First Department found that, since the plea allocution did not disprove defendant's allegations, and counsel provided a sworn assertion regarding the threat, no hearing was required. Id. [5]

1. Judge Boklan's Threat and Explicit Bias

In the Friedman case, Judge Boklan did precisely what the law prohibits, by telling 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 that he was convicted on" Panaro Aff. at 11.

[5] Every court to consider this question is in accord. See, e.g., Santiago, 71 A.D.3d at 704 (court's remarks regarding its sentencing intentions if defendant proceeded to trial, in addition to its bias against the defendant "created a coercive environment which rendered the defendant's plea involuntary"); People v. Flinn, 60 A.D.3d 1304, 1305 (4th Dept. 2009) (court's statement that defendant would get a "substantially longer" sentence if convicted after trial "do not amount to a description of a range of the potential sentences but, rather, they constitute impermissible coercion, 'rendering the plea involuntary and requiring its vacatur.'"); People v. Stevens, 298 A.D.2d 267, 268 (1st Dept. 2002) (plea invalid due to court's statement to defendant that "[i]f you're convicted after trial, given the circumstances of this case under which you were apprehended and the nature of your record, 25 to life, that's what you're going to get"); People v. Min, 249 A.D.2d 130, 132 (1st Dept. 1998) (A court wrongly burdens the defendant's exercise of his right to trial when it indicates he will receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea.)

There has never been an evidentiary hearing on the accuracy of the Panaro Affidavit. However, as in Richards, 17 A.D.3d at 137, the sworn assertions by counsel, not contradicted by the record,[6] provide a more than sufficient basis to conclude that this threat was made. Panaro made his statement under oath at a time when he could be prosecuted for perjury. We believe Judge Boklan has never submitted a sworn statement contradicting Panaro. Moreover, Judge Boklan herself admitted to having said this, volunteering this fact in her filmed interview with Jarecki. Jarecki Aff. at 7.

Such a statement is consistent with her explicit bias against Jesse. Indeed she has publicly stated that "there never was an issue as to whether they were guilty or not." Marina Pisano, *Abuse Experts Assail Movie*, SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2004, at 1C.

2. Judge Boklan's Extraordinary Conduct Went Beyond Her Threats

Given the mass-sex-abuse hysteria on Long Island (as well as elsewhere in the country at the time), Friedman had to take seriously Judge Boklan's threats to impose the maximum sentence upon conviction. During the pendency of Jesse's case, Kelly Michaels was convicted and sentenced in New Jersey to 47 years in prison.[7] She had been accused of similarly

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6 The absence of a transcript of the plea also weighs heavily against making any finding that Friedman's plea was knowing, voluntary, and intelligent. Transcripts of pleas, while not determinative, provide some basis for the reviewing authority to begin an inquiry into the voluntariness of the plea. See, e.g., People v. Chimilio, 83 A.D.3d 537 (1st Dep't 2011) (Transcript of the plea [showed] that Defendant, aided by new counsel, failed to elaborate on his claims that he was innocent and had been coerced by prior counsel); People v. Grace, 59 A.D.3d 275 (1st Dep't 2009) (Defendant's claims of coercion and ineffective assistance were unsubstantiated, and were refuted by the record of the plea); People v. Henry, 30 A.D.3d 199 (1st Dep't 2006) (The transcript and record established that Defendant had received effective assistance of counsel).

[7] Hindsight has proven Jesse correct in fearing such judicial sentencing threats. During the following two years other similar overzealous sex-abuse cases were brought to court by Sgt. Galasso and her team of detectives, and resulted in sentences after trial for Robert Izzo of 60 years, and Richard Taus of 90 years. In November 1991 a defendant in Suffolk County received a sentence of 274 years.

outrageous conduct, and was convicted solely upon the unsupported testimony of child witnesses. Judge Boklan's inexplicably reckless and frightening behavior was specifically shown during the Ross Goldstein sentencing, where she read portions of his Grand Jury testimony into the record and then violated the plea agreement by imposing a two to six year sentence, later vacated on appeal.

To exacerbate matters, Judge Boklan decided to make the Friedman case the first in the history of Nassau County in which television cameras were allowed in the courtroom; she allowed filming of pre-trial appearances and granted permission in advance to News 12 LI to cover the trial from inside the courtroom. Any potential jury pool was certainly tainted by massive pre-trial publicity and community hysteria. By the time the case was to have been tried, it was widely known in the community that Arnold Friedman had possessed child pornography, had pled guilty to the federal child pornography charges, and had also pled guilty to the state sexual abuse charges for which Jesse Friedman was indicted as having "aided and abetted." The Great Neck P.T.A. organized letter-writing campaigns, organized car-pool events for court appearances, prepared announcements in all the local schools requesting that students approach counseling/guidance staff to talk about events involving Arnold Friedman's computer classes, and organized community meetings with local clergy, police staff, and therapeutic counseling staff. The Friedman case was a demonstration project in what not to do with a delicate case.

Thus, the evidence fully supports the Second Circuit's conclusion:

> [W]ith the number of counts in the indictments and Judge Boklan's threat to impose the highest conceivable sentence for each charge, petitioner faced a virtually certain life sentence if he was convicted at trial. And the likelihood that any jury pool would be tainted seemed to ensure that petitioner would be convicted if he went to trial, regardless of his guilt or innocence. Nor could he have reasonably expected to receive a fair trial from Judge Boklan, the former

> head of the Nassau County District Attorney's Sex Crime Unit, who admitted that she never had any doubt of the defendant's guilt even before she heard any of the evidence or the means by which it was obtained. Even if innocent, petitioner may well have pled guilty.

Friedman, 618 F.3d at158. For these reasons alone and based on an objective standard, there must be a "reasonable belief" that Friedman's guilty plea was obtained in violation of his basic Sixth and Fourteenth Amendment rights.

3. Judge Boklan Has Affirmed Her Bias In the Intervening Years

Judge Boklan's threat and attendant actions remain consistent with her behavior both on and off the record since the plea. Despite knowing that she would be the judge to preside over his SORA hearing when he was released from prison, Judge Boklan agreed to appear in the film *Capturing the Friedmans* and gave a multi-hour interview in which she made numerous prejudicial statements about the case and her personal views. As documented in the film, Boklan, who was a sitting judge at the time she was interviewed, stated, "There was never a doubt in my mind as to [his] guilt." She expressed this view despite the fact that there was never a trial, and that more than a year elapsed between Jesse's arrest (when he pled not guilty) and his eventual guilty plea, with three intervening indictments.

Judge Boklan also went on a tour of national television shows to discuss Jesse's case, repeatedly volunteering her opinion that he was guilty. Her appearances include: *The Today Show* (Dec. 3, 2003); *Dateline* NBC (Jan., 2004); CNN -- *Now with Paula Zahn* (Feb. 18, 2004); and *Nitebeat,* hosted by Barry Nolan (Feb. 26, 2004).

On *Now with Paula Zahn*, Judge Boklan purported to cite at length psychiatric reports regarding Jesse's childhood. She stated, "When he was in ninth grade, he was incorrigible. He had rages that were uncontrolled and he was placed in a special school. In that special school, he started on drugs. He was stoned every day on marijuana and LSD during the years that this

abuse took place." These statements are as untrue as they are irresponsible. Like Galasso's vision of "foot-high stacks" of child pornography "in plain view" all around the Friedman house, her friend Judge Boklan's statements became wilder and more divorced from reality with every repetition.

After a screening of *Capturing the Friedmans* in Great Neck, New York on May 30, 2003, Judge Boklan stood up from the audience to address attendees and the media and stated that she "does not want this [film] to become a crusade to free Jesse Friedman." However, given her shocking history of indiscretion in this case, it appears that it is she who is on her own crusade to perpetuate the injustice that she helped to create.

B. THE CUMULATIVE PRESSURE FROM JESSE'S FAMILY, ATTORNEY, AND THE POLICE RESULTED IN A PLEA THAT WAS NEITHER KNOWING AND INTELLIGENT, NOR VOLUNTARY

In addition to Boklan's conduct, there was more that tainted the guilty plea. Jesse was 19-years-old when he took his plea and had lived through a year watching his father, his family, and his future destroyed. Sgt. Galasso terrorized Jesse with threats of continued arrests in an ever-expanding criminal case. As this Panel is aware, there were similar threats of arresting Friedman's closest friend Judd Maltin. The Nassau County Police Department had already arrested Jesse's father and mother, as well as his classmate Ross Goldstein. Friedman knew that detectives had dedicated a great deal of time and resources toward an imminent arrest of additional high school students Danny Ackerman and Gino Scotto. Friedman had little reason to disbelieve the threats from the police that if he continued down the road toward a trial, the police were going to arrest one or both of his older brothers Seth and David, and charge them as additional suspects.

One need only view a few moments of the Friedman family home movies included in *Capturing the Friedmans* recording the period in which Jesse was considering his options, to see

that the family was in freefall. Reeling from the loss of Arnold, the family's breadwinner and decision maker, they found themselves without money to pay their legal bills or the sophistication to fight an onslaught of legal troubles. As they sat on tenterhooks awaiting the next threatened indictment or attack from the community, family discussions and therapy sessions and disagreements about what to do deteriorated into screaming matches. Jesse's mother Elaine, deathly afraid that her son would go to jail for the rest of his life, decided that the only course of action was to persuade Jesse to plead guilty. These issues are set forth in a letter from Jesse's mother to his attorney, Peter Panaro, in which she lists tools Panaro could use to convince Jesse to plead guilty, e.g. "taking a plea was the best thing for [Jesse's father]"; assertions that Jesse's brother, David, will be implicated if he does not take the plea; appealing to David directly, stating that Jesse "is facing LIFE. There is no way out – Save your brother's life."

As the Friedman family disintegrated, and Jesse's mother became increasingly panicked, Panaro took on more of a parental role for Friedman through the fall of 1987, and his comparatively calm guidance was disproportionately heeded.[8] But Panaro appeared completely unprepared to take the case to trial, provided no hope for a defense, and was operating under the direction of Friedman's mother to do and say anything to get Jesse to plead guilty. During this time of mass sex-abuse cases around the country, no one had yet waged an effective defense against such accusations. There was no network of experts on which a defense attorney could rely for assistance in understanding what he and his client were likely to face during a trial.

[8] Rather than supporting Jesse's oft-stated desire to stand by his innocence and insist on a trial for which he wasn't prepared, Panaro gave Jesse the false hope that he would be a perfect candidate for early release.

A plea is voluntary if it represents a choice freely made by the defendant among legitimate alternatives. Fisher, 70 A.D.3d at 118, citing People v. Grant, 61 A.D.3d 177, 182 (2d Dept. 2009); see also Wilson v. McGinnis, 413 F.3d 196, 198-199 (2d Cir. 2005). Here, the cumulative pressure on Jesse vitiated any alternative.

IV. THE INVESTIGATIVE MISCONDUCT CREATED FALSE EVIDENCE.

Though the circumstances surrounding the guilty plea are sufficient to provide a reasonable belief that the conviction should be set aside, the Panel ought also consider the substantial investigative misconduct that permeated this case. That misconduct discredits all of the so-called evidence, leaving nothing to support the charges.

A. THE INTERVIEWERS PRESUMED GUILT WHEN INTERVIEWING THE CHILDREN

"Well, if you talk to a lot of children, you don't give them an option really… you don't really give [kids] too much of any edge to say, what we're here to find out about. We already know about it."

- Detective Anthony Sgueglia, *Capturing the Friedmans*

As this Panel is aware, one of the improper and suggestive techniques utilized by the interviewers in eliciting allegations against the Friedmans was a presumption of guilt: the detectives communicated to the children that the detectives already knew they had been victims of abuse, and they did not accept denials. As Detective Sgueglia, who conducted many of the interviews, explained:

> Well, if you talk to a lot of children, you don't give them an option, really. You just – be pretty honest with them. You – you have to tell them pretty honestly that we know you went to Mr. Friedman's class, we know how many times you've been to the class. You know – we go through the whole routine. We know there was a good chance that he touched you or Jesse touched you or somebody in that family touched you in a very inappropriate way.

Sgueglia I, 21. If an interview subject inquired about what the detective knew about the alleged abuse, Detective Sgueglia would say, "'I know things. But I can't tell you what I know because

you know things that I don't know.' And whether they understood that or not, they knew what I was talkin' about." Sgueglia I, 22. In Sgueglia's words, the detectives "did whatever it took." SgueliaI, 20. As Detective Lloyd Doppman said, "We knew going in certain things had happened. We knew that." Jarecki Aff. ¶ 13 (available at *Capturing the Friedmans*, Special Features, Doppman).

For example, the police did nothing to hide their belief that the Friedmans were guilty when they came to speak to Gregory Doe, one of the child complainants. Gregory Doe has explained:

> Thursday night, about six o'clock knock, knock, knock, knock on the door. My parents came to the door. "It's the Nassau County Police Department. We need to talk to you. Can you please send your son downstairs – upstairs. We need to inform you that your son has been molested for the past year and Jesse and Arnold Friedman have been arrested."

Gregory Doe II, 48-49. When the interview began, police asked Gregory Doe, "What the fuck happened? Tell me. You were molested. We know. Tell me. I need to make a report." Gregory Doe II, 61. When Gregory Doe's mother told the police that such a thing could not have happened to her child, one of the detectives responded, "It's that attitude that probably caused your son to be molested in the first place." Gregory Doe II, 52.

Richard Tilker, the father of one of the students, Brian Tilker, recalls the police arriving at his home unannounced and saying they, "knew 'something happened' to [your] son." "They didn't say 'We believe,' they said, 'We know,' and they insisted upon speaking to our son alone." R. Tilker Aff. ¶ 4. Mr. Tilker expressed his belief "that the detectives had already formed their opinion of what had happened in the computer classes and that they were just trying to get Brian to agree with their story. . . . [T]hey kept repeating that they know what happened and that he should tell." R. Tilker Aff. ¶ 5. Brian Tilker "remember[s] that they made specific

suggestions to me about things that they believed happened in the computer classes . . . ." B. Tilker Aff. ¶ 5.

The suggestiveness of a police presumption of guilt is dramatically demonstrated in the interview of Gary Meyers. In the interview, the detectives went beyond presuming guilt, to actively vilifying the Friedmans. The detectives told Gary on at least seven separate occasions during the interview that Arnold Friedman had confessed to sodomizing children in the classes. See Taped Interview of Gary Meyers ("Meyers Interview") at 1 ("He admitted he sodomized a lot of children"; "Why would Arnold admit to something that wasn't true?"; "Arnold Friedman stipulated in court that he sodomized a large number of children.").

The tactic of telling potential witnesses that Arnold Friedman had already specifically admitted molesting them was clearly not limited to Gary Meyers. As Detective Hatch's references to admissions made "in court" make plain, these assurances of Arnold Friedman's guilt were based on the "closeout" statement he gave right after pleading guilty in the state case in which he admitted abusing every non-complaining child whose name was raised by the police on pain of facing many additional felony charges. Friedman Aff. ¶ 17. "Presumption" is too weak a word to use to describe this virtual guarantee of guilt that detectives provided to the young boys they interviewed.

B. POLICE RELENTLESSLY INTERROGATED CHILDREN IN THE FACE OF REPEATED DENIALS

"We had to go back to this one boy fifteen times before he finally admitted to what happened… he had kept it deep inside…I drew it out again."

- Detective Wallene Jones, Kuhn Aff. ¶ 10.

"What I do remember is the detectives putting me under a lot of pressure to speak up, and at some point, I kind of broke down. I started crying. And when I started to tell them things, I was telling myself it was not true. I was telling myself, 'Just say this to them to get them off your back.'"

- Dennis Doe, *Capturing the Friedmans*

A second suggestive tactic involved the use of repeated questioning in the face of denials of abuse. Detective Wallene Jones and her partner, William Hatch, were key investigators on the Friedman case, and handled many of the interviews. Kuhn Aff.[9] ¶ 5. In March 2001, Jones discussed the case with David Kuhn, a lawyer and legal advisor on *Capturing the Friedmans*, who interviewed Jones for the film. Jones told Kuhn that when the detectives were unable to procure incriminating statements from a student at first, they visited the child on many occasions – in one case on fifteen separate occasions – until the child provided such statements. Kuhn Aff. ¶ 9. In interview sessions that lasted as long as four hours, this particular boy repeatedly denied being the victim of abuse, on one occasion jumping up and down and shouting that nothing had happened. Kuhn Aff. ¶ 12. But the detectives kept returning to the house because they "already knew" that the boy was a victim. Kuhn Aff. ¶ 9. On the fifteenth visit, the detectives spoke with the boy alone in his bedroom, explaining to his mother that they were going to stay "as long as it takes." Kuhn Aff. ¶ 10. The boy finally stated that he had been abused. Asked why it took

[9] Kuhn took contemporaneous notes. The quotations of Jones in his notes were taken down verbatim. Kuhn Aff. ¶ 4.

fifteen interviews for the child to make the accusation, Jones told Kuhn that this boy had suffered tremendous trauma and had "kept it deep inside." "I drew it out again," she said. Kuhn Aff. ¶ 11.

As revealed by the post-conviction discovery, this sort of relentless questioning was not the exception, but the rule. Ron Georgalis was a student in the classes when he was nine and ten years old. On their initial visit to his home, when detectives Hatch and Galasso questioned Ron he told them that nothing inappropriate had happened to him. Ron Georgalis Aff. ¶ 5. Still, Galasso returned for a second interview. When Galasso spoke to his parents in the kitchen, Ron eavesdropped on the conversation and heard Galasso tell his parents that he had been sodomized both anally and orally and that Arnold Friedman had referred to him as "his favorite." Ron Georgalis Aff. ¶ 5. See also Affidavit of Ralph Georgalis ("Ralph Georgalis Aff.") ¶ 3 ("Det. Galasso stated to my wife and me that [Arnold] Friedman had been interviewed in prison, and Galasso quoted him as saying 'Ron was my favorite.'").

Brian Tilker told a similar story:

> I remember the police questioning me on two occasions. On each occasion, I told them I had never been abused by Arnold or Jesse Friedman or anyone else, and that I did not witness anything inappropriate in the computer classes at any time. I recall that this did not end their questioning and that I felt that they would be unsatisfied with any response other than my concurring with their view that sex abuse had taken place in the Friedman computer classes.

B. Tilker Aff. ¶ 4. Likewise, James Forrest, another student, has stated that "[t]he Nassau County Police visited our house unannounced and questioned me and my brother regarding the classes and regarding the Friedmans. We told them nothing inappropriate happened." Affidavit of James Forrest ("Forrest Aff.") ¶ 4.[10] Gregory Doe, a complainant who has acknowledged that

[10] Hal Bienstock, a student who was not interviewed by the police, also states that he never saw anything happening in the classes ("I never noticed anything inappropriate happening in any of the classes."). Affidavit of Hal Bienstock ¶ 3. See also CTF 30-31 (Former computer student # 2) ("I think as someone who took the classes it was just hard to picture even that going on

he only made claims against the Friedmans after being subjected to hypnosis, is yet another child who failed to implicate the Friedmans upon initial inquiry.

C. POLICE USED REWARDS AND PUNISHMENT TO ELICIT TESTIMONY

"…the police would have pizza parties and give police badges to the children who cooperated."

- Richard Tilker Aff. ¶ 8, 11.

The investigators further used reinforcement and punishment to obtain desired answers. When police encourage certain responses by linking them in the child's mind with rewards, or discourage other responses by linking them to punishments, children are far more likely to provide responses consistent with the interviewer's beliefs. These rewards and punishments can be subtle and can take many forms, such as praising, bribing, or befriending a child on the one hand, or refusing to accept a child's answer, or denigrating a child who doesn't provide the desired responses, on the other. For example, after failing to elicit claims of abuse from one child, a detective in this case told the child's mother, in the child's presence, that "he was a wise guy, and I didn't like his answers." Meyers Interview at 2. This type of interview creates an emotional tone in which the motivation to please the interviewer may be elevated above the desire to provide accurate responses.

For example, mindful that "children always wanna please adults," Detective Sgueglia would "find out the child would either favor myself or my partner. And that's who would take the investigation." Sgueglia I, 7- 8. Often, the interviews would take place in the child's room, a "very friendly atmosphere," where detectives could "make friends with them" and gain the children's confidence. Sgueglia I, 12, 17. Sgueglia described another situation in which multiple

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because I did have a good experience. And I didn't . . . see anything . . . remotely like . . . child molestation or child abuse or any, child-anything going on.").

interviews, establishment of a "friendship" with the child and other inducements were necessary to bring forth a charge of molestation:

> You would . . . find some children, this one particular kid, we went to four or five times. He was very cool. Didn't say anything, nothing happened. Sit down on the floor, play games. Totally ignore you – that you were even there. After an hour or two you helped him with his toy, you did this, you did that. And then you were friendly. And then – from that point, you'd say – you know, enough tonight, and why don't you think about it. And you know – we'll come back tomorrow. And you know we'll deputize you and you know – I like cops – do you like cops? I like – yeah, they, my mommy says they help us. That kind of stuff.

Sgueglia I, 37-38. Similarly, Richard Tilker "heard from other parents the police would have pizza parties and give police badges to the children who cooperated." R. Tilker Aff. ¶ 8; see also B. Tilker Aff. ¶ 11. At least one detective in this case flattered his interviewee by offering to make the child a "deputy" to the officer himself, asking the child, "Do you like cops?" Sgueglia I, 37-38. Some children considered their interaction with the police "an adventure" and "appeared to get a lot of excitement out of the attention they were getting from the police." B. Tilker Aff. ¶ 11.

The police resorted to the stick as readily as they did to the carrot. The repetitive questioning by police could be so unpleasant that students would finally agree that abuse occurred in order to obtain psychological relief:

> After many sessions in which the police appeared unsatisfied by my negative responses, I became frustrated at the persistent questioning. As I stated in my interview with Mr. Jarecki for his film, I remember finally telling the police officers that I had seen Jesse chase a kid and hit him. I remember saying that not because it was true, but instead because I thought it would get them off my back. This statement was not accurate but at the time – being 8 years old – I felt that saying this would allow me to avoid the unpleasant experience of being questioned repeatedly by the police.

B. Tilker Aff. ¶ 8. This recollection is confirmed by the boy's father. R. Tilker Aff. ¶ 6 ("Brian finally told them that one time he saw Jesse chase after and strike a child, though he later told us that that was not true and that the only reason he had said that was to end the questioning.").

One child, responsible for sixty-seven counts, including twenty-nine counts of sodomy, clearly remembered the stress produced by police questioning:

> What I do remember is the detectives putting me under a lot of pressure to speak up, and at some point, I kind of broke down. I started crying. And when I started to tell them things, I was telling myself it was not true. I was telling myself, "Just say this to them to get them off your back."

CTF 99 (Dennis Doe). This use of negative reinforcement to prompt allegations of abuse is also evident in the taped interview of Gary Meyers. In that interview, Detective Hatch pressured Gary with the intimation that denying abuse in the face of Arnold Friedman's confessions would be an indictment of the boy's intelligence: "You're reasonably intelligent. I wouldn't say you're a genius but you're reasonably intelligent." Meyers Interview at 1. Detective Hatch challenged the child's version of events, taunting him: "Oh, it happened to everyone else but not to you." After declaring that Arnold Friedman "liked" young boys, he resorted to sarcasm: "[y]ou were nine years old and nothing happened?" The detective continued, "[y]ou'll find out as you get older that certain things are true, certain things are lies. You denying this doesn't mean it didn't happen." Id. at 1-2.

D. POLICE MANIPULATION OF CHILD WITNESSES ESCALATED TO INCLUDE PSYCHOLOGICAL THREATS

Moving beyond the tactic of refusing to credit the interviewee's answers, the detectives resorted to the even more shocking tactic of communicating to Gary, approximately 14 years old at the time of the interview, that his obstinacy might increase the chances of his becoming a homosexual or pedophile and having profound psychological problems in the future. After Detective Jones informed Gary that "a lot of boys seem to have concerns about their own sexuality," Detective Hatch expanded on the theme:

> What about a homosexual act over a period of years? Formative years? Would you consider that having an affect [sic] on a person's sexuality? Do you think that determines if you are a homosexual? If a person was involved in a

> homosexual act during preadolescent years after they are forced out of it do you think they would like it?

Id. at 2. Hatch then explained that a person's failure to admit being the victim of a pedophile could lead to severe psychological distress in later life or even becoming a pedophile oneself:

> Most children who abuse children have been abused themselves. It's a monster created within you. This little monster inside you. This little voice and every now and then it rears its ugly head. Unless the victim knows enough about the problem to get himself straightened out. If suppressed, it's a two-fold problem. One is anger and frustration. And the other is acting itself out. It's a no-win situation unless the person goes and gets help and admits that he was victimized. If something bad happens even though it's not the kid's fault the child blames himself and feels tremendous guilt. We find, with the help that they can see it's not their fault. And then they place the blame on the person who created the situation and then they are a lot better off. Id.

In addition to the other suggestive techniques they used, the detectives also exploited the power of peer pressure by telling children they questioned that other children in their class had implicated Jesse and Arnold Friedman. This coercive technique, which plays upon a child's reluctance to make statements inconsistent with those of his peers, took two forms. Detectives told children either that other children had claimed to have been abused or that other children had stated that they had witnessed the interviewee himself being abused.

Detectives told Gary Meyers that several of the other children had seen Gary being abused, and told the police about it in their interviews. Detective Hatch advised Gary, "We've had kids who stated that they saw you and that you're involved, OK?" "Don't deny it yet," Detective Jones immediately interjected. Meyers Interview at 1. Gary repeatedly denied that he had been abused or had witnessed the abuse of others, saying, "No, he never touched me" and "I didn't see it. I didn't hear it." Id. But the detectives persisted, making it plain that they thought Gary was lying and that they were impatient with or offended by what they viewed as his evasions of the truth.

The same tactic was used in the Georgalis home. According to Ron Georgalis's father, "the clear intent of the detectives was to convince us that Ron had been molested and that several other children had already admitted that they, also, had been molested." Ralph Georgalis Aff. ¶ 4. Detectives told Brian Tilker "repeatedly that other students in my class had already told them that they had been abused, and that they were certain in fact I had also been abused and I should tell them so." B. Tilker Aff. ¶ 5. One detective "recount[ed] for me certain statements that others had allegedly made." B. Tilker Aff. ¶ 6.

Furthermore, the interviewers used their authoritative status to influence the responses. To a pre-adolescent child, a police officer conducting an official interview is an authority figure with high status. Inherent in this relationship is the natural desire of the child to please this authority figure and to provide answers consistent with the beliefs expressed by the officer. While an interviewer's high status is an intrinsic feature of the interview, even where the interviewer strives to maintain neutrality, the suggestive potential of this power relationship is activated when an interviewer communicates his implicit agenda to a child or directly exploits the power of his office.[11]

Here, as described above, the interviewing detectives employed a host of suggestive tactics. The fact that the interviewer was a police detective was made even more compelling when the detective claimed to have information from others about the child and what allegedly had happened to him. It would take an enormously self-assured 12 year-old to maintain his

[11] See S.J. Ceci & M. Bruck, *The Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOLOGICAL BULLETIN, 403-439 (1993); A. Tobey & G.S. Goodman, *Children's Eyewitness Memory: Effects of Participation and Forensic Context*, 16 CHILD ABUSE & NEGLECT, 779-796 (1992); Robert Rosenthal, *Suggestibility, Reliability, and the Legal Process*, DEVELOPMENTAL REVIEW 22 (2002) 334-369.

position in direct contravention of an adult police officer questioning him alone, and with the tacit approval of his parents.

E. NOW-DISCREDITED TECHNIQUES FORMED THE BASIS FOR THE ALLEGATIONS

"I just remember that I went through hypnosis, came out, and it was in my mind.."

- Gregory Doe III, *Capturing the Friedmans*

> [T]he post-conviction consensus within the social science community is that suggestive memory recovery tactics can create false memories and that aggressive investigation techniques like those employed in Petitioner's case can induce false reports. Indeed, it is not even clear from the record that Assistant District Attorney Onorato was aware of the suggestive questioning techniques that were used by the Nassau County police. More importantly, the record does not speak to whether the then-District Attorney of Nassau County, whose principal role was administering and overseeing the activities of one of the largest such offices in the United States, was aware of the techniques used by the Nassau County detectives, who were not members of his staff.[12]

Friedman, 618 F.3d at 160. (Footnotes omitted).

The evidence discovered post-conviction reveals the use of hypnosis, memory recovery, and visualization techniques. At least one of the complainants did not assert that he had been abused until after he was subjected to hypnosis. As that complainant has acknowledged, "I just remember that I went through hypnosis, came out, and it was in my mind." Gregory Doe III, 28. This child was the source for thirty-five separate sodomy counts against Jesse Friedman. But it is likely that this instance of hypnosis is not the only one that occurred in this case. Detective Galasso acknowledged at the time that there were "additional charges revealed during therapy

[12] See also Royal College of Psychiatrists, *Reported Recovered Memories of Child Sexual Abuse*, 21 THE COLLEGE OF PSYCHIATRIC BULLETIN, 663-665 (1997); Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA, 1918-1923 (1985).

sessions." See Bill Van Haintze and Alvin E. Bessent, *New Arrest in Child Sex Case*, NEWSDAY (June 23, 1988).

Dr. Sandra Kaplan – a therapist who worked closely with the police in this case – was an advocate of hypnosis and other so-called "visualization methods," particularly for alleged victims who had "amnesia" for their abuse. Dr. Kaplan worked with the detectives (and the alleged victims) involved in this case as early as December 1987, long before many of the charges were made and almost a year before Jesse pled guilty. She attended meetings at Great Neck schools in December 1987, January 1988, and November 1988, together with Galasso and others involved in the case. See William S. Dobkin, *Great Neck Community Marshals its Resources to Deal With Child Abuse and Child-Sex Crime*, GREAT NECK RECORD, February 4, 1988 at 1; Friedman Aff. ¶ 30; Temple Beth-El of Great Neck Panelists of Sexual Abuse of Children Program, November 16, 1988.

After Jesse pled guilty, Kaplan and Galasso (along with others) presented a talk entitled "Child Pornography and Extrafamilial Child Sexual Abuse,"[13] and discussed the methods used to treat children in the Friedman case. The presentation summary discusses the techniques used to treat the Friedman computer students -- including hypnosis -- and describes the utilization of memory recovery techniques in detail:

> Of the fifteen children seen in the two groups, six children had no memories of being victimized even though members witnessed their abuse. A technique that was useful in helping these children remembering was having all group members draw pictures of the room where they were victimized and speak about their memories of the classes using the pictures as a visual aid. With the help of this technique, two group members who had amnesia for the abuse, remembered most of the detail of their victimization. Two of the remaining four have had vague but

[13] Center for Child Protection, Health Science Response to Child Maltreatment, with the American Professional Society on the Abuse of Children Annual Meeting and the California Professional Society on the Abuse of Children Annual Meeting in Cooperation with the Office of Victims of Crime, United States Department of Justice, in San Diego California, January 1990.

> not detailed memories and the remaining two continue to not remember their abuse. The group was also helpful in that those children who remembered, who initially had dissociated, were able to reassure those with amnesia that the process of remembering would not be painful (the children had been told by detectives who questioned them that when they remembered it would be traumatic).[14]

Thus, even after the conviction of both Friedmans, and all the statements allegedly volunteered by the students, six of the children in the classes could not independently recall the abuse. We have requested copies of the full presentation, and have reason to believe it exists, but Dr. Kaplan, Dr. Pelcovitz, and Sgt. Galasso have refused to provide it. As described earlier in this brief, these doctors refused to be interviewed for *Capturing the Friedmans*, refused to speak to Jesse Friedman's lawyers, and it is likely the District Attorney has had similar experience in trying to gain their voluntary cooperation.

CONCLUSION

The prosecutor's obligation to investigate a conviction and to determine whether it should be set aside is rooted in the longstanding tenet of criminal law, that his or her duty "in a criminal prosecution is not that it shall win a case, but rather that justice be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor's ethical and professional responsibilities are no different in the case of obtaining guilty pleas than they are in obtaining convictions after trial. It is well established that violations of those obligations can require reversal, even where a defendant pleads guilty. See People v. Brown, 66 A.D.2d 158 (4th Dep't 1979). It is also established that the obligations exist "throughout (one's) official duties as a prosecutor" not merely at any given stage. Id. at 162.

[14] In the submission dated December 13, 2010, attorney Ronald L. Kuby provided abstracts of papers presented to various academic conferences. The sponsors of these conferences refused to supply the actual papers and tapes of the sessions in the absence of a subpoena. Presumably, the contents of these sessions would have confirmed the widespread use of hypnosis and other improper memory regression techniques.

Given the charge of the Second Circuit, the procedures that conviction integrity programs have established, and the extraordinary facts identified above, the charge of this Panel is clear: objectively investigate anew and sufficiently exhaust all of the resources available to it to come to a reasonable belief that the conviction should or should not be set aside. We submit that given the facts set out, the conviction must be set aside.

Respectfully submitted,

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