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Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF JESSE FRIEDMAN,

Appellant,

—against—

KATHLEEN M. RICE,

Respondent,

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT PURSUANT TO RULE 500.1(f)

The proposed *Amici Curiae*, the National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers, have no parents, subsidiaries, or affiliates.

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a non-profit corporation with a subscribed membership of more than 750 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar in the State of New York. It is a recognized state affiliate of the NACDL and, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused and convicted of crimes.

The NACDL and NYSACDL regularly file amicus curiae briefs in this Court, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. This case presents just such an issue. The government asserts that the "confidential source" exemption in New York's Freedom of Information Law (N.Y. Pub. Off. Law § 87(2)(e)(iii), hereinafter "FOIL") authorizes it to withhold every statement made to it by a non-testifying witness regardless of whether he or she was promised confidentiality. That interpretation, endorsed by the Second Department but no other New York appellate court, runs counter to the language and purpose of FOIL and would work a tremendous injustice on defendants who rely on FOIL to obtain crucial information about their cases.

SUMMARY OF ARGUMENT

New York's FOIL, founded on principles of transparency in government, has proved an essential tool for correcting shortcomings in our criminal justice system. New York's pretrial discovery rules are stringent, and prosecutors do not always comply with their Brady obligations. It is not uncommon that criminal defendants in New York are convicted without access to evidence that is essential to a fair trial, or, in some cases, that proves their actual innocence. We know this to be the case because defendants regularly use FOIL to obtain exculpatory material that leads to the reversal of their convictions or directly to their exonerations.

The Second Department's decision in this case—that the government may withhold under FOIL's confidential source exemption any statement by any non-testifying witness—is inconsistent with the language and purpose of the statute, and with decisions issued by every other New York appellate court. The Second Department's decision, premised on the outdated notion that witness statements are presumptively shrouded in a "cloak of confidentiality," is inconsistent with FOIL's opening declaration, which states that access to government information "should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." And the Second Department's decision is inconsistent with proposed legislation from

the New York State Justice Task Force calling for "all relevant witness statements to be disclosed, regardless of whether the prosecutor considers the content exculpatory or intends to have the witness testify at trial." The Second Department's decision is therefore inconsistent with a robust body of New York law and policy that has adhered to the bedrock principle that justice is achieved through more transparency in government, not less.

This Court should reverse the Second Department's decision.

ARGUMENT

I. FOIL IS AN INDISPENSIBLE TOOL FOR CRIMINAL DEFENDANTS WHO HAVE BEEN DENIED ACCESS TO EXCULPATORY EVIDENCE.

There is broad agreement, among practitioners and scholars alike, that the criminal discovery system in New York suffers from significant shortcomings that have resulted in wrongful convictions. FOIL has been an essential tool for exposing these shortcomings and providing criminal defendants who have been adversely affected by them with the evidence they need to challenge their convictions and, in some cases, to establish their innocence.

A. Criminal Defendants in New York Are Routinely Denied Exculpatory Information.

New York's criminal discovery system substantially restricts defendants' access to information before trial. That system, set forth in C.P.L. article 240, has not been significantly revised in decades, and lags behind other jurisdictions in both the scope and timing of pretrial disclosures. See New York State Justice Task Force, "Report of the New York State Justice Task Force of Its Recommendations Regarding Criminal Discovery Reform," at 2 (July 2014) (hereinafter "Justice Task Force Report"). Indeed, "New York is so far outside the mainstream" that it is among those jurisdictions that "provide defendants in criminal cases with the least discovery in the nation." New York State Bar Association, "Report of the Task

Force on Criminal Discovery" (approved Jan. 30, 2015) (hereinafter "NYSBA Report") (emphasis in original). The result is that discovery in criminal cases "often comes too late to permit both sides to investigate facts fully and make informed decisions before trial," Justice Task Force Report at 5. Such restrictions create challenges for all criminal defendants, but they are especially harmful to wrongfully accused defendants who may know little or nothing about the charges against them;[1] and indigent defendants represented by institutional legal services providers with heavy caseloads that limit the amount of time counsel can spend focusing on a given case.[2]

To be sure, a body of court-made rules has developed in part to offset this highly-circumscribed discovery regime. For example, the prosecution must disclose evidence that is favorable to any defendant, see Brady v. Maryland, 373 U.S. 83, 87-88 (1963), and it must disclose prior statements of prosecution witnesses pertaining to the subject of their testimony, see People v. Rosario, 9

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[1] See Jenny Roberts, Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases, 31 Fordham Urb. L.J. 1097, 1102 (2004) ("How can counsel investigate enough to make informed choices about trial defenses when the client can say no more than 'I know nothing about these charges'?"); Ion Meyn, Discovery and Darkness: the Information Deficit in Criminal Disputes, 79 Brook. L. Rev. 1091, 1092 (2014) ("A criminal defendant, having no discretion to compel pretrial discovery and permitted but a keyhole view of the State's evidence, is the only litigant relegated to darkness.").

[2] Hurrell-Harring v. State, 15 N.Y.3d 8, 33 (2010) (Pigott, J., dissenting) ("Legal services for the indigent have routinely been underfunded, and appointed counsel are all too often overworked and confronted with excessive caseloads, which affects the amount of time counsel may spend with any given client.").

N.Y.2d 286, 290 (1961). Such rules were established on the principle that a fair prosecution is one in which defendants have access to information that may aid in their defense. See People v. Bryce, 88 N.Y.2d 124, 129 (1996) (explaining that the purpose of Brady is to "insure that the accused receives a fair trial"); People v. Jackson, 78 N.Y.2d 638, 644 (1991) (explaining that Rosario "is, in essence, a discovery rule, based on a deeply held belief that simple fairness requires the defendant to be supplied with prosecution reports and statements that could conceivably aid" in the defense).

Further, ethics rules require prosecutors to disclose information known to the prosecutor that tends to negate the defendant's guilt, mitigate the degree of the offense, or reduce the sentence. See New York Rule of Professional Conduct 3.8(b). The rule does not contain the materiality limitation of state or federal constitutional case law. Further, the rule requires that disclosure to the defense be "timely," id., which ordinarily would be as soon as reasonably practicable. Under this rule, a New York prosecutor may be required to disclose favorable evidence and information at an earlier time than the prosecutor is required to disclose evidence and information under substantive law. See New York City Bar Assoc., Formal Opinion 2016-3: Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense (Aug. 29, 2016) (hereinafter, "Formal Opinion 2016-3).

Unfortunately, while these rules are essential to prevent wrongful convictions, they do not always work in practice. The prosecution is not obligated to disclose Rosario material until after trial commences. See C.P.L. § 240.45(1). Accordingly, however beneficial the Rosario rule is in theory, it has hardly any practical utility in a system in which well over 90 percent of cases are resolved by guilty plea. See Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (pointing to DOJ statistics reflecting the "simple reality" that "ninety-four percent of state convictions are the result of guilty pleas" and observing that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant").

Further, the New York State Justice Task Force has pointed to "[d]ocumented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence." Justice Task Force Report at 2. And the State Bar has similarly acknowledged that "New York Brady violations occur at all phases of the criminal justice process and are often not discovered until after conviction." NYSBA Report at 52. As one federal judge remarked, "Brady violations have reached epidemic proportions in recent years." United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting).[3]

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[3] See also Bennett L. Gershman, Reflections on Brady v. Maryland, 47 S. Tex. L. Rev. 685, 686 (2006) ("Thousands of decisions by federal and state courts have reviewed instances of serious Brady violations, and hundreds of convictions have been reversed because of the

The frequency with which Brady errors occur is perhaps unsurprising given that prosecutors alone bear responsibility for determining whether information tends to exculpate or is favorable to the defendant. But even setting aside instances of intentional or negligent prosecutorial misbehavior, prosecutors are as prone as anyone to confirmation bias, which can inform their assessment about whether material should be disclosed as exculpatory.[4] Meanwhile, the defense lawyer, who is single-mindedly driven to uncovering exculpatory material, is not afforded any active role in the Brady analysis. See Rosario, 9 N.Y.2d at 290 (recognizing that "single-minded counsel for the accused . . . is in a far better position to appraise the value" of potential impeachment material).[5]

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prosecutor's suppression of exculpatory evidence.").

[4] See Alafair Burke, Talking About Prosecutors, 31 Cardozo L. Rev. 2119, 2135 (2010) ("Because the prosecutor believes that the defendant is guilty, she is likely to weigh the evidence against him as strong. In contrast, she is likely to view evidence that might be helpful to the defendant's lawyer as unreliable, distracting, or immaterial. As a consequence, she may conclude that the evidence is not material and exculpatory, or perhaps not even exculpatory at all."); NYSBA Report at 5 ("often prosecutors do not know the defense's theory of the case at the time decisions about disclosure are made, so they may have little basis for making accurate 'materiality' assessments").

[5] See also William J. Brennan, Jr., The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report, 68 Wash. U. L.Q. 1, 9 (1990) (prosecutors are "unlikely to search as long and hard as would defense counsel for possible exculpatory arguments that might be based on evidence in the prosecutor's files.").

B. FOIL Has Proven Crucial in Ensuring Criminal Defendants Obtain Exculpatory Information To Which They Are Entitled.

Evidence uncovered pursuant to FOIL requests made by wrongfully convicted defendants has demonstrated how troublesome and pervasive these discovery problems are. Criminal defendants in New York regularly use FOIL to obtain exculpatory information withheld before trial, and they have used that information to prove in post-conviction proceedings that they were denied a fair trial or are actually innocent. Consider the following examples:

- Jabbar Collins was convicted in 1995 in connection with a murder-robbery. From prison, Collins made FOIL requests to the Kings County District Attorney's Office seeking witness statements, among other materials. After denying it had any such materials for 15 years, the prosecution finally produced them and conceded that a key prosecution witness had recanted statements implicating Mr. Collins in the charged crimes. In 2010, the prosecution further conceded that the recantation violated Mr. Collins' constitutional rights under Brady, and it stipulated to dismissing his case with prejudice.[6]

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[6] See Collins v. Ercole, 08-Civ.-1359, Final Judgment Order, Dkt. 55 (E.D.N.Y. June 9, 2010); Collins v. City of New York, 923 F. Supp. 2d 462 (E.D.N.Y. 2013); A.G. Sulzberger, "Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years," N.Y. Times (June 8, 2010); Sean Gardiner, "A Solitary Jailhouse Lawyer Argues His Way Out of Prison," Wall Street Journal (Dec. 24, 2010).

- Don Taylor was convicted of murder in 1989 as a result of shooting in the Bronx. The conviction was based on eyewitness testimony of Omar Portee. Portee was facing up to 50 years in prison on multiple charges, but he agreed to an extremely favorable plea deal with the Bronx County District Attorney's Office in return for testifying against Taylor. Over a decade later, Taylor's attorneys filed a FOIL request that led to the production of previously-undisclosed police notes indicating that another witness had provided a physical description of the shooter that did not match Taylor. Taylor's attorneys interviewed Portee, who admitted he testified falsely at Taylor's trial. Taylor's conviction was vacated in 2004.[7]
- Roy Brown was convicted of the 1992 murder of a social-service worker in upstate New York. From prison, Brown filed FOIL requests with the Sherriff's department that investigated the murder, which revealed previously-undisclosed documents that implicated another man, Barry Bench, in the murder. Bench committed suicide when Brown confronted him with the newly-discovered evidence, but DNA taken from his exhumed

[7] See Taylor v. State, 24 Misc. 3d 931 (Ct. Cl. 2009); http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3935.

body confirmed he was the true killer. The Cayuga County District Attorney's Office joined Brown's motion for release in 2007.[8]

- Petros Bedi was convicted in 2000 for a 1996 shooting at an Astoria night club. Pursuant to a 2010 FOIL request filed with the Queens District Attorney, Bedi requested records of financial consideration paid to the prosecution's star eyewitness, who had testified on cross-examination that he did not receive any such payments. The prosecution initially denied any prior recorded statements of the witness but later disclosed dozens of pages of financial records showing the District Attorney's payment of nearly $20,000 to the witness for various expenses, some of which were not explained. In 2013, a Queens trial court concluded that the prosecution's Brady violations, and its failure to correct the witness's false testimony, entitled Bedi to a new trial.[9]
- Floyd Batten was convicted in 1984 for the murder of a furniture store owner. The prosecution's case rested almost exclusively on testimony of a single eyewitness. Six years after his trial, in response to a FOIL request, the Brooklyn District Attorney's Office turned over a series of reports

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[8] See Innocence Project, http://www.innocenceproject.org/cases/roy-brown/.

[9] See People v. Bedi, No. 4107/96 (Queens Co. Sup. Ct., March 13, 2013) (N.Y.L.J., 1202592836531).

indicating that the police prematurely abandoned their investigation into another individual that an informant had implicated in the shooting. In 2003, a federal district court concluded the reports constituted improperly-withheld Brady material and granted Batten's habeas petition.[10]

- Larry Gurley was convicted of murder in 1972 and sentenced to 20 years to life in prison. Gurley's appeals over the next two decades failed. However, in 1991, in response to Gurley's FOIL request, the police produced a previously-undisclosed ballistics report. The report indicated that the victim died from a bullet fired downward from an elevated position, which supported Gurley's account of the shooting and contradicted the prosecution's. The trial court ruled that the undisclosed report was material and that Gurley was entitled to a new trial.[11]

These cases are only a sampling of the many cases in which post-conviction FOIL requests have resulted in the disclosure of improperly-withheld exculpatory material. See also, e.g., People v. Negron, 26 N.Y.3d 262, 266-68 (2015) (exculpatory material obtained through FOIL request required reversal of conviction); People v. Taylor, 116 A.D.3d 1074, 1074-75 (2d Dep't 2014) (police

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[10] See Batten v. Griener, No. 03-MISC-0066 (JBW), 2003 WL 22284187 (E.D.N.Y. Aug. 26, 2003).

[11] See People v. Gurley, 197 A.D.2d 534 (2d Dep't 1993); http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4312.

reports and witness statements disclosed pursuant to FOIL request nearly two decades after conviction); People v. Felix-Torres, 281 A.D.2d 649, 650 (3d Dep't 2001) ("we are persuaded that defendant was deprived of Rosario material by the People's failure to timely disclose . . . statements obtained in response to defendant's FOIL request made after his conviction"); People v. Giordano, 274 A.D.2d 748, 749-50 (3d Dep't 2000) (new trial ordered after witness statements were produced pursuant to FOIL request); People v. White, 200 A.D.2d 351, 352-53 (1st Dep't 1994) (reversing after defendant's FOIL requests revealed an exculpatory witness statement); People v. Bellamy, 20 Misc. 3d 1131(A), at *19 (Queens Co. Sup. Ct. 2008), aff'd., 84 A.D.3d 1260 (2d Dep't 2011) (affirming trial court's reversal of conviction based in part on exculpatory witness statement obtained through FOIL requests); People v. Bozella, 25 Misc. 3d 1215(A), at *11 (Dutchess Co. Ct. 2009) (vacating on basis of, inter alia, witness statements obtained by FOIL request).[12]

Without FOIL, the documents that led to the reversals in the above-cited cases would probably still be collecting dust in government storage, and Jabbar Collins, Roy Brown and other innocent individuals would probably still be imprisoned for crimes they did not commit.

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[12] See also Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016) (response to a Georgia Open Records Act request disclosed materials showing that state's use of peremptory strikes were unconstitutionally racially motivated).

II. THE SECOND DEPARTMENT'S DECISION IS INCONSISTENT WITH THE LAW AND POLICY OF THIS STATE

A. The Second Department's Decision Is Contrary to the Legislature's Intent

Public Officers Law § 87(2)(e)(iii), the only exemption invoked by the prosecution in this case, authorizes the government to withhold law enforcement records "which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation." The Second Department's holding in this case, that § 87(2)(e)(iii) shields from disclosure any statement made by any non-testifying witness, Friedman v. Rice, 134 A.D.3d 826, 829 (2d Dep't 2015), is contrary to the Legislature's intent and this Court's precedents.

The Second Department's interpretation of § 87(2)(e)(iii) is not supported by the express language of that provision. According to the Second Department, information is "confidential," and therefore may be withheld, if it has not been "used in open court." 134 A.D.3d at 829. That is an unjustifiably expansive interpretation of the word "confidential" that would exempt a vast universe of material. Since the Legislature is presumed to have used the word "confidential" consistently throughout the statute, see New York State Bridge Authority v. Moore, 299 N.Y. 410, 416 (1949), not only would the identities of non-testifying

witnesses (i.e., "confidential source[s]") be exempt under the Second Department's interpretation, but so would nearly every document the government possesses in a given case since all such documents would "relat[e] to [the] criminal investigation." The only exception, under the Second Department's reading, would be documents the government has already "used in open court"—in other words, documents a criminal defendant has already seen. Had the Legislature intended to exempt from disclosure such an absurdly broad category of government documents as all those not "used in open court," it would have explicitly said so. See Spodek v. Com'r of Taxation & Fin., 85 N.Y.2d 760, 766 (1995) ("[W]hen the construction claimed is inconvenient, absurd, or leads to other objectionable consequences, the argument is especially sound that, if the Legislature had intended legislation resulting in such consequences, it would have said so in explicit language") (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74, at 158).

Allowing the government to withhold all but the documents it has "used in open court" is also inconsistent with the Legislature's stated purpose in enacting FOIL, which was to "extend public accountability wherever and whenever feasible." Pub. Off. Law. § 84. Indeed, the Second Department's explanation for why the information at issue in this case is exempt—it is shrouded in a "cloak of

confidentiality," id. at 828-29—could not be more at odds with the Legislature's declaration of what information is not exempt from disclosure:

> The people's right to know the process of governmental decision-making . . . is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

Pub. Off. Law § 84 ("Legislative declaration") (emphasis added). Rarely is the question of whether a court's interpretation is consistent with the Legislature's intent answered so directly by the Legislature itself.

Information is "confidential" within the meaning of § 87(2)(e)(iii) when it is provided to the government by a witness to whom the government has promised confidentiality, and a "confidential source" refers to the witness himself or herself. This natural interpretation, which would exempt a much smaller universe of material, is consistent with FOIL's policy of open government and this Court's rule that FOIL's exemptions must be "narrowly construed" to allow "maximum access" to records. Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566 (1986) ("FOIL provides that all records of a public agency are presumptively open for public inspection and copying unless otherwise specifically exempted"); see also Price v. Price, 69 N.Y.2d 8, 16 (1986) ("a particular construction of a statute should be preferred which furthers the statute's object, spirit and purpose"). Every New York appellate court (other than the Second Department) has embraced such

a construction in the context of witness statements, including this Court. See, e.g., Gould v. New York City Police Dep't, 89 N.Y.2d 267, 275-77 (1996) (stating that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" and making clear that a witness statement cannot be withheld under any FOIL exemption absent a "particularized" showing); Exoneration Initiative v. New York City Police Dep't, 114 A.D.3d 436, 440 (1st Dep't 2014) (confidential source exemption does not apply unless witness receives "express or implied promise of confidentiality"); Gomez v. Fischer, 74 A.D.3d 1399, 1401 (3d Dep't 2010) (government must show witness was "a confidential informant or requested or was promised anonymity, or that his or her life or safety would be endangered by disclosure"); Hawkins v. Kurlander, 98 A.D.2d 14, 17 (4th Dep't 1983) (application of exemption proper upon proof that government entered into confidentiality agreement with witnesses).

This Court has also held that, even where the government has promised confidentiality, it may not withhold more information than is necessary to honor that promise. In Harbatkin v. New York City Dep't of Records & Info. Servs., a historian sought disclosure of transcripts of interviews conducted by the Board of Education during the Red Scare to "ferret out" alleged Communists working in the school system. 19 N.Y.3d 373, 377-78 (2012). The government invoked FOIL's

exemption for materials that "if disclosed would constitute an unwarranted invasion of privacy," pointing to the fact that the interviewees were promised confidentiality. Id. at 379-80 (citing Pub. Off. Law § 87(2)(b)). This Court agreed that the government's promise of confidentiality to witnesses was the key determinant of whether the exemption applied, but it disagreed that such promise entitled the government to redact broad swaths of information from the transcripts. Id. at 378-79. It held that the FOIL petitioner was "entitled to everything in the transcripts except material that would identify informants who were promised confidentiality." Id. at 377. There was no basis, the Court reasoned, for withholding most of the information contained in witness statements made decades earlier, even though the Court could "not say that disclosure w[ould] be completely harmless to [non-interviewees] named in the documents." Id. at 380. Harbatkin accordingly supports the rule that the scope of information the government may withhold to honor a promise of confidentiality is limited. By logical extension, where, as here, there is no promise of confidentiality, nothing in § 87(2)(e)(iii) authorizes the government to withhold requested information as somehow "inherently" confidential.

B. The Second Department's Decision Is Contrary to Legislative Proposals to Reform Criminal Discovery

Leaders of the Bar have recognized the importance of criminal defendants' access to meaningful discovery about their cases, and they have drafted reform proposals that flag witness statements—the type of statements at issue in this case—as precisely the sort of material that should be liberally disclosed at the earliest stages of criminal trial court proceedings. For example, the Justice Task Force—which includes among its members "judges, prosecutors, defense attorneys, members of law enforcement, legislators, executive branch officials, forensic experts, victim's advocates and legal scholars" from across the State[13]—has concluded prosecutors' inconsistent compliance with Brady could be addressed by requiring automatic disclosure of witness statements well before trial in every criminal prosecution:

> The Task Force addresses this issue ["inconsistent" Brady disclosures] with a ground-breaking proposal—namely, a recommendation for legislation requiring all relevant witness statements to be disclosed, regardless of whether the prosecutor considers the content exculpatory or intends to have the witness testify at trial.

Justice Task Force Report at 2 (emphasis added). The Justice Task Force concluded that such a reform would "remove the subjective determination of

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13 See www.nyjusticetaskforce.com.

whether a given statement is exculpatory" and would "help defense lawyers by better enabling them to investigate their cases and prepare for trial." Id. at 3.

The New York State Bar Association has similarly focused on the disclosure of witness information as one of "five key changes" to "make discovery practice more fair and efficient, and to return New York State's criminal justice system to the mainstream nationally." NYSBA Report at 7-8. Included in its recent legislative proposal is language that would require the prosecution to disclose "written or recorded witness statements" as early as fifteen days after arraignment. NYSBA Report at 34-35.

The Second Department would take the law in precisely the opposite direction. It would ensure that criminal defendants are denied the very information they have depended on to prove their innocence. Had the Second Department's ruling prevailed in cases like Jabbar Collins' or Don Taylor's, those individuals might still be incarcerated for crimes they did not commit.

* * *

Mr. Friedman asks the Court to hold that FOIL entitles him to witness statements he believes support his innocence. That the prosecution is so insistent on denying him access to those statements is troubling for a number of reasons—from the "bizarre, sadistic, and even logistically implausible" allegations in this case to the fact that the government has been wrong about the guilt of dozens of

similarly-situated criminal defendants. See Friedman v. Rehal, 618 F.3d 142, 148-49, 155-56 (2d Cir. 2010) ("at least seventy-two individuals were convicted in nearly a dozen major child sex abuse cases and satanic ritual prosecutions . . . almost all . . . have since been reversed"). Rather than clinging to an imaginary "cloak of confidentiality," the government should be as adamant as Mr. Friedman that justice will best be served by disclosing the materials he seeks. For, as this Court recognized in Rosario, "the state has no interest in interposing any obstacle to the disclosure of facts." 9 N.Y.2d at 290. That is the principle that the Legislature sought to advance through FOIL.

CONCLUSION

The Second Department's ruling should be reversed.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 500.13(c)(1)

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