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Actual Innocence after *Friedman v. Rehal*: The Second Circuit Pursues a New Mechanism for Seeking Justice in Actual Innocence Cases

Jonathan M. Kirshbaum*

Introduction

In the 1980s, a "moral panic" swept across the United States as a result of incendiary allegations of mass sexual abuse of children at schools and day care centers.[1] "The media sensationalized these [cases], generating a national perception that sex rings were widespread and had infiltrated average communities."[2] Many scholars now believe, however, that these cases represented "a modern-day 'witch hunt.'"[3] In fact, of the seventy-two convictions associated with these cases, almost all were later overturned.[4]

At the height of this nationwide frenzy, Jesse Friedman and his father were accused of abusing several dozen young boys in computer classes that they taught in the basement of their home in Great Neck, New York.[5] But there was no

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1. Friedman v. Rehal, 618 F.3d 142, 155-56 (2d Cir. 2010) (citing eight cases from around the country).

2. *Id.* at 155 (citing *Devil Worship: Exposing Satan's Underground* (Geraldo Rivera, NBC television broadcast Oct. 25, 1988)).

3. *Id.* at 156.

4. *Id.*

5. *Id.* at 146.

physical evidence of abuse.[6] The accusations stemmed purely from information that detectives gathered in interviews with the victims.[7] The methods used by the detectives to gain these admissions, however, have always been subject to question.[8] Now the "consensus within the social science community" is that aggressive investigatory techniques—similar to those used in the Friedman case—"can induce false reports."[9] Despite the questionable nature of the evidence, Jesse pled guilty to the abuse.[10]

Many years after the conviction, an extraordinary series of events occurred that resulted in the Nassau County district attorney's office agreeing to re-investigate the case. The chain reaction began with the production of the critically-acclaimed documentary *Capturing the Friedmans*.[11] The movie depicts the accusations of abuse, the ensuing investigations, the impact of the case on the Friedman family, the children who were the focus of the allegations, and the Great Neck community.[12] Based on information he learned in the movie, Jesse raised claims in state court and then in a habeas corpus petition in federal court seeking to vacate the conviction.[13] Each legal challenge was unsuccessful.[14] Nevertheless, in a remarkable opinion, the Second Circuit engaged in a lengthy discussion of the facts and circumstances in Jesse's case, focusing on the question of actual innocence.[15] The court believed that "new and material evidence"[16] in Jesse's case established a "reasonable likelihood"[17] that an "injustice"[18] may have

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6. *Id.*
7. *Id.*
8. *See id.* at 156-58.
9. *Id.* at 160.
10. *Id.* at 145.
11. CAPTURING THE FRIEDMANS (HBO 2003) [hereinafter CAPTURING MOVIE].
12. *See* Friedman v. Rehal, No. 06-CV-3136, 2008 WL 89625 (E.D.N.Y. Jan. 4, 2008).
13. *Friedman*, 618 F.3d at 151.
14. *Id.* at 151-52.
15. *Id.* at 152.
16. *Id.* at 160.
17. *Id.* at 159.

occurred. For this reason, it urged the prosecutor to reinvestigate the case.[19] Within days of the decision, the prosecutor agreed to follow this extraordinary request.

Since the dawn of the DNA testing era, actual innocence cases have captured the attention of both the legal community and our society at large. But most cases—like Jesse's—do not present the potential for DNA testing.[20] It is certain, however, that a real percentage of these defendants have been wrongfully convicted.[21] In an era where society has come face to face with the indisputable reality that there are people in prison (including people on death row) who are innocent,[22] it should not be acceptable that actually innocent prisoners have to suffer the punishment of a wrongful conviction simply because they are not lucky enough to have a case that involved forensic evidence susceptible to DNA testing.[23]

In calling for the reinvestigation, the Second Circuit in *Friedman* took a novel and creative approach to address the vexing problems posed by wrongful convictions. More important, the manner in which the court approached the question of innocence and called for a reinvestigation

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18. *Id.* at 161.

19. *Id.* at 160.

20. Brandon Segal, Comment, *Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the* Schlup v. Delo *Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225, 225 (2008) ("[T]he number of exonerations of the wrongfully convicted can only be a fraction of the actually innocent, because most exonerations are DNA-based and many crimes do not have exonerating DNA evidence.") (citing Stuart Taylor, Jr., *Innocents in Prison: Many Thousands of Wrongly Convicted People are Rotting in Prisons and Jails Around the Country*, NAT'L ASS'N OF CRIM. DEF. LAW. (Aug. 6, 2007), http://www.nacdl.org/public.nsf/defenseupdates/innocence138); Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1286-87 (2010).

21. Mourer, *supra* note 20, at 1282-84. *See also infra* notes 121-24 and accompanying text.

22. David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027 (citing studies that show 340 post-conviction exonerations between 1989 and 2003, with 251 due to DNA evidence alone).

23. Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 143 (2005).

represents the real innovation in the decision. Despite the fact that the underlying legal claim was procedurally defective and substantively meritless, the court took it upon itself to consider the question of actual innocence. Rather than analyzing the factual allegations through one of the actual innocence theories currently in existence, it addressed the question of innocence in a novel manner and directly linked this analysis to its call for a reinvestigation of the case. In doing so, the court created a new mechanism for federal courts to use when they believe that there may have been an injustice—namely, a call for a reinvestigation based on "new and material evidence" establishing a "reasonable likelihood" that a habeas petitioner is actually innocent.

Part II of this Article will review the Second Circuit's decision in *Friedman*, explaining the background of the case and discussing the court's opinion. Part III will review the court's analysis in *Friedman* and show that the court's focus on actual innocence and its call for a reinvestigation were justified. Part IV will survey the newly developed freestanding actual innocence claim under the New York State Constitution and show that the claim, while important, does not render superfluous the need for courts to call for a reinvestigation in appropriate cases. Finally, Part V will show why the Second Circuit's analysis on the actual innocence issue was a novel approach and will breakdown the mechanism that the court used to provide guidance on how it can be followed in future cases.

I. Friedman v. Rehal

In 1982, Arnold Friedman, a retired school teacher, began teaching computer classes to children in the basement of his family's house.[24] In 1984, when Jesse was fifteen years old, he began to assist his father in teaching the classes.[25]

In 1987, customs agents "intercepted a package containing

24. *Friedman*, 618 F.3d at 146.

25. *Id.* Jesse assisted his father up until he left for college in September 1987. *Id.*

child pornography addressed to Arnold."[26] Federal agents searched the Friedman home and discovered additional child pornography hidden in a desk and behind a piano in the basement.[27] The agents also found a list of eighty-one students who were enrolled in the computer classes and provided these names to the Nassau County Police Department.[28] The department's Sex Crime Unit "sent out two-detective teams to interview [the] students."[29]

The tactics that the detectives used when interviewing the students became a central focus of the case. Some former students and their parents reported that detectives utilized "aggressive and suggestive questioning techniques to gain statements from children."[30] Detectives would allegedly reward children who admitted abuse.[31] If a child denied abuse, the detectives would repeatedly visit the child and conduct lengthy and overly aggressive follow-up interviews until the child admitted abuse.[32] A secretly videotaped interview with a former student, Gary Meyers, demonstrated these "hostile" techniques.[33] The videotape showed that, throughout the

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26. *Id.*

27. CAPTURING MOVIE, *supra* note 11, at 9:49-9:56 & 10:42-10:48.

28. *Friedman*, 618 F.3d at 146.

29. *Id.*

30. *Id.* For example, in an affirmation, one former student reported that the officers made "specific suggestions [as to what] they believed happened in the computer classes." *Id.* at 147 (quoting Brian Tilker Aff. ¶ 5). The detectives told him that other students had stated that they had been abused. *Id.* The detectives stated that they were certain that he had been abused and advised him that he should admit it. *Id.* A detective who had conducted many of the interviews explained in an interview with the film-makers that, in the interviews with the children, the detectives would tell them that they knew "there was a good chance that . . . somebody in that family touched you in a very inappropriate way." *Id.* (quoting transcript of interview with Detective Squeglia).

31. *Id.* at 147.

32. *Id.* at 146-47.

33. *Id.* at 147. The Friedmans became aware of this videotape during the criminal case itself and provided it to Jesse's lawyer. *Id.* The attorney confronted the prosecutor with the videotape and requested that he provide the defense with any other evidence of these "hostile" techniques. *Id.* Nothing was ever turned over. *Id.*

interview, the detectives "pressured" Meyers to admit abuse.[34] When he persistently maintained that he was not abused, the detective told Meyers' mother that he did not "like his answers" and referred to Meyers as a "wise guy."[35]

As a result of the interviews, Arnold and Jesse were arrested on a felony complaint alleging child sexual abuse.[36] Between December 1987 and December 1988, three separate indictments were filed charging Jesse with over two hundred counts of child sexual abuse.[37] Despite the great number of charges, there was no physical evidence of abuse.[38] In fact, no student had ever complained of abuse prior to the investigation.[39] As the case proceeded, however, the allegations against the Friedmans "grew increasingly bizarre, sadistic, and even logistically implausible."[40]

Due to the nature and extent of the sexual abuse allegations, "the community [was] in an 'uproar.'"[41] The case received a tremendous amount of media attention in the New

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34. *Id.*

35. *Id.* (internal quotation marks omitted). *See also* Friedman v. Rehal, No. 06-CV-3136, interim order at 3 (E.D.N.Y. July 20, 2007).

36. *Friedman*, 618 F.3d at 146.

37. *Id.* at 146. In addition, as the case expanded, the prosecution began to speculate that the Friedmans and other local teenagers had been operating a "sex ring." *Id.* at 148. One of the teenage suspects, Ross Goldstein, eventually pled guilty pursuant to a cooperation agreement, even though more than half of the charges were alleged to have taken place before Jesse and Goldstein had ever met. *Id.* Goldstein later stated that he had falsely implicated others. *Id.*

38. *Id.* In the movie, the prosecutor, Assistant District Attorney Joe Onorato, stated that "there was a dearth of physical evidence." CAPTURING MOVIE, *supra* note 11, at 33:43-33:54.

39. *Friedman*, 618 F.3d at 146.

40. *Id.* at 147-48. In the movie, an anonymous student described a group molestation game called "Leap Frog," in which Jesse would leap frog from one student to the next inserting his penis into their anuses. CAPTURING MOVIE, *supra* note 11, at 29:40-30:29.

41. *Friedman*, 618 F.3d at 148 (alteration in original) (citing Richard Tilker Aff. ¶ 10). Hundred of parents attended community meetings to discuss the allegations. *Id.* The town defined itself as a "victimized community," and those parents and children who denied that the abuse occurred no longer "fit in." *Id.* (citing CAPTURING MOVIE, *supra* note 11, at 35:26-36:01).

York newspapers.[42] As a result of the "media frenzy" over the explosive nature of the charges, the judge presiding over the case, Nassau County Supreme Court Justice Abbey Boklan, allowed video cameras in the courtroom for the first time in Nassau County history.[43] Notwithstanding the charged atmosphere, the judge denied Jesse's request for a change of venue.[44]

On March 25, 1988, Arnold Friedman pled guilty to forty-two counts of child sexual abuse and was sentenced to an aggregate sentence of ten to thirty years in prison.[45] He pled guilty "at least in part because he believed [Jesse] would have a better chance at a fair trial that way."[46]

After his father's guilty plea, Jesse, now nineteen years old, claimed to have felt "enormous pressure" to plead guilty.[47] According to Jesse's attorney, Justice Boklan expressly informed Jesse's attorney that, if Jesse was convicted after trial, she intended to impose consecutive sentences.[48] In response to the threat and out of a fear that he might spend most of his life in prison, Jesse advised his attorney that he

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42. *Friedman*, 618 F.3d at 148.

43. *Id.* (internal quotation marks omitted).

44. *Id.* at 149.

45. *Id.*; Friedman v. Rehal, No. 06-CV-3136, interim order at 4 (E.D.N.Y. July 20, 2007). Arnold Friedman also pled guilty in federal court to sending child pornography through the mail. Leonard Buder, *A Pornographer Given 10 Years By a U.S. Judge*, N.Y. TIMES, Mar. 29, 1988. He was sentenced to 10 years in prison. *Id.* It was also discussed in the documentary that Arnold admitted that, when he was in his early forties, he had sexual contact with two young boys while at his summer home. CAPTURING MOVIE, *supra* note 11, at 1:11:20-1:13:50.

46. *Friedman*, 618 F.3d at 149. In the documentary, Arnold stated in a home movie filmed right before the plea that this was one of his reasons for pleading guilty. CAPTURING MOVIE, *supra* note 11, at 1:11:04-1:11:10; *see also id.* at 1:00:47-1:01:14 & 1:02:14-1:02:18. After the guilty plea, however, Arnold was pressured to admit to the police that he had abused eighty children. *Friedman*, 618 F.3d at 149. Soon afterwards, *Newsday* leaked Arnold's admissions. *Id.*; *see also* Alvin E. Bessent, *Teen Faces 37 New Sex Charges*, NEWSDAY, June 24, 1988.

47. *Friedman*, 618 F.3d at 149.

48. *Id.* The judge made this threat apparently before she had seen any of the evidence against Jesse. *Id.* In the movie, Justice Boklan stated that "[t]here was never a doubt in [her] mind" as to Jesse's guilt. *Id.* (citing CAPTURING MOVIE, *supra* note 11, at 31:28-31:32).

wished to plead guilty.[49]

On December 20, 1988, Jesse pled guilty to seventeen counts of sodomy in the first degree, four counts of sexual abuse in the first degree, and other lesser counts.[50] On January 24, 1989, Jesse was sentenced to an aggregate term of six to eighteen years in prison.[51]

In 1990, Arnold and Jesse both signed an "Open Letter," that challenged the tactics that the police used to obtain admissions from the children.[52] Throughout the letter, they alleged that detectives "grilled, coerced, pressured, lied to, and victimized children to encourage them to falsely accuse" the Friedmans of wrongdoing.[53]

After spending thirteen years in prison, Jesse was released on parole in December 2001.[54] In 2000, "documentary filmmaker Andrew Jarecki began investigating the Friedman case for a possible film. Jarecki interviewed members of the Friedman family, many of the former . . . students" and their

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49. *Id.* at 150 (quoting Panaro Aff. ¶ 12). The Second Circuit criticized Jesse's attorney for requiring Jesse to admit his guilt directly to the attorney before he would allow him to plead guilty. *See id.* In a footnote, the court stated that the attorney's actions could not be reconciled with both the federal and New York State Constitutions, which allow a defendant to plead guilty without explicitly admitting his guilt so long as the plea itself is knowing and voluntary. *Id.* at 150 n.1 (citing North Carolina v. Alford, 400 U.S. 25, 37-38 (1970) and People v. Serrano, 206 N.E.2d 330, 333 (N.Y. 1965)).

50. *Id.* at 150. Both the district court and the Second Circuit refer to December 20th—the date of the guilty plea—as the judgment date. *Id.* at 151; *Friedman*, No. 06-CV-3136, interim order at 5. However, under New York law, the judgment date is the sentencing date, N.Y. CRIM. PROC. LAW § 1.20(15) (McKinney 2003), here, January 24, 1989. *Friedman*, No. 06-CV-3136, interim order at 7.

51. Alvin E. Bessent, *Teen Gets 6-18 Years for Child Sex Abuse*, NEWSDAY, Jan. 25, 1989, at 35. At sentencing, both Jesse and his attorney claimed that Arnold sexually abused him as a child. *Id.* Soon after the guilty plea, Jesse gave a televised interview with Geraldo Rivera in which he repeated his admission of guilt and reiterated that his father had abused him. *Friedman*, 618 F.3d at 150.

52. *Friedman*, No. 06-CV-3136, interim order at 4-5.

53. *Id.* at 5.

54. *Friedman*, 618 F.3d at 151. Upon his release, Jesse was classified a level III "violent sexual predator" under the Sex Offender Registration Act. *Id.*

parents, law enforcement personnel, the judge, and attorneys involved in the case.[55] "After a three-year investigation, Jarecki created *Capturing the Friedmans* . . . ."[56] In the movie, an anonymous student, who was referred to in one of the indictments as "Gregory Doe," claimed that he was subject to hypnosis prior to recalling abuse.[57] Jesse viewed the film for the first time on January 10, 2003.[58]

On January 7, 2004, Jesse moved to vacate the judgment of conviction under New York Criminal Procedure Law § 440.10(h).[59] Jesse claimed that the movie brought to light three new pieces of evidence: (1) some eyewitnesses initially denied that petitioner sexually abused them; (2) "detectives used interrogation methods known for eliciting false accusations"; and (3) the hypnosis of at least one accuser before he made any accusations.[60] Jesse "argued that, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), he was entitled to the disclosure of [this exonerating material] prior to the entry of his guilty plea."[61] Jesse did not raise an actual innocence claim. The Nassau County Court denied the motion[62] and, on March 10,

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55. Friedman v. Rehal, No. 06-CV-3136, 2008 WL 89625, at *1 (E.D.N.Y. Jan. 4, 2008) (citations omitted).

56. *Id.* One of the more compelling aspects of the film was the large number of home movies that the Friedman family provided to the film makers. These home movies provided a behind-the-scenes look at how the family members (which included Jesse's mom and two older brothers) struggled with the allegations and the criminal prosecution.

57. *Id.* at 151; CAPTURING MOVIE, *supra* note 11, at 1:20:11-1:21:00. Both the student's therapist, as well as the prosecutor, denied that any hypnosis was ever used. *Friedman*, 618 F.3d at 151. For his part, Jesse claimed that other evidence showed that hypnosis was used more broadly. *Id.*

58. *Friedman*, 618 F.3d at 151. Jarecki allowed Jesse to view the underlying investigatory materials in July 2003. *Id.* The movie itself was released in theaters on May 30, 2003. Carol Strickland, *A Family in Great Neck, and the Secret Life it Led*, N.Y. TIMES, June 8, 2003.

59. *Friedman*, 2008 WL 89625, at *2. This section provides, in relevant part: "At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . (h) [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." N.Y. CRIM. PROC. LAW § 440.10(h) (McKinney 2011).

60. *Friedman*, 618 F.3d at 151.

61. *Id.*

62. *Id.* The state court denied the claim on the merits, relying on *United*

2006, the New York Appellate Division denied Jesse's application for leave to appeal.[63]

On June 23, 2006, Jesse filed a petition for a writ of habeas corpus.[64] He asserted that his due process rights were violated based on the prosecution's failure to disclose the three categories of newly discovered evidence.[65] On July 20, 2007, the district court concluded that the claims based on the first two types of evidence—the initial denials and the police interrogation techniques—were untimely under the one-year statute of limitations for filing a habeas petition under 28 U.S.C. § 2244(d)(1)(D).[66] On January 4, 2008, the district court held that the third claim based on the hypnosis was also untimely.[67] However, the district court granted Jesse a certificate of appealability.[68]

In an opinion written by District Judge Edward R. Korman, sitting by designation, the Second Circuit affirmed.[69]

States v. Ruiz, 536 U.S. 622 (2002), which held that the *Brady* rule does not apply to impeachment evidence in guilty plea context. *Id.*

63. *Id.* Jesse also sought leave to appeal from the New York Court of Appeals, which was denied. *Id.* at 152 n.3. However, as the Second Circuit noted, Jesse had exhausted his remedies after leave was denied from the Appellate Division. *Id.* at 151.

64. *Id.*; *Friedman*, 2008 WL 89625, at *1.

65. Friedman v. Rehal, No. 06-CV-3136, interim order at 5-6 (E.D.N.Y. July 20, 2007).

66. *Id.* at 2. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner has one year from the date his conviction becomes final to file a petition for habeas relief. 28 U.S.C. § 2244(d) (2006). The statute does provide some exceptions, however, including situations where petitioner could not have previously learned the factual basis of the claim through the exercise of due diligence. *Id.* § 2244(d)(1)(D). The district court concluded that Jesse was on notice of this type of evidence before the movie, as reflected in his lawyer's knowledge of the Meyer's videotape and the information contained in the Open Letter. *Friedman*, No. 06-CV-3136, interim order at 10-11.

67. *Friedman*, 2008 WL 89625, at *2-6. The court concluded that petitioner did not file his petition within one year of January 3, 2003, the date when he learned the factual basis for the claim. *Id.* at *7.

68. *Friedman*, 618 F.3d at 152. In a habeas proceeding, a petitioner can only bring an appeal from a denial if either the district court or the circuit court grants a certificate of appealability. *See* 28 U.S.C. § 2253. To obtain one, a petitioner must show a "substantial denial of a constitutional right." *Id.*

69. *Friedman*, 618 F.3d at 145, 161.

The court opened its opinion with a "lengthy discussion of the facts and circumstances"[70] of the case, relying upon "the facts as alleged in the petition, as well as the affidavits and supporting materials, including the transcript used in . . . *Capturing the Friedmans*, and the memoranda of interviews taken in preparation for the film."[71] This discussion covered the facts as set forth above, but went one step further. In several instances, the court presented Jesse's allegations of police, prosecutorial, and judicial misconduct as accepted fact. For instance, the court flatly stated that, "[d]etectives generally entered an interview with a presumption that a child had been abused and refused to accept denials of abuse."[72] Similarly, the court stated, as true, that Justice Boklan had threatened consecutive sentences if Jesse went to trial and was convicted.[73] The court, however, provided no record citation for this factual assertion. Rather, it seems to have been a fact that Jesse's trial attorney alleged in his affirmation.[74] The factual recitation served its intended purpose: it cannot be denied after reading

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70. *Id.* at 161 (internal quotations omitted).

71. *Id.* at 145. In the end, the court limited the "new and material evidence" to the "post-conviction consensus within the social science community that [the] suggestive" techniques used here can induce false allegations. *Id.* at 160 (internal quotations omitted).

72. *Id.* at 146.

73. *Id.* at 149. In general, a guilty plea is rendered involuntary if a judge threatens the defendant that she will impose a far more severe sentence should the defendant reject the plea offer and proceed to trial. People v. Wilson, 666 N.Y.S.2d 164, 165-66 (App. Div. 1997) (guilty plea coerced where judge promised to impose sentence almost four times greater than the plea offer); People v. Beverly, 528 N.Y.S.2d 450, 450 (App. Div. 1988) (guilty plea coerced where, prior to plea, court told defendant that if he went to trial, court probably would sentence him to "the maximum sentence, 'on top of' the sentence for another crime"); People v. Christian, 527 N.Y.S.2d 1020, 1020 (App. Div. 1988) ("A defendant may not be induced to plead guilty by the threat of a heavier sentence if he decides to proceed to trial . . . ."); People v. Griffith, 435 N.Y.S.2d 767, 768 (App. Div. 2d Dep't 1981) (guilty plea coerced by the trial court's "explicit threat of a heavier sentence should he choose to proceed to trial").

74. In the paragraph after the court discussed the threat, it focused on the impact of the threat. *Friedman*, 618 F.3d at 150. At that point, the court cited to trial counsel's affirmation. *Id.* Since there is no specific record citation for the threat, it is fair to deduce that the threat itself, supposedly made to trial counsel, was alleged in the same affirmation.

the compelling presentation that the Friedman case had every mark of a criminal investigation gone wrong.

After setting forth the background of the case (without a specific focus on the actual legal claim raised), the court turned to the *Brady* claim.[75] On appeal, Jesse only advanced the *Brady* claim relating to the evidence of hypnosis.[76] As did the district court, the Second Circuit concluded that this claim was untimely because Jesse did not file his petition within one year of the date that he learned the factual predicate for the claim, namely when he first watched the movie.[77]

After finding the petition untimely, the court first introduced the notion of "actual innocence" into the case.[78] It noted that "[a] claim of actual innocence could provide a basis for excusing this late filing even though petitioner pled guilty."[79] The court decided, however, not to "resolve" this issue because it concluded that the underlying *Brady* claim had no merit.[80]

The court did not end its opinion there. After it concluded that the claim was both procedurally defective and substantively meritless, the court took an extraordinary turn and "voic[ed] some concern regarding the process by which the petitioner's conviction was obtained."[81] The court then engaged in a lengthy analysis of what it viewed as serious problems with the evidence in Jesse's case.[82] The court detailed the "[v]ast moral panic" surrounding large-scale child abuse allegations that engulfed the country in the late-1980s and

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75. *Id.* at 151.

76. *Id.* at 152.

77. *Id.* The court found that, once the time was tolled for the periods in which Jesse first sought relief in state court, the petition was filed three months late. *Id.*

78. *Id.*

79. *Id.* (citing Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004)).

80. *Id.* The court concluded that *Ruiz* barred relief, and, to the extent that the hypnosis could potentially be considered "exculpatory" *Brady* material, there was no clearly established Supreme Court precedent providing that *Brady* material must be turned over prior to a guilty plea. *Id.* at 153-55.

81. *Id.* at 155.

82. *Id.* at 155-62.

early-1990s.[83] After discussing the many problems surrounding the interviewing techniques used to obtain evidence of abuse in these large-scale abuse cases,[84] the court stated that, "viewed in its proper historical context, petitioner's case appears as merely one example of what was then a significant national trend."[85] It was a "heater case" where "the criminal process often fails."[86] The police appeared "unfazed by the lack of physical evidence" and "the prosecution allowed itself to get swept up in" the moral panic.[87]

The court stated that Jesse had "come forward with substantial evidence that flawed interviewing techniques were used" to obtain a massive amount of allegations.[88] Jesse "never had an opportunity to explore how the evidence against him was obtained."[89] To the contrary, all parties involved in the case put pressure on him to plead guilty and, based on the moral panic and the judge's admitted feelings on the case, the chances of a fair trial were slim.[90] In contrast to cases where the court can "take comfort" in a verdict after trial, the "extraordinarily suspect" evidence in the case was "never subjected to vigorous cross-examination" or judged by a "properly instructed jury."[91] In this way, the court described Jesse's case as "unlike other appeals which raise concerns about the quality of the evidence and the guilt of the defendant."[92]

The court then focused on how a habeas court should

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83. *Id.* at 155.

84. *Id.* at 156-57.

85. *Id.* at 157-58.

86. *Id.* at 158 (quoting Susan Bandes, *The Lessons of* Capturing the Friedmans*: Moral Panic, Institutional Denial and Due Process*, 3 J.L. CULTURE & HUMAN. 293, 310 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=781585) (internal quotation marks omitted).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

proceed when faced with a claim of actual innocence.[93] In framing its analysis, the court quoted from a seminal article by former Second Circuit Judge Henry Friendly, who opined that, in an "unusual case of the innocent man," a habeas court should be more concerned about exercising its equitable power rather than feel "burdened by so much dross in the process."[94] Nevertheless, the court noted that whether or not a free-standing actual innocence claim under the federal Constitution "exists [remains] an open question" in the Supreme Court.[95] While the Court has assumed *arguendo* at times that such a claim may exist, it has "not[ed] the difficult questions such a right would pose and the high standard any claimant would have to meet."[96]

The Second Circuit stated that, even if it assumed that such a right existed and that Jesse could meet the high standard, the court could not reach the issue since the actual innocence claim was unexhausted.[97] The court noted that Jesse may still have a remedy in state court as some New York State courts have concluded that an actual innocence claim may rely on the New York State Constitution.[98] The court believed that

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93. *See id.* at 159.

94. *Id.* (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970)). The full quotation contained in *Friedman* is:

> A remedy that produces no result in the overwhelming majority of cases, . . . an unjust one to the state in much of the exceedingly small minority, and a truly good one only rarely, would seem to need consideration with a view to caring for the unusual case of the innocent man without being burdened by so much dross in the process.

Id. (quoting Friendly, *supra*) (alteration omitted).

95. *Id.* (citing Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009)).

96. *Id.* (quoting *Osborne*, 129 S. Ct. at 2321) (internal quotation marks omitted).

97. *Id.* "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that: the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A) (2006).

98. *Friedman*, 618 F.3d at 159 (citing cases). *See infra* notes 222-53 and

Jesse's case "may be one in which the New York courts may be particularly sympathetic . . . ."[99]

Despite the legal impediment to relief, the court believed that it still had options to right the injustice. The court pointed to the district attorney's "continuing ethical obligation . . . to seek justice."[100] Relying upon a comment in the New York Rules of Professional Conduct, the court stated that prosecutors are required "to take reasonable remedial measures when it appears likely that an innocent person was wrongly convicted."[101] The comment provides further: "[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."[102]

The court stated that, under that standard, Jesse had provided "new and material evidence" that suggested a "reasonable likelihood" that he was wrongly convicted.[103] The court emphasized that "[o]nly a reinvestigation of the underlying case or the development of a complete record in a collateral proceeding can provide a basis for determining whether petitioner's conviction should be set aside."[104] The court "hope[d]" that, even if the "current Nassau County District Attorney, who was not responsible for the investigation and prosecution of Jesse Friedman," continued to oppose collateral relief, she would "undertake the kind of complete review of the underlying case" required under the ethical rules.[105]

Remarkably, only three days after the opinion was issued,

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accompanying text.

99. *Id.*

100. *Id.*

101. *Id.* (quoting N.Y. RULES OF PROF'L CONDUCT R. 3.8 cmt. 6B (2009)) (internal quotation marks omitted).

102. *Id.* (emphasis added).

103. *Id.* at 159-60.

104. *Id.* at 160.

105. *Id.*

Nassau County District Attorney Kathleen Rice agreed to reinvestigate the case.[106] Ronald Kuby, one of Jesse's lawyers, summed up the decision best when he stated:

> I've never seen the U.S. Court of Appeals for the Second Circuit criticize a district attorney's office and police practices with such vehemence—nor have I ever seen them so vocally advocate for a reexamination of a case, ... I've lost a lot of cases in the Second Circuit, but I've never lost one this well.[107]

II. The Second Circuit Was Justified In Using Its Equitable Powers to Call for a Reinvestigation of the Case Out of Its Concern that Jesse May Be Actually Innocent

While truly remarkable, the Second Circuit's opinion in *Friedman* does raise some questions. The court engaged in a detailed analysis of the actual innocence claim even though it had concluded that the petition was procedurally defective, the underlying claim was meritless, and there was a legal bar to the court granting relief to the petitioner. Under such circumstances, it must be asked whether it was appropriate for the court to even consider the actual innocence claim.

The appropriateness of the court's actions was not absent from the opinion itself. In fact, this question was expressly raised in the concurring opinion of Judge Rena Raggi.[108] In her brief concurrence, Judge Raggi questioned whether the court

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106. *See* Andrew Keshner, *Rice Picks Advisers for Review of Friedman Child Sex Abuse Case*, N.Y. L.J., Nov. 9, 2010, at 1. At the time of the announcement, Rice was running for New York State Attorney General. Mark Hamblett, *Court Faults Abuse Prosecution but Rejects Petition for Habeas*, N.Y. L.J., Aug. 17, 2010, at 1. Any concern, however, that her announcement was political was alleviated in November 2010 when she appointed a diverse advisory panel of experts that included Barry Scheck of the Innocence Project, Susan Herman, a criminal justice professor at Pace University, and Mark Pomerantz, a well-known New York trial attorney. Keshner, *supra*.

107. Hamblett, *supra* note 106.

108. *Id.* at 161 (Raggi, J., concurring).

should have engaged in its "lengthy discussion of the facts and circumstances that Friedman asserts led to his conviction, much less assume the truth of those facts or the misconduct of police officers, prosecutors, defense counsel, and the presiding state court judge before a hearing."[109] Nonetheless, Judge Raggi did agree that "the facts alleged are disturbing and may well warrant further inquiry by a responsible prosecutor's office."[110]

The court responded to her concerns in the main opinion. After pointing out that all three panel members did agree that a reinvestigation was warranted, the court stated that it would prefer for the facts to be developed at a hearing.[111] It lamented, however, that it simply did not have the power to order it over the objection of the district attorney, who refused to waive the defense of statute of limitations.[112]

Nevertheless, the court emphasized that its purpose in engaging in the lengthy discussion of actual innocence was "to make the case that a 'further inquiry by a responsible prosecutor's office' is justified despite a guilty plea entered under circumstances which clearly suggest that it was not voluntary."[113] It concluded, "an appellate court faced with a record that raises serious issues as to the guilt of the defendant and the means by which his conviction was procured, yet unable to grant relief, is not obligated to become a silent accomplice to what may be an injustice."[114]

Thus, the court viewed the purposes of its discussion as two-fold: to make the case for a reinvestigation and to voice its concern about a possible injustice. But it was not any type of injustice. It is clear from the decision that the injustice here was the potential actual innocence of Jesse Friedman.

Although the manner in which it proceeded was unorthodox, the court's focus on whether there had been an

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109. *Id.*
110. *Id.*
111. *Id.* at 160-61.
112. *Id.* at 161.
113. *Id.*
114. *Id.*

injustice was justified based on the central role that actual innocence plays in habeas law. Further, the call for a reinvestigation was a creative and prudent step forward for actual innocence cases.

A. *The Call for a Reinvestigation Carefully Balanced the Equitable Principles Present in Habeas Jurisprudence*

The history of the writ of habeas corpus has been "inextricably intertwined with the growth of fundamental rights of personal liberty. . . . [I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[115] "[H]abeas corpus is, at its core, an equitable remedy."[116] Over the years, habeas courts "acquired 'enormous flexibility and power.'"[117] In this regard, the habeas corpus statutes provide that a court entertaining an application for a writ of habeas corpus shall "dispose of the matter as law and justice require."[118]

At this point, there can be no doubt that actually innocent people are suffering intolerable restraints. "Legal and scientific studies clearly establish that the conviction and execution of innocent Americans does occur."[119] Since the dawn of the DNA era in the late 1980s, over 250 people have been exonerated of

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115. Fay v. Noia, 372 U.S. 391, 401-02 (1963).

116. Schlup v. Delo, 513 U.S. 298, 319 (1995).

117. Segal, *supra* note 20, at 230 (quoting Max Rosenn, *The Great Writ: A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 353 (1983)).

118. 28 U.S.C. § 2243 (2006).

119. Segal, *supra* note 20, at 225 (citing a "conservative study" that estimated almost 10,000 innocent citizens are convicted each year); Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 377 & n.154 (2001-2002) (listing articles detailing numerous wrongful convictions). *See also* Mourer, *supra* note 20, at 1283-84; Berg, *supra* note 23, at 121 ("We now know that we convict innocent people of crimes, including murder, and we know that we sometimes sentence innocent people to death. The American public now believes that we execute innocent people, and the unease about the specter of this happening has reached the chambers of the Supreme Court . . . .") (quoting Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 63 (2003)).

serious crimes due to new and material evidence.[120] "We now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted of capital crimes with some frequency."[121] It cannot be denied that "depriving the innocent of life and liberty completely undermines the public's confidence in our criminal justice system."[122]

And the federal courts have a critical role in ensuring protection of the innocent. "[N]ot only should the innocent defendant not be incarcerated or executed—that is patently obvious—but it is a responsibility of the federal courts to see that this does not occur."[123] One district court judge in New York has stated that "[i]f there is *any* core function of habeas corpus—any constitutionally required minimum below which the scope of federal habeas may not be reduced—it would be to free the innocent person unconstitutionally incarcerated."[124] "The very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected."[125]

Thus, federal courts in habeas cases should exercise their broad equitable powers in such a way as to ensure that innocent persons do not suffer unjust punishment. The call for reinvestigation is just such an equitable response. Notably, even in her concurrence, Judge Raggi did not object to a call to

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120. David Wolitz, *supra* note 22, at 1028.

121. United States v. Quinones, 196 F. Supp. 2d 416, 420 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

122. Segal, *supra* note 20, at 236 (citing Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute of Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2136 (2002)).

123. Sussman, *supra* note 119, at 367-68 (quoting Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 430 (1990-1991)) (internal quotation marks omitted).

124. Alexander v. Keane, 991 F. Supp. 329, 338 (S.D.N.Y. 1998). *See also* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 248, 323 (1988) ("Although the concept of 'actual innocence' has not explicitly played a part in federal post-conviction jurisprudence until recently, it is obvious that an enlightened system of justice should not tolerate continued incarceration of one who is demonstrably innocent.").

125. Harris v. Nelson, 394 U.S. 286, 291 (1969).

reinvestigate the case.[126]

The call for a reinvestigation appropriately balances the equitable concerns present in habeas law—fairness, finality, and federalism.[127] The utility of a reinvestigation in certain cases cannot be denied, as recent history has shown that reinvestigations have led to numerous exonerations.[128] Fairness dictates that all legitimate post-conviction claims to innocence should be fully investigated to determine whether there has been an injustice. And, in our criminal justice system, the prosecution plays a vital role in ensuring that such an injustice does not occur. As the New York Court of Appeals has stated, "[p]rosecutors occupy a dual role as advocates and as public officers and, as such, they are charged with the duty not only to seek convictions but also to see that justice is done."[129] As the Second Circuit pointed out in *Friedman*, that

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126. Friedman v. Rehal, 618 F.3d 142, 161-62 (Raggi, J., concurring).

127. Daniel M. Bradley, Jr., Schlup v. Delo*: The Burden of Showing Actual Innocence in Habeas Corpus Review and Congress' Effort at Reform*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 463, 483 (1997) ("Fairness, finality, and federalism are considered the touchstone principles that guide and shape habeas jurisprudence."); *see also* Panetti v. Quarterman, 551 U.S. 930, 945 (2007) (internal citations omitted) (stating that the goals of the AEDPA were to "further the principles of comity, finality, and federalism" (quoting Miller-El v. Cockrell, 537 U.S. 322, 337 (2003))); Eric Seinsheimer, *Supreme Court Review:* Dretke v. Haley *and the Still Unknown Limits of the Actual Innocence Exception*, 95 J. CRIM. L. & CRIMINOLOGY 905, 907 (2005) ("[I]t is the precarious balance between a prisoner's right to freedom from unlawful confinement and a state's interest in comity and finality that continues to avoid simple resolution today." (citing CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 368 (6th ed. 2002))).

128. For example, the well-known Medill Innocence Project at Northwestern University, under the direction of Professor David Protess, has been able to uncover evidence through post-conviction investigation to free eleven innocent men. MEDILL INNOCENCE PROJECT, http://www.medillinnocenceproject.org/home (last visited Feb. 1, 2011); *see also* Monica Davey, *Prosecutors Turn Tables on Student Journalists*, N.Y. TIMES, Oct. 25, 2009, at A14. The Medill Innocence Project is now part of The Innocence Network, a consortium of more than fifty similar projects at journalism and law schools. *See* THE INNOCENCE NETWORK, http://www.innocencenetwork.org/members.html (last visited Feb. 1, 2011). In 2009 alone, the network's investigations led to twenty-seven exonerations. *Innocence Network Exonerations 2009*, THE INNOCENCE NETWORK, http://www.innocencenetwork.org/report09.html (last visited Feb. 2, 2011).

129. People v. Steadman, 623 N.E.2d 509, 511 (N.Y. 1993); *see also*

obligation to seek justice clearly continues after a conviction.[130] The court pointed out that the New York Rules of Professional Conduct for prosecutors do require the prosecutor to act, post-conviction, when it appears that an injustice has occurred.[131]

In fact, the Supreme Court has also discussed a prosecutor's duty to correct wrongful convictions. In *Imbler v. Pachtman*,[132] the Court explained that one of the justifications for granting absolute immunity to prosecutors lies in the fact that they have a continuing duty to correct injustices. Specifically, the Court stated:

> The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the requirements of due process, *but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction*.[133]

As can be seen, even the Supreme Court sees the obligation to reinvestigate legitimate claims of actual innocence as a continuing and fundamental aspect of a prosecutor's duty to seek justice.

The call for a reinvestigation also does not undermine a state's interest in finality. "Habeas corpus law is one of the

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Berger v. United States, 295 U.S. 78, 88 (1935) ("[The prosecution's interest] is not that it shall win a case, but that justice shall be done. As such, [the prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."); *see also* N.Y. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

130. Friedman v. Rehal, 618 F.3d 142, 159 (2d Cir. 2010).

131. *Id.* at 159 (citing N.Y. RULES OF PROF'L CONDUCT R. 3.8 cmt. 6B).

132. 424 U.S. 409, 427 n.25 (1976).

133. *Id.* (emphasis added).

most contentious areas of law because it is the only instance in which federal courts can review and overturn state court decisions without giving res judicata effect to those decisions."[134] One of the main counterbalancing forces to that power is the state's strong interest in the finality of a criminal conviction.[135] The call in *Friedman* does not run counter to that interest. It is a moderate approach that respects the finality of the conviction—the conviction remains in place—but creates the possibility that a miscarriage of justice will be corrected. Notably, there is no guarantee that the investigation will have any effect on the finality of the conviction. As Judge Raggi stated in her concurrence, no one can "predict whether the outcome of any such inquiry will be favorable to petitioner."[136] The call for reinvestigation simply provides a mechanism for further review that could lead to a more accurate conclusion.

But no matter the outcome, there will be clear societal benefits. If the prosecution investigates the case and concludes that there was an injustice, then society can be assured that, when the conviction is vacated, even the prosecution believes that justice is being served. On the other hand, if the reinvestigation leads to evidence that shows that the conviction is reliable, then public confidence in the criminal justice system will be replenished.[137]

In a similar vein, the call for a reinvestigation is fully consistent with the notions of comity and federalism. It is a hands-off approach that affirms state sovereignty[138] as it provides a state agency with full discretion to determine the extent of the investigation and whether, after further

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134. Andre Mathis, *A Critical Analysis of Actual Innocence After* House v. Bell*: Has the Riddle of Actual Innocence Finally Been Solved?*, 37 U. MEM. L. REV. 813, 815 (2007) (citing MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS 623 (5th ed. 2002)).

135. *See* Coleman v. Thompson, 501 U.S. 722, 730, 739 (1991).

136. *Friedman*, 618 F.3d at 161 (Raggi, J., concurring).

137. *See* Bradley, *supra* note 127, at 485-86 ("It is not in society's interest, however, to punish those who are completely innocent of a crime.").

138. Arleen Anderson, *Responding to the Challenges of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489, 499 (1998) ("Other commentators maintain that the concept of state sovereignty is affirmed by the states themselves adjudicating claims of actual innocence.").

investigation, the conviction should be upset.[139]

In further support of the court's actions, the call for an investigation is completely in line with current trends in the criminal justice system. As concerns for the wrongfully convicted have grown, many states and local district attorney's offices have taken steps to address these concerns.[140] One of the more significant developments has been the establishment of post-conviction investigatory units. For example, through statute, North Carolina established the North Carolina Innocence Inquiry Commission, a state agency established to "investigate and evaluate post-conviction claims of factual innocence."[141] Further, an "emerging trend" is for district attorney's offices, including the New York County District

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139. N.Y. RULES OF PROF'L CONDUCT R. 3.8 cmt. 6D (2009).

> If the prosecutor comes to know of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor should seek to remedy the injustice by taking appropriate steps to remedy the wrongful conviction. These steps may include, depending on the particular circumstances, disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor believes that the defendant was wrongfully convicted.

Id.; *see, e.g.*, People v. Calabria, 816 N.E.2d 1257, 1260 (N.Y. 2004) (Rosenblatt, J., concurring) ("If on further investigation the District Attorney shares these concerns, he has the power and, I am confident, the motivation, to take whatever steps are appropriate to do justice.").

140. Wolitz, *supra* note 22, at 1031-32 (discussing the different methods states have developed to address wrongful convictions, such as DNA testing statutes and commissions to study systemic problems leading to wrongful convictions).

141. N.C. INNOCENCE INQUIRY COMMISSION, http://www.innocencecommission-nc.gov/ (last visited Feb. 8, 2011). *See also* Larry May & Nancy Viner, *Actual Innocence and Manifest Injustice*, 49 ST. LOUIS U. L.J. 481, 482, 496 (2005) (recommending creation of special appellate court or permanent special master to consider evidence of actual innocence). Canada and England have also set up post-conviction innocence commissions. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 490-92 (2009) (discussing England's Criminal Cases Review Commission and Canada's Criminal Conviction Review Group).

Attorney's Office, to set up wrongful conviction units to potentially reinvestigate wrongful convictions.[142]

As Barry Scheck has stated, the development of these conviction integrity units within district attorney's offices "represents an extremely significant first step toward achieving serious quality assurance in the criminal justice system."[143] Prosecutors have greater access to resources that simply are not readily available to other entities,[144] in particular pro se

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142. Cyrus R. Vance, Jr., *A Conviction Integrity Initiative*, 73 ALB. L. REV. 1213 (2010) (announcing the establishment of New York County District Attorney's Office Conviction Integrity Unit); John Eligon, *Prosecutor in Manhattan Will Monitor Convictions*, N.Y. TIMES, Mar. 5, 2010, at A20. It also appears that the Kings County District Attorney's Office has such a unit. *See* People v. Cole, 765 N.Y.S.2d 477, 483 (Sup. Ct. 2003). One of the more effective units has been the one established in Dallas County, which has played a role in over twenty exonerations, including two non-DNA cases. Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2250 n.99 (2010). Another notable unit is the Post Conviction Review Section assembled in 2009 by the Harris, Texas County District Attorney to investigate credible claims of innocence. James McKinley, *Cleared, and Pondering the Value of 27 Years*, N.Y. TIMES, Aug. 13, 2010, at A12. As of July 2010, that unit had cleared two wrongfully convicted men, Michael Anthony Green and Allen Wayne Porter. Peggy O'Hare, *Odds Still Against Clearing Convicts*, HOUS. CHRON., Aug. 2, 2010, at A1.

143. Scheck, *supra* note 142, at 2256.

144. For example, in a footnote in his *Conviction Integrity* article, Scheck discusses the exoneration of Steven Phillips. *Id.* at 2250 n.101. After the exoneration, the police investigator of the prosecution's conviction integrity unit pursued a lead with police departments in other states until the investigator was able to identify the perpetrator of the crimes to which Phillips had originally pled guilty. *Id.* Similarly, in arguing why it was important for prosecutors to reinvestigate post-conviction innocence claims, Bruce Green and Ellen Yaroshefsky state that, "it will be difficult without the prosecutor's assistance to prove the defendant's innocence, because the defense will rarely have access to evidence comparable to that of the prosecution." Green & Yaroshefsky, *supra* note 141, at 502 (2009). They use the infamous case of the two defendants who were convicted, but later exonerated, of the murder of a bouncer outside the Palladium nightclub as an example. *Id.* at 502-03.

> The prosecution had access to imprisoned witnesses and other witnesses who were far more likely to speak with law enforcement authorities than with defense counsel. Evidently, the prosecutor's familiarity with some of the exculpatory evidence from having personally conducted

prisoners.[145] They have the ability to review their own files, which contains the full investigatory material gathered in every case. Prosecutors will also have better access to police departments and whatever materials they may have available in a case. Further, they will have experienced investigators on staff who can be dispatched quickly and efficiently to investigate any credible claim of innocence. In addition, as more and more district attorney's offices develop the post-conviction units and take on more cases, the prosecutors and investigators will gain an expertise in pursuing the validity of these claims.[146]

On the other hand, the existence of these units does not provide a full guarantee that credible claims will be investigated. There are strong "psychological reasons why prosecutors might be unduly skeptical of post-conviction challenges."[147] Even with the existence of the unit, there

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> aspects of the investigation was superior to that of defense counsel.

Id.

145. Green & Yaroshefsky, *supra* note 141, at 508-09 ("Prosecutors must assume this responsibility because convicted defendants generally lack the resources to uncover new evidence or to follow up effectively on their own."); Segal, *supra* note 20, at 248 ("It would appear very difficult for pro se prisoners, while incarcerated, to satisfactorily perform witness investigations, secure post-conviction DNA testing, or analyze physical evidence."); Zheng, *supra* note 122, at 2135 ("It is convenient to blame prisoners for inactivity, but prisoners generally lack the resources necessary to conduct a thorough investigation of the new evidence by themselves.").

146. *See* Wolitz, *supra* note 22, at 1033, 1075.

147. Green & Yaroshefsky, *supra* note 141, at 472, 487-88. Discussing "cognitive bias" that can affect a prosecutor in the post-conviction setting, the authors state:

> There is a significant body of social science literature about how human judgment is skewed by psychological biases, such as "confirmation bias" and "hindsight bias." Cognitive biases account for what is popularly known as "tunnel vision," the human tendency to evaluate evidence through the lens of one's preexisting expectations and conclusions.

Id.

certainly can be "a natural unwillingness"[148] for a district attorney's office to reopen a conviction that its own office obtained—either by jury verdict or guilty plea—particularly where they believe that the proper procedures were followed.[149] Indeed, in a high profile case such as *Friedman*, it would seem unlikely for the prosecution to second-guess how it handled the case where each step in the process was so carefully watched by the media and the public.[150] When a prosecutor publicly questions the reliability of the conviction in such a case, there is a fear that the public's confidence in the district attorney's office will be undermined.[151] There certainly is a potential that

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148. People v. Calabria, 816 N.E.2d 1257, 1260 (N.Y. 2004) (Rosenblatt, J., concurring).

149. Green & Yaroshefsky, *supra* note 141, at 475, 487-89.

150. Green and Yaroshefsky point out that, in the Palladium case, *see supra* note 144, allegations were made that a prosecutor's "political self-interest" may have motivated his actions in the post-conviction proceedings. Green & Yaroshefsky, *supra* note 141, at 467-70. In that case, a senior prosecutor in the New York County District Attorney's Office was assigned to reinvestigate after the defense came forward with new exonerating evidence. *Id.* at 467-68. After investigating the evidence, the prosecutor became convinced of the defendants' innocence and chose not to challenge their post-conviction motion for relief from the judgment. *Id.* at 468. This decision, however, was overruled by more senior prosecutors. *Id.*

> [A] *New York Times* article raised questions about how the district attorney made the decision to reject the senior prosecutor's recommendation to assent to the defendants' release, suggesting that the district attorney may have been motivated by political self-interest during an election year in which his opponent publicly criticized how his office had handled the case.

Id. at 469. Although the district attorney denied the allegation, *id.*, there is no doubt that high profile cases can lend themselves to such suspicions. *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816) ("The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."). One commentator has stated that, "if the state's trial system fails to protect an individual, it is important for habeas corpus to safeguard the kind of injustice that can result. In fact, historical interpretation shows that Congress enacted the Habeas Corpus Act of 1867 to protect individuals against possible state abuse." Bradley, *supra* note 127, at 487.

151. *See* Green & Yaroshefsky, *supra* note 141, at 475-76.

fear of these types of repercussions can prevent a prosecutor from taking corrective action.[152]

This is precisely why the Second Circuit's actions in *Friedman* represent such an important check on the system. The court used its equitable powers in a prudent and minimally intrusive way and asked that a significant claim of innocence be reinvestigated. It provided the proper balance between the interests of finality and federalism and a habeas court's supervisory power to protect the integrity of the state's criminal justice system.[153] Indeed, while the Second Circuit's action provided public pressure on the district attorney's office to act, it also removed pressure on the office to refrain from acting out of concern for how such action would appear to the public. In other words, the court's actions provided cover to the prosecutor to take remedial action in *Friedman*. Further, the very threat that a federal court may make a public call for an investigation may compel district attorney's offices to act on their own to avoid the stigma and embarrassment that results from such a call from a court.[154]

At the same time, there is an underlying concern that the court's call for a reinvestigation will be illusory. There is nothing that binds the prosecutor to reinvestigate the case. Further, even if the prosecution agrees to reinvestigate the

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152. Scheck, *supra* note 142, at 2237. Discussing the different reasons why a prosecutor may not turn over *Brady* material out of fear: "[f]ear is a powerful driver that can subvert almost any system or set of rules, and fear of losing cases can powerfully subvert the better natures of both prosecutors and defense lawyers engaged in an adversary system." *Id.*

153. Zheng, *supra* note 122, at 2118 (one of writ's main goals is to ensure "integrity of the criminal justice system"); Wolitz, *supra* note 22, at 1068 ("The habeas regime we constructed in the second half of the twentieth century serves the important social interest of ensuring systemic compliance to constitutional due process.").

154. In an analogous context, one commentator has stated that threat of federal habeas corpus review has "perhaps motivated state courts to conduct their proceedings in a constitutional manner." Zheng, *supra* note 122, at 2137. Similarly, another commentator has argued that the mere existence of the North Carolina Innocence Commission, which is empowered to investigate post-conviction claims of innocence, "serves to remind law enforcement authorities that 'winning' in front of a jury is not their goal; rather, bringing to justice actual criminal perpetrators is the goal." Wolitz, *supra* note 22, at 1075.

case, there will be no oversight of the reinvestigation. There is no guarantee that the reinvestigation will be thorough or meaningful.

Nonetheless, while real, these concerns do not militate against the court issuing the call. Despite the lack of oversight, criminal defendants clearly would prefer that these investigations occur. In fact, Jesse's attorney himself applauded the court for calling for the reinvestigation.[155] For an actually innocent defendant, a good faith investigation into credible evidence of innocence opens the door, even if just a crack, to the chance that justice will be done.[156] It is also true that a court is more willing to grant relief if the prosecutor joins in a defendant's post-conviction motion.[157] And it must be emphasized that a prosecutor's "mission is not so much to convict as it is to achieve a just result."[158] If done with a mind to achieving justice, a prosecutor's reinvestigation could certainly lead to an exoneration.

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155. On the other hand, there is no doubt that defense attorneys will remain somewhat skeptical of a prosecutor's agreement to reinvestigate a case. For example, after the panel of advisors for the reinvestigation was appointed, Ronald Kuby stated, "I was extraordinarily mistrustful of District Attorney Rice's sudden change from obdurate obstructer [sic] to newfound champion of justice . . . . But for once my cynicism appears to have been misplaced." Sean Gardiner, *Review Slated for Abuse Case*, WALL ST. J., Nov. 9, 2010, at A25. Presumably in an attempt to encourage prosecutors to agree to reinvestigate cases, The Innocence Project honored the Harris County District Attorney's Office for its work in its post-conviction unit. *See Innocence Project Honors District Attorney's Post Conviction Review Section*, THE CYPRESS TIMES (Oct. 14, 2010), http://www.thecypresstimes.com/article/News/Local_News/INNOCENCE_PROJECT_HONORS_DISTRICT_ATTORNEYS_POST_CONVICTION_REVIEW_SECTION/34865.

156. After pointing out that the Kings County district attorney had established a section to establish post-conviction claims of innocence, a trial level judge noted that he was aware of several cases in Kings County where the prosecution had requested the court to vacate a conviction based upon what was later determined to be an unjustified conviction. People v. Cole, 765 N.Y.S.2d 477, 483 (Sup. Ct. 2003); *see also* People v. Calabria, 816 N.E.2d 1257, 1260 (N.Y. 2004) (Rosenblatt, J., concurring).

157. Green & Yaroshefsky, *supra* note 141, at 486-87.

158. People v. Zimmer, 414 N.E.2d 705, 707 (N.Y. 1980). *See also* Green & Yaroshefsky, *supra* note 141, at 505 ("Not only does the executive branch have a constitutional obligation to free the innocent, it has a moral responsibility to do so.").

Thus, the Second Circuit's call for a reinvestigation was a creative, minimally intrusive, and meaningful step towards addressing the persistent problem of wrongful convictions.

B. *Actual Innocence Is a Central Component of Habeas Law*

The more controversial aspect of the Second Circuit's decision in *Friedman* was the court's focus on Jesse's claims of innocence. Even though the call for a reinvestigation may have been justified, that call was only made after a lengthy discussion of the facts and circumstances of Jesse's case. But it must be remembered that the actual legal claim raised in the petition was both procedurally defective and substantively meritless. Further, the claim itself did not require the court to engage in a "lengthy discussion of the facts and circumstances" of the case. The *Brady* claim failed for purely legal reasons—impeachment evidence does not justify relief under *Brady* in the plea context and the claim otherwise did not meet the standard for granting habeas relief under 28 U.S.C. § 2254(d). Despite these clear logistical problems, the *Friedman* court engaged in a lengthy discussion of the petitioner's potential innocence.

Nevertheless, the Second Circuit headed down a proper path in making actual innocence a central focus of the decision.

> [C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected . . . in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[159]

Following that principle, the Supreme Court has clearly provided that actually innocent persons "should be afforded certain protections in order to 'balance the societal interests in

159. Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.'"[160] As one commentator has stated, "[i]nnocence is now unquestionably relevant to federal habeas corpus review."[161]

In his highly influential article from 1970, Second Circuit Judge Henry Friendly urged that actual innocence play a central role in habeas corpus jurisprudence.[162] The article was a response to the expansion of habeas corpus that occurred after the Supreme Court's seminal decision in *Brown v. Allen*,[163] which brought several federal constitutional challenges under the umbrella of federal court habeas review of state court convictions.[164] Judge Friendly complained that, through this expansion of the doctrine, "the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime."[165] He suggested that, before a federal court should entertain a habeas petition, a petitioner must "supplement[ ] his constitutional plea with a colorable claim of innocence."[166] He defined a colorable claim:

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160. Sussman, *supra* note 119, at 378 (quoting *Schlup*, 513 U.S. at 324 (1995)). *See also* Engle v. Issacs, 456 U.S. 107, 135 (1982) ("In appropriate cases [the principles of finality and comity] must yield to the imperative of correcting a fundamentally unjust incarceration.").

161. Sussman, *supra* note 119, at 378. *See also* May & Viner, *supra* note 141, at 488 ("In these limited circumstances [i.e. when a state court is unwilling or barred from considering actual innocence claims], federal courts should seriously consider actual innocence claims so that the general fidelity and respect for law, which is clearly an important federal issue, is not undermined.").

162. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142, 150, 160 (1970-1971). In fact, the influence of the article is still being felt today as even the *Friedman* court cited to the article to justify its discussion of petitioner's actual innocence. *See* Friedman v. Rehal, 618 F.3d 142, 159 (2d Cir. 2010).

163. 344 U.S. 443 (1953). *Brown* actually was three cases heard together: *Brown v. Allen*, *Speller v. Allen*, and *Daniels v. Allen*.

164. Friendly, *supra* note 162, at 143-45; *see also* Zheng, *supra* note 122, at 2116-17 (discussing the expansion of the writ in the 1960's after the *Brown* decision).

165. Friendly, *supra* note 162, at 145.

166. *Id.* at 142.

> The petitioner for collateral attack must show a fair probability that, in light of all of the evidence, including that alleged to have been illegally admitted (but with due regard to any reliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.[167]

Ironically, while Judge Friendly suggested a focus on actual innocence as a way to limit habeas review, notions of actual innocence have actually been used to *expand* the writ's availability. Over the years, several different types of actual innocence theories have come into existence: (1) actual innocence as a "gateway" claim to overcome a procedural default to challenge a conviction;[168] (2) actual innocence "to the death penalty" as a "gateway" claim to overcome a procedural default to challenge the imposition of a death sentence;[169] and (3) a freestanding actual innocence claim.[170] As explained below, two of these actual innocence claims—the first of the gateway claims and the freestanding actual innocence claims—could have easily been applied to Jesse's case. Before engaging in that analysis, it is important to set forth the general principles of these two innocence claims.

1. Actual Innocence Gateway Claim

Petitioner's face a variety of procedural barriers when seeking habeas relief. Many habeas petitioners find their claims procedurally defaulted based on a failure to properly present the constitutional claim in state court.[171] These

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167. *Id.* at 160.

168. Schlup v. Delo, 513 U.S. 298, 315-16 (1995); Murray v. Carrier, 477 U.S. 478, 496 (1986).

169. Sawyer v. Whitley, 505 U.S. 333 (1992).

170. Herrera v. Collins, 506 U.S. 390, 401 (1993). *See generally* Jackson v. Virginia, 443 U.S. 307 (1979).

171. *See* Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977). These

procedural bars are typically justified out of concerns for federalism and comity to state courts.[172] In order to obtain federal review of a procedurally-defaulted claim, a habeas petitioner must establish cause and prejudice before obtaining relief.[173]

In the 1986 case *Murray v. Carrier*,[174] the Supreme Court implemented the actual innocence exception to the procedural default rule. The petitioner in *Murray* did not properly exhaust the constitutional claim as he failed to raise it on direct appeal in state court.[175] The Court concluded that the claim was procedurally defaulted and that the petitioner had not shown cause for the default.[176] The Court went on to state that "[i]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration."[177] To ensure that this occurs, the Court provided that, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural

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procedural barriers include: the exhaustion doctrine—a petitioner must utilize all available remedies to assert his constitutional claim in state court, *see* 28 U.S.C. § 2254(b)(1); Baldwin v. Reese, 541 U.S. 27, 29 (2004)—and the independent and adequate state law ground—a constitutional claim is barred from federal review where a state court rejected the claim based on an independent and adequate state procedural rule, *see* Coleman v. Thompson, 501 U.S. 722, 729-31 (1991).

172. *Coleman*, 501 U.S. at 730-31.

173. Engle v. Isaac, 456 U.S. 107, 129 (1982). "Cause" is defined as "whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray*, 477 U.S. at 488. "Prejudice" is not as well-defined, but focuses on "actual prejudice" to the petitioner resulting from the constitutional error. *Engle*, 456 U.S. at 135. While difficult to quantify, the "actual prejudice" standard is at least stricter than the "plain error" standard courts use on direct appeal in criminal cases. *Id.*

174. 477 U.S. 478 (1986).

175. *Id.* at 482-83, 490-93.

176. *Id.* at 492.

177. *Id.* at 495 (quoting *Engle*, 456 U.S. at 135) (internal quotation marks omitted).

default."[178]

In the 1993 case *Schlup v. Delo*,[179] the Supreme Court fully defined the contours of this new "gateway" actual innocence claim. A gateway innocence claim must be grounded in "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[180] Once it is determined that the evidence is reliable, a habeas court must consider the actual innocence claim in light of the evidence in the record as a whole.[181] If the court concludes that, in light of all of the evidence, it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," a petitioner may proceed through the gateway, and the court can address the merits of the underlying claim.[182]

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which drastically altered habeas law to place significant restrictions on the availability of the writ to state prisoners.[183] One of the main restrictions was the imposition of a one-year statute of limitations upon the filing of a federal habeas petition.[184] The statute provides different dates from which the time period can begin to run: either "the conclusion of direct review";[185] "the date on which the impediment to filing" the claim was removed;[186] "the date on which the constitutional right asserted was initially recognized

178. *Id.* at 496. On the same day as *Murray*, the Supreme Court decided *Kuhlman v. Wilson*, 477 U.S. 436 (1986). The case concerned the situations under which a habeas court could consider a claim in a second or successive petition that had been raised in an earlier petition. *Id.* at 438. Relying heavily on Judge Friendly's article, a plurality of the Court concluded that such claims are barred from further review unless a petitioner "supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454 (plurality opinion).

179. 513 U.S. 298 (1995).

180. *Id.* at 324.

181. *Id.* at 327-28.

182. *Id.* at 327.

183. Zheng, *supra* note 122, at 2111-14.

184. *Id.* at 2113; *see* 28 U.S.C. § 2244(d) (2006).

185. 28 U.S.C. § 2244(d)(1)(A).

186. *Id.* § 2244(d)(1)(B).

by the Supreme Court";[187] or "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence."[188] The statute also allows tolling of the time period during which a properly filed application for post-conviction relief was pending in state court.[189] Although the statute does not provide an actual innocence exception to the statute of limitations period, the Second Circuit has extended the "gateway" innocence claim to excuse a late filing from the one-year statute of limitations.[190]

2. Freestanding Actual Innocence Claim

A freestanding actual innocence claim is rooted in several different concepts: substantive due process,[191] procedural due process,[192] and the Cruel and Unusual Punishment Clause.[193] Despite the broad foundation, the Supreme Court has yet to establish a free-standing actual innocence claim.[194] In fact, no federal court has ever granted relief on such a claim.[195] There is a strong indication from Supreme Court case law, however, that such a claim does exist. In fact, as a result of a 2009 decision from the Court, it would appear that the existence of

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187. *Id.* § 2244(d)(1)(C).

188. *Id.* § 2244(d)(1)(D).

189. *Id.* § 2244(d)(2).

190. Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004).

191. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 431-35 (1993) (Blackmun, J., dissenting); *In re* Davis, 565 F.3d 810, 829 (11th Cir. 2009) (Barkett, J., dissenting); *In re* Davis, No. CV409-130, 2010 WL 3385081, at *43 (S.D. Ga. Aug. 24, 2010); May & Viner, *supra* note 141, at 494-95; Mourer, *supra* note 20, at 1298, 1306-09.

192. Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 237-39 (2003).

193. *See, e.g.*, *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting); *In re Davis*, 565 F.3d at 830 (Barkett, J., dissenting); Mourer, *supra* note 20, at 1298, 1309-10. *See generally In re* Davis, 130 S. Ct. 1 (2009) (Stevens, J., concurring).

194. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009).

195. Berg, *supra* note 23, at 136-37.

this type of claim has now become inevitable.[196]

The Supreme Court first addressed the question of a freestanding innocence claim in *Herrera v. Collins*.[197] The majority opinion, written by Chief Justice Rehnquist, found that a claim of actual innocence did not state an independent constitutional claim cognizable in a federal habeas petition, so long as the state allowed a defendant to obtain executive clemency based on actual innocence.[198] Nevertheless, the majority assumed for the sake of argument that such a claim could exist.[199] It stated that, for a defendant to be successful on such a claim, he would need to make an "extraordinarily high" threshold showing, which Herrera had not done.[200]

Despite the majority's opinion, a "shadow majority" of at least five of the judges *did* conclude that a freestanding actual innocence claim does exist.[201] In a concurring opinion joined by Justice Kennedy, Justice O'Connor stated, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."[202] Justice White, also concurring, "assume[d] that a persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of [a] petitioner."[203] Further, in

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196. Scheck, *supra* note 142, at 2251-52 ("There seems little doubt that if the appropriate case gets there, the Supreme Court will confirm that proof of actual innocence does state a constitutional claim.").

197. 506 U.S. 390 (1993).

198. *Id.* at 398-417.

199. *Id.* at 417.

200. *Id.* at 417.

201. *In re* Davis, 565 F.3d 810, 829 (11th Cir. 2009) (Barkett, J., dissenting); Sacco v. Greene, No. 04-CV-2391, 2007 WL 432966, at *3 (S.D.N.Y. Jan. 30, 2007); Berg, *supra* note 23, at 129; Greg Bylinksky, Herrera v. Collins*: A New Innocence Principle?*, 11 HARV. BLACKLETTER L.J. 191, 192, 199-200 (1994).

202. *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring).

203. *Id.* at 429 (White, J., concurring). Justice White's concurring opinion is most notable for the standard he set for potential freestanding claims: "petitioner . . . [must] show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could . . . [find] proof of guilty beyond a reasonable doubt.'" *Id.* (alteration in original) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)). "[M]ost courts tend to follow the standard set out in Justice White's concurring opinion for the requisite standard for free-standing actual

dissent, Justice Blackmun, joined by Justices Stevens and Souter, stated that a free-standing actual innocence claim did exist under the Due Process and Cruel and Unusual Punishment Clauses.[204] Notably, in *Schlup v. Delo*, the Supreme Court seemed to acknowledge that such a substantive innocence claim could be asserted if the evidence of innocence was "strong enough to make his execution 'constitutionally intolerable.'"[205]

It now appears, however, that the Supreme Court has thrown the door wide open to the potential of a freestanding actual innocence claim.[206] In *In re Davis*,[207] the Court considered the original writ of habeas corpus of Troy Davis.[208] In the very brief opinion, the Court ordered that "[t]he [d]istrict [c]ourt should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[209]

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innocence claims." Mathis, *supra* note 134, at 822.

204. *Herrera*, 506 U.S. at 430-46 (Blackmun, J., dissenting). In his inimical style, Justice Blackmun stated, "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." *Id.* at 430 (internal citations omitted). *See also In re Davis*, 565 F.3d at 830 (Barkett, J., dissenting) ("I do not believe that any member of a civilized society could disagree that executing an innocent person would be an atrocious violation of our Constitution and the principles upon which it is based.").

205. Schlup v. Delo, 513 U.S. 298, 316 (1995).

206. Mourer, *supra* note 20, at 1279.

207. 130 S. Ct. 1 (2009).

208. *Id.* An "original writ" is distinct from a regular petition filed under 28 U.S.C. § 2254. An original writ relies on the Supreme Court's power to consider a habeas petition under Supreme Court Rule 20.4(a), 28 U.S.C. §§ 2241(b), 1651(a), and the Court's original jurisdiction under Article III of the U.S. Constitution. *See* Byrnes v. Walker, 371 U.S. 937 (1962).

209. *In re Davis*, 130 S. Ct. at 1. The real battle in *Davis* occurred between the concurring opinion of Justice Stevens and the dissenting opinion of Justice Scalia. In dissent, Justice Scalia pointed out it would be impossible for the district court to grant relief here since its power was restricted under 28 U.S.C. § 2254(d)(1), which only allows a grant of habeas where petitioner can show that the state court "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at 2-3 (Scalia, J., dissenting) (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)). Because the question of whether a free-standing actual innocence claim exists is an open question, there was no

The district court then held a hearing on the factual matters, but denied relief.[210] Before addressing the factual matters presented at the hearing, the court indicated that it felt compelled to decide whether or not a freestanding actual innocence claim was cognizable under the Federal Constitution.[211] In an exhaustive and compelling analysis, the court concluded that the execution of an innocent person would violate the Eighth Amendment's Cruel and Unusual Punishment Clause.[212]

As can be seen in response to *Davis*, the court that was required to address the freestanding actual innocence issue concluded that such a claim does exist under the Federal Constitution.[213] This decision builds upon the prior indications from the Supreme Court that such a claim may exist upon a truly persuasive showing of innocence. As a result, "[t]here seems little doubt that if the appropriate case gets there, the Supreme Court will confirm that proof of actual innocence does state a constitutional claim."[214] The "lurking probability"[215] of

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clearly established law on this principle. *Id.* at 3. Justice Stevens disagreed. He stated that the district court could conclude that § 2254(d) did not apply to an original writ or applied in only a modified form. *Id.* at 1 (Stevens, J., concurring). He suggested that the habeas statute may be unconstitutional to the extent that it restricted "relief for a death row inmate who has established his innocence." *Id.* He further opined that a court could conclude that Supreme Court precedent does support a finding of a constitutional violation. *Id.* at 1-2 (citing *In re Davis*, 565 F.3d at 830 (Barkett, J., dissenting)).

210. *In re* Davis, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

211. *Id.* at *37-39 & n.15.

212. *Id.* at *37-43. Notably, in its decision, the district court did not address the § 2254(d)(1) question raised by Justice Scalia in his dissent. *See supra* note 209. The only reasonable conclusion to draw from this lack of analysis is that the district court believed that there was clearly established law to support its conclusion, something that Justice Stevens suggested in his concurrence. *In re* Davis, 130 S. Ct. at 1-2.

213. Davis filed a cert. petition directly with the Supreme Court, but the petition was denied. Davis v. Humphrey, 131 S. Ct. 1787 (Mar. 28, 2011).

214. Scheck, *supra* note 142, at 2251 (arguing that the Court's actions in *Davis* in conjunction with the fact that six Justices in *Herrera* had "expressly [taken] the position that truly persuasive 'freestanding' innocence claim would clearly be cognizable" supported the conclusion that the Court would conclude in the appropriate case that such a claim does exist). *See also*

this claim underscores the critical role that federal courts have in ensuring that an innocent defendant does not suffer an unjust incarceration.

Thus, the Second Circuit's actions in calling for a reinvestigation out of a concern of a possible injustice were fully justified. It carefully balanced the equitable principles present in habeas jurisprudence. It showed respect for the finality of the conviction and affirmed state sovereignty while, at the same time, sought to ensure protection of a potentially innocent petitioner. It was consistent with the current trend in our criminal justice system in which prosecutors have developed post-conviction investigatory units. Finally, the court's focus on actual innocence was in line with the expansive role that innocence plays in habeas law. In the end, the call for a reinvestigation was a prudent and reasonable approach to address a possible injustice.

III. Actual Innocence Claim Under the New York State Constitution

In *Friedman*, the court noted that Jesse still had the potential to obtain relief in state court pursuing the actual innocence claim.[216] It noted that some trial level courts in New York had acknowledged the existence of a freestanding actual innocence claim under the New York State Constitution.[217] But if this possibility of relief existed, then it could be argued that the Second Circuit should not have reached out and called for a reinvestigation of the case. In fact, a reinvestigation may not even be necessary as Jesse may be able to obtain in court the ultimate relief that a reinvestigation would have provided—an exoneration.

Even with the existence of the relatively new actual

Mourer, *supra* note 20, at 1279 (as a result of its decision *Davis*, "[f]or the first time in history, the Supreme Court . . . has come close to recognizing this reality" of a freestanding actual innocence claim).

215. Scheck, *supra* note 142, at 2251.

216. *Friedman*, 618 F.3d at 159.

217. *Id.*

innocence claim under state law, however, the call for a reinvestigation was still a necessary and important step. The call for a reinvestigation addresses the concern that, despite compelling new evidence of innocence, a defendant still may fall short of the demanding standard to establish an actual innocence claim. Under such a situation, a call for a reinvestigation would work to bolster society's confidence in the criminal justice system as it would provide an assurance that those highly credible claims of innocence have not been ignored, but instead have been fully explored.

A. *Freestanding Actual Innocence under the New York State Constitution*

In 2003 Justice John M. Leventhal, a New York State Supreme Court Justice in Brooklyn, became the first New York State judge to acknowledge the existence of a freestanding actual innocence claim under the cruel and unusual punishment clause of section 5[218] and the due process clause of section 6[219] of article I of the New York State Constitution.[220]

Justice Leventhal opened his opinion in *People v. Cole* with commentary on the meaning of a jury's verdict after trial.[221] He stated that, in "American jurisprudence," an acquittal does not necessarily mean that defendant "did not actually commit the crime," only that the prosecution had failed to prove one of its elements beyond a reasonable doubt.[222] On the other hand, a guilty verdict only indicated that the government had met its burden, but not that the defendant had, with all certainty, committed the crime.[223] After acknowledging the limitations of

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218. Utilizing the same language as the federal Constitution, section 5 provides: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." N.Y. CONST. art. I, § 5.

219. Section 6 enumerates almost all of the numerous positive rights for criminal defendants including "No person shall be deprived of life, liberty or property without due process of law." *Id.* § 6.

220. People v. Cole, 765 N.Y.S.2d 477, 484-85 (Sup. Ct. 2003).

221. *Id.* at 478.

222. *Id.*.

223. *Id.*

our criminal justice system, Justice Leventhal stated that the issue in *Cole* was "what is a court's role when" a defendant makes a claim of actual innocence in a post-conviction motion, even though the defendant's conviction was procedurally proper in every other way.[224] The court viewed its task as answering several questions, such as "what is the legal basis for the innocence claim? What criteria should a court use in determining, post judgment, the actual innocence of a defendant? If the court finds that a convicted person is in fact innocent, what is the appropriate remedy?"[225]

Justice Leventhal noted that, in *Herrera*, the Supreme Court had refused to hold that a freestanding actual innocence claim existed under the Federal Constitution, so long as the state provided a possibility of a pardon based on actual innocence.[226] Since New York provides for such a pardon, a New York inmate could not raise a claim under the Federal Constitution.[227]

The judge pointed out, however, that "[t]he New York State Constitution grants an accused greater rights than those provided in the Federal Constitution."[228] "These . . . rights were granted to an accused in order to protect an innocent person from improper conviction."[229] For example, the state of New York "affords an accused broader rights to counsel than the Federal Constitution in order to insure that 'the innocent go

224. *Id.*

225. *Id.* The judge also raised the question of whether separation of powers barred the court from considering the issue. *Id.* After reviewing the pardon process in New York, the court concluded that it remained a judicial function to: (i) "determine whether the New York State Constitution bars the conviction or the jailing of an actually innocent individual"; and (ii) "vacate a court judgment which violates the [c]onstitution." *Id.* at 539.

226. *Id.* at 484.

227. *Id.* (citing N.Y. EXEC. LAW § 19 (McKinney 2010)).

228. *Id.*; *accord, e.g.*, People v. Bermudez, No. 8759/91, 2009 WL 3823270, at *23 (N.Y. Sup. Ct. Nov. 9, 2009) ("[P]rocedural mechanism . . . for an incarcerated defendant to bring a post-conviction motion upon a claim of actual innocence" must exist under the New York State Constitution because the "[c]onstitution provides a state prisoner alleging actual innocence with greater protection than the [F]ederal [C]onstitution.").

229. *Cole*, 765 N.Y.S.2d at 484.

free.'"[230] Other state constitutional rights that have been interpreted more broadly than their federal counterparts also focus on protecting the innocent. These include the right of an accused to be present at trial,[231] the requirement of indictment by grand jury,[232] and a bar against the introduction of suggestive identification procedures.[233]

As Justice Leventhal emphasized, "[o]ur Court of Appeals has recognized that the function of a criminal prosecution and the interest of society is to convict the guilty and to acquit the innocent."[234] The broad rights ingrained in the state constitution are meant to insure that the guiltless are not placed under unnecessary restraint.[235] He concluded that "the ends of acquitting the non-guilty is an essential part of the constitution."[236]

The judge reasoned that the due process clause required that the government grant "elemental fairness" to an accused.[237] "Further, a person who has not committed any crime has a liberty interest in remaining free from punishment."[238] He held that, for these reasons, "the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the [d]ue [p]rocess [c]lause of the [s]tate [c]onstitution."[239] He also determined that the punishment of "an actually innocent person is disproportionate to the crime (or lack of crime) committed and violates the cruel and inhuman treatment clause."[240]

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230. *Id.* at 485 (quoting People v. Claudio, 629 N.E.2d 384, 386 (N.Y. 1993)).

231. People v. Mullen, 3744 N.E.2d 369, 370 (N.Y. 1978).

232. People v. Infante, 511 N.Y.S.2d 293, 296 (App. Div. 1987).

233. People v. Gee, 782 N.E.2d 1155, 1157-58 (N.Y. 2002).

234. *Cole*, 765 N.Y.S.2d at 485 (citing People v. Roselle, 643 N.E.2d 72, 75 (N.Y. 1994)).

235. *Id.*

236. *Id.*

237. *Id.* (citing People v. Vilardi, 555 N.E.2d 915, 919 (N.Y. 1990)).

238. *Id.*

239. *Id.*

240. *Id.* In line with Justice Leventhal's conclusion, courts in other

Once he had concluded that a freestanding innocence claim existed under the state constitution, Justice Leventhal turned to the standard that should be used to determine whether a defendant has made the requisite showing of actual innocence. He reviewed the differing views of what the proper standard should be for such claims and stated that the standard must balance the interests of finality, the societal interest in seeing that an innocent person not face conviction or punishment, and the interest of an individual who has not committed a crime to remain at liberty.[241]

Balancing those interests, the judge concluded that, to establish actual innocence, a defendant must demonstrate by clear and convincing evidence that no reasonable juror could convict the defendant of the crimes for which he was convicted.[242] Critically, Leventhal concluded that all credible evidence may be considered, including new evidence, whether or not that new evidence satisfies the typical factors used to judge whether it would justify a new trial.[243] On a claim of

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states had concluded that their state constitutions also provided for free-standing actual innocence claims. People v. Washington, 665 N.E.2d 1330 (Ill. 1996); Montoya v. Ulibarri, 163 P.3d 476 (N.M. 2007). *See also In re* Clark, 855 P.2d 729 (Cal. 1993); Miller v. Comm'r of Corr., 700 A.2d 1108 (Conn. 1997); State *ex rel.* Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003) (en banc); *Ex parte* Elizondo, 947 S.W.2d 202 (Tex Crim. App. 1996). Other states have reached the opposite conclusion. *See, e.g.*, Heffernan v. State, No. CR 02-239, 2002 WL 1303388 (Ark. June 13, 2002); Tompkins v. State, 994 So. 2d 1072 (Fla. 2008); State v. Placzkiewicz, 36 P.3d 934 (Mont. 2001); Pellegrini v. State, 34 P.3d 519 (Nev. 2001); State v. Byrd, 762 N.E.2d 1043 (Ohio Ct. App. 2001); State v. Ratliff, 71 S.W.3d 291 (Tenn. Ct. App. 2001); Reedy v. Wright, 60 Va. Cir. 18 (2002).

241. *Cole*, 765 N.Y.S.2d at 486.

242. *Id.*

243. *Id.* These are typically referred to as the *Salemi* factors. To constitute newly discovered evidence justifying a new trial, the evidence: 1. must be able to

> change the result if a new trial is granted; 2. . . . must have been discovered since the trial; 3. . . . could not have been discovered before the trial by the exercise of due diligence; 4. . . . must be material to the issue; 5. . . . must not be cumulative . . . ; and, 6. . . . must not be merely impeaching or contradicting the former evidence.

actual innocence a court should admit "any reliable evidence whether in admissible form or not . . . because the focus is on factual innocence and not on whether the government can prove the defendant's guilt beyond a reasonable doubt."[244]

Finally, the judge considered what the proper remedy would be, namely a dismissal of the accusatory instrument.[245] He explained that this was the appropriate remedy because a defendant who proves his innocence by clear and convincing evidence has demonstrated that "there is no reasonable juror who could convict," and therefore, there was no reason to order a new trial.[246] He pointed out that, if a new trial was ordered and the petitioner was convicted again, the second conviction would be equally unconstitutional because there existed clear and convincing evidence that no jury could reasonably convict the defendant.[247]

After Justice Leventhal's landmark decision in *Cole*, two other trial judges who have explicitly addressed the issue have concluded that such a claim may be raised.[248] Further, several

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People v. Salemi, 128 N.E.2d 377, 381 (N.Y. 1955) (quoting People v. Priori, 58 N.E. 668, 672 (N.Y. 1900)). These factors supplement and clarify the statutory right to obtain a new trial under New York law, which provides that a court should vacate a conviction where:

> New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

N.Y. CRIM. PROC. LAW § 440.10(g) (McKinney 2010).

244. *Cole*, 765 N.Y.S.2d at 486 (citations omitted).

245. *Id.* at 487.

246. *Id.*

247. *Id.*

248. People v. Bermudez, No. 8759/91, 2009 WL 3823270 (N.Y. Sup. Ct. Nov. 9, 2009); People v. Wheeler-Whichard, 884 N.Y.S.2d 304 (Sup. Ct. 2009). The *Wheeler-Whichard* court concluded:

> [I]t would be abhorrent to my sense of justice and fair play

other courts have assumed that a claim of actual innocence was cognizable, even though the defendant in those cases failed to prove he was actually innocent.[249]

B. *Does the Existence of the Freestanding Actual Innocence Claim Render a Call for Reinvestigation Unnecessary?*

It cannot be denied that the establishment of the freestanding actual innocence claim is a critical step towards addressing the fundamental problem of wrongful convictions in the New York State criminal justice system. Wrongfully convicted defendants now have a legal mechanism to raise their claims in state court—even if they are relying on newly discovered evidence that would not meet the requirements to justify a new trial. In fact, two defendants have been able to obtain relief under this newly-established claim.[250]

The existence of this new claim, however, does not render the court's action in *Friedman* unnecessary. Despite the availability of relief under the state constitution, it remains the case that the standard for obtaining that relief is exceedingly high. A clear and convincing level of proof is an exacting standard. As Justice Leventhal stated in *Cole*, such a high level

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> to do other than to vacate defendant's convictions . . . and to declare that he is innocent of this horrible murder, and to ensure he does not continue to serve any more time in prison for these convictions.

Id. at 314. These courts have also adopted Justice Leventhal's standard for establishing innocence. *Bermudez*, 2009 WL 3823270, at *22; *Wheeler-Whichard*, 884 N.Y.S.2d at 7313-14. *See also* People v. Days, No. 0469/01, 2009 WL 5191433 (N.Y. Cnty. Ct. Dec. 31, 2009). No appellate court in New York, however, has yet addressed these issues. *See generally* People v. Tankleff, 848 N.Y.S.2d 286, 303 (App. Div. 2007) (declining to address whether a freestanding claim is cognizable under the state constitution).

249. *See, e.g.*, *Days*, 2009 WL 5191433, at *13 (citing People v. Bryant, No. 3520/96, 2009 WL 3134841 (N.Y. Sup. Ct. Sept. 14, 2009); People v. Bellamy, No. 194/94, 2008 WL 3271995 (N.Y. Sup. Ct. June 27, 2008); People v. Bozella, No. 102/83, 2009 WL 3364575 (N.Y. Cnty. Ct. Oct. 14, 2009)).

250. *Bermudez*, 2009 WL 3823270, at *38; *Wheeler-Whichard*, 884 N.Y.S.2d at 313-14.

of proof is necessary to balance all of the competing interests.[251] It is a certainty, however, that some defendants will be able to come forward with compelling evidence of innocence that falls short of reaching the high standard to justify a dismissal of the accusatory instrument. And while two defendants have been able to obtain relief under this new claim, it does not alter the fact that other defendants with a real claim to innocence simply cannot reach the elevated evidentiary level. Such a reality is simply a natural result of how stringent the constitutional standard must be.

But in such a case, that compelling claim of innocence can work to undermine the public's confidence in the criminal justice system.[252] As previously stated, it is a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[253] Although a defendant in such a situation may not have enough evidence to be entitled to relief, real questions can be raised about the reliability of the conviction where a defendant has a legitimate claim to innocence. A call for reinvestigation serves to mollify such concerns without upsetting the finality of the conviction.[254] In fact, upon further investigation, additional

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251. *Cole*, 765 N.Y.S.2d at 486.

252. *See* Segal, *supra* note 20, at 249. The article discusses what one professor described as the "innocence gap"—the amount of exculpatory evidence sufficient to generate a profound sense of public discomfort with a conviction compared to the amount necessary to trigger a federal court's willingness to excuse a procedural default under *Schlup*. *Id.* It quotes an example from the same professor that suggests that a "large segment of the public undoubtedly would feel profoundly disquieted if they believed there was a fifty-fifty chance that a person whose constitutional rights may have been violated, and who was about to be executed, was actually innocent of any crime." *Id.* at 250 (quoting Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2350 (2007)). *See also* Segal, *supra* note 20, at 238 ("[P]ublic fear and distrust arises [sic] as a result of incarcerating the innocent."); Zheng, *supra* note 122, at 2136 ("Even if society can tolerate crooked prosecutors and incompetent lawyers in exchange for speedy justice as long as the system seemingly punishes the guilty, depriving the innocent of life and liberty would completely undermine the public's confidence in our criminal justice system.").

253. Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

254. *See generally* Segal, *supra* note 20, at 250-51 (habeas law that does

evidence could be discovered that would either support or undermine the innocence claim. In either situation, the goals of the criminal justice system are advanced.

Indeed, the decision in *Cole* itself provides a good example of a situation where the freestanding actual innocence claim fails to fully address a potential wrongful conviction. Although Justice Leventhal determined in *Cole* that a freestanding actual innocence claim does exist, he concluded that the defendant had not met the high standard for relief.[255] Nevertheless, his ultimate decision clearly left reason for the reader to feel uncomfortable about the reliability of the conviction.

Cole had been convicted of first-degree manslaughter based on the shooting of Michael Jennings on a street corner in Brooklyn.[256] During the initial investigation, various witnesses, including one named Fleming,[257] identified people other than the defendant as the shooter. Each of the people identified were ruled out as suspects. Two eyewitnesses, including a man named Jeffrey Campbell, eventually identified Cole as the shooter.[258] In his defense, Cole called an alibi witness.[259] In addition, he also called another eyewitness who testified that he was not the shooter.[260] So the evidence at trial, while strong,

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not take into account public's response to newly discovered evidence is "poorly calculated to assure the public that the 'ends of justice' have been achieved" and those deserving of relief have obtained it (quoting Pettys, *supra* note 252, at 2352)).

255. People v. Cole, 765 N.Y.S.2d 477, 487-88 (Sup. Ct. 2003).

256. *Id.* at 479.

257. In the decision on Cole's habeas corpus petition, the district court judge identified Fleming as Winston Fleming. Cole v. Walsh, No. 05-CV-736, 2009 WL 3124771, at *1 (E.D.N.Y. Sept. 29, 2009). The judge noted that Fleming had told the police that the shooter worked for someone named "Scotty." *Id.* The investigating detective, however, never connected Cole to "Scotty" and did not even interview "Scotty." *Id.*

258. *Cole*, 765 N.Y.S.2d at 479. It is notable that Campbell actually was originally arrested when a police officer saw him fleeing from the scene. *Id.* at 479 n.1. He was later released, however, based on evidence that he was not the shooter. *Id.* He also received a benefit in his pending criminal case in exchange for his testimony. *Cole*, 2009 WL 3124771, at *1. The other eyewitness was named Charles Ford. *Id.*

259. *Cole*, 765 N.Y.S.2d at 479.

260. *Id.*

did raise some questions about Cole's guilt.

Several years after his conviction, Cole filed his section 440.10 motion. Justice Leventhal held a hearing on the motion at which four eyewitnesses testified that Cole was not the shooter.[261] Instead, they all identified a man named "Denzel" as the shooter.[262] Each of these witnesses, however, had criminal records.[263] In addition to these witnesses, Cole presented a videotaped statement from Campbell in which he recanted.[264]

Justice Leventhal determined that Cole had failed to establish that he was innocent by clear and convincing evidence.[265] He pointed out that Cole's witnesses had credibility problems and that their testimony was inconsistent with documentary evidence and testimony from police officers at the hearing.[266] The judge rejected their testimony that they had spoken to police officers during the investigation.[267] He also faulted their delay in coming forward. He found evidence that Cole or a person on his behalf threatened and bribed witnesses.[268]

On the other hand, the judge also found significant reasons to think that there had been a wrongful conviction.[269] He pointed out the critical fact that "[a]ll the descriptions given to the police at the time of the incident do not match that of the defendant's appearance at the time of the crime."[270] He also concluded that there were reasons to believe Cole's witnesses—there was nothing in their demeanor to question their reliability and their testimony was consistent with each other

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261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* An investigator for petitioner testified that Ford had recanted to him. Cole v. Walsh, No. 05-CV-736, 2009 WL 3124771, at *3 (E.D.N.Y. Sept. 29, 2009). However, Ford later testified that he never recanted and he stood by his testimony. *Id.*

265. *Cole*, 765 N.Y.S.2d at 487.

266. *Id.*

267. *Id.* at 481.

268. *Id.* at 487.

269. *Id.*

270. *Id.*

and with Cole's trial witnesses.[271]

Nevertheless, Leventhal concluded that the combination of these factors did not represent "clear and convincing evidence that no reasonable juror could convict the defendant."[272] However, the judge did not end his decision there. He found that, for the purpose of "completeness" and should the appellate court adopt a different standard for an innocence claim, "that the defendant has shown that he is probably innocent (more likely than not approximating 55%)."[273]

Thus, *Cole* stands as a good example of where the freestanding actual innocence claim does not do enough to address a compelling claim of innocence. The judge concluded that Cole was *probably* innocent. But this 55 percent innocent defendant must remain under restraint pursuant to what could be an unjust conviction. This result undermines confidence in the criminal justice system. Even with its protections and various post-conviction remedies, our legal system could have failed to prevent a wrongful conviction.

Such concerns could have been alleviated here with a call for a reinvestigation.[274] The utility of further investigation is apparent from the decision itself—it shows that the police

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271. *Id.*

272. *Id.*

273. *Id.*

274. It should be noted that, in September 2009, a district court judge denied Cole's habeas petition. Cole v. Walsh, No. 05-CV-736, 2009 WL 3124771, at *7-8 (E.D.N.Y. Sept. 29, 2009). After assuming, for the sake of the analysis, that an actual innocence claim exists under the Federal Constitution, the judge concluded that Cole had not even met the lower *Schlup* gateway standard. *Id.* at *6. In her analysis, the judge took a far more negative view towards Cole's claim of innocence than Justice Leventhal, finding that the credibility of the defense witnesses was "severely undermine[d]"—a factual finding that Leventhal did not make in his opinion. *Id.* She also did not defer to Leventhal's conclusion that Cole was "probably innocent." *Id.* Nevertheless, the decision is not inconsistent with a call for a reinvestigation under *Friedman*. As discussed *infra* notes 289-90 and the accompanying text, the *Friedman* standard is lower than the *Schlup* standard. Under that standard, Cole's factual presentation could potentially justify a call for further investigation under the framework set up in *Friedman*. Because *Cole* pre-dates the *Friedman* decision, the district judge obviously did not have the benefit of *Friedman* to determine whether to make such a call for a reinvestigation.

received disparate information in their investigation, some of which was never fully investigated.[275] With the new information provided by the defense, further investigation could have allowed the police to harmonize the evidence in their files, providing a possible lead on a way to identify the shooter. And while a hearing was held and Cole's witnesses were allowed to testify, that does not run counter to further investigation. Despite the ability to explore the factual allegations at the hearing, the government's position at the hearing was adversarial. From the decision itself, it is clear that the prosecution's goal at the hearing was simply to do what it took to defeat the motion. That is a qualitatively different posture than having investigators explore the credibility of the new evidence through further investigation which could potentially further petitioner's claim of innocence.[276] Indeed, the Second Circuit asserted in *Friedman* that, even if the prosecution should take an adverse position to Jesse in post-conviction proceedings, the case would still benefit from a "complete review" by the prosecution.[277] This review provides an important assurance that all legitimate claims of innocence will be fully explored to ensure that no injustice has occurred.

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275. As discussed *supra* note 257 and accompanying text, various witnesses, including one named Fleming, identified people other than the defendant as the shooter. However, each of the people who were identified were ruled out as a suspect. *Cole*, 765 N.Y.S.2d at 479; *see also Cole*, 2009 WL 3124771 at *1. Additionally, Fleming had told the police that the shooter worked for someone named "Scotty." *Cole*, 2009 WL 3124771 at *1. The investigating detective, however, never connected Cole to "Scotty" and did not even interview "Scotty." *Id.* Further, it does not appear that the police ever investigated the evidence presented by the defense witnesses at the post-conviction hearing that the shooter was a "Guyanese individual, known as 'Denzel,' 'GT,' or 'Dooley,'" even though one of these witnesses may have mentioned it to the police during the investigation. *Cole*, 2009 WL 3124771 at *2 & n.3.

276. Osborne v. Dist. Attorney's Office for Third Judicial Dist., 521 F.3d 1118, 1139 (9th Cir. 2008) (noting that, even though prosecution may seek to reinvestigate to try and fight Osborne's claim to innocence, "such an investigation might instead lead in the opposite direction and further solidify Osborne's case for innocence"), *rev'd on other grounds*, 129 S. Ct. 2308, 2321 (2009).

277. Friedman v. Rehal, 618 F.3d 142, 160 (2d Cir. 2010).

IV. The Framework of a *Friedman* Call for a Reinvestigation

The final question is whether the *Friedman* decision will have any impact on future cases. To be sure, the court's actions in *Friedman* have no precedential value. The call for a reinvestigation was clearly done in dicta. The court had already rejected the *Brady* claim as both procedurally defaulted and, in the alternative, on the merits. As a result, no federal court in New York is now required to consider whether to issue a call for a reinvestigation.

Nevertheless, the same reasons that justified the Second Circuit's actions in *Friedman* would justify any other federal habeas court in making the same call for a reinvestigation. Once again, it is a balanced approach that furthers the federal court's critically important role of ensuring that a potentially innocent defendant does not suffer an unjust incarceration. However, the true innovation of the *Friedman* decision is that, beyond opening the door for federal courts to consider making a call for a reinvestigation in the appropriate case, the court established a responsible mechanism for determining when such a call should happen.

The final part of this Article will first discuss the novelty of the court's approach in calling for the reinvestigation. Then, the article will break down the mechanism that the court used to provide guidance on how federal courts can apply it in future cases.

A. *The Mechanism Used in the Friedman Decision Was a Novel Approach to Considering a Petitioner's Allegation of Actual Innocence*

The two actual innocence theories applicable to non-capital habeas cases, the gateway and freestanding actual innocence claims, clearly were applicable to the *Friedman* case. In *Friedman*, the court concluded that the petition was procedurally defective because it was untimely under the one-

year statute of limitations.[278] Thus, the gateway innocence claim was a route available to the court to address the actual innocence claim. In fact, it could be reasonably argued that the court should not have addressed the merits of the *Brady* claim at all *unless* it had first addressed the gateway innocence claim and concluded that it could consider a claim that was untimely. The court specifically declined, however, to address the actual innocence claim in this posture.[279]

It is also clear that the court could have easily addressed the actual innocence claim as a substantive freestanding claim. The court did not, however, frame its analysis in that way. In fact, the court sidestepped the issue entirely, saying that it did not have the authority to grant relief on the claim since it was unexhausted.[280] But the court could have easily navigated around that procedural issue—at least to the extent that it wanted to address the merits of the claim without going so far as granting relief. A federal court has the power to stay and hold a petition to allow for a petitioner to exhaust a claim in state court so long as the claim to be exhausted is not "plainly meritless."[281] Thus, in service of the freestanding actual

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278. *Id.* at 152.

279. *Id.*

280. It is true that the claim was unexhausted, but it is not clear that a meaningful remedy was available to Jesse. In New York, a court "may" deny a motion to vacate where a defendant was in a position to adequately raise the issue but did not do so. N.Y. CRIM. PROC. LAW § 440.10(3)(c) (McKinney 2010). Thus, the state court would not be required to consider the claim but could dismiss for the sole reason that it was not raised at an earlier time. *Id.* On the other hand, the court also has the discretion to grant the motion "in the interest of justice and for good cause shown" where the claim has merit. *Id.*

281. Rhines v. Weber, 544 U.S. 269, 277-78 (2005); Zarvela v. Artuz, 254 F.3d 374, 380 (2d Cir. 2001) (finding a stay of petition is "preferable" in "many cases" where petitioner has unexhausted claims). This "stay and abeyance" procedure also requires that the petitioner show "good cause" for the failure to exhaust the claim. *Rhines*, 544 U.S. at 277. This is a lenient standard that would not have presented any hurdle for the Second Circuit. Indeed, a generalized claim of "reasonable confusion" is sufficient to establish "good cause." Whitley v. Ercole, 509 F. Supp. 2d 410, 420 (S.D.N.Y. 2007) (adopting dicta from Pace v. DiGugliemo, 544 U.S. 408, 416 (2005)). Here, the court could have easily found that Jesse harbored "reasonable confusion" over whether a freestanding actual innocence claim existed or whether it would apply to a defendant who had pled guilty.

innocence claim, the court could have easily reviewed the merits of the unexhausted claim.

The court chose, however, not to link its discussion to any recognized actual innocence theory. Indeed, as Judge Raggi pointed out, the court reviewed the factual allegations in a different way than would appear to be allowed under either a gateway innocence claim or a freestanding innocence claim. Instead of pursuing a recognized theory, the court charted a new course and directly linked its extended discussion of the facts and circumstances to its desire to call for a reinvestigation. While it certainly is not novel for a court to call for a reinvestigation,[282] the true innovation of the court's approach is that it only made the call after determining that the factual allegations had met a certain standard justifying further investigation. More specifically, the call was only made once the court concluded that there was substantial "new and material evidence" that created a reasonable likelihood of a wrongful conviction. This was a creative and reasonable approach, as it simply utilized an existing standard that the prosecution was already bound to follow.[283] And that is the real value of *Friedman* for future cases—it established a responsible and workable mechanism for determining whether a habeas court should exercise its equitable powers to call for a reinvestigation.

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282. For example, in a concurring opinion in *People v. Calabria*, New York Court of Appeals Judge Rosenblatt "urge[d] the District Attorney to undertake a fresh and unbiased review of the case and investigate fully all the evidence." 816 N.E.2d 1257, 1260 (N.Y. 2004) (Rosenblatt, J., concurring). He added that, even though the prosecution has fought the defendant in court, "this is a particularly disquieting case, one that calls for a new and fastidious layer of review. If on further investigation the District Attorney shares these concerns, he has the power and, I am confident, the motivation, to take whatever steps are appropriate to do justice." *Id.*

283. *Friedman*, 618 F.3d at 159 (pointing to the standards that prosecutors must follow under the ethical rules in determining whether to conduct a further investigation after a conviction).

B. *The Mechanism that a Federal Court Can Use in Determining Whether to Call for a Reinvestigation?*

The basic outline of the *Friedman* mechanism for deciding whether to call for a reinvestigation can be easily drawn from the Second Circuit opinion. This includes the legal standard, how a court should analyze the evidence in the petition, and the quality and quantity of evidence needed to justify the call for a reinvestigation. In addition, the opinion raises secondary questions related to habeas law that also need to be considered: the power of a district court to issue the call and the availability of making the call in the context of a second or successive petition. Each of these issues will be addressed in this section.

Legal Standard. The *Friedman* court called for the reinvestigation based on its conclusion that "new and material evidence," viewed in conjunction with the remaining evidence in the record, "suggest[ed] a reasonable likelihood" that Jesse Friedman was "wrongfully convicted."[284]

From the opinion itself, it is clear that the new evidence must be evidence that could not have been discovered prior to the conviction.[285] The Second Circuit described that "[t]he 'new

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284. *Id.* at 159-60.

285. It should be noted that a federal court's consideration of "newly discovered evidence" in this context is not inconsistent with the Supreme Court's recent decision in Cullen v. Pinholster, 131 S. Ct. 1388 (2011). In *Pinholster*, the Court concluded that, in determining whether a state court's decision was an "unreasonable application" of federal law under 28 U.S.C § 2254(d)(1), a habeas court is limited to the record that was before the state court that adjudicated the claim on the merits. *Id.* at 1398. Thus, under *Pinholster*, a habeas court is limited in the evidence in the evidence it can consider when deciding whether to grant habeas relief. *See* 28 U.S.C § 2254(d)(1) ("an application . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to). The question here is different and does not focus on the 2254(d) standard of review. Rather, it only concerns what evidence a court can consider when taking the less intrusive step in calling for a reinvestigation. There is nothing in *Pinholster* that would prevent a habeas court from considering any "new evidence" under those circumstances. Critically, the Supreme Court has authorized a federal habeas court to consider "new evidence" when

and material' evidence in [the] case [was] the post-conviction consensus within the social science community 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."[286] Thus, the Second Circuit did not view any of Jesse's claims of newly discovered evidence—the suggestive techniques or the hypnosis—as newly discovered. The court obviously viewed that evidence as material—the court spent a good portion of its factual discussion recounting the suggestive techniques, which included the hypnosis.[287] So its failure to mention this critical evidence as part of the "new and material" evidence justifying the reinvestigation suggests that the court did not believe that it was truly newly discovered.

The other significant aspect of the standard is the focus on a reasonable likelihood of a wrongful conviction. It sets a relatively high bar for a call for reinvestigation. It clearly is lower than the "high standard"[288] that it would take to establish a freestanding actual innocence claim. It also appears to be lower than the *Schlup* standard, which asks whether it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[289] While the *Friedman* test does seem to ask for the same type of "probabilistic"[290] assessment of the evidence as the *Schlup* test, the ultimate question under *Friedman* is not as stringent as it is in *Schlup*. A conclusion that no reasonable juror would have convicted petitioner beyond a reasonable doubt is a demanding question that searches for a high level of proof that petitioner has established innocence. The *Friedman* standard has a broader, and less demanding, analysis of whether there has been a wrongful conviction. It looks more generally to whether

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determining whether the petitioner had established a gateway innocence claim. *See* House v. Bell, 547 U.S. 518, 536-37 (2006).

286. *Friedman*, 618 F.3d at 160.

287. *Id.* at 146-48.

288. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009).

289. Schlup v. Delo, 513 U.S. 298, 327 (1995).

290. *Id.* at 329. *Accord House*, 547 U.S. at 538.

there are significant reasons to question the reliability of the jury's determination on the question of guilt or innocence, rather than determining that no juror would convict the defendant. While still high, it does not ask as much as these standards under other innocence-based theories.

The lower standard for the call for an investigation makes sense. The call for a reinvestigation is far less intrusive into the finality of the conviction and does not raise the same type of federalism concerns as the innocence claims currently in existence. The freestanding actual innocence claim will directly void a conviction and end the criminal case entirely. Clearly, such an intrusive act by a federal court into the finality and autonomy of a state court proceeding should have the highest standard. While not as intrusive as a freestanding actual innocence claim, the *Schlup* test does provide for a gateway into federal review of a state court conviction. The ultimate resolution of that claim would be a federal court vacating a state court conviction. As discussed before, the call for a reinvestigation is far less intrusive. It does not have as direct an impact on the finality of the conviction. Indeed, there is no guarantee that any reinvestigation will result in any further challenges to the conviction.[291] Further, it does not raise the same level of federalism concerns as it is solely asking for state actors to potentially act to rectify an injustice on their own.[292]

Analysis of Evidence. In determining whether Jesse met the standard, the Second Circuit accepted the factual allegations set forth in the petition as true and then weighed that evidence against the remaining evidence in the case. In its detailed factual discussion, the court described much of what happened in the investigation as true, even though that evidence was not sworn testimony, but merely set forth in the habeas petition itself, the affirmations in support of the petition, or the transcripts of the documentary and its associated interviews.[293] The same can be said about how the court discussed the prosecutor's and the court's actions in the

291. *See Friedman*, 618 F.3d at 161-62 (Raggi, J., concurring).
292. *See id.* at 160 (majority opinion).
293. *Id.* at 146-49.

case.[294] In fact, the concurring judge accused the majority of doing just that, stating that the court simply "assume[d] the truth of those facts or the misconduct of police officers, prosecutors, defense counsel, and the presiding state court judge before a hearing."[295] Similarly, the court accepted the "social science consensus" in this case also without any sworn expert testimony to establish its reliability.[296]

The analysis on a *Friedman* claim, therefore, does not make an initial assessment of the credibility of the evidence. A court accepts the allegations as true and determines whether they are sufficient to establish a reasonable likelihood of a wrongful conviction. Once again, such an analysis is less stringent than the *Schlup* standard, which requires the court to make an initial assessment of the reliability of the evidence.[297] The *Friedman* court simply did not make such an evaluation. After accepting the allegations in the petition as true, the court then engaged in an assessment of all of the evidence in the record as a whole to determine the likelihood of a wrongful conviction.[298] That represents the basic framework that a court would use in assessing whether to make the call for a reinvestigation.

Certainly, a court accepting the allegations in the petition as true is a highly favorable analysis for a habeas petitioner. That beneficial standard of review, however, is limited by the *amount or quality* of evidence that would be needed to justify the call for a reinvestigation. In justifying its actions, the court stated that Jesse had come forward with "*substantial* evidence that flawed interviewing techniques were used to produce a flood of allegations."[299] There can be no doubt from reading the opinion that Jesse presented a great deal of evidence in support

294. *Id.*

295. *Id.* at 161 (Raggi, J., concurring).

296. *See id.* at 160 (majority opinion).

297. Schlup v. Delo, 513 U.S. 298 (1995). The Second Circuit has described the reliability analysis as "whether the new evidence is trustworthy by considering it both on its own merits and, where appropriate, in light of the pre-existing evidence in the record." Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004).

298. *Friedman*, 618 F.3d at 157-60.

299. *Id.* at 158 (emphasis added).

of his claim of innocence. Further, the evidence that was presented—including statements from most of the people involved in the criminal case—was substantial. Much of that can be attributed to the investigation done by the filmmakers in support of the documentary. It certainly will be unusual for a habeas petitioner to come across such a wellspring of compelling investigatory material after being convicted.

Nevertheless, it is logical that a call for a reinvestigation from a court will look to whether "substantial evidence" has been presented. A reinvestigation necessarily needs evidence to support it. The more substantial the evidence presented—either in terms of amount or character—the greater the justification there will be for a call to expend the required resources for the investigation. Similarly, the reinvestigation will more likely be fruitful if the basis for that effort is substantial evidence.

Unfortunately, the *Friedman* decision provides little guidance on what type of evidence needs to be presented in order to justify a call for a reinvestigation. The Second Circuit stated that it had specifically considered the facts alleged in the petition, the sworn affidavits, the transcript of the movie, and the memoranda of interviews taken in preparation of the film.[300] In addition, the court looked to media coverage and academic articles.[301] As mentioned above, it represents a substantial body of evidence. But the court did not indicate that it was motivated to act on the basis of the type of evidence that was presented. More importantly, there was no indication that the court valued sworn statements in evaluating the claims. Nevertheless, it can be assumed that a court probably will not consider the evidence presented to be "substantial" unless it is supported, at least in part, by sworn statements.[302]

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300. *Id.* at 145.

301. *Id.* at 148, 151, 155-58.

302. Clearly, the court viewed a future § 440.10 motion raising an actual innocence claims as the means to which Jesse would be able to vacate his conviction, either on the basis of the evidence that he already had in his possession or the evidence that would be developed during the reinvestigation. *See id.* at 159. The Criminal Procedure Law requires that any such motion based on "the existence or occurrence of facts . . . must contain sworn allegations thereof . . . ." N.Y. CRIM. PROC. LAW § 440.30(1)

What court can consider making a call for a reinvestigation. In the *Friedman* decision, the court justified its call for a reinvestigation by stating that an "appellate court faced" with a disturbing record should not be a "silent accomplice to what may be an injustice."[303] There is no legitimate reason, however, to limit this authority to the circuit court. The court did not provide one in *Friedman*. At most, it seemed to suggest that an appellate court had an appellate record on which to base its decision to call for a reinvestigation. The "record" on which the Second Circuit based its conclusion, however, appears to be the same factual record that was before the district court. The court stated that its discussion of the facts was based on the allegations *in the petition* as well as the exhibits attached to that petition.[304] Thus, the lower court was in the same position to make an assessment as to whether a call for a reinvestigation should issue.

Moreover, outside of its role in screening applications for second or successive petitions, the circuit courts have no greater powers in habeas cases than the district courts. The habeas statutes provide district courts with the same authority to grant relief as circuit judges. In fact, the district courts review far more habeas cases than the circuit courts because they are required to consider all of the first habeas petitions filed by state inmates.[305] The circuit courts only hear a small number of those habeas cases should the petition meet the demanding requirements for a certificate of appealability.[306] There is no reason why, when considering injustice in habeas cases, the power to make a call for a reinvestigation should be limited to a circuit court. The district courts are in an equivalent position to the circuit courts to consider whether a call for a reinvestigation could be made under the *Friedman*

(McKinney 2004). This would also strongly suggest that any request for reinvestigation must contain some sworn allegations of fact.

303. *Friedman*, 618 F.3d at 161.

304. *Id.* at 145.

305. Ryan Hagglund, *Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions*, 72 U. CHI. L. REV. 989, 994 (2005).

306. *Id.* ("[T]he [Supreme] Court has long permitted Congress to significantly curtail a prisoner's right to appeal" a habeas denial.").

framework.

Under What Circumstances Should A Court Consider Making a Call for a Reinvestigation. The court's decision in *Friedman* provides a wide-range of possibilities under which a court could consider making a call for a reinvestigation using the *Friedman* framework.. In fact, there does not appear to be any limit on when a court can consider making the call. In *Friedman*, the court addressed the question of actual innocence even though it was not the claim raised in the petition. In fact, the actual claim raised in the petition was procedurally defective and substantively meritless.[307] Indeed, the court concluded that it was not entitled to grant legal relief at all to Jesse on a freestanding actual innocence claim—even if it believed that Jesse had established his innocence under the demanding freestanding actual innocence standard—because Jesse had not properly exhausted such a claim in state court.[308] Despite all of these limitations, the court engaged in its actual innocence analysis.

The court leapt every hurdle in its way in deciding to call for a new investigation. This means that, should another federal court desire to make a call for a reinvestigation under the mechanism set forth in *Friedman*, there are very few roadblocks. The petition must allege in the first instance a constitutional violation or the petition will be summarily dismissed.[309] Yet, as *Friedman* shows, the constitutional claim need not detain the federal courts long. If the petitioner has made a substantial showing similar to the one set forth in *Friedman*, there would be grounds to consider making the call.

An interesting question here is whether the circumstances in which a court could consider making a call for a reinvestigation include an application to file a second or successive petition. It can be assumed that some petitioners will discover new and material evidence after they have

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307. *Friedman*, 618 F.3d at 152-55.

308. *Id.* at 159.

309. *See* Rule 4, 28 U.S.C. foll. § 2254 (2004) ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.").

already lost their first petition. Unfortunately, the AEDPA severely curtailed the ability of a petitioner to file a second or successive petition. A claim presented in a second petition that was raised in a previous petition must be denied.[310] A claim presented in a second petition that was not raised in a previous petition must be denied unless there has been a retroactive change in law or the factual predicate for the claim is newly discovered.[311] The habeas statute requires that a petitioner seek authorization from the appropriate federal circuit court.[312] That court can only grant authorization if the petitioner has made a "prima facie showing that the application satisfies the requirements of this subsection."[313]

Even under these strict requirements for gaining authorization to file a petition, there still would be room available for the court to consider making the call. *Friedman* shows that, no matter the obstacle to granting relief on the underlying claim, a court would still be empowered to consider whether a reinvestigation would be appropriate under the *Friedman* framework. The circuit court can deny authorization (just as Jesse was denied habeas relief in *Friedman*), but still address whether or not a call to reinvestigate should be issued.[314]

In fact, it would appear that considering a call for a reinvestigation would be highly appropriate in these situations. One of the grounds on which a petitioner can obtain authorization to file a second or successive petition is on the ground of newly discovered evidence. The statute requires that

310. 28 U.S.C. § 2244(b)(1) (2006).

311. *Id.* § 2244(b)(2)(A)-(B).

312. *Id.* § 2244(b)(3)(A).

313. *Id.* § 2244(b)(3)(C).

314. An interesting side note is that the statute requires a court of appeals to decide upon the application for authorization within thirty days after the filing of the motion. *Id.* § 2244(b)(3)(D). However, even this limitation would not stand in the way of a court addressing a *Friedman* claim, which clearly would require more than thirty days to consider. The Second Circuit has stated that it "may exceed the 30-day time limit . . . where an issue requires a published opinion that cannot reasonably be prepared in 30 days." Quezada v. Smith, 624 F.3d 514, 517 n.3 (2d Cir. 2010) (quoting Johnson v. United States, 623 F.3d 41, 43 n.3 (2010) (internal quotations omitted)).

"the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."[315] "[T]he facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[316] A petitioner only needs to make a prima facie showing, however, which the Second Circuit does not consider to be a very penetrating analysis.[317] Nevertheless, there does appear to be room here for a court to conclude that this standard for gaining authorization may not be met, but the factual allegations in the petition are enough for the court to consider whether a call for a reinvestigation is appropriate. Otherwise, where a petitioner does obtain authorization, this would seem like the precise circumstance where a federal court could consider making the call for a reinvestigation should the court deny relief on the legal claim in the petition.[318]

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315. 28 U.S.C. § 2244(b)(2)(B)(i) (2006).

316. *Id.* § 2244(b)(2)(B)(ii).

317. *Quezada*, 624 F.3d at 521. Indeed, a petitioner does not need to show that he is entitled to relief on the underlying legal claim or even whether a federal court has the power to grant relief on the claim under 28 U.S.C. § 2254(d)(1). *Id.* This means that, even though it has not yet been officially recognized, a petitioner can seek authorization pursuant to a freestanding actual innocence claim. Thus, unless a petitioner has raised an actual innocence claim in the first petition, a petitioner will be able to, at the very least, put the innocence claim before the Second Circuit.

318. An interesting example of the authorization process is the *Cole* case. According to the district court, the Second Circuit granted Cole authorization to file a second or successive petition. Cole v. Walsh, No. 05-CV-736, 2009 WL 3124771, at *1, *4 (E.D.N.Y. Sept. 29, 2009). Because Cole's legal claim—a freestanding actual innocence claim—clearly did not meet the requirements of subsection (b)(2)(A), it means that authorization had to have been granted on the factual predicate ground. Thus, it can be deduced that the Second Circuit believed that Cole had at least made a *prima facie* showing that, but for constitutional error, he is actually innocent by clear and convincing evidence. 28 U.S.C. § 2244(b)(3)(C) (circuit court may grant authorization to file second or successive petition where petitioner has made a "prima facie showing that the application satisfies the requirements of the subsection"); *see also Quezada*, 624 F.3d at 520. This would seem to be enough to establish a *Friedman* actual innocence claim. However, as discussed *supra* note 274, the district court judge never considered a *Friedman* claim and, even worse, did not believe that Cole was even "probably" innocent. *Cole*, 2009 WL 3124771 at *7. No notice of appeal was

Guilty Plea vs. Conviction After Trial. Despite the fact that the call for a reinvestigation occurred in a case in which the petitioner had pled guilty, this does not mean that a *Friedman* claim is unavailable to a defendant who was convicted after trial. That cannot be the case as the ends of justice would not be served by limiting the claim to those defendants who plead guilty. In fact, the opposite is true. This is self-evident in one obvious way: a defendant who pleads guilty has, in nearly every case, *admitted* to committing the crime. A defendant who has gone to trial has maintained a plea of not guilty throughout the case. In this regard, it is not surprising that the great majority of exonerations in the DNA era have been in cases where the defendant was convicted after trial.[319] A conviction after trial truly is the situation where a reinvestigation would most likely have the greatest impact.

In fact, the debate really should be over whether a court should even consider making a call for a reinvestigation in those cases where a defendant has pled guilty. While strong evidence of guilt, a guilty plea does not necessarily "preclude the possibility of innocence."[320] Fortunately, the Second Circuit settled this issue in *Friedman* itself—a call for an investigation is an appropriate step in situations where the defendant has pled guilty.[321] But using *Friedman* as a guide, a petitioner in

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ever filed. Even more tragic, it appears from the docket sheet that notice of the court's opinion was served on counsel, but that notice was returned to the court as a result of counsel's death. Thus, the notice of appeal does not appear to have been filed because petitioner or his representative never received notice of the decision. Since the entry of judgment occurred over 180 days ago, even if petitioner sought to reopen the time to file a notice of appeal, the request would have to be denied. *See* FED. R. APP. P. 4(a)(5).

319. Among the over 250 exonerations from DNA evidence, only thirteen exonerations have occurred in cases where the defendant pled guilty. *See Know the Cases*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Mar. 16, 2011) (1993 exoneration of William Kelly, 1997 exoneration of Keith Brown, 1999 exoneration of Anthony Gray, 2001 exonerations of John Dixon and Marcellius Bradford, 2006 exonerations of Eugene Henton and James Ochoa, 2007 exoneration of Larry Bostic, 2008 exoneration of Steven Phillips (guilty plea only occurred after two hung juries) and 2009 exonerations of Kathy Gonzalez, Debra Shelden, Ada JoAnn Taylor, and Thomas Winslow).

320. Green & Yaroshefsky, *supra* note 141, at 512-13.

321. Indeed, it appears that the Second Circuit's reasoning was focused

such a situation would most likely need to allege that he was pressured into pleading guilty or that the plea was not otherwise voluntary, knowing, or intelligent.[322]

Conclusion

There is no doubt that the situation in *Friedman* was quite extraordinary. It is not every day that a critically-acclaimed and influential documentary gets created about a criminal case and, through the creation of that movie, a critical assessment gets made of the fairness of the conviction. But while the case was exceptional in many ways, Jesse Friedman clearly is not the only person who can present compelling, new evidence of innocence. Using the framework set forth in the *Friedman* opinion, other federal courts should now consider whether to make a call for a reinvestigation in the appropriate case.

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom."[323] However, no federal court has explicitly provided relief to a habeas petitioner on the ground of actual innocence. The *Friedman* decision represents a critical step forward in habeas jurisprudence to address the persistent problem of wrongful convictions. The call for a reinvestigation represents a creative and prudent way for habeas courts to balance the

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on why a reinvestigation was justified even though Jesse had pled guilty. It reasoned that Jesse was pressured to plead guilty and was thus deprived of a chance to challenge the evidence against him. Friedman v. Rehal, 618 F.3d 142, 158 (2d Cir. 2010). However, the court's further reasoning that this case was more troubling than a jury trial case where the court could take "comfort" in the jury verdict, was nearly non-sensical and certainly illogical. *Id.* at 158. It is far more justified for any court to take comfort in those cases where the defendant has actually *admitted to a crime* rather than when a defendant is convicted after a trial. Further, the standard that the court used in *Friedman* applies equally to a case where there has been a jury verdict. A court cannot take comfort in a jury verdict, even after all of the constitutional process is afforded to the defendant, if there is "new and material" evidence discovered after the trial that establishes a "reasonable likelihood" of a wrongful conviction. That was the whole purpose of calling for a reinvestigation in *Friedman*.

322. *See Friedman*, 618 F.3d at 158.

323. *Ex Parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).

state's strong interest in finality against the need to right a potential injustice. Although the number of petitions that will present factual allegations sufficient to justify a call for a reinvestigation under the *Friedman* framework will be small, the existence of this new mechanism is an important safety valve to ensure that legitimate claims of actual innocence get the attention that they deserve.