To be argued by:
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(15 minutes requested)

NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

JULIO NEGRON,

Claimant-Appellant,

Appellate Case No. 2021-05132

- against -

THE STATE OF NEW YORK,

Defendant-Respondent.

BRIEF FOR CLAIMANT-APPELLANT

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Court of Claims No. 130899 (Sise, J.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

Court of Claims Act § 8-b was enacted so that innocent criminal defendants could recover compensation from the State for their unjust convictions and imprisonments, and courts have liberally construed the statute to achieve this laudatory goal. Nevertheless, a § 8-b claimant still must satisfy a gatekeeping proviso, codified at § 8-b(3)(b), intended to preclude claimants who are less likely to be factually innocent. Under this proviso, a claimant ordinarily must show that his conviction was overturned on one of several grounds listed in Criminal Procedure Law § 440.10(1), which the Legislature viewed as indicative of likely innocence. Under *Baba-Ali v. State*, 19 N.Y.3d 627 (2012), and *Turner v. State*, 50 A.D.3d 890 (2d Dep't 2008), the vacating court need not explicitly state that the vacatur was on such an enumerated ground, so long as the court's factual findings imply that the vacatur was based, at least in part, on such a ground. This case presents the following questions arising under § 8-b:

1. Where a criminal defendant cites several grounds for vacating a conviction under CPL § 440.10(1), one of which is the qualifying ground of prosecutorial misrepresentation or fraud (subsection (b)), and the vacating court acknowledges and substantiates this claim, may the Court of Claims dismiss the defendant's ensuing § 8-b claim merely because the vacating court did not also

make an "authoritative" statement that it was basing its vacatur on the fraud ground?

The court below dismissed the claim because of its view that such an "authoritative" statement was lacking in the Court of Appeals decision vacating Claimant's conviction.

2. May a claimant obtain relief under § 8-b, even though his vacatur was not on a qualifying ground, where the gatekeeping function of the statute has been satisfied by a court's subsequent dismissal of the indictment based on circumstances corresponding to such a ground?

The court below answered this question in the negative.

PRELIMINARY STATEMENT

Julio Negron, a New York City school custodian, husband, and father, spent ten horrendous years in state prison before the Court of Appeals overturned his attempted murder conviction. The Court did so after finding that the prosecutor had deliberately withheld evidence suggesting a third party was the true perpetrator, while deceiving both the defense and the trial court about the existence of such evidence. On remand, the trial court dismissed the entire case because the prosecutor also had committed fraud and deceit in the grand jury. It found that the prosecutor had deliberately introduced misleading testimony while intentionally concealing exculpatory evidence showing that Negron likely was innocent. In other words, Negron never should have been indicted in the first place.

Julio Negron is precisely the type of person the Legislature had in mind when it passed the Unjust Conviction Act, codified at Court of Claims Act § 8-b. In the words of the statute's preamble, the Act is intended to compensate "innocent persons who have been wrongly convicted of crimes and subsequently imprisoned." To try to limit claims under the Act to individuals who are likely innocent, the statute contains a proviso requiring claimants to show that their convictions were vacated on one of several qualifying grounds, enumerated in CPL § 440.10(1), which are meant to be a "useful and relevant indicator of innocence." *Ivey v. State*, 80 N.Y.2d 474, 480 (1992). In interpreting this proviso, the Court of

Appeals has repeatedly eschewed an overly technical reading of the text, instead emphasizing that "the 'linchpin' of the statute is innocence" and the statute must be read accordingly. *Id.* at 479.

In one such decision, *Baba-Ali v. State*, 19 N.Y.3d 627 (2012), the Court of Appeals reached a holding that squarely controls this case. In that case, the vacating court had found a constitutional violation under *Brady v. Maryland*, 373 U.S. 83 (1963), under which a conviction must be overturned when a prosecutor withholds material evidence favoring the defense, regardless of the prosecutor's good or bad faith. Such a pure constitutional violation is not a qualifying ground under § 8-b's proviso. However, the vacating court had also found that the prosecutor *deliberately* violated *Brady*. The Court of Appeals held that this factual finding showed prosecutorial misrepresentation or fraud under CPL § 440.10(1)(b) and satisfied § 8-b's proviso. *Baba-Ali* controls this case because, here too, the vacating court found that the prosecutor violated *Brady and* that he did so with the knowledge that the court and the defense would be deceived. Just as in *Baba-Ali*, the vacating court's finding satisfied the Unjust Conviction Act's proviso.

However, based upon two errors, the court below dismissed Negron's § 8-b claim. First, the court held that the Court of Appeals decision vacating Negron's conviction (the "Vacatur Decision") had not been based on a qualifying ground because it contained "no analysis" or "meaningful discussion" of Negron's

allegations in his underlying 440 motion of prosecutorial misrepresentation and fraud. But that is wrong. The Vacatur Decision noted that Negron's 440 motion had alleged such prosecutorial misconduct, discussed the facts upon which Negron had relied, and then spent a full paragraph analyzing and agreeing with Negron's argument. "Under the circumstances presented," it then concluded, Negron did not receive a fair trial, and therefore the lower courts had erred in denying his 440 motion. *People v. Negron*, 26 N.Y.3d 262, 270 (2015). The prosecutor's deliberate deception having been one of "the circumstances presented," the decision plainly was based upon it.

Second, the Court of Claims also erroneously read the *Baba-Ali* decision to require a vacatur decision to contain an "authoritative" statement that the vacatur was on a qualifying ground. Although here, the Vacatur Decision does makes clear that the vacatur was on a qualifying ground, *Baba-Ali* contains no such requirement. While *Baba-Ali* notes that the Appellate Division—reviewing its own vacatur decision years later in the course of upholding Baba-Ali's § 8-b claim—had made an "authoritative" statement that its original decision was based in part on prosecutorial fraud under CPL § 440.10(1)(b), the Court of Appeals did not hold that such a statement is necessary in *every* § 8-b case. Indeed, courts reviewing criminal convictions often grant 440 motions without specifying the subsection on which their decision is based. The lower court's cramped view of

§ 8-b misconstrues *Baba-Ali* and defeats the Legislature's intent to lift substance over form when implementing § 8-b. The rule of *Baba-Ali*, at most, is that there must be circumstances in the record from which the § 8-b court may infer that a vacatur decision was based, at least in part, on circumstances establishing a qualifying ground under § 8-b. The Vacatur Decision in this case clearly satisfies this rule.

Claimants such as Julio Negron, who have compelling evidence of innocence but were convicted due to a prosecutor's misrepresentations or fraud, deserve compensation for their life-shattering injuries. This Court should vacate the judgment below, reinstate Negron's § 8-b claim, and remand this case for trial.

STATEMENT OF FACTS

A. The shooting and investigation[1]

Just before 4 a.m. on February 6, 2005, Mervin Fevrier and another motorist were involved in a traffic dispute in Queens, and the motorist shot Fevrier. Amended Claim, R.400 ¶¶ 25-27.[2] Fevrier and a friend, Elliot Miley, fled the scene and flagged down a police car. *Id.* ¶ 28. They described the shooter as a young

[1] Citations prefixed with "R" are to consecutively-paginated record on appeal.

[2] When the Court of Claims granted Defendant's motion to dismiss, it also granted Claimant's motion to file an amended claim. It explicitly stated, "[t]he amended claim will be considered in addressing the motion by defendant to dismiss the claim." R.17 n.1. Thus, the Amended Claim is the operative pleading on this appeal, and our recitation of the facts is based on that pleading. *See* R.393-502.

Hispanic man, 20-25 years old, with a beard and mustache, who drove a dark blue, four-door sedan. *Id.* ¶ 29. Police recovered three spent .45-caliber shell casings from the scene. *Id.* ¶ 30.

The shooting happened near the apartment of Claimant Julio Negron's then-girlfriend, Diana Caban (now Claimant's wife, Diana Negron), on the second floor of 583 Woodward Avenue. *Id.* ¶ 31. Negron was asleep in this apartment when the shooting occurred. *Id.* ¶ 32. Contrary to Fevrier and Miley's description of the shooter, Negron had no facial hair and was 38 years old. *Id.* ¶ 33. He drove a green, two-door coupe, not a blue, four-door sedan. *Id.* ¶ 34.

Later the same morning, Negron voluntarily accompanied detectives to the 104th Precinct, where they detained him. R.401 ¶ 35. Eyewitness Zoryana Ivaniv—who had seen the shooting from a parked car she was sitting in with two friends, directly across the street—told police she had recognized the shooter from seeing him on previous occasions on the same block, where she lived. *Id.* ¶¶ 36-38. Detective Robert Moscoso and a riding ADA, Patrick O'Connor, then displayed Negron to Ivaniv in a show-up, which was intended to produce a confirmatory identification. Despite the extreme suggestiveness of this procedure, Ivaniv told them Negron was *not* the shooter. *Id.* ¶¶ 39-41.

Negron gave Detective Moscoso consent to search his car and Diana's apartment. *Id.* ¶ 42. Police found no incriminating evidence in either place. R.401-404 ¶¶ 43, 59.

However, while police were assembling at 583 Woodward to search Diana's second-floor apartment, neighbors from two doors down, 587 Woodward, alerted police that a man and a woman had just forced their way into 587 Woodward and gone to the roof, then banged on the door trying to get back in. R.402 ¶ 45. The neighbors later identified the two as Fernando Caban and Monica Guartan. *Id.* ¶ 46. Caban and Guartan lived on the first floor of 583 Woodward, the roof of which was connected to the roof of 587 Woodward. *Id.* ¶ 47. Caban resembled Negron, except Caban looked more like the descriptions of the shooter in that he wore a beard and mustache, unlike the clean-shaven Negron, and was younger. *Id.* ¶ 48. Caban had previously been convicted of two serious felonies: in 1985 of first-degree assault with a deadly weapon, for which he was sentenced to 18-54 months in state prison, and in 1992 of federal firearms offenses, for illegally possessing dozens of automatic machine guns that he had assembled from mail-order parts to sell on the street, for which he was sentenced to 75 months. R.402-03 ¶ 49.[3]

[3] Fernando Caban is Diana's brother, but Negron barely knew him, and, at the time of Negron's trial, Negron had no knowledge of the relevant circumstances of Caban's own arrest and criminal history. R.414 ¶ 129.

Officers searched the roof of 587 Woodward and found numerous black plastic trash bags filled with weapons, including an AR-15 semi-automatic assault rifle, many types of ammunition, thousands of dollars in counterfeit money, police bulletproof vests, forged police shields, false identification cards bearing Caban's photograph, and other items. R.403 ¶¶ 50-51. Upon searching Caban's first-floor apartment at 583 Woodward, police found, among other items, black trash bags matching those found on the roof and apparent money-counterfeiting equipment. *Id.* ¶ 52. The ammunition from the roof included .45-caliber ammunition, the same caliber as the shell casings recovered after the shooting. R.404 ¶¶ 53-54.

Despite Ivaniv's exoneration of Negron, Moscoso held Negron in custody for almost another full day before putting him in a lineup. *Id.* ¶ 60. ADA O'Connor supervised this process, and Negron's lawyer was present for it. R.404-05 ¶¶ 61, 64. Before the lineup, Moscoso told Fevrier that the police shooting suspect would be in the lineup, thereby encouraging Fevrier to pick whoever he believed looked most like his recollection of the shooter. R.405 ¶ 65. Nevertheless, Fevrier failed to unequivocally identify Negron, who was number five in the lineup. *Id.* ¶¶ 66-67. With a tone of uncertainty, Fevrier said of number five, "I think it's him? I believe it's him." *Id.* ¶ 68. Immediately after this equivocal statement, Moscoso placed before Fevrier a "Line-Up Report" that Moscoso had filled out by hand. *Id.* ¶ 69. In this report, Moscoso described person number five as "SUSPECT," thus informing

Fevrier that Negron was the police suspect. *Id.* ¶ 70. Moscoso further wrote the numeral "5" in the field marked "Number of Person Identified," falsely indicating that Fevrier had positively identified Negron. R.406 ¶ 71. Upon Moscoso's request, Fevrier read and signed this report. *Id.* ¶¶ 72-73.

The second witness, Fevrier's friend Miley, selected a filler. *Id.* ¶ 74. A third witness, Andriy Vintonyak, made no identification. *Id.* ¶ 75. The final witness, Dmitriy Khavko, selected a filler; this filler was the only one with facial hair, which was consistent with the eyewitness descriptions of the shooter. *Id.* ¶¶ 76-78.

Recognizing he lacked probable cause to prosecute Negron, O'Connor told Negron's counsel he was going to authorize Negron's release. *Id.* ¶ 79. However, O'Connor, Moscoso, and another detective then spoke to Fevrier in a private room for approximately 15 to 20 minutes and pressured him to say he was "sure" that number five, Negron, was the shooter. R.407 ¶ 82. They excluded Negron's attorney from the room. *Id.* ¶ 83. When O'Connor emerged, he told Negron's attorney that he was now going to proceed with Negron's prosecution. *Id.* ¶ 84.

In the grand jury, O'Connor elicited misleading testimony from Fevrier and Moscoso that Fevrier had positively identified Negron as the shooter, withholding that Fevrier initially expressed uncertainty about number five and had said he was sure only after being pressured to do so. R.407-08 ¶¶ 86-88. O'Connor also withheld that Ivaniv had exonerated Negron, that three other witnesses had not

recognized Negron as the shooter, and that Negron and his car did not fit the descriptions the police had received. R.408-09 ¶¶ 89-90, 97(b)-(c). Negron exercised his right to testify before the grand jury, but ADA O'Connor refused to let him explain that O'Connor had initially authorized his release when none of the witnesses could unequivocally identify him in the lineup. R.408 ¶¶ 91-93. O'Connor also refused to allow any answer to a grand juror's question about whether police had found anything incriminating in Negron's apartment—which they had not. *Id.* ¶¶ 94-96. Finally, O'Connor withheld the evidence that suggested Caban was the shooter. R.408-09 ¶ 97. The grand jury then indicted Negron for attempted murder and related charges. R.409 ¶ 98.

B. Pretrial and trial proceedings

At the end of a pretrial *Wade* hearing, the court suppressed Fevrier's lineup identification of Negron on the grounds that (a) the lineup was suggestive because the fillers were too dissimilar from Negron in appearance, (b) O'Connor and Moscoso's closed-door meeting with Fevrier was improper, and (c) Moscoso lacked probable cause to arrest Negron and therefore the lineup identification was the fruit of an unlawful seizure. R.410 ¶ 102.

At a subsequent independent-source hearing, O'Connor withheld from the defense and the court how he and Moscoso had pressured Fevrier, after the latter had expressed uncertainty, to say he was sure that number five was the shooter. *Id.*

¶ 103. As a result, the court ruled that Fevrier could identify Negron at trial. *Id.* ¶¶ 104-105.

Before Fevrier testified at trial, O'Connor took him into the courtroom and reinforced his prospective identification by allowing him to view Negron sitting at the defense table. *Id.* ¶ 106. Fevrier then made an in-court identification of Negron as the shooter. *Id.* ¶ 107. The other witnesses did not identify Negron and acknowledged the exculpatory results of the show-up (Ivaniv) and the lineup (Miley, Khavko, and Vintonyak). R.411 ¶¶ 110-112.

Negron's attorney sought permission to introduce evidence that Fernando Caban was the likely shooter. *Id.* ¶ 113. He cited to the court all the information he knew: that Negron resembled Caban and thus could have been mistaken for him; that Caban lived in the same building as Negron's girlfriend, 583 Woodward Avenue; and that Caban had been arrested for possessing a cache of weapons found on a rooftop connected to that building. *Id.* ¶ 114. Negron's attorney did not know additional, crucial information tending to suggest Caban was the shooter, including that Caban had forced his way into 587 Woodward and jettisoned his cache of weapons and other contraband on the roof just as police prepared to search 583 Woodward, thereby revealing Caban's apparent consciousness of his own guilt in the shooting; that Caban's cache included .45-caliber ammunition, the same type of ammunition used in the shooting of Fevrier; that when Caban was

arrested, he was wearing green outerwear similar to a description Khavko had given of the shooter; and that Caban had previous felony convictions involving assaultive behavior and weapons manufacturing, distribution, and possession. R.411-12 ¶ 115.

Exploiting defense counsel's unawareness, O'Connor continued to withhold the exculpatory information in his possession, in violation of his constitutional and ethical obligations to disclose it. R.412 ¶¶ 116-117. O'Connor then defrauded the defense and the court by deceptively arguing that Caban's connection to the shooting was too "tenuous" to allow admission of evidence of Caban's possible culpability. R.413 ¶ 118. As a result, the court precluded the defense from introducing any such evidence. *Id.* ¶ 119.

Negron took the stand in his own defense and testified that he was home asleep at the time of the shooting. *Id.* ¶ 120.

In summation, O'Connor exploited his success in concealing the evidence of Caban's likely culpability and influencing Fevrier to falsely identify Negron. R.413-14 ¶¶ 121, 125-126. He argued that it was "utterly unreasonable and not worthy of belief" that someone else committed the shooting, that "everything was done by the book with this case, nothing is being hidden from you," and that Fevrier's identification of Negron had been unequivocal. R.413-14 ¶¶ 122-127.

Negron was convicted and, on April 26, 2006, sentenced to twelve years in state prison. R.397 ¶¶ 14-15.

C. Post-conviction proceedings

Negron's direct appeal was denied. *Id.* ¶ 16. In December 2008, Negron filed a CPL § 440.10 motion *pro se*, alleging that ADA O'Connor deliberately suppressed exculpatory evidence and that his lawyers were ineffective. *Id.* ¶ 17. The court denied the motion without a hearing. *Id*. In September 2009, Negron filed a *pro se* habeas corpus petition in federal court. *Id.* ¶ 18.

In July 2010, Negron received a response to a FOIL request he had filed in June 2008 seeking information about Fernando Caban's case. R.398 ¶ 19. The newly disclosed documents provided compelling evidence of Caban's likely guilt in shooting Fevrier that had been unknown to Negron and his attorney at trial. *Id.* Negron obtained similarly revelatory transcripts from court reporters. *Id.* Back in federal court, *pro bono* counsel was appointed for Negron and the proceedings were paused so that the state courts could consider Negron's newly discovered evidence. *Id.* ¶ 20.

On April 20, 2012, Negron filed another motion to vacate his conviction, this time represented by *pro bono* counsel. *Id.* ¶ 21. In these 440 papers, Negron initially discussed in constitutional terms ADA O'Connor's deliberate withholding of the Caban-related evidence and false argument to the court, arguing that

O'Connor had violated both *Brady v. Maryland*, 373 U.S. 83 (1963), and "the due process requirement that a prosecutor not rely on false or misleading evidence or argument to achieve a conviction," R.462 (citing *Su v. Filion*, 335 F.3d 119, 126-27 (2d Cir. 2003); *People v. Steadman*, 82 N.Y.2d 1, 7 (1993)). Then, in a separate point addressing the procedural rules governing 440 motions, Negron contended that the above-described misconduct by O'Connor required reversal on several 440 grounds, including the ground—which qualifies for relief under Court of Claims Act § 8-b—that "the judgment was obtained through 'misrepresentation or fraud on the part of . . . the prosecutor' (subdiv. 'b')." R.469.[4] The motion papers also argued that Negron's trial counsel had been ineffective. R.466.

The court denied the motion on September 26, 2012. R.398 ¶ 21. The Appellate Division affirmed this decision on December 11, 2013. *People v. Negron*, 112 A.D.3d 741 (2d Dep't 2013). However, the Court of Appeals granted leave to appeal.

In his briefing to the high court, Negron again argued that O'Connor had violated both *Brady* and the constitutional rule that a prosecutor may not "rely[] on false or misleading evidence or argument" or "mislead the court into denying a

[4] Negron's 440 papers also cited a second subsection of CPL § 440.10(1) that qualifies for relief under Court of Claims Act § 8-b: subsection (g) (newly-discovered evidence). R.469. While we maintain that subsection (g) was part of the basis for the vacatur of Negron's conviction, this brief focuses on subsection (b).

defendant relief to which he may be entitled." R.478. Negron again described how O'Connor had "knowingly suppress[ed]" evidence of Caban's guilt, R.485, and "misle[d] the court," R.483, by disputing Caban's relevance to the case, "[a]ll the while" knowing he had "failed to disclose" evidence tying Caban to the shooting, R.481. In Negron's reply brief, he reiterated that O'Connor had "deliberately withheld" information inculpating Caban "in order to mislead the court into" denying Negron's third-party culpability defense. R.492 (capitalization omitted).

On November 23, 2015, the Court of Appeals reversed the lower court's decision and vacated the judgment of conviction. *People v. Negron*, 26 N.Y.3d 262 (2015); R.424-39. The Court summarized the two-part argument that Negron, in "the instant motion," had made about O'Connor's misconduct, alleging that O'Connor had "violated [his] *Brady* obligations" by failing to disclose the evidence tending to inculpate Caban, "while *actively misleading the court* as to the potential merit of [Negron]'s third-party culpability defense." *Negron*, 26 N.Y.3d at 267. The Court further noted that Negron had "also argued that his trial counsel had been ineffective." *Id.*

In its analysis, the Court first held that Negron's counsel had failed to provide meaningful representation and had deprived Negron of a fair trial by failing to object to the trial court's use of the wrong standard when deciding

whether to allow the defense to introduce third-party culpability evidence. *Id.* at 268-69.

Next, the Court addressed, and agreed with, both of Negron's arguments about ADA O'Connor's misconduct. The Court first spent a paragraph finding that O'Connor had deliberately misled the trial court about the strength of the Caban evidence. It wrote that O'Connor, who "was also prosecuting Caban and was quite familiar with the circumstances of his arrest," had "characterized Caban's arrest as 'irrelevant' and his connection with the shooting as 'tenuous at best' . . . , *all while aware* that defense counsel was not fully familiar with the relevant information surrounding Caban's arrest" and thus not in a position to rebut O'Connor's misleading argument. *Id.* at 269 (emphasis added). In the next two paragraphs, the Court discussed the *Brady*/*Vilardi* standard, found that the suppressed Caban-related evidence "was plainly favorable to the defense," and held that there was "a reasonable possibility that the verdict would have been different if the information about Caban had been disclosed." *Id.* at 270. Finally, summarizing its holding with respect to O'Connor's concealment of the Caban evidence, the Court made clear it was relying upon both parts of Negron's argument and of the above analysis—the prosecutor's deliberate deception and the *Brady* violation—stating: "*Under the circumstances presented*, it cannot be said that defendant received a fair trial and it

was error to deny the application to vacate his judgment of conviction." *Id.* (emphasis added).

The decision's final, decretal paragraph stated, without limitation, "the order of the Appellate Division should be reversed, [and] defendant's motion pursuant to CPL 440.10 granted." *Id.* As noted above, "defendant's motion" had expressly included, *inter alia*, CPL § 440.10(1)(b) (prosecutorial "misrepresentation or fraud"), which is a qualifying ground under Court of Claims Act § 8-b, and the Court's decision had expressly acknowledged Negron's argument under that subsection, in "the instant motion," that O'Connor had "actively misle[d] the court."

Negron was transferred from state to local custody and, several weeks later, released on his own recognizance awaiting retrial. R.399 ¶ 23. He had served nearly ten years of his sentence, almost all of it in state prison. *Id.*

In September 2016, Negron moved to dismiss the charges against him. *Id.* ¶ 24. On September 6, 2017, the State Supreme Court, Queens County (Lasak, J.S.C.), granted this motion. *Id.*; *see* R.49-68. Justice Lasak based his ruling on O'Connor's fraudulent deception of the grand jury. He held that O'Connor had impaired the integrity of the grand jury by omitting "a plethora of exculpatory evidence"—namely, by (1) presenting Fevrier's identification in an "utterly misleading manner," an "indisputably deliberate" act of "deception";

(2) concealing that Ivaniv, in a highly suggestive show-up, "stated that [Negron] was *not* the perpetrator"; and (3) withholding that the three other eyewitnesses did not recognize Negron as the shooter in a lineup. R.61, 63-65 (emphasis added). In sum, "[w]hen [O'Connor] put this case in the Grand Jury, he was aware that there was significantly more evidence pointing away from [Negron]'s identity as the perpetrator of the crimes than there was pointing towards it," yet "he not only failed to present any of this exculpatory evidence, but he chose to present the only piece of evidence that he did have to connect the defendant to the crime in an incomplete way." R.65.

On January 23, 2018, Negron brought the present claim. R.23-114. On March 9, 2021, following the completion of discovery and the scheduling of a trial date, he filed a motion for leave to amend the claim, which Defendant did not oppose. R.121-189. On March 25, 2021, he filed a corrected proposed amended claim, noting that Defendant continued not to oppose the amendments. R.192.

D. Defendant's motion to dismiss

However, a week later, before the Court had decided the motion for leave to amend the claim, Defendant moved to dismiss the action. *See* R.339-81. Defendant argued that Claimant's pleading was incurably deficient because he could not establish that the Court of Appeals had vacated his conviction on any of the CPL

§ 440.10(1) grounds that are enumerated in the proviso clause of Court of Claims Act § 8-b(3)(b).

On July 8, 2021, the court granted Claimant leave to serve and file his amended claim, stated that the amended claim was the operative pleading for purposes of the motion to dismiss, and then granted Defendant's dismissal motion. R.15-21.

In discussing the controlling law, the court wrote that, where "the decision vacating the judgment does not explicitly reference one of the enumerated subdivisions [of CPL § 440.10(1) that qualifies for relief under Court of Claims Act § 8-b], a claimant may still show that the judgment was vacated on one or more of the enumerated grounds." R.17. "In such instances the record surrounding the vacatur may be considered but the review is necessarily concerned only with the court's rationale for vacatur . . . , not to alternative potential grounds for vacatur." R.17-18. Citing the decision of the Court of Appeals in *Baba-Ali v. State*, 19 N.Y.3d 627 (2012), and of subsequent appellate decisions purporting to rely on *Baba-Ali*, the court then held that, "while an explicit statement of an enumerated ground as the basis for the vacatur is not necessary, the law requires that the reasoning offered by the court *authoritatively* place the basis within one of the enumerated categories" of CPL § 440.10(1) that qualifies a claimant for relief under Court of Claims Act § 8-b. R.19 (emphasis added).

The court then applied these principles to the Court of Appeals decision vacating Negron's conviction (the "Vacatur Decision"). The court first characterized the Vacatur Decision as having "mention[ed] . . . that Negron had *previously* argued that the prosecution actively misled the trial court as to the potential merit of a third-party culpability defense." *Id.* (emphasis added). In reality, the Vacatur Decision explained that *the motion it was reviewing* contained such a claim; it was not a former claim that the appellant had abandoned. The Court of Claims then stated that the Court of Appeals had undertaken "no analysis" or "meaningful discussion of th[is] subject." *Id.* In fact, as we have shown, the Vacatur Decision did analyze, and uphold, Negron's argument that the prosecutor had deceived the defense and the trial court.

In reliance upon the above errors, the Court of Claims concluded: "claimant's contention that the [C]ourt [of Appeals] relied on [the qualifying ground of CPL § 440.10(1)(b)] in vacating the judgment must be rejected." *Id.*

The Court of Claims also rejected Claimant's argument that the dismissal of the indictment for prosecutorial misrepresentation and fraud in the grand jury satisfied the text and legislative purpose of the proviso clause of Court of Claims Act § 8-b(3)(b). R.20.

STANDARD OF REVIEW

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the claimant must be accorded the benefit of every favorable inference." *Roemer v. State*, 174 A.D.3d 931, 932 (2d Dep't 2019). The court's task is to "determine only whether the facts as alleged fit within any cognizable legal theory." *Nyari v. Onefater*, 171 A.D.3d 936, 937 (2d Dep't 2019) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)). This Court applies the same standard on appeal. *See Roemer*, 174 A.D.3d at 932; *Cunningham v. Nolte*, 188 A.D.3d 806, 807 (2d Dep't 2020). Its review is thus *de novo*.

ARGUMENT

POINT I

UNDER CONTROLLING APPELLATE PRECEDENT, THE VACATUR OF JULIO NEGRON'S CONVICTION—WHICH WAS IMPLICITLY BASED UPON PROSECUTORIAL MISREPRESENTATION AND FRAUD—SATISFIES THE PROVISO OF COURT OF CLAIMS ACT § 8-b(3)(b) AND ENTITLES NEGRON TO SEEK COMPENSATION FOR HIS UNJUST CONVICTION

A. Relevant law governing claims under the Unjust Conviction Act

The Legislature enacted the Unjust Conviction Act, codified at Court of Claims Act ("CCA") § 8-b, with the purpose that "innocent persons who have been wrongly convicted of crimes and subsequently imprisoned . . . should have an

available avenue of redress over and above the existing tort remedies to seek compensation for damages." CCA § 8-b(1). The Act notes, in its preamble, that innocent individuals had been "frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law" and that, by enacting the statute, "the legislature intend[ed]" to ensure that such individuals "be able to recover damages against the state." *Id.* The statute is "based upon principles of fundamental fairness," "recogniz[ing] that it is the State's obligation to do what justice and morality demand." Report of the Law Review Commission for 1984 ("Law Commission Report"), at 41-42.

Among the requirements for pleading a claim under CCA § 8-b is the so-called "proviso" of § 8-b(3)(b). It requires a claimant, in his pleading, to:

> 3. . . . establish by documentary evidence that . . .
>
> (b) . . . (ii) his judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; *provided that the judgement [sic] of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) paragraph (a), (b), (c), (e) or (g) of subdivision one of section 440.10 of the criminal procedure law*; or (B) subdivision one (where based upon grounds set forth in item (A) hereof), two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of section 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law . . . .

CCA § 8-b (emphasis added).

Among the enumerated grounds for vacatur that qualify a claimant for relief under the proviso is CPL § 440.10(1)(b), which requires vacatur where "[t]he judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor."

When faced with ambiguities in the proviso, the Court of Appeals and other courts have consistently interpreted the text in a manner that promotes the Legislature's stated purpose in enacting § 8-b: overcoming technical obstacles to ensure compensation of the innocent. "When presented with an issue of statutory interpretation, the court's primary consideration 'is to ascertain and give effect to the intention of the Legislature.'" *Long v. State*, 7 N.Y.3d 269, 273 (2006) (quoting *Riley v. Cty. of Broome*, 95 N.Y.2d 455, 463 (2000)). In the case of § 8-b, "the 'linchpin' of the statute is innocence," and "the grounds enumerated in the proviso clause" were intended as "useful and relevant indicator[s] of innocence." *Ivey v. State*, 80 N.Y.2d 474, 479-80 (1992) (quoting Law Commission Report at 74). Therefore, while the proviso serves a gatekeeping function—that is, it seeks to "strike a balance between the goals of compensating innocent individuals who had been unjustly convicted and imprisoned, and foreclosing frivolous suits against the State," *id.* at 479—the priority of courts construing the proviso should be to ensure that it embraces those claimants who can show their innocence, as the Legislature intended, rather than excluding them.

Exemplifying this interpretive approach are the holdings of the Court of Appeals in *Ivey* and *Long*. In *Ivey*, the Court held that the proviso need not be satisfied where the claimant was acquitted on retrial, since an acquittal is "a useful and relevant indicator of innocence, just as the grounds enumerated in the proviso clause are." 80 N.Y.2d at 480. Any other reading would "clash with the underlying purpose of the statute—providing a remedy for recompense of innocent victims of State prosecutorial power." *Id.* at 481. In *Long*, the Court similarly acknowledged that, while "the plain language of the proviso appears to suggest that both the vacatur of the judgment and dismissal of the accusatory instrument must be premised on one of the [enumerated] grounds," the proviso is satisfied so long as the *vacatur* was on a qualifying ground, "regardless of the basis for the dismissal of the accusatory instrument." *Long*, 7 N.Y.3d at 274-75.

The Court's clear message in *Ivey* and *Long* is that courts applying § 8-b should focus on substance over form, resolving any ambiguities in the proviso in favor of promoting, rather than constraining, the remedy that § 8-b was enacted to provide for those claimants who can adequately plead their innocence.

In accordance with this controlling approach to § 8-b, other courts have held that, where the vacating court did not explicitly cite one of the grounds in the proviso, the proviso is still satisfied if the § 8-b court can infer from the vacating-

court record that the vacatur decision was based, at least in part, on circumstances establishing a qualifying ground under § 8-b.

The leading case is *Baba-Ali v. State*, 19 N.Y.3d 627 (2012) ("*Baba-Ali IV*"). Claimant Baba-Ali was charged with raping his young daughter. On the eve of his criminal trial, the prosecutor belatedly disclosed exculpatory medical records. But Baba-Ali's defense lawyer failed to make effective use of the records at trial, and Baba-Ali was convicted. This Court vacated the conviction on direct appeal. *See People v. Baba-Ali*, 179 A.D.2d 725 (2d Dep't 1992) ("*Baba-Ali I*"). First, the Court spent three paragraphs explaining why trial counsel's ineffectiveness required reversal. *See id.* at 729. Then, in a single paragraph to end the decision, the Court also stated:

> Finally, we find the People's withholding of the [relevant] medical records until the eve of trial inexcusable. *Knowing full well* that those medical records tended to exonerate the defendant, the People failed to give them to the defense counsel . . . . Had the defendant known of the existence of those medical records well in advance of the trial, as he should have, there is a "reasonable possibility" that the outcome of the trial would have been different (*see People v. Vilardi*, 76 N.Y.2d 67, 77, 556 N.Y.S.2d 518, 555 N.E.2d 915).

Id. at 729-30 (emphasis added).[5]

[5] In those cases where a criminal defendant has previously made a specific request for *Brady* material, New York courts apply the *Vilardi* "reasonable possibility" standard when analyzing the materiality element of a *Brady* claim. *See People v. Scott*, 88 N.Y.2d 888, 890-91 (1996). Thus, the Appellate Division's reference to *Vilardi* when reversing Baba-Ali's conviction was a way of saying the prosecution had violated *Brady*.

After Baba-Ali's indictment was dismissed, he filed a § 8-b claim, and the State argued precisely what it has argued in the present case: "the conviction was reversed on two grounds: ineffective assistance of counsel, and failure of the prosecution to provide exculpatory material, neither of which falls within any of the grounds for reversal set forth in the Court of Claims Act." *Baba-Ali v. State*, No. 87328 (Ct. Cl. Nov. 12, 2003) (Nadel, J.) (unpublished) ("*Baba-Ali II*"), at p. 2, R.505. The Court of Claims rejected that argument. *See* R.505-506.

This Court did the same on appeal. *See Baba-Ali v. State*, 20 A.D.3d 376, 377 (2d Dep't 2005) ("*Baba-Ali III*"). The 1992 vacatur decision had not explicitly held that the prosecutor "procured" the conviction "by duress, misrepresentation or fraud"—a finding that would correspond to a qualifying proviso ground, CPL § 440.10(1)(b). But 13 years later, this Court held that its 1992 decision "was based, in part, on the ground that the judgment was procured by prosecutorial misconduct that was tantamount to fraud," which corresponded to the type of prosecutorial misconduct described in "CPL 440.10[1][b]." *Id.* at 377. The Court explained why its own 1992 finding that the prosecutor had violated *Brady*, while "knowing full well" he was doing so, made out reversible misconduct under § 440.10(1)(b) and thus satisfied § 8-b(3)(b)'s proviso:

> The prosecutor's *deliberate withholding of evidence which tended to exonerate the claimant* constituted a "fraudulent act," which is "[c]onduct involving bad faith, [or] dishonesty," as well as a "fraud on the court," which is "a lawyer's . . .

> misconduct [in a judicial proceeding] so serious that it undermines . . . the integrity of the proceeding."

Baba-Ali III, 20 A.D.3d at 377 (emphasis added) (quoting Black's Law Dictionary 687 (8th ed. 2004)). In short, this Court held that a judicial finding of a *deliberate Brady* violation by definition makes out prosecutorial fraud within the meaning of CPL § 440.10(1)(b).

The Court of Appeals affirmed this reasoning. It acknowledged that the vacatur of Baba-Ali's conviction was based on "findings that claimant had been denied effective assistance of counsel and that there had been a *Brady* violation, and that *neither of those grounds for reversal itself qualifies as a predicate for a Court of Claims Act § 8-b claim*." *Baba-Ali IV*, 19 N.Y.3d at 636 (emphasis added). However, it agreed with this Court that, while the vacatur was based in part on these "non-actionable constitutional violations," it was *also* based on "an element of prosecutorial misconduct going well beyond a simple *Brady* violation—one consistent with the sort of misrepresentation and fraud described by CPL 440.10(1)(b)." *Id.* Accordingly, the Court held, Baba-Ali had satisfied § 8-b(3)(b)'s proviso. *Id.* at 636-37.

The reasoning of *Baba-Ali III* and *IV* acknowledges the principle of the *Brady* doctrine that a prosecutor's withholding of material information favorable to the defense violates the Constitution regardless of whether the prosecutor did so knowingly or deliberately. *See People v. Rong He,* 34 N.Y.3d 956, 958 (2019)

(citing *Brady,* 373 U.S. at 87). Thus, if a court vacates a conviction solely for the non-disclosure of favorable information, without finding that the prosecution deliberately suppressed or misrepresented that information, there is a constitutional error but not fraud under CPL § 440.10(1)(b). By contrast, where a vacating court finds *both* that a prosecutor withheld exculpatory evidence *and* that he did so deliberately to mislead the defense, the jury, or the court, the vacatur is based on *both* "non-actionable constitutional violations" *and* prosecutorial misrepresentation and fraud within the meaning of CPL § 440.10(1)(b).

This Court has similarly held in other cases that the proviso is satisfied where the vacating court makes factual findings that correspond to a qualifying ground. In *Turner v. State*, a federal court had vacated a conviction on habeas corpus review on the constitutional ground that the prosecutor violated *Brady* and due process by knowingly "offer[ing] perjured testimony at trial." 50 A.D.3d 890, 891 (2d Dep't 2008). The prosecutor, who was "in actual possession of the complainant's criminal record," had let the complainant falsely testify that he had no record. *Id.* at 892. Although the constitutional violations themselves did not establish a qualifying ground under § 8-b(3)(b), this Court nevertheless held that the vacatur decision made out the qualifying ground of CPL § 440.10(1)(c) (knowing reliance on false evidence), because the federal court's finding that the

prosecutor had knowingly failed to correct perjured testimony corresponded to that ground, and thus satisfied the proviso. *Id.*

To be contrasted is this Court's decision in *Leka v. State*, 16 A.D.3d 557 (2d Dep't 2005). In *Leka*, a federal appeals court vacated a conviction, again on habeas corpus review, based on the prosecution's untimely disclosure, on the eve of trial, of exculpatory evidence. *See Leka v. Portuondo*, 257 F.3d 89, 97, 100, 106-07 (2d Cir. 2001). In so doing, the Second Circuit explicitly stated that it would "*not* decide whether the non-disclosure was a deliberate tactical concealment." *Id.* at 103 (emphasis added). Because the court thus found a *Brady* violation *alone*, a purely constitutional ground for vacatur, without making any finding about the prosecutor's state of mind, this Court held that a § 8-b claim did not lie. *See Leka*, 16 A.D.3d at 558.

B. The Court of Appeals decision vacating Julio Negron's conviction satisfies the proviso of Court of Claims Act § 8-b(3)(b) because it was based, at least in part, on findings of prosecutorial misrepresentation or fraud

The Vacatur Decision satisfies CCA § 8-b(3)(b)'s proviso as interpreted by the Court of Appeals in its controlling *Baba-Ali IV* decision and by this Court in *Baba-Ali III* and *Turner*. As in *Baba-Ali* and *Turner*, the vacating court here made factual findings not just that the prosecutor failed to disclose *Brady* material, but that he did so *knowingly*; the court then relied, at least implicitly, upon this finding in vacating the conviction. Thus, § 8-b(3)(b)'s proviso was, and is, satisfied.

In the Vacatur Decision, the Court of Appeals summarized Negron's two-part contention in his 440 motion with regard to the concealment of the Caban evidence: Negron had argued in his motion papers "that the People had violated their *Brady* obligations" by withholding the Caban evidence, and he had also argued that the prosecutor "actively misle[d] the court as to the potential merit of defendant's third-party culpability defense." *Negron*, 26 N.Y.3d at 266-67. The Court then analyzed these claims in turn, just as Negron had done in his motion papers and Court of Appeals briefing.

The Vacatur Decision began by recounting that the trial court had considered whether there was sufficient evidence to let Negron pursue a third-party culpability defense. It then found that, while the prosecutor had successfully contended there was not, he did so while deliberately suppressing evidence that gave the lie to his own argument: Caban's possession of ammunition similar to that used in the shooting and Caban's furtive activities implying consciousness of guilt.

> The trial assistant (who was also prosecuting Caban and *was quite familiar with the circumstances of his arrest*) in addressing defendant's third-party culpability application characterized Caban's arrest as "irrelevant" and his connection with the shooting as "tenuous at best." The prosecutor also attempted to portray defendant's application as a mere attempt to pin the crime on another individual who lived in the same building and happened to be of the same ethnicity, *all while aware* that defense counsel was not fully familiar with the relevant information surrounding Caban's arrest.

Id. at 269 (emphasis added). The Court also found that Negron had not possessed this information before obtaining it through his post-conviction FOIL requests. *Id.* at 269 & n.5.

The Court then moved on, in separate paragraphs, to discuss the prosecutor's knowing suppression of this evidence in terms of *Brady*/*Vilardi*, finding that the Caban evidence "was plainly favorable to the defense" and was material under the *Vilardi* standard. *Id.* at 270-71.

Certainly, the paragraph finding that the prosecutor *knowingly* suppressed the Caban evidence and misled the court about it was not included in the Vacatur Decision for no purpose; rather, it was included for the purpose of supporting the Court's ultimate decision to grant a new trial. After finding both prosecutorial fraud and a *Brady* violation, the Court held that it was granting Negron's 440 motion and vacating the conviction "[u]nder the circumstances presented." *Id.* at 270. Those circumstances included Negron's post-conviction discovery via FOIL of evidence that the prosecutor had *knowingly* violated *Brady* in order to deceive the court and the defense. The vacatur was based every bit as much on Negron's argument that the prosecutor actively misled the court as it was on Negron's constitutional *Brady* argument.

This case is thus controlled by *Baba-Ali IV*. In each case, the vacating court found "prosecutorial misconduct going well beyond a simple *Brady* violation—one

consistent with the sort of misrepresentation and fraud described by CPL 440.10(1)(b)," *Baba-Ali IV*, 19 N.Y.3d at 636, and then vacated the conviction at least in part on such ground.

This Court's decision in *Turner* also compels the conclusion that § 8-b's proviso has been satisfied. *Turner* held that the proviso was satisfied because it was "[i]mplicit" in the federal court's decision vacating a conviction on due process grounds that the prosecutor had *knowingly* withheld *Brady* and elicited perjured testimony. *Turner*, 50 A.D.3d at 892. In Negron's case, the vacating court also found that the prosecutor's misconduct was knowing—the prosecutor was "quite familiar with" Caban's case and minimized the Caban evidence "all while aware" the defense was in the dark. *Negron*, 26 N.Y.3d at 269. Indeed, Negron's case is even stronger than the claimant's case in *Turner*: while the federal court's finding of knowing misconduct in *Turner* had been only implicit, the finding in the *Negron* Vacatur Decision was explicit.

The court below nevertheless dismissed Negron's claim because, in its view, the Vacatur Decision did not contain an "authoritative" statement that it was vacating the conviction on a qualifying ground. But this is obviously wrong. As we have shown, the Vacatur Decision made sufficiently clear that it was relying on the qualifying ground of fraud or deceit and in that sense was "authoritative." However, more importantly to the development of the law concerning

compensation for innocent persons unjustly convicted, there is no such onerous "authoritative" statement requirement.

According to the Court of Claims, the Vacatur Decision "mention[ed] . . . that Negron had *previously* argued that the prosecution actively misled the trial court as to the potential merit of a third-party culpability defense," but contained "no analysis" or "meaningful discussion of the subject." R.19 (emphasis added). However, as we have shown, the Vacatur Decision summarized the contentions Negron made in his 440 motion, including prosecutorial misrepresentation and fraud, and then spent the balance of its opinion reviewing these very claims. These were current, not abandoned, claims. Moreover, the Vacatur Decision *did* contain an "analysis" and "meaningful discussion" of Negron's prosecutorial fraud claims: in a lengthy paragraph, the Court discussed the facts set forth earlier in its opinion, agreed with Negron's argument that these facts showed fraud by the prosecutor, and then based its decision to vacate the conviction in part on this finding. While this discussion was briefer than the Vacatur Decision's discussion of ineffectiveness and the constitutional *Brady* violation, it was still "authoritative" in the sense that it made clear that the fraud ground was part of the basis for its decision.

Even if the Court of Appeals decision with respect to prosecutorial fraud or deceit was not as "authoritative" as this Court's statement interpreting its own

vacatur decision in *Baba-Ali*, the law does not require it to have been so. Indeed, the lower court's decision was contradictory on this issue. It began by correctly noting that "an explicit statement of an enumerated [CPL § 440.10(1)] ground as the basis for the vacatur is not necessary" to qualify the claimant for relief under CCA § 8-b. R.19. Yet, having agreed that an explicit statement is not necessary, the court below then incongruously concluded that "the law requires that the reasoning offered by the [vacating] court *authoritatively* place the basis within one of the enumerated categories." *Id.* (emphasis added). "Authoritative" would seem to equate to explicit; the court's reasoning makes little sense. Indeed, it is almost a contradiction in terms to recognize that reliance on a qualifying ground may be *implicit* but then require that such reliance be "authoritative." No case imposes any such requirement.

The lower court's rule appears to be based upon its misunderstanding of a statement in *Baba-Ali IV*. In that decision, the Court of Appeals found that the original vacatur decision—by this Court in 1992—was based in part on the qualifying ground of prosecutorial fraud because "the decision itself . . . reads" that way. *Baba-Ali IV*, 19 N.Y.3d at 636. It then found further support for its conclusion in the Appellate Division's "gloss" of its own vacatur decision—that is, its conclusion in 2005, in upholding Baba-Ali's civil § 8-b claim, that its 1992 vacatur decision had been based in part on the qualifying ground of prosecutorial

misrepresentation or fraud. The Court of Appeals stated that this Court's 2005 analysis of its own 1992 decision "would seem to be authoritative" evidence of its intent in 1992. *Id.* at 637. But the Court of Appeals did *not* adopt a requirement of such an "authoritative" statement in every case. The Court almost certainly would have reached the same conclusion even without the Appellate Division's statement interpreting its own decision. A vacating court's authoritative statement concerning the grounds for its previous decision certainly can make the § 8-b analysis easier, but the proviso may be satisfied as well by a vacating court's implicit finding of misrepresentation or fraud, just as this Court found in *Baba-Ali* and *Turner*.

As for the post–*Baba-Ali IV* Appellate Division decisions that the Court of Claims cited, *see* R.18-19, they are consistent with our reading of *Baba-Ali IV*. These cases hold that the Court of Claims, in deciding whether a given vacatur qualifies for relief under § 8-b, must look "only to the actual basis for the vacatur of the underlying criminal judgment, not to the alternative *potential* grounds for vacatur." *Jeanty v. State*, 175 A.D.3d 1073, 1075 (4th Dep't 2019) (emphasis added); *Manes v. State*, 182 A.D.3d 1012, 1014 (4th Dep't 2020) (emphasis omitted) (quoting *Jeanty*); *see also Greene v. State*, 187 A.D.3d 539, 540 (1st Dep't 2020) (citing *Jeanty*).

In *Jeanty*, the vacating court had explicitly stated that it had vacated claimant's judgment pursuant only to CPL 440.10(1)(f) and/or (h)—both

nonqualifying grounds. 175 A.D.3d at 1075. In *Manes* and *Greene*, the *sole ground* for vacatur was ineffective assistance of counsel, a purely constitutional error under CPL § 440.10(1)(h) that, absent some further finding of a qualifying ground, does not satisfy the statutory proviso. *See also Bryant v. State*, 160 N.Y.S.3d 609 (1st Dep't 2022) (same); *Hicks v. State*, 179 A.D.3d 1521, 1522 (4th Dep't 2020) (vacatur based solely on constitutional violation of Confrontation Clause). To be distinguished, of course, is a case like *Baba-Ali*, where the vacating court found not only ineffective assistance but also deliberate misconduct making out a qualifying ground. None of the above cases changes the rule that the "actual basis" for vacatur, to use *Jeanty*'s words, may include a qualifying ground by *implication*, as it did in *Baba-Ali*.

The "authoritativeness" standard applied by the Court of Claims would frustrate the Unjust Conviction Act's legislative purpose by raising the threshold for an § 8-b claim to a level that many deserving claimants would be unable to satisfy, through no fault of their own. It would elevate form over substance, allowing a technicality to defeat righteous claims by innocent persons who have been convicted despite being innocent—exactly the type of legal frustration that the Legislature explicitly stated the statute was intended to overcome. Courts tasked with deciding 440 motions, direct appeals, and habeas petitions often grant relief without explicitly invoking the specific subsections of CPL § 440.10(1) that

apply, since they are deciding the criminal case before them, not some future civil case that has not yet been brought. This is why this State's appellate courts have looked to the implicit basis of the vacating court's decision and not limited themselves to any talismanic invocation of a qualifying ground under § 8-b.

Julio Negron's life was destroyed by the misrepresentations and fraud of the State's prosecutor. He should not be deprived of his statutory right to compensation because the court that vacated his conviction wrote that it was acting "[u]nder the circumstances" but, at least in the lower court's view, failed to add an "authoritative" statement about what already was implicit: such circumstances included the prosecutor's deliberate misconduct. How many times can the law victimize one man?

POINT II

THE DISMISSAL OF JULIO NEGRON'S INDICTMENT AFTER THE VACATUR OF HIS CONVICTION, DUE TO THE PROSECUTOR'S FRAUDULENT CONCEALMENT OF EXCULPATORY EVIDENCE FROM THE GRAND JURY, INDEPENDENTLY SATISFIED § 8-b(3)(b)'S PROVISO AND ENTITLES NEGRON TO GO TO TRIAL ON HIS § 8-b CLAIM

This Court should also reverse the lower court and reinstate Negron's claim because, independent of the grounds for vacatur, Justice Lasak dismissed Negron's indictment on a ground that was comparable to CPL § 440.10(1)(b)—namely, ADA O'Connor's "utterly misleading" conduct in, and "indisputably deliberate . . .

deception" of, the grand jury, which proximately caused Negron's indictment and eventual conviction. R.63-65. The statutory text and the legislative history support such an analysis.

As discussed above, CCA § 8-b(3)(b)(ii) requires a showing that "the judgement [sic] of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: [CPL § 440.10(1)](a), (b), (c), (e) or (g)." As the Court of Appeals has observed, "the plain language of the proviso appears to suggest that both the vacatur of the judgment and dismissal of the accusatory instrument must be premised on" a qualifying ground. *Long*, 7 N.Y.3d at 274. However, because "the court's primary consideration [must be] to ascertain and give effect to the intention of the Legislature," the Court of Appeals has rejected this reading. *Id.* at 273 (internal quotation marks omitted). It has held that "a claim satisfies the statutory criteria [i.e., the proviso] if the claimant establishes that the judgment of conviction was vacated under one of the specified grounds in Court of Claims Act § 8-b(3)(b)(ii), regardless of the basis for the dismissal of the accusatory instrument." *Id.* at 275. In other words, vacatur on a qualifying ground is by itself *sufficient* to satisfy the proviso.

No court has yet ruled on the inverse question of whether dismissal of an indictment on a qualifying ground, regardless of the basis for the vacatur, is

equally sufficient to satisfy the proviso. However, the Court of Appeals decisions in *Ivey* and *Long*, together with the Legislature's clear intent, support such a view.

The purpose of the proviso is to serve a gatekeeping function—to "strike a balance between the goals of compensating innocent individuals . . . and foreclosing frivolous suits against the State." *Ivey*, 80 N.Y.2d at 479. The qualifying grounds listed in the proviso were enacted to serve this function because they were deemed to be "useful and relevant indicator[s] of innocence." *Id.* at 480. If *either* the vacatur decision *or* the dismissal order was based on a ground that indicates the claimant's innocence, it follows that the gatekeeping function of the proviso has been accomplished. In either instance, the § 8-b claimant can show that his criminal prosecution was disposed of in his favor at least in part on a ground indicating his likely innocence.

The Court of Appeals ruling in *Ivey* was based on similar reasoning. In *Ivey*, the Court held that a claimant satisfies the pleading requirements of § 8-b if his conviction was vacated and he was acquitted at retrial, *regardless of the grounds for the vacatur*. *Id.* at 481. This holding was based in part on the logic that an acquittal "is a useful and relevant indicator of innocence, just as the grounds enumerated in the proviso clause are." *Id.* at 480. Thus, the Court held in *Ivey* that an event occurring *after* a vacatur may perform the gatekeeping function of permitting only those § 8-b claims where there is an indication of the claimant's

innocence. It follows that a post-vacatur dismissal of an indictment on a ground that indicates innocence, as happened here, also satisfies the gatekeeping function of the statute.

It is true that the dismissal of an indictment occurs not under CPL § 440.10 but under a different provision of the Criminal Procedure Law, so a dismissal cannot technically occur under a 440 ground. *See Long*, 7 N.Y.3d at 274-75. But the statute and the case law already provide that vacaturs or dismissals not expressly based on CPL § 440.10 may still satisfy the proviso if based on grounds *comparable* to a qualifying 440 ground. Under CCA § 8-b(3)(b)(ii)(B), a vacatur on direct appeal qualifies if "based upon [the qualifying] grounds." Such a vacatur cannot *literally* be based on such a ground, so the statute must be referring to a vacatur based upon a ground *corresponding to* one of the enumerated 440 grounds. This is, of course, what happened in *Baba-Ali*. Similarly, under CCA § 8-b(3)(b)(ii)(C), a vacatur or dismissal under "*comparable* provisions of the former code of criminal procedure *or subsequent law*" qualifies (emphasis added). Thus, in *Turner*, this Court held that a vacatur on federal habeas corpus review satisfied § 8-b because it was based on a ground that corresponded to a 440 ground enumerated in § 8-b(3)(b)(ii)(A), even though the statute does not expressly encompass habeas-based vacaturs.

In light of the above, the dismissal of an indictment under CPL § 210.35(5)—on the basis that "the integrity of [the grand jury proceeding wa]s impaired" by prosecutorial misconduct amounting to fraud—should qualify a claimant for relief under § 8-b, because it, too, corresponds to an exoneration under CPL § 440.10(1)(b). Section 440.10(1)(b) applies where "[t]he judgment was procured through duress, misrepresentation or fraud on the part of . . . a prosecutor." Where, as here, the indictment that was the basis for the conviction and judgment was procured by prosecutorial misrepresentation and fraud, absent which no indictment would have occurred, the causal relationship required by the statute is established. Had the prosecutor's fraudulent grand jury presentation been raised on direct appeal or collateral attack, the conviction could have been vacated on that basis under § 440.10(1)(b) or its direct-appeal or habeas equivalent. *See, e.g.*, *People v. Pelchat*, 62 N.Y.2d 97, 107 (1984) (vacating conviction and dismissing indictment where prosecutor concealed his knowledge that a police officer had given false testimony in the grand jury). Negron should not be deprived of his right to compensation under § 8-b just because the relief for ADA O'Connor's grand jury misconduct was granted on a motion to dismiss, after the vacatur of the conviction, instead of in an earlier direct appeal or a collateral attack on the conviction.

This Court in *Wilson v. State,* 127 A.D.3d 743 (2d Dep't 2015), appeared to assume the rule we propose. In that case—decided after *Long* held that a dismissal may be on any ground as long as the vacatur is on a qualifying ground—the claimant's conviction had been vacated on federal habeas review for ineffective assistance of counsel, a nonqualifying ground, and then the case was dismissed "on the ground that the claimant, even if convicted in a new trial, had already served his sentence." *Id.* at 744. In affirming the dismissal of the subsequent § 8-b claim, this Court did not dispute that a claim could be based upon a dismissal of an indictment on a qualifying ground, but instead it reasoned that "the *dismissal of the indictment* was not based on any of the grounds set forth in the statute or premised on any likelihood of innocence." *Id.* (emphasis added).

Here, after the Court of Appeals vacated Negron's conviction, Justice Lasak dismissed the indictment based upon the prosecutor's fraudulent concealment from the grand jury of evidence of Negron's innocence. He found that the prosecutor had (1) presented the sole lineup identification of Negron in an "utterly misleading manner," an "indisputably deliberate" act of "deception" that concealed the unreliability of the identification; (2) concealed that an eyewitness had definitively stated, following a "confirmatory" show-up, "that [Negron] was *not* the perpetrator"; and (3) withheld that the three other eyewitnesses, after viewing the lineup, also did not recognize Negron as the shooter. R.63-65. In sum, the

prosecutor concealed that "there was significantly more evidence pointing away from [Negron's] identity as the perpetrator of the crimes than there was pointing towards it." R.65. Dismissal on these grounds was comparable to a vacatur under CPL § 440.10(1)(b) for prosecutorial fraud, or under the Appellate Division's weight-of-the-evidence review power, which itself is a qualifying ground. *See* CCA § 8-b(3)(b)(ii)(B); CPL § 470.20(5). The dismissal was strongly indicative of innocence. The procedural quirk that it occurred following the appeal of Negron's 440 motion, and not during that appeal, should not deprive Negron of his ability to seek compensation.

CONCLUSION

Julio Negron spent almost ten years in prison before the Court of Appeals found that a prosecutor had deliberately suppressed evidence of a third party's likely culpability and freed him. Since then, the evidence pointing to Negron's innocence has only grown. His is precisely the kind of case the Legislature deemed eligible for relief under the Unjust Conviction Act. In accordance with that legislative purpose and with the controlling decisions of this Court and the Court of Appeals, this Court should vacate the decision below, reinstate Negron's claim, and remand this case for a trial.

Respectfully submitted,

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Dated: New York, New York
April 8, 2022

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

JULIO NEGRON,	:	
Claimant-Appellant,	:	Court of Claims No. 130899 (Sise, J.)
- against -	:	A.D. No. 2021-05132
THE STATE OF NEW YORK,	:	
Defendant-Respondent.	:	

PRINTING SPECIFICATION STATEMENT

1. The following statement is made in accordance with the Practice Rules of the Appellate Division, § 1250.8(j).

2. This brief was prepared using Microsoft Word. The brief uses the font Times New Roman, double-spaced, size 14 points, except that headings, footnotes, and block quotations are single-spaced, and footnotes use 12-point font.

3. According to Microsoft Word, this brief contains 10,345 words, not counting the cover, table of contents, table of authorities, caption, signature block, CPLR § 5531 statement, or this certification.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

JULIO NEGRON,	:	
Claimant-Appellant,	:	Court of Claims No. 130899 (Sise, J.)
- against -	:	A.D. No. 2021-05132
THE STATE OF NEW YORK,	:	
Defendant-Respondent.	:	

CPLR § 5531 STATEMENT

1. The Index Number in the trial court was Court of Claims No. 130899.

2. The full names of the original parties are set forth above. There have been no changes.

3. The action was commenced in the New York State Court of Claims.

4. The action was commenced on January 23, 2018, by the filing of a claim in the New York State Court of Claims. An amended claim, which is the operative pleading for purposes of this appeal, was served on March 25, 2021.

5. This is a civil action seeking damages under Court of Claims Act § 8-b for Claimant Julio Negron's unjust conviction and imprisonment.

6. This appeal is from a decision and order, and judgment, of the Court of Claims, by the Honorable Richard E. Sise, entered on July 8, 2021, dismissing the claim.

7. This appeal is being perfected on the full reproduced record.