To be argued by:
Joel B. Rudin, Esq.
(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.

REPLY BRIEF FOR CLAIMANT-APPELLANT

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

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INTRODUCTION

When the Legislature passed the Unjust Conviction Act, it enshrined, in the very text of the statute, its intent that *all* clearly innocent exonerees be compensated. The law states: "The legislature intends . . . that those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against the state." Court of Claims Act ("CCA") § 8-b(1).

At the same time, the Legislature provided a mechanism for weeding out claims not based upon likely innocence. This is the proviso requiring a claimant to show his conviction was vacated on any of several qualifying grounds that are "indicator[s] of innocence." *Ivey v. State*, 80 N.Y.2d 474, 480 (1992). Mindful of the Legislature's overall purpose, the Court of Appeals has consistently construed the proviso to avoid frustrating the claims of innocent exonerees.

Respondent, however, would use the proviso as a procedural bar for its own sake, arbitrarily excluding many innocent claimants. By applying such a rigid reading of the proviso, Respondent seeks to thwart the legislative purpose of removing "substantive and technical obstacles" that had "frustrated" innocent exonerees seeking damages. CCA § 8-b(1).

Fortunately for deserving claimants like Julio Negron, this State's appellate courts have rejected Respondent's view, instead applying the proviso in a way that

promotes the Legislature's intent. The cases discussed in our opening brief hold that § 8-b claims may proceed if one of the proviso's qualifying grounds is *implicit* in the vacating court's decision; it need not be explicit. Respondent misconstrues or improperly minimizes these controlling decisions, as we discuss below.

Respondent also misrepresents the content of Negron's 440 motion, the claims he raised on appeal, and, ultimately, the resolution of those claims by the Court of Appeals. Negron did not cite § 440.10(1)(b) in passing; he explicitly asked the court to vacate his conviction on that ground. He made detailed allegations of prosecutorial fraud in support of that ground. After his motion was denied, he made the same arguments to the Court of Appeals. The Court upheld this claim, finding that the prosecutor had knowingly misled the defense and the trial court by withholding evidence of another man's likely guilt while arguing there was insufficient evidence to warrant a third-party culpability defense. The Court then granted the 440 motion in its entirety. It is at least implicit in that vacatur decision that prosecutorial misconduct amounting to fraud was part of the basis for the Court's decision. Our State's highest court is busy enough already without going off on immaterial factual larks.

Remarkably, Respondent doesn't even mention, let alone defend, the illogical test the lower court fashioned for § 8-b claims. The court required claimants to show that the vacating court "authoritatively" stated it was relying on

a qualifying ground. That Respondent doesn't defend this standard is understandable, as it makes no sense. If, as the lower court acknowledged, the proviso is satisfied where the vacating court merely *implies* it is relying on a qualifying ground, *see* R.19, it is inconsistent at the same time to require an "authoritative" statement.

Unable to mount an effective argument on the merits, Respondent attempts to prejudice this Court against Negron by starting its brief with a one-sided, sometimes false Statement of the Case,[1] trying to impugn Negron's claim of innocence. Of course, in reviewing Respondent's motion to dismiss, this Court is required—just like the lower court was—to assume the truthfulness of the facts alleged in the claim and to draw all reasonable inferences from those facts in Negron's favor. *Roemer v. State*, 174 A.D.3d 931, 932 (2d Dep't 2019). The facts in Negron's claim so clearly establish his innocence that Respondent never challenged the claim on that basis. Heedless of how motions to dismiss must be decided, Respondent selectively cites the trial record, out of context, to misleadingly challenge facts alleged in the claim or reasonable inferences from

[1] To give one example, Respondent claims that Mr. Negron, testifying at his criminal trial, "admitted lying to the grand jury about his whereabouts" the night of the shooting. Resp. Br. 16 (citing Court of Appeals Appendix at 883). In fact, in the cited cross-examination testimony, Negron explained that he told the grand jury he was at a "motorcycle club" that night, but he considered it more a "motorcycle hangout" than a "club." His consistent defense, before the grand jury and at trial, was that he was out with friends, then drove home and went to sleep before the shooting occurred. To say that Mr. Negron "admitted lying" is itself a lie.

such facts. In doing so, Respondent cites information that has nothing to do with the narrow technical issue that Respondent *did* raise in the lower court and that this Court is reviewing. Ironically, to impugn the claim, Respondent relies on the record of a trial that the Court of Appeals found was fundamentally unfair. Most of Respondent's Statement of the Case is improper and irrelevant and should be disregarded.

There is ever-growing awareness about "wrongful convictions and the prevalence with which they have been discovered in recent years." *People v. Delamota*, 18 N.Y.3d 107, 116 (2011). In this Court's words, "the gravest manner of injustice that we know is the imprisonment of a fellow human being for a crime that he or she did not commit." *People v. Hargrove*, 162 A.D.3d 25, 29 (2d Dep't 2018). Respondent's miserly reading of § 8-b and its proviso would deny relief to a large swath of deserving claimants, like Julio Negron, who have endured the unspeakable catastrophe of being imprisoned under horrendous conditions for something they did not do. The holding Respondent seeks would subvert the Legislature's stated intention of compensating *all* clearly innocent exonerees for their suffering. This Court should vacate the judgment below, reinstate Mr. Negron's § 8-b claim, and remand this case for trial.

ARGUMENT

POINT I

IN ACCORDANCE WITH THE LEGISLATURE'S INTENT THAT INNOCENT EXONEREES BE COMPENSATED, THE PROVISO OF CCA § 8-b IS SATISFIED IF A QUALIFYING GROUND WAS AN *IMPLICIT* BASIS FOR THE VACATUR, AS WAS THE CASE IN THE DECISION VACATING JULIO NEGRON'S CONVICTION

A. Contrary to Respondent's brief, § 8-b's purpose is to compensate *all* innocent persons who were wrongfully convicted, and the proviso must be read in that light, as the Court of Appeals has repeatedly emphasized

The Legislature enacted § 8-b's gatekeeping proviso to promote the legislative "goal[] of compensating innocent" exonerees, while at the same time limiting "frivolous suits against the State." *Ivey*, 80 N.Y.2d at 479. The proviso does this by requiring a claimant to show that his conviction was vacated—or his indictment dismissed, *see* Point II, *infra*—on certain qualifying grounds that are "indicator[s] of innocence." *Id.* at 480.

While, as Respondent correctly notes, § 8-b ordinarily must be "strictly construed," *Long v. State*, 7 N.Y.3d, 269, 276 (2006) (internal quotation marks omitted), the Court of Appeals has noted that "[t]he awkward location and punctuation of the proviso" make it "difficult[to] discern[]" its exact meaning, *Ivey*, 80 N.Y.2d at 480. Mindful that the "primary consideration" in construing statutes is to "give effect to the intention of the Legislature," *Long*, 7 N.Y.3d at 273 (internal quotation marks omitted), the Court has repeatedly emphasized the

legislative purpose of compensating innocent exonerees when resolving the proviso's ambiguities.

In *Ivey*, the Court held that a post-vacatur acquittal—which is an "indicator of innocence" like the qualifying vacatur grounds are—satisfies the proviso, regardless of the reason for the vacatur. 80 N.Y.2d at 480. This approach, the Court reasoned, best resolves the "awkward" text and is also "consistent with the legislative intent of Section 8-b." *Id.* at 481. In *Long*, the Court held that vacatur on a qualifying ground satisfies the proviso, regardless of the reason for dismissal. 7 N.Y.3d at 275. While noting that "the plain language of the proviso appears to suggest that both" vacatur and dismissal must occur on qualifying grounds, the Court rejected this reading, because vacaturs and dismissals occur under different statutes. *Id.* at 274. The Court also again emphasized the legislative purpose of "compensating innocent individuals." *Id.* (quoting *Ivey*, 80 N.Y.2d at 479).[2]

Respondent nowhere acknowledges the above statutory and judicial emphasis on innocence. Reading Respondent's brief, one would think the Legislature enacted the proviso to arbitrarily limit innocent claimants' lawsuits. Respondent writes that "the Legislature enacted . . . § 8-b[] to give *certain* innocent individuals who have been wrongfully convicted a cause of action," and that it "did

[2] As we note in Point II, *infra*, *Long* left unanswered whether a dismissal alone, on a ground "comparable" to a qualifying CPL § 440.10(1) ground, *see* CCA § 8-b(3)(b)(ii)(C), satisfies the proviso, regardless of the basis for vacatur. Below we argue that it does.

not intend to provide compensation to every person who has been wrongfully convicted, *even if they can demonstrate innocence*." Resp. Br. 5, 8-9 (emphasis added). But § 8-b, *Ivey*, and *Long* are to the contrary. The Legislature created a cause of action for "those innocent persons" who were "unjustly convicted and imprisoned." CCA § 8-b(1). The proviso should be applied to achieve its limited purpose of filtering out likely unmeritorious claims, not to subvert the statute's broader aim of compensating those claimants who are clearly innocent.

B. *Turner* and *Baba-Ali* hold that the proviso is satisfied where a vacatur was at least *implicitly* based on a qualifying ground; Respondent does not show otherwise

In our opening brief, we discussed at length the decisions by this Court in *Turner v. State*, 50 A.D.3d 890 (2d Dep't 2008), and *Baba-Ali v. State*, 20 A.D.3d 376 (2d Dep't 2005) ("*Baba-Ali III*"), and by the Court of Appeals in *Baba-Ali v. State*, 19 N.Y.3d 627 (2012) ("*Baba-Ali IV*"), which clearly establish that the proviso is satisfied if it can be *inferred* from the vacating-court record that the vacatur was based, at least in part, on circumstances establishing a qualifying ground. *See* Opening Br. 23-27. Accordingly, here, the Court of Claims correctly recognized that "an explicit statement of an enumerated ground as the basis for the vacatur is not necessary" to satisfy the proviso. However, it then went on to hold, incorrectly, that the vacating court must "*authoritatively* place the basis [for

vacatur] within one of the enumerated categories." Opening Br. 33 (emphasis added) (quoting R.19).

Respondent never addresses our argument, and the holding of the Court of Claims, that an implicit ground for vacatur may satisfy the proviso—the word "implicit" does not appear in its brief. Indeed, nowhere does Respondent even attempt to defend the Court of Claims requirement of an "authoritative" statement of the ground for vacatur despite the same court's acknowledgment that an implied ground will suffice. Respondent mentions *Turner* only in a footnote, failing to rebut our showing that *Turner* controls this case, and it totally misreads the *Baba-Ali* decisions.

1. *Turner* held that the proviso is satisfied when, as here, factual findings making out a qualifying ground are "implicit" in the vacatur decision, a holding Respondent has no answer to

As discussed in our opening brief, the § 8-b claim in *Turner* arose out of a vacatur decision by a federal habeas court, not a 440 decision based upon one of the proviso's authorized grounds. *See* Opening Br. 27-28. The explicit grounds for the vacatur were that the prosecutor violated *Brady* and due process by knowingly presenting false testimony. *See Turner*, 50 A.D.3d at 891. This Court held that the habeas decision satisfied the proviso, even though the vacatur was *explicitly* premised only on constitutional violations and did not cite any qualifying ground in the proviso. This was because the habeas decision contained "*[i]mplicit* . . .

factual findings" that "were sufficient to constitute the CPL 440.10(1)(c) ground for vacatur" that the prosecutor knowingly relied on false evidence. *Id.* at 892. The rule in *Turner* is that the proviso is satisfied if the vacatur decision contains "[i]mplicit" factual findings making out a qualifying ground. Which of the qualifying grounds is the one that is "implicitly" satisfied is irrelevant.

Absurdly, Respondent contends that *Turner* has no relevance because it concerned a different qualifying ground, § 440.10(1)(c) (reliance on false testimony), while Negron's case concerns § 440.10(1)(b) (misrepresentation or fraud). Resp. Br. 32 n.6. Respondent fails to explain why this difference matters—obviously, it doesn't. *Turner* controls this case.

2. *Baba-Ali,* too, relies on the principle that a vacatur decision's *implicit* reliance on a qualifying ground satisfies the proviso

Because *Baba-Ali*, which Respondent also attempts to distinguish, has a complex history—discussed in detail in our opening brief at pp. 24-27—we briefly summarize it here. On the eve of Baba-Ali's rape trial, the prosecutor disclosed exculpatory medical records, but the jury nevertheless convicted. This Court vacated the conviction on direct appeal. *See People v. Baba-Ali*, 179 A.D.2d 725, 725, 729-30 (2d Dep't 1992) ("*Baba-Ali I*"). At the start of its analysis section, the Court wrote that it "f[ound] merit" to Baba-Ali's claims of "ineffective assistance of trial counsel" and "the prosecutor's misconduct in withholding" the medical records. *Id.* at 728-29. It then spent three paragraphs finding counsel ineffective for

failing to adequately use the late-disclosed records, followed by just one paragraph discussing the prosecutor's delayed disclosure. *Id.* at 729. In that final paragraph, the Court found it "inexcusable" for the prosecutor to make such a late disclosure despite "[k]nowing full well that th[e] records tended to exonerate the defendant." *Id.* at 729-30. The Court held that this delay violated the *Brady*/*Vilardi* rule. *Id.* at 730. That rule does not require any finding of deliberateness, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), and nowhere did the Court explicitly say it was reversing because the prosecutor acted in bad faith.

Upholding Baba-Ali's ensuing § 8-b claim on appeal, this Court held that one ground for the vacatur in *Baba-Ali I* was "prosecutorial misconduct that was tantamount to fraud." *Baba-Ali III*, 20 A.D.3d at 377. Its reasoning was that *Baba-Ali I*'s paragraph describing the prosecutor's "knowing" delay in disclosing *Brady* material was a "fraudulent act" and "fraud on the court," as those terms are defined in *Black's Law Dictionary*. *Id.* The Court of Appeals affirmed in *Baba-Ali IV*.

We showed in our opening brief that *Baba-Ali I* is remarkably similar to the decision vacating Negron's conviction, and that *Baba-Ali III* and *IV* established, as did *Turner*, that the vacating court need not have explicitly stated that the vacatur was based on a finding of bad faith to satisfy the proviso; it was enough if the connection was implicit. *See* Opening Br. 24-31. In both *Baba-Ali I* and *Negron*, the vacating court found ineffective assistance of counsel and a *Brady* violation

that was knowing and deliberate. Ignoring the congruity between *Baba-Ali* and this case, Respondent advances several arguments purporting to distinguish the cases that are completely unpersuasive.

First, Respondent appears to argue that *Baba-Ali I*'s finding of fraud was explicit, not implicit, in contrast with the vacatur decision in Negron's case. This position is based on this Court's statement that it "f[ou]nd merit" to Baba-Ali's argument about "*the prosecutor's misconduct*." Resp. Br. 30 (emphasis in Respondent's brief) (quoting *Baba-Ali I*, 179 A.D.2d at 728-29); *see also* Resp. Br. 34. But the word "misconduct" does not equate to fraud. The United States Supreme Court has referred to "a *Brady* prosecutorial misconduct claim," even while noting that such a claim does not require a showing of willfulness. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Similarly, the New York Court of Appeals has described an error-filled cross-examination as "persistent prosecutorial misconduct," even while accepting that the "misconduct was not intentional." *People v. Adames*, 83 N.Y.2d 89, 92 (1993). New York's district attorneys frequently complain that the term "[p]rosecutorial misconduct" is "widely and promiscuously used . . . to describe every miscue by a prosecutor whether deliberate malfeasance, nonfeasance or a simple mistake."[3]

[3] Letter from Frank A. Sedita, Erie Cty. Dist. Attorney, President of the District Attorneys Association of the State of New York, to Hon. John J. Flanagan, N.Y.S. Senate (June 4, 2015), at 1, *available at* https://perma.cc/4F3X-DSFU.

In short, the mere reference to the "prosecutor's misconduct" in *Baba-Ali I* was not an explicit finding of "fraud." If anything, Negron's vacatur decision was more direct in finding fraud: the Court of Appeals found that Negron's prosecutor not only deliberately delayed disclosing *Brady* evidence, as in Baba-Ali's case, but withheld it entirely, and for the purpose of *deceiving* the defense and the trial court about the strength of Negron's third-party culpability defense. *See* Point I.C.2, *infra*.

Second, turning to *Baba-Ali IV*, Respondent argues that the Court of Appeals upheld the § 8-b claim only because this Court had twice before "confirm[ed]" that the vacatur decision, *Baba-Ali I*, was based upon a finding of fraud. Resp. Br. 32. Respondent's argument refers to (1) an order by this Court, soon after *Baba-Ali I* was decided, denying a prosecution motion to delete *Baba-Ali I*'s discussion of prosecutorial misconduct, *see Baba-Ali IV*, 19 N.Y.3d at 633-34 (recounting this motion and order), and (2) this Court's holding in *Baba-Ali III* that the vacatur in *Baba-Ali I* had relied in part on a finding of fraud.

Contrary to Respondent's argument, the Court of Appeals did not decide *Baba-Ali IV* the way it did only because of these two "confirmations" of the meaning of *Baba-Ali I*. In *Baba-Ali IV*, the Court first concluded, *based purely on a textual analysis* of *Baba-Ali I*, that the vacatur was based on prosecutorial fraud. It wrote that "[t]he decision itself . . . reads" as though fraud was a basis for the

holding, even though the decision was not explicit about this. *Baba-Ali IV*, 19 N.Y.3d at 636-37. Yes, the Court also found circumstantial support for this textual analysis in this Court's 1992 denial of the prosecution's motion to amend and its later interpretation, in *Baba-Ali III*, of *Baba-Ali I*. But the Court of Appeals' reliance went no further than that. The Court simply noted that the Appellate Division itself had concluded that its 13-year-old earlier decision, by a different panel, implied fraud as a basis for vacatur and acknowledged that such an interpretation by the same court was "authoritative." *Baba-Ali IV*, 19 N.Y.3d at 637. However, the high court's own textual analysis makes clear that it would have reached the same decision even without this Court's analysis of what the earlier panel had intended. It certainly did not hold that an "authoritative" statement of reliance on a qualifying ground was a prerequisite to a § 8-b lawsuit.

Finally, Respondent argues that, under *Baba-Ali IV*, a "§ 8-b claim must be based on the grounds for vacatur *actually decided* by the vacating court." Resp. Br. 27, 30 (emphasis added). We assume this is correct. But *Baba-Ali* and *Turner* hold that a vacating court may "actually" rely on a qualifying ground *impliedly*, as in Negron's case.

C. Contrary to the distortions in Respondent's brief, prosecutorial fraud was a basis for vacating Julio Negron's conviction every bit as much as it was for vacating the *Baba-Ali* conviction

1. Negron's 440 motion and appeal argued forcefully for vacatur based on prosecutorial misrepresentation and fraud

Misrepresenting Negron's unambiguous 440 papers, Respondent claims that Negron "never argued for vacatur based on prosecutorial fraud." Resp. Br. 28. Rather, Respondent contends, Negron merely "*noted* that CPL § 440.10(1) permits vacatur" based on prosecutorial fraud and "did not supplement this *stray reference* to CPL § 440.10(1)(b) with any argument." Resp. Br. 18 (emphasis added). To be blunt, this is false.

As detailed in our opening brief at pp. 12-14, Negron's motion papers explicitly argued for vacatur under CPL § 440.10(1)(b). Negron first set forth the *Brady* rule and the due process prohibition on relying on false evidence or argument. R.462. After explaining that relevant law, he then presented the relevant facts: that the prosecutor, Patrick O'Connor, had opposed Negron's third-party culpability defense "while suppressing information [he] knew would have tended to support it," thereby "actively misle[ading] the court into denying the defense." R.465. Finally, Negron argued that the court "should . . . decide th[e] motion" on several CPL § 440.10 grounds, *including that the conviction "was obtained through 'misrepresentation or fraud [by] the prosecutor' (subdiv. 'b')*." R.469 ¶ 83 (emphasis added).

Respondent next mischaracterizes Negron's subsequent briefing in the Court of Appeals. Respondent claims that Negron "argued only that vacatur was warranted based on the ineffective assistance of trial counsel and a *Brady* violation." Resp. Br. 20 (emphasis omitted). But this is also wrong. In the Court of Appeals, Negron again argued that O'Connor violated both *Brady* and the "similar" but distinct prohibition on relying on false evidence or argument. R.478. He again showed how O'Connor had "misle[d] the court," R.483, by "knowingly suppressing" evidence, R.485. He reiterated these arguments in his reply brief. *See* R.492; *see also* Opening Br. 13-14.

It is true that Negron's Court of Appeals briefs did not explicitly cite CPL § 440.10(1)(b) as he already had done in his motion papers, *see* Resp. Br. 20, but that did not mean he abandoned his claims of prosecutorial fraud. To the contrary, he repeated them, as just shown. Indeed, Negron's appellate briefs did not cite *any* specific subdivision of § 440.10 with reference to any of his individual claims, but instead referred to his motion simply as a "440 motion." There was simply no issue on appeal of whether the motion was procedurally proper, or which subdivision applied; the parties, and the Court, focused on the substance of Negron's multiple claims and whether, based upon the facts, vacatur was warranted.

2. Contrary to Respondent's arguments, the *Negron* vacatur decision was based in part on the finding that prosecutorial misrepresentation and fraud procured the conviction

Not content with misrepresenting the content of Negron's motion papers and Court of Appeals briefs, Respondent offers a badly skewed reading of the Court of Appeals' *Negron* vacatur decision, ignoring or misrepresenting each of the three parts of the decision that we highlighted in our opening brief.

In the first part of the decision, the Court of Appeals summarized Negron's "instant motion"—that is, the motion being reviewed, in which Negron explicitly invoked § 440.10(1)(b). *People v. Negron*, 26 N.Y.3d 262, 266-67 (2015). The Court noted that Negron had argued for reversal based on ineffectiveness and on the allegations that O'Connor had both "violated . . . *Brady*" *and* "*actively misle[d] the court* as to the potential merit of defendant's third-party culpability defense." *Id.* at 267 (emphasis added). We highlighted this summary paragraph in our opening brief, *see* pp. 14, 16, 29, but tellingly, Respondent ignores it.

In the second part of the vacatur decision, the Court analyzed Negron's legal claims in light of the relevant facts. *See* Opening Br. 15-16. It first spent four paragraphs finding Negron's lawyer ineffective, then analyzed Negron's arguments about O'Connor's misconduct. It found that O'Connor had mischaracterized Fernando Caban's "connection with the shooting as 'tenuous at best,' . . . all while aware that defense counsel" lacked "plainly favorable" information tying Caban to

the shooting. *Negron*, 26 N.Y.3d at 269-70. Next, the Court concluded that this deception was material to the outcome and therefore made out a *Brady*/*Vilardi* violation. *Id.*

The definitions of "fraudulent act" and "fraud on the court" invoked by this Court in *Baba-Ali III* perfectly describe O'Connor's misconduct, as found by the Court of Appeals: "[c]onduct involving bad faith, [or] dishonesty," and "misconduct [in a judicial proceeding] so serious that it undermines . . . the integrity of the proceeding." *Baba-Ali III*, 20 A.D.3d at 377 (quoting *Black's Law Dictionary*) (alterations and ellipsis in *Baba-Ali III*). Indeed, the Court of Appeals findings in *Negron* make out a much more serious fraud than the findings in *Baba-Ali*. In *Baba-Ali*, the prosecutor disclosed the exculpatory evidence, but just too late for the defense to make adequate use of it. In *Negron*, the prosecutor deceived the trial court and the defense by withholding the exculpatory information entirely, "*all while aware* that defense counsel" didn't have it. *Negron*, 26 N.Y.3d at 269 (emphasis added).

Respondent suggests that the vacatur decision's description of O'Connor's dishonest conduct was meant only to "summarize[] what Negron 'argue[d].'" Resp. Br. 29 (quoting *Negron*, 26 N.Y.3d at 269); *see also id.* at 35. Of course, this is inconsistent with Respondent's simultaneous position that Negron didn't actually argue fraud. But anyway, Respondent's reading is clearly wrong. The

Court's discussion of O'Connor's bad faith is there because it was agreeing with Negron's argument that it was a basis for relief, and it supports the Court's decision to grant the relief Negron was seeking. The paragraph about O'Connor's misconduct is not located at the beginning of the Court's opinion when it was summarizing Negron's motion, *see Negron*, 26 N.Y.3d at 266-67, but instead comes more than halfway through the decision, *in the middle of the Court's analysis section*, after the Court has just analyzed the ineffectiveness claim.

Thus, in the first sentence of the analysis paragraph in question, the Court alerted the reader that it was moving from Negron's ineffectiveness argument to Negron's "argu[ment]" about the prosecutor's "fail[ure] to turn over *Brady* evidence." *Id.* at 269. The next several sentences, including footnote 5, did not only "summarize" Negron's arguments; they were the Court's own findings. Indeed, in this section of the opinion, the Court not only found that O'Connor had acted in bad faith to deceive the trial court, but it also overturned the lower court's finding that Caban's possession of .45-caliber ammunition had been disclosed. *Id.* at 269 n.5.[4] This part of the opinion obviously contains the Court's findings and

[4] Respondent insists "the prosecution did in fact turn over . . . the purportedly suppressed evidence." Resp. Br. 41-42 n.10. This attempt to relitigate the factual basis for Negron's vacatur has no place in this appeal from a motion to dismiss a § 8-b claim. It is just another improper attempt to distract this Court and mislead it into doubting Negron's strong case for innocence. Because this allegation is so egregiously misleading, however, we briefly correct it.

analysis regarding O'Connor's behavior, because there are no such findings elsewhere in the decision supporting the Court's grant of relief.

The third section of the vacatur decision consists of the final two paragraphs, where the Court summarized its ultimate holding. *See* Opening Br. 15-16. It first wrote that the trial was unfair "[u]nder the circumstances presented"—i.e., O'Connor's deliberate misleading of the court and his *Brady*/*Vilardi* violation. *Negron*, 26 N.Y.3d at 270. Then, in its decretal paragraph, the Court wrote that "defendant's motion pursuant to CPL 440.10 [is] granted." *Id.* It did not single out any one of the grounds it had previously discussed but rather granted the motion on all the grounds. Respondent ignores these inconvenient paragraphs, too.

Finally, Respondent argues that the Court of Appeals never found Negron's conviction to be "procured" by fraud within the meaning of § 440.10(1)(b), but that *Baba-Ali I* does contain such a finding. Resp. Br. 36-38. This is wrong. *Baba-Ali I* described the prosecutor's deliberate suppression of evidence, then applied the

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According to Respondent, Justice Lasak found that "the prosecution had in fact disclosed Caban's possession of .45 caliber ammunition," but the Court of Appeals "declined to credit" this finding because "the parties failed to include th[e] confirming evidence of disclosure in the appendix" on appeal. Resp. Br. 19 (citing R.365 n.3), 22. But there was nothing to include. Justice Lasak claimed the ammunition evidence had been disclosed, despite acknowledging that both parties agreed it had not been, and he never identified any document that supported his claim. R.365 & n.3. No such document was in the appellate record because it was not in the trial-court record and *because neither party had any clue what Justice Lasak was referring to*. *See* R.481-82, 496 & n.3. On appeal, the District Attorney *conceded* there was nothing to show that the evidence of .45-caliber ammunition had ever been disclosed to the defense. It is odd for Respondent to rely on a factual statement by a trial judge that came out of thin air, that found no support in the trial record, and that was discredited and rejected by the highest court in this state.

Vilardi "reasonable possibility" standard in discussing the materiality of the evidence; it never made any other findings, implicit or explicit, about how the concealment "procured" the conviction. In the *Negron* vacatur decision, too, the Court found a causal relationship between the misconduct and the conviction, just as it did in *Baba-Ali*; otherwise the misconduct would have been immaterial or non-prejudicial and the trial would not have been unfair. The Negron prosecutor "procured" a conviction through his deliberate misconduct every bit as much as the Baba-Ali prosecutor did.

Under the controlling decisions in *Turner* and *Baba-Ali*, the *Negron* vacatur decision's implicit findings of prosecutorial misrepresentation and fraud make out a qualifying ground under the proviso. Respondent has not shown otherwise. This Court should vacate the lower court's decision and remand this case for a trial.

POINT II

RESPONDENT HAS NO PERSUASIVE RESPONSE TO CLAIMANT'S ARGUMENT THAT THE DISMISSAL OF HIS INDICTMENT ON A GROUND COMPARABLE TO CPL § 440.10(1)(b) SATISFIES THE PROVISO

An alternative basis for reversing the lower court and reinstating Negron's claim is that, after the Court of Appeals vacated Negron's conviction, Justice Lasak dismissed the indictment on a ground "comparable" to the qualifying ground

of CPL § 440.10(1)(b). *See* CCA § 8-b(3)(b)(ii)(C); Opening Br. 36-42. The text and purpose of the proviso support this argument.

As we have shown above, the Court of Appeals in *Ivey* and *Long* acknowledged the ambiguities in the proviso's text and, in resolving those ambiguities, emphasized the legislative purpose of enabling the claims of innocent exonerees. *See* Point I.A, *supra*.

In line with that reasoning, this Court should hold that, even if a claimant's vacatur was not on a qualifying ground, the subsequent dismissal of the indictment on a qualifying ground satisfies the proviso. This interpretation of the proviso's "awkward" text, *Ivey*, 80 N.Y.2d at 480, is as sensible as *Ivey*'s and *Long*'s. If "the plain language of the proviso" says vacatur and dismissal both must occur on qualifying grounds, *Long*, 7 N.Y.3d at 274, but a vacatur alone on a qualifying ground is sufficient, as *Long* holds—or an acquittal alone suffices even though there was no vacatur on a qualifying ground, as *Ivey* holds—then a dismissal on a qualifying ground also should suffice. Such a rule would, as in *Ivey* and *Long*, promote the proviso's purpose of screening out likely unmeritorious claims while allowing apparently meritorious ones to go to trial.

Under such a rule, the dismissal of Negron's indictment satisfied the proviso because it was based on prosecutorial fraud and thus was on a ground "comparable" to CPL § 440.10(1)(b). *See* Opening Br. 16-17, 41-42. Justice Lasak

found that ADA O'Connor "was aware that there was significantly more evidence pointing away" from Negron than toward him, yet O'Connor nevertheless achieved an indictment by "utterly misleading" and "dece[iving]" the grand jury. R.63-65.

Respondent's contrary arguments are meritless. First, Respondent claims that *Long* "forecloses" our argument, Resp. Br. 42, because the Court recognized that dismissals do not occur under CPL § 440.10, and therefore "requir[ing] a claimant to establish that the instrument was dismissed pursuant to CPL 440.10 would impose an impossible condition," *Long*, 7 N.Y.3d at 275. But *Long*'s holding—that a dismissal on a qualifying ground is not required where a vacatur on a qualifying ground has occurred—does not rule out the converse rule we propose. A dismissal on a ground "comparable" to one of those listed in § 440.10(1) satisfies the intent and the letter of the proviso just as much as a vacatur on such a ground does.

Respondent contends that § 8-b(3)(b)(ii)(C)'s reference to "comparable" grounds means only "older or newer versions of CPL § 440.10(1)," Resp. Br. 46 n.12, but the statute contains no such limitation. Indeed, when this Court held in *Turner* that a vacatur on federal habeas corpus review satisfies the proviso—even though such a vacatur, like a dismissal, cannot occur under CPL § 440.10(1)—the implication was that the proviso was satisfied because the vacatur was on a ground

"comparable" to § 440.10(1)(c), even though federal habeas review is independent of the CPL and existed long before it.

Respondent also argues that dismissal of an indictment for prosecutorial fraud in the grand jury cannot satisfy the proviso because it is not based on a review of the trial record. Resp. Br. 45-47. However, the qualifying grounds listed in § 440.10(1) do not all involve trials. Subdivision (a) is based upon lack of jurisdiction, which has nothing to do with trial evidence. Subdivision (b), at issue here, contains no requirement that the prosecutorial "misrepresentation or fraud" happened at trial: it could occur at a potentially dispositive pretrial suppression hearing or, as here, in the grand jury. As we pointed out in our opening brief, and Respondent does not dispute, the vacatur of a conviction on direct appeal because of prosecutorial fraud in the grand jury—as occurred in *People v. Pelchat*, 62 N.Y.2d 97, 106-07 (1984), a case involving a guilty plea—would satisfy the proviso, even though such vacatur involved no review of a trial record. *See* Opening Br. 40.

There is no reason to reach a different conclusion where, as here, prosecutorial fraud causes the indictment to be dismissed after an appeal has been granted on another ground. In both cases, prosecutorial fraud disposes of the case in the claimant's favor, thus accomplishing the proviso's gatekeeping purpose. To deny relief to a deserving § 8-b claimant because he has asserted prosecutorial

fraud as the basis to dismiss an ill-conceived indictment, as opposed to obtaining such relief through a 440 motion or a direct appeal, would thwart the Legislature's intent to compensate all clearly innocent exonerees. In Negron's case, the gatekeeping function is satisfied. He should be allowed now to prove his innocence in the manner the Unjust Conviction Act contemplates: at a trial.

CONCLUSION

Julio Negron suffered "the gravest manner of injustice that we know" when he was convicted for something he didn't do, *Hargrove*, 162 A.D.3d at 29, because a prosecutor first deliberately concealed a "plethora of exculpatory evidence" from the grand jury to secure an indictment, R.64, and then obtained a conviction by fraudulently hiding evidence of another man's likely guilt from the defense, the court, and the jury. Negron spent ten unspeakable years in prison. If the dismissal of his § 8-b claim is affirmed—after courts threw out his conviction *and* indictment based on the same prosecutor's deliberate concealment of evidence that pointed, and still points, to Negron's innocence—it will completely subvert the Legislature's express intention, enshrined in § 8-b but ignored by Respondent, that claimants like Negron be allowed to prove they are entitled to compensation. This case should be remanded for trial to give Negron that chance.

Respectfully submitted,

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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 reply 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 reply brief contains 5,832 words, not counting the cover, table of contents, table of authorities, caption, signature block, CPLR § 5531 statement, or this certification.