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Turn-Coat Disclosure: The Importance of Following Procedure - Turturro v. City of New York

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TURN-COAT DISCLOSURE: THE IMPORTANCE OF FOLLOWING PROCEDURE

SUPREME COURT OF NEW YORK
KING'S COUNTY

Turturro v. City of New York[1]
(decided May 16, 2011)

I. INTRODUCTION

In *Turturro v. City of New York*,[2] the Supreme Court of the State of New York held that the defendant's use of grand jury minutes from a prior related criminal proceeding, for the purpose of impeaching a witness in the subsequent civil proceeding, was precluded.[3] The decisions from the United States Supreme Court case, *Brady v. Maryland*,[4] and the New York Court of Appeals case, *People v. Rosario*,[5] are essential to analyzing the decision in *Turturro* and the potential impact such a decision will have, because they lay foundation for the issue of disclosure. In addition, the court in *Turturro* relied heavily on precedent, which suggested balancing the grand jury secrecy with the potential for serving a public purpose through disclosure.[6] Such judicial discretion requires a standard pro-

[1] 925 N.Y.S.2d 808 (Sup. Ct. 2011).

[2] *Id.*

[3] *Id.* at 810 ("This court holds that any attorney in a subsequent action who is in possession of grand jury minutes is obligated to promptly advise the trial court and must follow the proper procedure prior to any further disclosure, . . . retention of grand jury minutes among unsealed court records is inexplicable.").

[4] 373 U.S. 83 (1963).

[5] 173 N.E.2d 881 (N.Y. 1961).

[6] *See, e.g.*, People v. Di Napoli, 265 N.E.2d 449, 451 (N.Y. 1970) ("In exercising this discretion, the court must balance the competing interests involved, the public interest in disclosure against that in secrecy.").

cedure for disclosure.[7] Although *Turturro* presents a unique situation, considering the Government is both in possession of the grand jury minutes and acting as defendant, the rationale set forth in these influential cases is useful in determining the impact *Turturro* will have on the judicial system.

II. CASE AT ISSUE

The plaintiff in *Turturro*, was a child who "sustained extensive and permanent injuries" after being struck by a motor vehicle.[8] The driver was indicted on two separate charges and the plaintiff subsequently brought a civil action against the driver, the owner of the vehicle and the City of New York.[9] In the civil proceeding, the District Attorney, who represented the City of New York as a defendant, attempted to impeach a witness by utilizing grand jury minutes in the District Attorney's office's possession from the prior criminal proceeding.[10] The court dismissed the jury, allowed cross examination "to proceed under seal" and "required a motion to unseal the grand jury minutes."[11] However, the plaintiff objected, "assert[ing] that the minutes [were] not certified, not consecutively paginated and upon review seem[ed] to be incomplete."[12] The court had to determine whether the disclosure of grand jury minutes from a prior criminal proceeding in a subsequent civil proceeding required "a court order or judicial supervision."[13] The court found that:

[7] *See, e.g.*, In the Matter of the Dist. Attorney of Suffolk Cnty., 449 N.Y.S.2d 1004, 1006 (App. Div. 2d Dep't 1982) (requiring a written order requesting the release of grand jury minutes).

[8] *Turturro*, 925 N.Y.S.2d at 811 ("The underlying action stems from a vehicular accident wherein the defendant Pascarella struck the infant plaintiff, . . . while he was riding his bike. [The infant] sustained extensive and permanent injuries. . . . The claims against the City sound in the failure to institute proper road calming measures to allay speeding in a notoriously dangerous and problematic street.").

[9] *Id.* at 811 n.4 ("The accident gave rise to two grand jury investigations of Pascarella [driver], which resulted in charges being brought, and ultimately a plea to a felony offense.").

[10] *Id.* at 811 ("It is apparent that the City is in possession of two separate grand jury minutes related to two separate indictments stemming from the underlying incident. . . . [The minutes were obtained] when the City attorneys copied the criminal court file from the criminal record room . . . [and] via co-defendant . . . .").

[11] *Id.*

[12] *Id.*

[13] *Turturro*, 925 N.Y.S.2d at 810 ("Are grand jury minutes released pursuant to CPL §§

> [R]egardless of any prior disclosure of grand jury minutes to the defendant in a previous criminal proceeding, he or she is not at liberty to circumvent the safeguards set up by the required procedures of motion practice and judicial control of the minutes by unfettered dissemination and subsequent utilization. . . . Any other outcome would be completely contrary to the public policy of grand jury secrecy and would vitiate the rules and judicial control vested by the case law.[14]

Ultimately, the suppression of the grand jury minutes amounted to such a blatant disregard of public policy and procedure that it posed too great a "harm to the plaintiff" under the "zone of interest test" and the grand jury minutes were precluded from the case at issue.[15]

III. LANDMARK DECISIONS

The Supreme Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[16] In *Brady*, the defense counsel requested review of extrajudi-

240.44, 240.45 and *People v. Rosario* . . . considered public documents thereby permitting subsequent disclosure and use for impeachment purposes in a civil trial without a court order or judicial supervision?"). *See generally* N.Y. CPL 240.44 (McKinney 2011) (stating, "Subject to a protective order, at a pre-trial hearing held in a criminal court at which a witness is called to testify, each party, at the conclusion of the direct examination of each of its witnesses, shall, upon request of the other party, make available to that party to the extent not previously disclosed: 1. Any written or recorded statement, including any testimony before a grand jury, made by such witness other than the defendant which relates to the subject matter of the witness's testimony."); N.Y. CPL 240.45 (McKinney 2011) (stating, "After the jury has been sworn and before the prosecutor's opening address, or in the case of a single judge trial after commencement and before submission of evidence, the prosecutor shall, subject to a protective order, make available to the defendant: (a) Any written or recorded statement, including any testimony before a grand jury . . . .").

[14] *Turturro*, 925 N.Y.S.2d at 810.

[15] *Id.* at 814; *see also* Dairylea Coop., Inc. v. Walkley, 339 N.E.2d 865, 867 (N.Y. 1975) (establishing that under the "zone of interest test" a petitioner must show harm will ensue in order to object to disclosure).

[16] *Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

cial statements made by the co-defendant prior to the trial.[17] At trial, the defendant took the stand and "admitted his participation in the crime, but he claimed that [his co-defendant] did the actual killing."[18] After the defendant had been "tried, convicted, and sentenced"[19] it was discovered that the statement in which the co-defendant admitted to the actual killing had been withheld.[20] The Maryland Court of Appeals held that such suppression deprived the defendant of due process and remanded the case on "the question of punishment."[21] The Supreme Court affirmed this holding, stating the "suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment."[22]

In *Brady*, the Supreme Court likened the withholding of evidence to the prosecutor constructing a trial that would deny the defendant of exculpatory evidence—a trial that would be unjust.[23] The co-defendant's confession, in the prosecution's possession, was potentially exculpatory because it was evidence of the co-defendant's guilt and corroborated the defendant's defense theory; therefore, the prosecutor should have disclosed such evidence.[24] However, the confession's exculpatory value and admissibility is determined by the

[17] *Id.* at 84 ("Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine [the co-defendant's] extrajudicial statements.").

[18] *Id.*

[19] *Id.* ("[I]n his summation to the jury, [defendant's] counsel conceded that [the defendant] was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' ").

[20] *Id.* ("[B]ut one [statement] dated July 9, 1958, in which [the co-defendant] admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.").

[21] *Brady*, 373 U.S. at 85, 88 ("If [the co-defendant's] withheld confession had been before the jury, nothing in it could have reduced the appellant['s] . . . offense below murder in the first degree.").

[22] *Id.* at 86. *See generally* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[23] *Brady*, 373 U.S. at 87-88 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, ...").

[24] 7 N.Y. PRAC., NEW YORK PRETRIAL CRIMINAL PROCEDURE § 5:7 ("[W]here exculpatory evidence is in the prosecution's possession and it directly implicates a potential defense, the obligation to present it to the jury may well exist.").

court.[25] Supporting language giving deference to the Court's discretion states, "it is the court, not the jury, that passes on the 'admissibility of evidence' pertinent to 'the issue of the innocence or guilt of the accused.' "[26] Although the Supreme Court acknowledged that any admission of the confession would likely prejudice the defendant,[27] the Supreme Court stated that "we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment."[28] Therefore, the Supreme Court in *Brady* reinforced the role of the court in determining proper disclosure.

In *Rosario*, the Court of Appeals of New York considered whether the judge erred in releasing only "those portions of the [prior] statement containing the variances."[29] The court's refusal to release the testimony in its entirety denied the defense the opportunity to inspect and determine which portions of the statement would be helpful in potentially impeaching or discrediting a witness.[30] The Court of Appeals of New York held that:

> [A] right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination.[31]

[25] *Brady*, 373 U.S. at 90 ("[A] unanimous Court of Appeals has said that nothing in the suppressed confession 'could have reduced the appellant['s] . . . offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt.").

[26] *Id.* (quoting Giles v. State, 183 A.2d 359, 383 (Md. 1962)).

[27] *Id.*

[28] *Id.* at 90-91 (internal citation omitted).

[29] *Rosario*, 173 N.E.2d at 882 ("After . . . direct testimony, defense counsel requested that the witness' prior statements be turned over to them for possible use on cross-examination. Instead, the statements were submitted to the trial judge for his inspection. . . . [H]e announced that he found some 'variances' between statement and testimony . . . .").

[30] *Id.* at 883.

[31] *Id.*

The defense's ability to review the entire statement is crucial because statements which may not rise to the level of "variances" may still provide the defense with strategic insight.[32] Accordingly, the defense is better qualified than the "impartial presiding judge."[33] Additionally, the trial judge's discretion is not wholly compromised by disclosure of the entire statement as the trial judge ultimately has control over "the extent of cross-examination."[34] To ensure such control, the court mandated that any statement released to the defense be "relate[d] to the subject matter of the witness' testimony, . . . used for impeachment . . . [and is] not require[d] . . . [to] be kept secret or confidential."[35] Therefore, the court in *Rosario* found that the judge's failure to disclose statements requested by the defense was error.[36]

In *Brady* and *Rosario*, the Supreme Court and the New York Court of Appeals had to determine whether the suppression of pretrial statements violated the defendant's constitutional right to due process. Both *Brady* and *Rosario* pose similar conflicts between theory and application.[37] However, in each of these landmark decisions the court utilized a different approach. For instance, in *Brady*, the United States Supreme Court emphasized the role of the court in deciding the "admissibility of evidence."[38] However, in *Rosario*, the New York Court of Appeals pointed out some judicial shortcomings.[39] Ultimately, each of these decisions influenced the outcome in *Turturro*.

In *Turturro*, the court was required to establish the appropriate balance between the disclosure procedure applied to the use of

[32] *Id.* ("[S]tatements seemingly in harmony with such testimony may contain matter which will prove helpful on cross-examination[,] . . . or otherwise supply the defendant with knowledge essential to the neutralization of the damaging testimony . . . which will place the witness' answers upon direct examination in an entirely different light.").

[33] *Id.* ("[O]missions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes.").

[34] *Rosario*, 173 N.E.2d at 883.

[35] *Id.*

[36] *Id.* at 884 (stating however, that the appellant was not prejudiced by the judge's error due to overwhelming guilt).

[37] *See generally Brady*, 373 U.S. at 83, 90; *Rosario*, 173 N.E.2d at 881, 884 (finding that disclosure was immaterial due to the preponderance of the defendant's guilt).

[38] *Brady*, 373 U.S. at 90.

[39] *Rosario*, 173 N.E.2d at 883.

grand jury minutes and judicial discretion.[40] The potential for the grand jury testimony to affect trial raises a crucial issue in *Turturro* that was not present in *Brady*. Although typically kept secret, the grand jury testimony at issue in *Turturro* had the potential to impeach a witness.[41] If this testimony was let in it would alter the case whereas in *Brady*, the introduction of the confession was irrelevant.[42] Additionally, the determination of whether to admit grand jury testimony requires judicial discretion. Unlike *Rosario*, which emphasized the necessity of advocacy, a determination of whether to admit grand jury testimony requires an unbiased point of view. The admission of grand jury testimony, which has a strong policy for secrecy, is not a matter of advocating for the interest of the client, but for protecting a well established facet of trial procedure.

IV. PUBLIC POLICY & APPLICATION

The decisions in *Brady* and *Rosario* established the deference of the court's discretionary power and the rights of a defendant regarding disclosure of pre-trial statements. However, in *Turturro*, the court had to specifically address the disregard for judicial discretion and the disclosure of grand jury minutes by the defense.[43] Grand jury minutes are distinguished from other forms of pre-trial statements, as discussed in *Brady* and *Rosario*, due to the long standing public policy of grand jury minutes secrecy as opposed to disclosure.[44] In *United States v. Procter & Gamble Company*,[45] the Supreme Court held that a "particularized need" for the disclosure of grand jury minutes is necessary, otherwise, the secrecy of grand jury minutes must be maintained.[46] Similar to *Turturro*, in *Procter & Gamble Co.*, there

[40] *See generally Turturro*, 925 N.Y.S. 2d at 810 (discussing whether grand jury minutes are public documents that should be disclosed for impeachment purposes).

[41] *Id.* at 810-11.

[42] *Brady*, 373 U.S. at 88.

[43] *See generally Turturro*, 925 N.Y.S.2d at 810-11 (In this case, the government is the defendant; whereas, the government is typically acting as prosecutor.).

[44] *See generally* N.Y. CPL 190.25(4)(a) (McKinney 2011) (stating, "Grand jury proceedings are secret, and no grand juror, . . . may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding.").

[45] 356 U.S. 677 (1958).

[46] *Id.* at 683.

was a criminal grand jury proceeding, which produced a transcript the Government attempted to use in the subsequent civil trial.[47] The trial court granted the defendant's motion to utilize the same privilege, stating that the transcript's usefulness "outweighed the reasons behind the policy for maintaining secrecy of the grand jury proceedings."[48] On appeal, the Supreme Court reversed this decision.[49] The Supreme Court referred to the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts."[50] Such policy arguments include the need to "encourage all witnesses to step forward and testify freely," and the role grand jury proceedings play "as a public institution [meant to serve] the community."[51] As such, the Supreme Court found that grand jury secrecy "must not be broken except where there is a compelling necessity."[52] Although there are exceptions that will warrant disclosure of grand jury minutes, even if a particularized need is properly demonstrated, the Supreme Court required that "the secrecy of the proceedings is lifted discretely and limitedly."[53]

New York has recognized the tension between the public policy for grand jury secrecy and the reality that at times exceptional situations will warrant disclosure. For instance, in *People v. Di Napoli*,[54] the Court of Appeals found that the lower court did not abuse its discretion in allowing disclosure of grand jury minutes after it "bal-

[47] *Id.* at 678 ("The Government is using the grand jury transcript to prepare the civil case for trial; and appellees, who are defendants in that suit, desire the same privilege.").

[48] *Id.* at 679.

[49] *Id.* at 683 ("We only hold that no compelling necessity has been shown for the wholesale discovery and production of a grand jury transcript under Rule 34. We hold that a much more particularized, more discrete showing of need is necessary to establish 'good cause.' The court made no such particularized finding . . . .").

[50] *Procter & Gamble Co.*, 356 U.S. at 683; *see also* United States v. Johnson, 319 U.S. 503, 513 (1943) (stating, "To allow the intrusion, implied by the lower court's attitude, into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty—would subvert the functions of federal grand juries by all sorts of devices which some states have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes.").

[51] *Procter & Gamble Co.*, 356 U.S at 682.

[52] *Id.*

[53] *Id.* at 683 (limiting the use of grand jury transcripts to impeachment and testing a witness's credibility).

[54] 265 N.E.2d 449 (N.Y. 1970).

ance[d] the competing interests."[55] The court in *Di Napoli* referred to five factors that should be considered in the course of determining whether or not grand jury minutes should be disclosed:

> (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses . . . (4) protection of an innocent accused from unfounded accusations . . . and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.[56]

Although the court in *Di Napoli* established that the "secrecy of grand jury minutes is not absolute" and may be disclosed with a "written order of the court," precedent suggests that the "determination of the question whether disclosure should be permitted is addressed to, and rests in, the trial judge's discretion."[57] New York courts have also extended the application of the balancing test set forth in *Di Napoli* to further reconcile additional difficulties regarding whether or not disclosure may be expanded to civil and private proceedings.[58] Ultimately, by implementing a balancing test, the court in *Di Napoli* placed the power of discretion within the court system and reconciled the tension between the public policy of secrecy and the inevitable exceptions for disclosure speculated in *Procter*

[55] *Id.* at 451 ("In exercising this discretion, the court must balance the competing interests involved, the public interest in disclosure against that in secrecy.").

[56] *Id.* at 452.

[57] *Id.* at 451; *see also* In the Matter of Carey, 416 N.Y.S.2d 904, 908 (App. Div. 4th Dep't 1979) ("[T]he statutes express the legislative intention that the secrecy of Grand Jury minutes be carefully guarded and that any decision for disclosure be made by a court, not by the District Attorney, by a Special Deputy Attorney General superseding him, or even by the Governor."); Application of the City of Buffalo, 394 N.Y.S.2d 919, 921 (App. Div. 4th Dep't 1977) ("[T]he determination of a motion for disclosure of Grand Jury minutes rests in the sound discretion of the court.").

[58] *See, e.g.*, *Buffalo*, 394 N.Y.S.2d at 922 ("Disclosure of Grand Jury minutes is not limited to public bodies concerned with the administration of the criminal law . . . . [C]ourts have recognized a limited right in civil litigants to use a trial witness' Grand Jury testimony to impeach, to refresh recollection or to lead a hostile witness."); Matter of Attorney-General of United States, 291 N.Y.S. 5, 6, 10 (Cnty. Ct. 1936) (utilizing its discretionary power to allow inspection of grand jury minutes as it served a public service as opposed to a private interest).

& Gamble Co.[59]

It is apparent that both federal and New York State courts have emphasized the importance of judicial discretion regarding the public policy of grand jury secrecy and disclosure.[60] In *Turturro*, the court dealt with the disclosure of grand jury minutes derived from a criminal proceeding and later utilized by the District Attorney, for the defense,[61] in a subsequent civil proceeding.[62] This case was unique in the sense that the court was denied the opportunity to utilize the discretionary powers set forth in landmark decisions such as *Brady* because the grand jury minutes were withheld.[63] Likewise, the Government's full control over the grand jury minutes, completely disregarded the limited use permitted by a "particularized need," forsaking the long standing precedent of the public policy of grand jury secrecy.[64] Logically, the suppression of the grand jury minutes made the application of the balancing test set forth by *Di Napoli* unavailable to the court in *Turturro*.[65]

In further contrast to precedent, the District Attorney in *Turturro* was in possession of grand jury minutes and represented the City of New York as defendant to the proceeding, completely misappropriating the rights of the defendant as set forth by *Rosario* to the rights of the plaintiff.[66] Furthermore, circumvention of the necessary limitations regarding grand jury secrecy is not rationalized by the fact that the instant case was a civil proceeding since the policy of grand

[59] *See Procter & Gamble Co.*, 356 U.S. at 682 ("There are instances when that need [a compelling necessity] will outweigh the countervailing policy [of secrecy].").

[60] *Rosario*, 173 N.E.2d at 883 (stating that in spite of the defense's unique point of view regarding the usefulness of statements for cross-examination, the trial court judge would ultimately maintain control over the extent to which such disclosure would be utilized in cross-examination).

[61] *Turturro*, 925 N.Y.S.2d at 810-11.

[62] *Id.* at 811.

[63] *Id.* at 814 ("[T]he failure to provide the Court with the records or to make the appropriate application prevented the Court from reviewing the records for completeness, integrity and relevance.").

[64] *Id.* at 811-12 ("Allowing the use of the minutes for those limited purposes should in no way open the door to complete access and use of the grand jury proceedings, as apparently has occurred in this matter."). *See generally* Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563 (1994) (discussing the dichotomy between increasingly public trials and the traditional secrecy of grand jury testimony).

[65] *Id.* at 814.

[66] *Id.* at 813.

jury secrecy applies to both criminal and civil proceedings.[67] Moreover, *Turturro* requires application of both criminal and civil approaches to disclosure. Therefore, the District Attorney's complete disregard for submitting the grand jury minutes within the District Attorney office's possession to the court is blatantly inconsistent with the procedure set forth by influential cases in both federal and New York State courts.

V. APPLICATION OF GRAND JURY DISCLOSURE IN CIVIL TRIALS

A. Disparity Within Departments

Although grand jury secrecy issues typically arise in criminal proceedings, courts have recognized that civil litigants are not wholly precluded from the disclosure of grand jury testimony.[68] For instance, the Court of Appeals in *Di Napoli* rejected the contention that disclosure of grand jury minutes was exclusively enjoyed by "officials or agencies concerned with the administration or enforcement of the criminal law."[69] However, disclosure of grand jury testimony in civil cases is not absolute and decisions from the Second and Fourth Departments illustrate the disparate outcomes regarding this issue.

i. Second Department

The Appellate Division, Second Department, in *In re Quinn*,[70] allowed the appellants (an unofficial group of town residents) to utilize grand jury testimony.[71] In determining this, the court relied on the trial judge's discretionary power to make a determination based on the circumstances of the case.[72] Approximately thirty years later,

[67] *Buffalo*, 394 N.Y.S.2d at 921.

[68] *See* In re Quinn, 47 N.Y.S.2d 66, 67 (App. Div. 2d Dep't 1944) (reversing a denial of a motion to inspect grand jury testimony based on the court's discretionary power); Albert v. Zahner's Sales Co., 378 N.Y.S.2d 414, 415 (App. Div. 2d Dep't 1976) (stating that disclosure is permitted in civil cases when it aids public interest).

[69] *Di Napoli*, 265 N.E.2d at 452.

[70] 47 N.Y.S.2d 66 (App. Div. 2d Dep't 1944).

[71] *Id.* at 67.

[72] *Id.*

the Appellate Division, Second Department, in *Albert v. Zahner's Sales Co.*,[73] further acknowledged the trend to permit disclosure of grand jury testimony where disclosure would serve a public interest.[74] However, the court in *Albert* refused to extend this right to "aid private civil litigants" since disclosure had the potential to negatively affect the public policy of grand jury secrecy.[75] This inconsistency within the same department raises the issues of when, and to what extent, disclosure of grand jury testimony is permitted in civil proceedings.

ii. Fourth Department

In *Application of Scotti*,[76] the Appellate Division, Fourth Department, granted disclosure of grand jury testimony.[77] In *Scotti*, the proponent, the Special Deputy Attorney-General, sought the "release of specified Grand Jury minutes of testimony relating respectively to the conduct of certain officers . . . and certain employees . . . for consideration of disciplinary action."[78] The court granted this application for a particular purpose.[79] In affirming such disclosure, the court acknowledged its discretionary power to determine the release of grand jury testimony.[80] Next, the court relied on the District Attorney's (and in some instances the Attorney-General or Special Deputy) position as a facilitator of public interest.[81] Due to the propo-

[73] 378 N.Y.S.2d 414 (App. Div. 2d Dep't 1976).

[74] *Id.* at 415.

[75] *Id.* ("In our view, disclosure is not warranted to aid private civil litigants because of the chilling effect such disclosure might have on the ability of future grand juries to obtain witnesses.").

[76] 385 N.Y.S.2d 659 (App. Div. 4th Dep't 1976).

[77] *Id.* at 664.

[78] *Id.* at 661.

[79] *Id.* ("On May 5, 1976 Mr. Justice Ball granted an order on each such application, each order containing the limitation that the minutes released thereunder shall be used 'solely for the purposes of departmental disciplinary action and for no other purpose.' ").

[80] *Id.* at 662 ("By statute the court has jurisdiction over grand jury minutes and has discretionary power to release them."); *see also Di Napoli*, 265 N.E.2d at 451 ("Firmly settled is the rule that determination of the question whether disclosure should be permitted is addressed to, and rests in, the trial judge's discretion.").

[81] *Scotti*, 385 N.Y.S.2d at 662 ("Historically, the District Attorney (or the Attorney-General or his Special Deputy acting under appropriate authority) has represented the public interest.").

nent's position, it was within his power to request disclosure of grand jury minutes to facilitate disciplinary action for the public's interest.[82] To determine whether or not disclosure served a public interest, the court had to determine "whether the transmittal is in a public interest which transcends the policy of maintaining utmost secrecy in grand jury proceedings."[83] Accordingly, the court found that the testimony contained information necessary for the proponent to utilize in disciplinary investigations - a legitimate public purpose.[84]

In *Application of the City of Buffalo*,[85] the Appellate Division, Fourth Department, found that "the denial of inspection of the Grand Jury minutes was proper."[86] The court in *Buffalo* declined to raise the purpose of "recouping an undetermined amount of money" to the same level of public interest as set forth by precedent.[87] Ultimately, disclosure was denied.[88] Therefore, similar to the Second Department, courts in the Fourth Department have reached decisions both favoring and barring disclosure of grand jury testimony in civil proceedings. Within both departments it appears that disclosure is a matter of degree—balancing public interest with public policy of grand jury secrecy.[89]

B. The Use of Grand Jury Testimony in Civil Proceedings

Although courts have recognized that disclosure of grand jury testimony is available to civil litigants, there are still limitations to its

[82] *Id.* ("When in his judgment there is evidence which bears upon the propriety of the conduct of a public employee, . . . it is only right and proper for him to act in the public interest and to ask the court to consider his request that the information be transmitted to the agency.").

[83] *Id.* at 663.

[84] *Id.* at 663-64 ("[T]he Grand Jury minutes . . . relat[ing] to the propriety of the conduct of the named officers and employees . . . is appropriate for the agency . . . to consider . . . in disciplinary investigations . . . [and the] special Term did not abuse its discretion . . . .").

[85] 394 N.Y.S.2d 919 (App. Div. 4d Dep't 1977).

[86] *Id.* at 922.

[87] *Id.* ("Still, the public interest in recouping an undetermined amount of money seems far less compelling than the public interest at stake in *Di Napoli*, . . . where avoidance of future episodes of public contract bid rigging and potentially huge savings to utility rate payers were in the offing . . . .").

[88] *Id.* at 923.

[89] *See Scotti*, 385 N.Y.S.2d at 663.

application. For instance, in *Foley v. City of New York*,[90] the court found that disclosure of grand jury minutes for the purpose of impeachment was admissible.[91] Two years later in *Herring v. City of Syracuse*,[92] the court furthered the application set forth in *Foley*, and found that grand jury testimony may be used in a civil proceeding "not only for impeachment, but also to refresh recollection or lead a hostile witness."[93] Therefore, the disclosure of grand jury minutes in a civil case is not absolute.

C. *Turturro*

In *Turturro*, the City of New York sought to utilize grand jury testimony for the purpose of impeaching one of the plaintiff's witnesses.[94] Although the cause of action in *Turturro* was civil in nature, with the government acting as defendant rather than prosecution, the precedent set forth by *Di Napoli* did not preclude the government from seeking disclosure of grand jury testimony.[95] In determining whether or not to admit disclosure, the trial judge may utilize his discretion based on the circumstances of the case to determine whether disclosure would serve a public purpose.[96] In *Turturro*, the City of New York sought disclosure for the purpose of defending the City from alleged "failure to institute proper road calming measures to allay speeding in a notoriously dangerous and problematic street."[97] Unlike *Scotti*, where the disclosure would facilitate in the disciplinary investigations, the disclosure in *Turturro* would aid in exculpating the City from liability in a suit that rendered a child permanently injured. Although this particular action was private, it is arguable that a finding of liability would provide a remedy to those harmed by the City's negligence—thus serving a public purpose. Disclosure of grand jury, which would potentially exonerate the government from liability, would potentially bar recovery in the instant

[90] 348 N.Y.S.2d 813 (Sup. Ct. 1973).
[91] *Id.* at 814.
[92] 367 N.Y.S.2d 698 (Cnty. Ct. 1975).
[93] *Id.* at 700.
[94] *Turturro*, 925 N.Y.S.2d at 810-11.
[95] *See Di Napoli*, 265 N.E.2d at 452.
[96] *See Quinn*, 47 N.Y.S. at 67 (stating that the lower court properly utilized its discretion).
[97] *Turturro*, 925 N.Y.S.2d at 811.

suit and may set a trend for others harmed by the City's negligence in the future. Therefore, it is unlikely that the trial judge would find the circumstances of *Turturro* amounted to a public purpose that outweighed the public policy of grand jury secrecy. However, if disclosure was granted, the City's intent to utilize grand jury testimony for impeachment of a witness would have been sound, as established by the decisions in *Foley* and *Herring*.[98]

VI. BURDEN & PROCEDURE

As evidenced by the debilitating effect the District Attorney's actions caused in *Turturro*, the implementation of specific burdens and procedures to ensure proper disclosure becomes essential. The Supreme Court in *Pittsburgh Plate Glass Co. v. United States*,[99] established that the burden lies with the defendant to demonstrate "a particularized need" for disclosure.[100] In *Pittsburgh*, the Supreme Court found no error in the trial judge's denial of disclosure of grand jury minutes since "the petitioners failed to show any need whatever for the testimony . . . . They contended only that they had a 'right' to the transcript because it dealt with subject matter generally covered at the trial."[101] However, a "right" to grand jury transcripts does not make the procedures for disclosure unnecessary.[102] For instance, in *In the Matter of the District Attorney of Suffolk County*,[103] the court emphasized that the judge has discretion to require disclosure.[104] Accordingly, the burden is on the "party seeking disclosure to rebut a presumption [of secrecy]" to fulfill certain procedural guidelines prior to the court's determination regarding disclosure of the grand jury minutes.[105]

[98] *See Foley*, 348 N.Y.S.2d at 814; *Herring*, 367 N.Y.S.2d at 700 (allowing grand jury testimony for the purpose of impeachment).

[99] 360 U.S. 395 (1959).

[100] *Id.* at 400 ("The burden, however, is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy.").

[101] *Id.*

[102] *Id.* at 401.

[103] 449 N.Y.S.2d 1004 (App. Div. 2d Dep't 1982).

[104] *Id.* at 1006.

[105] *Id.* at 1007 ("[A] party seeking disclosure . . . must, by a factual presentation, demonstrate why, and to what extent, he requires the minutes of a particular Grand Jury to advance the actions or measures taken, or proposed . . . to insure that the public interest has been, or

In *Pittsburgh*, instead of arguing merely that the petitioner had a "right" to the grand jury testimony, the petitioner should have argued that the testimony of the witness from the grand jury was needed for cross examination for impeachment, recollection or credibility.[106] Further, the petitioner may have argued that withholding testimony that may potentially be exculpatory was a violation of his constitutional right to due process under the Fourteenth Amendment.[107] The application of these standards of "particularized need" would have likely demonstrated a need that outweighed the public policy of secrecy.[108]

However, even if a "particularized need" is properly demonstrated, the opposing party may object. In New York, courts have addressed the issue of determining who has standing to object to disclosure of grand jury minutes in cases such as *Dairylea Coop. Inc. v. Walkley*,[109] which implemented the "zone of interest" test in an effort to expand who has standing to object to disclosure:[110]

> The 'zone of interest' test was formulated to ascertain the petitioner's status without necessarily dealing with the merits of the litigation. A petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute.[111]

This approach focused more on the party bringing suit and less on the

will be, served."); *see also* Martinez v. CPC Int'l, Inc., 450 N.Y.S.2d 528, 529 (App. Div. 2d Dep't 1982) (requiring that Grand Jury minutes are provided to the court "immediately prior to trial").

[106] *Procter & Gamble Co.*, 356 U.S. at 683 (listing impeachment, recollection or credibility as acceptable instances of "particularized need" which may warrant the discrete and limited disclosure of otherwise secret grand jury minutes).

[107] *See generally Brady*, 373 U.S. 83; U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[108] *See Procter & Gamble Co.*, 356 U.S. at 679.

[109] 339 N.E.2d 865 (N.Y. 1975).

[110] *Id.* at 867 ("Under traditional theory a party had standing only where he established that his legal rights had been invaded. This approach, known as the 'legal interest' test has recently been disavowed because it focuses on the issues to be litigated rather than on the party bringing suit." (internal citation omitted)).

[111] *Id.*

issues being litigated.[112] This is essential considering "[t]he increasing pervasiveness of administrative influence on daily life on both the State and Federal level necessitates a concomitant broadening of the category of persons entitled to a judicial determination as to the validity of proposed action."[113]

Placing burdens on both parties to fulfill certain procedural steps prior to the court's decision regarding disclosure of grand jury minutes provides further safeguards for the strong public policy of grand jury secrecy. It has already been established that the District Attorney in *Turturro* failed to submit the grand jury minutes to the trial judge for review prior to disclosing the grand jury minutes at trial.[114] Rather than suppressing the grand jury minutes, the proper procedure would have been to demonstrate the need for disclosure of grand jury minutes, which may have been granted by a court order, and then to submit those grand jury "to the court immediately prior to trial to be kept in the custody of the court."[115] The District Attorney in *Turturro* failed to satisfy each element of the acceptable procedure and therefore, failed to satisfy the burden.[116] However, the plaintiff in *Turturro* had to show that he would be harmed by the use of grand jury minutes and that there was no "legislative intent negating review."[117] The court in *Turturro* found that "the plaintiff stands to suffer injury by the use of the minutes and there is no clear legislative negating review, [therefore] this Court finds that he is within the 'zone of interest' and may object."[118] The court rationalized this by stating:

> Clearly, fairness and integrity of proceedings was a concern for the Court of Appeals when the procedure was set down which requires the initial disclosure to the trial court and only then to the attorneys upon the witness taking the stand. It is precisely a case such as

[112] *Id.*

[113] *Id.* at 868.

[114] *Turturro*, 925 N.Y.S.2d at 814.

[115] *Id.* at 812.

[116] *Id.* at 811, 814.

[117] *Id.* at 811 ("Only where there is a clear legislative intent negating review or a lack of injury in fact will standing be denied.").

[118] *Id.*

> the one before us where the failure to follow the procedure may cause irreparable harm to the plaintiff.[119]

Based on the requirements set forth by *Procter & Gamble Co.* and *Pittsburgh Plate Glass Co*., it is likely that had the District Attorney in *Turturro* presented the grand jury transcripts in his possession to the trial court, he would have successfully met the burden of showing a particularized need because he sought to utilize the minutes "to impeach a witness."[120] In *Procter & Gamble Co.*, the Supreme Court addressed the issue of utilizing criminal proceedings to elicit evidence in subsequent civil proceedings.[121] The court found that "[i]t is only when the criminal procedure is subverted that 'good cause' for wholesale discovery and production of a grand jury transcript would be warranted."[122] The purpose for utilizing the grand jury testimony in *Turturro* was to impeach a witness, not to undermine the criminal procedure in a subsequent case.[123] However, the District Attorney in *Turturro* wholly failed to submit the grand jury transcripts to the trial court. As a result of such a failure, judicial intervention was impossible. Although cases such as *Procter & Gamble Co.* and *Pittsburgh Plate Glass Co*. set forth the requirements for the burden the proponent must satisfy, it is crucial to recognize that not only must such a burden be met, but such a burden hinges on judicial intervention which was completely and erroneously neglected in *Turturro*.

VII. CONCLUSION

It is important to address the emphasis cases such as *Rosario* put on defendant's rights regarding disclosure and the limits placed on judicial discretion.[124] Typically, the District Attorney is in possession of grand jury minutes and the issue is whether such minutes should be disclosed to the defense. However, in *Turturro*, the District Attorney, who represented the defendant, and was in possession

[119] *Turturro*, 925 N.Y.S.2d at 814.
[120] *Id.* at 811.
[121] *Procter & Gamble Co.*, 356 U.S. at 684.
[122] *Id.*
[123] *Turturro*, 925 N.Y.S.2d at 811.
[124] *Rosario*, 173 N.E.2d at 883.

of such grand jury minutes from the previous criminal proceedings.[125] Still, cases such as *Dairylea Coop.* establish that the plaintiff also has rights regarding disclosure if he or she satisfies the zone of interest test.[126] Additionally, cases such as *Procter & Gamble Co.* did not differentiate between plaintiff and defense, but merely stated that the party moving to disclose grand jury minutes has the burden of factual demonstration of a particularized need.[127] Furthermore, the issue of whether or not such procedure is applicable solely to criminal matters was decided in *Buffalo*, which extended disclosure to civil proceedings for the limited uses such as impeaching witnesses.[128] The sole purpose for the use of grand jury minutes in *Turturro* was to impeach a witness; therefore, the District Attorney could not have even rested on the assumption that as a defense counsel in a civil proceeding he could disregard the procedure clearly established by precedent.

The decision in *Turturro* is crucial for the breadth of intricate issues it covers regarding the issue of judicial discretion over disclosure. The decision in *Turturro* shows that a variation in details does not alter the precedent so consistently established by both federal and New York State precedent. All of the cases cited have a recurring theme of the importance of procedure and judicial intervention in the disclosure of traditionally secret grand jury minutes. In a sense, the impact of cases such as *Turturro* is mirrored in the policy set forth by *Di Napoli*—there is the tradition of grand jury secrecy and a need for that secrecy to be disclosed at times, the procedure and policy set in place seek to find the balance between those competing interests.

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[125] *Turturro*, 925 N.Y.S.2d at 811.

[126] *Dairylea Coop.*, 339 N.E.2d at 867.

[127] *Procter & Gamble Co.*, 356 U.S. at 685.

[128] *Buffalo*, 394 N.Y.S.2d at 922.

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