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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF FRIEDMAN,

Appellant,

-against- (Papers Sealed)

No. 56

RICE,

Respondent.

20 Eagle Street
Albany, New York
October 18, 2017

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE PAUL FEINMAN
GUEST JUDGE GERALD J. WHALEN
GUEST JUDGE KAREN K. PETERS

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 JUDGE RIVERA: Last case on the calendar for
2 today, Matter of Friedman v. Rice.

3 Counsel.

4 MR. KUBY: Good afternoon. May it please the
5 court, my name is Ron Kuby. To my left is my associate,
6 John O'Brien, and to his left is my associate-to-be, Leah
7 Trivedi. And this case presents two questions that - - -
8 that I'm going to address primarily.

9 Counsel, do you want to reserve rebuttable time?

10 MR. KUBY: I'm sorry, Judge. Three minutes,
11 please.

12 JUDGE RIVERA: Yes. You have it.

13 MR. KUBY: I'm just so excited to be here.

14 JUDGE RIVERA: We're happy to have you.

15 MR. KUBY: Thank you so much. First, whether the
16 Second Department's sort of unique jurisprudence in - - -
17 in this area which holds that - that anyone who gives
18 information to the police in the course of a criminal
19 investigation is either a confidential source or that
20 information is deemed confidential for purposes of FOIL
21 disclosure unless and until those individuals testify as
22 witnesses at trial whether that was error. And second,
23 whether this court should affirm Justice Winslow's finding
24 of good cause under B(2)(b) after he reviewed the documents
25 and - - - and made specific factual findings about the

1 contents of those documents.

2 JUDGE STEIN: Do we have to find that either the
3 - - - all of the documents here are FOILable or none of
4 them are FOILable or could we do something more along the
5 lines of - - - of the federal law where we - - - where we
6 talk about, you know, whether there's an expressed or
7 implied promise of confidentiality?

8 MR. KUBY: Well, yes. I mean you could do that.
9 I - - - I'm just not quite sure what the mechanism of - - -
10 of doing that would be for this court. Because remember -
11 - -

12 JUDGE STEIN: Well, we wouldn't necessarily have
13 to. Once we - - - once we say what the test is then - - -
14 then a different court could actually look at the documents
15 themselves and see whether they fit. For example, and this
16 is just one example, it - - - it could be that there's
17 implied confidentiality for witness statements that - - -
18 that disclose very personal and private and intimate acts
19 of a sexual nature. And maybe those are protected and
20 others, for example, where a witness said I didn't - - -
21 nothing happened to me, I didn't observe anything, maybe
22 those wouldn't be protected or excluded or exempted under
23 FOIL so.

24 MR. KUBY: The - - - the problem that - - - that
25 I have at this point given the procedural posture of this

1 case and the fact that we filed this request on September
2 19th, 2012. The purpose of FOIL was to provide fairly
3 expedient process in getting these documents, and now we
4 are here and we're talking about a remand because the DA's
5 office specifically adopted a test for confidentiality that
6 is not accepted anywhere except inside the Second
7 Department. There's even a question as to the Second's
8 Department's own jurisprudence.

9 JUDGE RIVERA: Well, then - - - well, then are
10 you arguing or advocating for the - - - whether it's the
11 federal rule or you can tell me if you think the other
12 departments have a different rule from the federal rule.
13 What - - - what is the rule that you're advocating?

14 MR. KUBY: The rule I - - -

15 JUDGE RIVERA: Or a specific rule?

16 MR. KUBY: - - - advocate is the rule set forth
17 in Landano, which - - -

18 JUDGE RIVERA: So the federal rule. So let me
19 ask you this. Do you think the other departments, their
20 rule - - - not the Second Department, First, Third, and
21 Fourth. Did their rules, if you think if there's more than
22 one or if you think they've coalesced to one rule, is it
23 significantly different from the federal rule?

24 MR. KUBY: I - - - I think that all other
25 departments either in words or in substance have adopted

1 the federal rule. I think the First Department has done so
2 explicitly in Matter of Johnson and specifically rejected
3 the position the DA's office is proposing here. The Third
4 Department, while not specifically articulating the test of
5 Landano has - - - has essentially applied the test in
6 Landano and did that in Carnevale, Gomez, John H.. If - -
7 - if the Third Department's view was that everything given
8 in the course of a criminal investigation was confidential
9 or the sources were confidential, John H. would have come
10 out, I think, very differently. It was a prison context.
11 And the Third Department in many ways has the most robust
12 jurisprudence in this area because of all the prison-based
13 Article 78s. It has - - - and the Fourth Department in
14 Brown v. Amherst, if in fact the - - - the Brown v. Amherst
15 court felt that all of the documents generated in the
16 course of a criminal investigation were confidential
17 sources or confidential information it would have been
18 different.

19 JUDGE RIVERA: So - - - so if we agree that the
20 federal rule is what the other departments have applied and
21 that is the appropriate way to construe this exception
22 under FOIL, do we have to do anything other than reverse
23 and send it back to the Second Department to apply the
24 correct rule? I understand your point about it's 2017, but
25 - - -

1 MR. KUBY: Well, of course, you're the Court of
2 Appeals. You don't have to do anything. But - - - but - -
3 - or you can do anything you want. But I think that
4 there's some sound reason - - -

5 JUDGE RIVERA: But you claim there is error, and
6 the question is we agree with you to this extent that the
7 Second Department applied the wrong rule and we adopt the
8 rule that you are advocating for or another rule other than
9 what the Second Department applies, do we do anything else
10 other than send it back to the Second Department? If
11 you're advocating for something else, this is your chance.

12 MR. KUBY: Yes. I most - - - I most certainly
13 am, and I'm - - - and I'm sorry if I'm - - - I'm not clear.
14 At no point in the five years of the history of this
15 litigation has the Nassau County DA's Office offered a
16 scintilla of proof or suggestion that any of these people
17 involved in the case, any of this - - - the people who gave
18 statements to the police, gave confidential information, or
19 were confidential sources. At no point have they ever
20 indicated that - - - that any of these individuals were
21 operating under express or implied promise of
22 confidentiality except their own sort of unique notion that
23 anyone who talks to the police department expects
24 confidentiality which is an expectation that is belied by
25 law.

1 JUDGE RIVERA: So if gets sent back - - - let me
2 just stay with this and then my colleagues, obviously, have
3 many questions to ask. If - - - if we were to agree that
4 it's an incorrect rule and we were to send it back, are you
5 arguing that they would not have an opportunity now to
6 comply - - - to make a showing under the proper rule, that
7 they're foreclosed from that, they have got to deal with
8 whatever record they've established to this point?

9 MR. KUBY: I - - - I think that if, in fact, any
10 of these witnesses were given an expressed or implied
11 assurance of confidentiality, without a remand they could
12 still go back to Justice Winslow and say wait, wait, you
13 know. We have four documents here out of the 10,000 that
14 you should protect. I'm sure Justice Winslow would - - -
15 would grant that. But - - - but to remand it back to
16 basically reset the clock and start this process again I
17 think is a mistake. And to avoid - - - with all due
18 respect, to avoid deciding the good cause issue, which the
19 Second Department decided not to decide, so we go back to
20 Justice Winslow and then, what, you remand back to the
21 Second Department to decide good cause? I - - - as you
22 know, I am old. I'm getting older. I don't know if - - -
23 if we have time for that much litigation.

24 JUDGE WHALEN: Counsel, does it matter that the
25 record below was established with the stare decisis

1 established to the Second Department and the rules that
2 were in place then and if we change the rule now and we set
3 a different rule, shouldn't your opponent have an
4 opportunity to go back and - - - and redevelop a new record
5 - - -

6 MR. KUBY: Well - - -

7 JUDGE WHALEN: - - - based upon the rule?

8 MR. KUBY: Of - of - course. But how is that - -
9 - how is that done in a way that's - - - that's most
10 expedient and efficient to the administration of justice.
11 You tell them, with all due respect, what the - - - the new
12 rule is, which is, in fact, the old rule that we've been
13 living by for decades throughout the United States and
14 throughout three departments. You tell them what the new
15 rule is. And - - - and of course, they would, of
16 necessity, without a remand, but of necessity have an
17 opportunity to go back and say to Justice Winslow, wait a
18 second. There's a problem here. Don't disclose these
19 small categories of documents and here's our evidence. But
20 to simply remand it back for them to begin this agonizing,
21 time-wasting process over again simply insures that it's
22 going to be more years until this is finally resolved.

23 JUDGE GARCIA: To go - - - to go, I think, back
24 to something Judge Stein was asking earlier counsel, what
25 information's actually here? There seems to be some

1 confusion as to the initial FOIL request, then what went
2 into the court, and then a little bit about what went up
3 and what the Appellate Division actually ruled on. So
4 what's your view of the universe of information we would be
5 applying this rule to, or we would be saying you apply the
6 rule to when we send it back?

7 MR. KUBY: Well, it - - - it's hard to know what
8 we don't know. Fair enough. But we do know some things.
9 We do know that there are the statements of complaining
10 witnesses. And that we're given - - - according to Justice
11 Winslow, that vary dramatically both from account to
12 account and individually from - - - from witness to witness
13 depending - - -

14 JUDGE GARCIA: I understood those statements.
15 What other types of information?

16 MR. KUBY: It's - - - many, many statements we
17 anticipate of - - - of individuals who were in the classes
18 and reported to the police that, in fact, absolutely no
19 sexual abuse took place.

20 JUDGE PETERS: That was seventeen - - -

21 MR. KUBY: So you have this - - -

22 JUDGE PETERS: - - - of the twenty-five, right?
23 Sorry for interrupting. Wasn't that seventeen of the
24 twenty-five that reported no abuse?

25 MR. KUBY: There were I - - - I think

1 substantially more who reported no abuse, but - - - but
2 again that's what the Rice report indicated. But - - - but
3 there were at least dozens that said there were no abuse.

4 JUDGE PETERS: So of - - - of the individuals who
5 reported no abuse, are they considered a witness whose
6 statement is confidential when they said nothing happened?

7 MR. KUBY: The DA's Office considers them. DA's
8 Office said every single document is protected completely
9 by 50(b)(2)(B). That's their position. I mean - - - and
10 again, I can see how they - - - they could do that. They
11 could say, well, here's this statement of - - - I won't
12 even name him or - - - and here's his statement. He said
13 there was no sexual abuse taking place. But he mentions
14 specifically that he was seated next to Gregory Doe, and
15 Gregory Doe was not sexually abused. Their position is ah
16 ha, Gregory Doe is a sex abuse victim and therefore they're
17 going to exclude that statement - - - not redact it, even
18 though they have redacted version - - - they're not going
19 to include that because it identifies Gregory Doe by name
20 even though we've had Gregory Doe's name, actual name, for
21 thirty years and he participated in "Capturing the
22 Friedmans" in sort of a starring role.

23 JUDGE FAHEY: Two questions. Just - - - just to
24 clarify for me first. The documents they're requesting,
25 you're going back to - - - to the original FOIL request I

1 thought was everything that the DA's panel had reviewed.
2 Is that correct? Plus all records supporting a
3 determination that the members of the panel are not what's
4 called members of the general public for FOIL or - - - or
5 50(b) purposes.

6 MR. KUBY: It's - - -

7 JUDGE FAHEY: That was what - - - what was
8 originally requested?

9 MR. KUBY: Not precisely.

10 JUDGE FAHEY: Okay.

11 MR. KUBY: We - - - we asked for - - -

12 JUDGE FAHEY: What am I - - - tell me - - - just
13 tell me what I'm missing.

14 MR. KUBY: Sure. We asked for all documents that
15 were provided to the Friedman case review panel, and I
16 believe that was our language. We subsequently found out
17 that there were two very different entities. There was the
18 advisory panel that was provided one set of documents and
19 summaries in redacted form by the DA's office, and the
20 Friedman case review team, which consisted of, as - as we
21 have been told, senior experienced assistant district
22 attorneys.

23 JUDGE FAHEY: So - - - let me ask this. So is
24 that the basis of some members of the panel saying that
25 they were not given all the documents?

1 MR. KUBY: Yes.

2 JUDGE FAHEY: Is that - - - is that your - - -
3 okay.

4 MR. KUBY: Yes.

5 JUDGE FAHEY: Second question. When it went to
6 Supreme Court, did Supreme Court, the court itself, ever do
7 a review of all the documents?

8 MR. KUBY: Yes it did.

9 JUDGE FAHEY: It did an in camera review?

10 MR. KUBY: That's my understanding that it did an
11 in camera review of all of the documents with the question
12 that was left open of whether Justice Winslow actually
13 viewed and reviewed the grand jury minutes, and that was
14 never adequately determined.

15 JUDGE FAHEY: Well, I saw that the law clerk, was
16 that - - - was that her law clerk that made a statement?

17 MR. KUBY: Yes. Judge Balkin's law clerk, Scott
18 Banks.

19 JUDGE FAHEY: I see but there - - - there wasn't
20 - - - in other words, we don't know if Supreme Court did an
21 in camera review of the grand jury minutes then?

22 MR. KUBY: We do not.

23 JUDGE FAHEY: Okay. Thank you.

24 MR. KUBY: And that remains an open question.

25 JUDGE RIVERA: Counsel, your - - - your light is

1 out but do you want to take thirty seconds to address the
2 grand jury issue?

3 MR. KUBY: Yes. And I'll - - - I'll do so in
4 thirty second.

5 JUDGE RIVERA: Please. You have rebuttal time,
6 obviously.

7 MR. KUBY: Okay. If we have not made out a case
8 of compelling and particularized need in this case then I
9 really don't think any non-governmental entity will ever
10 achieve that.

11 JUDGE PETERS: As I understand, the
12 particularized assertion or particularized showing, it has
13 to do with the fact that the grand jury minutes could
14 reveal that the techniques that the police used in
15 questioning the children at issue were invalid. Is that
16 correct?

17 MR. KUBY: Not - - - not entirely, but - - -

18 JUDGE PETERS: Did I - - - is there some other
19 assertion in your brief?

20 MR. KUBY: Yes. I mean what the grand jury
21 minutes do, according to our expert in this area, Kenneth
22 Lanning, is they provide sort of the final statement that
23 the children, now adults, made after this entire process
24 went on as they revealed more and more - - - or made up, as
25 we contend, more and more fantastic scenarios. And - - -

1 and- and our expert Lanning said that, look, it's very
2 important, as we demonstrated I - - - I think with the Fred
3 Doe disclosures that we in fact have. It's very important.
4 You start at the beginning, first disclosures, and you
5 examine each all the way to the end. The grand jury
6 minutes, in essence, would be the endpoint for - - - for
7 our purposes. And that's what - - -

8 JUDGE RIVERA: So it's - it's evolution of the
9 way the story of the victims unfolds. Is that what you're
10 trying to say and tell us?

11 MR. KUBY: That's correct. How a child in one
12 case at the very beginning said nothing happened except
13 Arnold would give me bad hugs. And over a period of time
14 through repeated investigations, that child maintained that
15 he was repeatedly and publicly - - -

16 JUDGE RIVERA: At the point of the grand jury?

17 MR. KUBY: Correct. And that would be the - - -
18 the sort of endpoint. Now - - - now, look could reverse
19 engineer and guess at this? We - - - we probably could
20 based on the counts, but we have no other way of getting
21 that final information.

22 JUDGE WHALEN: Counsel, the - - - a question, if
23 you would, with respect to the grand jury minutes. I - - -
24 I can see, I think, you know, seeking the grand jury
25 minutes for purposes of maybe an insufficiency of the

1 evidence argument. But we're here on actual innocence, and
2 those seem to me to be two different things. And so you're
3 looking for factual proof of actual innocence, not
4 necessarily to try and find out what evidence was before
5 the grand jury and how can you degrade that in your
6 argument. Do - - - do you follow my question? And I'm
7 wondering what - - - why could you not have the same result
8 here without the grand jury minutes by looking at the
9 indictment and the allegations in the indictment and the
10 information that you already acknowledge that you have?

11 MR. KUBY: And again, the - - - the only answer
12 to that is simply by completeness. If there were ten
13 statements given under various forms of examination and we
14 have nine of them that - - - that changed, each one being
15 different, it would be very good to have the ultimate
16 statement, the tenth statement, which appeared before - - -
17 which was contained in the grand jury minutes to find out
18 what they ultimately and finally said.

19 JUDGE RIVERA: Okay. Thank you, counsel.

20 MR. KUBY: Thank you.

21 JUDGE RIVERA: You have rebuttal.

22 MS. STERNBERG: May it please the court, I'm
23 Judith Sternberg of counsel to the District Attorney of
24 Nassau County.

25 JUDGE STEIN: Can I - - - can I just start with

1 one question sort of where we left off on the grand jury
2 minutes so I don't forget?

3 MS. STERNBERG: I - - - I don't want to forget
4 either.

5 JUDGE STEIN: My - - - my question is if we were
6 to find that there was a compelling and particularized
7 interest sufficient to disclose the grand jury minutes,
8 would that in itself answer the question of whether there's
9 good cause under the Civil Rights Law?

10 MS. STERNBERG: Well, compelling need is - - - is
11 certainly a stronger term than good cause. But the
12 considerations are different. One is considering the
13 significance and - - - and public interest of the secrecy
14 in the grand jury and the other is considering the privacy
15 needs of these specific sex crimes victims. But I am - - -
16 when I said I didn't want to forget either, what I meant
17 was I didn't want to forget to answer the question
18 concerning whether the Supreme Court had the grand jury
19 minutes. Supreme Court did not have the grand jury
20 minutes. The District Attorney was ordered to supply
21 specific materials and inquired - - -

22 JUDGE FAHEY: So - - - so I had asked the
23 question. So on the record you're saying it's clear that
24 they didn't - they didn't review the grand jury minutes?

25 MS. STERNBERG: They - - - he didn't have the

1 grand jury minutes, and he said he didn't want the grand
2 jury minutes provided to him.

3 JUDGE FAHEY: I see.

4 MS. STERNBERG: And it is - - - it is not
5 impossible that there could be some case somewhere - - -

6 JUDGE RIVERA: Do we have to send it back so
7 somebody actually looks at it?

8 MS. STERNBERG: If they're going to be disclosed,
9 most certainly. Because this court, aside from the fact
10 that there was no particularized need, there was no showing
11 that these minutes are essential and there was absolutely
12 no attempt to minimize the invasion of the grand jury.
13 There was no suggest- - - -

14 JUDGE FEINMAN: So - - - so you would have to
15 remand to see whether other informational - - - you would
16 have to remand to figure out whether there are other
17 available sources?

18 MS. STERNBERG: Absolutely, Your Honor.

19 JUDGE FEINMAN: Okay.

20 MS. STERNBERG: But even then the petitioner
21 would have to establish that his interest in getting these
22 minutes overcomes the privacy interest and the secrecy
23 interest in the grand jury proceedings. And that is - - -

24 JUDGE STEIN: Well, why doesn't the expert's
25 affidavit do that?

1 MS. STERNBERG: Well, it doesn't do it for a lot
2 of reasons. But more - - - one of the most significant is
3 that the - - - what he wants is more. He has already - - -
4 petitioner has already told the courts below concerning his
5 actual innocence hearing that he has enough.

6 JUDGE STEIN: But isn't that - - - well, he
7 didn't say he has enough.

8 MS. STERNBERG: He actually said - - -

9 JUDGE STEIN: He says he had some. But - - - but
10 isn't that suggesting that - - - that the less you have the
11 more you can show compelling interest? I mean there's - -
12 -

13 MS. STERNBERG: Well, if you have - - -

14 JUDGE STEIN: - - - there's some interesting
15 results that could - - -

16 MS. STERNBERG: - - - made no attempt to provide
17 your own and find your own evidence then - - -

18 JUDGE STEIN: Well, we're talking about a lot of
19 years after these events. I mean this is a pretty unusual
20 circumstance so - - -

21 MS. STERNBERG: It's a very unusual circumstance,
22 Your Honor.

23 JUDGE STEIN: And by the same token many of the -
24 - - many of the reasons for grand jury secrecy may not
25 apply as strongly here.

1 MS. STERNBERG: I can't agree with that, Your
2 Honor.

3 JUDGE FAHEY: Well, what about the - - - what
4 about the - - -

5 JUDGE RIVERA: But you - - - you concede that
6 there's only actually one of the five that's been
7 identified that applies here, right?

8 MS. STERNBERG: Oh, yes.

9 JUDGE RIVERA: Which is that you don't want to
10 discourage people, right? You don't want to discourage
11 people from testifying at the grand jury.

12 MS. STERNBERG: That's right. And - - - and
13 these people went into the grand jury believing - - - well,
14 their parents, they were children at that time - - - at the
15 time. Their parents gave permission for them to testify
16 believing that this testimony was going to be secret, that
17 their - - - their privacy was always going to be protected.
18 And indeed, that is why a plea was negotiated.

19 JUDGE RIVERA: Maybe just redact the names.
20 Maybe redact the names. Because his - - - his point is he
21 wants to show the evolution. What - - - what if you redact
22 the names?

23 MS. STERNBERG: That would probably be
24 insufficient, Your Honor, if there's other identifying
25 information and information that refers to other students.

1 JUDGE RIVERA: Well, what if you redact that? Is
2 - - - isn't his point that he just wants to show that - - -
3 I forget the name he used, but - - - Gregory Doe, I think,
4 Gregory Doe says one thing this day and over time, based on
5 these - - -

6 MS. STERNBERG: Or - - -

7 JUDGE RIVERA: Excuse me.

8 MS. STERNBERG: I'm sorry.

9 JUDGE RIVERA: - - - investigatory techniques.
10 Gregory Doe now has a very different, if not fantastical
11 story, that Gregory Doe has come up with?

12 MS. STERNBERG: Well, if all identification
13 testimony could be redacted that would be one reason that
14 he might want getting the material.

15 JUDGE RIVERA: Well, it's hard if no one's looked
16 at the grand jury, right? Or at least the court has not.

17 MS. STERNBERG: Excuse me?

18 JUDGE RIVERA: It's hard to make that call,
19 perhaps, if the grand jury - - -

20 MS. STERNBERG: It absolutely - - -

21 JUDGE RIVERA: - - - if the judge - - - but I'm
22 saying if the judge has not had an opportunity to look at
23 the minutes?

24 MS. STERNBERG: He chose not to have the
25 opportunity to look at them.

1 JUDGE RIVERA: Yeah. But now we're at a
2 different point, right? We're at the - - - sort of getting
3 back to his point - - -

4 MS. STERNBERG: Right.

5 JUDGE RIVERA: - - - we're at the Court of
6 Appeals now, right?

7 MS. STERNBERG: And he would still have to
8 exercise his discretion. There were never - - -

9 JUDGE FAHEY: Let me ask this. Wait, let me ask
10 this to you. The Second Circuit, what - - - did they
11 review the grand jury minutes?

12 MS. STERNBERG: No. You mean the Second
13 Department? No. They didn't.

14 JUDGE FAHEY: No. The Second Circuit.

15 JUDGE RIVERA: Circuit.

16 JUDGE FAHEY: The Second Circuit.

17 MS. STERNBERG: Oh, no.

18 JUDGE FAHEY: No.

19 MS. STERNBERG: The Second Circuit certainly did
20 not.

21 JUDGE FAHEY: I see.

22 JUDGE PETERS: Can we go for a moment to the
23 witness's statements as compared to the grand jury?
24 Because it's my understanding your assertion, as reflected
25 on page 34 of your brief, is that: "It's reasonable for

1 one who speaks to the police in the course of a criminal
2 investigation to believe that the information he provides
3 is given and received in confidence."

4 MS. STERNBERG: Yes, Your Honor.

5 JUDGE PETERS: So your assertion, as I understand
6 it, and I believe the - - - the DA's Association amicus
7 brief says the same thing, that any statement any
8 individual gives to a police agency in the course of an
9 investigation is confidential. Is that correct?

10 MS. STERNBERG: Yes, Your Honor.

11 JUDGE PETERS: So - - -

12 MS. STERNBERG: We're defending - - -

13 JUDGE PETERS: Which is not, of course,
14 consistent with the First, Third, and Fourth Departments
15 interpretation - - -

16 MS. STERNBERG: Well, actually - - -

17 JUDGE PETERS: Am I right?

18 MS. STERNBERG: Well, actually, the Fourth
19 Department - - -

20 JUDGE RIVERA: Or the federal courts?

21 MS. STERNBERG: No. It's not consistent with
22 what - - - what Landano says.

23 JUDGE PETERS: But if - - - but if you're right
24 then I'm - - - I'm a little confused as to why FOIL talks
25 about identifying a confidential source of a confidential

1 information, because the word confidential isn't even
2 necessary if every single thing anyone says to a police
3 officer is confidential.

4 MS. STERNBERG: Well, the Second Department has
5 not said anything they say is confidential. They've said
6 that anything they say is confidential until and unless
7 that witness testifies in trial at which case, of course,
8 any kind of confidentiality is waived. This - - -

9 JUDGE PETERS: So if someone says - - - so - - -
10 just so I understand how you define a person speaking to a
11 police officer or investigator, so if - - - if someone
12 comes up to me - - - there's an accident, a car accident,
13 on my way home and somebody comes up and said what did you
14 see and I say I saw absolutely nothing, I have no idea what
15 happened, that's confidential?

16 MS. STERNBERG: No.

17 JUDGE PETERS: Why? That's what you - - - page
18 34 of your brief articulates this - - - this
19 confidentiality that's so broad. I'm - I'm having a hard
20 time understanding.

21 MS. STERNBERG: Because that is - - - I guess I
22 would say that in that case the presumption has been
23 rebutted. And although I know - - -

24 JUDGE PETERS: Because I'm not - - - because I
25 didn't see anything?

1 MS. STERNBERG: Because - - - because your
2 statement was so innocuous and that's different from
3 children who speak to police officers concerning
4 allegations - - -

5 JUDGE RIVERA: Well, let's get to - - - get - - -
6 okay. We'll get to the sex crime issue in a moment. But
7 can you just clarify what you just said? What - - - what's
8 the presumption you're talking about? Because I thought
9 the presumption in FOIL was disclosure, and it's your
10 burden to - - -

11 MS. STERNBERG: The presumption is disclosure.

12 JUDGE RIVERA: - - - explain why it's not going -
13 - -

14 MS. STERNBERG: And petitioner - - -

15 JUDGE RIVERA: - - - to be disclosed.

16 MS. STERNBERG: And petitioner has alleged that
17 the Second Department has created a blanket.

18 JUDGE RIVERA: No. No. But what - - - I'm
19 asking about what you just said. What's the presumption
20 you were referring to?

21 MS. STERNBERG: Well, I was referring to the
22 presump- - - - I shouldn't have used the word presumption.

23 JUDGE RIVERA: Okay.

24 MS. STERNBERG: I should use the word blanket
25 exemption because that's the word that petitioner claims -

1 - - that's the phrase petitioner claims the Second
2 Department has created. But - - -

3 JUDGE RIVERA: Well, do you disagree - - -

4 JUDGE FAHEY: Well, the way - - - the way I
5 understand it - - - I'm sorry. You go ahead.

6 JUDGE RIVERA: No. No. Go, please.

7 JUDGE FAHEY: The way I - - - the way I
8 understand the argument is is that most clearly through the
9 dissent in the - - - in the Second Department is that where
10 it - - - where you're saying that everything either
11 expressed or implied is covered in a particular instance
12 and testimony. Then that in essence covers then everything
13 which means that the burden has then shifted from you,
14 who's got to claim the exemption and articulate a reason
15 for the exemption, to the party that wants the information.
16 But the party that wants the information is caught in a
17 catch-22 because they have no basis upon which to make an
18 argument because they have no information. That's why the
19 burden under FOIL is placed on you. But by providing a
20 blanket exemption it - - - that burden can never be met.
21 That's the way I understand the - - - the dissent's
22 argument.

23 MS. STERNBERG: Right. But the statute itself
24 com- - - - creates a blanket exception. A blanket
25 exception - - -

1 JUDGE RIVERA: For - - - for what's confidential.
2 I think we're back to - - -

3 MS. STERNBERG: Well, what is confidential.

4 JUDGE RIVERA: - - - Judge Peters' point - - -
5 it's a question of what's the point of that word. Perhaps
6 Judge Stein - - - what's the point of the word in the
7 statute if it really means any witness that law enforcement
8 speaks with?

9 MS. STERNBERG: Well, the point of it is to
10 recognize how people deal with the police. People don't
11 want to be involved.

12 JUDGE RIVERA: Well, no, no, no. But that's your
13 - - - that's your rationality for your own rule. My
14 question is just on the plain reading of the statute
15 there's a word that's inserted there that you're trying to
16 excise - - - or the Second Department apparently has
17 excised through its construction. I'm - - - I'm not clear
18 how you get around just the plain reading of this statute.

19 MS. STERNBERG: Well, the plain reading of the
20 statute speaks of confidential information. And you don't
21 have to construe that or apply any statutory interpretation
22 about speaking to the police or not speaking to the police.

23 JUDGE STEIN: Well, let me ask you this - - -

24 MS. STERNBERG: Or going to trial. This is
25 confidential.

1 JUDGE STEIN: Following up on Judge Peters'
2 example, if you say that an eyewitness who says I didn't
3 see anything, I don't know anything, that - - - that
4 doesn't fall within the exemption. Then what's the
5 difference between that and one of these children's
6 statements - - -

7 MS. STERNBERG: Well, Your Honor - - -

8 JUDGE STEIN: - - - that said I was in class, I
9 didn't see anything, nothing happened to me. How - - - how
10 are those two statements different?

11 MS. STERNBERG: If I may retract. The children
12 who spoke to these police officers with their parents'
13 permission, some of them made statements. Some of them
14 were not permitted them to speak. Some of them said
15 nothing happened. Some of them said I wasn't in the class.

16 JUDGE STEIN: Well, I'm asking about the ones who
17 said nothing happened and I wasn't in class.

18 MS. STERNBERG: The ones who said nothing
19 happened, to that extent their parents probably - - - I
20 don't know what their parents would probably have done.
21 But the decision to allow your child to speak to the police
22 concerning a sex crime can be compelled by an - - - an
23 expectation that any of this will be confidential. And for
24 that reason - - -

25 JUDGE FAHEY: Would that apply in a different

1 crime? The rule that we make here will apply across the
2 board. So this crime, the accusations and the - - - can be
3 particularly heinous, but if we're dealing with an - - - an
4 ordinary drug case or some - - - some other ordinary kind
5 of crime that we see thousands and thousands of, this rule
6 would still apply to them. Would you be making that same
7 argument?

8 MS. STERNBERG: I would. I would not - - -

9 JUDGE FAHEY: You don't think that the nature of
10 the crime has prompted the - -- the argument for a blanket
11 exemption?

12 MS. STERNBERG: Well, that is not how the Second
13 Department has - - - puts forth but - - -

14 JUDGE FAHEY: No. I'm asking you what you think,
15 what your argument is. Do you agree with that position?

16 MS. STERNBERG: In - - - do I think that the
17 Second Department applied its long-established rule in this
18 case because they were sex crimes? Is that what you're
19 asking me?

20 JUDGE FAHEY: No. I'm asking you if you think
21 the nature of the crime has prompted such a broad blanket
22 exemption.

23 MS. STERNBERG: I don't. I - - - the nature - -
24 - I think I'm not understanding, Your Honor. I apologize.
25 May I just say it is - - -

1 JUDGE RIVERA: Let me ask you this. Since you've
2 already conceded that it's not a blanket exception because
3 there may very well be statements that a witness or an
4 individual actually in the - - - in the example your answer
5 should have been it's not a witness. But let - - - let's
6 just say with this. A statement made to law enforcement
7 may not fall within this exception. What would be the
8 other examples other than it's innocuous?

9 MS. STERNBERG: Well, the Appellate Division
10 itself has said - - -

11 JUDGE RIVERA: Okay.

12 MS. STERNBERG: - - - that this may possibly be
13 rebutted. In Knight v. - - - I'm sorry, let me find the
14 case.

15 JUDGE PETERS: You mean the Appellate Division
16 Second Department - - -

17 MS. STERNBERG: Yes.

18 JUDGE PETERS: - - - when you say the Appellate
19 Division?

20 MS. STERNBERG: Yes. In Knight v. Gold under the
21 prior law they said that: "Witness statements will not be
22 disclosed under the - - - unless - - - except under the
23 most unusual circumstances."

24 JUDGE RIVERA: Okay. So what would be an unusual
25 circumstance other than, I don't know, you said before it's

1 benign or whatever, innocuous.

2 MS. STERNBERG: An unusual circumstance might be
3 - - -

4 JUDGE RIVERA: What would that be?

5 MS. STERNBERG: - - - where the - - - the witness
6 goes and reports a crime to the police and then runs over
7 to the Daily News office.

8 JUDGE RIVERA: Okay. And is - - - is unusual
9 circumstances in the - - - in FOIL? Do we find that
10 somewhere in the statute, that language?

11 MS. STERNBERG: No, Your Honor. That - - -

12 JUDGE RIVERA: So what are we to do when - - -
13 when it's very clear that the rule with FOIL is that the
14 exceptions are read narrowly, and it sounds to me like
15 that's a large carve-out to expand the exception rather
16 than to read it narrowly.

17 MS. STERNBERG: Well, what you could do in this
18 case is not reach this issue at all.

19 JUDGE RIVERA: Okay.

20 MS. STERNBERG: Because the facts of this case
21 come so squarely within the language of the statute
22 concerning confidential information.

23 JUDGE STEIN: Well, you - - - you just referred
24 to a situation in which somebody goes running to the
25 newspaper. In this case, we have some of the witnesses who

1 were part of a documentary that was made public and
2 presumably, they were part of that voluntarily. So how is
3 that different from the unusual circumstance that you just
4 described other than the nature of the crime?

5 MS. STERNBERG: People have the responsibility to
6 protect these witnesses' statements under several different
7 theories. Under the - - - the privacy exemption and - - -

8 JUDGE STEIN: But that wasn't - - - that wasn't
9 asserted here, was it?

10 MS. STERNBERG: It wasn't, Your Honor. Correct.

11 JUDGE STEIN: Why? Do you know why?

12 MS. STERNBERG: Because the DA's Office was - - -
13 was relying on long-established Second Department
14 precedent.

15 JUDGE STEIN: Harder to prove the privacy
16 exemption?

17 MS. STERNBERG: I don't think that was what came
18 into it. I think it was simply that this was such a long-
19 established exemption.

20 JUDGE RIVERA: Thank you, counsel. Thank you.

21 I'm sorry. Did you want to ask one more
22 question?

23 JUDGE PETERS: But what you're asking us to do is
24 affirm the Second Department on a - - - on a ruling of law
25 that affects not just child victims, not just victims of

1 sex offenses, but every single statement made to the police
2 in the course of a criminal investigation. That's an
3 extraordinarily broad request; don't you think?

4 MS. STERNBERG: Your Honor, I'm not asking you to
5 affirm that specifically. I'm asking you to acknowledge
6 that these statements come under the confidential
7 information language. And that's all that the court need
8 address.

9 JUDGE RIVERA: Well, so are you arguing then that
10 - - - that if - if - these statements are assessed by the
11 federal rule or the rules of the other departments they
12 would still not be subject to disclosure.

13 MS. STERNBERG: Absolutely they - - -

14 JUDGE RIVERA: Okay.

15 MS. STERNBERG: - - - would not be subject to
16 disclosure.

17 JUDGE RIVERA: So do - - - do we not have to send
18 that back down so that the court applies the correct
19 standard?

20 MS. STERNBERG: You certainly could.

21 JUDGE RIVERA: Thank you.

22 MS. STERNBERG: Or you could determine it based
23 on - - - on the absolute application of the - - - those
24 words to these statements.

25 JUDGE RIVERA: Okay. Thank you, counsel.

1 MR. KUBY: With all due respect, and I do say
2 this advisedly, I - - - I think that - that at least for me
3 I need a reality check. One of the things that is
4 uniformly true in almost every conceivable case is that a
5 complaining witness who testifies in front of the grand
6 jury and that testimony provides the basis for an
7 indictment, that person legally in - - - with the rarest of
8 exceptions cannot be a confidential source, cannot be a
9 confidential informant. And whatever subjective
10 expectation may have been created on the part of the
11 parents, it was not one that the law in this country will
12 ever, ever accept in the absence of some sort of, okay,
13 well, we'll make you a confidential informant, we will
14 never call you to testify at trial.

15 JUDGE WHALEN: Counsel, can I for a second,
16 though? I mean and maybe I'm misunderstanding this but
17 when we're talking about the grand jury minutes, we're
18 really not talking about the FOIL - - -

19 MR. KUBY: No.

20 JUDGE WHALEN: - - - request, right? And so the
21 grand jury minutes, we're talking about CPL 190.25, right?

22 MR. KUBY: Absolutely.

23 JUDGE WHALEN: And so it's under that - - - that
24 framework that we're looking. And - - - and - and so when
25 you're getting into the confidential argument, I - - - I

1 feel we're slipping back into the - - - the FOIL language.

2 MR. KUBY: Oh, oh, oh, yeah. I - - I - I - I am.
3 I'm not talking about the grand jury minutes at this
4 moment. I'm talking about - - -

5 JUDGE GARCIA: Talking about FOIL.

6 MR. KUBY: - - - the vast body of documents.

7 JUDGE GARCIA: Counsel, on that - - - and on that
8 point and - - - and maybe on this reality check theory, if
9 you go back to the statute, right, if you go back to FOIL
10 and you talk about the federal statute and the state
11 statute and I think it gets to some of what we're trying to
12 determine here in - - - in the sense of a rule. It seems
13 to me the federal language is a little different, and the
14 federal language focuses on the source of the information
15 almost exclusively, right? So it's confidential source.
16 It's information from a confidential source. Whereas the
17 state FOIL says confidential source, yes. And we could
18 argue in this particular were these witnesses confidential
19 sources or not. But it also says confidential information
20 somewhat more untethered to a confidential source. So
21 wouldn't an approach to this be, is this a confidential
22 source? And in these - - - these cases what kind of rule
23 would you have? What's the expectation of the witness?
24 Also, what is the nature of the information provided. And
25 wouldn't that get to something of what Judge Peters was

1 saying is, okay, you may have, you know, a confidential
2 source. You know, don't worry, this is all confidential,
3 the child's a sex - - - crime victim, or you may have
4 information that in some way is confidential to the
5 investigation, right? I mean isn't that really the - - -

6 MR. KUBY: Sure.

7 JUDGE GARCIA: - - - two ways you're getting at
8 this very - - - which one makes this a different standard
9 than the federal standard, I think.

10 MR. KUBY: Well, it - - - it - it doesn't - - -
11 it doesn't have to, okay. Because your - your - scenario -
12 - - and let's take an example federally the FBI roles up to
13 a witness's spouse and says, look, you know, we just really
14 need to find Bill, and we need to know if he's got a gun or
15 not. Look, you're not in this case, but we got to find
16 him, and we got to know if he's got a gun. And - - - and
17 she says, all right, you know what, he hangs out with Joe
18 and Sally and, yeah, he was armed to the teeth when he left
19 here. Okay. I got it. She's not a witness. She's not
20 going to come into the case. She may well have given that
21 information under an implied assurance of confidentiality.
22 But when you are a material witness, whether you saw
23 something or you didn't see the thing the prosecution says
24 you should have saw - - - seen - - - seen - - -

25 JUDGE RIVERA: Yeah. But let's get back - - -

1 MR. KUBY: - - - you're going to be disclosed.

2 JUDGE RIVERA: - - - to Judge Garcia's - - - I
3 think Judge Garcia's - - - unless I'm misunderstanding him,
4 he will correct me, of course. His point is to the extent
5 there is some difference in language between the Freedom of
6 Information Act and our State Freedom of Information Law,
7 does that then require a tweaking of the rule as opposed to
8 the federal rule?

9 MR. KUBY: Okay.

10 JUDGE RIVERA: That's his point and - - - and why
11 don't you try and answer that.

12 MR. KUBY: But if you - - - if you tweak it
13 because the language is not identical, I - - - I still
14 think you get to the same point in your - - - in your
15 tweakage. Which is for it to be confidential, there has to
16 be either a promise or the information has to be given
17 under circumstances which imply confidentiality. And in
18 criminal cases post-indictment it's either going to come
19 out under Brady or it's going to come out in the course of
20 discovery as it did here. We had these names - - -

21 JUDGE GARCIA: It would come out after - - -

22 MR. KUBY: They gave us this on November 30th.

23 JUDGE GARCIA: Counsel, it would come out on one
24 of those things, I assume if it was Brady or not. And
25 we're not talking about that in this context. But - - - so

1 the question would be an implied - - - given your scenario
2 of the person who provides information about a gun and the
3 other side of the coin maybe where we have I didn't see
4 anything in this car accident, parents bring their child in
5 and they say to the officers, you know, I don't want my
6 child talking about this. It's traumatic. I don't want
7 them to have to testify. I don't want this ever to be
8 public and they say don't worry. Okay. You would agree
9 that's confidential?

10 MR. KUBY: I would - - -

11 JUDGE GARCIA: Even after, they never testified.
12 They never - - - let's say they never go to the grand jury
13 would that statement be confidential under this - I'm
14 sorry, under FOIL.

15 MR. KUBY: The - - - the answer to that is yes,
16 comma, but. Because we know in criminal investigations the
17 - - - the police and the DA's Office are - - - are not in a
18 position to tell anybody that this person will never have
19 to testify.

20 JUDGE STEIN: But they may or may not be but but
21 for that person they are providing that information with
22 the understanding. And if - - - and if we backtrack from
23 that and say, well, but that doesn't really matter, it's
24 going to be disclosable under FOIL, aren't we really going
25 to inhibit people from coming forward and believing what

1 they're told?

2 MR. KUBY: Well, okay. Yeah.

3 JUDGE STEIN: Even if it's not true?

4 MR. KUBY: Yeah. That is true. But there's
5 another problem, with all due respect, in that approach.
6 It encourages the police and the district attorney's office
7 to affirmatively mislead witnesses as to their legal
8 obligation.

9 JUDGE GARCIA: It's not - - - I think that
10 statement about you can never guarantee confidentiality is
11 if a court orders you to disclose a witness, as a
12 prosecutor you're going to do it. So there's no absolute
13 protection against disclosure of your name because you can
14 never promise what a court will do. But we're talking
15 about the FOIL obligation here and a confidentiality issue,
16 which is very different I think in - - - in many respects
17 from that issue of what can I promise or what do I have to
18 - - - what caveat do I give to a witness? I mean they
19 could say give the caveat of course not unless a judge
20 orders me to. And then under your thing would that be
21 qualifying - - -

22 JUDGE RIVERA: To the extent the law permits, we
23 will keep your statement and your identity confidential.

24 MR. KUBY: All right. That's - - - that's fine,
25 but that's not an assurance of confidentiality if we want

1 to use the term assurance in its normal sense, not talking
2 about the weirdest possible case we can find. Because the
3 legal obligation, the legal obligation in this society that
4 we all work under, which is why we have subpoena power and
5 they can send nice people with automatic weapons to collect
6 people.

7 JUDGE STEIN: So then what would be - - - what
8 would be confidential, then, under your - - -

9 MR. KUBY: What would be confidential are - - -

10 JUDGE STEIN: If that - - - if that sounds like
11 an expressed assurance, what - - - if that doesn't count
12 what would?

13 MR. KUBY: Either, A, you - - - and presumably
14 the legislature - - -

15 JUDGE STEIN: Written agreement?

16 MR. KUBY: Yeah. When the legislature - - - by
17 the way, and I know my time is way over - - -

18 JUDGE RIVERA: No. Continue.

19 MR. KUBY: Huh?

20 JUDGE RIVERA: Answer please, no. Answer,
21 please.

22 MR. KUBY: Yes. That - - - that in 1974, when
23 FOIL was passed, the presumption was against disclosure.
24 There were six specific categories of information that
25 could be disclosed. And the DA's office then, just to make

1 extra sure, even though their investigatory file wasn't one
2 of those available to disclosure they also got written into
3 the 1974 version that by the way, just in case anybody goes
4 crazy, the investigatory file, the entire investigatory
5 file is exempt. 1977, over the District Attorney's
6 Association protests the statute was amended. The - - -
7 and by the way Gold v. Knight was decided under the old
8 statute. The new statute reversed the presumption,
9 provided six areas of - - - of exemption, now up to nine,
10 to address the DA's office concerns, which were threatening
11 and ongoing judicial proceeding, life and safety of a
12 witness, and confidentiality. So presumably, when - - -
13 when the legislature changed that whole scheme to give us
14 the law we had now, when they used confidential source of
15 confidential information, they did it in accordance with
16 what this court has held in Gold that words mean the things
17 that they say.

18 JUDGE RIVERA: Let me just ask you this since you
19 mentioned that particular amendment. At the time, did the
20 Freedom of Information Act only say confidential sources?
21 Was the legislature aware of this difference at that time?

22 MR. KUBY: Well, the original law made no
23 reference to confidential sources or confidential
24 information because it gave a blanket exemption in two
25 different ways to the district attorney's and the police -

1 - -

2 JUDGE RIVERA: No. I mean the Freedom of
3 Information Act.

4 MR. KUBY: Oh, under FOIA.

5 JUDGE RIVERA: The difference that Judge Garcia's
6 referred to.

7 MR. KUBY: You know - - -

8 JUDGE RIVERA: You know, if you don't know, you
9 don't know.

10 MR. KUBY: - - - you actually caught me with
11 something that not only do I not have an answer to, I can't
12 even make up one.

13 JUDGE RIVERA: It's my red letter day then. If I
14 may ask you one other thing, because your red light is off,
15 just again, do you know whether or not the federal courts
16 have applied the exemption to confidential information not
17 just sources?

18 MR. KUBY: I - - -

19 JUDGE RIVERA: Is this twice I got you?

20 MR. KUBY: Yeah. You want to ask me one other
21 thing and then I'll leave?

22 JUDGE RIVERA: No. Your time is up. Thank you,
23 counsel.

24 MR. KUBY: Maybe I'll leave now then. Thank you
25 so much.

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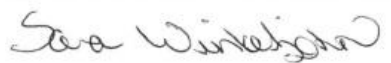
JUDGE RIVERA: Thank you, counsel.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Friedman v. Rice, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 24, 2017