No. 08-

IN THE
Supreme Court of the United States

L. DENNIS KOZLOWSKI and MARK H. SWARTZ,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's right to present a defense under the Sixth and Fourteenth Amendments is violated when the court quashes his subpoena for the recorded, investigatory-stage statements of the key prosecution trial witnesses – statements which were found likely to be exculpatory – because the defendant did not seek to interview the witnesses himself *before* he had been accused of the crime for which he was tried.

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MISCELLANEOUS

L. Dennis Kozlowski and Mark H. Swartz respectfully petition for a writ of certiorari to review the decision of the New York Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 11 N.Y.3d 223 (2008), and set forth in Appendix A. The opinion of the Appellate Division of the Supreme Court, First Department is reported at 47 A.D.3d 111 (1st Dep't 2007), and set forth in Appendix B. The opinion of the Supreme Court, New York County, is available at 2005 WL 6175342, and set forth in Appendix C.

JURISDICTION

The final judgments of the New York Court of Appeals, orders denying reargument of the court's October 16, 2008 Opinion and Order, were entered on January 13, 2009, reported at 11 N.Y.3d 904 (2009) and 11 N.Y.3d 905 (2009), and are set forth in Appendices D and E, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1998). 28 U.S.C. § 2403(b) (1973) may apply, and service is being made upon the Attorney General of the State of New York.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. AMEND. VI.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

This case merits review because it presents a direct and increasingly frequent collision between bedrock values – a criminal defendant's right to obtain evidence necessary for his defense, versus a non-governmental third party's interest in being able to conduct investigations without fear of having to later divulge its files – in a specific context that makes that collision almost inevitable: a non-public internal investigation followed by a public prosecution. In such cases, the first statements by individuals who later testify for the prosecution are made, not to law enforcement, but instead to private lawyers or investigators retained to conduct an internal investigation. When defendants thereafter subpoena these statements from the private parties who recorded them, objections to disclosure based upon the principle that the statements are qualifiedly protected litigation materials are often asserted. *See*, *e.g.*, Fed. R. Civ. Pro. 26(b)(3). But when, as here, the statements sought have genuine potential to undercut the prosecution's case, the defendant has a "need for production of relevant evidence in a criminal proceeding" that is "central to the fair adjudication of a particular criminal case in the administration of justice." *United States v. Nixon*, 418 U.S. 683, 713 (1974).

Courts thus increasingly find themselves having to balance the competing values at stake: a private party's claim of qualified privilege versus a criminal defendant's need for relevant and potentially exculpatory material. The constitutional standard by which these competing values are to be weighed, and the collision between them resolved, has never been articulated by this Court. It is the issue that lies at the heart of this case.

In its opinion, the New York Court of Appeals explicitly recognized that these values had clashed. For example, it articulated its obligation to "strike an appropriate balance between the rights and interests of law enforcement, corporations and their employees, and the accused." *People v. Kozlowski*, 11 N.Y.3d 223, 243 (2008). And, in the process of elucidating some of the factors relevant to this balancing, the court held that the materials sought by the Defendants were "reasonably likely to . . . contradict the statements of key witnesses for the People." *Id*. But nevertheless, it sustained the quashing of the Defendants' subpoena for those materials because the Defendants had failed to interview the witnesses *before* the indictment was handed up. *Id.* at 245–46. In doing so, the court made Defendants' right to obtain exculpatory material conditional on a procedural requirement that itself was unconstitutional because it deprived the Defendants of their right to obtain essential evidence based only on their failure to anticipate and defend a criminal case before it existed.

INTRODUCTION

The matter in which this question arose was among the most intently watched white-collar criminal cases ever brought in a state court – the prosecution of the former CEO and CFO of Tyco International, Ltd. ("Tyco"), L. Dennis Kozlowski and Mark H. Swartz. The essence of the accusation was that the Defendants committed larceny by taking "bonuses" that they had not earned. The key issue at trial was whether Tyco's directors had approved the bonuses. After a seven-month trial that ended in a mistrial, followed by a four-month re-trial, the Defendants were convicted and are each serving indeterminate prison sentences of 8 and 1/3 to 25 years.

The Internal Investigation

The investigation that led to the Defendants' criminal prosecution was not begun by law enforcement or a government agency. Rather, in April, 2002, Tyco retained the law firm Boies, Schiller & Flexner LLP ("Boies") to conduct an internal investigation to determine whether there had been improper transactions between Tyco and any of its directors or officers. *Kozlowski*, 11 N.Y.3d at 233–34. As part of this investigation, Boies conducted various interviews, four of which came to be the focus of the appeal. Specifically, on June 6, 2002, Boies interviewed Tyco director and interim CEO, John Fort. *Id.* at 234. On August 12 and 13, 2002, Boies interviewed Stephen Foss, Peter Slusser and James Pasman, who had been members of Tyco's Compensation Committee, as well as directors, on the relevant dates. *Id.* The interviews were memorialized in handwritten notes and draft memoranda. *Id.* at n.6.

During the month after these interviews, co-defendant Mark Swartz continued to be employed as Tyco's CFO. He served actively, for example, by signing Tyco's 10-Q as its Sarbanes-Oxley Act designated representative and conducting investor conference calls on the Corporation's behalf. *Id.* at 235. As Defendants later argued when seeking to obtain copies of the recorded director interviews, Tyco's continued employment of Swartz in a position of such importance *after* Boies had interviewed the directors belied the notion that the directors had told Boies that Swartz and Kozlowski stole their bonuses. If the directors had told Boies that the bonuses were unauthorized, it is hard to imagine that Tyco would have permitted Swartz to

continue to discharge the very sensitive, high level responsibilities that it did.

On September 11, 2002, Mr. Swartz stepped down after the appointment of a new CFO, pursuant to a separation agreement, negotiated in August, whose terms included a $50 million severance payment. A1119–22.[1] The next day, Messrs. Swartz and Kozlowski were indicted. The principal charges, upon which they were later convicted, were that they had stolen four specific sums, claimed by the Defendants as bonuses. *Kozlowski*, 11 N.Y.3d at 230.

The Relationship between the Internal Investigation and the Prosecution

Boies learned of the first "unauthorized" bonus to the Defendants in mid-July, 2002. Swartz Appellate Division Reply Brief at 40. During the next few months, Tyco worked closely with the prosecution in investigating the matter. It produced "some ten million pages of documents," waiving privilege – at the prosecutor's request – over untold numbers of documents. Swartz Subpoena Hearing Transcript, RA216 at 37.[2] Approximately 35 lawyers from the Boies firm worked on the investigation, assisted by three forensic accounting firms. Transcript of Trial Two, A2525, A2542. These lawyers "consulted regularly with the District Attorney's Office about the proceedings" and were

1. Numbers preceded by the letter "A" refer to pages in the Appellate Division Joint Appendix.

2. Numbers preceded by the letters "RA" refer to pages in the Respondent's Court of Appeals Appendix.

"committed" to "provid[ing] answers to questions or documents that exist." Transcript of Trial One, A663. Among the documents produced by Tyco to the prosecutor were several pages of notes and memoranda, redacted to exclude attorneys' opinions or mental impressions, memorializing interviews with Mr. Swartz and communications with Mr. Kozlowski's attorneys. Tyco Reply Memorandum of Law in Further Support of Motion to Quash at 10. Two months after Boies learned about the disputed bonuses, the prosecution obtained a 94-page indictment setting forth, in detail, years of financial transactions at Tyco. Swartz App. Div. Reply Brief at 40. In its motion to quash the Defendants' subpoena duces tecum, Tyco argued that its "common interest" with the prosecution was so strong as to permit it to disclose core work product to the prosecution without waiving work product protection for what it disclosed. Tyco Reply Memo at 17.

The Mistrial, Defendants' Subpoena for Impeachment Materials and Tyco's Motion to Quash the Subpoena

The prosecution called the previously-mentioned directors as witnesses at the Defendants' first trial to testify that they had not approved the disputed bonuses. The case ended in a mistrial. Before the commencement of the re-trial, the Defendants issued a subpoena duces tecum to Tyco for the recorded interviews of these director-witnesses.[3] *Kozlowski*, 11

3. The Defendants learned of these interviews when they were listed on a privilege log produced by Tyco to the Defendants in civil litigation. The privilege log describes the subject of the August 12 and 13 interviews as including the (Cont'd)

N.Y.3d at 235. The subjects discussed included the interviewees' knowledge and/or authorization of the Defendants' bonus compensation, a critical subject given that the prosecution "center[ed] on the charge that defendants' bonuses were not approved by the Compensation Committee or the board of directors." *Id.* at 241.

Tyco filed a motion to quash, claiming that the Defendants had not met the standard for subpoena enforcement enunciated in a leading New York case, *People v. Gissendanner*, 48 N.Y.2d 543 (1979), which requires a criminal defendant to demonstrate that its subpoena is not merely a "fishing expedition," but rather, is "reasonably likely" to "produce relevant and exculpatory evidence." Tyco Memorandum of Law in Support of Motion to Quash at 4, 6. Tyco acknowledged that materials prepared in anticipation of litigation, as distinguished from opinion work product, are discoverable pursuant to N.Y. C.P.L.R. 3101(d)(2) upon a showing of substantial need and inability to replicate, but claimed that the subpoenaed materials were entitled to the higher level of protection afforded to opinion work product. Tyco Memo at 5, 7.[4]

(Cont'd)

KELP and relocation loan programs, Compensation Events and Use of Company Assets. *Kozlowski*, 11 N.Y.3d at 234. Although the subpoena originally sought production of additional materials, the Defendants thereafter narrowed the subpoena and, on appeal, focused exclusively on the quashing of the subpoena for the notes of these particular interviews.

4. Although Tyco initially asserted that the materials were also protected by the attorney-client privilege, the prosecution abandoned this argument on appeal. *See Kozlowski*, 11 N.Y.3d at 244.

In response, the Defendants made explicit that they sought only to discover facts (the directors' statements), not the attorneys' opinions, and agreed that any expression of opinion should be redacted from the interview notes. Transcript of Hearing, RA213 at 22–23. The Defendants explained that they had substantial need for the subpoenaed materials because of their relevance and potential to be exculpatory. RA213 at 24, 216 at 36 (noting that after the interviews of the director-witnesses, Tyco continued to treat Swartz as though he "had [not] done anything wrong," which went directly to "the credibility of directors who [now] say, we found out Mark Swartz [received] an ADT bonus, we never approved that"); *see Kozlowski*, 11 N.Y.3d at 243 (finding that the subpoenaed materials, if produced, would be reasonably likely to support an inference that "the director witnesses . . . changed their tune [about the Defendants' innocence] after the District Attorney obtained an indictment"). The Defendants also explained that the subpoenaed materials could not be replicated because the interviews were conducted during a "window of time" that had long since closed – the period after the investigation had been commenced but before Defendant Swartz's employment as CFO had been terminated. RA213 at 24; RA214 at 26. In other words, as the Court of Appeals later held, the statements were the earliest recordings of the director-witnesses' positions on the key issue in the trial, and the fact that the directors continued to employ Swartz as CFO after those statements were made gave rise to a high likelihood that the statements were inconsistent with the directors' trial testimony. *Kozlowski*, 11 N.Y.3d at 242-43.

Moreover, the Defendants repeatedly asserted their right to obtain the subpoenaed materials in constitutional terms. They noted that it would be "fundamentally unfair to the Defendants" if the trial court were to thwart the Defendants' right to compulsory process by allowing Tyco "to hide behind" the privileges it claimed. RA182; *see also* Trial Court Order, *Tyco Int'l Ltd. v. Swartz*, No. 5259/02, 2005 WL 6175342 (Sup. Ct. N.Y. County Jan. 14, 2005) (summarizing the Defendants' position that regardless of Tyco's assertion of privileges, the subpoenaed materials should "nevertheless [be] subject to disclosure"). The Defendants also emphasized that the interview notes were "material to issues at the heart of this case," RA182, and argued that the notes were so likely to be exculpatory that the prosecution, if it had obtained them, would have been under an obligation to "provide it as *Brady* to us," RA215 at 33; *see Brady v. Maryland*, 373 U.S. 83 (1963).

The Trial Court's Decision to Quash the Subpoena

The trial court's opinion did not directly address Tyco's argument that the Defendants failed to meet the *Gissendanner* standard. But New York's highest court later found that the trial court, by focusing on privilege issues that became relevant only *after* a finding that the subpoena was otherwise enforceable, "implicitly recognized" that the Defendants had satisfied that standard. *Id.* at 242.

Nevertheless, the trial court granted Tyco's motion to quash. The court reached this result based largely on its interpretation of N.Y. C.P.L.R. 3101(d)(2), the state-law discovery statute compelling production of

materials prepared in anticipation of litigation.[5] Specifically, the court held that the Defendants had failed to seek the "substantial equivalent" of the subpoenaed materials because they did not seek to interview the director-witnesses, at an "earlier time," *i.e.*, before the defendants were accused of stealing their bonuses. *Tyco Int'l*, 2005 WL 6175342.

The Re-trial

At the re-trial, the director-witnesses again denied having approved the bonuses. This time, the Defendants were convicted.

The Intermediate-Level State Appeal

The Defendants appealed to the Appellate Division of the Supreme Court [New York's intermediate level appellate court], where they challenged the quashing of their subpoena as a deprivation of their "right to compulsory process and . . . to present a defense, as guaranteed by the United States Constitution." Swartz Appellate Division Brief at 90 n.47. Specifically, Defendants explained that there was "every reason to believe that the statements . . . were at odds with the

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5. The statute makes materials "prepared in anticipation of litigation" discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." By contrast, New York's statute that governs requests to obtain work product, N.Y. C.P.L.R. 3101(c), states in its entirety: "The work product of an attorney shall not be obtainable."

directors' trial testimony." Swartz App. Div. Reply Brief at 11–12. The prosecution defended the quashing of the subpoena on two principal grounds. First, it contended that Defendants' subpoena had been a "fishing expedition" and therefore failed to satisfy the *Gissendanner* threshold for enforcement. Prosecution App. Div. Brief at 261–62. Second, it argued that the materials were protected from disclosure by the opinion work-product privilege. Prosecution App. Div. Brief at 269. The Appellate Division affirmed. App. B. With respect to the quashing of the subpoena, it said only that the trial court had not "improvidently exercise[d] its discretion . . . since the documents sought were not material and exculpatory." *People v. Kozlowski*, 47 A.D.3d 111, 120 (2007).

The Appeal to New York's Highest Court

Defendants sought and received rarely granted leave to appeal to the state's highest court, the New York Court of Appeals.[6]

On appeal, the Defendants again emphasized that the quashing of the subpoena violated their constitutional rights. *See* Swartz Court of Appeals Brief at 35, 42–43; *see also* Prosecution Ct. App. Brief at 159 ("Swartz claims that he 'has a constitutional right to compel disclosure of material evidence from a third

6. In 2007, the year before Defendants obtained leave from the N.Y. Court of Appeals, it granted leave in only 36 of 2,371 criminal cases, or 1.5%. N.Y. Court of Appeals, Annual Report of the Clerk of the Court 2007, *available at* http://www.nycourts.gov/ctapps/AnnRpt2007.pdf, at 8. The 2008 annual report has not yet been released.

party'").[7] The Defendants focused on this Court's decisions in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (holding that due process was violated by quashing a criminal defendant's subpoena for confidential files of a state agency that investigates claims of child abuse), and *Davis v. Alaska*, 415 U.S. 308 (1974) (holding that Sixth Amendment right to present a defense outweighed countervailing privacy interest). *See* Swartz Ct. App. Brief at 42–43.

In response, the prosecution argued that the Defendants' subpoena sought only "general credibility" evidence and therefore did not satisfy *Gissendanner*. Prosecution Ct. App. Brief at 166–72. The prosecution also argued that even if the subpoena did satisfy the *Gissendanner* standard, it was nevertheless unenforceable because the materials sought were pure opinion work product and therefore protected from disclosure. *Id.* at 172–79.

The prosecution did not argue that the materials were protected from disclosure by a qualified privilege. In other words, the prosecution did not assert that the Defendants should not receive the materials if the court rejected the prosecution's argument that the materials were pure opinion work product. Thus, the prosecution did not suggest, at any point in the appellate process, that the Defendants failed to meet the minimal standard

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7. Although the subpoena issue was discussed more expansively in the brief of Defendant Swartz, Mr. Kozlowski's Brief articulated that he joined in all of Swartz's arguments, "including but not limited to . . . the trial court's error in refusing to enforce the subpoena issued to the Boies firm." Kozlowski Ct. App. Brief at 81.

for disclosure of materials prepared in anticipation of litigation, or argue that Tyco's right to *qualified* protection for its litigation materials could outweigh the Defendants' need for potentially exculpatory impeachment materials, or that Defendants should have interviewed the directors *before* the indictment was issued.

The Court of Appeals' Decision

The New York Court of Appeals decided both of the disputed issues in the Defendants' favor. First, disagreeing with the Appellate Division, it held that the Defendants had satisfied the *Gissendanner* standard by proffering facts that made it reasonably likely the subpoenaed notes contained "material that could contradict the statements of key witnesses for the People." *Kozlowski*, 11 N.Y.3d at 243. The court explained that the subpoena sought "specifically identified statements made by the director witnesses regarding key issues in the case." *Id.* at 241–42. The opinion went on to explain why the subpoenaed interview notes had genuine potential to undercut the prosecution:

> Defendants pointed to undisputed facts, arguing that after the directors were made aware of at least some of the defendants' questionable activities through the Boies Schiller investigation, they continued to permit Swartz to exercise substantial authority as the CFO of Tyco until September 11, 2002 – the day before he was indicted – and voted to pay him $50 million in severance just one day after the last of the relevant director interviews.

Id. at 243.

Second, the court held that the interview notes were not protected by the absolute privilege for opinion work product, but constituted only qualifiedly protected materials prepared in anticipation of litigation, discoverable upon a showing of substantial need and inability to obtain their substantial equivalent. *Id.* at 244–45. Only then did the court affirm the quashing of the subpoena, on a ground *not* argued by the prosecution at any appellate level – that the failure of the Defendants to seek interviews with the director-witnesses was fatal, on the theory that such interviews would have been the substantial equivalent of the directors' statements to Tyco. *Id.* at 245.

In a footnote, the court said it would not address the Defendants' constitutional argument, seeming at first to accept the prosecution's view that the constitutional argument was unpreserved. *Id.* at 242, n.11. But in the very same breath, the court went on to do that which it said it would not – it clearly addressed the Defendants' constitutional argument. For example, the opinion began its discussion of the subpoena issue by citing this Court's opinions in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and *United States v. Nixon*, 418 U.S. 683 (1974), as binding authority for the proposition that it must consider the Defendants' "right to a fair trial." *Id.* at 242. Plainly, this is a reference to a constitutional right, as the "fair trial" right articulated in *Ritchie* and *Nixon* is explicitly constitutional. Indeed, there was no reason for the New York court to cite United States Supreme Court authority at all, other than to address constitutional issues. Moreover, the court made the point of citing a specific page from the *Ritchie* opinion, 480 U.S. at 56, whose content and theme

is exclusively constitutional (*e.g.*, it holds that criminal defendants have a Sixth Amendment right to "put before a jury evidence that might influence the determination of guilt" and concludes that a defendant's right to subpoena confidential records is "properly . . . considered by reference to due process"). *See Kozlowski*, 11 N.Y.3d at 242. The theme of the specifically cited page of *Nixon*, 418 U.S. at 711, is also clearly constitutional, as it includes such observations as "[t]he right to the production of all evidence at a criminal trial similarly has constitutional dimensions" and that the "Sixth Amendment explicitly confers upon every defendant in a criminal trial the right . . . to have compulsory process." *See Kozlowski*, 11 N.Y.3d at 242. And finally, the opinion went on to weigh the "competing considerations" that the *Ritchie* decision mandates. *Id.* at 243.[8]

But despite recognizing the importance of the materials, the court held that Defendants were not entitled to compel their production because the Defendants had themselves not attempted to interview the director-witnesses at an "earlier time." *Id.* at 245–

8. *People v. Gissendanner*, repeatedly emphasized by the Court of Appeals as the leading New York case on the standard for subpoena enforcement, is itself based on federal constitutional principles. Gissendanner holds that although enforcement of subpoenas for "general credibility" evidence may be left to the sound discretion of trial courts, requests for "access . . . to otherwise confidential data relevant and material to the determination of guilt or innocence" "must" be afforded. *Id.* at 548. Indeed, the *Gissendanner* opinion cites *Davis v. Alaska*, 415 U.S. at 316, for the principle that evidence material to "biases, prejudices or ulterior motives" falls into the category of evidence that must be disclosed, even when "otherwise confidential." *Id.*

46. Although neither the Court of Appeals nor the trial court ever explicitly defined the "earlier time" during which the Defendants might theoretically have attempted to interview the Tyco directors, the phrase had to refer to the period before September 12, 2002 – the date on which both of the Defendants were criminally charged with stealing from the company. Indeed, given that the directors testified in the grand jury that the Defendants' bonuses were unauthorized, by the date the indictment was handed up the directors had already "changed their tune" and adopted the prosecution's view of the impropriety of the bonuses. Thus, to the extent there can ever have been a time when director statements "substantially equivalent" to the statements made to Boies might have been obtainable, this could only have been before the indictment was handed up.[9] In other words, the New York Court of Appeals held that the Defendants would be deprived of compulsory process to obtain evidence having genuine potential to undercut the central allegation against them, because they did not seek to investigate that allegation at a time before it had even been made. As we argue below, to condition the Defendants' access to exculpatory material on that procedural requirement is to deny Defendants their constitutional right to present a defense.

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9. Furthermore, the notion that one party's questions to a witness are the substantial equivalent of another, adverse party's questions to the same witness is inconsistent with the premise of our judicial system that witnesses say different, inconsistent things to different parties at different times. Indeed, this is why our system of justice permits cross-examination and imposes obligations such as those mandated by the Jencks Act, 18 U.S.C. § 3500 (1957).

REASONS FOR GRANTING THE PETITION

The New York Court of Appeals affirmed the trial court's quashing of the Defendants' subpoena for prior, likely inconsistent, witness statements because the Defendants had failed to satisfy a state-law requirement that the Defendants were to have attempted to interview those witnesses *before* they had been charged with the crime. The question we ask this Court to review is whether such a requirement violates a defendant's right to present a defense under the Sixth and Fourteenth Amendments. This issue is squarely presented, broadly consequential and has not previously been addressed. And as explained below, the issue is increasingly likely to recur in the context in which it arose here – an internal corporate investigation followed by a criminal prosecution.

A. This Court Has Never Directly Addressed the Issue of How to Balance a Criminal Defendant's Right to Obtain Exculpatory Evidence Against the Qualified Privilege for Materials Prepared in Anticipation of Litigation.

The New York court acknowledged that it was required to "strike an appropriate balance" between the fundamental right of a criminal defendant to obtain critical impeachment evidence and the qualified privilege that protects litigation materials. The question of how to balance these interests is one of profound constitutional importance, similar to, yet different from, the questions this Court confronted in cases such as *Ritchie*, 480 U.S. at 39, *Nixon*, 418 U.S. at 683, *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Davis*, 415 U.S.

at 308. In each of those cases, this Court analyzed how to balance a defendant's right to present a defense against different kinds of countervailing values, such as the statutory confidentiality for the records of a child-welfare agency (*Ritchie*), the presumptive privilege that protects communications of the President (*Nixon*), and evidentiary rules that disallow hearsay evidence (*Chambers*). But in none of those cases, or any other, has this Court held that a Defendant waived his right to obtain exculpatory materials because he failed to conduct his discovery *before* he was charged with a crime.

B. Logical Application of This Court's Prior Decisions Suggests That the New York State Court's Decision Violated the Defendants' Right to Present a Defense.

This Court has yet to define the contours of the "appropriate balance" between a criminal defendant's right to obtain exculpatory evidence and a third party's qualified privilege for litigation materials. However, in weighing these competing values, this Court's decisions involving a defendant's right to present a defense suggest that the need for exculpatory evidence should be paramount.

On numerous occasions, this Court has held that, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S.

319, 324 (2006); *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986). While this constitutional principle does not "confer the right to present testimony free from the legitimate demands of the adversarial system," *United States v. Nobles*, 422 U.S. 225 (1975), procedural or evidentiary rules may not be applied in such a way as to have an "arbitrary or disproportionate" impact on a defendant's ability to present his or her defense, *Holmes*, 547 U.S. at 324; *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Michigan v. Lucas*, 500 U.S. 145, 151 (1991); *Rock v. Arkansas*, 483 U.S. 44, 55–56 (1987). Such rules are clearly outweighed by a defendant's need to obtain and utilize relevant, potentially exculpatory information or materials. *See, e.g.*, *Holmes*, 547 U.S. 319; *Rock*, 483 U.S. 44; *Ritchie*, 480 U.S. at 39; *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Crane*, 476 U.S. at 683; *Green v. Georgia*, 442 U.S. 95 (1979); *Davis*, 415 U.S. at 308; *Chambers*, 410 U.S. at 284; *Smith v. Illinois*, 390 U.S. 129 (1968); *Washington v. Texas*, 388 U.S. 14 (1967).

Thus, in *Ritchie*, this Court held that a defendant's constitutional right to due process required enforcement of a subpoena, issued to an agency that investigates the sexual abuse of children, for "verbatim statements" made by a prosecution witness, even though the agency's records were confidential under state law. 480 U.S. at 45, 58. In reaching this conclusion, this Court emphasized that the state statute did not provide for "unqualified" confidentiality and, instead, permitted disclosure in "certain circumstances." *Id.* at 57–58. Given the qualified nature of the confidentiality interest, this Court held that the defendant was "entitled," as a matter of due process, to

trial court review of the file to determine if it contained "information that probably would have changed the outcome of his trial." *Id.* at 58; *see also Rovario v. United States*, 353 U.S. 53, 60–61 (1957) (holding that the confidentiality of a government's informant must give way to an accused's right to defend against criminal charges).

Similarly, in *Nixon*, this Court held that a "demonstrated, specific need for evidence in a pending criminal case" required enforcement of a subpoena issued to the President of the United States for recordings of conversations between the President and his advisers that were protected by executive privilege. 418 U.S. at 713. As this Court explained, "allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the court." *Id.* at 712. Therefore, "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal case is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713.

These cases suggest that when a qualified privilege is at stake – such as that accorded to materials prepared in anticipation of litigation – it must give way to a defendant's constitutional right to present a defense, and that evidentiary or procedural rules intended to safeguard such privileges cannot be applied arbitrarily or disproportionately so as to deprive a defendant of access to potentially exculpatory material.

If certiorari is granted, Defendants will argue that the judgment of the New York Court of Appeals was wrong, as a matter of federal law, based on the constitutional values inherent in the precedent cited above. The Court of Appeals applied a discovery statute in an arbitrary and disproportionate way, allowing the qualified privilege for materials prepared in anticipation of litigation to trump the Defendants' fundamental right to present a defense under the Sixth and Fourteenth Amendments.[10] As explained above, when the New York court criticized the Defendants for not having sought director-witness interviews at an "earlier time" as a condition of subpoena enforcement, it was unquestionably referring to the time before the Defendants were charged with larceny. But it is anathema to the very concept of due process that a criminal defendant can be denied his right to obtain exculpatory evidence, based only on his failure to mount a defense to a criminal charge that does not yet exist (*e.g.*, by conducting defense interviews of potential witnesses).

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10. The Court of Appeals cited *Hickman v. Taylor*, 329 U.S. 495, 513 (1947), for the proposition that "production of attorney's account of witness statements is justified only in 'rare' cases and is not appropriate when 'potential for direct interviews with witnesses themselves' is possible," *Kozlowski*, 11 N.Y.3d at 246. Thereby, the court confused the degree of protection given to qualifiedly privileged litigation materials with that owed to true opinion work product. It is plain from this Court's opinion in *Hickman* that this quotation referred to opinion work-product materials, as opposed to materials like those at issue here, of a factual nature, prepared in anticipation of litigation.

Also central to the New York court's error was its assumption that the interviews Defendants might theoretically have conducted of the director-witnesses would have been the "substantial equivalent" of the interviews Tyco had conducted during a window of time that had long past. In so doing, the New York court departed from the widely held view that prior inconsistent statements are unique, and therefore, that a party should not be required to attempt to replicate prior inconsistent statements as a condition for obtaining them. As Justice White explained more than thirty years ago:

> In the main, where a party seeks to discover a statement made to an opposing party in order to prepare for trial, he can obtain the 'substantial equivalent' by other means, Fed. Rule Civ. Proc. 26(b)(3), *i.e.*, by interviewing the witness himself. A prior inconsistent statement in the possession of his adversary, however, when sought for evidentiary purposes – *i.e.*, to impeach the witness after he testifies – is for that purpose unique.

Nobles, 422 U.S. at 248 (White, J., concurring); *see also Southern Railway Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1969) (rejecting the "rigid rule" that a party seeking to subpoena recorded statements of witnesses from his adversary "must always show that he has been unable to obtain statements of his own" from the witnesses whose statements he seeks to subpoena). The Court of Appeals' finding – that the statements at issue were "reasonably likely to . . . contradict the statements of key witnesses" – was tantamount to a conclusion that

the Defendants could not have replicated those statements by conducting their own interviews of the witnesses. Indeed, the notion that particular statements made by witnesses before trial could *ever* be replicable is belied by *Jencks v. United States*, 353 U.S. 657, 667 (1957), which found that such statements are so relevant to the defense of a criminal case that they must be turned over to the defendant as a matter of course when held by the prosecution. In articulating the values that led to the *Jencks* holding, this Court explained that denial of access to prior statements that might be used to impeach a witness is to "deny the accused evidence relevant and material to his defense." *Id.* at 667. And although *Jencks* was not decided on explicitly constitutional grounds, its holding plainly has constitutional underpinnings. *See Palermo v. United States*, 360 U.S. 343, 362–63 (1959) ("[I]t would be idle to say that the commands of the Constitution were not close to the surface of the [*Jencks*] decision.") (Brennan, J., concurring).

In sum, by quashing the Defendants' subpoena on the grounds that: (a) Defendants' right to obtain prior inconsistent witness statements was contingent on their having attempted to interview those witnesses themselves; and (b) that this requirement would be imposed even though the "earlier time" at which the Defendants might have theoretically been able to conduct interviews was before they had been indicted, the Court of Appeals applied a discovery statute in an arbitrary and disproportionate way. The court's ruling depended upon the unreasonable assumptions that prior inconsistent statements are reproducible and that defendants should be expected to take action to defend

criminal cases that do not exist. By its ruling, the court unconstitutionally elevated the qualified privilege for materials prepared in anticipation of litigation above the Defendants' fundamental right to present a defense.

C. The Issue Merits This Court's Attention Because It Has Never Been Decided, Is Likely to Recur and Is of Enormous Public Importance.

The context in which the issue at the heart of this case arose – an internal corporate investigation – has rapidly become an institutionalized feature of the governance of public corporations. Since 2001, "over 2,500 public companies have retained outside counsel to conduct internal investigations into suspected wrongdoing by corporate executives and employees." *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, American College of Trial Lawyers, February 2008. Recently enacted government policies, such as those explicitly described in the Department of Justice's Thompson and McNulty memoranda, have given corporations greater incentive today than ever before to unearth wrongdoing inside the corporation and disclose it to the authorities. As the Court of Appeals acknowledged, corporations "consult with law enforcement authorities to advance their corporate client's interest in avoiding potentially serious criminal sanctions," which at times "may come at the expense of the proper safeguarding of the rights of individual corporate employees." *Kozlowski*, 11 N.Y.3d at 243. What this meant for Messrs. Kozlowski and Swartz, and what it will mean for hundred or thousands of other officers and directors accused of corporate wrongdoing,

is that the first interviews of future witnesses for the prosecution will have been conducted and recorded by private actors who are not bound by discovery obligations such as those imposed by the Jencks Act, 18 U.S.C § 3500 (1957) and the *Brady* doctrine. Some of these initial interviews will include statements favorable to those who eventually become criminal defendants, as impeachment material or otherwise. But because, as here, the prosecution will not have been involved in conducting the interview and will not possess it in its recorded form, the defendant's only means to obtain it will be an invocation of the right to compulsory process – issuance of a subpoena to the private entity that conducted and possesses the recorded interview.

Inevitably, many of the private entities that receive such subpoenas will resist compliance, even when (indeed, particularly when) the interviews contain statements favorable to the former corporate insider who has since become adverse to the corporation (and a criminal defendant). Private actors will use the best tool at their disposal to resist these subpoenas. Like Tyco, they will assert that the recorded interviews are not discoverable on the ground the interview constitutes either opinion work product or, as here, materials prepared for litigation. Thus, courts will have to grapple with how to balance a criminal defendant's right to present a defense against a civil litigant's qualified protection for materials it prepared in anticipation of litigation.

The manner in which the New York Court of Appeals went about the constitutionally mandated balancing conflicts with the approach recently taken by other

courts encountering the same issue. For example, in *United States v. Ferguson*, No. 3:06-CR137, 2007 WL 4577303, at *3 (D. Conn. Dec. 26, 2007), a federal district court held that when a criminal defendant issues a third-party subpoena for potentially inconsistent witness statements made in the context of an internal investigation, the proper procedure is to require *in camera* inspection, followed by disclosure to the defense of "any non-privileged prior inconsistent statements by the witness." *See also United States v. Reyes*, 239 F.R.D. 591, 601 (N.D. Ca. 2006) (implementing same procedure). Notably, this procedure called for a true balancing – one which required a court's examination of a potentially exculpatory witness statement so that the interest of a defendant in the statement's disclosure could be fairly and accurately measured. It stands in marked contrast to the approach by the New York Court of Appeals, permitting even a qualified privilege to trump a defendant's need for genuinely exculpatory materials.

As the Association of Corporate Counsel ("ACC") wrote in its amicus brief to the New York Court of Appeals, one of its "primary missions" is to "provide a voice for the in-house bar on *issues of universal importance* to our members, *such as those involved in this appeal*." ACC Brief at p. 3 (emphasis added). [11]

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11. The ACC is a 24,000 member organization active in 81 countries. ACC Brief at p. 3. The court also received an amicus brief from the New York Council of Defense Lawyers ("NYCDL"). The NYCDL is an elite organization of criminal defense lawyers. It filed its amicus brief to address "the inherent unfairness, and serious constitutional implications, of

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Plainly, this is a broadly consequential issue. By granting certiorari, this Court can provide badly needed guidance, setting legal standards for the balancing between these competing values that will continue to clash with increasing frequency.

D. The Issue is Squarely Presented

The determination made by the Court of Appeals in this case – that the perceived failure to satisfy a procedural requirement embodied in a discovery statute is sufficient to support the quashing of a criminal defendant's subpoena for relevant, likely exculpatory materials – was neither an independent nor an adequate state-law ground and, as such, does not deprive this Court of jurisdiction to grant certiorari and address Defendants' federal claims.

Where "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law," that decision does not rest on an "independent" state-law ground. *See Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 150, 152 (1984). As described above, the Court of Appeals explicitly considered federal constitutional law in making its decision. For example, it began discussion of the subpoena issue by citing this Court's opinions in *Ritchie*

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the trial court's order denying [the Defendants] access to the prior witness statements of key prosecution witnesses – evidence that they sought to obtain for the critical, constitutionally protected, purpose of impeaching those witnesses on relevant and material issues in the case." NYCDL Statement of Interest.

and *Nixon* as binding constitutional authority for the proposition that it must consider the defendants' "right to a fair trial." *Kozlowski*, 11 N.Y.3d at 242. Thus, in holding that Defendants could be denied access to potentially exculpatory materials relevant to their defense, the court necessarily concluded that such denial did not infringe on the federal rights established by the precedent it cited. *See Three Affiliated Tribes*, 467 U.S. at 152 (noting that where state courts "construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority," this Court will render judgment on federal law); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (accepting review where the state court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did"); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (same); *see also* Justice O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 5–6 (1984) (stating that this Court will review cases in which a state court "upholds a particular state action on the ground that it offends *neither* federal nor state law").

For several reasons, the Court of Appeals' decision also does not rest on an "adequate" state-law ground. This is so, first and foremost, because regardless of whether the court interpreted N.Y. C.P.L.R. 3101(d)(2) correctly as a matter of state law, its application of that statute to deny Defendants' access to relevant, likely exculpatory materials violated the federal Constitution. *See Xerox Corp. v. County of Harris*, 459 U.S. 145, 149 (1982) (holding that state-law ground is not adequate if law itself is unconstitutional); *see also Staub v. City of Baxley*, 355 U.S. at 319 (state law that violated First

Amendment not adequate); *Reece v. Georgia*, 350 U.S. 85 (1955) (state law that violated due process not adequate); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) (same). According to the court, N.Y. C.P.L.R. 3101(d)(2) works a forfeiture of the right to compulsory process unless a defendant seeking pre-trial statements made by prosecution witnesses has previously attempted to interview those witnesses himself. The court would have required Defendants to interview the directors *before* the Defendants had been indicted, and assumed that statements made by the witnesses to the Defendants would have been the substantial equivalent of those made to Tyco's investigators. This application of N.Y. C.P.L.R. 3101(d)(2) was arbitrary and disproportionate and violated the Defendants' right to present a defense under the Sixth and Fourteenth Amendments. Therefore, it cannot serve as an adequate state-law ground.

Likewise, a state procedural requirement is not considered an adequate ground where it serves no "legitimate state interest" and "heavily burden[s] the assertion of federal rights." *Henry v. Mississippi*, 379 U.S. 443, 447–48 (1965) (holding that "state procedural rule[s] ought not be permitted to bar vindication of important federal rights" unless those rules serve a "legitimate state interest"); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev 1130, 1142 (1986) (noting that this Court will review cases where state procedural rules were not followed if those rules "heavily burden the assertion of federal rights without significantly advancing any important state policy"); *see also James v. Kentucky*, 466 U.S. 341, 349 (1984) (accepting review where state court's

interpretation of procedural rule was "an arid ritual of meaningless form and would further no perceivable state interest" (internal citations omitted)); *Douglas v. Alabama*, 380 U.S. 415 (1965) (accepting review where procedural rule served no legitimate state interest). Here, no legitimate state interest was served by burdening Defendants with a requirement to interview the director-witnesses at a time before the Defendants had been charged with the crimes about which the witnesses would eventually testify. Moreover, as explained at length above, the New York court's interpretation of the rule heavily burdened Defendants' right to present a defense under the Sixth and Fourteenth Amendments by barring them from access to relevant, potentially exculpatory materials.

The Court of Appeals' interpretation of N.Y. C.P.L.R. 3101(d)(2) also cannot serve as an adequate state-law ground because that interpretation had not been "strictly or regularly followed." *See Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); *see also Ford v. Georgia*, 498 U.S. 411 (1991) ("[A]n adequate and independent state procedural bar to the entertainment of constitutional claims must have been firmly established and regularly followed."); *James*, 466 U.S. at 348–349 (holding that state-court's interpretation of procedural rule was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"); *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982) (holding state procedural rule inadequate where not applied "evenhandedly to all similar claims");

NAACP v. Alabama, 357 U.S. 449, 457–58 (1958), 377 U.S. 228 (1964) ("Novelty in [state] procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."); *Staub*, 355 U.S. at 320 (holding state procedural rule inadequate where state court's interpretation was contrary to a long line of prior state-court rulings). The Court of Appeals' holding – that a defendant fails to satisfy N.Y. C.P.L.R. 3101(d)(2) if he could have obtained "substantially equivalent" materials at some time in the past – is a novel interpretation of state law because New York courts had previously interpreted this as a present-tense requirement. *See, e.g.*, *Lamitite v. Emerson Electric Co.*, 208 A.D.2d 1081 (3d Dep't 1994); *232 Broadway Corp. v. New York Prop. Ins. Underwriting Ass'n*, 171 A.D.2d 861 (2d Dep't 1991); *Babcock v. Jackson*, 40 Misc. 2d 757 (Sup. Ct. Monroe County 1963). Even the prosecution, as evidenced by its brief, did not have the foresight to anticipate the Court of Appeals' departure from precedent.

Finally and for similar reasons, the New York court's statement that the Defendants did not "raise a constitutional argument" in the trial court cannot serve as an adequate and independent ground for its judgment. Whether a federal claim is adequately presented in state court is matter of federal, not state law. *James*, 466 U.S. at 349 (citing *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)). Adequate presentation of a federal claim requires "no particular form of words or phrases . . . [and is satisfied] if the record as a whole

shows either expressly *or by clear intendment*" that a federal constitutional claim was raised. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (emphasis added). To determine "whether a claim that the defendant has been denied a 'fair trial' involves a constitutional claim, one must look to the factual allegations supporting the claim." *Daye v. New York*, 696 F.2d 186, 193 (2d Cir. 1982) (*en banc*). In short, "where the claim rests on a factual matrix that is 'well within the mainstream of due process adjudication' . . . the state courts must have been considered to have been fairly alerted to its constitutional nature." *Id.* at 193.

Application of these principles requires the conclusion that the Defendants adequately raised their constitutional claims in the trial court (as well as on appeal). First, the Defendants issued a subpoena for evidence. By its nature, a subpoena for documents is an invocation of the right to compulsory process. *See In re Martin Marietta Corp.*, 856 F.2d 619, 621 (4th Cir. 1988) ("Rule 17(c) implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor."); *Wilson v. United States*, 221 U.S. 361, 372 (1911); *see also Christoffel v. United States*, 200 F.2d 734 (D.C. Cir. 1952) ("The right of an accused by appropriate means to obtain evidence material to his defense is essential to the administration of the criminal law. A subpoena duces tecum to one who has custody of the evidence is an appropriate means."). The Court of Appeals acknowledged as much when it noted that its determination of the subpoena issue was constrained by federal constitutional law, as set forth in *Ritchie* and *Nixon*.

Also important to the question of whether the Defendants raised a federal constitutional claim is the way they described the evidence and their need for it. By describing the subpoenaed documents as material to "the heart of the case," RA182, supporting an inference that key prosecution witnesses "changed their tune" about Defendants' guilt, RA187, having no equivalent because they consist of statements recorded during a "window of time," RA213 at 24, and finally, undercutting "the credibility of directors" as witnesses, RA216 at 36, the Defendants made it apparent that their legal position was ultimately founded, not on narrow state law grounds, but on well recognized constitutional values. Plainly, this was a "factual matrix that is 'well within the mainstream of due process adjudication.'" *Daye*, 696 F.2d at 193. Moreover, when Tyco's lawyer characterized Defendants' arguments as raising *Brady*-like claims, RA216 at 37, he demonstrated that Tyco, too, understood Defendants' arguments to sound in constitutional values.

Perhaps most significantly, the trial court understood that Defendants' claims were not limited to state law questions about the applicability of the privileges asserted by Tyco. As the trial court described, apart from the questions of whether Tyco had valid claims of privilege, Defendants "contend[ed] that they [the subpoenaed documents] are *nevertheless* subject to disclosure." A823–24. Indeed, the only conceivable reason that the subpoenaed documents could be technically protected by a privilege, but *nevertheless* subject to disclosure, is that constitutional values override the privilege. In sum, there is no reasonable basis for the New York Court of Appeals' statement that

the Defendants had not raised a constitutional argument in the trial court.

Alternatively, the novel interpretations of the New York Court of Appeals – first, that New York's discovery statute requires criminal defendants to seek witness interviews, before they become criminal defendants, as a condition of subpoena enforcement, and second, that there is such a thing as the "substantial equivalent" for a prior inconsistent statement – were so unexpected that these determinations, in and of themselves, provide a basis for this Court's jurisdiction. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 86 n. 9 (1980) ("This Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation.") (*citing Brinkerhoff-Faris Trust & Savings Co.*, 281 U.S. at 677–78); *Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, 244 U.S. 317 (1917); *see also Bouie v. City of Columbia*, 378 U.S. 347 (1964) (finding Supreme Court review appropriate where state court broadens application of state law beyond a fair reading so as to deny due process); *Wright v. Georgia*, 373 U.S. 284, 291 (1963) (finding Supreme Court review appropriate where there is no state precedent for holding). Here, the New York court's interpretation of N.Y. C.P.L.R. 3101(d)(2) was entirely unexpected, amounted to a violation of due process and rested on an interpretation of the statute that was contrary to precedent and was never argued by the prosecution. Accordingly, we respectfully submit that this petition presents a case for Supreme Court review that is not merely appropriate, but compelling.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK, DATED OCTOBER 16, 2008

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

L. DENNIS KOZLOWSKI,

Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MARK H. SWARTZ,

Appellant.

Oct. 16, 2008

OPINION OF THE COURT

CIPARICK, J.

In this appeal relating to the convictions of two former executives for crimes associated with corporate wrongdoing, we are asked to determine whether the admission of an attorney's testimony concerning certain facts related to a corporate internal investigation

improperly conveyed to the jury an opinion regarding defendants' guilt. We conclude that this testimony—and the prosecutor's summation comments thereon—did not convey such an opinion. Second, we hold that Supreme Court did not abuse its discretion in quashing defendants' subpoena duces tecum, which sought the factual portions of certain interview notes and a memorandum prepared during the course of the internal investigation. Although defendants satisfied the minimal threshold showing necessary for enforcement, the materials defendants requested are shielded from production by the qualified privilege covering trial preparation materials (*see* CPLR 3101[d][2]). Finally, we do not reach the question whether the fines imposed under Penal Law § 80.00 violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [2000], because we conclude that if error exists it was harmless.

I.

Defendants are the former chief executive officer (L. Dennis Kozlowski) and chief financial officer (Mark H. Swartz) of Tyco International Ltd., a publicly-held diversified manufacturing company. After a nearly six-month trial, a jury convicted defendants of 12 counts of first degree grand larceny (Penal Law § 155.42), eight counts of first degree falsifying business records (Penal Law § 175.10), one count of fourth degree conspiracy (Penal Law § 105.10[1]) and one Martin Act count of

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1. This was a second trial. The initial trial ended in a mistrial during jury deliberations.

securities fraud (General Business Law § 352-c [5]).[1] The principal charges concerned defendants' theft of four multimillion-dollar "bonuses" between 1999 and 2001.

Defendants' convictions arose primarily out of their abuse of two Tyco loan programs: the Key Employee Loan Program (KELP) and the relocation loan program. KELP allowed defendants and other executives to borrow funds to pay taxes due upon the vesting of restricted stock. The relocation loan program covered certain moving expenses incurred when the company transferred an employee to a new geographic area. Defendants did not, however, utilize these programs for permissible purposes. Instead, they incurred debts under them that were used to finance opulent lifestyles.

For example, in 2001, Swartz assisted Kozlowski in charging $12.75 million in purported KELP loans to cover the cost of nine paintings, including a Monet and a Renoir. These paintings were hung in a $30 million Fifth Avenue apartment that Kozlowski shared with his wife.[2] Kozlowski also purchased a $7.2 million Park Avenue residence, which he later relinquished as part of a divorce settlement, by charging it to his Tyco relocation account as a no-interest loan. Additionally, Kozlowski utilized KELP loans to finance millions of dollars in jewelry purchases and an $8.3 million stake in a New Jersey sports partnership. Swartz similarly had millions of dollars in company loans transferred to his

2. Kozlowski characterized this residence, which was only used by him and his wife, as a "hotel room," albeit one that was "larger and more elaborate."

personal accounts to cover the costs of personal expenditures and investments. By August 1999, Kozlowski and Swartz owed Tyco $52.7 million and $17.4 million, respectively. To satisfy these obligations, defendants turned to Tyco's "Incentive Compensation Plan."

Under the Plan, defendants were entitled to a base salary regardless of the company's performance, but had the potential to earn "performance awards," or bonuses, by exceeding certain performance goals or "hurdles." These awards took the form of cash payments and the vesting of restricted stock. In general, Swartz's potential awards were half those of Kozlowski's.

Performance goals were established by Tyco's four-member Compensation Committee, under authority delegated to it by the corporation's board of directors. The Incentive Compensation Plan specifically provided that prior to any payments the Committee would certify that the performance goals had been satisfied. Such certification generally took place at the close of Tyco's fiscal year, which ended on September 30, when audited financial results were available.[3] The Committee would review information packages prepared by employees working under the direction of defendants. In addition, Swartz would appear before the Committee to explain

3. A 1997 amendment to the Incentive Compensation Plan permitted the Committee to authorize payments prior to the close of the fiscal year. No documentation or third-party testimony was presented that this authority was exercised with respect to any of the alleged larcenies.

whether that year's performance goals had been satisfied. Following its review, the Committee—acting as a whole—would determine whether any bonuses were due defendants and record its awards in the official minutes.

These procedures were not employed with respect to the four so-called "mega-larceny" bonus counts, under which the jury convicted Kozlowski and Swartz of stealing $77 million and $44.5 million, respectively. Two of these bonuses—those paid in August 1999 and August 2000—took the form of reductions of debts that defendants owed Tyco. During the relevant time periods, defendants' loan balances were considerable. Even after they ordered bonus payments of $25 million (Kozlowski) and $12.5 million (Swartz) in August 1999, Kozlowski still owed $27.7 million and Swartz owed $4.9 million. Those amounts did not decrease over time. Indeed, in August 2000, when defendants facilitated a second round of "loan-forgiveness" bonuses, including a "tax gross-up," that were valued at $32.97 million for Kozlowski and $16.6 million for Swartz, their respective loan obligations stood at $25 million and $8.3 million.

The remaining bonus counts concerned payments made in November 2000 and August 2001. In the first, defendants ordered cash payments for themselves, totaling $17.2 million (Kozlowski) and $8.65 million (Swartz). In connection with the November 2000 bonus, defendants also received $8.2 million (Kozlowski) and $4.1 million (Swartz) worth of stock. The August 2001 bonus took the form of a vesting of restricted stock.

After the bonus transaction was processed, defendants sold that stock for $8.2 million (Kozlowski) and $4.1 million (Swartz).

Common to all four of these bonuses was the absence of documentation in the information packets provided to the Compensation Committee or that Committee's minutes authorizing the bonuses that defendants received. In addition, every member of the Compensation Committee who was available to testify at trial denied approving these purported bonuses.

Defendants asserted, however, that the bonuses had been properly authorized. As to the first three bonuses, their claim rested primarily upon Kozlowski's communications with the late Philip Hampton, the former chair of the Compensation Committee.[4] Kozlowski testified that he had explained the justification and mechanics of these bonuses to Hampton. According to Kozlowski, Hampton's response was that he was "fine with" the bonuses and that he would "handle" the authorization of the payments by "dealing with the issues" raised by the Compensation Committee and by requesting additional materials from Kozlowski and his subordinates, if necessary. Defendants proffered no documentation from Hampton or Kozlowski reflecting these assurances. Swartz did assert that he made certain presentations to the Compensation Committee and the board, but also offered no evidence to support that claim.

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4. At the time that he allegedly authorized the first bonus payment in August 1999, Hampton was suffering from cancer and receiving radiation treatment and chemotherapy.

Hampton died prior to defendants' receipt of the August 2001 bonus. Kozlowski claims that this bonus was approved by Stephen Foss, then-chair of the Compensation Committee. After Kozlowski told him that the bonus had been approved, Swartz ordered that it be processed. Under the heading "FY 2001 Projected Incentive Plan Projected Payments," the Compensation Committee's October 2001 minutes contain a resolution stating that the restricted stock bonus "vested on June 20, 2001." But defendants had already sold this stock to a Tyco subsidiary in August 2001, long before the Compensation Committee passed this retroactive vesting resolution. There is no documentation or third-party testimony demonstrating that the Committee was aware at the time of passage that such sales had occurred.

In April 2002, Tyco retained the law firm of Boies, Schiller & Flexner LLP (Boies Schiller) to conduct an internal investigation into Kozlowski's payment of a $20 million investment banking fee to a member of the company's board, Frank Walsh.[5] The May 17, 2002

5. Without informing Tyco's board of directors or its shareholders, defendants arranged this payment to Walsh in exchange for his efforts in facilitating Tyco's merger with the CIT Group in March 2001. Because they believed that payments of less than $15 million did not need to be disclosed in Tyco's proxy statement, defendants had $10 million paid to Walsh and another $10 million paid to a charity of his choosing. Walsh pleaded guilty to a securities fraud charge for concealing the payment and was sentenced to a fine and a conditional discharge. Defendants were convicted of first degree grand larceny for having approved and facilitated the Walsh payment.

retention letter memorializing this engagement states that it encompassed "any litigation arising from or relating to" a review and analysis of transactions between the company and "certain of its directors and officers." Such litigation, including a federal multi-district litigation in a federal court in New Hampshire, did in fact eventually commence.

At least a dozen Boies Schiller attorneys assisted in the investigation, which was headed by the firm's founding partner, David Boies. Although initially confined to the circumstances surrounding the Walsh payment, the Boies Schiller investigation expanded in June 2002, when Kozlowski resigned as CEO after being indicted for his failure to pay sales taxes owed on artwork that he purchased. On June 3, 2002, the Boies Schiller attorneys began looking into whether Tyco's directors and officers had engaged in improper transactions with company funds. In connection with this assignment, they interviewed Tyco's employees and directors. These interviews occurred following Kozlowski's departure from Tyco.

On July 17, 2002, Boies interviewed Swartz regarding the August 1999 bonus. Boies met with Swartz alone and he did not take notes or otherwise memorialize the interview. That same day, Boies met with director, and then-interim CEO, John Fort to report the results of his interview with Swartz; Swartz was present for a portion of this meeting. Subsequently, Boies also met with Tyco's new CEO, and Fort's replacement, Ed Breen, regarding Swartz's continued

employment and recommended that Tyco's board of directors accept a severance package that would pay Swartz $50 million.

As part of their investigation, Boies Schiller attorneys also interviewed Tyco's directors. As evidenced by Boies Schiller's retention letter, the purpose of these interviews was to assist the company in preparing for potential litigation, particularly shareholder derivative suits. Thus, on June 6, 2002, a Boies Schiller attorney interviewed director Fort. As summarized in privilege logs that Tyco filed in connection with the federal multi-district litigation in New Hampshire, this interview concerned the "Walsh payments." On August 12 and 13, 2002, Boies Schiller attorneys interviewed all the surviving members of the Compensation Committee-directors Stephen Foss, Peter Slusser and James Pasman. The federal privilege logs summarize these interviews as concerning the KELP and relocation loan programs, "Compensation Events" and "Use of Company Assets."[6]

On August 1, an agreement was reached whereby Swartz would resign from Tyco's board of directors immediately, but continue as CFO until a successor was found. The August 1 agreement also limited Swartz's severance, in the event that he was terminated as CFO prior to being convicted of a felony, to $50 million. This reduced Tyco's severance obligation, as set forth in an

6. The relevant interviews were memorialized in handwritten notes and a draft memorandum.

earlier retention agreement, by $100 million. Around the time that the August 1 agreement was entered, Tyco publicly announced that Swartz would leave the company when a new CFO was hired.

On August 14, Tyco's board voted to approve the August 1 agreement. After that date, however, Swartz continued to serve as Tyco's CFO until he was terminated on September 11, 2002, one day before he was indicted. In that capacity, he participated in investor conference calls as one of Tyco's spokespersons and signed Tyco's 10-Q as its representative under the federal Sarbanes-Oxley Act.

The subpoena duces tecum in question, joined in by Kozlowski, was served by Swartz's counsel on October 13, 2004—approximately six months after the initial mistrial in this case—in preparation for defendants' second trial. It sought from Boies Schiller "[a]ll memoranda and notes of [the firm's] personnel (or forensic accountants working on their behalf) relating to interviews of employees, directors or auditors of Tyco." The relevant interviews covered a range of 19 topics, including executive compensation, the $20 million payment to Frank Walsh and the payment or recording in Tyco's books and records of the bonuses.

On behalf of Tyco, Boies Schiller moved to quash the subpoena, arguing that it was overbroad and impermissibly sought disclosure of materials shielded

by the attorney-client and work product privileges.[7] In response, defendants' counsel submitted an affirmation, which attached as an exhibit the federal privilege logs. Defendants placed a check mark next to 72 privilege log entries, which, they said, identified the documents responsive to their subpoena.[8]

Defendants acknowledged that there was "little dispute" that the requested materials were either attorney-client or work product privileged, but claimed that Tyco waived both privileges. According to defendants, waiver had occurred through: (1) Tyco's production to the District Attorney of a large volume of privileged documents, predating the Boies Schiller investigation, (2) testimony by Tyco's in-house and corporate counsel and employees regarding privileged conversations prior to the investigation, (3) the introduction in evidence of privileged communications and work product prepared by Tyco's corporate and litigation attorneys before the investigation, (4) Boies's direct testimony at the first trial, and (5) Tyco's having "cooperat[ed] fully" with the District Attorney's investigation by responding to document requests and

7. Before filing their reply brief on the motion to quash the subpoena, Tyco did provide 4 of the 72 requested documents to defendants. These were notes and memoranda describing interviews with Swartz, "redacted to exclude attorney's opinions or mental impressions," that Boies Schiller delivered to both defendants and the People.

8. Only three of those entries—those that described the June 6, August 12, and August 13 director—witness interviews—are relevant here.

questions from that office and preparing employees for interviews with assistant district attorneys.

To justify their demand for the director-witness interview notes, defendants argued that such documents "go directly to the issues underlying this indictment" and "likely reflect a better recollection by those witnesses of details and facts th[a]n the witnesses had at trial, or will have upon a retrial almost three years after the interviews." In sum, defendants argued that they were entitled to these privileged documents because they are "relevant and material" and because they "more than adequately identified those specific memoranda and notes th[at] . . . [are] responsive to the subpoena."

In response, Tyco argued that defendants had not shown a substantial need for the Boies Schiller work product and an inability to duplicate the same because "Swartz and his lawyers have access to the same witnesses Tyco does. He can interview them, he has already cross-examined them, and he can investigate them as well as Boies Schiller did." In addition, Tyco contended that disclosure of attorney-client and work product privileged documents produced "in the ordinary course of Tyco's business" or for "litigations no longer at issue," which the company referred to as "historical privileged communications," could not effect a subject matter waiver over privileged materials prepared in the course of a subsequent internal investigation.

Finally, Tyco asserted that defendants' "suppos[ition]" that it had "presented to the District Attorney the substance of *everything* contained in its attorney's memoranda and notes [was] . . . incorrect" (emphasis added). The company argued that it could respond to subpoenas and document requests, answer questions and otherwise cooperate with the District Attorney's Office without "presenting . . . Boies Schiller's analysis and strategy from its investigation." To bolster this point, Tyco cited the statement of an assistant district attorney during the related criminal trial of Tyco's former general counsel, Mark Belnick: "I cannot agree with the representation that the Boies firm have been reporting the results of their interviews to the District Attorney's Office." At oral argument, Tyco's counsel stated that, with respect to "Boies Schiller's communications with the District Attorney's Office . . . there w[as]n't disclosure of Boies Schiller work product" and that "Tyco did not disclose the results of its investigation to the District Attorney's Office."

On January 14, 2005, Supreme Court quashed the subpoena. The court ruled that no waiver of the work product privilege had occurred because "there is no showing that Tyco has disclosed work product created by Boies, Schiller to the District Attorney." In addition, the court concluded that defendants were not entitled to the director-witness materials under CPLR 3101(d)(2) because, although they pointed to the importance in this case of the witnesses' knowledge and the passage of time since the interviews were undertaken, defendants had not explained why they could not have sought to

conduct their own interviews of these witnesses at an earlier time.

At trial, defendants did not move to reopen the subpoena question following the director-witnesses' testimony. In the course of Boies's direct, however, they objected that they had not seen a privileged memorandum that described how Boies Schiller had discovered the illicit August 1999 bonus. The prosecutor responded by reiterating Tyco's claim that no materials prepared by Boies Schiller during the investigation had been shared with the People, stating: "I want to emphasize that neither the defense nor the prosecution has access to . . . materials that have been held to be privileged." Defense counsel further explained, however, that "[i]t seems like that memorandum is the sole source of information that [Boies is] relying on for his testimony, and I think it would be inappropriate for us not to have access to [it]." The court agreed and ordered production of the memorandum.

Defendants were convicted and Supreme Court imposed concurrent prison terms of 8 1/3 to 25 years on each of the four bonus counts. In addition, the court ordered joint restitution of $134,351,397 and that fines of $35 million and $70 million be imposed on Swartz and Kozlowski, respectively. With one exception—where the amount was $3 million less—each of these fines corresponded to the amounts set forth in the indictment and amounts that defendants affirmatively testified to having taken. Responding to defendants' constitutional argument against imposition of the fines, Supreme

Court held that "Apprendi applies to the terms of prison sentences as opposed to fines."

The Appellate Division affirmed in all respects (*see* 47 A.D.3d 111, 846 N.Y.S.2d 44 [2007]). The court concluded that Boies's testimony and the prosecutor's summation comments thereon did not convey Boies's personal opinion as to defendants' guilt of the crimes charged; that defendants' subpoena was properly quashed because "the documents sought were not material and exculpatory" (*id.* at 120, 846 N.Y.S.2d 44); and that there was no *Apprendi* violation because defendants had "not dispute[d] the amount of their gains from the acts in question" (*id.*).

A Judge of this Court granted defendants leave to appeal (10 N.Y.3d 767, 854 N.Y.S.2d 329, 883 N.E.2d 1264 [2008]); 10 N.Y.3d 772, 854 N.Y.S.2d 333, 883 N.E.2d 1268 [2008] and we now affirm.

II.

Defendants first argue that they are entitled to a new trial because of the prejudicial effect of Boies's testimony and the People's summation comments on that testimony. Because the testimony and summation complained of merely set forth facts enabling the jury to draw an inference of defendants' guilt, we disagree.

As an initial matter, the trial court did not abuse its discretion in permitting the People to elicit Boies's background, a general overview of internal

investigations and the scope of the Tyco investigation. Defendants assert that testimony regarding Boies's credentials—including his having lectured on the topic of internal investigations—and his statement that law firms conducting internal investigations often work both with forensic accountants specially trained to ferret out "wrongdoing" and with law enforcement authorities, impermissibly cast a "patina of officialdom" over Boies Schiller's work on behalf of Tyco. This background testimony was not unduly prejudicial. Indeed, such testimony is generally admissible, especially where, as here, it provides helpful context for the jury about complex subject matter, such as an internal investigation. In addition, such evidence was also admissible to allow the jury to evaluate defendants' contention that Boies's representation of Tyco in ancillary civil litigation gave him a motive to slant his testimony in favor of the People (*see* 2-401 Weinstein's Federal Evidence § 401.04[4][a]). We turn then to the substance of Boies's direct testimony at the second trial.

The purpose of Boies's testimony was twofold. First, the People sought to use Boies's account of his conversation with Swartz to undercut defendants' claim that they had taken the August 1999 bonuses in good faith (*see* Penal Law § 155.15). Second, in response to Swartz's eliciting testimony tending to show that the board continued to employ him as CFO after it was aware of the August 1999 bonuses, Boies's testimony as to his conversations with Tyco's board and senior management were used to establish how the company reacted once it became aware of evidence suggesting

that Swartz may have violated company compensation procedures.

Boies's testimony on these subjects was limited to a firsthand factual account. Thus, Boies told the jury that, on July 17, 2002, he explained to Swartz that his firm's investigation had uncovered "no documentation," either from Tyco's board or the Compensation Committee, authorizing the August 1999 multimillion-dollar bonuses. Boies then explained that Swartz's response to this factual assertion was that a "journal entry" authorizing those payments was "a mistake." As Boies further testified, never in the course of the July 17 interview did Swartz refer to the KELP loan reduction authorized by this journal entry as "a bonus." Rather, said Boies, Swartz stated that he instructed Tyco's director of financial operations, Mark Foley, to process the loan reductions because Kozlowski had told him to do it.[9] In addition Boies testified that Swartz agreed that he would make good on his mistake by repaying the money with interest.

Similarly, Boies's testimony concerning his interactions with Tyco's senior management and its board did not stray from its factual focus. Thus, Boies

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9. The Appellate Division held that it was error to admit this statement against Kozlowski under the theory that it was made in furtherance of a conspiracy. The court concluded, however, that the error was harmless because Kozlowski testified that he instructed Swartz to make the entry after the late Philip Hampton approved the bonus (*see* 47 A.D.3d at 119, 846 N.Y.S.2d 44). We agree.

explained that during the July 17 interview he told Swartz that in response to questioning from Boies Schiller attorneys, Foley stated that Swartz directed him to process the August 1999 bonuses. Boies then recounted for the jury another July 17 meeting with director Fort during which Swartz confirmed his undertaking to repay the August 1999 bonus with interest; Boies then told the jury that Swartz did eventually discharge that obligation. Further, Boies explained that he provided new CEO Breen with certain "facts" and "information" concerning Swartz, which carried an "inherent" recommendation regarding Swartz's continued employment. Indeed, said Boies, Breen decided to terminate Swartz "as soon as a replacement could be identified" and to reduce his role as CFO in the interim. Boies then discussed the mechanics of the August 1 agreement that facilitated the removal of Swartz as a director and limited his CFO-related severance to $50 million. He told the jury that he had advised the board to accept the agreement at the August 14 board meeting and that the board had, in fact, voted in favor of approval.

It is fundamental that facts, such as those Boies provided regarding his firm's investigation of the 1999 bonus, his conversations with Swartz and Fort, his recommendation to Breen and his advice to the board "are the appropriate subject of evidence" (*see People v. Creasy,* 236 N.Y. 205, 222, 140 N.E. 563 [1923]). At bottom, defendants' complaint is that Boies was permitted to rebut their testimony and theory of the case with certain facts that may have led the jury to

convict. This, however, is not prohibited. The line is crossed not when a witness relates facts that may be prejudicial, but when he or she conveys—either directly or indirectly—a personal opinion regarding the defendant's criminal guilt (*see id.* at 209, 221-222, 140 N.E. 563; *People v. Ciaccio,* 47 N.Y.2d 431, 439, 418 N.Y.S.2d 371, 391 N.E.2d 1347 [1979]).

Contrary to defendants' assertion, this case is markedly different from *Ciaccio.* There, a police detective was called to corroborate a victim's account of a hijacking by answering a hypothetical question that assumed the facts set forth in the victim's testimony. We held that the detective's testimony that the victim's account "was not unusual" constituted improper opinion evidence because it usurped the function of the jury to test the credibility of the victim-witness (*see Ciaccio,* 47 N.Y.2d at 439, 418 N.Y.S.2d 371, 391 N.E.2d 1347). What was impermissible about the testimony was that its sole purpose was to bolster the testimony of another witness by explaining that his version of the events was more "believable" (*id.*). It was thus the equivalent of an opinion that the defendant was guilty, which is impermissible.

Here, in contrast, Boies testified to facts. This testimony was in no sense hypothetical. Indeed, defendants were provided with Boies Schiller's work product memorandum that led to the discovery of the 1999 bonuses. Boies's testimony, when considered as a whole, relayed to the jury his preliminary findings during the investigation and the reaction of Tyco's

directors and senior management when they were confronted with those findings. For example, Boies's discovery that "[t]here was no documentation" of the bonuses does not constitute a legal conclusion of guilt—the jury still had to determine defendants' intent at the time of the taking. Similarly, testimony that Breen resolved on the basis of Boies's "inherent" recommendation to remove Swartz immediately or that the board took Boies's advice and agreed to pay Swartz $50 million in severance to facilitate such removal are not conclusions but facts, which—at most—support an inference of criminal guilt. Kozlowski and Swartz vigorously argued that they were entitled to the bonuses and never contested receiving them. And Swartz maintained that the board stood behind him even after it learned of his alleged improprieties. The People were entitled to present evidence casting doubt on those theories. In sum, Boies recounted facts, which the jurors, in light of their experience, could use to test the merits of the charges levied against defendants (*see Creasy,* 236 N.Y. at 222, 140 N.E. 563; *Ciaccio,* 47 N.Y.2d at 439, 418 N.Y.S.2d 371, 391 N.E.2d 1347).

We likewise reject defendants' assertions that the prosecutor's summation of Boies's testimony was prejudicial. Defendants place particular emphasis on the prosecutor's statement—made in response to defendants' assertion that Tyco's directors had branded them as scapegoats to avoid their own civil and criminal liability—that the board only became aware of defendants' illicit activities "after the forensic auditors had come in and combed through all the tens of millions

of pages that are the books and records of Tyco [a]nd after the Boies lawyers ha[d] done their investigation." But this, as well as the prosecutor's references to Boies's factual testimony, did not convey a "personal belief or opinion" regarding the trial evidence or defendants' guilt (*see People v. Bailey,* 58 N.Y.2d 272, 277, 460 N.Y.S.2d 912, 447 N.E.2d 1273 [1983]). Instead it quite properly "concentrated, in argument, on proved facts and circumstances and the inferences to be drawn therefrom" (*id.*).

III.

The second issue we address is whether Supreme Court abused its discretion in quashing defendants' subpoena. Our standard for enforcing a third-party subpoena duces tecum was set forth nearly 30 years ago in *People v. Gissendanner*, 48 N.Y.2d 543, 550, 423 N.Y.S.2d 893, 399 N.E.2d 924 [1979]. Under it, defendants must proffer a good faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory.

Here, the People's case centers on the charge that defendants' bonuses were not approved by the Compensation Committee or the board of directors. Defendants maintain that the bonuses were properly approved through the efforts of either the late Philip Hampton or Stephen Foss. Among other things, their subpoena seeks specifically identified statements made

by the director-witnesses regarding key issues in this case, including, most notably, compensation events. Although defendants have certainly not made a robust showing under *Gissendanner,* we disagree with the People's contention that defendants were simply fishing for "general credibility" evidence (*see Gissendanner,* 48 N.Y.2d at 548, 423 N.Y.S.2d 893, 399 N.E.2d 924). Indeed, the trial court implicitly recognized as much by confining its written opinion on the subpoena application to questions concerning the applicability of the work product and trial preparation privileges (*cf. United States v. Nixon,* 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 [1974] [after determining that subpoena is otherwise enforceable court must evaluate whether documents sought are shielded by privilege]).

The proper purpose of a subpoena duces tecum, of course, is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. The relevant and material facts in a criminal trial are those bearing upon "the unreliability of either the criminal charge or of a witness upon whose testimony it depends" (*see Gissendanner,* 48 N.Y.2d at 550, 423 N.Y.S.2d 893, 399 N.E.2d 924). Here, defendants seek to challenge the director-witnesses' testimony that they did not approve the four charged bonuses, evidence that bears directly on the question whether defendants took those bonuses under a good faith claim of right (*see* Penal Law § 155.15[1]).

In meeting the burden for production, defendants need not—and indeed could not—show that director-

witness statements are "actually" relevant and exculpatory (*see Gissendanner,* 48 N.Y.2d at 550, 423 N.Y.S.2d 893, 399 N.E.2d 924).[10] *Gissendanner* does mandate, however, that they point to specific facts demonstrating a reasonable likelihood that such material may be disclosed and that they are not engaged in a fishing expedition. In applying this standard, we must give due regard to the accused's right to a fair trial (*Ritchie,* 480 U.S. at 56, 107 S.Ct. 989; *Nixon,* 418 U.S. at 711, 94 S.Ct. 3090).[11]

Here, defendants were not engaged in "general discovery" regarding the director-witness statements. Instead, they identified the specific director-witness interview notes and memorandum that they sought by referring Supreme Court to Tyco's privilege log. Defendants pointed to undisputed facts, arguing that after the directors were made aware of at least some of defendants' questionable activities through the Boies Schiller investigation, they continued to permit Swartz to exercise substantial authority as the CFO of Tyco until

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10. The People do not urge us to adopt the Appellate Division's framing of the *Gissendanner* test, which would require defendants to show that "the documents sought *were* . . . material and exculpatory" (*see* 47 A.D.3d at 120, 846 N.Y.S.2d 44 [emphasis added]). In any event, we reject this standard, as it is "impossible" to satisfy absent review of the relevant documents (*see Pennsylvania v. Ritchie,* 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 [1987]).

11. As the People point out, defendants did not raise a constitutional argument in support of their subpoena below, and we therefore address none.

September 11, 2002—the day before he was indicted—and voted to pay him $50 million in severance just one day after the last of the relevant director interviews. On the basis of these facts, defendants asserted that the "directors witnesses . . . did not believe Mr. Swartz had engaged in any wrongful conduct and only 'changed their tune' after the District Attorney obtained an indictment." The People argue that this factual showing was insufficient.

We conclude that defendants met their burden under *Gissendanner:* they identified specific director-witness statements and proffered facts that permitted an inference that those statements were reasonably likely to contain material that could contradict the statements of key witnesses for the People. In this case, however, there is a claim that the relevant documents are privileged and thus not subject to production. Additional analysis is therefore required.

IV.

As frequently occurs today, the director-witness statements were obtained in the course of corporate internal investigation, which inevitably implicates the attorney-client and work product privileges (*see* McNeil and Brian, Internal Corporate Investigations, at 18-19 [3d ed] [hereinafter McNeil and Brian]). In that connection, private law firms conducting internal investigations may consult with law enforcement authorities to advance their corporate client's interest in avoiding potentially serious criminal sanctions

(*see e.g. United States v. Stein,* 541 F.3d 130, 137, 142 [2d Cir.2008]). While collaboration between prosecutors and attorney investigators may provide a public benefit through the more efficient detection and punishment of corporate wrongdoing, it may come at the expense of the proper safeguarding of the rights of individual corporate employees (*see Stein,* 541 F.3d at 156-157). Courts must be sensitive to these competing considerations and endeavor to strike an appropriate balance between the rights and interests of law enforcement, corporations and their employees, and the accused. We cannot say that the balance struck by the trial court here amounts to an abuse of discretion as a matter of law.

This case highlights a tension in CPLR 3101's treatment of attorney work product (which is not obtainable) and trial preparation materials (which may be disclosed "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means" [CPLR 3101(c), (d)(2)]). The separation of work product and trial preparation materials was apparently an attempt to shield materials protected by the attorney-client privilege from disclosure (*see* 11th Ann Rep of N.Y. Jud. Conf., at 152 [1966] ["Whoever drafted the 'work product' provision . . . was doubtless thinking of such things as private consultations between attorney and client and memoranda of them"]; Connors, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR

C3101:27, at 53-54; Siegel, N.Y. Prac. § 347 [4th ed.]). Thus, when particular work product is generated for litigation, courts have tended to classify it as trial preparation material, unless it contains otherwise privileged communications (*see* Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:27, at 53-54).

Here, the director-witness interview notes and memorandum were prepared to assist Tyco's preparation for civil litigations that eventually commenced. In its motion to quash the subpoena, Tyco asserted that these materials were shielded by the attorney-client privilege, stating at oral argument that "[t]hose are interviews with Tyco employees . . . [who] are communicating with counsel for a . . . legal purpose." Assuming that these communications were confidential, this assertion may well be correct.[12] In this Court, however, neither the People nor defendants urge us to hold that the director-witness interview materials are attorney-client privileged. Instead, defendants assert that those statements are merely conditionally-privileged trial preparation materials while the People contend that they are absolutely privileged work product.

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12. A trial court may conduct an in camera review of subpoenaed materials to assess an opposing party's privilege claims (*see Matter of Subpoena Duces Tecum to Jane Doe,* 99 N.Y.2d 434, 442, 757 N.Y.S.2d 507, 787 N.E.2d 618 [2003]; *accord Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003,* 4 N.Y.3d 665, 679 n. 11, 797 N.Y.S.2d 790, 830 N.E.2d 1118 [2005]). Here, however, no such review was necessary because defendants failed to meet the statutory criteria necessary to obtain production of the director-witness statements (*see* CPLR 3101[d] [2]).

On this record, we conclude that defendants have the better argument. This is because they have limited their request to "the facts reported to Boies Schiller in th[e] interviews." Indeed, defendants expressly agreed to permit Supreme Court to redact any material that would reveal opinion work product, or that portion of the interview notes reflecting the Boies Schiller attorneys' "mental impressions, opinions, or legal theories" (*see* McNeil and Brian at 47). As we explained (*see People v. Consolazio,* 40 N.Y.2d 446, 453, 387 N.Y.S.2d 62, 354 N.E.2d 801 [1976]), the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement "work product" (*see also* Siegel, N.Y. Prac. § 347 ["The fact that a lawyer has taken a statement from a witness does not transmute the statement into a 'work product': a lay person could have taken it"]; Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 3101.47 ["Where . . . statements of witnesses could not reveal legal analysis or strategy by their disclosure, and legal training might have been used but was not required for their creation, the courts should consider them trial preparations covered by CPLR 3101(d)"]).

Although we agree with defendants that the director-witness statements are trial preparation materials and not absolutely privileged, enforcement of their subpoena was directed to the trial court's discretion (*see Gissendanner,* 48 N.Y.2d at 550, 423 N.Y.S.2d 893, 399 N.E.2d 924; *cf. People v. Hodge,* 53 N.Y.2d 313, 319, 441 N.Y.S.2d 231, 423 N.E.2d 1060 [1981]). In making its discretionary determination that

defendants did not establish an inability to "obtain the substantial equivalent" of the facts contained in the director-witness interview notes without "undue hardship" (*see* CPLR 3101[d][2]; Weinstein-Korn-Miller, N.Y. Civ Prac ¶ 3101.55), Supreme Court relied upon defendants' failure to "explain[ ] why the defense could not have sought to conduct its own interviews of these witnesses at an earlier time." We cannot say that this conclusion represents an abuse of the trial court's discretion. Defendants made no effort to show any "undue hardship" that would have prevented them from securing their own "substantial[ly] equivalent" interviews with the director-witnesses (*see* CPLR 3101[d] [2]). As Tyco pointed out in its reply submission on its motion to quash, defendants "have access to the same witnesses as Tyco does."

Even on appeal, defendants have not proffered an explanation for their failure to seek interviews with the directors at an earlier time or stated whether they ever made an independent attempt to secure the relevant statements, a requirement for obtaining an attorney's trial preparation materials (*see Hickman v. Taylor,* 329 U.S. 495, 513, 67 S.Ct. 385, 91 L.Ed. 451 [1947] [production of attorney's account of witness statements is justified only in "rare" cases and is not appropriate when potential for "direct interviews with the witnesses themselves" is possible]; *see also In re Grand Jury Proceedings,* 219 F.3d 175, 192 [2d Cir.2000] [remanding for a determination whether government had "exhausted other means" for obtaining work product and instructing prosecutor to "explain to the district

court why it cannot obtain the information it seeks through other witnesses"]; *United States v. Reyes,* 239 F.R.D. 591, 602 n. 2 [N.D. Cal.2006]; *People v. Grady,* 130 Misc.2d 677, 679, 497 N.Y.S.2d 234 [Sup. Ct., Bronx County 1985]).

Since they failed to make the requisite showing of "undue hardship" under CPLR 3101(d)(2), defendants would only have been entitled to production of the director-witness statements if Tyco had waived the qualified privilege covering those documents (*see United States v. Nobles,* 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 [1975]). The qualified privilege governing trial preparation materials "is waived upon disclosure to a third party where there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality" (*see Bluebird Partners v. First Fid. Bank, N.J.,* 248 A.D.2d 219, 225, 671 N.Y.S.2d 7 [1st Dept.1998]). In response to defendants' specific waiver allegations, Tyco bore the burden of establishing that no such waiver had occurred (*see Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055 [1991]).

The determination of whether and to what extent waiver has occurred is inherently factual and turns on case-by-case considerations of "fairness" (*see John Doe Co. v. United States,* 350 F.3d 299, 302 [2d Cir.2003], quoting *In re Grand Jury Proceedings,* 219 F.3d at 183). Although review of this discretionary determination is "highly deferential" (*John Doe Co.,* 350 F.3d at 306), the

U.S. Supreme Court has indicated that a trial court properly exercises its discretion when it orders disclosure of "the portion" of trial preparation materials that is directly relevant to another, previously-disclosed, portion (*see Nobles,* 422 U.S. at 240, 95 S.Ct. 2160). Thus, a party is essentially precluded from using its trial preparation materials as both a sword and a shield. In evaluating defendants' waiver claims, we must confine our analysis to those arguments they asserted before Supreme Court (*see People v. Nieves,* 2 N.Y.3d 310, 315, 778 N.Y.S.2d 751, 811 N.E.2d 13 [2004]). We affirm Supreme Court's discretionary determination that Tyco met its burden of establishing the absence of waiver in this case.

Defendants first argue that waiver occurred when Tyco produced attorney-client and work product privileged materials to the People in response to their grand jury subpoena. Tyco had initially declined to tender these documents because it was conducting a privilege review. Two days before the grand jury's term was to expire, however, Tyco honored the District Attorney's demand that it produce the documents to prevent unnecessary delay in the grand jury's deliberations.[13] Defendants do not dispute that the

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13. In its letter accompanying production of these documents, Tyco referenced an agreement with the District Attorney, whereby "production . . . would not constitute a waiver of any privilege." In light of our conclusion that these documents were unrelated to the director-witness statements, we need not pass upon the effect—if any—of Tyco's "reservation" of its privilege.

documents produced in response to the subpoena do not refer to the Boies Schiller investigation. As Supreme Court found, those documents—which were prepared by Tyco's in-house and outside counsel—"were not created for the current criminal case and civil proceedings, but for past litigation, government filings and other corporate actions." In addition, it can hardly be said that Tyco was wielding the qualified privilege covering these documents as both a sword and a shield since it provided them to both the People and defendants before trial.

Defendants cite no authority for the proposition that disclosure of historical privileged documents waives the privilege covering trial preparation materials created in a subsequent internal investigation. We decline to so hold. We reach this conclusion because a trial court has discretion to limit waiver of the qualified privilege covering trial preparation to matters actually referenced in disclosed materials. Here, the materials produced to the grand jury did not—and could not—refer to director-witness interview notes and a memorandum produced in a subsequent internal investigation.[14]

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14. Defendants also premise their documentary waiver claims on the introduction in evidence of KELP summaries prepared by UKW, a forensic accounting firm that assisted Boies Schiller in its investigation, and the minutes of the board's August 14 meeting, which described Boies's recommendation that Tyco fire Swartz and summarized Tyco's counsel's discussion with an assistant district attorney regarding Swartz's potential indictment. Having failed to present these claims to

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Next, defendants argue that waiver occurred through Tyco's cooperation with the District Attorney's investigation. It is beyond dispute that, had Boies Schiller provided the prosecution with the "written or recorded statements" of the director-witnesses, or had the People taken such notes themselves, defendants would be entitled to those statements pursuant to the rule of *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 [1961]; CPL 240.45. But defendants ask us to hold that the statements should have been provided here based upon their conjecture that Boies Schiller attorneys shared the substance of the director-witness statements with the People. Two assistant district attorneys and Tyco's counsel, all of whom owed duties of candor to the tribunal, denied that this occurred (*see* Code of Professional Responsibility DR 7-102[a][5] [22 NYCRR 1200.33(a)(5)]). Certainly, it is possible for attorneys to assist prosecutors without divulging their trial preparation materials. Absent some other proof, we conclude that Supreme Court properly held that defendants had not established any disclosure of Boies Schiller work product to the People.

Defendants also urge that "testimonial" waivers occurred at the first trial when Tyco's lawyers and employees testified regarding privileged communications that occurred prior to the internal investigation. Here, again, however, there is no showing that the jury in the

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(Cont'd)

Supreme Court, defendants may not raise them here. But, we note that like their other examples of purported waiver, neither of these documents references or relies upon the key director-witness interview statements.

first trial needed the director-witness interview notes and memorandum to properly assess the evidence.

But defendants say that "Tyco's [testimonial] waivers were not limited to events that occurred prior to the investigation." They assert that a Tyco employee's testimony that Boies asked her about the 1999 bonus and instructed her to "really think about it because he was talking about fraud" and that another Boies Schiller attorney asked her for a relocation loan plan document constituted waiver. This testimony certainly references communications with the Boies Schiller attorneys, but it does not impermissibly use the relevant director-witness statements as both a sword and shield (*see In re Grand Jury Proceedings*, 219 F.3d at 192). Indeed, the referenced testimony does not even mention those statements.

According to defendants, the "most damaging" testimonial waiver occurred during the testimony of David Boies. But they point to no impermissible use of the director-witness statements. Boies's direct testimony was limited to facts concerning the interview with Foley, his July 17, 2002 conversations with Swartz and Fort, his recommendation to Breen regarding Swartz's continued employment and his recommendation that the board approve Swartz's severance package. At no point in his testimony did Boies seek to bolster his statements with the aid of the relevant director-witness statements. Moreover, in response to defendants' specific request, Supreme Court ordered disclosure of a privileged memorandum upon which a portion of Boies's testimony was based. At that time, defendants did not request any

disclosure of the director-witness statements.[15] Thus, under these circumstances, there was no waiver and no abuse of discretion (*compare Nobles,* 422 U.S. at 239-240, 95 S.Ct. 2160 [work product privilege over portions of investigator's report waived where "respondent sought to adduce the testimony of the investigator" regarding witness statements contained in the report]).

V.

Finally, defendants challenge the constitutionality of the fines that were imposed upon them. They contend that these fines contravened their right to a jury trial, as guaranteed by the Sixth Amendment to the U.S. Constitution.

Penal Law § 80.00(1) provides that

> "[a] sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not exceeding the higher of
>
> "a. five thousand dollars; or
>
> "b. double the amount of the defendant's gain from the commission of the crime."

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15. During Boies's testimony, defendants also specifically requested handwritten notes taken by director Slusser at board meetings conducted on July 2 and 17, and August 14, 2002. In response to a claim of privilege, Supreme Court reviewed these materials in camera and declined to order their production.

Appendix A

When a fine is imposed on the basis of "gain," "*the court* shall make a finding" as to that amount (*see* Penal Law § 80.00[3] [emphasis added]). This finding may be based upon facts brought out at trial, a plea allocution, sentencing, or a factfinding hearing conducted pursuant to CPL 400.30 (*see* Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law art. 80 ["Fines"], at 6). Here, Supreme Court did not hold a CPL 400.30 hearing and instead appears to have based defendants' fines upon facts brought out at trial or conceded in "sentencing letters" that defendants filed with the court.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [2000] and its progeny, the U.S. Supreme Court has set forth three rules delineating when judicial fact-finding in sentencing is impermissible under the Sixth Amendment. First, the Court has directed that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (*id.* at 490, 120 S.Ct. 2348). The Court has subsequently referred to this as a "bright-line rule" (*see Blakely v. Washington,* 542 U.S. 296, 308, 124 S.Ct. 2531, 159 L.Ed.2d 403 [2004]). Second, the " 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* " (*Blakely,* 542 U.S. at 303, 124 S.Ct. 2531; *accord United States v. Booker,* 543 U.S. 220, 235, 125 S.Ct. 738, 160 L.Ed.2d 621 [2005] [*Apprendi* violation occurs when judges

"f(i)nd facts beyond those found by the jury"]). Third, *Apprendi* violations are subject to harmless-error review (*see Washington v. Recuenco,* 548 U.S. 212, 220-221, 126 S.Ct. 2546, 165 L.Ed.2d 466 [2006]). We apply the third of these rules to the present case.

Assuming without deciding that an *Apprendi* violation occurred here, we nonetheless affirm because error, if any, was harmless. Our precedents establish that "all the elements of an indicted crime *which are not conceded by defendant* or defendant's counsel must be charged [to the jury]" (*see People v. Flynn,* 79 N.Y.2d 879, 881, 581 N.Y.S.2d 160, 589 N.E.2d 383 [1992] [emphasis added]; *see also People v. Walker,* 198 N.Y. 329, 335, 91 N.E. 806 [1910] ["(W)hen a fact, even of great importance, is admitted by the defendant or his counsel in open court during the trial, that fact is established by the admission, and no evidence need be given in relation to it"]). Here, defendants' trial testimony—with respect to each of those counts upon which the trial court imposed fines—established gains that corresponded to or exceeded the fine amounts. Thus, the *Apprendi* violation here, if any, was harmless (*see Recuenco,* 548 U.S. at 215, 126 S.Ct. 2546).

We have considered defendants' remaining arguments and conclude that they are either unpreserved or without merit. Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge KAYE and Judges GRAFFEO, READ, SMITH, PIGOTT and JONES concur.

In each case: Order affirmed.

APPENDIX B — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK, DATED NOVEMBER 15, 2007

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

L. DENNIS KOZLOWSKI,

Defendant-Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MARK H. SWARTZ,

Defendant-Appellant.

Nov. 15, 2007

DAVID FRIEDMAN, J.P., JOSEPH P. SULLIVAN, JOHN T. BUCKLEY, BERNARD J. MALONE, JR., JJ.

Appendix B

SULLIVAN, J.

The convictions at issue arise out of the prosecution of defendants Dennis Kozlowski and Mark H. Swartz, who were respectively the CEO and CFO of Tyco International, a multinational public corporation, for allegedly engaging in large-scale self-dealing and drawing on Tyco's treasury, as they saw fit, for their own personal use, including investments, luxuries and expenses. They allegedly accomplished this by abusing corporate procedures while keeping the directors and shareholders in the dark. Allegedly, they stole more than $100 million in three "bonus" larcenies in 1999 and 2000 and many millions more in other thefts until their enterprise began to unravel in January 2002, when Tyco's board learned that defendants had made a secret $20 million payment to a supposedly independent director. In June 2002, Kozlowski abruptly resigned and left Tyco after being indicted by a New York County grand jury. A few months later, in September, both defendants were charged in a second indictment with several counts of first degree grand larceny, multiple counts of falsification of business records, securities fraud and conspiracy, leading to a conviction after trial.[1]

Defendants raise a host of issues. Contrary to their arguments, the larceny convictions relating to bonuses were based on legally sufficient evidence and were not against the weight of the evidence. The evidence amply

1. At a first trial, the jury was unable to agree because of a lone holdout, and a mistrial was declared.

supports the conclusion that defendants took unauthorized bonuses from Tyco in 1999 and 2000. As neither defendant disputes, only Tyco's compensation committee, acting as a whole, had the authority to grant them any compensation. Every member of that committee, with the exception of Philip Hampton, who had died early in 2001, before the trial, testified to never having heard of these mid-year payments, much less to having voted approval. As the compensation committee minutes show, neither the August 1999 $37.5 million reduction of defendants' massive Key Employee Loan Program (KELP) balances, run up during the first three quarters of that fiscal year, nor the August 2000 TyCom IPO bonuses—$32 million for Kozlowski and $16 million for Swartz—in the form of a loan reduction plus tax gross-up (additional benefit to cover taxes), nor the November 2000 ADT Automotive bonuses—$16 million for Kozlowski and $8 million for Swartz, was authorized.

As the record shows, there were no references to any of these multimillion-dollar payouts in the materials prepared for the committee, no resolutions approving these bonuses in the staff minutes prepared for the committee, and no reference to bonuses in the committee's reports to the board.[2] Before either

2. While an exhibit to the minutes of the October 1, 2001 compensation committee meeting does certify that certain of defendants' shares vested on June 20, 2001 (the FLAG bonus), the committee did not have the full facts before it when it made this resolution, and defendants did not have the right to vest and sell their shares prior to the resolution.

defendant could receive a bonus, the compensation committee had to certify that the performance goals had been satisfied. Since Tyco's fiscal year ended on September 30, this certification usually occurred in early October. Most notably, Tyco's annual proxy statements, prepared under defendants' supervision, failed to indicate even the most oblique reference to their multimillion-dollar midyear bonuses. This documentary void revealed more than a few isolated "procedural irregularities," as Swartz maintains, or a "fail[ure] to adhere meticulously to all of the niceties of corporate governance," as Kozlowski would have it. Rather this consistent pattern of documentary omission over a period of years constituted powerful evidence of defendants' intentional hiding of these payments from the directors and led inexorably to the jury's conclusion that defendants took these bonuses without permission or authority. The absence of any reference to these transactions in the chain of documentation available to the committee clearly demonstrates defendants' coverup of their thievery.

Defendants' testimonial claims of entitlement—that the bonuses represented early payouts of money that would otherwise have been due them or, at least, that they believed was due them—presented a question of fact for the jury and was, indeed, a hard sell. While the committee could have made midyear payouts if it chose to, such an event would have run counter to Tyco's highly touted pay-for-performance philosophy.

More significantly, though, the entitlement claim was flatly refuted by Mark Foley, the Tyco executive who was responsible for the calculation of the year-end figures on which the annual bonuses were based. In fact, Foley's testimony unequivocally established that defendants received everything they were entitled to under the end-of-the-year formula. Thus, defendants' claims only succeeded in pitting their credibility against that of the committee members and Foley and various other members of their own staff. Defendants even contradicted each other on a number of points. The jury's resolution of this factual issue is amply supported by the weight of the evidence since defendants' self-serving testimony was illogical, internally inconsistent, refuted by Tyco's records and shown to be false by all other witnesses. While defendants assert that their entitlement and good-faith claims present a legal sufficiency issue, we cannot discern one except for the 1999 bonus, preserved by the motion for a trial order of dismissal, which we reject.

We reject defendants' argument that their conduct with respect to the August 1999 bonuses (counts 1 and 2) did not constitute larceny, but rather, a civil wrong. These bonuses took the form of a reduction of defendants' KELP balances without any tax gross-up, i.e., money, leaving Tyco. As noted, in reaching its verdict, the jury rejected defendants' tale of entitlement, raised after the fact, and accepted the evidence showing that they took the bonuses without approval. The argument that the bonuses awarded to defendants in 1999 and 2000—used completely in 1999 and partially

in 2000 to pay down their KELP loan accounts—shows that there was no taking from another, reduces itself to a claim that "all that transpired was the making of certain book entries," a claim that, as the trial court aptly noted, "exalts form over substance." While, indeed, the mere failure to pay one's debts does not constitute larceny (*see People v. Yannett,* 49 N.Y.2d 296, 299, 425 N.Y.S.2d 300, 401 N.E.2d 410 [1980]; *see also People v. Jennings,* 69 N.Y.2d 103, 127, 512 N.Y.S.2d 652, 504 N.E.2d 1079 [1986]), this is not a case of defendants' failure to repay their debts. On the contrary, they did repay their debts, but with money in the form of bonuses that they unlawfully took from Tyco. In 1999, they clearly exercised collectively dominion and control over $37.5 million of Tyco's money and allocated it to their own benefit, precisely the sort of taking that establishes larceny (*see id.* at 118-119, 512 N.Y.S.2d 652, 504 N.E.2d 1079).

The evidence was legally sufficient to support Swartz's conviction for stealing $1.2 million (count 7), and that conviction is not against the weight of the evidence. Tyco received nothing of value in exchange for the $1.2 million it wired to Swartz's personal account. As the record shows, Swartz had contracted for the purchase of 13 units at the Trump International Hotel and Tower "as a personal investment" and had paid the 10% down payment of $1.2 million with his own funds. Prior to March 1, 2001, the date the $1.2 million of Tyco's funds were wired to Swartz, the seller of the Trump condominium units had already informed the purchaser, a nominee of the undisclosed Swartz, that he was in

default for his intransigent refusal to disclose the real buyer's identity, giving the seller the right to keep the $1.2 million down payment. Thus, the jury properly found Swartz guilty of stealing the $1.2 million he paid himself as "reimbursement" for the down payment, for which, as noted, Tyco received nothing in return.

The evidence was also legally sufficient to support Kozlowski's conviction for stealing $1.975 million (count 10) for the purchase of three paintings at a London gallery, and that conviction is not against the weight of the evidence. Kozlowski did not have authority to spend Tyco's money on paintings for his personal use. While he had authority to make capital expenditures of up to $200 million without board approval, this authority was to make purchases for business purposes, not personal use. There is no indication of a business purpose for the purchase of these paintings, used to furnish the luxurious Fifth Avenue apartment Kozlowski and his wife occupied and title to which was in his name personally. While Kozlowski had the paintings listed as assets on Tyco books, the record of this purchase, claimed by Kozlowski to be "appropriate," failed even to mention that paintings were involved; nor was any invoice attached to the wire-transfer form to explain what was being purchased. The form requested that $1.975 million be moved from Tyco to the account of an otherwise unidentified "Richard Green" and noted only that the money was for "Furniture/Furnishings for N.Y. apartment" at "950 5th Ave.," an apartment that was carried on Tyco's books. Interestingly, the directors had no idea that this supposed "Tyco facility" even existed.

A jury could find that this mask of legitimacy, created by Kozlowski to justify the money transfer, could not disguise the fact that he was embezzling money from Tyco for his personal use without any intention of ever repaying it.

Defendants' convictions for stealing $8.8 million in or about December 2001 (count 11) and $3.95 million on or about January 3, 2002 (count 12) were sufficiently proven, and those convictions were not against the weight of the evidence. There was no basis for Kozlowski to take Tyco's money in the form of KELP loans to purchase works of art. KELP loans were to be taken to pay taxes on the vesting of restricted stock, not to buy paintings. Given the manner in which defendants misused KELP, one can reasonably infer that Kozlowski did not intend to repay the loans. As for Swartz's involvement, he told Tyco's senior vice president for finance to charge the art to Kozlowski's account.

The evidence was also sufficient to support defendants' conviction for stealing $20 million (count 13), and the verdict was not against the weight of the evidence. Tyco's bylaws and the testimony of various Tyco directors show that Kozlowski did not have authority to pay an outside director an investment banking fee in connection with Tyco's acquisition of CIT, when that director had advocated the transaction without revealing his interest. This incident, which was ultimately determined to involve criminality at the receiving end of the transaction as well, led to the board's suing the director for return of the payment.

As for Swartz's involvement, he authorized the director's invoices to be paid.

Defendants' arguments for overturning the Martin Act conviction (count 15) are unavailing. "[T]o sustain a claim that the state's jurisdiction has been preempted by federal law, the defendant must show a clear and unambiguous intent of Congress to do so" (*People v. Cohen,* 9 A.D.3d 71, 87, 773 N.Y.S.2d 371 [2004], *lv. denied* 2 N.Y.3d 797, 781 N.Y.S.2d 296, 814 N.E.2d 468 [2004], *cert. denied* 543 U.S. 927, 125 S.Ct. 316, 160 L.Ed.2d 227 [2004]). Defendants have not shown such a clear and unambiguous intent. On the contrary, "Congress plainly contemplated the possibility of dual litigation in state and federal courts relating to securities transactions" (*Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 383, 116 S.Ct. 873, 134 L.Ed.2d 6 [1996]; see also 15 USC § 78bb[a]). As for defendants' claim that the People relied on an impermissible "management integrity" theory of materiality, a fair reading of the People's opening and closing fails to support such a claim.

We reject defendants' arguments that their convictions for falsifying Director and Officer Questionnaires (DOQs) (counts 18-31) are not supported by legally sufficient evidence and are also against the weight of the evidence. The DOQs explicitly state that the person signing them is not required to disclose KELP loans and loans made in the ordinary course of business. As the evidence showed, relocation loans were mistakenly understood at Tyco to be in the ordinary

course of business. To be sure, defendants misused both KELP and relocation loans, but citing *People v. D.H. Blair & Co.,* 2002 N.Y. Misc. LEXIS 317, *73-77, 2002 WL 766119, *24 [accurate entry of an unauthorized action is not false], Kozlowski argues that their answers were accurate and the DOQs were literally true.

In fact, though, while defendants took enormous loans that were listed as KELP or relocation loans, the millions of dollars involved were not spent on taxes or relocation. For example, one year Kozlowski took money to furnish a home in New Hampshire, where he already lived, to buy a multimillion-dollar yacht and $2 million worth of jewelry and to make a series of large personal investments, including an $8.3 million share in a sports partnership. Swartz similarly took money to buy a yacht, to finance the purchase of a second New Hampshire home and to make various personal investments. Defendants never listed any of these loans on their DOQs.

Thus, defendants falsified their DOQs not by omitting KELP and relocation loans, but by failing to list the millions of dollars they took for purely personal loans, which they should never have recorded as KELP or relocation loans in the first place. An exception to the reporting requirement for tax-related KELP loans does not cover loans made to buy a yacht. Nor does an exception from disclosure for relocation loans cover loans incurred in purchasing a personal pleasure craft, a point even Swartz conceded at trial. The fact that defendants recorded these loans as KELP or relocation

loans did not transform the loans—used for unauthorized, personal purposes—into an ordinary—course loan or a KELP loan. They were neither.

Defendants also raise several evidentiary issues. We conclude that the challenged portion of the testimony of a People's witness, Tse, was not offered or used to impeach the testimony of another People's witness, Prue, but rather to show, as the People argued, Tse's own recollection of the relevant events. Her testimony did not fall within any of the three categories of proscribed forms of impeachment testimony (*see Becker v. Koch,* 104 N.Y. 394, 401, 10 N.E. 701 [1887]; *see generally* Prince, Richardson on Evidence § 6-419 [Farrell 11th ed.]).

The portion of Swartz's statement (as related by David Boies) that inculpated Kozlowski, however, should technically not have been admitted against Kozlowski since defendants' conspiracy to commit larceny had ended by the date of the statement (*see People v. Storrs,* 207 N.Y. 147, 158, 100 N.E. 730 [1912]; *People v. Van Vleet,* 256 A.D.2d 1181, 1182-1183, 683 N.Y.S.2d 362 [1998], *lv. denied* 93 N.Y.2d 879, 689 N.Y.S.2d 441, 711 N.E.2d 655 [1999]), and there was no evidence that the conspiracy continued or that Kozlowski did anything after June 3, 2002 (the date on which he left Tyco) to impede the recovery of Tyco's money or property. The People may not extend the conspiracy merely by claiming that defendants were trying to cover up their previous crimes (*see e.g. Lutwak v. United States,* 344 U.S. 604, 616-617, 73 S.Ct. 481, 97 L.Ed. 593 [1953]). Nor was the

statement in furtherance of the conspiracy because it placed responsibility on Kozlowski for authorizing a 1999 journal entry that collectively reduced defendants' loan balance to Tyco by $37.5 million. As noted, the record shows that the transaction had never been authorized by Tyco's board of directors. This reference to Kozlowski, however, merely confirmed that Kozlowski had authorized the transaction—as he testified—after he had spoken to Hampton, chairman of the remuneration committee. As already noted, however, the committee's approval, acting as a whole, was required to authorize such action, and no other member of the committee supported this assertion or had ever heard of it. As the jury could take into account in assessing credibility, Hampton, who had died prior to trial, could not be offered as a witness to challenge Kozlowski's testimony. We therefore find the error to be harmless (*see id.,* 344 U.S. at 619-620, 73 S.Ct. 481).

Defendants' other arguments relating to Boies's testimony are without merit. The record fails to support their assertion that his testimony, or any summation comments by the prosecutor, gave the jury the impression that Boies had drawn a conclusion, based on his investigation and expertise, that defendants were guilty.

The court did not improvidently exercise its discretion in quashing defendants' subpoena directed to the Boies Schiller firm (*see e.g. People v. Gissendanner,* 48 N.Y.2d 543, 550, 423 N.Y.S.2d 893, 399 N.E.2d 924 [1979]), since the documents sought were

not material and exculpatory (*see e.g. People v. Ricketts,* 38 A.D.3d 291, 831 N.Y.S.2d 395 [2007], *lv. denied* 8 N.Y.3d 989, 838 N.Y.S.2d 493, 869 N.E.2d 669 [2007]). In any event, were we to find any error, we would find it to be harmless.

Defendants failed to preserve their argument that they were constitutionally entitled to introduce a letter expressing an ethics opinion to the director who accepted the undisclosed payment, which was the basis of the $20 million larceny (*see People v. Angelo,* 88 N.Y.2d 217, 222, 644 N.Y.S.2d 460, 666 N.E.2d 1333 [1996]; *People v. Gonzalez,* 54 N.Y.2d 729, 442 N.Y.S.2d 980, 426 N.E.2d 474 [1981]), and we decline to review it in the interest of justice. Were we to reach the claim, we would find it unavailing (*see Crane v. Kentucky,* 476 U.S. 683, 689-690, 106 S.Ct. 2142, 90 L.Ed.2d 636 [1986]). Although the court excluded the letter itself, it allowed various witnesses to testify that the director told the Board he had obtained legal advice suggesting that it was appropriate for him to accept the investment banking fee.

We perceive no basis for reducing either defendant's aggregate term of incarceration. Under the circumstances, the fines imposed do not violate *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [2000]. A court may impose a sentence above the statutory maximum based on a fact admitted by a defendant (*see Cunningham v. California,* 549 U.S. 270, 127 S.Ct. 856, 860, 166 L.Ed.2d 856 [2007]). With respect to the counts on which the court imposed fines,

defendants did not dispute the amount of their gains from the acts in question. To the extent defendants are making a constitutional argument with respect to the restitution awards, that argument is without merit (*see People v. Horne,* 97 N.Y.2d 404, 414-415, 740 N.Y.S.2d 675, 767 N.E.2d 132 [2002]).

We have considered defendants' other arguments and find them without merit.

Accordingly, the judgments of the Supreme Court, New York County (Michael J. Obus, J.), rendered September 19, 2005, convicting defendants, after a jury trial, of grand larceny in the first degree (12 counts), conspiracy in the fourth degree, violation of General Business Law § 352-c(5) and falsifying business records in the first degree (8 counts), and sentencing them to aggregate terms of 8 1/3 to 25 years, restitution of $134,351,397, and fines of $70 million for Kozlowski and $35 million for Swartz, should be affirmed.

Judgments, Supreme Court, New York County (Michael J. Obus, J.), rendered September 19, 2005, affirmed.

All concur.

APPENDIX C — ORDER OF THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY QUASHING SUBPOENA, DATED JANUARY 14, 2005

SUPREME COURT, NEW YORK.
NEW YORK COUNTY

No. 5259/02.

In the Matter of the Application of
TYCO INTERNATIONAL LTD.,

Petitioner,

v.

MARK H. SWARTZ,

Defendant/Respondent.

January 14, 2005

For an Order Pursuant to Cplr 2340 Quashing Subpoenas Duces Tecum Issued by Mark H. Swartz

Michael J. Obus, J.

The defendant, Mark Swartz, has been indicted, along with L. Dennis Kozlowski, on charges that include multiple counts of grand larceny in the first degree, Penal Law § 155.42. An initial trial ended in a mistrial on April 2, 2004, and the defendants now await a retrial scheduled to commence on January 18, 2005. On

October 13, 2004, Swartz served a subpoena duces tecum on Boise, Schiller & Flexner LLP ("Boies, Schiller"), outside counsel to Tyco International Ltd. ("Tyco"). After a number of informal attempts to resolve some disputed issues, Tyco and Boies, Schiller moved to quash the subpoena in a motion filed on November 15, 2004. Further filings ensued and ultimately, the court heard arguments from both parties on December 21, 2004.

Tyco has brought a civil lawsuit against Swartz and co-defendant Kozlowski. The civil claims are based in large part on the same allegations underlying the criminal case. Tyco also faces several stockholder suits on related claims. Tyco contends that the Boies, Schiller notes and memoranda that Swartz has subpoenaed are immune from disclosure under CPLR § 3101(b),(c) and (d) as privileged attorney-client communications, attorney work product, and trial preparation materials. Swartz does not dispute that the documents sought constitute work product and trial preparation materials, but contends that they are nevertheless subject to disclosure.

As a first ground for denying protection, Swartz cites the fact that Tyco has produced documents containing work product and attorney-client communications to the District Attorney and other government agencies and has allowed testimony at trial regarding attorney-client communications. Swartz maintains that by doing so, Tyco waived any protection for work product relating to the same subject matter.

Appendix C

Work product privilege is waived upon disclosure to a third party when there is a likelihood that the material will be revealed to an adversary under conditions that are inconsistent with a desire to maintain confidentiality. *Bluebird Partners, LP v First Fidelity Bank, NA,* 248 AD2d 219 (1st Dept 1998). A line of Federal cases has held that in certain circumstances when a party elects to make a substantial disclosure of work product to a potential adversary, such as a law enforcement agency, there may be a waiver of protection not only for the documents produced, but for other documents on the same subject matter. *In re Martin Marietta Corp.* 856 F.2d 619 (4th Circ. 1988); *Bank of America, NA v Terra Nova Insurance Company,* 212 FRD 166 (SDNY 2002).

No reported New York case has clearly adopted the doctrine of subject matter waiver of work product protection. Even assuming that it is applicable her, it would still not reach the documents that Swartz seeks.

The documents that Tyco provided to the District Attorney, which have been made available to the defendants, do not include Boies, Schiller memoranda and notes. The work product and employee communications therein were not created for the current criminal case and civil proceedings, but for past litigation, government filings and other corporate actions. As Tyco contends, the fact that some documents containing work product have been disclosed does not mean that protection for any work product relating to similar subjects, whenever created, is forever lost. Whether a documents is to be protected as work product

in general, or against a particular party, will depend at least in part on when and for what litigation purposes it was created. *Lawrence v Cohn,* 90 Civ. 2396 (SDNY 2002); *Amoco Oil Co. v Hartford Accident & Indemnity Co.,* 93 Civ. 7295 (SDNY 1995).

Swartz cites *Bank of America, supra,* as particularly instructive because "the facts are strikingly similar to the case at hand." In *Bank of America,* the defendant, Terra Nova, discovered that one of its agents had issued unauthorized insurance policies. Terra Nova's attorneys conducted an investigation of the matter. Terra Nova then contacted the United States Attorney's Office and other law enforcement agencies. Terra Nova gave the agencies documents generated in the investigation along with an oral presentation, and offered to make available all the materials and information that it had collected. Bank of America subsequently brought suit against Terra Nova in connection with the unauthorized policies, and sought discovery of documents relating to the investigation. The court held that Terra Nova had waived work product protection by disclosing documents to a potential adversary, the United States Attorney. Further, because Terra Nova had offered to disclose all its materials, the waiver applied not just to those documents which it had actually disclosed, but to all work product it had related to the investigation at the time of the disclosure.

The situation here differs in key respects from that in *Bank of America.* Tyco is not a party in this case. All the documents that it produced to the District

Attorney's Office have been made available to the defendants. The documents were produced at the demand of the District Attorney, rather than provided unsolicited. Perhaps most important, there is no showing that Tyco has disclosed work product created by Boies, Schiller to the District Attorney.

A party asserting a privilege has the burden of establishing that the privilege has not been waived. *John Blair Communications, Inc. v Reliance Capital Group.* 182 AD2d 578 (1st Dept 1992). However, Swartz has not refuted Tyco's affirmations that Boies, Schiller has not provided work product directly or indirectly to the People. Contrary to Swartz's contention, the fact that Boies, Schiller attorneys may have answered questions from the District Attorney's office and provided requested documents does not establish that work product has been shared. It is noted that in the related case of *People v Mark Belnick,* Indictment Number 143/03, this court inspected in *camera* s large volume of the correspondence between Boies, Schiller and the District Attorney's Office. None of that correspondence disclosed any Boies, Schiller work product directly. Nor did the inspection reveal any attempt to use work product by offering opinions on the case or otherwise steer the course of the criminal investigation. Thus, there is no indication of the type of potentially unfair selective disclosure that would form the basis of a subject matter waiver. *See John Doe v United States,* 350 F.3d 299 (2nd Cir. 2003). Most of the trial testimony cited by Swartz refers to attorney-client communications that took place before the current

litigation was contemplated. None of the few instances where testimony might be considered to be based on Boies, Schiller work product involves any material issues in this case.

Swartz also contends that work product protection should not apply because the contents of the requested memoranda and notes are material and relevant to this case. He points specifically to interviews of Tyco directors that might indicate when they became aware of the defendants' alleged wrongful conduct.

Work product protection is waived when the non-disclosing party affirmatively acts to put otherwise protected information at issue in a case and application of the privilege would deny the party seeking disclosure access to information vital to resist the non-disclosing party's affirmative act. *IMO Industries v Anderson Kill & Olick PC,* 192 Misc.2d 605 (Sup Ct, NY County 2002); *Royal Indemnity Co. v Salomon Smith Barney,* 4 Misc.3d 1006(A)(Sup Ct, NY County 2004).

In *Royal Indemnity,* Smith Barney claimed that Royal, their exceas insurer, was obligated to provide coverage for claims arising from the settlement of two gender discrimination suits. As part of its claim, Smith Barney had show that it has provided timely notice to Royal after learning that the settlement amounts would be above the level required to trigger the excess coverage. Royal sought to discover work product relating to the settlement negotiations from Smith Barney's attorneys. The court held that Royal was

entitled to the documents, reasoning that because Smith Barney was charged with knowledge of the contents of the documents, the documents themselves could establish when, at the latest, Smith Barney would have known that the settlement amounts had reached the triggering level.

Here, Swartz argues that it is significant that he remained at Tyco for a period of time after Boies, Chiller began its investigation on behalf of the corporation and, indeed, that Tyco was aware of Swartz' alleged wrongful conduct by that time. He has not shown, however, that Tyco's knowledge of Swartz' activities or lack of such knowledge, during the time frame of the Boies, Schiller interviews, is vital to the trial issues. Lack of such knowledge at that point is not a necessary element of any of the crimes charged. Thus, to the extent that memoranda and interview notes might record witnesses' statements as to whether and when *in the past* they were aware of the alleged conduct, the "at issue" doctrine would not apply. *DeGourney v Muizac,* 287 AD2d 680 (2nd Dept 2001); *Bolton v Well, Gotshal & Manges, LLP,* 4 Misc 3d 1029(A) Sup Ct, NY County 2004); *Standard Chartered Bank PC v Ayala International Holdings,* 111 FRD 76 (SDNY 1986).

Swartz also contends that he has substantial need pursuant to CPLR § 3102(d)(2) for the notes and memoranda of witness statements. He points to the importance in this case of the witnesses' knowledge or lack of knowledge of the charged conduct and the passage of time since the interviews were undertaken.

However, he has not explained why the defense could not have sought to conduct its own interviews of these witnesses at an earlier time. Moreover, the mere possibility that a witness might have said something to counsel that differs from the witness' trial testimony is not sufficient to provide substantial need. To seek disclosure on that basis would constitute the proverbial fishing expedition for impeachment material. Rather, the party must establish that there is a likelihood that the witness said something different to counsel. *DeGourney v Mulzac, supra.* Swartz has not shown any specific instance where, due to professed lack of memory or other circumstance, there is a likelihood that a witness made a statement to counsel inconsistent with his or her trial testimony.

Accordingly, Swartz is not entitled to disclosure of the requested notes and memoranda.

Swartz also seeks all records relating to legal bills for work done by Boies, Schiller on behalf of Tyco. As Tyco contends, this request is overbroad and would encompass matter covered by the attorney-client privilege. *IMO Industries, supra.* Swartz contends that he needs these materials to verity how much time David Boies and other attorneys at the firm spent interviewing Mr. Swartz and on the investigation in general. While there was some testimony on that subject in the first trial, it remains an extremely collateral; if not entirely irrelevant, issue in this case. A subpoena duces tecum cannot be used to discover impeachment material on such an issue. *People v Gissendanner,* 48 NY2d 543 (1979).

For the above-stated reasons, the motion to quash is granted.

The foregoing opinion shall constitute the decision and order of the court.

Enter.

Dated: January 14, 2005

APPENDIX D — ORDER OF THE COURT OF APPEALS OF NEW YORK DENYING MOTION FOR REARGUMENT, DATED JANUARY 13, 2009 (APPELLANT: *KOZLOWSKI*)

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

L. DENNIS KOZLOWSKI,

Appellant.

Jan. 13, 2009

Motion for reargument denied.

APPENDIX E — ORDER OF THE COURT OF APPEALS OF NEW YORK DENYING MOTION FOR REARGUMENT, DATED JANUARY 13, 2009 (APPELLANT: *SWARTZ*)

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MARK H. SWARTZ,

Appellant.

Jan. 13, 2009

Motion for reargument denied.

APPENDIX F — STATUTE INVOLVED

New York Civil Practice Law and Rules § 3101 (Scope of disclosure) (c) and (d)

> **(c) Attorney's work product.** The work product of an attorney shall not be obtainable.
>
> **(d) Trial preparation.** 1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without

court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.