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

Argument Requested By:
Jennifer M. O'Connor and
Stephen L. Braga

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PEOPLE OF THE STATE OF NEW YORK

Docket Nos. 2006-09042 &
2007-01292
(Consolidated)

-against-

Suffolk County Indictment
Nos. 1290/88 & 1535/88

MARTIN H. TANKLEFF,

Defendant-Appellant.

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REPLY BRIEF FOR DEFENDANT-APPELLANT MARTIN H. TANKLEFF

STEPHEN L. BRAGA
On the Brief
BAKER BOTTS LLP
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7700

BARRY J. POLLACK
On the Brief
KELLEY DRYE & WARREN, LLP
Washington Harbor, Suite 400
3050 K Street, N.W.
Washington, D.C. 20007-5108
(202) 342-8472

JENNIFER M. O'CONNOR
Of Counsel
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

BRUCE BARKET
Of Counsel
666 Old Country Road
Garden City, NY 11530
(516) 745-0101

Attorneys for Defendant-Appellant
Martin H. Tankleff

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INTRODUCTION

The DA's position on these appeals reduces down to the unjust conclusion that a defendant facing murder charges would be prohibited from informing the jury that two violent career criminals, with no credible alibis, admitted committing the murders in question to ten different witnesses on varied occasions over a course of years. The defendant would also be prohibited from telling the jury that one of those career criminals blatantly lied (as even the DA admits) about telling others that he had committed the murders, and that the other career criminal spontaneously cried when confronted with allegations of his participation in the murders. The jury would also never get to hear the getaway driver for these career criminals on the night of the murders confirm everything, or to learn other corroborating information about who hired these criminals to commit the murders and why. That cannot—and should not—be the law.

These consolidated appeals challenge the County Court's denial, without a hearing of any kind, of Martin H. Tankleff's supplemental 440 motions based upon seven new witnesses who "came forward with evidence of Marty's innocence" only "after Marty's original 440 hearing concluded in December 2005." Brief For Defendant-Appellant Martin H. Tankleff ("Tankleff Br.") at 2-3. We maintain that this new evidence both "taken on

its own" and "when that evidence is considered—as it must be—in conjunction with the wealth of evidence presented in Marty's first 440 motion," id. at 3-4,[1] necessarily creates the reasonable doubt required to find that Marty is actually innocent of the charges against him or—at the very least—that he is entitled to a new trial on those charges. There is nothing in the DA's misfocused opposition brief [2] on these appeals that alters those conclusions in the slightest.

FACTS

In Marty's principal reply brief to be filed in pending Appeal No. 2006-03617, we regrettably had to take the DA to task for making numerous false characterizations of "fact" in his opposition brief on that appeal. We had hoped that would be the end of this problem, but unfortunately it was not. The DA's recitation of facts in his opposition brief on this appeal is, unfortunately again, materially false in many respects, as the following examples illustrate:

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[1] This "wealth of evidence presented in Marty's first 440 motion" is fully discussed in Marty's opening brief and his reply brief in pending Appeal No. 2006-03617. Many of the legal arguments specified in those briefs are equally applicable to the issues herein as well, and are therefore hereby incorporated by reference. The opening brief that was filed in pending Appeal No. 2006-03617 is referenced as "Tankleff Principal Br." The reply brief that will be filed in pending Appeal No. 2006-03617 is referenced as "Tankleff Principal Reply Br." The DA's opposition brief filed in pending Appeal No. 2006-03617 is referenced as "DA Principal Br."

[2] See Brief Of Respondent ("DA Br.").

"The" Murder Weapon. The most striking example of such falsity is the DA's assertion that "Venard Adams, the Suffolk County Deputy Medical Examiner who performed the autopsy on Arlene, testified that she was killed with the end of the small, solid-core barbell that crime-scene personnel recovered from Tankleff's bedroom." DA Br. at 27 (without transcript citation). It is incredible that the DA could have authored such a wholly misleading statement for submission to this Court.

Here is what Dr. Adams actually testified to on this point on direct examination by the lead prosecutor at trial:

> Q. Now, with respect to that opinion, Doctor, can you opine based upon the information available to you that that [barbell] bar—those wounds are consistent with having been caused by that particular bar and no other instrument on the face of this earth?
>
> A. No, I cannot say that.

A.3724 (Adams) (emphasis added). Dr. Adams was thus clear that he could not definitively say that Arlene Tankleff "was killed with the end of the small, solid-core barbell that crime-scene personnel recovered from Tankleff's bedroom." DA Br. at 27. Yet the DA has told this Court that Dr. Adams testified that he actually reached that conclusion.

Significantly Dr. Adams also testified at trial that the blunt instrument wounds to Arlene Tankleff's head were generally consistent with having been caused by multiple possible instruments, such as a hammer, a tire iron, a baseball bat or the barbell bar, and that those wounds could have been caused by multiple assailants as well. See A.3724, A.3740-46, A.3748-49, and A.3754 (Adams).[3] In addition, Dr. George Tyson, who performed surgery on Seymour Tankleff the day of the attacks, testified that Seymour's head injuries were "caused by a hammer or an object similar to a hammer," Trial Tr. at 4347, and also could have been caused by multiple instruments and multiple assailants. See id. at 4348. We understand that the DA would like to be able to point this Court to a direct physical link between Marty and a murder weapon, but there is no such link in this case no matter how much the DA pretends that there is.[4]

Kent's "Alibi". The DA relies heavily on Peter Kent's alleged alibi during the time of the Tankleff murders. The alibi is based on an affidavit from Daniel Raymond on July 12, 2004, which was one week before the hearing on Tankleff's principal 440 motion commenced. C.P.L. § 440.10.

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[3] Dr. Adams also noted that the wounds to Arlene's head did not show any screw impressions, such as were on the barbell bar.

[4] Given the open-ended testimonies by both Drs. Adams and Tyson as to the types of blunt instruments that could have caused the head injuries in this case there is also no credible way for the DA to definitively maintain that "Arlene and Seymour were not killed with a pipe." DA Br. at 27. Id.

In this affidavit, "Raymond admitted having used cocaine and heroin with Kent from the evening of September 6, 1988, through the early afternoon of September 7, 1988." DA Br. at 11. However, the DA fails to deal with the threatening circumstances and duress under which Raymond agreed to provide this affidavit, and Raymond's subsequent recantation of the affidavit. See Tankleff Br. at 10-14.[5] Perhaps that is because the DA and his investigator had their own questionable—and threatening—dealings with Raymond during this same chain of events. See Tankleff Br. at 10-14.[6] At bottom, Raymond's threat-induced July 12, 2004 affidavit is not worth the paper it is written on as an alibi for Kent on the night of the murders.

What is more interesting about Kent and his alleged alibi are various other facts left unaddressed by the DA. For example, in support of his alibi, Kent testified that he was "using drugs and . . . doing armed robberies" with Danny Raymond at the time of the murders. A.2306 (Kent). But on cross-

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[5] It is ironic that when Glenn Harris writes a letter recanting some of his prior statements that recantation is immediately accepted by the DA, but when Danny Raymond signs a subsequent affidavit under oath recanting his prior statements to Kent the DA just as immediately rejects that recantation. It is disturbing to see such an inconsistent, "ends justifies the means" approach to witnesses by a public officer.

[6] What was equally questionable was the DA's willingness to sit quietly in the courtroom while Kent gave a version of his alibi that was directly contradicted by another statement that the DA's office had obtained from Raymond. See Tankleff Br. at 20 n.23. In light of this contradiction, the DA apparently decided not to call Raymond to testify at the 440 hearing even though he was the only witness alive who could possibly support Kent's alibi. Against this backdrop, it rings hollow for the DA to complain that "there is no valid excuse for Tankleff's having failed to call [Lisa Harris] as a witness at the hearing." DA Br. at 19.

examination, Kent was forced to admit that there was no such robbery on the night of "September 6th," A.2407 (Kent), and that the robbery they were involved in on September 7th was well after the time of the Tankleff murders. See Def. Ex. 29; H.01237. And Kent later conceded that, in general, it was quite difficult to know where one was "thirteen fucking years ago." A.2397 (Kent).[7]

"Corroborating" Evidence. The DA claims that "Tankleff has forgotten, among other things, the corroborating blood evidence that he once conceded 'contributed mightily to the case against him.'" DA Br. at 2 (quoting DA Principal Br. at 43). The DA cites to a Petition For Rehearing Marty filed in the United States Court of Appeals for the Second Circuit to support his claim. See id., Petition for Rehearing, at 175-89 of the DA's Principal Appendix ("DA Appendix"). A complete review of that petition will reveal that the DA has misinterpreted the Petition "mightily" in order to find the concession about "corroborating evidence" he so desperately seeks.

For example, if the DA had read the whole of Marty's petition for rehearing, he would have seen that Marty argued for rehearing, inter alia, because: "the panel . . . wholly failed to discuss the many significant doubts

[7] Also noteworthy is the fact that during Kent's interview with the DA and the DA's investigator, when Kent was implicated in the Tankleff murders he began to "cry" and told the authorities that Creedon was capable of killing someone, although he and Harris were not. A.2386, A.2355 (Kent).

as to the trustworthiness of Tankleff's post-warnings statements, which were both uncorroborated by subsequently obtained forensics evidence and substantially contradicted by that evidence." See DA Appendix at 184 (citing, e.g., lack of traces of blood on purported murder weapons, lack of traces of blood in area where weapons were purportedly washed, presence of dried blood that indicated attacks took place hours earlier than Mr. Tankleff purportedly committed them and forensics finding that murderer wore gloves) (emphasis added). That hardly sounds like a "concession" about the presence of "corroborating evidence." To serve that end, Marty also advised the Second Circuit that "even the detectives who questioned him acknowledged the inconsistencies between the confession and the evidence. See id. at 184 n.11. No "concession" there either.

It is true that Marty's petition also referred to "evidence" that was "elicited" during his unconstitutional interrogation that "contributed mightily to the case against him at trial," id. at 185, and complained that the DA "used this evidence to crucify Tankleff at trial." Id. at 186. But that evidence did not "contribute[] mightily" to Marty's crucifixion at trial because it was "corroborating blood evidence" as the DA now suggests. DA Br. at 2. Instead, as the petition fairly reveals, Marty was complaining about the effects of that evidence because it armed the DA to argue "He's lying" to

the jury, DA Appendix at 186-187, which the DA did "mightily" below. The DA has self-servingly missed this distinction entirely.

ARGUMENT

As a initial matter, even Marty's evidence that has been brought forward in this particular § 440.10 motion is more than sufficient to create reasonable doubt in a new jury's eyes, particularly given how weak the case against Marty was at trial. Cf. Jones v. Stinson, 229 F.3d 112, 120 (2d Cir. 2000) ("[I]n a close case, additional evidence of minor importance might be sufficient to create a reasonable doubt." (internal quotation marks omitted)). The DA's weak attempts at discrediting the new evidence in this appeal are ineffective. For example, the DA's best attempt at discrediting key witness James Moore is that a "heated argument" between Moore and Kent during their work day in which "Kent threatened to kill Moore" provided Moore with a "a motive to implicate Kent" four years later. See DA Br. at 27. Even more unpersuasive is the DA's pathetic attempt to discredit Sullivan. The DA claims that Sullivan's testimony cannot be trusted because he cannot accurately pinpoint the month in which he saw McCready and Steurman together nearly ten years ago (though Sullivan was able to accurately pinpoint the general season and year in which he saw McCready and Steuerman together). See DA Br. at 30. Moreover, when considered in

conjunction with the overwhelming new evidence brought forward in Marty's § 440.10 motion in pending appeal No. 2006-03617, there can be no doubt that the totality of the new evidence before this Court.

I. There Was No Lack Of Due Diligence In Bringing The New Witnesses' Evidence Forward.

The DA argues, as the County Court found below, that Marty failed to exercise due diligence with respect to bringing forward the new evidence that is the subject of these appeals.[8] But there is a reasonable explanation for why this evidence was brought forward when it was, although the County Court held no hearings to consider it. It is an abuse of discretion to deny a 440 motion on due diligence grounds when there is a reasonable explanation for any delay and the State does not demonstrate any prejudice arising from the delay. See People v. Maynard, 183 A.D.2d 1099, 1103-1104, 585 N.Y.S.2d 511 (App. Div. 3d Dep't 1992). The State has never made any effort to demonstrate prejudice from delay in this case, and it cannot do so now.

A. Lisa Harris.

The DA claims that "there is no valid excuse for Tankleff's having failed to call [Lisa Harris] as a witness at the hearing that the County Court

[8] Of course, as recognized by the County Court below and as explained in Tankleff's principal briefs, there is no due diligence requirement applicable to Marty's actual innocence claims. See Tankleff Principal Br. at 98.

conducted on Tankleff's prior 440 motion." The DA is wrong. As Marty explained in his prior briefing, Marty's defense team could not readily call Lisa Harris as a witness in the 2004 hearing because at that time it appeared that her testimony lacked detail and would be inadmissible due to the marital privilege. See Tankleff Br. at 7 n.5 and Tankleff Principal Br. at 118 n.99; People v. Starr, 213 A.D.2d 758, 622 N.Y.S.2d 1010 (App. Div. 3d Dep't 1995) ("[o]ne spouse may not, without consent, disclose a confidential communication made by the other during marriage") (quoting People v. Fediuk, 66 N.Y.2d 881, 883, 489 N.E.2d 732, 734 1985). Yet the DA nowhere even addresses this explanation in his opposition brief.

It was only through diligently working to strengthen Marty's case, after the initial 440 hearings, that Marty's lawyers learned of additional testimony by Lisa Harris that made her testimony more valuable, and also learned that some of her testimony would not be privileged because Glenn Harris had provided some information to her about the night of the murders in the presence of his mother. A.3934. It is well-settled that marital communications in the presence of a third-party are not protected by the marital privilege. See, eg, People v. Mills, 1 N.Y.3d 269, 276, 804 N.E.2d 392, 396 (2003) ("The privilege, which is '[d]esigned to protect and strengthen the marital bond encompasses only those statements that are

'confidential'"). Once Marty learned this additional information, Marty obtained an affidavit from Lisa Harris, and quickly brought it to the Court's attention by filing his 440 motion less than a month later. In view of this explanation, Marty's failure to call Lisa Harris as a witness in 2004 should hardly be viewed as any lack of diligence on his part.

B. Danny Raymond.

The DA's argument as to how Marty failed to exercise due diligence "with respect to Raymond" is concise, DA Br. at 20, but ridiculous. The entirety of the DA's argument on this point is as follows: "because at the hearing Kent testified that he and Raymond had committed robberies together on the day of the murders, Raymond's existence was known to Tankleff. Thus, Tankleff could have subpoenaed Raymond." Id. Under the DA's view, therefore, if a defense lawyer merely knows that a witness "exists," due diligence obligates that he find and call that witness to testify without any opportunity for investigation or even a chance to speak with the witness. That is pure nonsense.

The DA's position is not the law. In fact, the opposite is. As we have elsewhere explained, one critical component of providing effective assistance of counsel to a criminal defendant is to conduct an adequate factual investigation before deciding whether to call a witness or not. See

Tankleff Principal Br. at 144-49. The rule requiring due diligence was certainly not intended to supplant this constitutional duty. Merely knowing that Raymond "existed" created no obligatory mandate for calling him to the witness stand.

C. The Five Other Witnesses.

The DA's argument against Marty's due diligence in bringing forward the other five witnesses at issue on these appeals is the following one-liner: "Whatever factors led to Harris's and Kent's supposed confessions, and by implication whatever factors led Lisa Harris, Moore, Messina, Sullivan, Raymond, Bezgamblick and Touhey to come forward, would have existed ten or more years ago had Tankleff exercised due diligence." DA Br. at 19. This is a not-so-subtle reference back to the County Court's statements, in ruling upon Marty's principal 440 motion, that "Jay Salpeter, the defendant's investigator did concede at the hearing that an investigator could have developed [the Kovacs] lead [in 1994] and located Glenn Harris. The defendant could have fully investigated the assertions made by Kovacs in 1994 which very well could have led him to uncover the same witnesses he was able to produce in 2005." A.11.

Due diligence, however, is not to be judged by what a highly trained and skilled former New York City police detective—like Mr. Salpeter—now

operating as a defense investigator might have been able to do with such a lead.[9] If there is an investigatory burden at all,[10] the standard should be what a "reasonable" defendant could do. "Ordinary diligence" is all that is required here, not superhuman diligence. United States v. Gordon, 246 F. Supp. 522, 525 (D.D.C. 1965) accord, Williams v. Comm'r of Correction, 917 A.2d 555, 562 (Conn. 2007) ("burden to prove, inter alia, due diligence by demonstrating that the proffered evidence is newly discovered such that it could not have been discovered by reasonable investigation").

Moreover, it does not aid the County Court's due diligence analysis to say that Salpeter-like detective work "very well could have led . . . to uncover[ing] the same witnesses" earlier. (Emphasis added). The touchstone must be whether the defense would have inevitably discovered those same witnesses. If there is doubt about the discovery of the same witnesses (which the County Court's qualified phrase "very well could have" necessarily suggests) there cannot be any chargeable lack of due diligence associated with a failure to bring those witnesses forward earlier.[11]

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[9] The County Court's point is purely hypothetical because Salpeter was not retained by Marty's defense team until June 2001. H.00063.

[10] But see Tankleff Principal Reply Br. section discussing a more limited due diligence standard.

[11] The fact that the Tankleff defense provided a copy of the 1994 Kovacs affidavit to the Suffolk County Police in the mid-1990's and those authorities did not earlier find these witnesses either, should count for something in the analysis as well.

That is, in fact, the case here. As specified in our opening brief, most of the new witnesses at issue on this appeal voluntarily came forward as a result of the publicity from the hearings held on Marty's initial 440 motion.[12] There was not the same publicity, and therefore no similar reason for them to come forward any earlier. There was, thus, no lack of due diligence in their discovery either. And once these witnesses were discovered, the Tankleff defense brought their evidence promptly before the County Court.

II. The Exculpatory Evidence From The New Witnesses Is Probative And Admissible As To Marty's Innocence.

In order to distract the Court from Marty's extraordinary showing of his actual innocence, the DA spends most of his opposition brief arguing "mightily" for the exclusion of admissible evidence. Rather than considering the substantive import of Tankleff's new evidence, the DA employs every procedural dodge imaginable to avoid ever having to confront the merits of that new evidence.

In ruling vast amounts of Marty's new evidence inadmissible, the County Court applied the law incorrectly, did not consider the full array of facts, and failed to apply the due process mandate of Chambers v.

[12] The exceptions in that regard are Lisa Harris and Danny Raymond, who are discussed above, and Raymond's 92 year-old grandmother, Helen Bezgamblick. The evidence surrounding Raymond's testimony, moreover, is clear that it could not have been brought forward earlier because Raymond was unwilling to incur the DA's wrath by speaking the truth until his parole time had expired. And there was no need for Bezgamblick's testimony until after Raymond first gave his testimony.

Mississippi, 410 U.S. 284, 301 (1973). The DA, in turn, repeats and aggravates these mistakes. As explained below, the DA's arguments against the admissibility of this evidence are simply wrong.

A. Daniel Raymond, James Moore, and Frank Messina Jr.

Raymond's, Moore's and Messina's testimonies undeniably add to the mountain of evidence implicating Kent in the murders. The DA claims that Kent's direct admissions to Raymond, Moore and Messina, as well as Kent's consciousness of guilt in extorting an alibi for the murders from Raymond, would not be admissible. However, the testimony could be admitted under the hearsay exceptions for statements against penal interest or as prior inconsistent statements. In addition, some of the statements would also be admissible to show the consciousness of guilt in Kent's state of mind, or as classic alibi rebuttal evidence.[13]

The DA claims that Kent's admissions will not be admissible as a prior inconsistent statement or as a statement against penal interest because if Kent is called to testify he would be "available" and thus his prior admissions could not be admitted as statements against penal interest. The DA further argues that if Marty called Kent to testify, then the "voucher"

[13] Notably the County Court did not rely on *any* of the procedural barriers to admissibility that the DA had raised against Raymond's testimony. County Court Opinion, Suffolk County Court, January 3, 2007 (Braslow, *J.*)

rule would prevent him from impeaching Kent's denials of involvement with their prior admissions. The DA's position is unavailing. Whether or not a defendant's new exculpatory evidence merits a new trial under § 440.10(1)(g) should not turn on speculation as to which side would call a certain witness or whether a witness would or would not invoke his rights against self-incrimination. [14] See Tankleff's Principal Reply Br. for a more complete discussion on admissibility. Whether a new trial is warranted ultimately depends on the strength of a defendant's new evidence and, therefore, courts should normally resolve any speculation of this kind in favor of admissibility. Thus, this Court should assume either that Kent would (rationally) invoke his rights against self-incrimination, thus rendering him unavailable, or assume that the DA would call him as a witness, thus subjecting him to impeachment with prior inconsistent statements.[15]

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[14] It was a strikingly similar application of a state evidentiary rule in Mississippi which prevented defendant Chambers from impeaching his own witness that the Supreme Court struck down as violative of due process in Chambers v. Mississippi. This Court should not allow similar hypertechnical application of state evidentiary rules to lead to the same result here.

[15]The DA argues that Marty is procedurally barred from raising the exception for prior inconsistent statements as to Moore, statements against penal interest as to Raymond, Moore, and Harris, and prior consistent statements as to Bezgamblick and Touhey, because he did not raise the arguments in the County court. However, Marty raised the ground of prior-inconsistent statements for Raymond, the statement-against-penal interest argument is a pure question of law, and the admissibility of these confessions has been thoroughly briefed. In any event, this Court can and should consider these arguments in

Prior Inconsistent Statements. The DA does not contest that if he called Kent to the stand at a new trial, and Kent denied his involvement in the Tankleff murders, then Marty could impeach those denials by introducing their admission to the murders as prior inconsistent statements. See DA Br. at 22. The DA argues, however, that if these statements are admitted, they can only be used to impeach Kent and not as affirmative evidence of their guilt. Id. But this is irrelevant. At a new trial, Marty would not need to prove Kent's guilt; rather, it would remain the DA's burden to prove Marty's guilt beyond a reasonable doubt. In this context, Marty could use Kent's prior statements defensively to raise a reasonable doubt as to his guilt.[16] Doing so would allow a jury to assess the credibility of Kent's denial and thus the overall likelihood that he participated in the crimes, which is directly relevant to whether there is reasonable doubt as to Marty's guilt. A jury which disbelieved the truth of Kent's denial of his participation in the Tankleff murders would, we submit, necessarily have a reasonable doubt as to Marty's guilt of those murders.

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the interest of justice. See People v. Cona, 49 N.Y.2d 26, 33, 399 N.E.2d 1167, 1169 (1979); People v. McKenna, 77 A.D.2d 926, 927, 431 N.Y.S.2d 100, 102 (App. Div. 1980); People v. Clegg, 18 A.D.2d 694, 694, 236 N.Y.S.2d 7, 8 (App. Div. 1962); People v. Altintop, 13 A.D.2d 508, 508, 211 N.Y.S.2d 756, 757 (App. Div. 1961).

[16] Kent's admissions to Messina, though not direct evidence of Kent's guilt, self-evidently tend to show that Kent had been at the Tankleff house before to commit the murders and therefore in conjunction with the rest of the evidence against Kent, would also help establish a reasonable doubt that Marty did not commit the murders.

State of Mind. The DA contends that Kent's admissions do not qualify as nonhearsay statements showing consciousness of guilt, or state of mind, because we "fail[] to explain how Kent's or Raymond's state of mind would be relevant to whether Tankleff murdered his parents." DA Br.at 23-24. The DA, correctly, does not contest that statements showing consciousness of guilt or state of mind are admissible as nonhearsay. See id. Rather, he denies the relevance of Kent's statements regarding his alibi and his involvement in the Tankleff murders. See id. This argument is curious indeed.

Kent's statements show that Kent, and not Marty, was involved in the murder of Marty's parents. Raymond's statements regarding Kent's alibi are relevant to Marty's innocence because they prove that Kent believed that his alibi was false, and "[c]ertain postcrime conduct is 'indicative of a consciousness of guilt, and hence of guilt itself," such as the giving of a false alibi and the coercion or harassment of witnesses. People v. Bennett, 79 N.Y.2d 464, 469, 593 N.E.2d 279, 282 (1992) quoting People v. Reddy, 261 N.Y. 479, 486, 185 N.E. 705 (1933). Hence, once again, if a jury believed that Kent was exhibiting "consciousness of guilt" concerning the Tankleff murders, then the jury would necessarily also find a reasonable doubt that Marty committed these crimes.

The DA also argues that "it is unlikely" that Raymond's testimony would be admitted as alibi rebuttal evidence because Kent is not the defendant in this case and therefore his alibi is a collateral issue and thus not a "material, core issue in this case." DA Br. at 24 quoting People v. Cade, 73 N.Y.2d 904, 905, 536 N.E.2d 616, 617 (1989). However, as discussed above, the core issue in this case—Marty's innocence—is intrinsically related to the whereabouts of Creedon, Harris, and Kent the night of the murders and therefore Kent's alibi goes "to a material, core issue in this case" regardless of the fact that he is not the defendant.

B. Lisa Harris

Statements Against Penal Interest. Respondent claims that Glen Harris's statements to Lisa Harris are not admissible as statements against penal interest because Glen Harris was not aware that his statements were contrary to his penal interest, did not have competent knowledge of the underlying facts of which he spoke, and there is no adequate independent evidence demonstrating that Harris's statements were trustworthy and reliable. DA Br. at 21.[17] However, it is patently ridiculous to assert that a career criminal like Harris would not know that it is against his penal interest

[17] For a more complete discussion of the DA's arguments regarding the admissibility of Harris' statements and Marty's responses see Tankleff's Principal Reply Brief section on the admissibility of Harris' statements.

to admit to being a getaway driver to what he thought was a robbery but turned out to be a brutal double murder.

The DA also argues that Harris lacks competent knowledge of the facts. However, Harris statements indicate that he was present at the time of the crime and has direct knowledge of what occurred. "[T]here can be little doubt but that, as an admitted participant in the robbery and homicide[,] . . . [the witness] had firsthand knowledge of the facts underlying the statement." People v. Settles, 46 N.Y.2d 154, 167-168, 385 N.E.2d 612, 619 (1978).

Despite the DA's contention, Harris's statements also meet the requisite standard of reliability to be admissible as a statement against penal interest. As thoroughly detailed in Marty's Principal Reply brief Harris's statements bear sufficient independent indicia of reliability to establish a "reasonable possibility" that they might be true. A key factor pointing to the reliability of Harris' declarations is the large number of people to whom he confessed (including a priest), starting immediately after the crime and continuing up until this day. See, e.g., People v. Fonfrias, 204 A.D.2d 736, 738, 612 N.Y.S.2d 421, 423 (App. Div. 1994); People v. Smith, 195 A.D.2d 112, 123, 606 N.Y.S.2d 656, 663 (App. Div. 1994). In these cases, the declarant had only confessed four or five times. Fonfrias, 204 A.D.2d at 738, 612 N.Y.S.2d at 423 (four confessions to four different people); Smith,

195 A.D.2d at 123, 606 N.Y.S.2d at 663 (five confessions to two different people). Yet in this case, Glenn Harris has confessed to at least nine different people and the manner in which Harris provided some of his confessions (to a priest with an expectation of confidentiality, in an affidavit under the penalty of perjury) further confirms that the statements were made in conditions conducive to reliability. See Def. Br. 109 n.91 for Docket No. 2006-03617 (citing cases). Hence, Harris's statements meet the three requirements for statements against penal interest and should be admissible evidence.

C. Helen Bezgamblick

Prior Consistent Statements. The DA does not dispute that Raymond's statements to his grandmother regarding the pressure that Kent had put on him to lie about an alibi on the night of the murders would qualify under the exception for prior consistent statements. It is well established, and the DA does not contest, that if "a witness' testimony is assailed . . . as a recent fabrication, the witness may be rehabilitated with prior consistent statements." People v. McDaniel, 81 N.Y2d 10, 18, 611 N.E.2d 265, 270 (1993). By pointing to Raymond's 2004 affidavit and his present testimony in his briefing, the DA has made it abundantly clear that he would assail Raymond's testimony during cross-examination at any

future trial. See People v. Boyd, 58 N.Y.2d 1016, 1018, 448 N.E.2d 1346, 1347 (1983) (prior consistent statements admissible to rebut even "implicit assertions of recent fabrication."). Hence, Bezgamblick's statements can be used to rehabilitate Raymond's testimony

Instead, the DA argues that this issue was not raised below with respect to Bezgamblick, DA Br. at 23, and therefore cannot be considered on this appeal. That is nonsensical. In fact, Ms. Bezgamblick's testimony was introduced precisely to rebut the DA's claim that Raymond had fabricated his testimony. The only reason for ever submitting Ms. Bezgamblick's testimony in a judicial proceeding like this would be as a "prior consistent statement" to support Raymond's credibility against an attack. It was obvious and self-evident. Nothing more was required to preserve the issue.

D. Patrick Touhey

Prior Consistent Statements. The DA argues that Harris's admissions to Touhey are inadmissible as prior consistent statements because there is no warrant for any prior consistent statement rehabilitation of Harris since Harris has not yet been cross-examined. DA Br. at 23. This argument would actually be humorous, if a young man's freedom was not at stake. Glenn Harris' alleged fabrications of his statements concerning the Tankleff murders is the singular topic that the DA argued about more than anything

else in the County Court below, and that he has written about more than anything else in his briefs to this Court. Throughout these proceedings, the DA has done nothing but assail Harris' favorable statements for Tankleff as a recent fabrication. See, e.g., DA Principal Br. at 144 ("[b]ecause Harris lied, any other witness who 'corroborated' Harris also lied"). It would be extremely unfair for the DA to be able to attack Harris' statements as fabricated without allowing the defense to introduce evidence that rehabilitates Harris' statements through classic proof of prior consistent statements made by Harris.[18] The DA cannot "have its cake and eat it too."

E. Due Process

Even if the Court accepts the DA's argument that some of the statements might not be admissible under any of the hearsay exceptions stated above, these admissions would nevertheless be admissible as a matter of federal and state due process. Holmes v. South Carolina, 126 S. Ct. 1727, 1731 (2006) (citations omitted); Chambers, 410 U.S. at 302-03 (1973); People v. Robinson, 89 N.Y.2d 648, 679 N.E.2d 1055 (1997). These cases recognize that the Constitution "guarantees criminal defendants 'a

[18] In People v. McDaniel, 81 N.Y.2d 10, 611 N.E.2d 265 (1993), the court explained the exception for prior consistent statements "is rooted in fairness; it would be unjust to permit a party to suggest that a witness, as a result of interest, bias or influence, is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose." Id. at 18 (emphasis added). But, that is exactly what the DA seeks to do to Marty here.

meaningful opportunity to present a complete defense." Holmes, 126 S. Ct. at 1731.[19]

The statements at issue on these appeals could not be more critical to Marty's defense and are in fact more vital to Marty's defense than as was the case in Chambers itself. Second, despite the DA's claims to the contrary, these statements bear strong indicia of reliability: (1) The statements at issue are indisputably incriminating. See Williamson v. United States, 512 U.S. 594, 599 (1994) (acknowledging the "commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.") (emphasis added); see also Chambers, 410 U.S. at 300-01 (concluding that hearsay statements were sufficiently reliable because they "were in a very real sense self-incriminatory"); (2) Kent's spontaneous confessions were made to four people over the course of several years and Harris' admissions were made to 9 people over the course of several years; (3) Both Kent's and Harris' admissions are further corroborated by Creedon's admissions to six separate people on different occasions that he committed the Tankleff murders; (4) all of the confessions and statements

[19] For a more complete discussion see Tankleff's Principal Reply Brief.

are corroborated by each other as well as by other admitted evidence discussed in Marty's briefs before this Court.

While the DA would urge this Court to prohibit this evidence based on its own assessment, rather than the jury's assessment, of the witnesses' credibility, that view too contradicts Chambers. As one court has put it, "If [Chambers] mean[s] anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury." Pettijohn v. Hall, 599 F.2d 476, 481 (1st Cir. 1979). The evidence erroneously deemed inadmissible below measures well above the threshold of reliability that Chambers requires and the degree of weight to be accorded to it should be appropriately determined by a jury of Marty's peers.

CONCLUSION

The DA's cynical approach to the pursuit of justice in this case is amply evidenced by the "CONCLUSION" to his opposition brief, which cites People v. Crimmins'(38 N.Y.2d 407, 343 N.E.2d 719 (1975)) denial of a defendant's "440 motion" that was supported "with an affidavit of a 'witness' recalling events of seven years earlier." DA Br. at 34 (emphasis added). We have no quarrel with Crimmins; that decision makes perfect sense on its own unique facts. What we do have a quarrel with, though, is

the DA's suggestion that the facts of Crimmins are somehow applicable herein.

This case does not involve a singular witness, like Crimmins. Rather, this case involves numerous new witnesses, many of whom corroborate each other in reliability—enhancing ways wholly absent from Crimmins. Does it make a difference whether there is one witness or twenty witnesses in support of a proposition? Of course it does, but you would never know it from the myopic manner in which the DA focuses on the witnesses in this case. One by one, the DA tries everything he can to knock each of Marty's witnesses down, but he does so without ever looking at the whole of what those witnesses have to say. He is chopping down trees while entirely missing the forest.

When all is said, there is no reason other than simple truth for the collection of witnesses who have come forward to testify to what they know about Steuerman, Creedon and Kent or to what they know about Marty. It would be an impossible coincidence for so many unrelated witnesses to have evidence which dovetails in so many respects. And it would be a wholly implausible conspiracy of witnesses as well, although that has not stopped the DA from suggesting the same. What these numerous witnesses represent instead is corroboration; ample and fulsome corroboration of the central core

truth that Marty Tankleff did not murder his parents on the night of September 7, 1988.

Dated: July 3, 2007

Respectfully submitted,

BY: _____

Stephen L. Braga
Sheila J. Kadagathur
On the Brief

BAKER BOTTS LLP
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Jennifer M. O'Connor
Of Counsel
Roberto J. Gonzalez
On the Brief
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue,
Washington, D.C. 20004-2400
(202) 663-6000

Barry J. Pollack
Dawn E. Murphy-Johnson
On the Brief
KELLEY DRYE & WARREN, LLP
Washington Harbor, Suite 400
3050 K Street, N.W.
Washington, D.C. 20007-5108
(202) 342-8472

Bruce Barket
Of Counsel
666 Old Country Road
Garden City, NY 11530
(516) 745-0101

Warren Feldman
Scott J. Splittgerber
Of Counsel
CLIFFORD CHANCE US LLP
LLP
31 West 52nd Street
New York, NY 10019
(212) 878-8000

Mark F. Pomerantz
Of Counsel
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Attorneys for Defendant-Appellant Martin H. Tankleff

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f), counsel for Defendant-Appellant certifies that this brief complies with the applicable rules. This brief has been prepared using Microsoft Word in a proportionally spaced typeface.

Name of typeface: Times New Roman

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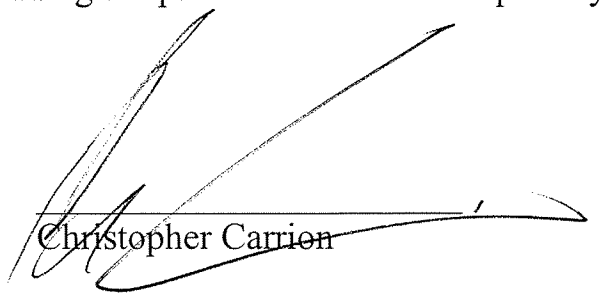
This brief contains 6635 words, excluding the parts of the brief exempted by 22 NYCRR § 670.10.3(a)(3).



Christopher Carrion

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

People of the State of New York

- against -

Martin H. Tankleff

AFFIDAVIT OF SERVICE

Appellate Division Docket No.:
2006-09042 &
2007-61292 (consolidated)

State of New York)
County of _____) s.s.:

Natalya Calhoun, being duly sworn, deposes and says that:

1. The deponent is not a party to the action, is 18 years of age or older, and resides at:

2. On the 3 day of July, 2007, the deponent served the following described paper upon the person or persons listed in paragraph 5 hereof:

3. The number of copies served on each of said persons was 2.

4. The method of service on each of said persons was:

- ☐ By delivering the paper to the person personally pursuant to CPLR 2103(b)(1).
- ☐ By mailing the paper to the person at the address designated by him or her for that purpose by depositing the same in a first class, postpaid, properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State of New York pursuant to CPLR2103(b)(2).
- ☐ Where the person served is an attorney, by leaving the paper with the person in charge of the office of that attorney, pursuant to CPLR 2103(b)(3).
- ☐ Where the person served is an attorney whose office was not open for business at the time of service, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box pursuant to CPLR 2103(b)(3).
- ☐ By leaving the paper at the person's residence within the State of New York with a person of suitable age and discretion, pursuant to CPLR 2103(b)(4) where service at the person's office could not be made pursuant to CPLR 2103(b)(3).
- ☐ By transmitting the paper by facsimile transmission to the telephone number or other station designated by the person for that purpose, pursuant to CPLR 2103(b)(5). A signal was obtained from equipment of the person served indicating that the transmission was received and a copy of the paper was mailed to the person

☒ By dispatching the paper to the person by overnight delivery service at the address designated by the person for that purpose, pursuant to CPLR 2103(b)(6).

5. The name of the person or names of the persons served and the address or addresses at which service was made are as follows:

Thomas J. Spota
District Attorney of Suffolk County

Leonard Lato
Assistant District Attorney
200 Center Drive
Riverhead, New York 11901-3388
(631) 852-2500

Dated: _____, New York
July 3, 2007

Natalya Calhoun

Sworn to before me this 3rd
day of July, 2007

_____
Notary Public

CHRISTOPHER CARRION
Notary Public, State of New York
No. 01CA6049262
Qualified in King County
Commission Expires 10/10/2010