Steuerman "hanging out and having conversations together" at the restaurant on at least two occasions. A.3936-3938 (Affidavit of Sullivan).[28]

The DA has never denied that McCready perjured himself, despite numerous opportunities to do so in the court below.

6. False Confession Experts Reviewed The Circumstances of Marty's Confession and Found The Confession To Be "Unreliable" and "Almost Certainly False"

Marty also presented the opinions of two noted experts on interrogations and false confessions, Professors Richard J. Ofshe and Richard A. Leo.[29] Professor Ofshe described the psychological interrogation techniques used by police and testified that these techniques can cause innocent people to confess, even to crimes as heinous as murder and rape. A.1574, 1578.

Professor Ofshe reviewed the circumstances of Marty's interrogation and found that Detective McCready's tactics were consistent with those that have

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[28]*See also* A.3937 (Affidavit of Sullivan) ("I also recall that on both occasions when I saw Jerry and Jim [McCready] talking together, McCready was already at the nightclub and then, sometime later, Steuerman would arrive. Jerry seemed kind of nervous and ancy [sic], and at that time, I noticed it and thought that maybe he was a married man about to stray into the affair zone. That is why I also found noticeable and strange [sic] because Steuerman didn't really mingle in the crowd, I never saw him dance, or hang around or even have [a] drink at the bar. It seemed to me he was just a free loader, who came in, talked with McCready and would then leave without spending any money.").

[29]The court admitted Professor Ofshe as an expert in police interrogations without objection. A.1569. Professor Ofshe has been a Professor in the Department of Sociology at the University of California at Berkeley since 1982. He has published widely on the topic of false confessions and has testified on hundreds of occasions. *See* A.164 (Declaration and Curriculum Vitae of Professor Ofshe). Professor Leo is an Associate Professor at the University of San Francisco School of Law and has testified 69 times in state, federal, and military courts. *See* A.203 (Affidavit and Curriculum Vitae of Professor Leo).

produced false confessions in the past. Among the important factors are that Marty was separated from family and friends; he was interrogated over the course of hours in a small windowless room; his answers were continuously met with disbelief; and Detective McCready deceived Marty with false evidence by telling him that his father had awoken from his coma and identified him as the attacker. Professor Ofshe testified—convincingly and without any government rebuttal—that the use of false but seemingly incontrovertible evidence can cause a suspect to lose faith in his own memory and come to believe things that in fact never occurred. A.1582-1598 (Ofshe).

Based on the interrogation techniques used and the conflicts between the confession and the physical evidence, Professor Ofshe concluded that Marty's confession was "unreliable." A.181. Professor Leo agreed, stating that Marty's confession was "almost certainly false." A.220.

7. Marty Passed a Polygraph Examination

In September 2001, Marty was given a polygraph examination by a respected authority in the field, Joel M. Reicherter. Reicherter is Professor Emeritus at SUNY-Farmingdale in Human Anatomy Physiology and Polygraph, and for the past seven years he has been an adjunct faculty member at the U.S. Department of Defense Polygraph Institute. A.152 (Curriculum Vitae of Joel M. Reicherter). According to Professor Reicherter's affidavit, Marty passed the

examination, showing the truthfulness of his denials of involvement in his parents' murders. A.149 (Polygraph Report for Martin Tankleff).

L. The County Court Denies Marty's § 440.10 Motion

Despite the wealth of evidence put forward at the hearing, the County Court held, in a decision fraught with legal and factual errors, that Marty did not satisfy his burden of proving his actual innocence or showing that his newly discovered evidence warrants a new trial. *See* A.8 (County Court's Decision Denying Defendant's 440.10 Motion, March 17, 2006, hereinafter "Decision"). The court rejected the majority of Marty's witnesses out of hand, due to their criminal records or to minor inconsistencies in their testimony. A.11-18. The court also rejected the false confession expert evidence—although no contrary evidence was presented—by relying on an unrelated district court opinion, which actually supports Marty's argument. A.20. Additionally, the County Court held that it could not consider Lubrano's testimony establishing Detective McCready's perjury because it mistakenly believed that it was bound by the decision of a previous court, which was unaware of Lubrano's testimony, on an arguably related issue. A.21. With respect in particular to the new trial claim, the court also held, based on an apparent misunderstanding of the law, that Marty had not been diligent in bringing the claim and that some of his evidence was inadmissible. A.11, 13. The court also rejected Marty's *Miranda*, *Brady/Giglio*, and ineffective assistance of

counsel claims as "lacking in merit," without so much as even mentioning them by name. A.26.[30]

M. The Appellate Division, Second Department, Grants Leave to Appeal

On April 17, 2006, Marty sought leave to appeal the County Court's March 17, 2006 decision, and the DA opposed the motion. On May 25, 2006, Associate Justice Reinaldo E. Rivera certified that the County Court's decision "involves questions of law or fact which ought to be reviewed by the Appellate Division, Second Department," and granted Marty's motion for leave to appeal pursuant to C.P.L. §§ 450.15, 460.15.[31]

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[30]The County Court denied Marty's second § 440.10 motion on largely the same grounds. *See* A.3905 (April Decision).

[31]*See* A.4 (Decision, Order, and Certificate Granting Leave to Appeal, Motion No. 2006-03617; 2006 N.Y. Slip Op. 69369 (May 25, 2006)). Marty is also concurrently appealing the County Court's denial of his motion to conduct DNA testing on scrapings from his mother's fingernails, *see* A.27 (County Court's decision), as well as the County Court's denial of Marty's motion to vacate his conviction for the depraved indifference murder of his mother, *see* A.30 (County Court's decision); A.6 (order granting leave to appeal).

The County Court also denied a series of motions seeking the disqualification of the DA and the DA's office. *See* A.854-1017. Marty was denied permission to appeal the County Court's decision denying the last of these motions. *See* Decision and Order on Application, Motion No. 2006-03618; 2006 N.Y. Slip Op. 69370 (May 25, 2006) (Rivera, J.). Although these disqualification motions are not being appealed, this Court should consider the impact of the DA's conflicts of interest and its misconduct in interfering with certain defense witnesses in evaluating the strength of Marty's new evidence. *Cf. Smith v. Baldwin*, 466 F.3d 805, 822-827 (9th Cir. 2006) (holding that the defendant satisfied his burden of showing that he was more likely than not innocent where prosecutorial intimidation caused the defendant's key exculpatory witness to refuse to testify at an evidentiary habeas hearing and where the court, as a remedy, accorded that witness' affidavits a presumption of truthfulness).

ARGUMENT

The old adage advises us not to lose sight of the forest for the trees. Yet that is exactly what the County Court did below in Marty's case. By ticking off seriatim its reactions to each individual piece of exculpatory evidence provided by Marty's new witnesses, the County Court dealt with the evidence tree-by-tree and never took a step back to look at the forest. Yet the law mandates a big picture, rather than a myopic, review of Marty's new evidence of innocence, and for good reason. The big picture in this case simply cannot be squared with any confidence in Marty's murder convictions. Another man, a violent career criminal, has actually admitted on multiple occasions that he—not Marty—committed these murders, and there is corroborative evidence aplenty to establish that he did just that and why. A truly cumulative review of the totality of Marty's exculpatory evidence can lead to only one conclusion: Marty Tankleff is actually innocent of the murders of his parents.

I. MARTY'S NEWLY DISCOVERED EVIDENCE DEMONSTRATES HIS ACTUAL INNOCENCE AND, AT A MINIUMUM, ENTITLES HIM TO A NEW TRIAL

A. Legal Principles Governing Marty's Actual Innocence and New Trial Claims

Marty's new evidence proves two distinct claims. The first is a claim of actual innocence brought under the federal and state constitutions.[32] A showing of actual innocence warrants relief because the imprisonment of an actually innocent person violates the fundamental guarantee of fairness embodied in due process, and also constitutes cruel and unusual punishment. *See People v. Cole*, 1 Misc. 3d 531, 765 N.Y.S.2d 477 (Sup. Ct. 2003) (holding that the imprisonment of an actually innocent person violates the New York State Constitution); *cf. Herrera v. Collins*, 506 U.S. 390 (1993).[33] A defendant must establish "by clear and

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[32]This claim is made under C.P.L. § 440.10(1)(h), which provides, as a ground for vacating a judgment, that "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States," and Judiciary Law § 2-b[3], which permits the Court to devise new processes where fairness so requires, and thus provides an alternative mechanism for the Court to remedy the injustice of a wrongful conviction.

[33]*See also People v. Washington*, 665 N.E.2d 1330 (Ill. 1995) (recognizing freestanding claim of actual innocence); *Miller v. Commissioner of Corr.*, 700 A.2d 1108 (Conn. 1997) (same); *In re Clark*, 855 P.2d 729 (Cal. 1993) (same); *see also State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003).

In *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the Supreme Court assumed that a persuasive showing of actual innocence would warrant relief, but held that the defendant had not made such a showing. A majority of the Justices agreed that a defendant who demonstrates his actual innocence would be entitled to a remedy under the Federal Constitution. *See id.* at 419 (O'Connor, J., concurring, joined by Kennedy, J.); *id.* at 442 (Blackmun, J., dissenting, joined by Stevens and Souter, J.J.); *see also House v. Bell*, 126 S. Ct. 2064, 2087 (2006); *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *Rochin v. California*, 342 U.S. 165, 172 (1952) (due process prohibits government conduct that "shocks the conscience"). Thus, this

convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the [defendant] was found guilty." *Cole*, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486.[34] In making this determination, a court must consider all reliable evidence, "whether in admissible form or not." *Id.*

Marty's second claim is that his newly discovered evidence warrants a new trial pursuant to C.P.L. § 440.10(1)(g).[35] To establish this claim, a defendant must show "by a preponderance of the evidence that, had this newly discovered evidence been received at trial, a probability exists that the verdict would have been more favorable to him." *People v. Wong*, 11 A.D.3d 724, 726-727, 784 N.Y.S.2d 158, 161 (3d Dep't 2004). The new evidence must satisfy the six

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Court may grant relief based on actual innocence under the Federal Constitution. *See, e.g., Ex Parte Elizondo*, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996) (granting relief under the Federal Constitution to a non-capital prisoner based on his clear and convincing showing of actual innocence).

[34]A preponderance standard is more appropriate, but this brief will discuss the clear-and-convincing standard used by the court below.

[35]C.P.L. § 440.10(1)(g) provides, as a ground for vacating a criminal conviction, that "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence."

conditions set out in *People v. Salemi*, 309 N.Y. 208, 128 N.E.2d 377 (1955),[36] and must be admissible at trial, *see People v. Boyette*, 201 A.D.2d 490, 491, 607 N.Y.S.2d 402, 404 (2d Dep't 1994).

In considering new evidence in support of either type of claim, a court's analysis should be guided by two fundamental principles. First, the court must consider the new evidence in its totality, and in connection with the original trial evidence. *See, e.g.*, *Cole*, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486; *Wong*, 11 A.D.3d at 726, 784 N.Y.S.2d at 161 (examining totality of new and original evidence in granting a new trial); *see also Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc) ("When determining the impact of evidence unavailable at trial, a court must make its final decision based on the likely *cumulative effect* of the new evidence had it been presented at trial.") (emphasis added).

Second, a court must evaluate the evidence from the perspective of a "reasonable juror." *Cole*, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486. As the U.S. Supreme Court recognized in an analogous context, such a "reasonable, properly

[36]Under *Salemi*, newly discovered evidence must "[1.] be such as will probably change the result if a new trial is granted; [2.] have been discovered since the trial; [3.] be such as could have not been discovered before the trial by the exercise of due diligence; [4.] be material to the issue; [5.] not be cumulative to the former issue; and [6.] not be merely impeaching or contradicting the former evidence." 309 N.Y. at 216 (citations and internal quotation marks omitted). The question of Marty's diligence and the admissibility of the new evidence will be discussed in Section I.C.

instructed juro[r]" must be presumed to "consider fairly all of the evidence presented" and to "conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt." *Schlup v. Delano*, 513 U.S. 298, 329 (1995); *see also id.* at 328 (emphasizing that in predicting the impact of new evidence on a reasonable juror, a court's analysis "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence"). "[I]t is not the district court's judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329.

B. The County Court's Analysis of Marty's New Evidence Was Flawed as a Matter of Law and, In Any Event, the Court Reached Unreasonable Factual Conclusions

The County Court committed numerous errors of law and fact that warrant this Court's correction. The County Court's methodology in evaluating Marty's new evidence was legally flawed in that the court did not consider that evidence in its totality or from the perspective of a reasonable, properly instructed juror. Rather, the court erroneously examined and rejected each witness' testimony in isolation, without regard to how the various witnesses corroborated one another's testimony. The court's analysis was further flawed by its failure to consider certain key pieces of new evidence at all, as well as its failure to take into account

the exculpatory physical evidence from the original trial. Because the County Court's evaluation of the evidence did not conform to applicable legal principles, its determinations are erroneous as a matter of law and warrant this Court's reversal.

Even assuming *arguendo* that the County Court applied the proper legal framework, its factual conclusions are contradicted by the record and should therefore be reversed. It is well settled that the Appellate Division is not bound by a trial court's factual determinations and that it may reach its own factual conclusions by reevaluating the testimony and other evidence. *See* C.P.L. § 470.15(1); *see also People v. Bleakley*, 69 N.Y.2d 490, 495, 508 N.E.2d 672, 675 (1987) ("Even if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further. If based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, weigh the relative probative force of conflicting inferences that may be drawn from the testimony." (internal quotation marks omitted)); *People v. Neely*, 219 A.D.2d 494, 447, 645 N.Y.S.2d 494, 496 (2d Dep't 1996) ("Because the Appellate Division has authority to make its own findings of fact in such nonjury matters, we have made factual determinations that have reversed or modified the findings of hearing courts."

(internal citations omitted)).[37] In addition, this Court may reverse the County Court as a matter of discretion in the interest of justice. *See* C.P.L. § 470.15(3)(c); *see also People v. Bryce*, 287 A.D.2d 799 (3d Dep't 2001) (granting new trial in the interest of justice, even where the exculpatory evidence could have been discovered at trial); *People v. Kidd*, 76 A.D. 2d 665, 668, 431 N.Y.S.2d 542, 544 (1st Dep't 1980) (describing powers of review in the interest of justice as "extremely broad"); *People v. Gioeli*, 288 A.D.2d 488, 489, 733 N.Y.S.2d 242, 243 (2d Dep't 2001).

For example, in *People v. Wong*, the County Court denied the defendant's motion for a new trial because it disbelieved the recantation of a trial witness. The Appellate Division, while noting that the County Court's credibility determinations are "generally accorded great deference," disagreed with that finding. 11 A.D.3d at 725-726, 784 N.Y.S.2d at 160-161. The Appellate Division found the recantation believable upon examining the witness' testimony and motives and noting that "[t]he recantation further acquires an aura of believability because of the testimony of the other witnesses in the hearing and the lack of trial evidence

[37] *See also People v. Lopez*, 95 A.D.2d 241, 252-253, 465 N.Y.S.2d 998, 1006-1007 (2d Dep't 1983) (acknowledging the "great weight" ordinarily accorded to the trial judge, but recognizing that "[i]f the determination is made after a Bench trial and the Appellate Division finds that the trier of fact incorrectly assessed the evidence, the Appellate Division has the power to make new findings of fact"). *Cf. People v. Baxley*, 84 N.Y.2d 208, 212, 639 N.E.2d 746, 749 (1994) (stating that it is "the general rule that the power to vacate a criminal conviction and grant a new trial for newly discovered evidence rests within the unlimited discretion of the *lower courts*" (emphasis added)).

connecting defendant with the commission of the crime or establishing a motive for him to commit the crime." *Id.; see also People v. Jackson*, 29 A.D.3d 328, 816 N.Y.S.2d 22 (1st Dep't 2006) (reversing trial court's denial of new trial based on its independent review of the new evidence).[38]

In the instant case, because it would certainly not be "unreasonable" to reach different factual conclusions than the County Court, this Court has an obligation to evaluate and weigh the hearing testimony and affidavit evidence anew. *See Bleakley*, 69 N.Y.2d at 495, 508 N.E.2d at 675. It is respectfully submitted that when this Court itself weighs the evidence, it will find that the new witnesses gave strong, credible, and corroborated testimony proving Marty's innocence. When the new evidence and the original trial evidence is considered holistically, the Court will find that, by "clear and convincing" evidence, a reasonable jury would find a

[38]The U.S. Supreme Court's recent decision in *House v. Bell*, 126 S. Ct. 2064, 2087 (2006), exemplifies the probing appellate review that is required in this context. There, the district court denied relief after crediting the State's various witnesses (including the third party who the defendant was accusing of the murder) and finding incredible the defendant's blood expert; two defense witnesses who reported that a third party confessed to the murder two decades ago; and the defendant himself. Despite the federal system's "clear error" standard for reviewing factual findings, the Supreme Court performed its own careful review of the new and old evidence and reversed the district court. While acknowledging the clear error standard, the Supreme Court stated that a reviewing court must ultimately make a "holistic judgment about 'all the evidence,'" *id.* at 2078, and that, "[a]s a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact," *id.* Although the defendant's new evidence was of mixed weight and reliability, the Supreme Court found that, viewed in its totality, it would more likely than not cause a reasonable jury to entertain a reasonable doubt about the defendant's guilt.

Thus, *House v. Bell* shows that a court's determination of how new evidence would affect a reasonable jury is ultimately a *legal* one, and, as a result, a trial court's binary labeling of new evidence as credible or incredible cannot "tie the hands," 126 S. Ct. at 2078, of a reviewing court. This lesson applies *a fortori* here, where, unlike a federal appellate court, the Appellate Division is not constrained in the first instance by a clear error standard of review.

reasonable doubt as to Marty's guilt. At the very least, it is "more likely than not" that a reasonable jury would so find, thus entitling Marty to a new trial.

1. In Rejecting the Multiple Witnesses Who Reported Creedon's Confessions, the County Court Failed to Consider the Evidence in Its Totality and From the Perspective of a Reasonable Juror

In rejecting Marty's witnesses on the thinnest of grounds, the County Court failed to consider the evidence in its totality and failed to adopt the perspective of a reasonable juror, who is presumed to "consider fairly all of the evidence presented" and to "conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. To entertain a reasonable doubt, such a juror need not believe a witness with absolute certainly, nor must such a juror be convinced of a witness' overall honesty or integrity. As will be demonstrated below, the County Court departed from the perspective of a reasonable juror at every turn.

a. The County Court Erred in Failing to Accept, Or Even to Acknowledge, the Concession of the DA's Investigative Report that Creedon Admitted His Involvement in the Tankleff Murders to Numerous People

The most glaring example of the County Court's failure to consider the totality of the evidence was its refusal to credit even *one* of the witnesses who reported that Creedon had made statements implicating himself in the Tankleff murders. These witnesses include Joseph Guarascio (Creedon's son), Gaetano

Foti, Karlene Kovacs, John Guarascio, Billy Ram, and Joseph Graydon. In rejecting these witnesses, the County Court failed to accept (or even acknowledge) the crucial concession made in the DA's investigative report that was submitted to the court: "Beginning on or about Easter Sunday 1991 and continuing for years after, Joseph Creedon stated to several persons that he had something to do with the Tankleff murders. Although Creedon denied . . . that he made the statements, *too many persons unconnected with one another have reported that he did.*" A.498 (Report on the People's Investigation of the Defendant's Claim that "New Evidentiary Materials" Establish His Actual Innocence) (emphasis added) (hereinafter "People's Investigation" or "DA's report").[39]

The DA's report thus *admits* the credibility of the various witnesses who reported Creedon's admissions, and therefore *squarely contradicts* the County Court's findings that these witnesses were incredible. That the County Court took a more dismissive view of these witnesses than the DA's investigative report—without even pausing to consider the commonsense point that "too many persons

[39]The DA's office undertook this investigation in response to Marty's request for an evidentiary hearing. After conceding that Creedon had in fact made multiple admissions to the murders, the report predictably went on to speculate that Creedon lied when making these statements in order to "enhance his violent reputation." A.499 (DA's report). Of course, there is no evidence to support this assertion. In fact, the hearing evidence showed that Creedon's violent reputation was well established by his actual violent and sadistic acts, and was thus in no need of bolstering. *See, e.g.*, A.1991 (Ram). The DA's self-serving speculation falls far short of negating the reasonable doubt created by Creedon's numerous confessions. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 300 (1973) ("The sheer number of independent confessions provided additional corroboration for each.").

unconnected with one another" have reported Creedon's admissions—is nothing short of astonishing. Indeed, it is a telling indication of the court's mechanical, results-oriented approach to Marty's witnesses. Rather than evaluate these witnesses holistically and thus have to account for their striking degree of mutual corroboration, the County Court proceeded as though its task were to focus on a witness in isolation, check off some number of factors allegedly weighing against the witness' credibility (minor inconsistencies, a criminal record, etc.), and then repeat this process with the next witness.

When the witnesses' accounts are viewed in aggregate, a very different picture emerges than that depicted in the County Court's decision. Not only, as the DA's report stated, is it the case that "too many persons unconnected with one another" have reported Creedon's admissions for them to be lying,[40] but also many of the details of their accounts correspond in a manner that underscores the witnesses' reliability. For example, Kovacs reports that Creedon mentioned hiding in the bushes outside the house watching a card game, while Joseph Guarascio testified that Creedon said that he was waiting outside for Jerry Steuerman to signal for him and Kent to enter the Tankleff house. This account is further corroborated by the fact that various doors at the Tankleff house were found

[40]For example, Kovacs has not spoken to John Guarascio for over a decade, and she does not know any of the other witnesses.

unlocked the morning after the attacks. A.3418-3430. The County Court utterly ignored these facts.

Indeed, the only way to account for the extraordinary agreement of these multiple witnesses—other than that they are telling the truth—is to posit an astounding (and, frankly, unbelievable) coincidence, or to hypothesize an equally incredible conspiracy theory, for which there is absolutely no evidence. The County Court itself never attempts to explain why so many unconnected witnesses would have come forward to commit perjury during the hearing.

The only plausible explanation is that conceded by the DA's own report: these witnesses are being truthful. Indeed, the sheer fact that a person like Creedon—who has an extensive criminal history and cannot account for his whereabouts on the night of the murders—has made multiple admissions of involvement in the Tankleff murders is sufficient to undermine confidence in Marty's conviction and, at a minimum, warrants the holding of a new trial.[41]

b. The County Court Erroneously Adopted a Virtual *Per Se* Rule That Witnesses With Criminal Records Are Unworthy of Belief

The County Court roundly denounced the "cavalcade of nefarious scoundrels paraded before this court by [the defendant]," A.11, and erroneously

[41]The DA's report's concession is also, logically, a concession that Creedon *perjured* himself at the 440 hearing by denying that he made statements implicating himself in the Tankleff murders to various people. *See* A.1443-1449 (Creedon). This Court can consider this perjury as evidence of Creedon's lack of credibility and his consciousness of guilt.

adopted a virtual *per se* rule that witnesses with criminal records are unworthy of belief. For example, the court rejected Billy Ram's testimony solely on the basis of his criminal record, stating that because Ram is a criminal, "this court does not believe that [Ram] would do anything like testifying in favor of this defendant out of some underlying need to see justice done." A.15; *see also* A.24-25 (rejecting other witnesses because they were of the "same ilk as Creedon," given their criminal records).

The County Court's determinations squarely conflict with previous cases, which have granted new trials based on the testimony of convicted criminals. *See e.g.*, *Wong*, 11 A.D.3d 724, 784 N.Y.S.2d 158 (granting new trial based on the recantation of a former inmate and on the affidavits of other inmates). Because the County Court believed that a witness' criminal record is a sufficient basis for rejecting his testimony, its findings are flawed as a matter of law.

Moreover, the County Court's approach is unrealistic and fails to consider how a reasonable juror would view the evidence. Indeed, prosecutors frequently bring cases using witnesses with criminal backgrounds, such as cooperating co-defendants and paid informants. In such cases, a prosecutor will explain to the jury that while a given witness might have a criminal record (or drug problem, etc.), this is exactly the kind of person who associates with other criminals and is thus in a position to give valuable testimony. In fact, because many prosecutorial

witnesses receive leniency in exchange for their cooperation, they often have a *much greater* motivation to fabricate than any of Marty's witnesses.[42] Thus, a reasonable juror would likely disagree with the County Court's blanket condemnation of the "cavalcade of nefarious scoundrels paraded before this court." While it is clear that the court below found these witnesses distasteful, that assuredly was not the legal question at issue. *See Schlup*, 513 U.S. at 329 ("[I]t is not the district court's judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do.").

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[42]Prosecutions based on witnesses with criminal backgrounds are legion. *See, e.g., People v. Mensche*, 276 A.D.2d 834, 714 N.YS.2d 377 (3d Dep't 2000); *People v. Comstock*, 266 A.D.2d 856, 698 N.Y.S.2d 812 (4th Dep't 1999). One federal prosecutor observed that "[i]t is a rare federal criminal trial that does not require the use of criminal witnesses," and she further noted that "[p]aying an informer or cooperating witness is often unavoidable." Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. Rev. 679, 682, 697 (1999); *see also id.* at 696 (advising prosecutors in closing statements to "[a]cknowledge the distasteful background of the [criminal] witnesses, thus validating the jurors' feeling about them. Argue that the defendant picked the witnesses, not the Government (*i.e.*, "The defendant picked John Doe as a witness when he approached him with an opportunity to launder drug money."). Remind the jury that people do not confide their criminal plans in people who are honest, law-abiding citizens."); John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1979, 1815 (2001) ("Accomplices make the best witnesses. After all, the first qualification for 'witnessing' is perception. Since most criminal activity is carried out in secret, accomplices have a unique advantage: They see and hear the defendant plan and commit the crime. For that reason, accomplices often provide the most complete and most compelling evidence in a criminal case. Sometimes, they provide the only direct, eyewitness account. Without information from cooperating accomplices, many crimes would never be prosecuted at all.") (footnotes omitted); *United States v. White*, 27 F. Supp. 2d 646, 649 (E.D.N.C. 1998) (noting that the government relies on witnesses who testify in return for leniency in "thousands of cases each year").

c. In Rejecting Various Witnesses, the County Court Improperly Seized Upon Minor Inconsistencies in Testimony, Relied Upon Speculative and Contrived Motives To Establish Bias, and Ignored Corroborating Witnesses

The County Court's rationale for rejecting Marty's witnesses differs sharply from how a reasonable juror would approach the testimony. For instance, the County Court found various witnesses incredible by seizing on minor inconsistencies in their testimony. A reasonable juror, however, would most likely attribute minor inconsistencies in a witness' testimony to an innocent lapse in memory, rather than to a motive to deceive, particularly when there are other witnesses or pieces of evidence that corroborate that testimony. By failing to recognize this commonsense point, the County Court committed an error similar to the one identified in *Wong*. *See Wong*, 11 A.D.3d at 726, 784 N.Y.S.2d at 161 (rejecting the County Court's conclusion that "certain minor inconsistencies in [the new witnesses'] testimony were sufficient to require that the testimony as a whole be considered incredible," where the witnesses' testimony agreed on important points); *see also Schreyer v. Platt*, 134 U.S. 405, 416 (1890) (observing that the lack of perfect consistency "tends to prove honesty, rather than to establish fraud"); *Beachum v. Tansy,* 903 F.2d 1321, 1326 (10th Cir. 1990) (noting that "uncertainties and minor variations [are] normal to the recollection of honest witnesses after lapse of time"). Moreover, the County Court engaged in

unreasonable and unsupported speculation regarding the witnesses' possible biases.[43] Finally, the County Court wholly ignored certain corroborating witnesses, and thus plainly failed to "consider fairly all of the evidence presented." *Schlup*, 513 U.S. at 329.

(1) Joseph Guarascio

Joseph Guarascio, Creedon's seventeen-year-old son, testified that in April 2004 his father admitted to him his involvement in the Tankleff murders. The County Court dismissed this testimony because it believed that Guarascio "was motivated by his mother who was both physically and emotionally abused by Joseph Creedon while they lived together." A.13.

There is, quite simply, *nothing* in the record to support this conclusion. While Guarascio testified that he feared his father and that his father had abused his mother in the past, he said nothing at the hearing to indicate that his testimony was motivated by these considerations. To the contrary, one would think such fears would have kept him from coming forward unless he sincerely felt, as he testified, that his father's admissions were just "too much" to "hold in" and that he

[43]Indeed, the County Court employed a perverse logic with respect to the witnesses implicating Creedon. It is a fact of life that a career criminal like Creedon associates with people who themselves have criminal records. It is also unsurprising that a person like Creedon has wronged many people in his life, such as his ex-girlfriend Teresa Covias, the mother of Joseph Guarascio. Given this, it would be most ironic if Creedon were never held accountable for the Tankleff murders because the only witnesses who are likely to have heard his admissions of guilt are rejected out of hand, either because of their criminal records (Billy Ram, Joseph Graydon) or because they have been hurt by Creedon in the past and were therefore presumed by the court to be out to get him (Joseph Guarascio, Teresa Covias).

"couldn't take it anymore." A.2931 (Joseph Guarascio). Indeed, the DA did not even suggest on cross-examination or otherwise that Guarascio was motivated by his father's past abuse of his mother.

Thus, the court manufactured this motivation out of whole cloth. Crucially, the court did not even attempt to explain how Guarascio would have known what details to include in his purportedly fabricated story. That these details correspond to what other witnesses have reported counts strongly in favor of Guarascio's reliability.

(2) Gaetano Foti

Gaetano Foti, who worked at a bar that Creedon frequented in the early 1990s, testified that Creedon admitted his involvement in the Tankleff murders on two occasions. The County Court rejected Foti's testimony in three cursory sentences:

> Gaetano Foti also testified that Creedon told him that Tankleff didn't do it, that Creedon was there and that he killed the Tankleffs. However, on cross-examination, Foti testified that Creedon may have only said that Tankleff didn't do it and that he knows that because he was there. It thus appears that Foti's testimony is equivocal and not reliable.

A.15-16. But this reasoning is exceedingly weak. In describing Creedon's first admission, Foti testified on direct that he had said to Creedon that it was a shame about the "kid" (Marty) because he thought he was innocent, to which Creedon

said that he was innocent because "I [Creedon] did it." A.1715. On cross-examination, Foti agreed that he had previously told Assistant DA Lato that Creedon had said that the kid didn't do it because "I was there." A.1717. It is perfectly understandable that Foti would remember Creedon's admission of involvement in a notorious crime, but that, a decade later, he might not remember Creedon's exact wording. Clearly, if Creedon knew Marty was innocent because *Creedon was "there"* at the Tankleff house, this is tantamount to saying that Creedon committed the murders. As Foti himself testified, "it sounds like the same thing to me." A.1718.

Thus, a reasonable juror would hardly conclude that Foti's lack of verbatim recall rendered his testimony wholly "equivocal and not reliable." A.15-16 (Decision). *See Beachum*, 903 F.2d at 1326 (noting that "uncertainties and minor variations [are] normal to the recollection of honest witnesses after lapse of time"); *see also Ouber v. Guarino*, 293 F.3d 19, 30 (1st Cir. 2002) ("The inescapable fact . . . is that a witness's testimony is rarely identical two times running."). What is more, the County Court never gave any reason to doubt Foti's account of Creedon's *second* admission, in which Creedon admitted to Foti and a third person, Billy, that he had committed the Tankleff murders.

The County Court also wholly failed to mention a witness that strongly supports Foti's reliability: Detective Robert Trotta testified that he considers Foti

to be a "reliable source," having used him for information in the past. A.2626 (Trotta). Further, the DA's report's conclusion that Creedon had in fact admitted to the Tankleff murders over the years was based in part on Foti's statements. Given these factors, the County Court's rejection of Foti's testimony was manifestly erroneous.[44]

(3) Karlene Kovacs and John Guarascio

Karlene Kovacs testified that in 1990 or 1991 she accompanied her then-boyfriend, John Guarascio, to the home of Creedon and Teresa Covias for Easter dinner. While Kovacs, Guarascio, and Creedon were smoking a joint of marijuana together, Creedon told Kovacs about his involvement in the Tankleff murders, including details such as that he was in the bushes outside the house watching a card game and was there with one of the Steuermans. A.1530-1531 (Kovacs).

[44]The DA has argued that Foti is also unreliable because he "was a heavy drug user and believed that Creedon had shot Foti's friend." Respondent's Memorandum in Opposition to Defendant-Appellant's Application for Leave to Appeal 43. Again, it is insufficient merely to list a number of speculative credibility concerns without any indication that they actually affected the reliability of the witness' testimony. Here, there is no testimony that Foti was taking drugs when he heard Creedon's admissions, and any drug use apparently did not diminish Detective Trotta's perception of Foti as a "reliable source." With regard to the shooting of Foti's friend, simply reading the transcript reveals this to be a red herring. Defense counsel asked Foti a few questions at the beginning of his direct testimony regarding when he first encountered Creedon. Foti responded that it "was in a bar in Farmingville called Mr. Lucky's"; "He shot a friend of mine"; "He shot him in the behind, and I didn't know him then but I knew of him." A.1712 (Foti). This background incident is never mentioned again, and the DA apparently could not even muster a good-faith question suggesting that this somehow biased Foti's testimony. It is unlikely that a reasonable juror would believe that Foti perjured himself over a decade later to vindicate an unnamed friend who was only mentioned in passing.

John Guarascio corroborated Kovacs' account in his testimony. A.1682-1687 (Guarascio).

The County Court cited a number of reasons for rejecting Kovacs' testimony, but they are all unpersuasive. *See* A.13-14. Whether the joint was smoked inside the house (as her 1994 affidavit stated) or outside the house (as she now remembers) matters little. *See Beachum*, 903 F.2d at 1326; *Ouber*, 293 F.3d at 30. Although her memory of certain details may have changed over time, Kovacs has never wavered from the fundamental point that she heard Creedon admit his involvement in the Tankleff murders. Crucially, neither the County Court nor the DA has ever suggested why Kovacs would have fabricated this account when she first gave it in a 1994 affidavit. She did not know Marty or his family; she had long since stopped dating Guarascio; and she had no criminal record and was certainly in no way part of Creedon's criminal network.[45]

[45]While it is true that Kovacs had a cocaine problem in the early 1990s, it is undisputed that she was not using cocaine when Creedon confessed to her. Nor is it disputed that by the time she gave her affidavit in 1994, she had completed a rehabilitation program and married. Indeed, there is no evidence that her previous drug problem in any way tainted her testimony. It bears noting that the County Court went so far beyond the reasonable juror standard as to charge that Kovacs "has developed a biased interest in the outcome of this matter," because she had recently posted messages on a website dedicated to Marty's case, and stated that she cannot wait to give Marty a hug. A.14 (Decision). But, of course, this confuses cause and effect. It is *because* Kovacs heard Creedon's admissions that she, like any well-meaning person in her situation, is interested in vindicating Marty's innocence. This does not make Kovacs "biased" in any meaningful sense of the term. In any event, Kovacs' internet postings occurred in May 2004, and there is absolutely no evidence that she was somehow "biased" towards Marty's innocence *a decade earlier* when she gave her affidavit describing Creedon's statements.

The County Court also *wholly failed* to mention three other considerations that strongly support Kovacs' reliability. Most significantly, the court failed to mention that John Guarascio—a municipal employee with no criminal record or history of drug abuse—was present at the *same* conversation and corroborated Kovacs' account of what Creedon said.[46] Additionally, the court failed to consider that Kovacs passed a polygraph examination in 2002, the results of which the DA has never disputed. A.144. Indeed, the DA's investigative report based its concession partly on Kovacs' statements. A.498. A reasonable juror would credit Kovacs' and John Guarascio's accounts.

(4) Billy Ram

Billy Ram testified that, on the night of the murders, Creedon told him that he was going to "rough up" "some Jew in the bagel business" (referring to Seymour Tankleff), and Ram later saw Creedon leave together with Kent and Harris. In placing Creedon, Kent, and Harris together that night, Ram is a crucial eyewitness. Ram also testified that Creedon, Kent, and Harris later admitted to him on separate occasions their involvement in the murders. A.1968-1969 (Ram).

As noted earlier, the County Court erroneously rejected Ram's testimony on the sole basis of his criminal history. *See supra* Section I.B.1.b. The court also

[46]The DA predictably argued below that Guarascio was biased because Creedon had abused his sister, Terry. But, again, there is no basis to suppose that this would cause a person like Guarascio to decide—a decade later—to perjure himself in open court.

erred in failing to consider an important witness who corroborated Ram's testimony. Ram's girlfriend, Heather Paruta, testified that, in or about 1999, Ram told her about an innocent person who was serving 25-to-life for killing his parents and said that he knew who in fact committed the crimes. A.2029-2032 (Paruta). This testimony, which reports a prior consistent statement made long before this § 440 motion was filed, undercuts the DA's baseless and fantastic assertion that Ram fabricated his testimony at the 2004 hearing in exchange for a bribe from Marty's *pro bono* defense team.[47] Unless Ram knew this information first-hand, he would have had no reason or ability to make this claim to Paruta in 1999.

(5) Joseph Graydon

Graydon testified that in 1992 or 1993 he talked to Creedon at a bar, and Creedon told him that he had committed a couple of murders and gotten away with

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[47]The County Court mentions Kent's allegation that Ram told him that he received a bribe from the defense investigator, but the court evidently did not credit this self-serving testimony. A.15. In fact, there is no evidence that the defense team paid Ram anything other than that sanctioned by New York ethics rules—his out-of-pocket expenses and lost wages for traveling to Long Island for the 440 hearing. In addition to Paruta's testimony, Ram gave a consistent account to Marty's investigator in September 2004, and again to Marty's counsel in October 2004, before there was any discussion of him being paid his expenses and lost wages. A.2739-2740 (Salpeter).

The credibility of Ram's testimony at the 440 hearing is further bolstered by the fact that he refused to recant it in exchange for a shorter prison sentence. Over a year after he gave that testimony, when Ram was prosecuted for armed robbery in Florida, the DA's investigator, Walter Warkenthien, told Ram's attorney that he would help Ram obtain a reduced sentence if Ram would "admit" that he accepted a bribe from Marty's defense team in exchange for testifying falsely. When he learned of this offer, Ram refused to recant his testimony and insisted again that he testified truthfully and that Marty was innocent. That Ram resisted the inducement of a lower prison sentence—ultimately being sentenced to 15 years' imprisonment—is strong proof that his testimony was truthful. Although Marty's counsel raised Warkenthien's behavior in support of the motion to disqualify the DA and to impose sanctions, the court ignored the submission. *See* A.1013-1016 (Affirmation of Bruce A. Barket, January 25, 2006).

it. A.1870-1871 (Graydon). The court rejected this testimony, finding that "the admission was supposedly made while he was arguing with Creedon over which one of them could sell drugs at a particular location." A.15. The court, however, misheard the testimony. Graydon testified that after one of his drug runners was threatened by an unnamed person at Sullivan's bar, Graydon phoned the bar and argued with that person about who controlled drug sales there. Graydon then drove to the bar, preparing for a fight. But when he arrived, he realized that the person he had been arguing with was his old associate, Creedon. They had an amicable conversation, and Creedon mentioned that he had gotten away with two murders. A.1870, 1915-1917 (Graydon). Based on Graydon's previous dealings with Creedon, he believed that Creedon was referring to the Tankleff murders.[48]

Thus, the court's rationale is flatly contradicted by the record. Further, other than emphasizing Graydon's criminal record, the County Court cited no motive Graydon would have had to fabricate his testimony.

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[48]The County Court also erred in rejecting Graydon's testimony that in June 1988 he agreed to help Creedon murder one of the partners of Strathmore Bagels (Seymour Tankleff). Graydon testified that, after their plan to commit the murder at the bagel store one Sunday failed after they found the store closed, they robbed a stationary store in the same shopping center. A.1866-1869 (Graydon). The court reasoned that the police records and the former store manager's testimony contradicted Graydon's account, *see* A.14, but that is not the case. Although the former store manager testified that a robbery occurred in November 1988, which would have been after the murders, she also testified that the store had been broken into on multiple earlier occasions. A.2559-2566 (Goldstein). Further, a police records clerk said that she was only asked to perform, and only did perform, a manual search for incidents that occurred in July and August, but not in June, which was the month Graydon identified in his testimony. A.2577, 2583 (Stillufsen).

2. The County Court Failed to Consider the Statements of Glenn Harris From the Perspective of a Reasonable Juror

As noted earlier, Harris stated in an affidavit that he was the unwitting getaway driver for Creedon and Peter Kent on the night of the murders. When Creedon and Kent emerged from the house in Belle Terre that they were ostensibly going to rob, the pair was frantic and covered in blood. The next day, Harris pieced together from news reports that he had driven them to the Tankleff house to commit murder.

The County Court found Harris' statements unreliable because he is "mentally unstable and equivocal, often recanting his statements." A.16. The court was correct that Harris has some mental health issues, but there is nothing in the record to establish that those issues render him incompetent to testify as a witness on the historical facts in this case. The Court was incorrect that Harris had "often" recanted his statements. He has never given sworn testimony recanting the sworn testimony set forth in his voluntarily executed affidavit. *See* A.35 (Sworn Statement of Glenn Harris, August 29, 2003).

Of the scores of letters Harris wrote to the defense investigator, Jay Salpeter, while in prison, there is a single letter from July 2002 in which Harris declared, in a hyperbolic and unnatural fashion, that "everything" he had said previously was a fabrication. A.329. Notably, Harris never repeats any of these statements in his subsequent letters. Indeed, his subsequent letters confirm his account of Creedon's

and Kent's roles in the murders, and, in August 2003, Harris provided a sworn statement to that effect. When considered in conjunction with his other letters and the testimony of Harris' prison chaplain, Father Lemmert, Harris likely wrote the peculiar "recantation" letter because he was afraid of being accused as an accomplice to the murders and afraid of retribution by Creedon. A.1803-1807 (Lemmert). This unsworn letter does not justify ignoring Harris' subsequent sworn testimony, which is corroborated by his prior and subsequent statements and by the sworn testimony of other witnesses. *See* A.298, 300, 343-345, 351 (Harris letters).[49]

Indeed, several considerations support the reliability of Harris' sworn testimony. The County Court seriously erred in neglecting to even *mention* these factors. First, Harris passed a polygraph examination in June 2002, verifying the truthfulness of his account. *See* A.146 (Polygraph Report for Glenn Harris). Second, in investigating Harris' account, the DA's office sent not one, but *two*, wired inmates to talk to Harris in prison in an attempt to get Harris to admit that he had fabricated his story. On both occasions, despite much prodding, Harris adhered to his account. *See* A.459-478 (DA's report). Third, Harris has given the

[49]There is certainly no *per se* rule that a person's recantation of a confession renders the confession unreliable. For example, in *Chambers*, 410 U.S. 284, the Supreme Court held that a third party's confessions bore indicia of reliability and would be crucial to the defense, despite the third party's recantation. Indeed, if there were such a rule, the prosecutor should have ignored Marty's "confession" at trial solely because Marty immediately recanted it once he was free from the police.

same account to multiple people over a span of years, including to Billy Ram the day after the murders; his mother, Virginia Harris, in 2002; his wife, Lisa Harris, in January 2003; Salpeter, the defense investigator; Father Lemmert and Sister Angeline, who worked at the prison; and the co-residents of the "sober" house where Harris lived in early 2004. A.1961-1965 (Ram); A.3973-3974 (Affidavit of Lisa Harris); A.1177-1179, 1189-1190, 1258, 1348 (Salpeter); A.1799-1801 (Lemmert); A.2696-2697 (Kelly).[50]

Fourth, although Harris' retellings of the events of that night contain minor inconsistencies, it is unlikely that he could have fabricated his account.[51] In

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[50]As noted earlier, a recently discovered witness, Patrick Touhey, must now be added to this list. *See supra* nn.2 & 20. In 1996, while he and Harris were in prison together, Harris told Touhey that he knew of someone "in jail for committing murder but didn't do it." A.4005 (Affidavit of Touhey). This incident took place years before Harris was in contact with Marty's defense team and thus years before Harris would have any conceivable incentive to fabricate his account.

[51]The County Court also stated that "Harris sought details of the crime from Salpeter, the defendant's investigator, which would indicate that he probably had nothing to do with committing the crimes." A.15. But reading Harris' letters supports a different conclusion. Harris does in fact ask Salpeter many questions about the evidence of the crimes, but this is out of his persistent worry that Salpeter will be relying *only* on Harris to support Marty's defense. Harris repeatedly expressed his concern that his credibility would be wrongly "attacked" and that he would be left high and dry on the witness stand. A.259, 264, 268, 272, 304, 342, 344. (Incidentally, Harris' statement that "it ain't gonna wash" was clearly meant in this vein, A.342, not as an admission of fabrication, as the DA asserted below.) Because of these fears, Harris wanted Salpeter's assurances that other evidence would support Marty's case. A.342.

Moreover, Harris' letters are filled with statements that are plainly inconsistent with the theory that he fabricated his account. For example, in Harris' earlier letters both to Salpeter and Marty (the letters to Marty were never delivered), Harris asked questions to ascertain whether Marty was connected to Creedon and involved in the murders in "ANY way." A.311; *see also* A.262 (letter to Marty asking him if he was involved in drugs and whether he previously knew Creedon). Of course, Harris would have had no reason to go to such efforts if he had invented his account of Creedon's involvement in the first place. (Harris' uncertainty about what transpired inside the Tankleff house stems from the fact that he was waiting outside in the car; as a result, Harris should not be expected to know all the "details of the crime," A.17 (Decision).)

naming Creedon and Kent, he named two individuals who had ties to Steuerman, no alibi for the night in question, and who another witness has corroborated were with Harris the night of the murders discussing committing a crime in Belle Terre. *See supra* Background Part K.1 – K.4; A.1961-1964 (Ram). Harris could not have known that any of these facts would be subsequently corroborated when he originally named Creedon and Kent as his accomplices. Harris also provided details that indicate that he was in Belle Terre on the night in question. He stated that there was nobody in the guard booth as he drove into Belle Terre that night, A.2848 (Warkenthien), and a witness verified that, based on the logbooks of that night, there was in fact no guard on duty between 2:10 a.m. and 6:15 a.m, A.2639-2643 (Ciulla). In addition, Harris told Salpeter, the defense investigator, that as they drove away from the Tankleff house, Creedon got out of the car and threw a pipe—one of the murder weapons—into the woods. Salpeter later went to that location and found a 36-inch long pipe, which the owner of the land, John Trager, could not explain. A.1203 (Salpeter); A.1284-1286 (Trager).[52]

[52]Salpeter informed the police, but they declined to investigate. Salpeter and another investigator then collected the pipe according to instructions provided by Forensic Science Associates, the California lab where it was analyzed. It tested negative for biological material, which is consistent with its having been exposed to the elements for 15 years. A.1202-1206 (Salpeter). The County Court found that the pipe has "no probative value" because the DA's investigators later went to the lot where the pipe was found and "found other pipes of the same type of varying lengths on the lot." A.13 (Decision). This, however, ignores the testimony. Salpeter testified that the pipe he found was 36 inches long and loose on the ground, *see* A.1202-1205, while the four pipes that the DA's investigator found were well pipes that measured *ten feet long* or longer and were half-buried in the ground, *see* A.2862-2864 (Warkenthien). Additionally, Salpeter's

Finally, Harris has no plausible motive to fabricate his account—in fact, he has every reason to *deny* his involvement in a double homicide. In evaluating Harris' statements, a reasonable juror would strongly consider this lack of motive, as well as the fact that Harris has knowledge indicating he was in Belle Terre on the night in question; that he gave the same account to multiple witnesses—including his mother, his wife, and a priest—over a period of years; and that the DA's office twice sent wired inmates to obtain an admission from Harris and was twice disappointed. In combination with the other relevant factors—Creedon and Kent's criminal records, their lack of an alibi, their multiple admissions to the crimes, Ram's testimony that Creedon, Kent, and Harris left together on the night in question—Harris' account grows in credibility. Taken together, a reasonable juror would likely find that this evidence creates, *at the very least*, a reasonable doubt as to Marty's guilt.

3. The County Court Failed to Consider Neil Fischer's Testimony From the Perspective of a Reasonable Juror

Neil Fischer testified that in the spring of 1989, while he was installing counters at Jerry Steuerman's bagel store, he heard Steuerman angrily scream at an oven repairman and say that he had "already killed two people." A.1833-1834

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pipe was conical in shape (measuring 1 3/8 inches on the wide end and 1 inch on the narrow end), thus negating the possibility that it was merely detached from the larger pipes the DA's investigator found, which were perfectly cylindrical (measuring 1 1/2 inches in diameter throughout). A.2869 (Warkenthien).

(Fischer). The court found this testimony unreliable because Fischer "had his head in a cabinet" at the time and "was probably not paying close attention to what was being said." A.17. But while it is true that Fischer was working on the cabinets at the time, he testified as to what he was in fact able to hear. A.1844 (Fischer). Further, as the court recognized, this witness was indisputably credible. And while the court suggested that perhaps Steuerman's comment was "facetious," this is pure speculation and contrary to the witness' testimony, and therefore should more properly be considered by a new jury in light of all the evidence.

4. The County Court Erred In Failing to Address Key Pieces of Marty's New Evidence

The County Court also erred as a matter of law in failing to consider at all key pieces of Marty's new evidence. By ignoring this favorable evidence, and by generally drawing every inference against the defendant, the court fell short of adopting the perspective of a "reasonable juror," who is presumed to "consider fairly all of the evidence presented." *Schlup*, 513 U.S. at 329.

a. The County Court Wholly Ignored Marty's Polygraph Evidence, Which Was Unrebutted and Constitutes Strong Proof of His Innocence

The court never as much as *mentions* the three polygraph examinations that Marty submitted into evidence. Professor Reicherter, who is an authority in the field and an adjunct professor at the Department of Defense's Polygraph Institute, administered polygraph examinations to Marty, as well as to the first witnesses

Marty identified, Karlene Kovacs and Glenn Harris. The results verify the truthfulness of their statements. *See* A.144-151 (polygraph reports). These results are highly probative, and the DA offered no evidence to rebut them. Clearly, this polygraph evidence not only undermines the DA's case against Marty, but it also bolsters the reliability of the other new evidence, such as the testimony reporting Creedon's multiple admissions to the murders.

Even accepting *arguendo* the DA's argument below that polygraph evidence would not be admissible at a new trial—a questionable proposition given the much-improved reliability of such tests[53]—the County Court should nevertheless

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[53]The Court of Appeals has left open the possibility that a defendant can show in a *Frye* hearing that polygraph evidence has become sufficiently accepted in the scientific community to be admissible. *See People v. Angelo*, 88 N.Y.2d 217, 223-224, 666 N.E.2d 1333, 1335-1336 (1996). Courts have recognized the reliability of modern polygraph techniques. *See United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995) (allowing expert testimony regarding polygraph results and noting the reliability of modern polygraph techniques as compared to their precursors); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995); *In re Mackenzie FF*, 2 Misc.3d 1012(A), 784 N.Y.S.2d 921, 2004 N.Y. Slip Op. 40304(U) at 9 (N.Y. Fam. Ct. 2004) (unpublished) (receiving testimony of a certified polygraph examiner with the New York State police, who testified that "polygraph exams are used widely throughout the country as an investigative tool to determine if a person is deceptive or truthful and also to determine whether criminal charges should be pressed"); *People v. Miller*, 2 Misc.3d 1006(A), 784 N.Y.S.2d 923, 2004 WL 615136 at *4, 9 (N.Y. Co. Ct. 2004) (unpublished) (granting motion to dismiss in the interest of justice primarily because "the defendant passed a polygraph examination wherein a very experienced polygrapher with a police background found that [the defendant] was being truthful in his statements that he did not steal money from the Elmira Police Department or falsify records in that department," and noting that "law enforcement officials frequently avail themselves of lie detector testing. District Attorneys often direct such examinations as an aid in determining whether a case is in need of further investigation; whether dismissal proceedings are appropriate; and, when a trial is contemplated, whether a particular person should be called as a witness. In short, whether its results are admissible or not, the polygraph appears to be a sufficiently reliable and valid investigatory tool, and has been praised as such."). Given the reliability of modern polygraph testing, and the undisputed qualifications of Marty's polygraph expert, this evidence would be admissible at a new trial. The County Court, however, not only

have addressed this evidence with regard to Marty's actual innocence claim, for which all reliable evidence, *regardless of admissibility*, must be considered. *Cole*, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486. In addition, the court should have considered the polygraph evidence in making any threshold reliability determinations regarding the admissibility of Marty's other evidence. *See* Michael M. Martin, *New York Evidence Handbook*, § 1.5.2, at 18 (2d ed. 2003) ("In making its determination of preliminary questions, the court is ordinarily not bound by the rules of evidence."); *see also People v. Kemp*, 59 A.D.2d 414, 419-420, n.2, 399 N.Y.S.2d 879, 882 (1st Dep't 1977).

b. The County Court Ignored Certain Corroborating Witnesses

The County Court also erred as a matter of law in failing to consider the testimony of certain corroborating witness. As noted earlier, the court inexplicably ignored the testimonies of Detective Trotta, John Guarascio, and Heather Paruta, which corroborated, respectively, the testimonies of Gaetano Foti, Karlene Kovacs, and Billy Ram. A reasonable juror who "consider[s] fairly all of the evidence presented," *Schlup*, 513 U.S. at 329, would not simply ignore these witnesses.

The court committed a similar error with regard to the testimony of Brian Scott Glass. The court found Glass' statements to the defense investigator—in

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failed to make any findings as to the admissibility of this evidence, but it ignored this evidence completely.

which Glass said that Jerry Steuerman tried to hire him to injure Seymour and that he passed that job onto Creedon—to be unreliable because Glass recanted those statements at the hearing. Glass testified that he had made up the story so that the defense team would give him a free lawyer. However, it is more plausible that Glass recanted only because, after he made those statements, the DA threatened to go hard on him with regard to a pending robbery charge. The court wholly failed to mention an important defense witness, Mark Callahan, who gave credible testimony that Glass told him that his first account was truthful and that he recanted under pressure by the DA's office. A.2785-2786 (Callahan); *see also supra* n.23 (describing Callahan's testimony).

c. The County Court Failed to Consider Evidence From Numerous Family Members Disproving Marty's Supposed Motive

The County Court also failed to address the numerous unrebutted affidavits from family members and friends that attested in detail to Marty's happy family life, his loving and nonviolent character, and his good relationship with his parents in the period leading up to the murders.[54] These witness—the siblings and other close relations of the murder victims—uniformly expressed their belief that Marty was utterly incapable of committing these crimes. This evidence would have gone

[54] *See infra* n.118 (listing affidavits by twelve family members). Although a diligent defense counsel would have called these witnesses at trial —the subject of Marty's ineffective assistance of counsel claims, *see infra* Section IV—at the very least, the County Court should have considered this evidence in ruling on Marty's actual innocence claim.

far in undermining the image of a brooding and disturbed teenager that the prosecution painted at trial. Although evidence of the defendant's motive and character is crucial in a case like this, *see House*, 126 S. Ct. at 2079 ("When identity is in question, motive is key."), the court below ignored it.

5. The County Court Erred in Rejecting Marty's False Confession Experts

As noted earlier, Professor Ofshe testified that false confessions are a "regularly occurring phenomenon in modern America" and that approximately one-fourth of wrongful convictions are a result of police-induced false confessions. A.1574, 1578. After reviewing the circumstances of Marty's confession, Professors Ofshe and Leo concluded that the confession was "unreliable" and "almost certainly false." *See* A.181 (Declaration of Professor Ofshe); A.1574-1580 (Ofshe testimony); A.220 (Affidavit of Professor Leo).[55]

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[55]This evidence could not have been obtained or introduced at the time of trial. At the time of Marty's trial, the science of false confessions was only beginning to take hold, and it was only in the 1990s that significant developments took place—including the wave of DNA exonerations that provided conclusive evidence of false confessions—that advanced the field into general acceptance. *See* Gisli Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* 626 (2003); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 900-906 (2004). In fact, even compared to the late 1990s, "empirical social science research into the problem of false confessions was not nearly as developed as it is today [in 2006]." Richard A. Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards In the Twenty-First Century*, 2006 Wis. L. Rev. 479, 525 (2006); *see id.* at 525-526 (noting that, since 1998, "the number of proven false confessions which have been documented has more than tripled"). At the time of Marty's trial, a court would not have admitted such evidence under the *Frye* standard. *See* Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 Am. J. Crim. L. 191 (2005) (discussing the frequent exclusion of such expert testimony in this period); *see also, e.g.*, *People v. Brown*, 117 Misc.2d 587, 459 N.Y.S.2d 227 (Co. Ct. 1983). Of

Although the County Court did not dispute the experts' methods or qualifications, and although the DA introduced no contrary evidence, the court nevertheless rejected their expert opinions. The court concluded that "[t]here was no conduct by the detectives that would have rendered the defendant's confession false." A.19. The court based this finding on a district court case, which stated that "'a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary.'" *United States v. Rodgers*, 186 F. Supp. 2d 971, 977 (E.D. Wis. 2002).

The County Court's rejection of the false confession evidence is manifestly erroneous. The proposition chiefly relied upon by the court—that lies relating to evidence are the least likely to render a confession involuntary—is flatly contradicted by Professors Ofshe and Leo, is not based on any evidence presented at the hearing, and is an inappropriate subject for judicial notice, *see Dollas* v. *W.R. Grace & Co.*, 225 A.D.2d 319, 639 N.Y.S.2d 323 (1st Dep't 1996).[56] As Professor

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course, to the extent that trial counsel could have called an expert of this kind, his failure to do so constituted ineffective assistance of counsel in violation of the state and federal constitutions. *See, e.g.*, *Gersten v. Senkowski*, 426 F.3d 588 (2nd Cir. 2005); *Phoenix v. Matesanz*, 189 F.3d 20 (1st Cir. 1999).

Furthermore, despite the DA's contentions below, the psychiatrist who testified at Marty's trial did not somehow obviate the need for a false confession expert. That psychiatrist most assuredly did not, and could not properly have been qualified to, "let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fits the facts of the case being tried." *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996) *aff'd*, 165 F.3d 1095 (7th Cir. 1999); *see also* A.1581 (Ofshe).

[56]In any event, the district court decision relied upon by the County Court is factually distinguishable and actually supports Marty's position. In the district court case, unlike Marty's,

Ofshe testified, deceiving a suspect about the evidence against him is a primary cause of false confessions. A.1582-1598. Here, Detective McCready's hoax about Marty's father induced a false confession because it played on Marty's trust in his father and his belief that his father would never lie to him. A.3770-3773.[57] Under the stress of the detectives' hostile questioning, Marty tried to reconcile his father's (false) accusation with what he knew to be true, and he became convinced that he had blacked out and had somehow committed the crimes. A.1582-1598 (testimony by Professor Ofshe that the use of false but apparently incontrovertible evidence can cause a suspect to lose faith in his own memory and become convinced of things that in fact never occurred).

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the interrogation was "relatively benign," and the suspect was "not browbeaten with repeated assurances of his guilt by multiple officers." *Rodgers*, 186 F. Supp. 2d at 980. Further, that case explicitly acknowledged that "lies about evidence can sometimes lead to unreliable confessions" because they can convince a suspect that "continued resistance is futile." *Id.* at 977 (internal quotation marks omitted). Significantly, the district court noted that "[t]he possibility of a false confession is further compounded if the suspect is young and impressionable, and would be forced to contradict the assurances of authority figures in order to resist." *Id.* at 978. These are precisely the circumstances of Marty's case. Indeed, approximately 33% of DNA exonerees who gave false confessions were juveniles. Drizin & Leo, *supra* n.55, at 944-945. The district court decision is further distinguishable because it addressed whether the false evidence at issue rendered the confession involuntary *under the due process clause*—an exceedingly strict standard that would in no way bind the jury's independent evaluation of the confession's reliability. *Cf. Crane v. Kentucky*, 476 U.S. 683 (1986) (holding that a court's ruling that a confession was voluntary for purposes of due process does not limit a defendant's right to present evidence to the *jury* showing that the confession was involuntary and unreliable).

[57]Not only did Marty trust his father, but he was brought up to trust police officers due to his father's service as Commissioner of Constables in Belle Terre. A.3769-3772, 3780.

Moreover, by deciding that, *in fact*, there "was no conduct by the detectives that would have rendered the defendant's confession false," A.9, the County Court exceeded its appropriate role. "The court's function is not to make an independent factual determination about what likely occurred, *but rather to assess the likely impact of the evidence on reasonable jurors.*" *House*, 126 S. Ct. at 2077 (emphasis added). A reasonable, properly-instructed juror surely would not have shared the court's conclusion because there is simply *no evidence in the record* that "'a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary,'" A.20 (Decision) (quoting *Rodgers*, 186 F. Supp. 2d at 977), and what evidence is in the record is to the contrary.

In any event, the court's conclusion was seriously flawed. The defendant asked another expert, Professor Saul Kassin,[58] to review the County Court's conclusion, and he found it "grossly out of step with basic, widely accepted principles of psychology and with the growing forensic literature on police-induced false confessions." A.228 (Affidavit of Professor Kassin). As he explained:

> The power of false evidence to produce these effects is not surprising in light of the fact that suspects who know they are innocent may agree to confess as an act of compliance when they perceive that there is strong

[58]Kassin was the Massachusetts Professor of Psychology at Williams College. Beginning in the fall of 2006, he became Distinguished Professor of Forensic Psychology at John Jay College of Criminal Justice. A.221 (Affidavit and Curriculum Vitae of Professor Saul Kassin).

> evidence against them, a belief that leads them to feel trapped and in need of escape. To the extent that a suspect is vulnerable to manipulation (e.g., by virtue of youth, naivete, stress, exhaustion, or drugs) and the false evidence is disclosed as credible if not incontrovertible fact (e.g., physical or scientific evidence, or testimony from a trusted source), he may further come to believe that he committed the crimes without awareness, a belief change that is sometimes accompanied by false memories. For these reasons, there is broad and general agreement that lying about evidence puts innocent people at risk in the interrogation room.

A.223-225 (footnotes omitted).[59] Professor Kassin also observed that the County Court was wrong to consider McCready's lie in isolation from the other circumstances at play, including Marty's youth and his acute stress. A.230.

Marty's false confession evidence would undoubtedly have a powerful effect on a jury. At trial, the prosecutor repeatedly urged the jury that the circumstances of Marty's interrogation—including McCready's hoax about his father—would not have caused an innocent person in Marty's shoes to confess to crimes "so horrible as these." A.3157. *See, e.g.*, A.3876 ("A normal, healthy non guilty person's will is not overborne by what happened in this case.").[60] The original jury had little

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[59]*See also* A.1582-1598 (Professor Ofshe testifying that the use of false evidence can convince a suspect—even an innocent suspect—that there is overwhelming evidence against him and that the marginal cost of confessing is therefore "little or zero"); A.254 (Saul M. Kassin & Gisli H. Gudjonsson, *True Crimes, False Confessions*, Scientific American Mind (June 2005), at 30 (article discussing various cases of false confessions, including the case of 18-year-old Peter Reilly, now exonerated, who falsely confessed to murdering his mother after police lied to him)).

[60]A.3875 ("Your common sense tells you that you do not admit to crimes such as these after a minimal, minimal amount of confrontational questioning unless you did it."); A.3883 ("Brainwashing. Detective McCready['s] trick phone call. Ask yourselves this question, would

choice but to accept the prosecutor's assurances. In fact, most jurors—one study showed a statistic of 70%—do not believe that an innocent person could be made to falsely confess and thus are remarkably biased against the "false confession" conclusion. A.1574 (Ofshe).[61] However, if armed with expert testimony about the reality of false confessions (including the startling figure that one-fourth of all DNA exonorees had falsely confessed) and the factors that produce such confessions, a reasonable jury hearing Marty's case today would have a radically different reaction.[62] *See, e.g.*, *Washington v. Miller*, No. 15279-1-III, 1997 WL 328740 (Wash. Ct. App. June 17, 1997) (reversing conviction based on exclusion of Professor Ofshe's testimony: "stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant was effectively disabled

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that tactic cause a non guilty person to admit their guilt to a crime such as this? Period."); A.3157 ("Ask yourselves when you contemplate this case that if that act [McCready's lie] is such that it would cause a non-guilty person to then admit his guilt in crimes so horrible as these.").

[61]*See* Leo, et al., *supra* n.55, at 485 ("Confessions are among the most powerful forms of evidence introduced in a court of law, even when they are contradicted by other case evidence and contain significant errors. This is because police, prosecutors, judges, juror, and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt. Juries tend to discount the possibility of false confessions as unthinkable, if not impossible. False confessions are viewed as contrary to common sense, irrational, and self-destructive. Moreover, police-induced false confessions tend to be facially persuasive because police make sure the confessor includes 'elective statements' such as crime scene details, expressions of remorse, the confessor's alleged motives for committing the offense, and acknowledgements of voluntariness.")

[62]Importantly, the jury would also learn that the vividness of a confession is no guarantee of its authenticity. As Professor Kassin noted, in many cases of confirmed false confessions, the confessions "contained vivid and accurate details, statements of motivation, corrected errors, and even apologies and expressions of remorse—making it difficult to distinguish these statements from their true counterparts." A.224 n.10.

from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?").[63] This expert testimony would, on its own, create a reasonable doubt as to Marty's guilt. At the very least, it would cause a reasonable jury to place much less weight on the confession, thus freeing the jury to find reasonable doubt in the lack of physical evidence, lack of motive, and the evidence pointing to different assailants.[64]

6. The County Court Wrongly Held That It Was Precluded From Considering New Evidence Establishing Detective McCready's Perjury at Trial

Marty's new evidence establishes that lead Detective McCready perjured himself at trial when he repeatedly and categorically denied knowing Jerry Steuerman before the day of the murders. *See supra* n.27 (quoting McCready's trial testimony). At the 440 hearing, Leonard Lubrano testified that he saw Steuerman and McCready together as early as 1984. During Lubrano's daily visits

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[63]*See also Hall*, 93 F.3d at 1345 ("Properly conducted social science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony, assuming its validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried."); *Miller v. Indiana*, 770 N.E.2d 763 (Ind. 2002) (reversing conviction based on trial court's exclusion of Professor Ofshe's testimony); *Boyer v. State*, 825 So. 2d 418, 419-420 (Fla. Ct. App. 2002) (reversing conviction based on exclusion of Professor Ofshe's testimony, which met *Frye* standard, went to the heart of the defense, and would have assisted the jury).

[64]The false confession evidence would also cast doubt on the integrity of Detective McCready's interrogation tactics. In fact, there is much cause for concern. The 1989 report of the State of New York Commission of Investigation found that "94 percent of Suffolk homicide prosecutions involved confessions or oral admissions," A.577, which was an "astonishingly high figure compared to other jurisdictions, so high in fact, that in and of itself it provokes skepticism regarding Suffolk County's use of confessions and oral admissions." *Id.; see also infra* n.70 (discussing additional findings by the Commission).

to Steuerman's bagel store in this period, he saw McCready conversing with Steuerman on more than one occasion, and McCready once told him that he was doing contracting work for one of Steuerman's businesses. A.1930-1934. Additionally, William Vincent Sullivan, who managed a restaurant/nightclub at the time in question, stated that he saw McCready and Steuerman "hanging out together and having conversations together" on at least two occasions. Sullivan witnessed these interactions sometime between the fall of 1987 and February 1988, which is within the year preceding the Tankleff murders. A.3936-3938.

The court did not dispute the credibility of these witnesses, and in fact stated that Lubrano "appeared to be a very honest individual and was a very credible witness." A.20. Nevertheless, the court held that it could not consider Lubrano's and Sullivan's evidence because, in ruling on an earlier C.P.L. § 330.30 motion that was filed before sentencing, Judge Tisch found that an arguably similar piece of evidence would be "collateral" and thus "inadmissible" at trial. *See* A.811-812 (Decision of October 4, 1990) (addressing an affidavit by a high school student, Kirsten Stanton, stating that McCready mentioned his friendship with Steuerman to a group of students); *see also* A.52 (Affidavit of Kirsten Stanton). The County Court held that Marty's new evidence "does not change the ruling of Judge Tisch in this case. This testimony would therefore not be admissible at a new trial." A.21; *see also* A.3907 (April Decision).

The court gravely erred in holding that it was bound by Judge Tisch's previous ruling. As an initial matter, Judge Tisch's evidentiary ruling applied to a wholly separate piece of evidence and thus does not apply to Lubrano's and Sullivan's testimony. Indeed, Marty's new witnesses have provided a meaningfully different type of evidence. Unlike the evidence considered by Judge Tisch, Lubrano provided an *eyewitness* account of McCready and Steuerman's previous relationship, and he testified that the pair not only had a social, but also a *business* relationship. Sullivan's affidavit also provides eyewitness proof of the relationship, and, importantly, it shows that McCready had socialized with Steuerman as recently as *the year leading up to the murders*.

Even assuming *arguendo* that Judge Tisch's decision somehow applies to Lubrano's and Sullivan's statements, the County Court erred in failing to exercise (or even recognize) its statutorily conferred discretion to nevertheless consider this evidence. *See* C.P.L. § 440.10(3)(b) (the court "*may*" deny a motion if it was previously determined on the merits (emphasis added)); § 440.10(3) (stating that "in the interest of justice and for good cause shown [the court] may in its discretion grant the motion"); *see also People v. Lewis*, 165 Misc.2d 814, 818, 630 N.Y.S.2d 605, 609 (Sup. Ct. 1995).[65] Here, the County Court had ample "good cause" not to

[65]At the very least, the court should have considered this evidence of perjury in deciding Marty's actual innocence claim, for which all reliable evidence, regardless of admissibility, must be considered. *See Cole*, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486.

follow Judge Tisch's earlier ruling. First, the portion of Judge Tisch's decision that addressed admissibility was dicta—as the decision itself notes, Marty had not in fact made a claim of newly discovered evidence. *See* A.801 (Decision of October 4, 1990).[66] Second, and more importantly, Judge Tisch's ruling was manifestly erroneous as a matter of evidence law: Extrinsic evidence showing that McCready and Jerry had a longstanding relationship would clearly be admissible because it would go to McCready's bias.[67] *See Badr v. Hogan*, 75 N.Y.2d 629,

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[66]Also, because this determination was dicta, it does not even qualify as a determination "on the merits" for purposes of § 440.10(3)(b).

[67]*See generally* Christopher B. Mueller & Laird C. Kirpatrick, *Evidence* (2d ed. 1999), § 6.19, at 530 ("Bias is always relevant and never collateral, and the parties are entitled to reasonable latitude in cross-examining the target witness and offering extrinsic evidence (typically documents or testimony by other witnesses). ... In criminal cases, the accused is constitutionally entitled to a reasonable chance to show bias, which means developing the relevant points sufficiently to let the fact finder make an informed evaluation of credibility." (footnote omitted)); *see also Holmes v. South Carolina*, 126 S. Ct. 1727 (2006) (holding that the federal constitution requires admission of evidence critical to the defense); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (same).

Further, Lubrano's and Sullivan's statements should not be excluded as "merely impeaching" under the *Salemi* factors. *See Salemi*, 309 N.Y. at 216, 128 N.E.2d at 381. Because Marty's new evidence includes testimony showing who actually committed the murders, his evidence cannot be described as *merely* impeaching. In any event, Lubrano's and Sullivan's statements would satisfy *Salemi* even if they were Marty's only new evidence. Under the case law, evidence is not considered "merely impeaching" when it undercuts the credibility of a key prosecution witness, as it does in Marty's case. *See People v. Santos*, 306 A.D.2d 197, 198, 761 N.Y.S.2d 651, 653 (1st Dep't 2003) (upholding granting of new trial based on new evidence that victim corrections officer had assaulted inmates in the past and had falsified records concerning those assaults), *aff'd*, 1 N.Y.3d 548, 807 N.E.2d 881 (2003); *People v. Marzed*, 161 Misc. 2d 309, 318, 613 N.Y.S.2d 826, 833 (N.Y. Crim. Ct. 1993) (new evidence was of critical importance to credibility of key prosecution witness and was thus not merely impeaching); *People v. Ramos*, 132 Misc. 2d 609, 613, 505 N.Y.S.2d 511, 514 (Sup. Ct. 1985) (granting new trial where the credibility of the victim was central and the new evidence impeaching that victim would have "altered the entire texture and focus of the case"); *People v. Jackson*, 29 A.D.3d 328, 2006 N.Y. Slip Op. 03502 (1st Dep't 2006). In addition, even were this Court to hold that Lubrano's and Sullivan's testimony would not be admissible into evidence, the defense could

635, 554 N.E.2d 890, 893 (N.Y. 1990) (matters such as a "witnesses's bias, hostility, or impaired ability to perceive" are not "collateral" and may therefore be proved by extrinsic evidence for impeachment purposes).[68]

McCready's potential bias was highly relevant because he was a crucial prosecution witness. Not only was he an important *eyewitness,* testifying to Marty's allegedly suspicious demeanor and his allegedly incriminating statements, but, as the lead detective, he also made critical judgments about the investigation, including, of course, the decision to force a confession from Marty *only hours* after arriving at the crime scene and *before* reviewing the results of forensic testing and *before* making any investigation of Steuerman. A.3694; A.3698-3716.[69] If it were

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nevertheless use this evidence as fodder for a devastating cross-examination of McCready. *See People v. Marzed*, 161 Misc. 2d at 319, 613 N.Y.S.2d at 832.

[68]Additionally, the "interests of justice," § 440.10(3), support consideration of Lubrano's testimony. Now that Marty has gathered a credible body of new evidence showing his innocence, there is no sound basis for declining to consider Lubrano's testimony. Indeed, the "interests of justice" demand consideration of uncontested evidence of police perjury.

[69]During the drive to the police station, Marty gave McCready details about Steuerman's financial disputes with his father and also said that *two weeks* earlier his mother had expressed fear that Steuerman might do them violence. McCready, however, admitted on cross-examination that he did nothing to confirm this information—and did not even relay it to the other officers involved in the investigation—before pressing ahead with his interrogation. A.3668-3684. In fact, other than having a "congenial" conversation, A.3713-3714, with Steuerman over bagels and coffee at Steuerman's bagel store, McCready did virtually nothing to investigate Steuerman's involvement in the murders. A.3701-3714. Additionally, although McCready should have diligently interviewed the surviving family members even after Marty's "confession"—both to obtain information about Steuerman and as a way of testing the reliability of that confession—the family members have uniformly stated that neither McCready nor any other police officer asked them *a single question. See infra* n.118 (family member affidavits). This violation of standard investigative procedure is further proof that McCready had already "closed" the book on Marty's guilt and did not want to do anything that would risk jeopardizing

revealed that McCready had a longstanding friendship and business relationship with Steuerman—the obvious suspect in the case and the person Marty and his family had been accusing from the beginning—a reasonable jury would likely find that McCready was biased in his reports of what Marty said and did, and biased in making up his mind so early about Marty's guilt. Indeed, if McCready were so committed to protecting Steuerman and implicating Marty that he would go so far as to *perjure* himself repeatedly in open court—an act that shows his consciousness of bias and wrongdoing—a reasonable jury would likely find that McCready was wholly unworthy of belief.

Such impeachment would have ripple effects throughout the prosecution's case. Once McCready's bias and lack of credibility were established in this way, a reasonable jury would be far more likely to accept Marty's account of what happened in the interrogation room and far more inclined to believe that McCready aggressively pushed Marty for a confession based only on a slanted, and recklessly incomplete, view of the evidence. Further, while the original jury likely believed that the detectives had made a good-faith judgment excluding Steuerman as a suspect, a new jury informed of McCready's concealed relationship would focus on Steuerman with intense suspicion. Thus, evidence of McCready's perjury

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that conclusion. *See* A.514 (Suffolk County Investigative Guide, Ch 32) ("[F]riends and associates may disclose a possible suspect or motive for someone who wanted to kill the victim. . . . The family of the victim is usually able to provide the most background information about the victim. The lead detective should form a close relationship to the victim's family.").

would impugn the entire investigation and "alter[] the entire texture and focus of the case." *People v. Ramos*, 132 Misc. 2d 609, 613, 505 N.Y.S.2d 511, 514 (Sup. Ct. 1985).[70]

7. The County Court Erred in Failing to Consider the Exculpatory Evidence From the Original Trial

The court also erred in failing to address the evidence from the original trial that was favorable to Marty. It is well established that a court must consider the new evidence in conjunction with the original trial evidence.[71] The reason for this is obvious: If the prosecution's case at trial were strong, a defendant would have to make a concomitantly higher showing to merit relief; if, by contrast, the prosecution's case were already weak, a lesser showing would be sufficient. *Cf.*

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[70]This is not the only time McCready has perjured himself in an effort to secure a murder conviction. A 1989 State of New York Commission of Investigation Report found that McCready and two other officers perjured themselves in the 1985 murder trial of James Diaz, who the police claimed had confessed but was acquitted because of the incredible testimony of the police witnesses. *See* A.553-564 (Report); *see also* A.563 ("The Commission believes that in the *Diaz* trial McCready, Dubey, and Pistone all knowingly gave false testimony."). The report found that such misconduct was widespread in Suffolk County. A.550 ("The Suffolk County Police Department and District Attorney's Office engaged in and permitted improper practices to occur in homicide prosecutions, including perjury, as well as grossly deficient investigative and management practices."); *see also* A.533 (citing a 1980 investigation by a Suffolk County Bar Association committee that found a "serious" problem of police brutality used in interrogating murder suspects); *see also supra* n.64 (stating that Suffolk County's 94% confession rate in homicide cases was "astonishingly high" compared to that of other jurisdictions, indicating improper practices). This Court can and should take judicial notice of this report, as it is a public document prepared by a state investigative body. *See, e.g.*, *Quartararo v. Mantello*, 715 F. Supp. 449, 455 (E.D.N.Y. 1989) (citing the report), *aff'd*, 888 F.2d 126 (2d Cir. 1989).

[71] *See House v. Bell*, 126 S. Ct. at 2079 (the court must consider "all the evidence, old and new, incriminating and exculpatory" (internal quotation marks omitted)); *Cole*, 1 Misc. 3d at 543, 765 N.Y.S.2d at 486; *Wong*, 11 A.D.3d at 726, 784 N.Y.S.2d at 161 (granting new trial after considering the new evidence in conjunction with the trial evidence, including the lack of any physical evidence or motive linking the defendant to the crime).

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)).

Not only was the prosecution's physical evidence exceedingly weak, it was affirmatively *exculpatory* because it contradicted Marty's supposed confession. The County Court, however, made no mention of any of this evidence. The following is the most important:

- Forensic experts disassembled the barbell and the kitchen knife that Marty "confessed" to using and found no traces of blood or human tissue. They also inspected the sinks, bathtub/shower, floor, and towels in Marty's bathroom, as well as the other sinks and drains in the house, and all tests came back negative. A.3534-3535; A.3542-3543; Background, Part F.

- A pink substance was found on the kitchen knife, which the forensic expert said was not human tissue. It is simply impossible that this knife could have been used in a double murder and washed so thoroughly as to remove even a microscopic trace of blood, and yet still have watermelon residue from earlier in the evening. A.3549-3550.

- Bloody glove prints were found at the crime scene, but despite a three-day investigation no gloves were ever found inside or outside the house. A.3576-3591. The DA has never been able to fathom an explanation for how Marty was able to make these gloves disappear. Nor were gloves mentioned in Marty's confession, which can only be attributed to the fact that the detectives that were coaching him on his confession did not know about the glove prints at that time.

- Defensive wounds found on Arlene Tankleff's body indicated that she struggled during the attacks, yet there were absolutely no signs of such a struggle on Marty's body. A.3546, 3731-3734, 3739-3746.[72]

[72]Additionally, the disparities in strength between Marty and his parents make it unlikely that Marty could have committed this gruesome double murder. Marty's mother (5' 6'' 190 lbs.) and

- Marty's parents were covered with dried, crusted blood when the emergency technicians arrived at the scene, suggesting that the attacks occurred hours earlier than was described in Marty's confession. A.3210-3211, 3219-3220; *see also supra* n.13.[73]

- Seymour's blood was found in the bedroom, indicating that Seymour was attacked before Arlene, contrary to the sequence in Marty's confession. Further, in the "confession," Marty committed both attacks and *then* called 911, yet on the 911 tape Marty only mentions having found his father. A.3504-3505.

- The timeline posited by the prosecution is implausible. According to the "confession," Marty attacked his mother in the bedroom; ran to the kitchen for a knife and returned to further attack his mother; went to his father's study and attacked him; then thoroughly cleansed himself and his weapons of blood in his bathroom; cleaned every trace of blood from the sink, bathtub/shower, bathroom floor, and drains; somehow removed the blood from the towels he used during this process and then dried the towels; and then ingeniously made the gloves disappear, as well as had time to lay down on his bed and consider what to do next—all in approximately 35 minutes.

The weaknesses in the prosecution's case went beyond the physical evidence, however. The evidence of motive was always paper-thin, but the County Court

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father (5' 11'' 250 lbs.) were bigger and stronger than Marty (5' 7'' 150 pounds), who was described as "fairly weak" and "wimpy." A.3399-3400; A.3751-3752; A.3848. The new affidavits from Marty's family reinforce this point. *See, e.g.*, A.82 (Affidavit of Syd Tankleff) ("Arlene and Seymour ... were physically much larger than Marty. If there came a time when Marty needed to be handled, Seymour or Arlene could have easily handled Marty without any question."). Indeed, some of the wounds sustained by Seymour and Arlene would have required tremendous strength. A.3725-3726. If nothing else, it is extremely unlikely that, given these strength disparities, Marty could have attacked his parents without suffering even a scrape. In particular, it borders on the absurd to suppose that the scrawny teenaged Marty could have singlehandedly overpowered his much larger father without encountering any resistance.

[73]Information provided by the surviving family members also suggests that the attacks occurred soon after the poker game ended at around 3:00 a.m. The family members uniformly stated that Seymour Tankleff was very concerned about security, and that every time he hosted the late-night poker game he diligently locked up the house and set the alarm once all the players left. *See, e.g.,* A.83 (Affidavit of Syd Tankleff). The fact that the house was not locked up when inspected the next morning indicates that the attacks interrupted Seymour's routine. A.3418-3430.

never put that fact on the scales.[74] *See House*, 126 S. Ct. at 2079 ("When identity is in question, motive is key."). Nor did the court ever pause simply to compare the chances that a 17-year-old kid—with no record of violence or disciplinary problems—would wake up on the first day of his senior year and decide to kill his parents against the chances that a desperate business partner with ties to vicious criminals would commit these crimes.

8. The Allegedly Incriminating Evidence Cited By the County Court is Unpersuasive and Insufficient To Defeat Marty's Claims

Importantly, Marty need not rebut every piece of allegedly incriminating evidence to prevail on his claims. *See House* 126 S. Ct. at 2077-2078 (a defendant need not establish innocence with "absolute certainty," nor must a defendant show that, in light of the new evidence, no evidence remains to support the verdict). Marty need only show that, given the totality of the evidence, a "reasonable juror would have reasonable doubt." *Id.* at 2077.

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[74]Detective McCready attempted to generate a plausible motive for the crimes during Marty's "confession," but McCready could only come up with mundane teenage complaints, such as that Marty did not like his car, which, incidentally, turned out not even to be true. *See* A.3830-3831 (trial testimony by Mark Perrone, Marty's best friend, that Marty never complained about his car and that he wanted to "mint it out," meaning "making it perfect . . . fixing it up totally"); *see also* A.3824, 3860-3861, 3872-3873 (testimony by Jennifer McClure, Mike McClure, Dorothy Depping-Ball). McCready also asked Marty questions about his father's businesses and wealth in an effort to establish a financial motive for the crimes. But this theory is belied by the fact that, under Seymour Tankleff's will, Marty's inheritance would be held in trust for him until seven years later when he reached the age of twenty-four. *See* Probate Proceeding, Will of Seymour Tankleff, File No. 2060P88, Surrogate's Court, State of New York, County of Suffolk (January 31, 1985 will at 3-4). Marty told McCready that he knew the terms of his father's will, but, characteristically, McCready failed to investigate further. A.3689.

Indeed, courts have granted relief based on newly discovered evidence in cases where, unlike Marty's, there remained significant unrebutted trial evidence pointing towards guilt. For example, in *House v. Bell*, the Supreme Court found that the defendant was probably innocent despite a number of incriminating facts, including that the defendant—a convicted sex offender—was seen the day after the victim's disappearance on the side of the road near where the victim's body was later found, and gave a fabricated alibi to the police to account for his whereabouts during the murder. 126 S. Ct. at 2086. Similarly, in *People v. Rensing*, 14 N.Y.2d 210, 199 N.E.2d 489 (1964), the Court of Appeals granted relief even though the defendant was found in possession of the murder weapon (a shotgun) and had confessed (although later recanted), which had prompted the lower court to conclude that guilt was "'a foregone conclusion.'" *Id.* at 212, 199 N.E.2d at 490. The defendant moved for a new trial when a co-defendant who had testified against him was later diagnosed as insane. Preferring not to "surmise," the Court granted a new trial, although it was "impossible" to tell how this new evidence would have impacted the jury. *Id.* at 214, 199 N.E.2d at 491-492.

When compared to the unrebutted incriminating evidence in *House* and *Rensing*, the evidence cited by the County Court is exceedingly thin. For example, the County Court emphasized that although Marty was "upset and agitated that morning, the combination of emotions which one would think he should have been

displaying, such as overwhelming grief, fear, panic, bewilderment, did not appear to be present." A.25. But it is difficult to imagine "evidence" that is more malleable and prone to the observer's biases.[75] It is thus no wonder that police "intuitions" about a suspect's supposed lack of grief have led to false convictions in the past.[76] In any event, the court's description of Marty's demeanor is based entirely on the DA's extremely one-sided mischaracterization of the trial record. In fact, Marty went through a range of emotions that morning. No fewer than eight witnesses—Patricia Flanagan, Morty Hova, Linda Perrone, Mark Perrone, Shari Rother, Ethel Curley, Vincent Bove, and Dara Schaeffer—testified that the

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[75]Of course, one of the main reporters of Marty's demeanor was McCready, *see* A.3674-3675 (calling Marty's demeanor "totally inappropriate"), who harbored a concealed bias in favor of the man that Marty was accusing. The lead detective's impressions of Marty no doubt influenced the other officers' perceptions. Additionally, another witness who testified to Marty's supposedly suspicious behavior that morning—McNamara, who was the Tankleffs' neighbor—would be devastatingly impeached at a new trial. Less than a year after Marty's trial, McNamara pleaded guilty to taking more than $6 billion in fraudulent loans from GMAC. *See* Beth Whitehouse, *Quiet Witness for the Prosecution; McNamara Lays Out Pattern of His Crime*, Newsday, Dec. 9, 1994, A39. Whether McNamara's testimony against Marty was at all motivated by a desire not to antagonize the police and the DA's office is a question that Marty's jury was unable to explore.

[76]*See* A.226-227 n.19 (Affidavit of Professor Kassin) ("Scientific research on human lie detection has consistently demonstrated that experienced police investigators, like lay people, are poor and biased intuitive judges of truth and deception, despite their high levels of confidence. ... [C]linical psychologists who study bereavement find—in sharp contrast to deeply held myths about how people should react to the loss of a loved one—that individual victims differ in their behavioral responses to tragedy, with many appearing 'cool and collected.' This research helps explain why many exonerated false confessors, in cases involving the killing of family members, had been misidentified for interrogation by an apparent lack of emotionality (*e.g.*, Peter Reilly, Gary Gauger, Michael Crowe)." (citations omitted)); *see also* A.226-227 ("[A] plethora of psychology research conducted in a wide range of settings has shown that strong expectations of this nature [referring to the "hunch" about Marty's apparent lack of emotionality] can trigger a relentless chain of confirmation biases, often resulting in what is commonly known as a self-fulfilling prophecy." (footnote omitted)).

traumatized Marty was "screaming," "crying," "excited," "very upset," and "babbling." A.3150; A.3166-3167, 3226, 3270-3271, 3277, 3834-3835, 3857-3858. As the morning went on, he appears to have entered into a state of shock. A.3226. All of this testimony must simply be ignored in order to credit the police's self-serving—and offensive—description of Marty's "totally inappropriate" lack of grief. A.3674-3675 (McCready).

The County Court also emphasized Marty's allegedly "conflicting and confusing accounts," A.25, but it is perfectly understandable that a teenager who had just recently experienced the trauma of finding his bloodied parents would have minor inconsistencies in repeatedly recounting exactly what he did, when, and where on that fateful morning. And it is even less surprising that Detective McCready, who was purposefully trying to confuse Marty and make him contradict himself, was able to achieve this goal to a limited extent during the hostile, hours-long interrogation at the police station. Therefore, as with the evidence of Marty's demeanor, Marty's supposed inconsistencies are not independently incriminating.[77]

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[77]The County Court also cited other behavior that is suspicious only if one already thinks Marty guilty. For example, the court stated that, rather than experience grief, Marty "immediately set about trying to steer the detectives to Jerry Steuerman." A.25. But any innocent person in Marty's shoes would have done the same thing. In fact, on the morning of the murders, other family members told police that they suspected Steuerman was responsible. A.2206-2207 (Falbee); A.3432-3433; A.3434-3440 (trial testimony by Officer Pfalzgraf that Ron Rother said that morning that Steuerman was reneging on the large debt he owed Seymour and that Steuerman had recently threatened Seymour, as well as that Officer Pfalzgraf relayed this

Finally, just as Marty need not rebut every piece of allegedly incriminating evidence, it is also not his burden to prove conclusively his theory of who murdered his parents. The County Court raised two objections to this theory, but neither is persuasive. First, the court "found it hard to believe that characters such as Creedon and Kent would not have looked for something to steal from the Tankleff home." A.24. But this is pure speculation. If anything, it seems more likely that Creedon and Kent would want to flee the scene[78] rather than spend time looking for something to steal that could possibly be traced back to the Tankleffs.

Second, the court found it incredible that Creedon and Kent would have "left a potential witness behind by not also murdering the defendant." A.24. But Marty was not a witness to the crimes, and there is simply no reason to assume that the assailants would have gone out of their way to murder a juvenile who had not in fact witnessed the crimes.[79] And while Steuerman had a motive to kill Arlene Tankleff—she owned a 25% interest in the Strathmore Bagel chain and in other ventures and she presumably had damaging knowledge about Steuerman's threats

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information to McCready that day). Thus, rather than "steer" the detectives as the court alleged, Marty was merely reporting common family knowledge.

[78]Harris describes Creedon and Kent running from the house, winded, and Creedon yelling "let's go" once in the car. A.35 (Sworn Statement of Glenn Harris).

[79]In fact, in describing the details of the crime to his son, Creedon mentioned that before leaving the house he looked into Marty's room to make sure he had not awoken. A.2924 (Joseph Guarascio). And it is not surprising that Marty slept through the attacks. A sound expert testified at trial that, due to the size and layout of the Tankleff house, even loud screaming from his parents' bedroom would not have awoken Marty in his bedroom. A.3805-3821.

to Seymour—Steuerman had no similar motive for ordering Marty's death. Moreover, as we have seen, leaving Marty alive provided a ready suspect for McCready and the other officers. Thus, the fact that Marty survived the assault on his family should not be twisted into evidence of his guilt.

9. Considering the Totality of the Evidence, Marty Has Carried His Burden of Showing His Actual Innocence or, Alternatively, the Need For A New Trial

Given the infirmities in the prosecution's case at trial, the devastating testimony of multiple witnesses linking Creedon and Kent to the crimes would have changed the outcome. Most strikingly, even the DA's office conceded that Creedon had in fact confessed on multiple occasions over the years. Further, Glenn Harris, who has no plausible motive to lie, has told multiple people that he was the getaway driver for Creedon and Kent that night. Kent, for his part, twice told James Moore that he committed the Tankleff murders, and the court never doubted the credibility of Moore's reports. When this evidence is combined with the new and undisputed evidence establishing Jerry Steuerman's links to Creedon through his cocaine-dealing son, Steuerman's financial motive, his criminal history, and his mysterious disappearance would no longer appear simply to be suspicious. A reasonable jury's view of the case would only be further cemented upon learning that the lead investigator and lead interrogator, Detective McCready, had a longstanding relationship with the only credible suspect, Steuerman,

repeatedly lied about that relationship on the witness stand, and, rather than pursuing Steuerman, focused exclusively on extracting a confession from Marty. Indeed, the jury could only conclude that the wrong person was on trial.

And while the original jury obviously based its verdict on Marty's "confession"—and on the prosecutor's assurances that no one would falsely confess to such horrible crimes—a new jury would have a dramatically different perspective (that is, if the "confession" were admitted, which it would not be, *see infra* Section II). After hearing the unrebutted testimony of the false confession experts, a new jury would understand that false confessions do indeed occur and that Detective McCready's deceptive and relentless interrogation of Marty precisely fits this pattern. If the jury's trust in the confession were even moderately diminished, the holes in the prosecution's physical evidence and evidence of motive would be impossible for the jury to ignore.

Considering Marty's new evidence in relation to the original trial evidence, he has shown by clear and convincing evidence that he is innocent of these crimes. At the very least, a new trial should be held pursuant to C.P.L. § 440.10(1)(g) because it is more likely than not that the new evidence would cause a reasonable jury to find a reasonable doubt.

C. The County Court Erred In Holding that Certain New Evidence Would Be Inadmissible at Trial and that Marty Did Not Exercise Due Diligence

The County Court again fell into error in rejecting Marty's new trial claim on two additional grounds. First, it held that some of Marty's newly discovered evidence could not be considered because it would be inadmissible at trial. *See Salemi*, 309 N.Y. 208, 128 N.E.2d 377; *Boyette*, 201 A.D.2d at 491, 607 N.Y.S.2d at 403-404 (evidence in support of a new trial claim under C.P.L. § 440.10(1)(g) must be admissible). Second, the court ruled that Marty failed to satisfy the requirement that his motion be filed "with due diligence after the discovery of such alleged new evidence." C.P.L. § 440.10(1)(g). Both determinations are erroneous.[80]

Significantly, while the requirements of admissibility and diligence apply to claims for a new trial under § 440.10(1)(g), they *do not* apply to freestanding constitutional claims of actual innocence. *See Cole*, 1 Misc.3d at 543, 765 N.Y.S.2d at 486; *see also People v. Cole*, N.Y.L.J., September 20, 2002, at 20 (Sup. Ct. Kings Co., Justice Leventhal), at A.891. Even the County Court recognized that it would be constitutionally "abhorrent" to apply these requirements to defeat a genuine showing of actual innocence. A.21. Thus, regardless of whether Marty can show diligence and admissibility with respect to

[80]Notably, the DA's opposition to Marty's motion for leave to appeal did not contest that Marty's evidence is admissible and that he showed due diligence.

his new trial claim—and he can and does below—he should still prevail on the ground of actual innocence.

1. The County Court Erred in Its Admissibility Determinations

a. Creedon's Multiple Confessions Would Be Admissible As Prior Inconsistent Statements, As An Exception to the Hearsay Rule for Statements Against Penal Interest, or Under the Due Process Requirements of *Holmes v. South Carolina* and *Chambers v. Mississippi*

(1) Creedon's Confessions Would Be Admissible As Prior Inconsistent Statements

If, at a new trial, Creedon were called by the prosecution to testify and he denied that he had any involvement in the murders and that he had ever confessed his involvement, the defense would be entitled to impeach those denials by calling to the stand the six witnesses who say that Creedon confessed to the murders on at least seven different occasions. The defense would thereby urge the jury to disbelieve Creedon's present protestations of innocence. *See People v. Duncan*, 46 N.Y.2d 74, 80-81, 385 N.E.2d 572, 576-577 (1978) ("As a general rule, the credibility of any witness can be attacked by showing an inconsistency between his testimony at trial and what he has said on previous occasions." (citation omitted)); *People v. Wise*, 46 N.Y.2d 321, 328, 385 N.E.2d 1262, 1266-1267 (1978) (extrinsic evidence may be offered to prove prior inconsistent statements for impeachment purposes).