(2) Alternatively, Creedon's Confessions Would be Admissible Under the Hearsay Exception for Statements Against Penal Interest

If, on the other hand, Creedon were to invoke his right against self-incrimination at a new trial, then his multiple confessions would be admissible under the hearsay exception for statements against penal interest. A statement satisfies this exception if: (1) the declarant is unavailable to testify; (2) the declarant was aware at the time he made the statement that it was contrary to his penal interest; (3) the declarant had competent knowledge of the underlying facts; and (4) there is sufficient evidence independent of the declaration to assure its trustworthiness and reliability. *See, e.g.*, *People v. Thomas*, 68 N.Y.2d 194, 197, 500 N.E.2d 293, 295 (1986).

The first three requirements are easily met: (1) Creedon's invocation of his right against self-incrimination would render him "unavailable," *People v. Settles*, 46 N.Y.2d 154, 167, 385 N.E.2d 612, 619 (1978); (2) he obviously would have been aware that his admissions to a double murder were contrary to his penal interest;[81] and (3) he has competent knowledge of the underlying facts because his admissions describe what he himself saw and did, *see* 46 N.Y.2d at 167-168, 385 N.E.2d at 619 ("[T]here can be little doubt but that, as an admitted participant in

[81] *See, e.g.*, *People v. Fonfrias*, 204 A.D.2d 736, 737, 612 N.Y.S.2d 421, 422 (2d Dep't 1994); *see also People v. Egan*, 78 A.D.2d 34, 36, 434 N.Y.S.2d 55, 57 (4th Dep't 1980); *Morales v. Portuondo*, 154 F. Supp. 2d 706, 726 (S.D.N.Y. 2001).

the robbery and homicide[,] ... [the witness] had firsthand knowledge of the facts underlying the statement.").

As for the fourth requirement, New York law is clear that statements offered by a defendant as exculpatory evidence are held to a more lenient standard of reliability than those offered by the prosecution as inculpatory evidence. *Thomas*, 68 N.Y.2d at 197-198, 500 N.E.2d at 295. If offered by the defendant, the requirement of trustworthiness is satisfied if the evidence "establishes a *reasonable possibility that the statement might be true.* Whether a court believes the statement to be true is irrelevant . . . . If the proponent of the statement is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt." *Settles*, 46 N.Y.2d at 169-170, 385 N.E.2d at 621 (emphasis added); *see also People v. Darrisaw*, 206 A.D.2d 661, 664, 614 N.Y.S.2d 622, 625 (3d Dep't 1994) ("Moreover, where a statement forms a critical part of the defense, due process concerns may tip the scales in favor of admission.").

Here, there is no doubt that there is "a reasonable possibility that [Creedon's] statement[s] might be true." *Settles*, 46 N.Y.2d at 169-170, 385 N.E.2d at 621. As has already been detailed at length, numerous factors establish

the reliability of Creedon's confessions. *See supra* Section I.B.1.a.[82] Not only did the County Court incorrectly weigh this evidence, it applied a mistaken and unduly strict standard. The court evaluated whether each witness was individually credible, rather than asking, under the proper legal standard, whether there is a "*reasonable possibility* that [Creedon's] statement[s] *might* be true." If Marty's evidence were weighed correctly and under the proper standard, it is clear that Creedon's statements would be admissible as statements against his penal interest.[83]

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[82]These factors, which must be considered together, include the following: 1) the fact that Creedon made these confessions to multiple people on multiple occasions, *cf. Chambers*, 410 U.S. at 300 ("The sheer number of independent confessions provided additional corroboration for each."); 2) the concession in the DA's report that Creedon in fact made these confessions; 3) Graydon's testimony that in June 1988 he was recruited to help in Creedon's first attempt to kill a "partner" of "Strathmore bagels," *see* Background Part K.4; 4) Ram's testimony that Creedon left with Kent and Harris on the night of the murders after having solicited Ram's help in "roughing up" a "Jew in the bagel business"; 5) Harris' statements as an eyewitness to Creedon's involvement in the murders; 6) Kent's admissions to James Moore that he and a friend were hired to commit the Tankleff murders; 7) Creedon's undisputed ties to Jerry Steuerman through his drug-dealing son, as well as the fact that Steuerman later tried to hire Creedon to "cut out" Marty's tongue; 8) Creedon's extensive violent criminal history, his criminal ties to Harris and Kent, and his inability to account for his whereabouts on the night in question; and, finally, 9) the polygraph results showing the veracity of Marty, Kovacs, and Harris' statements, which, regardless of their admissibility at trial, may be considered in making a preliminary evidentiary determination, *see supra* Section I.B.4.a.

[83]Additionally, given the strong factors establishing the reliability of Creedon's confessions, they are admissible under New York's residual hearsay exception. *See, e.g.*, *People v. Ortiz*, 119 Misc. 2d 572, 463 N.Y.S.2d 713 (Sup. Ct., 1983).

(3) In Any Event, Creedon's Multiple Confessions Would Be Admissible Under the Due Process Requirements of *Holmes v. South Carolina* and *Chambers v. Mississippi*

Creedon's multiple confessions would also be admitted as a matter of Marty's federal and state constitutional rights. As the U.S. Supreme Court recently unanimously reaffirmed,

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

Holmes v. South Carolina, 126 S. Ct. 1727, 1731 (2006) (citations omitted); *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973).[84] In *Holmes*, the defendant sought to introduce evidence that a third party confessed on four occasions to the crimes (the rape and murder of an 86-year-old woman). The third party, however, denied any involvement in a pre-trial hearing. 126 S. Ct. at 1730-1731. The Supreme Court held that due process required the admission of this

[84] *See also Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curium) (exclusion of third-party confession evidence violated due process where it was "highly relevant" to penalty phase of trial); *see also Crane v. Kentucky*, 476 U.S. 683 (1986) (state evidentiary rule violated defendant's right to present complete defense); *Rock v. Arkansas*, 483 U.S. 44 (1987) (same); *Washington v. Texas*, 388 U.S. 14 (1967) (same); *People v. Robinson*, 89 N.Y.2d 648, 679 N.E.2d 1055 (1997) (recognizing these principles on federal and state due process grounds); *People v. James*, 242 A.D.2d 389, 661 N.Y.S.2d 273 (2d Dep't 1997); *People v. Esteves*, 152 A.D.2d 406, 413-414, 549 N.Y.S.2d 30, 35 (2d Dep't 1989).

evidence, despite a state evidentiary rule that prohibited third-party guilt evidence where the prosecution proffered strong forensic evidence against the defendant (there, DNA and palm-print evidence). *Id.* at 1734-1735. In *Chambers*, the defendant sought to introduce evidence that a third party confessed to the murder at issue on three occasions. The Court held that due process mandated admission of these confessions, despite state evidentiary rules to the contrary, because the evidence was "critical" to the defense. 410 U.S. at 302.

Thus, both *Holmes* and *Chambers* held that due process required the admission of evidence strikingly similar to Marty's—evidence that a third party, who currently denies any involvement in the crimes, had previously confessed on multiple occasions. Because Creedon's confessions are "critical to [Marty's] defense," *Chambers*, 410 U.S. at 302, the same result should follow here. *See id.* (the "hearsay rule may not be applied mechanistically to defeat the ends of justice").[85]

[85] *Holmes* established that state evidentiary rules that are arbitrary and disproportionate must yield to crucial defense evidence, even without a special threshold determination of the reliability of that evidence. *See Holmes,* 126 S. Ct. 1727. In any event, it is clear that Creedon's admissions bear ample indicia of reliability. His statements were clearly against his penal interest and thus unlikely to have been falsified. *See Chambers*, 410 U.S. at 300-301. And, as in *Chambers*, "[t]he sheer number of independent confessions provided additional corroboration for each." *Id.* at 300. In fact, Creedon confessed to at least *six* different people, in contrast to the three in *Chambers*. Finally, as already discussed, Creedon's confessions were amply "corroborated by some other evidence." *Id.; see supra* Section I.B.1.a; *see also supra* n.82.

b. Kent's 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*

In rejecting James Moore's affidavit stating that Kent twice confessed to the Tankleff murders, the County Court did not question Moore's credibility, nor did it question the reliability of Kent's admissions. Rather, the court's *sole basis* for rejecting this evidence was that, because Kent would likely testify at a new trial, the "unavailability" requirement of the statements-against-penal-interest exception to the hearsay rule would not be satisfied. A.3907-3908 (April Decision). As discussed extensively above with regard to Creedon's confessions, this reasoning is erroneous.

First, if Kent testified at a new trial, his denials of involvement in the Tankleff murders could be impeached by Moore's testimony that Kent previously confessed his role in the crimes on two occasions. *See Duncan*, 46 N.Y.2d at 80-81, 385 N.E.2d at 576.

Second, if Kent were to invoke his right against self-incrimination at a new trial, then his admissions to Moore would satisfy the four requirements of the hearsay exception for statements against penal interest. It is clear that (1) Kent's invocation of his right against self-incrimination would render him "unavailable," *Settles*, 46 N.Y.2d at 167, 385 N.E.2d at 619; (2) Kent would have been aware that

his confessions to a double murder were contrary to his penal interest; and (3) he would have had competent knowledge of the underlying facts because his admissions describe what he himself saw and did. As for requirement (4), the County Court never questioned the reliability of Kent's admissions to Moore, and they are amply corroborated by Creedon's multiple admissions (the most detailed of which named Kent specifically), as well as Harris' eyewitness account of Kent's participation in the crimes.[86] There is plainly "a reasonable possibility that [Kent's] statement[s] might be true." *Settles*, 46 N.Y.2d at 169-170, 385 N.E.2d at 621.

Third, and in any event, Kent's admissions to the crimes would be admissible as a matter of due process. Because Kent's admissions are crucial to Marty's theory of who actually committed the crimes, the failure to admit this evidence would deny Marty his right to present a complete defense. *See Holmes*, 126 S. Ct. at 1731; *Chambers,* 410 U.S. at 302; *Green*, 442 U.S. 95; *Robinson*, 89 N.Y.2d at 657, 679 N.E.2d at 1060.

[86]Kent's admissions are further corroborated by the fact that he fabricated a false alibi for the time of the murders and then threatened Danny Raymond into supporting it. *See* A.4081-4083 (Affidavit of Raymond, October 31, 2006); *see supra* n.22.

c. Harris' Statements Would be Admissible Under the Statements-Against-Penal-Interest Exception to the Hearsay Rule, or Under *Holmes v. South Carolina* and *Chambers v. Mississippi*

(1) Harris' Statements are Admissible as Statements Against Penal Interest

Glenn Harris' sworn statement and his statements to multiple witnesses indicate that Harris was an eyewitness to, and participant in, the Tankleff murders. These statements would be admissible under the exception for statements against penal interest.

The first three requirements are easily satisfied: (1) if Harris invokes his right against self-incrimination, as he did at the 440 hearing, he would be "unavailable" to testify, *Settles*, 46 N.Y.2d at 167, 385 N.E.2d at 619;[87] (2) he was undoubtedly aware at the time of his statements that admitting involvement in a double murder was contrary to his penal interest, *see supra* n.81; and (3) he had competent knowledge of the underlying facts because his statements concerned what he did and saw on the night of the murders. *See Thomas*, 68 N.Y.2d at 197, 500 N.E.2d at 295 (describing four requirements).

The County Court held that Harris' statements did not satisfy the fourth requirement. But, as with Creedon, the court incorrectly weighed the evidence and never applied the proper legal standard, which asks whether there is "a *reasonable*

[87]If Harris chose to testify, his testimony would be admissible to prove what he saw and did on the night of the murders.

possibility that [Harris' statements] *might be true*," Settles, 46 N.Y.2d at 169-170, 385 N.E.2d at 621.[88] Harris recounted his involvement in the Tankleff murders on numerous occasions to at last nine different listeners—Harris' wife,[89] Harris' mother, Jay Salpeter, Billy Ram, Father Lemmert, Sister Angeline, the DA's two confidential informants, and the co-residents at the sober house where Harris lived in early 2004.[90] Harris' reliability was also verified by a polygraph examination, whose methods and results the DA does not dispute. Given these and the other factors detailed at length in Section I.B.2, *supra*, there is plainly a "reasonable

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[88]In addition, the DA's refusal to grant Harris immunity weighs in favor of admissibility under this exception. *See Darrisaw*, 206 A.D.2d at 663-664, 614 N.Y.S.2d at 624-625.

[89]The County Court held that Lisa Harris would not be able to testify to some of Harris' confessions because of the marital privilege. A.3906 & n. 2 (April Decision). Even if this were true, the privilege would not apply, as the court recognized, to statements that Harris made to his wife in the presence of a third person. *See, e.g.*, *People v. Mills*, 1 N.Y.3d 269, 276, 2003 N.Y. Slip Op. 17888, at 6 (2003) ("The privilege, which is '[d]esigned to protect and strengthen the marital bond, . . . encompasses only those statements that are "confidential"'" (emphasis added) (quoting *Poppe v. Poppe*, 3 N.Y.2d 312, 315, 144 N.E.2d 72, 73 (1957))); *People v. Rodriguez*, 38 N.Y.2d 95, 99-100, 341 N.E.2d 231, 234 (1975) ("the presence of a third party negates intent to make such a 'confidential communication'"); *People v. Ressler*, 17 N.Y.2d 174, 179, 216 N.E.2d 582, 584 (1966). Lisa Harris' affidavit states that while she was driving in a car with Glenn Harris and his mother, Virginia, Glenn Harris gave a detailed account of what took place on the night of the murders. A.3934-3935 (Affidavit of Lisa Harris, February 23, 2006). Thus, if nothing else, these detailed statements—which were made in the presence of a third person, Harris' mother, and are therefore not protected by the marital privilege—would be admissible at a new trial.

[90]*See Chambers*, 410 U.S. at 300 ("The sheer number of independent confessions provided additional corroboration for each."); *People v. Smith*, 195 A.D.2d 112, 122-123, 606 N.Y.S.2d 656, 663 (1st Dep't 1994) (multiple confessions found sufficiently reliable to satisfy against-penal-interest exception); *People v. Fonfrias*, 204 A.D.2d 736, 612 N.Y.S.2d 421, 422-23 (2d Dep't 1994) (same); *People v. Fields*, 66 N.Y.2d 876, 489 N.E.2d 728 (1985) (written confession found sufficiently reliable); *Morales*, 154 F. Supp. 2d at 725-727 (confessions analogous to those in this case found sufficiently reliable).

possibility" that Harris' statements might be true.[91] They would therefore be admissible as statements against his penal interest.

(2) Alternatively, Harris' Statements are Admissible Under *Holmes* and *Chambers*

In the alternative, Harris' sworn statement and his statements to witnesses would be admissible under the due process requirements of *Holmes* and *Chambers*. Because these statements, which Harris repeated to multiple people over the course of years, are vital to Marty's theory of who actually killed his parents, the failure to admit them would deny Marty his right to present a complete defense. *See Holmes*, 126 S. Ct. at 1731; *Chambers,* 410 U.S. at 302; *Green*, 442 U.S. 95; *Robinson*, 89 N.Y.2d at 657, 679 N.E.2d at 1060.

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[91]The court notably erred in focusing so much on Harris' *credibility*, which is ultimately a question for the jury. *See Robinson*, 89 N.Y.2d at 657, 679 N.E.2d at 1060 ("Unless perjury is clear, which is not the case here, it is not for the court to determine that certain biases revealed by a witness would, as a matter of law, render testimony untrustworthy when it was adduced under circumstances which bear sufficient indicia of reliability. Credibility is for the trier of fact to determine."). The fact that Harris gave a sworn statement, which subjected him to the penalty of perjury, indicates that his statement was given with adequate deliberation and thus provides an assurance of reliability. *Id.* at 657 n.4, 679 N.E.2d at 1060 n.4. Additionally, Harris' incriminating statements to Father Lemmert, his prison chaplain, are particularly reliable since he made them in an effort to "unburden[ ] his conscience," *Morales*, 154 F. Supp. 2d at 727, rather than, for example, "in hopes of receiving a lenient sentence" from the authorities, *id.* *See* A.1796 (Father Lemmert's testimony describing Harris as morally distraught and torn between coming forward to tell the truth and his fear of a long jail sentence). Also, when Harris originally made his statements to Father Lemmert "he had every reason to believe that his conversations with [him] would be kept completely confidential." *Morales*, 154 F. Supp. 2d at 727 (finding that a confession made to a priest bore strong indicia of reliability). *See* A.1796 (Harris first approached Father Lemmert anonymously through another inmate in order to receive a guarantee of confidentiality; Harris later gave Father Lemmert an oral and written waiver).

d. Neil Fisher's Testimony That Jerry Steuerman Admitted to Killing Two People Would Be Admissible As a Prior Inconsistent Statement, As a Statement Against Penal Interest, or as a Matter of Due Process

Neil Fischer testified that in the period shortly after the murders he heard Steuerman scream to an oven repairman that "he had already killed two people and that it wouldn't matter to him if he killed him." A.1835. The court erroneously failed to recognize that if Steuerman testifies at a new trial (as he did at the original one) that he had no involvement in the murders, the defense could impeach him using the prior inconsistent statement reported by Fischer. Alternatively, if Steuerman were to invoke his right against self-incrimination, his statement would be admissible as a statement against penal interest because there is at the very least a "reasonable possibility that the statement might be true." *Settles*, 46 N.Y.2d at 169-170, 385 N.E.2d at 621. The statement was made spontaneously, in the heat of the moment, and against his penal interest, and his admission is corroborated by numerous other factors, including his feigned death a week after the crimes; his hostile relationship with Seymour; his threatening of Seymour at the bagel store in the weeks before the murders; his undisputed ties to Creedon through his cocaine-dealing son; and his solicitation of Creedon to "cut out" Marty's tongue.[92]

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[92]Finally, if not otherwise admissible, Fisher's testimony would be admitted under the due process requirements of *Holmes* and *Chambers* because Steuerman's incriminating statement is critical to Marty's defense. *See Holmes*, 126 S.Ct. 1734-1735; *Chambers*, 410 U.S. at 302.

The court should also have held other evidence admissible under *Holmes* and *Chambers*. For example, Demps' testimony regarding Todd Steuerman's statements would be admissible

e. The County Court Mislabelled Certain Testimony As Hearsay

Another mistake committed in the County Court's analysis was the mislabeling of certain testimony as hearsay. Hearsay is a "statement made out of court . . . offered for the truth of the fact asserted in the statement." *People v. Romero*, 78 N.Y.2d 355, 361, 581 N.E.2d 1048, 1050 (1991) (citation and internal quotation marks omitted). In a new trial, Marty would offer certain testimony not to prove "the truth of the fact" asserted, but to prove something else, such as the mere fact that the statement was made, or to establish the speaker's present state of mind.

For example, Billy Ram, in addition to testifying to an admission by Creedon, also testified to matters that do not implicate the hearsay rule. First, Ram's testimony that Creedon, Kent, and Harris left Ram's house together on the night of the murders would be admissible as Ram's first-hand knowledge. It is not hearsay, because it is testimony regarding events Ram perceived, not statements. *See, e.g., Romero*, 78 N.Y.2d at 361, 581 N.E.2d at 1050.

Second, Ram's testimony that Creedon told him that he was going to rough up a "Jew in the bagel business," as well as that Harris told him about what

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because those statements are important to the defense and bear adequate indicia of reliability. Demps testified that Todd told him that Marty was innocent and that his father Jerry hired people to kill the Tankleffs because of Jerry's debt. A.1761-1767. These statements are reliable because Todd repeated them to Demps on two separate occasions, they are corroborated by other evidence (for example, Jerry Steuerman's and Creedon's admissions), they were against Todd's father's penal interest, and because Todd had no plausible motive to lie.

happened, would not be hearsay if admitted to show that such statements were made on the night of and the day after the Tankleff murders. The timing of these statements is itself inculpatory of Creedon and Harris irrespective of the truth of their statements. *See, e.g.*, *DeLuca v. Ricci*, 194 A.D.2d 457, 458, 599 N.Y.S.2d 267, 269 (1st Dep't 1993) ("'Where the mere fact that a statement was made, as distinguished from its truth or falsity, is relevant upon trial, evidence that such statement was made is original evidence, not hearsay.'" (quoting Richardson, Evidence § 203 [10th ed.])). Additionally, Creedon's statement that he was going to Belle Terre to rough up a "Jew in the bagel business" that night would be admissible to show Creedon's present intention to perform a subsequent act. *See People v. Malizia*, 92 A.D.2d 154, 155, 460 N.Y.S.2d 23, 24 (1983) (1st Dep't. 1983) (recognizing that a "declarant's statement is permitted to show his existing intent, and from this intent the trier of fact is permitted to infer that the act was carried out"), *aff'd*, 62 N.Y.2d 755, 465 N.E.2d 364 (1984).[93] Finally, Creedon's solicitation of Ram's help in his violent endeavor qualifies as a "verbal act" in furtherance of a crime and is thus not hearsay. *People v. Tran*, 80 N.Y.2d 170, 603

[93]*See also Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 296 (1892) (declarant's statement that he intended to perform an act is evidence that he in fact held that intention, making it "more probable [that he performed the act] than if there were no proof of such intention"); *see also People v. Ricco*, 56 N.Y.2d 320, 328, 437 N.E.2d 1097, 1102 (1982) ("[A] relevant extrajudicial statement introduced for the fact that it was made rather than for its contents, as here for the purpose of proving its maker's state of mind, is not interdicted by the hearsay rule." (citation omitted)).

N.E.2d 450 (1992); *People v. Clark*, 203 A.D.2d 935, 611 N.Y.S.2d 387 (4th Dep't 1994).[94]

Thus, the County Court incorrectly labeled Ram's testimony, as well as that of other witnesses, as hearsay.[95]

2. The County Court Also Incorrectly Held That Marty Failed to Exercise Due Diligence

In holding that Marty failed to exercise due diligence with respect to his newly discovered evidence, and particularly the Kovacs affidavit, the County Court misapplied the relevant statute and case law. C.P.L. § 440.10(1)(g) imposes two separate diligence requirements on claims of newly discovered evidence: (1) the evidence must not have been able to be produced by the defendant *at the trial* even with due diligence; and (2) the motion must be made with due diligence

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[94]Graydon's testimony is admissible for similar reasons. Graydon's testimony—that months before the murders, in June 1988, Creedon told him that he was hired by a business partner of Strathmore Bagels to kill the other business partner—would be admissible for the mere fact that this statement was made, regardless of its truth. This testimony would be admissible to show Creedon's knowledge, as well as his intention to perform the subsequent act of murdering a Strathmore Bagels partner. *See Malizia*, 92 A.D.2d at 155, 460 N.Y.S.2d at 24. Creedon's recruiting of Graydon to aid in the murder would also be admissible as a non-hearsay verbal act in furtherance of a crime. *See Tran*, 80 N.Y.2d 170, 603 N.E.2d 450. Moreover, Graydon's testimony that the next Sunday he and Creedon went to the bagel store to commit the murder, but left after finding the store closed, would be admissible because Graydon would be testifying to events that he witnessed. This testimony does not relay a statement made out of court, and is thus not hearsay.

[95]Some pieces of Creedon and Harris' statements are also admissible as non-hearsay. Their statements demonstrating knowledge of certain details regarding the night of the murders at the Tankleff house—*e.g.*, the presence of Jerry Steuerman, the late-night poker game, the use of gloves—provide circumstantial evidence of their presence that night and are thus admissible for the very fact that the statements were made. *See United States v. Muscato*, 534 F. Supp. 969, 975-976 (E.D.N.Y. 1982); *Bridges v. State*, 19 N.W.2d 529, 536 (Wis. 1945).

after discovery of the new evidence. As demonstrated below, Marty has satisfied both requirements.

a. Marty Exercised Due Diligence With Respect to Kovacs' Affidavit

It is undisputed that Marty has satisfied the first requirement set out in § 440.10(1)(g): Because Creedon made his incriminating statements to Kovacs only *after* Marty's trial was completed, there is no way these statements could have been offered at trial. Marty has also satisfied the second requirement because he exercised due diligence upon discovering Kovacs' statements. He did not immediately bring a § 440.10 motion in 1994 based on Kovacs' affidavit because it appeared unlikely that that uncorroborated statement, standing alone, would have satisfied the *Salemi* criteria. Rather, only when Marty amassed additional evidence—here, Harris' sworn statement implicating Creedon—did he have sufficient new evidence, when viewed in the aggregate, to carry his burden under *Salemi*. Once Marty had enough evidence in hand, he moved promptly to bring that evidence before the County Court and therefore showed due diligence. In holding that Marty lacked diligence, the County Court made two fundamental errors.

First, the court wrongly assumed that in order to be diligent a defendant must file a § 440.10 motion immediately upon discovering new evidence, *without regard* to whether that evidence would satisfy the *Salemi* criteria. This approach

would prove disastrous in practice. It would encourage defendants to bring any new evidence, however minor, before the court *ad seriatim*, in multiple § 440 motions, for fear of being accused of not having exercised due diligence should additional evidence become available in the future. The more prudent approach would be to encourage a defendant to wait until he has a body of evidence that *in toto* could fairly be described as meeting the *Salemi* test. This approach would promote judicial economy by avoiding premature motions, hearings, and appeals, and it would also conserve the already limited resources of indigent prisoners. By being patient and awaiting corroborating evidence, Marty should be praised, not punished.

Second, in narrowly focusing on the passage of time between Kovacs' affidavit and Marty's filing of the instant motion, the County Court failed to conduct a particularized evaluation of Marty's diligence in light of the practicalities and equities of the case. What constitutes due diligence requires a pragmatic, case-by-case inquiry.[96] In addition to ignoring the very practical consideration noted above, the court failed to consider the balance of equities.

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[96]*See People v. Lemus*, N.Y.L.J., October 25, 2005, at 18 (Sup. Ct. N.Y. Co., Justice Hayes), at A.879 (diligence must "be measured against the limited resources generally available to the defense and the practicalities of the particular situation"); *People v. Hildenbrant*, 125 A.D.3d 819, 821, 509 N.Y.S.2d 919, 921 (3d Dep't 1986) (courts must look at "the practicalities of the situation" when making the due diligence determination); *see also Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir. 1990).

Where, as in this case, there has been no prejudice to the government as a result of any delay, courts are reluctant to dismiss a motion for lack of diligence. *See People v. Bell*, 179 Misc. 2d 410, 416, 686 N.Y.S.2d 259, 263 (N.Y. Sup. Ct. 1998) ("[A]fter more than 20 years, it is difficult to see how the additional five years since 1992 would dim memories disproportionately. The interests of justice, as perceived by this court, has required resolution of defendants' claims on the merits."). Indeed, where important liberty interests are at stake, courts routinely err on the side of resolving a motion on the merits rather than on the basis of a procedural bar.[97]

b. Even Assuming *Arguendo* That Marty Failed to Exercise Due Diligence With Respect to Kovacs' Affidavit, That Conclusion Would Not Affect The Other New Evidence

Although its decision is unclear, the County Court appears to have also concluded that the rest of Marty's new evidence was barred because the "defendant could have fully investigated the assertions made by Kovacs in 1994 which very

[97]*See People v. Farrell*, 159 Misc. 2d 992, 994, 607 N.Y.S.2d 557, 559 (Sup. Ct. 1994) (considering the merits of § 440.10 motion despite delay in bringing claim because, "[t]aking into account the nature of the dispute, the interests of justice require the court to resolve substantive questions rather than reject the application for technical procedural reasons"). Not only has the DA failed to suggest any prejudicial delay in this case, but it is worth noting that prisoners like Marty have very little incentive to sit on favorable evidence. Unlike an inmate on death row, who has some incentive to hold back evidence in order to bring it forward in the eleventh hour before an execution, the typical non-capital inmate in prison has every incentive to bring forward evidence to secure his freedom. Clearly, Marty, who has vigorously argued that he is innocent for over eighteen years, is no different—after all, Marty certainly had no reason to delay any efforts that were within his control while he was sitting for years on end in prison.

well could have led him to uncover the same witnesses he was able to produce in 2005." A.11.

If this is indeed the court's holding, it is based on a fundamental misunderstanding of the law. As noted earlier, the statute contains two diligence requirements: (1) the evidence must not have been able to "have been produced by the defendant at the trial even with due diligence on his part"; and (2) a "motion based upon [new evidence] must be made with due diligence *after the discovery of such alleged new evidence.*" § 440.10(1)(g) (emphasis added). With respect to the first diligence requirement, it is undisputed that Marty's new evidence could not have been found before or during his trial (indeed, much of the evidence did not exist at that time).

With respect to the second diligence requirement, that a private investigator allegedly could have found all of this evidence in 1994 does not make the pending motion untimely, because the statute by its clear terms requires only that the motion be made with due diligence *after the discovery of the new evidence.* In other words, where evidence is not available until post-trial, there is no statutory requirement that the defendant exercise due diligence to *discover* the new evidence.[98] Thus, there is no basis for the court's novel suggestion that *all* of

[98]Even were the court correct in ignoring the plain terms of the statute, its holding would be erroneous for an independent reason. The statute looks at the due diligence of a reasonable defendant, here an indigent incarcerated defendant. *See supra* n.96. By basing its decision on

Marty's new evidence should be barred because of his supposed lack of diligence as to a single affidavit obtained in 1994.[99]

II. MARTY'S CONVICTION WAS BASED ON A CONFESSION THAT WAS OBTAINED IN VIOLATION OF HIS FEDERAL AND STATE *MIRANDA* RIGHTS

In his § 440.10 motion, Marty raised compelling federal and state *Miranda* claims, yet the court failed even to discuss them. This Court's intervention is warranted finally to rescue Marty from the legal limbo he has found himself in

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what Marty's new defense investigator, Salpeter, was able to accomplish in recent years, the court incorrectly transformed the due diligence standard into an inquiry into what a well-trained, *pro bono* private investigator might have been able to discover. There is no statutory or other basis for this higher bar. Further, the court's reasoning is tainted by strong hindsight bias. The fact that Salpeter was able to obtain certain evidence years after the fact does not mean that this evidence could have been obtained earlier: With the passage of time, relationships change and people who were previously unwilling to come forward—whether due to their own problems with the law or to fears of antagonizing the real assailants—sometimes become willing to talk years later. A.1172-1173 (Salpeter). For example, when John Guarascio was approached by an investigator in 1994, he refused to corroborate Kovacs' account because he was afraid of Creedon "terrorizing his family or abusing [his] sister [Teresa Covias]," A.1696; he only changed his mind and came forward a decade later. Unfortunately, such delays are not uncommon in wrongful conviction cases. *See, e.g.*, *House*, 126 S.Ct. at 2064 (granting defendant relief based in part on two witness who came forward nearly 20 years later to report a third-party confession). Finally, some of Marty's new evidence did not even exist until recently—for example, Creedon confessed to his son only in 2004.

[99]In denying Marty's second § 440.10 motion, the Court held that Marty lacked diligence with regard to Lisa Harris. A.3907. That determination is also erroneous. Although defense counsel obtained an affidavit from Lisa Harris in 2003, the information she was willing to provide in that affidavit was cursory and likely inadmissible due to the marital privilege. It was only later, however, in her February 23, 2006 affidavit, that Lisa Harris disclosed a subsequent confession made by Glenn Harris in the presence of his mother, in which he gave detailed information about the night of the murders, including that he went to the Tankleff residence with Creedon and Kent to commit a robbery; that when Creedon and Kent came out of the house, Kent was covered in blood and carrying a pipe; that either Creedon or Kent subsequently threw the pipe out of the car; and that he later saw Kent take off his bloody clothes and burn them. A.3934 (Affidavit of Lisa Harris, February 23, 2006). Once Marty obtained this affidavit, which contained evidence admissible at a new trial, he moved quickly to bring it—and other recently obtained evidence—to the Court's attention by filing a § 440.10 motion a month later, on March 21, 2006.

with regard to *Miranda*. On the one hand, the U.S. Court of Appeals for the Second Circuit recognized that, contrary to the earlier state court holdings, Marty was clearly in "custody" at some point before he was finally administered *Miranda* warnings, which occurred *two hours* into the interrogation and only *after* Marty had made an inculpatory statement. *See Tankleff*, 135 F.3d at 244. If the state courts had not erred in this custody determination, they surely would have suppressed both his pre-warning and post-warning statements under New York law. *See People v. Chapple*, 38 N.Y.2d 112, 115, 341 N.E.2d 243, 245-246 (1975) (with respect to Miranda warnings,"[l]ater is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning"). On the other hand, although the Second Circuit correctly decided the question of custody, it *incorrectly* held that it could not order a federal remedy because, under its flawed interpretation of *Oregon v. Elstad*, 470 U.S. 298 (1985), the detectives' pre-warning interrogation of Marty did not taint his post-warning statements, even though there was *no break* in the interrogation and the failure to give warnings earlier was clearly *not* a good-faith mistake. *Tankleff*, 135 F.3d at 245. Thus, both the state courts and the federal courts mishandled Marty's *Miranda* claims.

This Court can finally untangle this morass. Ordinarily, because Marty's federal and state *Miranda* claims were decided on direct appeal, he would not be able to raise them in a § 440.10 motion. *See* C.P.L. § 440.10(2)(a). This rule, however, contains an exception. A defendant may advance a "ground or issue" that was previously determined on direct appeal when there "has been a retroactively effective change in the law controlling such issue." *Id.* Here, there have been at least two such "change[s] in the law" that warrant consideration of Marty's *Miranda* claims on the merits. The first is the Second Circuit's decision in this case, to which New York courts would give "great weight" with regard to ruling on Marty's federal and state *Miranda* claims. The second change in the law is the Supreme Court's decision in *Missouri v. Seibert*, 542 U.S. 600, 616 (2004), which importantly clarified *Miranda* law and demonstrated that the Second Circuit erred in failing to remedy the *Miranda* violation it correctly recognized. Due to either or both changes in the law, this Court may consider Marty's *Miranda* claims on their merits and finally grant relief for these egregious constitutional violations.

A. Marty Was In "Custody" Under the Federal and State Standard Well Before the Police Administered *Miranda* Warnings

It is hornbook law that statements obtained from a suspect as a result of custodial interrogation may not be admitted into evidence unless the suspect was first apprised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and Article I, § 6 of the New York State Constitution. Here, there is no dispute

that the police subjected Marty to hours of "interrogation" on the day in question. *See Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980) (defining "interrogation" as "express questioning" or its "functional equivalent"). Nor is there any dispute that no *Miranda* warnings were given to Marty until 11:54 a.m., more than five hours after police first began interrogating Marty at the crime scene, and more than two hours after the police began interrogating him in a small, windowless room at the police station. Thus, the dispositive question is whether Marty was in "custody," *at any point*, prior to 11:54 a.m. that day.[100]

The definition of "custody" under the New York State Constitution is identical to the federal definition of that term, and New York courts rely interchangeably on state and federal cases addressing custody. *See, e.g.*, *Tankleff*, 199 A.D.2d at 552, 606 N.Y.S.2d at 709 (defining "custody" in terms of "whether an ordinary person, innocent of any crime, would, in the defendant's position, think that he was free to leave"); *Tankleff*, 135 F.3d at 243 (defining "custody" in terms of "how a reasonable man in the suspect's situation would have understood his situation" and whether he would "have felt he [] was not at liberty to terminate the interrogation and leave").[101]

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[100]The "custody" issue is a legal question subject to *de novo* review. *See Thompson v. Keohane*, 516 U.S. 99, 111 (1995).

[101]As a result, the Second Circuit's analysis of the custody issue is relevant to both Marty's federal and state *Miranda* claims. The perfect congruity between these standards is not surprising because the entire area of law was federally generated.

Under this definition, there can be no question that during his stationhouse interrogation Marty was in "custody" at some point prior to the detectives' administration of the *Miranda* warnings. The Second Circuit correctly reached this conclusion after carefully analyzing what Marty experienced after arriving at the police station:

> Based on the totality of the circumstances, we believe that Tankleff was in custody and hold that he was entitled to *Miranda* warnings at some point prior to 11:54 a.m., when he was finally advised of his rights. For the last two hours, he had been subjected to increasingly hostile questioning at the police station, during which the detectives had accused him of showing insufficient grief, had said that his story was "ridiculous" and "absurd," and had added that they simply "could not accept" his explanations. Finally, at 11:45 a.m. they told him that his father had woken up from a coma and accused him of the attack. If not before, then certainly by this point in the interrogation no reasonable person in Tankleff's position would have felt free to leave.

135 F.3d at 244. Of particular significance is the fact that, after McCready confronted Marty with his father's supposed statements, the detectives continued to berate Marty and accuse him of murder for *a full nine minutes* until he finally began his "confession." During this period, no reasonable person in Marty's shoes—having just been told that the police had obtained seemingly conclusive eyewitness evidence identifying him as the assailant—would have believed himself free simply to stand up, walk past the detectives, open the closed door of the interrogation room, and leave the police station. Indeed, it would have been *unreasonable in the extreme* to think that the police would have stood by passively

as a brutal murderer walked away free.[102] *See generally* LaFave, Israel, and King, *Criminal Procedure* (3d ed. 2000) ("Criminal Procedure") § 6.6, at 339 ("[S]urely a reasonable person would conclude that he was in custody if the interrogation is close and persistent, involving leading questions and the discounting of the suspect's denials of involvement.").[103]

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[102]Several physical factors also would have informed a reasonable person's assessment of "the breadth of his or her 'freedom of action.'" *Stansbury v. California*, 511 U.S. 318, 320 (1994) (citation omitted) (describing "custody" for *Miranda* purposes). Detectives McCready and Rein, at 6' and 6' 2'' tall, respectively, towered over Marty, and they at various points impinged on his personal space. Rein placed his hands on Marty's knees and told him that he "couldn't accept" his explanations. And, after returning from his fake phone call, McCready leaned over and pointed at Marty when he told him that his father had fingered him as the attacker. A.3142-3143; A.3608-3609, 3615-3616, 3646-3647, 3691-3692. Moreover, a reasonable person in Marty's position would not have found himself readily able to leave. Marty did not have a car at the police station, nor did he even have shoes. He was barefoot and still wearing his shorts.

[103]The Appellate Division majority evidently believed that the detectives' accusatory statements to Marty (that they believed that he was guilty of murder and had eyewitness evidence to this effect) were irrelevant to the custody determination. 199 A.D.2d at 553, 606 N.Y.S.2d at 710. The majority cited an ambiguous sentence in *Oregon v. Mathiason*, 429 U.S. 492, 496 (1977), in support, but cases following *Mathiason* made clear that the police's communication of their suspicions of guilt can obviously be relevant to the suspect's reasonable perception of his ability to leave. *See Criminal Procedure* § 6.6, at 339 (stating that under the reasonable person test articulated in *Berkemer v. McCarty*, 468 U.S. 420 (1984), it would be "absurd" if a police officer's accusations of the suspect were not considered relevant to the custody determination); *see also Stansbury*, 511 U.S. at 320 ("[A]n officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave."); *Holguin v. Harrison*, 399 F. Supp. 2d 1052, 1058 (N.D. Cal. 2005) (granting habeas relief and stating: "These facts demonstrate that the officers conveyed to Holguin that they believed he was the shooter. A reasonable person in Holguin's position would not believe he could simply get up and walk away while being accused by three officers of having committed a murder. . . . Although the United States Supreme Court has stated that such a factor is relevant to the custody analysis, again, the State court gave no consideration to this fact."); *People v. Ripic*, 182 A.D.2d 226, 231-232, 587 N.Y.S.2d 776, 780 (3d Dep't 1992) (finding that defendant was not in custody where there was no "indication that the

Thus, as the Second Circuit's decision makes clear, Marty was plainly in custody before the detectives gave him his *Miranda* warnings.

B. Because Marty Was In Custody, Both His Pre-Warning and Post-Warning Statements Should Have Been Suppressed Under New York Law

Because Marty was in custody, under New York law both his pre-warning and post-warning statements should have been suppressed because they were elicited during a "single continuous chain of events." As the Second Circuit recognized, *Chapple* provides that "[w]arnings, to be effective . . . must precede the subjection of a defendant to questioning. Later is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning." 38 N.Y.2d at 115, 341 N.E.2d at 245-246. Indeed, the New York constitutional prohibition against self-incrimination "would have little deterrent effect if the police know that they can, as part of a continuous chain of events, question a suspect in custody without warning, provided that they only thereafter question him or her again after warnings have been given." *People v. Bethea*, 67 N.Y.2d 364, 366, 993 N.E.2d 937, 938 (1986).

New York courts determine whether there is a "single continuous chain of events" by evaluating factors including the following: (1) the time differential

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investigators openly accused defendant of the crime or that the investigators communicated to defendant that she was a suspect and not a mere witness").

between the *Miranda* violation and the subsequent admission after the *Miranda* warnings have been given; (2) whether the same police personnel were present and involved in eliciting each statement; and (3) whether there was a change in the location or nature of the interrogation. *See People v. Paulman*, 5 N.Y.2d 122, 130-131, 833 N.E.2d 239, 245 (2005).

There is no question that Marty's interrogation meets this standard.[104] After Detective McCready confronted Marty with his father's supposed statements, the detectives continued to badger Marty until he began his false confession, and only then did the detectives finally administer *Miranda* warnings. After the traumatized Marty waived his rights, *and with no break whatsoever*, the interrogation continued and the detectives elicited the wildly unbelievable and uncorroborated confession. Thus, the interrogation was conducted seamlessly, by the same detectives, in the same ten-by-ten interrogation room, on the same subject matter, and therefore constituted a "continuous chain of events." *See, e.g.*, *People v. Ripic*, 182 A.D.2d 226, 236, 587 N.Y.S.2d 776, 783 (3d Dep't 1992) (finding this standard met even where the post-warning interrogation was conducted at a different location and after various breaks and interruptions); *People v. Sturdivant*, 21 A.D.3d 581, 582-583, 799 N.Y.S.2d 835, 836 (3d Dep't 2005). As a result, both Marty's pre-

[104]No New York court has analyzed this issue in Marty's case.

warning and post-warning statements must be suppressed under New York law. *See Chapple*, 38 N.Y.2d at 115, 341 N.E.2d at 245-246.

C. Marty's Pre-Warning and Post-Warning Statements Should Have Been Suppressed Under Federal Law

Unlike the rest of its well reasoned decision, the Second Circuit's application of *Oregon v. Elstad*, 470 U.S. 298 (1985), to Marty's interrogation was erroneous, as subsequent Supreme Court jurisprudence has made clear. After having recounted at length the detectives' hostile and manipulative questioning of Marty, and concluding that he was in custody before *Miranda* warnings were given, the Second Circuit simply stated that "[t]he issue is a close one" and concluded that, under *Elstad,* "the interrogation that took place before the reading of the *Miranda* warnings barely did not entail the degree of coercion that would irredeemably taint Tankleff's 'second' *Mirandized* confession." *Tankleff*, 135 F.3d at 245.

In so holding, the Second Circuit overlooked critical differences between *Elstad* and this case. In *Elstad*, the police's failure to administer *Miranda* warnings at a proper time was undisputedly a mere "oversight." 470 U.S. at 316. The police officer spoke to the suspect at his house, in the middle of the day, with his "mother in the kitchen area, a few steps away." *Id.* at 315. While the police officer realized in retrospect that the suspect was in "custody" at the time, he did not realize this at the time of their conversation. *Id.* As the Supreme Court

observed, both the "environment" and the "manner" of the interrogation was not coercive. *Id.*

Marty's case is entirely different, involving a multi-hour, psychologically coercive interrogation during which the detectives studiously withheld *Miranda* warnings so as not to break the momentum of their questioning. Unlike the situation in *Elstad*, Marty was separated from his family and home and interrogated in a police-dominated environment. The detectives aggressively badgered him, repeatedly met his answers with disbelief, and perpetrated a series of lies, most notably the elaborate hoax involving his father. This was far indeed from the situation in *Elstad*, where the officer committed a mere "oversight" in failing to administer warnings. 470 U.S. at 316. Given the systematic, lengthy, and uninterrupted nature of Marty's interrogation, it is clear that the two experienced interrogators deliberately postponed *Miranda* warnings until the moment that Marty "cracked" and began his false confession.

In *Missouri v. Seibert*, Justice Kennedy's controlling opinion clarified the Supreme Court's holding in *Elstad*, explaining that the "two-step questioning technique"—in which, as in Marty's case, a suspect is questioned until he makes an incriminating statement, is then given his *Miranda* warnings, and is then questioned again on the same subject matter—"distorts the meaning of *Miranda* and furthers no legitimate countervailing interest." *See* 542 U.S. at 620-621

(opinion concurring in the judgment).[105] "When an interrogator uses this deliberate two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of the prewarning statements must be excluded absent specific, curative steps." *Id.* at 621. Thus, Justice Kennedy reaffirmed that *Elstad* defines the rule regarding *Miranda* warnings, but clarified that a two-step questioning strategy is barred by the rule.

Marty's interrogation falls squarely within the two-step strategy condemned in *Seibert*, and the detectives in Marty's case took no "specific, curative steps" to ensure that their belated *Miranda* warnings would be effective.[106] In light of

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[105]As the plurality decision explained: "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. ... Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to understand the nature of his rights and the consequences of abandoning them.'" *Seibert*, 542 U.S. at 613.

[106]Like the one condemned in *Seibert*, Marty's interrogation was "conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill." 542 U.S. at 616 (plurality). But in many ways Marty's interrogation was worse. Marty's pre-warning interrogation lasted two hours, rather than the 30-40 minutes in *Seibert*, 542 U.S. at 605, and while the suspect in *Seibert* was given a 20-minute break before her second interrogation began, *id*, Detective McCready admitted that he never offered Marty even a 5-minute break, A.3690. Courts have held that a strategy of deliberately withholding *Miranda* warnings can be inferred from the circumstances of interrogations such as Marty's. *See United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006) ("Consistent with our sister circuits, we hold that in determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning. Such objective evidence would include the timing, setting and completeness, of the prewarning interrogation, the continuity of police personnel and the overlapping content of

Seibert's clarification of *Elstad*, there can be no question that the Second Circuit erred in failing to remedy the *Miranda* violation it rightfully recognized. This Court should therefore hold that, with respect to Marty's federal *Miranda* claim, both his pre- and post-warning statements should have been excluded at trial.

D. This Court May Reach the Merits of the *Miranda* Claims Because the Procedural Bar of C.P.L. § 440.10(2)(a) Does Not Apply

As noted above, § 440.10(2)(a) provides that a defendant can advance a "ground or issue" that was "previously determined on the merits upon an appeal from the judgment" when there "has been a retroactively effective change in the law controlling such issue." In this case, there have been at least two such "retroactively effective change[s] in the law."

1. The Second Circuit's "Custody" Decision is a Relevant "Change in the Law" Warranting Consideration of the *Miranda* Claims on Their Merits

The Second Circuit's application of the federal definition of "custody" to the facts of this case represents a "retroactively effective change in the law controlling" Marty's federal and state *Miranda* claims. The prior state court rulings were all made without the benefit of this holding, and, hence, may legitimately be revisited in light of this new precedent. A contrary decision by a

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the pre- and post-warning statements.") (citations and footnote omitted). In any event, the government bears the burden of showing that McCready did not employ a deliberate two-step strategy during the interrogation. *See United States v. Ollie*, 442 F.3d 1135, 1143 (8th Cir. 2006) (noting that this burden is appropriate given that the government would typically possess "all or most of the pertinent evidence" on the issue).

federal appellate court on habeas review that examines the very same facts and the very same legal claims as that decided earlier by state courts is a "change in the law" controlling such claims. There can be no dispute that had the Second Circuit opinion in Marty's case existed at the time the state appellate courts considered his case, those courts would have accorded the opinion great weight.

For example, in a similar case, the Appellate Division affirmed the conviction of Harry Ip and rejected his claim that his federal Sixth Amendment rights had been violated. *See People v. Kan*, 164 A.D.2d 771, 559 N.Y.S.2d 717 (1st Dep't 1990), *aff'd on other grounds*, 78 N.Y.2d 54, 574 N.E.2d 1042 (1991). Ip then filed a federal habeas petition. The U.S. District Court overturned Ip's conviction on Sixth Amendment grounds, and the Second Circuit affirmed. *See id.* at 771, 559 N.Y.S.2d at 718. When Ip's co-defendant, Kin Kan, directly appealed her own conviction on the same grounds, the Appellate Division held that, even though it had found no Sixth Amendment violation on the same facts in Ip's case, it could not ignore that the federal courts had reached an opposite conclusion based on the very same facts. *Id.* Accordingly, by a 2-1 vote, the Appellate Division reversed Kan's convictions and ordered a new trial. Although the federal courts' holding in Ip's case was not binding in Kan's case, it was nonetheless a change in the body of law that controlled the facts and issues of the case.

Similarly, in *People v. Bonino*, when the Second Circuit held that one co-defendant's confessions were inadmissible, the Court of Appeals granted reargument to the other co-defendant, even though the Second Circuit decision was not "binding" on the latter case. 1 N.Y.2d 752, 753, 135 N.E.2d 51, 52 (1956). The Court of Appeals reasoned that "in the interest of justice" the second co-defendant deserved a new trial from which the inadmissible evidence would be excluded. *Id.*

Thus, New York courts give great weight to relevant federal court rulings in deciding federal issues. *See, e.g.*, *People v. Marty*, 294 N.Y. 61, 73, 60 N.E.2d 541, 547 (1945) (giving "due and great respect" to the federal court construction of federal law), *aff'd*, 326 U.S. 496 (1946); *New York Rapid Transit Corp. v. City of New York*, 275 N.Y. 258, 265, 9 N.E.2d 858, 860 (1937), *aff'd*, 303 U.S. 573 (1938) (federal court decisions are "entitled to great weight").[107] Likewise, New York courts also frequently rely on federal authority in determining analogous state-law claims, even where there is state precedent available. *See, e.g.*, *People v.*

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[107]*See also Kan*, 164 A.D.2d at 773, 559 N.Y.S.2d at 719 (determination of federal courts on federal constitutional question is "entitled to great weight") (J. Kupferman, dissenting); *Brenen v. Dahlstrom Metallic Door Co.*, 189 A.D. 685, 688, 178 N.Y.S. 846, 848 (1st Dep't 1919) (New York courts defer to federal courts construing federal statute); *Washington v. Hoke*, 144 Misc. 2d 336, 544 N.Y.S.2d 942 (Sup. Ct. 1989) (New York Supreme Court is bound by federal court where federal question is presented). This is particularly true where the federal precedent is from the United States Court of Appeals. *See, e.g.*, *People v. Cook*, 82 Misc.2d 875, 875, 372 N.Y.S.2d 10, 11 (Co. Ct. 1975); *Schneck v. Lewis*, 121 Misc. 370, 375 201 N.Y.S. 282, 286 (Sup. Ct. 1923). *But see Alvez v. American Export Lines, Inc.*, 46 N.Y.2d 634, 389 N.E.2d 461 (1979), *aff'd*, 446 U.S. 274 (1980).

Stephen J.B., 23 N.Y. 2d 611, 613-616, 246 N.E.2d 344, 346-348 (1969) (relying on state and Second Circuit cases in determining *Miranda* issues).[108]

Here, there can be no doubt that in deciding Marty's federal and state *Miranda* claims, the New York courts would have given great weight and consideration to the Second Circuit's decision in this case, involving as it did the exact same facts and legal standard. Accordingly, the Second Circuit's decision constitutes a relevant "change in the law controlling" Marty's *Miranda* claims, and thus justifies consideration of those claims on the merits. *See Kan*, 164 A.D.2d 771; 559 N.Y.S.2d 717; *Bonino*, 1 N.Y.2d 752, 135 N.E.2d 51.

2. *Missouri v. Seibert* is a Relevant "Change in the Law" Warranting Consideration of the *Miranda* Claims on Their Merits

An additional reason that the procedural bar does not apply is that *Seibert* represents a "retroactively effective change in the law" controlling the federal *Miranda* claim in this case.[109] As was discussed above, Justice Kennedy's

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[108]*See also People v. Obieke*, 186 Misc. 2d 708, 712-713, 712 N.Y.S.2d 919, 923 (Sup. Ct 2000) (relying on U.S. Supreme Court and Seventh Circuit precedent on New York state constitutional issue); *In re Travis S.*, 180 Misc.2d 234, 239-240, 685 N.Y.S.2d 886, 890-891 (Fam. Ct. 1999) (relying on federal and state authority for definition of "custodial interrogation"), *aff'd*, 271 A.D.2d 611, 706 N.Y.S.2d 162 (2d Dep't 2000), *aff'd*, 96 N.Y.2d 818, 752 N.E.2d 848 (2001).

[109]Justice Kennedy's controlling opinion in *Seibert* is "retroactively effective." For cases on collateral review, a new Supreme Court constitutional decision is retroactively binding on courts as a rule of decision unless that decision announced a "new rule" of constitutional law. *See Beard v. Banks*, 542 U.S. 406, 411 (2004). Justice Kennedy's opinion does not qualify as a new rule because it was dictated by Supreme Court precedent that existed as of the date Marty's conviction became final. *Id.* at 413. Indeed, the thrust of Justice Kennedy's opinion was that the invalidity of deliberate circumventions of *Miranda* followed from *Elstad* and *Miranda* itself. He

controlling opinion in *Seibert* explained the boundaries of *Elstad* and clarified that a deliberate two-step questioning strategy designed to undermine the *Miranda* warnings is not permitted by that decision. Although *Seibert* did not work a doctrinal upheaval, but rather gave important clarification to prior *Miranda* precedent, it is nevertheless a relevant "change in the law" that authorizes this Court to consider Marty's *Miranda* claims on their merits. *See* C.P.L. § 440.10(2)(a). And, as a United States Supreme Court decision, it is binding on New York courts.

For years, Marty's *Miranda* claims have slipped through the cracks of the federal and state judicial systems. This Court now can and should, with the benefit of the intervening law, finally correctly rule that Marty's federal and state *Miranda* rights were violated and that all of the statements he made to the interrogating detectives should have been suppressed. His convictions should be vacated and he

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explained that *Elstad* was "correct in its reasoning and result" and "reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning." *Seibert*, 542 U.S. at 620 (opinion concurring in the judgment). And while *Elstad* was correct that it is "extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning," Justice Kennedy went on to clarify that *Elstad* did not permit the two-step interrogation technique, which, by contrast, "distorts the meaning of *Miranda* and furthers no legitimate countervailing interest." *Id.* at 620-621. Given this understanding, Justice Kennedy's opinion did not announce a "new rule" and is thus retroactively effective.

should be granted a new trial at which these statements could not be admitted against him.[110]

Further, and at the very least, because Marty's claim for a new trial based on newly discovered evidence must be evaluated in light of a hypothetical new trial, *see Salemi*, 309 N.Y. at 216, this Court should take into account that Marty's pre-warning and post-warning statements to the detectives would surely be suppressed at such a trial. In such circumstances, a jury hearing Marty's powerful new evidence would undoubtedly reach a more favorable verdict.

III. THE PROSECUTION VIOLATED MARTY'S STATE AND FEDERAL DUE PROCESSS RIGHTS BY FAILING, UNDER *BRADY v. MARYLAND*, TO DISCLOSE EXCULPATORY EVIDENCE AND BY FAILING, UNDER *GIGLIO v. UNITED STATES*, TO CORRECT DETECTIVE McCREADY'S PERJURY AT TRIAL

Detective McCready perjured himself at Marty's trial when he repeatedly and categorically denied any prior relationship with Jerry Steuerman—the man who should have been the prime suspect in the Tankleff murders. *See supra* n.27 (quoting McCready's testimony); *see also supra* Background Part K.5 (describing Lubrano and Sullivan's eyewitness statements). As demonstrated below, by failing

[110]Alternatively, this Court may consider the *Miranda* claims 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); *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"). Also, Judiciary Law § 2-b[3] gives this Court authority to rule on these claims in order to account for the Second Circuit's opinion and *Seibert*. Section 2-b[3] permits the Court to devise new processes to carry out its functions where fairness requires. *See People v. Thompson*, 177 Misc. 2d 803, 809, 678 N.Y.S.2d 845, 851 (Sup. Ct. 1998); *People v. Ricardo B.*, 73 N.Y.2d 228, 232-233, 535 N.E.2d 1336, 1337-1338 (1989).

to reveal this longstanding relationship to the defense, the prosecution violated its federal and state constitutional duties to disclose exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963). Additionally, by failing to correct McCready's perjured testimony on this subject, the prosecution violated its constitutional duties to correct false testimony. *See Giglio v. United States*, 405 U.S. 150 (1972). The County Court dismissed these claims, without discussion, as "lacking in merit." This Court should reverse and vacate Marty's convictions.[111]

A. The Prosecution Violated its Duty under *Brady* by Failing to Disclose to the Defense McCready's Longstanding Relationship with Steuerman

To demonstrate a *Brady* violation, a defendant must show that: (1) the prosecution failed, whether willfully or inadvertently, to disclose evidence in its possession; (2) the evidence was favorable to the defense; and (3) the failure to disclose resulted in prejudice. *See Strickler v. Greene*, 527 U.S. 263, 281-282 (1999); *People v. Scott*, 88 N.Y.2d 888, 890, 667 N.E.2d 923, 924 (1996). Marty has satisfied each element of this test.

[111]C.P.L. § 440.10(1)(h) authorizes a court to vacate a judgment obtained in violation of an accused's constitutional rights; § 440.10(1)(b) authorizes a court to vacate a judgment procured by, *inter alia*, "fraud on the part of the . . . prosecutor or a person acting for or in behalf of a . . . prosecutor"; and § 440.10(1)(c) authorizes a court to vacate a judgment obtained via false material evidence.

1. The Prosecution Failed to Disclose McCready's Longstanding Relationship With Steuerman, Which Evidence Was Favorable to the Defense

There is no dispute here that the prosecution failed to inform the defense of McCready's longstanding relationship with Steuerman. It is equally clear that this evidence was "favorable" to the defense because it would have impeached the objectivity and credibility of the case's lead interrogator and investigator. *See Giglio*, 405 U.S. at 154 ("Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness."); *see also Youngblood v. West Virginia*, 126 S.Ct. 2188, 2190 (2006) ("This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence ....").

Additionally, it well established that the due process imperative to disclose favorable evidence extends to information held only by the police—here, by Detective McCready. As the Supreme Court has recently reaffirmed, "*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood*, 126 S.Ct. at 2190 (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)); *see also Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Banks v. Dretke*, 540 U.S. 668, 693 (2004). Indeed, if

Detective McCready were allowed to conceal unilaterally evidence that would be beneficial to Marty's defense, this would amount to "substitut[ing] the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Kyles*, 514 U.S. at 438. The Due Process Clause tolerates concealment by no government agent.

2. The Prosecution's Failure to Disclose This Evidence Prejudiced Marty at Trial By Depriving Him of Important Impeachment Evidence

To establish prejudice under *Brady*, there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (internal quotation marks omitted). This burden is lower than the one applicable to Marty's new trial claim. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434.

Marty's claim plainly satisfies this standard. As detailed in Section I.B.6, lead Detective McCready was a crucial prosecution witness, who not only gave important testimony about Marty's allegedly suspicious demeanor and statements,

but also made critical judgments about the direction of the investigation. It was, after all, McCready who decided to push Marty for a confession only hours into the investigation. And he did this *before* he knew the results of the forensic testing and *before* investigating Steuerman, who Marty and his family members were naming as the most likely culprit. McCready's good faith and credibility were thus fundamental to the prosecution's case.

At trial, the defense properly made an issue of McCready's rush to judgment and his suspicious failure to investigate Steuerman. However, McCready's uncorrected perjury—*e.g.*, "I didn't know one thing about Jerry Steuerman," A.3673—deprived the defense of the crucial piece of this story. Because McCready lied on the stand during cross-examination, the defense was unable to offer the jury a convincing explanation as to *why* McCready would have exhibited such ineptitude and tunnel vision in ignoring the multiple signs of Steuerman's guilt.[112] Instead, the prosecutor was able to ask the jury to decide between the credibility of a seemingly objective veteran lead detective and that of an accused murderer. The jury was asked to trust that McCready and his fellow officers had the right motives and had fingered the right man. "I submit to you," urged the

[112]As noted earlier, McCready did virtually nothing to investigate Steuerman despite learning numerous suspicious facts, including that Steuerman had recently threatened Seymour Tankleff and that Arlene Tankleff had recently expressed her fear that Steuerman would commit violence. *See supra* nn.69 & 77.

prosecutor, "that the testimony of the detectives has all the indications of being truthful, and I submit to you that that's how you will find it." A.3882.

The truth about McCready would have shattered that appearance. Lubrano's testimony shows that McCready and Steuerman had a close acquaintance for years before the day of the murders; they were, in fact, friends. Additionally, McCready's construction company did work for Steuerman, giving McCready not just a personal but also a potential financial stake in their relationship. Further, Sullivan's affidavit establishes that McCready and Steuerman were "hanging out and having conversations together" as recently as the *year preceding the murders*. This information would have finally given the defense an explanation for McCready's single-minded focus on Marty and his utter failure to investigate Steuerman. Marty's accusations of Steuerman, were, in fact, accusations against McCready's good friend and associate. Instead of recusing himself from the investigation—or at least informing his supervising officer of this conflict-of-interest—McCready stayed silent and aggressively pushed forward in his effort to implicate Marty in these crimes.

These facts would have been devastating to McCready's credibility and therefore would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. 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, the jury would have found McCready wholly unworthy of belief and his entire investigation lacking in reliability.[113] The jury could only conclude that the prime suspect had never really been investigated.

Given the significant weaknesses in the prosecution's evidence, and given that the jury's verdict was already close, the revelation of McCready's unabashed perjury quite likely would have tipped the verdict in favor of acquittal. *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."). Thus, Marty has demonstrated a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (internal quotations and citation omitted).[114]

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[113]This is classic *Brady* and *Giglio* evidence. *See Kyles*, 514 U.S. at 446-447 (granting relief based on undisclosed evidence that would have thrown into doubt the good faith and reliability of the police investigation); *Bowen v. Maynard*, 779 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such in assessing a possible *Brady* violation.").

[114] Because undisclosed evidence must be "considered collectively, not item by item," *Kyles*, 514 U.S. at 436, this Court should also factor into its prejudice determination another piece of evidence that the government was aware of, but never disclosed to the defense: When Steuerman first went into the bagel business, he hired Hell's Angels to attack union members who were protesting outside his store. Thus, despite Steuerman's testimony that he would "never do anything like that," A.3291, he had in fact previously turned to violence to settle a business dispute. Although the Second Circuit determined that the failure to disclose this evidence,

B. The Prosecution Violated its Duty Under *Giglio* by Failing to Correct McCready's Perjured Testimony

To prove a *Giglio* claim, a defendant must show that: (1) false testimony was introduced at trial; (2) the prosecution knew or should have known that the testimony was false; (3) the testimony went uncorrected; and (4) the false testimony resulted in prejudice, measured by a standard that is less demanding than that under *Brady*. *See United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Giglio*, 405 U.S. at 153; *Napue*, 360 U.S. at 269-270. As discussed below, Marty has demonstrated each of these elements.

1. Detective McCready Gave False, Uncorrected Testimony

McCready's repeated denials of any prior knowledge of Steuerman were plainly knowingly false—even the DA has not contested this. There is also no dispute that the prosecution failed to correct this perjury after it was committed.

Additionally, as with *Brady* claims, the duty not to commit or suborn perjury applies equally to the police. As one court has explained:

> [T]he argument to charge the prosecution with knowledge of a government agent's perjury is even stronger than the argument to impute knowledge of *Brady* material. While the prosecution's failure to disclose relevant information might be due to a negligent lack of

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standing alone, was not sufficiently prejudicial to warrant relief, *see Tankleff*, 135 F.3d at 251, when that evidence and the evidence of McCready's longstanding, secret relationship with Steuerman are considered together, there is clearly a "reasonable probability" that had the defense been armed with this critical impeachment evidence, the result of the trial would have been different.

> communication, perjury by a government agent can only be a knowing, intentional decision to lie by a member of the institution which is charged to uphold the law and seek just convictions.

United States v. Sanchez, 813 F. Supp. 241, 248 (S.D.N.Y. 1993) (holding that police officers' perjury was "knowing use of perjury by the prosecution," even though the Assistant U.S. Attorney was unaware of the perjury). *aff'd*, 35 F.3d 673 (2d Cir. 1994); *see also Schneider v. Estelle*, 552 F.2d 593, 595 (Tex. App. 1977) ("If the state through its law enforcement agents suborns perjury for use at the trial, a constitutional due process claim would not be defeated merely because the prosecuting attorney was not personally aware of this prosecutorial activity.").[115] Thus, perjury by a police officer violates the defendant's right to a fair trial regardless of whether the prosecutor is personally aware at the time that the testimony is perjurious.

2. McCready's Uncorrected Perjury Clearly Satisfies the Less Demanding Prejudice Standard that Applies to *Giglio* Claims

Because the Due Process Clause looks less kindly on perjury by a government agent, a lower standard for prejudice applies than in the *Brady* context. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood*

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[115] *See also United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990); *Wedra v. Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982); *United States v. Turner*, 490 F. Supp. 583, 610 (E.D. Mich. 1979), *aff'd*, 633 F.2d 219 (6th Cir. 1980).

that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103; *id.* at 104 (noting that such violations "corrupt[] the truth-seeking function of the trial process").

For the reasons given at length above, Marty has plainly satisfied the lower standard of showing "any reasonable likelihood" that McCready's perjury "affected the judgment of the jury." Thus, even if this Court finds the *Brady* issue a close question—it is not—this Court should grant relief under *Giglio*. *See Chamberlain v. Mantello*, 954 F. Supp. 499, 510-511 (N.D.N.Y. 1997) ("[W]hen new evidence of perjury by a prosecution witness is uncovered, the prosecution's case is imperiled in two respects. First, the prosecution could lose an evidentiary building block that helped construct the case against the defendant. Second, the prosecution could be tarnished by a jury's revelation that one of its witnesses has committed perjury.").[116]

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[116]The DA has contended that these due process violations should be ignored because of the procedural bar set out in § 440.10(3)(b). But as explained in Section I.B.6, Judge Tisch's previous decision addressed evidence of a meaningfully different kind than that presented here. Lubrano and Sullivan have provided *eyewitness* testimony that McCready and Steuerman had a *social* and a *business* relationship, which dates back as early as 1984 and extends into the period directly preceding the murders. As a result, § 440.10(3)(b) does not apply in the first instance.

Even assuming *arguendo* that § 440.10(3)(b) applies, the DA fails to recognize that dismissal under that provision is discretionary and that a court may grant relief "in the interest of justice and for good cause shown." § 440.10(3). The unique circumstances of this case warrant review on the merits. First, Marty's trial was tainted by undisputed, clear perjury by the lead interrogator and investigator, whose credibility was key to the prosecution's case. Second, Detective McCready is a repeat perjurer, *see supra* n.70, and the DA has never taken action against him for these infractions, nor has the DA even openly acknowledged McCready's wrongdoing in this case. In exercising its discretion, this Court may consider the damage to the criminal justice system represented by unaddressed and repeated police perjury. *See People v.*

IV. MARTY'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY HIS DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND CALL TO THE STAND NUMEROUS EXCULPATORY FAMILY WITNESSES

Marty has presented compelling claims of ineffective assistance of counsel under the federal and state constitutions, but they were summarily dismissed as "lacking in merit" by the court below. Marty's trial counsel was deficient in failing to investigate and call to the stand numerous family members who would have given crucial testimony about Marty's happy family life, his loving and non-violent character, and his lack of motive. Compounding this error is the fact that his counsel promised to call these witnesses during opening statements, but then failed to deliver. This left the jury with the damning impression that these family

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Neal, 72 P.3d 280, 298 (Cal. 2003) (Baxter, J., concurring) ("In a free society, we place the police in a position of unique power, but only on condition that they will do their best to uphold the law and to enforce it nobly and fairly. . . . When the police dishonor proper procedures, community respect for the police, and for the law itself, is undermined."). Third, this case has been marked by other instances of police and prosecutorial misconduct. *See Tankleff*, 135 F.3d at 250-251 (finding that the prosecution failed to disclose *Brady* evidence regarding Steuerman's previous resort to violence to settle a dispute, and finding that the prosecutor made "clearly improper" remarks in summation). This Court may take those violations into account in considering what the interests of justice require. *See Kyles*, 514 U.S. at 436 (holding that undisclosed evidence must be "considered collectively, not item by item"); *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (holding that the "cumulative effect of the potentially damaging circumstances" in a case may violate "the due process guarantee of fundamental fairness"). Finally, in exercising its discretion, this Court may take notice of the defendant's colorable showing of actual innocence. *See Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) ("ends of justice" require a court to entertain an otherwise barred successive petition for post-conviction relief "where the prisoner supplements his constitutional claim with a colorable showing of actual innocence"); *Schlup*, 513 U.S. at 315 (where there is evidence of actual innocence, "a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error," thus entitling an otherwise procedurally barred prisoner to "argue the merits of his underlying claims.")

members believed Marty to be guilty—an impression that the prosecutor was happy to exploit in his closing statements. In a case where Marty's motive was so crucial, and the evidence so close, it is clear that his counsel's serious errors were prejudicial and warrant a new trial.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was "deficient," and (2) that the deficiency caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984). To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. New York courts have adopted a standard that is "broader than its federal counterpart." *People v. Claudio*, 83 N.Y.2d 76, 84, 629 N.E.2d 384, 389 (1993) (Titone, J., concurring); *see People v. Garcia*, 75 N.Y.2d 973, 974, 555 N.E.2d 902, 902 (1990) (to succeed on a claim of ineffective assistance of counsel under the New York Constitution, the defendant must merely "demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims"); *see also People v. Benevento*, 91 N.Y.2d 708, 697 N.E.2d 584 (1998).[117]

[117]It is well established that claims of ineffective assistance of counsel may be raised in a § 440.10 motion. *See People v. Brown*, 45 N.Y.2d 852, 853-854, 382 N.E.2d 1149, 1149-1150 (1978) ("[I]n the typical case it would be better, and in some cases essential, that an appellate

A. Marty's Trial Counsel Failed In His Clear Obligation to Investigate and Call to the Stand Witnesses Favorable to the Defense

If one principle is clear in this area, it is the duty of counsel to conduct a reasonable investigation to discover evidence favorable to the defense. "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case.'" *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting 1 *ABA Standards for Criminal Justice* 4-4.1 (2d ed. 1982 Supp.), and noting that "we have long referred to these ABA Standards as guides to determining what is reasonable") (internal quotation marks and brackets omitted); *Wiggins v. Smith,* 539 U.S. 510 (2003) (granting relief where counsel failed adequately to investigate defendant's background); *Williams v. Taylor*, 529 U.S. 362, 395-396 (2000) (same); *Strickland*, 466 U.S. at 688; *see also People v. LaBree*, 34 N.Y.2d 257, 260, 313 N.E.2d 730, 732 (1974) (stating that it is "well settled" that "the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can develop'").

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attack on the effectiveness of counsel be based on an evidentiary exploration by collateral or post–conviction proceeding brought under C.P.L. 440.10 [rather than on direct appeal]"). Here, Marty's claim is necessarily based on evidence outside the trial record; indeed, his claim is precisely that his defense counsel was ineffective in failing to investigate necessary witnesses and therefore did not put their testimony on the record. *See People v. Harris*, 81 A.D.2d 839, 840, 438 N.Y.S.2d 843, 844 (2d Dep't 1981) (noting that the claim "involves the question of whether counsel, in fact, prepared defendant's case as he should have. Proof that he did not may be presented only through statements of persons who did not appear at trial and who had no connection with trial.").

Given the importance of Marty's character and motive in the case, Marty's trial counsel was plainly deficient in having failed to investigate and call to the stand Marty's numerous family members. The prosecution, with the weakest of evidence, sought to portray Marty as a brooding teenager who had trouble with his parents. Marty's counsel could have convincingly demolished this theory. He could have called to the stand numerous family members—including Arlene's father and sisters, Seymour's brother, and various close cousins—to testify to Marty's happy family life, his loving relationship with his parents, and his utter inability to have committed these crimes. Twelve family members (most of whom lived nearby in Long Island) gave sworn affidavits establishing that, with only a few exceptions, Marty's trial counsel *never contacted them about testifying.*[118] And counsel never followed up with the few family members whom he did initially contact.[119] In the end, the only family members called by counsel were the

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[118]*See* Affidavits of Harold M. Alt (Grandfather; Arlene's father) (A.59); Norman Tankleff (Uncle; Seymour's brother) (A.63, 67); Ruth Tankleff (Aunt; Seymour's sister-in-law) (A.69); Marcella Alt Falbee (Aunt; Arlene's sister) (A.73, 79); Syd Tankleff (Great Aunt) (A.81); Autumn Tankelff-Asness (first cousin) (A.85); Joy Adair Falbee Piccirillo (first cousin) (A.90); Ronald B. Falbee (first cousin) (A.96; 102); Carol Falbee (cousin) (A.104); Susanne Falbee (cousin) (A.106); Carolyn Falbee (cousin) (A.110); Larry Kadan (cousin) (A.114).

Additionally, trial counsel failed to call the following witnesses who would have testified to Marty's non-violent, friendly nature and to his utter inability to commit these crimes. *See* Affidavits of Vanessa Celentano (good friend from school) (A.130); Brian Diamond (same) (A.132); Marc Howard (same, currently a professor at Georgetown) (A.134); Bentley Strockbine (same) (A.137); William Strockbine (father of Bentley, who knew Marty) (A.139); Estelle Block (guidance director for high school) (A.142).

[119]*See* A.98-99 (Affidavit of Ronald B. Falbee, June 21, 2002); A.75-78 (Marcella Alt Falbee, June 21, 2002).

McClure family, but, as the prosecutor pointed out in his closing, the McClures, who lived in California, did not know Marty and his family well when compared to the numerous family members Marty's counsel had promised, but then failed, to bring forward. A.3877-3878

Contrary to the DA's contentions below, counsel's failure to call these witnesses cannot be excused as a "strategic" decision. It is well established by Supreme Court precedent that a valid "strategic" decision not to call family members may only be made after counsel makes a *reasonable investigation* into what those family members would in fact testify. *See Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. at 396. There is no way to classify counsel's failure to contact or interview a dozen family witnesses a "reasonable" investigation. As one court aptly put it, "it is hard to perceive any trial strategy which would justify counsel's failure to interview and/or call witnesses who had exculpatory information which tended to exonerate the defendant and substantiate his defense." *People v. Maldonado*, 278 A.D.2d 513, 515, 718 N.Y.S.2d 387, 388 (2d Dep't 2000). Indeed, the failure to contact a potentially favorable witness, *People v. Droz*, 39 N.Y.2d 457, 348 N.E.2d 880 (1976), or to interview available witnesses, *People v.*

Sullivan, 209 A.D.2d 558, 618 N.Y.S.2d 916 (2d Dep't 1994), has often resulted in a finding of ineffective assistance of counsel.[120]

In any event, Marty's trial counsel plainly believed that calling family members was a good strategy because he promised to do as much in his opening statement. He simply failed to follow through. Thus, trial counsel's failure to investigate and call to the stand Marty's numerous family members constituted deficient performance. *See Strickland*, 466 U.S. at 688.

B. Counsel's Deficient Performance Was Prejudicial and Was Compounded By His Failure to Deliver on His Promise to the Jury that He Would Call Marty's Family to the Stand

Trial counsel's error was compounded by the fact that he promised the jury in opening statements that he would call Marty's family members, but then dramatically failed to deliver on this promise. This failure left the jury with the damning impression that Marty's family members had changed their minds and now believed that he was guilty. Indeed, given counsel's promise, why else would his family not have testified?

Courts have recognized that a counsel's failure to follow through on such a promise can be highly prejudicial and can constitute deficient performance in its own right. "[L]ittle is more damaging than to fail to produce important evidence

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[120] *See also People v. Simmons*, 110 A.D.2d 666, 666-667, 487 N.Y.S.2d 396, 397-398 (3d Dep't 1985) (failure to interview available witnesses, *inter alia*, ineffective); *People v. Jones*, 65 A.D.2d 802, 802, 410 N.Y.S.2d 304, 304 (2d Dep't 1978) (failure to interview and call two exculpatory witnesses deprived defendant of meaningful assistance of counsel).

that has been promised in an opening." *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988) (finding ineffectiveness based on defense counsel's unkept promise made in the opening statement to call two witnesses);[121] *see also Ouber v. Guarino*, 293 F.3d 19, 27-28 (1st Cir. 2002) (same based on failure to call one promised witness). For "if counsel fails to deliver on a promise that [a witness] will testify, a danger arises that the jury may presume that the [witness] is unwilling to testify under the pressure of cross-examination under oath or that the defense is otherwise flawed." *Commonwealth v. Duran*, 755 N.E.2d 260, 271 (Mass 2001).[122]

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[121] As the *Anderson* court stated:

> [W]e might have no quarrel with counsel's decision to call, or not to call, [the witnesses] as a strategic decision, had that matter stood alone . . . but counsel's choice was not made in that parameter. The choice was made in the posture of the jurors having heard, only the day before, that [the witnesses would testify] ... and now they would not do so—surely a speaking silence. We cannot accept the approach that we should consider each matter separately—weighing counsel's choice on the [witnesses] as if there had been no opening. There was thrown into the scales the heavy inference the jurors would draw from the non-appearance of the [witnesses]. In those circumstances it was a very bad decision, or, if it was still wise because of the collateral evidence, it was inexcusable to have given the matter so little thought at the outset as to have made the opening promises.

858 F.2d at 18.

[122] *See also Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (finding ineffectiveness and noting that "[w]hen counsel failed to produce the witnesses to support [the defendant's] version, the jury likely concluded that counsel could not live up the claims made in the opening"); *People v. Shawn Brown*, N.Y.L.J., August 21, 1998, at 21 (Sup. Ct., Queens Co. 1998) (finding ineffectiveness based on failure to call a promised witness: "This substantial error by counsel so seriously compromised the defendant's right to a fair trial, that it qualifies as ineffective representation and mandates the vacatur of the judgment of conviction."). Indeed, it is well established that "[d]efense counsel should not allude to any evidence [during opening statement] unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence." *ABA Standards for Criminal Justice* §§ 4–7.4 (Opening Statement).

The prejudice to Marty's case was not limited to his own counsel's failure to deliver on promises made in his opening statement: The prosecutor predictably exploited these unfulfilled promises to devastating effect. The prosecutor argued as follows in his closing:

- "The defendant and the defense in the opening statement promised to deliver you certain things. I submit that they have not done that. And you can consider that in light of the fact that they elected to put on the testimony." A.3877.
- "You were promised by the defense in their opening statement that you would hear from family and friends as regards to the loving relationship between the defendant and his parents. Lets take a look at who did testify. With all due respect to the McClure family, their testimony can be summed up in four words, ten days in July, ten days in July, ten days in July...." A.3877-3878.
- "Where was the testimony from the family that lives here?" A.3879.
- "Where were the family members that saw and talked to the defendant that day? Where were Uncle Norm and Aunt Ruth?" A.3879.
- "Where was the favorite Aunt Marcella from Nassau County? Where were Ron and Carol and their children, Carol and Suzanne with whom the defendant now lives?" A.3879-3880.
- "Where were these folks who had regular contact with the Tankleffs and with the defendant? Why did we have to sing three verses of ten days in July? Maybe all was not so well." A.3880.

Significantly, the very relatives whose absence sounded so damning in the prosecutor's closing have all submitted affidavits indicating that they were ready and willing to testify on Marty's behalf.[123]

As their affidavits reveal, these witnesses would have given powerful testimony about Marty's character and family life. For example, Marcella Falbee, Arlene's sister, stayed at the Tankleff house in July and August of 1988, just weeks before the murders, so her observations about Marty's relationship with his parents would have been highly relevant. She would have testified that "Marty had an excellent and normal teenage relationship with his mother and father," which was filled with "a lot of love, laughs and happiness." A.74. She "never observed Marty act in a violent manner toward any other person" and "there was no way that he could have committed the crimes he was charged with." A.74. Similarly, Norman Tankleff, Seymour's brother, spent substantial time with Marty and his parents in 1988. He would have testified that Marty and his parents "had a good healthy and loving relationship," and that "there was never any signs of discord or hatred between Martin and his parents. Everyone got along quite well in a loving and caring manner." A.64.

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[123] *See* Affidavits of Norman Tankleff ("Uncle Norm") (A.63, 67), Ruth Tankleff ("Aunt Ruth") (A.69), Marcella Alt Falbee ("favorite Aunt Marcella") (A.73, 79), Ronald Falbee ("Ron") (A.96, 102), Carol Falbee ("Carol," Ron's wife) (A.104); Carolyn Falbee ("Carol") (A.110), and Susanne Falbee ("Susan") (A.106).

Marty's maternal grandfather, Harold M. Alt, would have testified that "there was no way that [Marty] could have committed the crimes," and that during the month he spent with the Tankleffs in 1988, "absolutely nothing stood out that would indicate that Marty and his parents had any type of anger or animosity towards each other." A.60. Autumn Tankleff-Asness, Marty's first cousin, would have told the jury that Marty and his parents "had a good healthy and loving relationship," and she would have recounted her memory of a time in 1988 "when Marty was sitting in our living room [and] his mothers' arm was around him. During this time, Marty spoke about his concern for his father and his need to take medication." A.87.

Finally, to take yet another example, Larry Kadan, Marty's cousin, would have given probative testimony about the time he spent with Marty and his parents on September 6, 1988—the very day before the murders. Larry went to the Tankleff house at 10:30 a.m. that day to help fix a leak in the Tankleff's pond. He stayed for two to two-and-a-half hours, and, during that time, he went with Marty and Seymour to the store to buy supplies, and Marty helped him with the repairs. Larry then had lunch with Marty and his parents. Larry would have testified that during his visit everyone was "completely normal," and that he did not sense "any tension whatsoever in Marty's relationship with his parents." A.115.

A dozen family members would have testified in this manner, and there is no doubt that the jury would have been keenly interested in what they had to say. When a person, particularly a juvenile, is accused of such horrible crimes, there is a natural desire to speculate about his motive. The prosecutor contrived a motive for the murders out of the flimsiest of evidence, and he played on defense counsel's failure to call Marty's family members to great effect. But, as shown above, Marty's counsel could have easily presented family member after family member who would have unequivocally dispelled this pernicious innuendo and testified passionately to Marty's lack of motive. Far from a troubled teenager, these family members would have testified that Marty was a warm, caring son, who took walks with his mother and enjoyed talking business with his father. *See, e.g.*, A.80-81 (Affidavit of Marcela Alt Falbee). He was a non-violent person who dearly loved his family. Such testimony, from the close relatives of the deceased, would have been impossible for the jury to ignore.

Marty's lack of motive was an important, if not central, part of his defense, but his trial counsel virtually abandoned him in this area. As a result, Marty did not receive the "meaningful representation" he was constitutionally due. *Benevento*, 91 N.Y.2d at 713, 697 N.E.2d at 587; *see also People v. Hobot*, 84 N.Y.2d 1021, 1022 (1995) (noting that "a single, substantial error by counsel" may warrant relief). Given the weaknesses in the prosecution's case, and the closeness

of the verdict, there is certainly a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 690.

CONCLUSION

"[T]he greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system." *People v. Ramos*, 201 A.D.2d 78, 89-90, 614 N.Y.S.2d 977, 984 (1st Dep't 1994). We could not possibly have penned more applicable words for this case.

"Unjust" is the proper term for convictions premised almost exclusively on a deception-induced "confession" that matches none of the physical evidence in the case and that three leading experts now agree was false.

"Scandalous" is the right characterization for convictions maintained in the face of repeated admissions by a violent career criminal that he committed these murders and in the face of multiple interlocking statements made by many third-parties corroborating the credibility of those admissions.

"Unfavorable" is a euphemistic description for convictions rooted in lies told by the lead detective and a wholesale failure by the police operating under his direction to investigate the most logical suspect behind the murders.

If "our [criminal justice] procedure has always been haunted by the ghost of the innocent man convicted," *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (Learned Hand, J.), that ghost is Marty Tankleff.

Twenty-six witnesses, and counting, have now come forward from all walks of life to add pieces to the factual puzzle of who murdered Seymour and Arlene Tankleff. Three recognized experts in the field of police interrogations and false confessions have offered unrebutted testimony that Marty's "confession" was false, while a violent career criminal—Joey "Guns" Creedon—has repeatedly admitted to others that he—not Marty—committed the murders. Friends, associates, and family members of Creedon have given interlocking snippets of evidence fleshing out the details of how Jerry Steuerman hired Creedon to murder the Tankleffs. This testimony is corroborated by the admissions of Creedon's accomplice in the murders, Peter Kent, as well as by the sworn affidavit of Creedon's getaway driver that night, Glenn Harris. New evidence has also been introduced revealing Steuerman's own admission to his involvement in killing two people. Finally, Marty's family members have sworn out affidavits in great number to undercut the prosecution's alleged "motive" for him to murder the parents he loved, while a polygraph expert at the Department of Defense Polygraph Institute has reported that Marty is telling the truth when he denies any

involvement in those murders. Yet the County Court did not appear to "hear" what these witnesses were saying.

Meanwhile, the United States Court of Appeals for the Second Circuit has concluded that Marty was interrogated by Suffolk County detectives in violation of his *Miranda* rights and has opined that New York law would plainly require the suppression of his "confession" in such circumstances. Moreover, the Supreme Court's recent decision in *Missouri v. Seibert* now makes clear that Marty is entitled to a *federal* remedy for the *Miranda* violation the Second Circuit rightly identified. Yet the County Court did not even bother to address these key legal issues, nor did it mention Marty's meritorious constitutional claims regarding police perjury and ineffective assistance of counsel.

On the one hand, it is truly astounding that so many factual and legal developments have lined up in Marty's favor sixteen years after his convictions. On the other hand, it is completely understandable that such developments have taken place, and continue to take place, because Marty Tankleff is innocent of his parents' murders. It is an outrage that these developments were effectively ignored by the County Court below. Given the persuasive evidence from multiple sources implicating Steuerman, Creedon, and Kent in the murders, and given the utter lack of credible evidence connecting Marty, this Court should hold that there is clear and convincing evidence that a reasonable jury would find a reasonable doubt as to

Marty's guilt. At the very least, the new evidence entitles Marty to a new trial, at which a new jury fully informed of all of the material facts could pass on Marty's guilt or innocence.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f), counsel for Defendant-Appellant certifies that this brief complies with the applicable rules, except with respect to the word limit, as to which the Clerk of the Court, by letter dated December 19, 2006, granted permission pursuant to 22 NYCRR § 670.10.3(e) to file an oversized brief of 46,817 words. This brief has been prepared using Microsoft Word in a proportionally spaced typeface.

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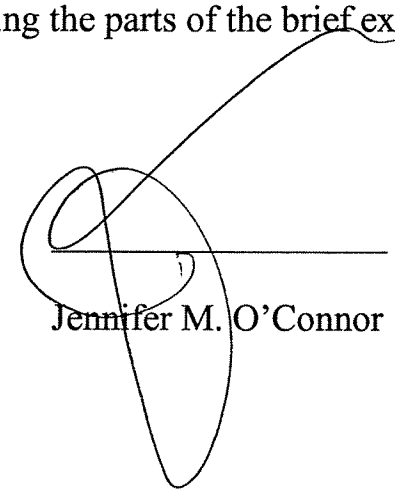

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CERTIFICATE OF SERVICE

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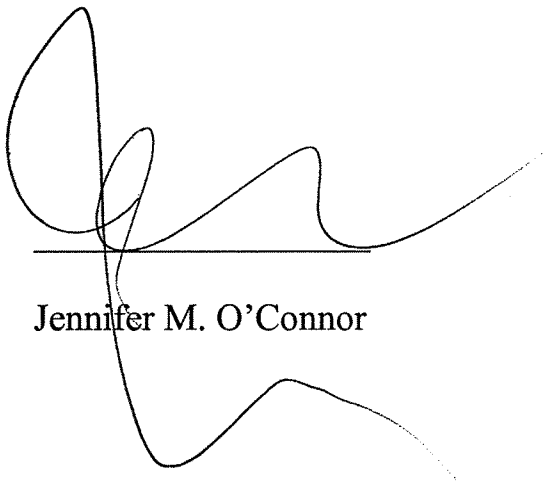

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