COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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THE PEOPLE OF THE STATE OF NEW YORK, **Indictment Nos. 1290/88 & 1535-88**

Respondent,

- against -

MARTIN H. TANKLEFF,

Defendant.

--X

THE PEOPLE'S MEMORANDUM IN OPPOSITION TO MARTIN TANKLEFF'S AUGUST 2005 C.P.L. § 440 MOTION TO VACATE HIS MURDER CONVICTIONS

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ISSUES PRESENTED

By notice of motion dated August 3, 2005, the defendant Martin H. Tankleff moves to vacate his murder convictions. The motion presents the Court with four issues. The first is whether the Court should treat the motion as a new 440 motion or as part of Tankleff's pending 440 motion. The second is whether the Court should hold the motion in abeyance until after the Court renders a decision on Tankleff's pending motion. The third is whether Tankleff has exercised due diligence in presenting what he contends is newly discovered, admissible evidence of his innocence. The fourth is whether Tankleff is entitled to a hearing.

THE CASE

The history of this case is set forth in the People's opposition memorandum of June 14, 2005. At the trial, Tankleff, his friends and his family members testified that he and his parents had a loving relationship and that he had no motive to kill them. But other witnesses testified that he had spoken of killing his parents weeks before the murders and that he had an ugly argument with Seymour hours before the murders, that he had walked away from Donald Hines when Hines stated that Seymour might regain consciousness and identify the assailant, that he had walked away from John McNamara when McNamara questioned why Tankleff had no blood on him, and that he had confessed to Detectives Norman Rein and James McCready. The jury also considered the physical evidence, such as the blood on Tankleff's shoulder and Seymour's barbell-caused skull fractures, which contradicted Tankleff's testimony and confirmed his guilt. (*See* The People's Post-Hearing Mem. of 6/14/05 at 9, 238).

At the trial, Tankleff contended that Jerry Steuerman had committed the murders. In the years following Tankleff's conviction, Tankleff adjusted his theory based on hearsay statements from others. In 1994, Tankleff contended that Joseph Creedon and "a Steuerman," not necessarily Jerry Steuerman, had committed the murders. In 1997, Tankleff contended that "a Hell's Angels friend of [Jerry Steuerman]" had committed the murders. On October 2, 2003, Tankleff

filed his fifth 440 motion, and in that motion he contended that Jerry Steuerman, through his son Todd, had met Creedon, that Glenn Harris had driven Creedon and Peter Kent to the Tankleff house and that Creedon and Kent had committed the murders. Beginning on July 19, 2004, the Court conducted a hearing on Tankleff's motion, and before the hearing ended Tankleff contended that Jerry Steuerman had asked Brian Glass to commit the murders but that Glass had "passed the hit" to Creedon. (*See id.* at 18-23, 26, 29, 71-76, 92-93, 95, 113 n.56, 143-46, 148-49; Def.'s Reply Mem. of 4/16/04 at 11).

The hearing concluded on February 4, 2005. Tankleff submitted a post-hearing brief on March 21, 2005, the People responded on June 14, 2005, and Tankleff replied on August 29, 2005. The Court's decision on the motion is pending.

Before Tankleff submitted his reply brief, he filed a notice of motion, dated August 3, 2005, requesting that the Court vacate his convictions and order that he be "produc[ed] at any hearing to be conducted for the purpose of determining this motion." (Def.'s Notice of Motion of 8/3/05 ¶¶ 1-2). Tankleff supported his motion with an affirmation from local counsel Bruce Barket, and Barket supported his affirmation with an affidavit from Joseph Guarascio, the son of Joseph Creedon. (Barket Aff. of 8/3/05 & Ex. A) (Guarascio Aff. of 7/28/05)).

In his affidavit, Guarascio stated the following:

1. . . . During a visit to New York in April of 2004 my father told me that [he] killed Marty Tankleff's parents.

2. In early April of 2004, I had seen a television program about the Tankleff case that said that my father might be involved . . . .

3. My Aunt Mimi (my uncle John Guarascio's wife) died on April 12, 2004. At the time I was living in Florida with my Mom, Terry Covais, my little sister Crystal and my step dad Leonard Covais. . . . [M]e, my mom and my sister went to New York for the funeral.

4. During the trip I made plans to see my father who lives in New York. I had just met my father a few weeks before when he had come to Florida. . . .

5. That first day with my father in New York was a good time. . . . We ended up staying at my aunt Maryann's house that night. . . .

6. The next day, my father and I went out to get bagels . . . . [A]fter breakfast my dad suggested that he and I go to see his mother, my grandmother . . . .

7. At my Grandmother's house . . . my dad took me to . . . his room. In his room he showed me a large safe. . . . My father opened the safe and showed me a whole bunch of jewelry that was still in a display case. There was also money stacked about 4-6 inches high all along the bottom of the safe. . . . At first I was impressed by his money, his cars and his Harley motorcycle.

. . .

9. [I]n the same room he . . . showed me a gun which I thought was a 357 pistol, some hand cuffs and leg shackles. He told me that this was for Glenn Harris if Harris testified. He also showed me 3 or 4 other guns which he had hidden under his mattress. . . .

10. After we left my grandmother's house we stopped by a drug store by an old school in Seldon [sic]. We then went back to my Aunt's house. I asked my father if he was worried about the Tankleff case. . . . My father said . . . that if he was worried, he would not stay here.

11. The next day my dad and I were driving around and I asked him, "Did you really do that?" We both knew that I meant the Tankleff murders. He said "Yeah, I did it." . . . He said that it was him, Peter Kent and Glenn Harris. He told me that Harris knew that they were going to kill people. According to my father, Joseph Creedon, he and Peter Kent waited outside of the house until Jerry Steuerman gave them a signal. My father told me that [he] brought a cable from a bicycle brake line with him that he had stripped of the black plastic cover. He told me that he used the cable to choke him,[1] which I understood to be Mr. Tankleff. He also told me that they (he did not say who) hit Mr. Tankleff with a snub nose .38 special. He told me that it was Kent who stabbed the "lady," which I understood to be Mrs. Tankleff. According to my father Kent stabbed "her" by or in the bed. He then told me that he had to go back into the house after they left because they had forgotten something. He also said that at some point he went up some steps and looked into Marty's room and saw he was asleep.

12. My father told me that after they left Harris threw a pipe that they had used out of the car. My father said they then went back to the home or house of a guy named "Ronnie Reefer" and burned their clothes in his basement. My dad said that the basement is the same place where he tortured people. I remember him telling me that he burned someone with a lighter and that he never heard anyone scream so loud.

13. When my father told me that he had killed the Tankleffs, I just didn't know what to do because I was so scared and shocked. I didn't tell anyone about this because I was afraid of my father and what he might do to my mother. After many months of holding this inside, [i]n February of 2005, my mom found me crying in bed one night and asked me what was wrong. At that point I told my mother everything and it felt very good to

[1] There is no evidence that Seymour suffered petechiae or other symptoms of strangulation.

> get it off my chest. The next day, my mom called the investigator working for Marty Tankleff. Several days later investigator Jay Salpeter came down to Florida, spoke with me, and I told him the same things that I told my mother. The day after that, I met with the attorneys for Marty Tankleff and they asked me to tell them what happened, which I did. They told me they would be in touch with me in the future to give a signed statement.

(Guarascio Aff. ¶¶ 2-7, 9-13).

On August 22, 2005, two investigators from the Suffolk County District Attorney's Office interviewed Guarascio. According to one of the investigators, Walter Warkenthien, Guarascio stated, "Jay Salpeter said I should not talk to you and to call him when you showed up." But Warkenthien told Guarascio that

> if Judge Braslow opens Marty Tankleff's hearing, he (Guarascio) would have to come to New York, take the witness stand and testify about the information that he had given in his affidavit to Mr. Barket. Mr. Guarascio, who until then was composed, became excited and stated that he did not have to testify and that he's not coming to New York. I asked him if Mr. Barket and Jay Salpeter had told him that he would have to testify in court about his affidavit. Mr. Guarascio said that no one told him that he would have to testify, that he doesn't do anything that he doesn't want to do and that he's not going to New York to testify. He repeated, without interruption, that no one can make him do anything that he doesn't want to do, and he was rambling that he wasn't testifying. He became very upset, almost out of control, in that he was shaking, looking about with quick movements and was on the verge of crying.

(*See* Ex. A) (Warkenthien Aff. of 9/7/05 ¶ 3)). According to Warkenthien, a few minutes later, Guarascio also stated,

> "You have to understand the predicament I'm in." I asked him what the predicament was, and he again said that he couldn't talk to us. I asked him what took him so long to give Mr. Barket an affidavit if he (Guarascio) had obtained the information in April of last year. He answered, "I don't know."

(*Id.* ¶ 4).

ARGUMENT

POINT ONE

TANKLEFF HAS FILED A NEW 440 MOTION

Tankleff has filed a notice of motion in which he asks the Court for an order vacating his convictions and, pursuant to C.P.L. § 440.30(5), for an order producing him "at any hearing to be conducted for the purpose of determining this motion." (Def.'s Notice of Motion of 8/3/05 ¶¶ 1-2). The notice of motion reads as a new motion, not as a motion to re-open the 440 hearing concluded earlier this year.

Similarly, in the first portion of the "wherefore" paragraph of his affirmation, Mr. Barket asks the court to "grant the relief requested," which, as stated above, is an order vacating the convictions and an order producing Tankleff "at *any* hearing to be conducted for the purpose of determining *this* motion." So Barket once again treats "this" motion and "any" hearing to be held pursuant thereto as a new motion. (Barket Aff. of 8/3/05 at 3) (emphasis added).

In the second portion of his "wherefore" paragraph, however, Mr. Barket confuses matters because he asks the Court, "in the alternative, [to] reopen the *pending* hearing to examine the testimony of Joseph Guarascio prior to making a determination on *this* motion." (*Id.*) (emphasis added). But there is no hearing "pending." The hearing conducted pursuant to Tankleff's prior 440 motion ended

on February 4, 2005,[2] and Tankleff has not requested that the Court reopen that hearing prior to making a determination on *that* motion. Thus, Tankleff's current motion is a new 440 motion.

2 In his memorandum of law, Tankleff acknowledges that his motion comes "more than a year after the hearing began and some six months after it closed." (See Def.'s Mem. of 8/3/05 at 20).

POINT TWO

THE COURT SHOULD HOLD TANKLEFF'S MOTION IN ABEYANCE

In the interest of judicial economy, the Court should hold Tankleff's new motion in abeyance until after the Court issues its decision on Tankleff's prior 440 motion. The Court's decision on Tankleff's prior 440 motion is pending. If the Court grants Tankleff's prior motion, Tankleff's new 440 motion will be superfluous. If the Court denies the motion, Tankleff will likely move, as he has done before, for reargument. (*See* Def.'s Renewed Motion to Disqualify of 3/21/05). If the Court grants reargument, and if Tankleff prevails on reargument, Tankleff's new motion will again be superfluous. And even if Tankleff loses on reargument, he will likely use portions of the Court's decision to modify his new motion. The Court should not consider a 440 motion that either will become moot or will be modified. *Cf. People v. Robles,* 194 A.D.2d 750, 752 (2d Dep't 1993) (noting that Supreme Court held defendant's 440 motion in abeyance until the Court of Appeals, in an unrelated case, had decided a *Rosario* issue relevant to the motion).

POINT THREE

TANKLEFF HAS FAILED TO EXERCISE DUE DILIGENCE

According to Mr. Barket, "During [Guarascio's] meeting with the attorneys" in February 2005, "Guarascio *expressed apprehension* about signing a sworn statement," and "counsel did not procure a sworn statement" until "[f]ive months later" when Guarascio stated that he was willing to make a sworn statement." (Barket Aff. ¶¶ 5-9) (emphasis added). In other words, according to Mr. Barket, Guarascio did not *decline* to give a statement, but merely "expressed apprehension" about giving one.

Guarascio's affidavit, however, is devoid of any evidence that he had expressed apprehension. Guarascio wrote:

> After many months of holding this inside, [i]n February of 2005 . . . I told my mother everything *and it felt very good to get it off my chest*. The next day, my mom called the investigator working for Marty Tankleff. Several days later investigator Jay Salpeter came down to Florida, spoke with me, and I told him the same things that I told my mother. The day after that, I met with the attorneys for Marty Tankleff and they asked me to tell them what happened, which I did. *They told me they would be in touch with me in the future to give a signed statement.*

(Guarascio Aff. ¶ 13) (emphasis added). Thus, according to Guarascio, "it felt very good" when he divulged the information, and the reason that he did not provide a statement in February 2005 was because the attorneys did not ask him

for one. (*See also* Warkenthien Aff. ¶ 4) (Warkenthien stating that in response to his question "what took [Guarascio] so long to give Mr. Barket an affidavit," "[Guarascio] answered, 'I don't know'").

Moreover, the question whether a witness such as Guarascio is willing to provide a statement differs from the question whether such a person can be produced to testify. Tankleff asks this Court to conduct a hearing "to examine the testimony of Joseph Guarascio," (Barket Aff. at 3), but he has not shown or even alleged that Guarascio's "apprehension" prevented Tankleff from securing Guarascio's appearance as a witness in February 2005. He would have difficulty doing so given that, in July 2004, he secured the testimony of Guarascio's mother, Theresa Covais, pursuant to a Florida-enforced New York subpoena. (*See* The People's Post-Hearing Mem. at 109); *see also McGrath v. New York,* 258 So.2d 291, 292-93 (Fla. Dist. Ct. App. 1972) (per curiam) (compelling Florida resident to testify at a grand jury proceeding in New York); *Epstein v. New York,* 157 So.2d 705, 706, 708 (Fla. Dist. Ct. App. 1963) (per curiam) (same).

Because it appears that Tankleff could have secured Guarascio's appearance in February 2005, the next question is whether Tankleff could have secured Guarascio's appearance, or notified the Court that he was attempting to secure Guarascio's appearance, on or before February 4, 2004, the last day of the

hearing.[3] If the answer to this question is yes, the Court should deny Tankleff's new motion on procedural grounds. (*See* The People's Post-Hearing Mem. at 70-71) (Judge Tisch denying Tankleff's second 440 motion on the ground that Article 440 "incorporates a provision which is 'aimed at discouraging motion proliferation and dilatory tactics'" and that Tankleff could have, and should have, raised his contentions in his first Section 440 motion (quoting C.P.L. § 440.10 practice commentaries)).

Attorneys like dates, and when attorneys know exact dates and know that the dates are material, they include the dates in their arguments. Tankleff's attorneys knew that the prior 440 hearing ended on February 4, 2005. They knew that the date that they learned of Guarascio's information was material. Yet in their motion papers they state only that they learned of Guarascio's information in "February 2005." (*See* Barket Aff. § 4) (Barket stating that he "learned of . . . Guarascio's" information "in February 2005"); (*id.* § 5) (Barket stating that Salpeter traveled to Florida and interviewed Guarascio "[i]n February 2005"); (*id.* § 7) (Barket stating that "[a]lso in February 2005 . . . Guarascio met with attorneys representing Martin Tankleff"); (Guarascio Aff. § 13) (Guarascio stating that he divulged the information to his mother "[i]n February 2005").

[3] Because at the hearing the Court permitted the parties to introduce hearsay, and because Salpeter had testified to what Glenn Harris and others had told him, Salpeter could have testified about his conversation with Guarascio even if Tankleff's attorneys were having difficulty in securing Guarascio's appearance. (*See, e.g.,* The People's Post-Hearing Mem. at 102-03).

Tankleff's reference to "February 2005" is not an oversight. The People submit that Theresa Covais contacted Salpeter before, on or immediately after February 4, 2005. Given the ease with which the People and Tankleff had obtained adjournments of the hearing dates, Tankleff's attorneys should have notified the Court of Guarascio's information when the attorneys learned of it.

Finally, although Tankleff contends that he did not learn of "the existence of Joseph Guarascio, in the context of his having information regarding Martin Tankleff's case, . . . until . . . February 2005," (Def.'s Mem. of 8/3/05 at 15), Tankleff knew, from the hearing testimony of Covais and Maryann Testa, that Creedon had spent time with Guarascio and Covais in April 2004. (*See* the People's Post-Hearing Mem. at 109-12). Tankleff's failure to interview Guarascio, especially in light of Covais's testimony that Creedon had recently admitted to her his involvement in criminal activity ("collecting"), demonstrates Tankleff's lack of due diligence.

POINT FOUR

TANKLEFF IS NOT ENTITLED TO A HEARING

A. Guarascio's Testimony Would be Inadmissible

Guarascio claims that, in his conversations with Creedon, Creedon admitted to having committed the Tankleff murders. But Tankleff does not even contend that the testimony that he would like to elicit from Guarascio would be admissible at trial.

Tankleff's prior motion was based in large part on the affidavit and hearing testimony of Karlene Kovacs, who claimed that, in a conversation with Creedon, Creedon admitted to having committed the Tankleff murders. In the People's post-hearing brief, the People pointed out that Creedon's alleged statements to Kovacs were hearsay and would be inadmissible under the due-process "exception" the Supreme Court discussed in *Chambers v. Mississippi,* 410 U.S. 284 (1973). (*See* The People's Post-Hearing Mem. at 185-86). The People consider Tankleff's failure to address the admissibility of Guarascio's testimony to be an oversight and will assume that, had Tankleff considered the admissibility question, he would have relied, as he did in his prior motion, on *Chambers*.

In *Chambers,* the defendant Leon Chambers was on trial for shooting and killing a policeman with a .22-caliber revolver during a melee in June 1969. Five months later, Gable McDonald, a man who was present during the melee, told

three friends and then Chambers' attorneys that he had shot and killed the policeman. McDonald provided the attorneys with a written confession, which the attorneys turned over to the police. But one month later, McDonald repudiated his confession. At Chambers' trial, although the trial court permitted Chambers' attorneys to call McDonald as a witness and to introduce his confession into evidence, under Mississippi's rules of evidence the court prevented Chambers' attorneys from treating McDonald as a hostile witness and from calling as witnesses the friends to whom McDonald had confessed. The Mississippi courts ruled that McDonald's statements were hearsay and that, because Mississippi lacked a hearsay exception for declarations against penal interest, the courts could not admit the statements under that exception. The Supreme Court held that Mississippi had denied Chambers "a trial in accord with traditional and fundamental standards of due process." *Chambers,* 410 U.S. at 285-94, 298-99, 302; (*see* the People's Post-Hearing Mem. at 186-87). The Supreme Court explained:

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case – McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional

> corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest. McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution.

Chambers, 410 U.S. at 300-01; (*see* the People's Post-Hearing Mem. at 187-88) .

As the People pointed out in their post-hearing memorandum, whereas the excluded testimony in *Chambers* "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest," the testimony that Tankleff elicited from Kovacs was untrustworthy. In *Chambers,* "each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred." In Tankleff, Creedon's alleged statement to Kovacs, though made spontaneously, was made to a person Creedon barely knew and who no longer liked him and who remained silent until six years after the murders. (*See* The People's Post-Hearing Mem. at 188 & n.96). Similarly, Creedon's alleged statements to Guarascio, though made spontaneously, were made nearly sixteen years after the murders to a son that Creedon had not seen in nine years, a son who "was beginning to see that the [bad] things that [he] had heard about [Creedon] were true," a son whose

mother hated Creedon.[4] (*See* Guarascio Aff. §§ 4, 9; The People's Post-Hearing Mem. at 211).

Moreover, unlike in *Chambers,* where each statement "was corroborated by some other evidence in the case – McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon," Guarascio's statement that Creedon committed the murders with the assistance of Kent and Harris is inconsistent with Kovacs's testimony that Creedon implicated only himself and "a Steuerman," Demps's testimony that Todd Steuerman implicated only Jerry Steuerman and an unidentified member of the Hells Angels, Neil Fischer's testimony that Steuerman had killed two other people and Harris's affidavit, in which Harris claimed that he was an unknowing participant in the murders and that Kent burned Kent's clothes near Kent's house. (*See* The People's Post-Hearing Mem. at 92-93, 188-89). As for Tankleff's contention that Guarascio's statement is "corroborated by the evidence at trial," the People address that contention in the next section.

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[4] Tankleff contends that Guarascio has "no motive to lie." (*See* Def.'s Mem. at 19). Guarascio's affidavit and Covais's hearing testimony show otherwise.

B. "Coincidences" and Tankleff's Evolving Theory

As the People set forth earlier in this brief, the testimonial and physical evidence adduced at Tankleff's 1990 trial demonstrated that Tankleff, not Steuerman, had killed Seymour and Arlene Tankleff. (*See supra* p. 2). But beginning in 1994, Tankleff began adjusting his theory of Steuerman's alleged involvement. (*See supra* pp. 2-3). And what is troubling about Tankleff's evolving theory is the number of "coincidences" and the incentives that he has given to witnesses. In 1994, only days after Judge Tisch denied Tankleff's second 440 motion, Karlene Kovacs, who did not like Creedon or Steuerman, was telling Tankleff investigator William Navarra that, "[a]fter the Tankleff murders on a subsequent Easter Sunday," Creedon had told her, "in essence, that he was involved in the Tankleff murders in some way" "with a Steuerman." (*See* The People's Post-Hearing Mem. at 208-09). In 1997, only two weeks after a federal judge determined that the People's alleged *Brady* violation for failing to disclose Steuerman's connection to the Hells Angels was a "close call," Tankleff fellow-inmate Bruce Demps submitted an affidavit in which he claimed that he had learned that Steuerman had hired the Hells Angels to kill the Tankleffs. (*See id.* at 213). In December 2001, less than two months after Glenn Harris joined Tankleff at the Clinton Correctional Facility, Tankleff asked Covais to put her trust in

Salpeter, and in March 2002 Harris told Salpeter that Creedon and Kent had committed the Tankleff murders. (*See id.* at 216-17).

But Harris lacked any knowledge how the Tankleff murders occurred, so Harris wrote letters to Tankleff and Salpeter requesting information, and Salpeter furnished Harris with "articles" and with details of the crime. But Tankleff made sure that Harris's August 2003 affidavit, which implicated Kent and claimed that Kent had burned his clothes near his house in Selden, omitted reference to Harris having told Salpeter that Kent probably had an alibi and that Kent was living in Center Moriches. Harris's affidavit also omitted reference to Harris's "I lied" letter, in which Harris stated that he had "fabricated, concocted the whole fuckin' story!" (*See id.* at 220, 224).

At the hearing, Harris declined to testify, and most of Tankleff's witnesses lacked credibility, either because they lied[5] or because their memories had been influenced by the high-profile nature of this case and the passage of time. (*See id.* at 236-37). So Tankleff sought to rehabilitate his witnesses and his theory with "new" evidence. For instance, in November 2003, in a recorded conversation, Harris admitted for the first time that Kent was carrying a pipe, and in June 2004 Salpeter found a pipe. (*See id.* at 101 n.49, 105-06). After Brian Glass testified

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[5] The witnesses who lied included Joseph Graydon, who had a drug and gambling addiction, and William Ram, who received $4,000 and other incentives from the Tankleff defense. (*See* The People's Post-Hearing Mem. at 229-30, 233-34).

that he had originally offered to help Tankleff only because the Tankleff defense had promised him a lawyer at no charge, Tankleff fellow-inmate Mark Callahan surfaced to claim that the district attorney's office had pressured Glass into withdrawing his offer to help Tankleff. (*See id.* at 144-49).

But the biggest problem that Tankleff faced was that, with few exceptions, his "new evidence" consisted of hearsay statements from persons who disliked Creedon, who lacked credibility and whose statements were unsupported by the physical evidence. One such credibility-lacking witness was Theresa Covais. At the hearing, Covais testified that Creedon was cruel to her, that he hit her over little things and that she saw him beat up many people. She testified that Creedon admitted that he had set someone's face on fire and that he would do the same to her if she ever told anyone. She also testified that Creedon had guns and that the first time that she had seen Creedon since they separated in 1995 was in April 2004, when Covais came to New York for a funeral. (*See id.* at 103, 109-10).

But the People confronted Covais with a prior recorded, inconsistent statement in which she stated that *if* Creedon had done collecting and *if* he had administered beatings, then it had occurred before they met and was all "hearsay." Covais's prior inconsistent statement showed that she testified falsely about Creedon's violent past, and the testimony of Maryann Testa demonstrated that Covais lied when she stated that the first contact that she had had with Creedon

since moving to Florida in 1995 was in April 2004. Testa produced pictures, taken in Florida prior to April 2004, depicting Creedon, Joseph and Crystal Guarascio, and a smiling Covais. (*See id.* at 110-11 & n.54, 210-11).

Tankleff's answer to the Covais disaster is the affidavit of her son, Joseph Guarascio. The affidavit is an attempt to resurrect Covais's credibility and to provide information corroborated by the physical evidence.

Guarascio's paragraph 7 claim that, at his grandmother's house, his father showed him a safe stacked with money is derived from Covais's claim that Creedon was still doing "some collecting." Guarascio's claim that at first he was impressed by his father's "Harley" is Tankleff's attempt to show that Creedon was "the biker" that Bruce Demps assumed to be the member of the Hells Angels who had killed the Tankleffs. Guarascio's paragraph 9 claim that his father showed him guns, handcuffs and leg shackles is an attempt to support Covais's claim that Creedon had guns and had tortured people. (*See* The People's Post-Hearing Mem. at 109). And Guarascio's paragraph 10 claim that if his father were worried, "he would not stay here," is an attempt to bolster Kovacs's testimony that, after the Tankleff murders, Creedon had to move out of town. (*See* The People's Post-Hearing Mem. at 113).

Guarascio's paragraph 11 claim that, when he asked if his father had killed the Tankleffs his father answered, "Yeah, I did it," is a quote from Detective

Rein's trial testimony. According to Rein, in response to Detective McCready's question whether Tankleff had killed is parents, Tankleff answered, "Yeah, I did it." (*See* The People's Post-Hearing Mem. at 46). Guarascio's claim that, according to his father, "he and Peter Kent waited outside of the house until Jerry Steuerman gave them a signal," is a response to a portion of page 238 of the People's post-hearing brief, which reads that, at the Tankleff house,

> the windows and doors were undamaged, and there was no sign of a break-in. . . .
>
> Moreover, contrary to Tankleff's inference that Steuerman lagged behind the others after the poker game ended, he and [co-player] Cecere were outside the house moments after the game ended. Steuerman did not open a door for Creedon . . . .

(*See* The People's Post-Hearing Mem. at 238). Guarascio's claim that Kent stabbed Arlene "by or in the bed" is Tankleff's attempt to have Guarascio's affidavit match the trial testimony that Arlene was attacked in her bed and that her body was found near the bed. (*See id.* at 19, 57). And Guarascio's claim that his father "went up some steps and looked into Marty's room and saw he was asleep" is an attempt to show that Tankleff slept through the murders and that Creedon could not have known of the steps if he had not been in the house.[6]

[6] Tankleff contends that Creedon entered Tankleff's room and, in "groping" for the light switch, smeared blood on the switch. (*See* Def.'s Mem. at 17). Thus the sound-sleeping Tankleff slept through Arlene's screams in the next room *and* the lights on in his room.

Guarascio's paragraph 12 claim that his father and Kent burned their clothes at "Ronnie Reefer's" house is Tankleff's acknowledgment that Kent could not have burned clothes at Kent's house in Selden when Kent was living in Center Moriches. Guarascio's additional claim that the Reefer basement was the one in which his father tortured people and burned someone with a lighter" is yet another attempt to support his mother's claim that Creedon tortured people and "had set someone's face on fire." (*See* The People's Post-Hearing Mem. at 109).

If the Court determines that, were a jury to hear Guarascio's testimony, Tankleff would still probably not be acquitted, the Court need not conduct a hearing. If the Court does conduct a hearing, the Court should direct Tankleff to produce Guarascio first, because Guarascio may, like Harris, take refuge in the Fifth Amendment or, like Glass, state that he had lied in exchange for some inducement from Tankleff.

CONCLUSION

The People predicted in their post-hearing memorandum that "[i]f the Court denies Tankleff's 440 motion, there will be another 440 motion with affidavits from new "witnesses" who will provide ever-changing, outrageous stories of conspiracy and cover-up." (*See* The People's Mem. at 239). Tankleff's new 440 has come even earlier than the People predicted, and Tankleff has informed the Court that his current 440 motion "[i]n all candor probably will not be the last." (Def.'s Mem. at 20). But a litigation must end sometime, and the Court should consider Tankleff's new motion as a separate motion and hold it in abeyance until after the Court decides Tankleff's prior motion. When the Court does address Tankleff's new motion, the Court should dismiss it on procedural grounds. If the Court orders a hearing, the Court should direct Tankleff to call Guarascio first, because Guarascio may not testify or may testify that he had lied in his affidavit.

Dated: Hauppauge, New York
September 9, 2005

Respectfully submitted,

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APPENDIX