To be argued by:
Leonard Lato
Time requested: 5 Minutes

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

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

MARTIN H. TANKLEFF,

Defendant-Appellant.

----------X

AD Docket No. 2006-5031

Suffolk County Indictment Nos. 1290-88, 1535-88

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

Defendant-Appellant Martin H. Tankleff appeals from an order entered on March 17, 2006, in the County Court of Suffolk County (Stephen L. Braslow, Judge). The order denied Tankleff's CPL 440.30(1-a) motion for DNA testing.

Tankleff sought DNA testing in an attempt to vacate two judgments entered in the same court on October 23, 1990 (Alfred C. Tisch, Judge). The judgments convicted Tankleff, after a jury trial, of the murders of his parents and imposed two consecutive sentences of 25 years to life. This Court issued an order affirming the judgments, the Court of Appeals affirmed this Court's order, and the federal courts denied Tankleff's habeas corpus petition. Tankleff is serving his sentences.

Tankleff contends that this Court must direct the County Court to permit him access to DNA testing even though he received access to DNA testing in 2001. His contention is meritless.

STATEMENT OF FACTS

Introduction

On September 7, 1988, at the Belle Terre house of Arlene, Seymour and Martin Tankleff, police officers discovered the body of Arlene Tankleff, the wounded Seymour Tankleff and the uninjured Martin Tankleff. Martin Tankleff confessed to killing Arlene and injuring Seymour, detectives arrested him, and a grand jury charged him with the intentional murder and depraved-indifference murder of Arlene and the attempted murder and assault of Seymour. On October 6, 1988, Seymour died of his wounds, and a grand jury charged Tankleff with the intentional murder and depraved-indifference murder of Seymour.

Trial Evidence

Events Leading Up to the Murders

Jerry Steuerman owned bagel stores on Long Island. Seymour Tankleff was one of his customers, and in or about 1983 they became friends. In 1985 and 1986, Steuerman was having a house built in Belle Terre, and to help finance the construction he borrowed $350,000 from Seymour. Steuerman testified that, as collateral for the loans, he gave Seymour a fifty-percent interest in two bagel stores and that he repaid the loans in weekly installments. Steuerman testified that he and Seymour also owned racehorses and that, in late 1986, he accepted Seymour's invitation to join "The After Dinner Club," a group whose members played poker

together on Tuesday evening. According to Steuerman, he and Seymour became "very close." (T 884-97, 922-25, 937-70, 984-86, 998, 1011-18, 1216-27).[1]

In July 1988, a business dispute damaged Steuerman's friendship with Seymour. Steuerman opened a bagel store for his son Todd, and Seymour objected that Steuerman had not asked Seymour to be a partner. Seymour wanted half the store, but Steuerman refused. Steuerman testified his friendship with Seymour "was beautiful, and it just disintegrated." (T 894-96, 969, 997-98, 1080-82, 1214).

Tankleff relative Michael McClure also testified about the decline in Steuerman's relationship with Seymour. According to McClure, Seymour complained about the store that Steuerman had established for Todd and Steuerman's repayment of the construction loans. (T 4623-25).[2]

McClure testified that the Tankleffs were a great family. McClure's wife, Marianne, and Martin's friend Mark Perrone, agreed. But problems existed. According to Martin's friend Lance Kirshner, during the summer of 1988, Martin, who had complained that his 1978 Lincoln was "a piece of shit," stated "that if . . . his parents weren't alive . . . he could get anything he wanted." Eleven days before

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[1] Parenthetical cites (i) to "A" refer to pages in Tankleff's Appendix in appeal 2006-3617, (ii) to "DNA A" refer to pages in Tankleff's DNA Appendix, (iii) to "RA" refer to pages in Respondent's Appendix, (iv) to "T" refer to pages in the trial transcript, and (v) to "H" refer to pages in the 440 hearing transcript.

[2] Tankleff testified at his trial. He testified about the approaching due date of a $50,000 promissory note that Steuerman had given Seymour. Tankleff also testified that, a few weeks before the murders, Arlene said that Steuerman had threatened the Tankleff family. (T 4168-69).

the murders, Martin said something similar to his friend Audra Goldschmidt, to her sister Stacy and to Stacy's friend, Danielle Makrides. According to the Goldschmidts and Makrides, Martin said that "[i]f [his] parents were killed," or "if he could have a hit on . . . his parents," then "he could get any car that he wanted." At trial, Tankleff testified that he had told Makrides and the Goldschmidts that if his "parents weren't around, [he] could have any car [that he] wanted." (T 138-41, 163-74, 188-93, 593-97, 4092-96, 4404-05, 4488-89, 4505, 4621-23).

At about 8:30 a.m. on September 6, 1988, house cleaner Marie Vieira arrived at the Tankleff house. Vieira observed that Arlene and Martin were friendly to each other. A short time later, Seymour and Martin brought Martin's Lincoln to Liberty Auto Repair, where Seymour asked Liberty's owner, Peter Cherouvis, to examine the Lincoln's exhaust system. Seymour and Martin left the Lincoln with Cherouvis and went home, where Vieira saw Seymour kidding with Martin. At about 2 p.m., Seymour and Martin returned to Liberty, where Cherouvis told Seymour that repairs would be expensive. According to Cherouvis, Seymour replied, "Leave it be." Cherouvis testified that a "belligerent," "loud and [] mad" Martin responded that he did not "want to drive that piece of shit to school" – it was the eve of Martin's senior year in high school – and that "he wasn't a fucking nigger." (T 171-84, 4372-74, 4634-44, 4662-72).[3]

[3] Tankleff denied that he and Seymour had gone to Liberty. (T 4097-98, 4182-86).

Evening Before the Murders

Martin's friend Zachery Suominen arrived at Tankleff's house at about 4 p.m. Suominen and Martin stopped at Perrone's house and then went with Margaret Barry to a mall. According to Suominen, Barry, Perrone and Perrone's father, Martin was in a good mood. (T 4424-27, 4494-4500, 4560, 4572-82).

September 6th was a Tuesday, a poker day, and the game that night took place at the Tankleff house. Player Joseph Cecere, driving 95-year-old player Al Raskin, arrived first, followed by players Steuerman, Peter Capobianco, Robert Montefusco and Belle Terre's mayor, Vincent Bove. According to the players, the game started in Seymour's office at about 7:30 p.m. and was a game like any other, with no "harsh words." According to Cecere, Bove and Steuerman, although Seymour appeared to be in good spirits, Seymour stated that he wanted to "get out of the area for a while" because he and Arlene were having problems and were "at each other's throats." (T 621-31, 657, 669, 673-82, 693, 719-31, 897-900).

The game was still underway when Tankleff returned home at about 9:30 p.m. According to Tankleff, he ate dinner, showered, wrapped himself in a towel and put a second towel on the pillow on his bed. He testified that, when he was dry, he went to his parents' bedroom and gave his mother a hug and a kiss good night. He testified that he went to his room, closed his door and went to bed. (T 631-32, 658-59, 677-78, 703, 731-32, 899-900, 4101, 4107-11, 4191).

Capobianco left the card game early, but the game continued until about 3 a.m., with Montefusco winning about $2,000. Except for the late hour, the game ended as it had on previous nights. According to Bove, he exited through the kitchen, where he removed a knife from a knife block, cut himself a slice of watermelon, "laid [the knife] perpendicular to the watermelon" and ate the slice on his way out. (T 632-34, 663-64, 677-82, 732-40, 900).

Montefusco and Steuerman left last. According to Montefusco, as he was leaving, Steuerman was speaking with Seymour. Steuerman testified, "I spoke with Seymour for a minute or two . . . about how much he had won or lost." Moments later, Montefusco and Steuerman were outside, as were Cecere and Raskin, in cars preparing to leave. Some cars blocked others, and the players, with one exception, departed in reverse order from which they had arrived. After Montefusco left, only Steuerman, Cecere and Raskin remained. Cecere, who arrived first, expected Steuerman to be next. But Steuerman's car was alongside Cecere's car rather than blocking it, and Steuerman waved to Cecere to go first. Steuerman testified that he was being polite because Cecere had the 95-year-old Raskin in his car. Cecere and Raskin left. Steuerman testified that he followed Cecere out, although Cecere testified that he did not notice Steuerman's car behind him. (T 634-35, 664-65, 683-84, 707-13, 898-901, 1150-51).

Steuerman testified that he "went straight home." He also testified that because he had forgotten his house keys, he rang the doorbell and that his daughter, Bari Steuerman, opened the door. When the doorbell rang, Bari was in bed, and her digital clock read 3:17 or 3:18 a.m. She testified that she opened the door for her father and returned to bed. (T 818-25, 901-02, 1103-04).

Belle Terre had a constabulary, and a constable or a deputy constable patrolled the village at all times. According to Donald Hines, the village's chief constable and Seymour's friend (Seymour was the constable commissioner), there were three shifts: noon to 8 p.m., 8 p.m. to 4 a.m. and 4 a.m. to noon. Hines testified that at 4 a.m. on September 7, he relieved the deputy working the prior shift and began patrolling the streets. (T 496-500).

At about 5:30 a.m., Jerry Steuerman awoke, got out of bed and washed and dressed. According to Jerry and Bari Steuerman, Bari asked Jerry to start her car, which he did. Jerry left for work at about 6 a.m., the same time that Hines stopped home to change into a warmer shirt. (T 500, 825-26, 902-03).

Morning of the Murders: 6:05 a.m. to 9:45 a.m.

According to Tankleff, he got out of bed at around 6:05 a.m. and put on underwear and shorts but did not put on his glasses or contact lenses. He testified that he walked to his parents' bedroom, looked in and, seeing that "[n]o one was there," walked down the lighted hallway to the front door, which was open. He

testified that he entered Seymour's office and saw Seymour behind the desk, seated upright in a reclining chair, with blood on him. He testified that he ran up to Seymour and, seeing that Seymour's throat had been cut, called 9-1-1 from the office telephone. (T 4112-16, 4199-4200, 4202).

Emergency-services dispatcher Patricia Flanagan received Tankleff's 9-1-1 call at 6:11 a.m. According to Flanagan, an "excited" but not "upset" Tankleff said that he had found his father bleeding. Flanagan told Tankleff that an ambulance was coming and instructed him to elevate Seymour's feet and to apply pressure to Seymour's wounds with a clean towel or cloth. Flanagan testified that the call ended at 6:12 a.m. (T 64-72, 83, 86-89).

According to Tankleff, he retrieved a pillow from his room and a towel from a closet and returned to Seymour. According to Tankleff, he pulled Seymour's reclining chair from behind the desk, turned it ninety degrees and tried unsuccessfully to get it to recline. According to Tankleff, he pulled Seymour from the chair and placed him on the floor and, while doing so, got blood on his hands, on his shoulders and on his lower leg. According to Tankleff, he put the pillow under Seymour's feet and the towel over the neck wound and pushed down once on the towel and ran. (T 4117-19, 4203-11).

According to Tankleff, he went to the garage to look for Arlene's car. According to Tankleff, he turned the garage-door handle and opened the door but,

finding his mother's car inside, closed the door and returned to the house. According to Tankleff, he went to his parents' bedroom and, at the bedroom entrance, saw his mother, dead, on the floor. He testified that he turned around and went to the kitchen, where he called his sister, Shari, from a kitchen telephone and told her, "Get over here. I think mom and dad have been murdered." According to Tankleff, after speaking with Shari, he checked on Seymour but then returned to the kitchen to answer a call from Shari. According to Tankleff, he then returned to his room, wiped his hands, and only his hands, on a towel on his bed, put on a sweatshirt and ran to next-door neighbor Morton Hova's house. Hova was sitting on the toilet, but upon hearing a scream, he hurried to the front door and saw the barefoot Tankleff clad in shorts and a zip-up sweatshirt. Hova and Tankleff ran to the Tankleff house. It was 6:17 a.m.,[4] and Police Officers James Crayne and Daniel Gallagher, who had received a radio transmission ordering them to the Tankleff house, had just pulled in. Tankleff ran past their vehicles saying, "Somebody murdered my parents." (T 92-94, 100-04, 248-56, 286-89, 316-17, 324-31, 369-70, 3478, 4119-25, 4209-21).

Crayne and Gallagher testified that Tankleff appeared upset or "agitated." They observed blood on his palms, on the right side of his face, on his right calf and on his right foot. Crayne, Gallagher and Hova followed Tankleff into the

[4] Although sunrise would not occur until 6:25 a.m., when Crayne and Gallagher received the radio transmission at about 6:14 a.m., it was already daylight. (T 250, 329-31, 3517).

house, where Tankleff said, "My mother's in the bedroom." Gallagher went to the master bedroom, and Crayne, Tankleff and Hova went to the office. According to Hova, Tankleff said, "Murder, murder. . . . [T]hey murdered . . . my parents." Hova testified, "I said, 'Who did it?' [And Tankleff] said, 'My father's business partner . . . Jerry.' " (T 104-06, 256-59, 318-19, 332-34, 357-59, 372).

In the office, Crayne observed Seymour on the floor. Crayne also observed a towel on Seymour's neck. According to Crayne, the towel was not pressed into the neck wounds but was "draped over the neck." Crayne applied pressure to Seymour's neck wounds in an attempt to stem the bleeding. (T 335, 343-44).

Gallagher reached the master-bedroom threshold. Gallagher observed that "the T.V. was on," that "the drapes were open on the middle window" and that "[i]t was light in the room." From the threshold, he also observed, on the floor, "[Arlene]'s head partially sticking out from the end of the bed." Gallagher approached Arlene, but only when he stood directly over her did he observe her injuries and conclude that she was dead. (T 259-72, 293-300; A 3884-85).

Gallagher entered the office, where Crayne asked him to bring oxygen for the unconscious Seymour. When Gallagher went to retrieve the oxygen, Crayne tried to rouse Seymour. Crayne testified, "I asked [Seymour], 'Who did this?' . . . The victim didn't answer but [Tankleff] stated to me, 'It was Jerry Steuerman.' "

When Gallagher returned, the "composed" Tankleff reiterated "that the only person who had the motive to do this was Jerry Steuerman." (T 271-77, 320-22, 344-45).

At about 6:27 a.m., Police Officer Edward Aki arrived in front of the Tankleff house, as did nurse Ethel Curley. A few minutes later, Tankleff's brother-in-law, Ron Rother, arrived and spoke with Tankleff inside the house. Unlike Tankleff, Rother "was very upset and he was crying, just visibly shaken." (T 83, 278-79, 315-16, 347, 375-76, 383-384, 403, 415, 422, 464-66).

Aki explained to Tankleff and Rother that, as witnesses to an incident, they needed to be kept separate. At Aki's request, they exited the house, and Rother went to his car and Tankleff and Aki went toward Aki's police car. But before they reached Aki's car, Tankleff asked if he could wash his hands at a spigot on the side of the house. Aki answered that the house "was now a crime scene and that it would be inadvisable [] to go up there." So Tankleff and Aki continued toward Aki's car. According to Aki, on the way, Tankleff said "that a Jerry Steuerman had done this." (T 384-89, 392-95, 403-06).

When they reached Aki's car, Aki opened the door, and Tankleff entered the back seat on the driver's side. Aki and Tankleff left the door open, and Tankleff placed his feet outside Aki's car. Aki then left Tankleff for a few minutes, and Tankleff "was free to move." Tankleff exited the car and bent down by a puddle in front of Aki's car. By now Hines had arrived in front of the Tankleff house and,

together with Aki, observed Tankleff washing his hands in the puddle. (T 387-89, 392-93, 403-10, 501-04).

Tankleff and Hines made eye contact and "immediately converged." Hines asked Tankleff what happened, and Tankleff answered, "Jerry Steuerman murdered my mother and my father." Hines and Tankleff knew each other well, and they entered Hines's car and continued their conversation. Tankleff, who was excited and spoke rapidly but did not cry, continued to accuse Steuerman. According to Hines, Tankleff said that Arlene had predicted that Steuerman was going to do something terrible, that Steuerman was the last person to leave the card game and that Steuerman "killed my mother and my father." But neither Arlene nor Seymour had ever expressed a fear of Steuerman to Hines. So when Tankleff repeated that Steuerman had "murdered" or "killed" Arlene and Seymour, Hines replied "that Seymour was still alive and that should he regain consciousness the police would be able to verify if Jerry was indeed the perpetrator." Tankleff's demeanor changed. (T 410, 504-07, 523-28, 535). Hines testified:

> Well, up until that time [] Marty was looking . . . at the ground, at his feet, at the floor of the car, at something other than me. He had his head down. When I made that statement, he picked his head up and he looked directly at me. His eyes widened, he stopped talking and didn't say another word.

(T 506-07, 526).

"Immediately after that," Tankleff exited Hines's car. Tankleff then met and had the first of what would be three conversations with John McNamara, who was on a morning walk. According to McNamara, "[Tankleff] sa[id] that his parents had been murdered and that . . . Jerry Steuerman committed the murder. . . . [H]e [said] his father . . . [was] bleeding very heavily." But when Tankleff said that he had lifted Seymour from the chair and placed him on the floor, McNamara asked why Tankleff "wasn't covered in blood." McNamara testified, "[Tankleff] looked at me and did not reply. . . . He walked away." (T 107-11, 507, 776-81, 811-12).

At about 6:42 a.m., the ambulance took Seymour to Mather Memorial Hospital. At about the time the ambulance was leaving, McNamara and Tankleff had the second of their three conversations. According to McNamara, Tankleff repeated that "Jerry Steuerman had murdered his parents." (T 83, 782, 812).

At about 7 a.m., Hines contacted Bove. Bove drove to the Tankleff house and, as he exited his car, Tankleff approached him. According to Bove, Tankleff said, "[S]omebody murdered my mother and my father. . . . Jerry Steuerman did it." Bove asked, "[W]hat makes you say that? . . . [N]othing took place at the card game. Did you see [Steuerman] do this?" According to Bove, Tankleff answered, "No, I didn't see him, but they've been arguing." (T 741-42).[5]

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[5] Tankleff testified that he did not recall speaking with Hines, McNamara or Bove. (T 4129-31, 4188-91).

Robert Doyle, a sergeant in the Suffolk County Police Department Homicide Bureau, received notice of Arlene's homicide at about 7:05 a.m. Between 7:15 a.m. and 7:20 a.m., he directed Detective Norman Rein and Detective James McCready to report to the Tankleff house. (T 2602-08, 2831, 3431).

McCready arrived in front of the Tankleff house at 7:39 a.m. After speaking with Aki, Crayne and other police officers, McCready entered the house. McCready examined the office and the master bedroom. McCready exited the house and, at about 7:50 a.m., introduced himself to Tankleff and asked Tankleff what happened. But Hines interrupted them, and at McCready's request, Tankleff waited in McCready's vehicle while McCready spoke with Hines. At about 7:55 a.m., McCready entered his vehicle and resumed his conversation with Tankleff. According to McCready, Tankleff appeared "excited" and said that Jerry Steuerman had done this because Steuerman and Seymour had been fighting. (T 3431-37, 3447, 3519, 3551-52, 3593, 3599).

According to McCready, Tankleff said that, after returning from the mall on September 6th, he said good night to his mother and went to bed. According to McCready, Tankleff said that, on September 7, he awoke at 5:35 a.m., stayed in bed until about 6:10 a.m. and then "got dressed in a sweatshirt and shorts" and saw lights on in the house. (T 3437-39). According to McCready:

> [Tankleff] said . . . that he looked into his mother's bedroom . . . . He said that it was dark. He said that the

> drapes were drawn . . . . He said that having not seen anyone . . . he [went to] the . . . office area . . . . He said that he . . . saw his father bleeding and gagging. . . . He said that he immediately called 911. . . . He told me that he used the phone in the office right on the desk.

(T 3439-41). According to McCready:

> [Tankleff] said that . . . [he] opened the garage door . . . and saw [] his mother's car . . . . He said he [returned] to his mother's room and that [from] . . . the doorway . . . saw his mother . . . . He said that he went to the kitchen . . . [and] called his sister Shari.

(T 3442-43). McCready observed that the only blood on Tankleff was a blood spot on his right calf and a blood spot on his right instep. McCready asked Tankleff, "Do you have blood on you from, after you helped your father?" According to McCready, Tankleff answered, "My hands were covered with blood" and "I washed them in a puddle." McCready left Tankleff and returned to the house, where he observed that there were unsmeared blood spatters on the office telephone, that there was no blood on the three telephones in or near the kitchen or on the garage door. McCready also observed that the drapes in the master bedroom were open. (T 3444-51, 3560-65).

Doyle arrived in front of the Tankleff house at about 8 a.m. Doyle walked through the house and to McCready's vehicle, where McCready introduced Doyle to Tankleff. According to Doyle, Tankleff did not appear "upset or emotional." According to Doyle, Tankleff said that, before he went to bed on September 6, he

went to his mother's room but did not say good night because his mother was already asleep. (T 2609-16, 2638, 2655, 2665, 2671, 2683-84, 2696-2702).

According to Doyle, Tankleff stated that, on September 7, he found Seymour, called 9-1-1, administered first aid to Seymour and went to the doorway of his mother's room, where he saw that his mother was dead. According to Doyle, Tankleff did not mention having gone to the garage. (T 2616-18, 2673-75).

Family attorney "Mike Fox" arrived in front of the house. McCready walked toward Fox. According to McCready, Fox introduced himself and asked McCready, " 'How's it going?' " According to Doyle and McCready, Fox asked Tankleff, "Marty, are you okay?" and, after Tankleff answered, "Yeah, I'm okay" or "fine," Fox left. (T 2620, 3452-54, 3531-48, 3923-24).[6]

Rein arrived in front of the Tankleff house and observed Tankleff exchange greetings with Fox. Rein approached Doyle, and McCready approached Charles Kosciuk, a detective with the crime-scene laboratory and an expert in crime-scene analysis and reconstruction. After Rein spoke with Doyle, Doyle asked Tankleff to tell Rein what Tankleff had told Doyle. Doyle also directed Detectives Pfalzgraf and Carmody to go to Mather Hospital. They arrived there at about 8:20 a.m. and, at Pfalzgraf's request, a Mather doctor removed a gold bracelet from Seymour's wrist. (T 1468-72, 1573-75, 1595-96, 2831-33, 2957-66, 3455).

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[6] Tankleff testified that he saw but did not speak with Fox. (T 4132-36, 4224-27).

From about 8:20 to 8:35 a.m., Tankleff told Rein, in a calm voice, what happened on September 6th. According to Rein, Tankleff stated that, after showering at about 11 to 11:15 p.m., he entered his mother's bedroom, that his mother "pulled the drapes closed" and that he "kissed his mother good night." (T 2833-34, 2842, 2862, 2945, 2977, 2984, 3026, 3455-56).

Rein then spoke with Tankleff about September 7th. According to Rein:

> [Tankleff said that he] looked into the master bedroom[,] and he said it was totally dark, and he did not see either one of his parents . . . . [H]e said [] he looked into the office [and] saw his father in his father's office chair at the desk. He said his father's bloody. He said he was gagging. He says his throat was cut all around. [He] said he . . . dialed 911 from his father's office phone.

(T 2835-36). According to Rein, Tankleff stated that he followed the operator's instructions and then went to look for his mother. According to Rein:

> [Tankleff] said he went to the garage . . . [and] found . . . his mother's car . . . . [He] said he [returned] to the master bedroom . . . and . . . looked in [and] saw his mother. . . . He said he ran into the kitchen[] and . . . telephoned his sister Shari. . . . [He] said then he went to the office . . . . [T]he telephone rang. [He] said he ran back into the kitchen and . . . answered the telephone.

(T 2836-37). Rein walked away from Tankleff and spoke with Doyle and McCready. Based on the discrepancies in Tankleff's statements to them and his behavior and appearance – Tankleff's "lack of emotion" and "whole demeanor" – Doyle directed McCready to ask Tankleff to accompany detectives to police

headquarters. Doyle also assigned McCready to be the lead detective.[7] But Doyle was in charge of the investigation. (T 2625-27, 2889-91, 2991-94, 3456-57, 3524-25, 3612, 3627, 3786).

McCready asked Tankleff to accompany McCready to police headquarters. According to McCready, "I told him that I wanted to speak to him further about what he had been telling us and . . . about Jerry Steuerman." According to McCready, Tankleff said, "Fine," and "he got in the right front passenger seat of my police car, . . . and we left." It was now about 8:40 a.m. At about the same time, Doyle went to the bathroom near Tankleff's bedroom, where he observed water droplets in the bathtub and a wet sponge. (T 2624, 2735, 3458, 3607-08).

McCready received a radio message to contact Pfalzgraf. McCready stopped at a pay telephone and, at 8:42 a.m., called Pfalzgraf and learned that Seymour had suffered "extensive head injuries" and was being transferred to Stony Brook Hospital. (T 3463-65, 3609-10). According to McCready:

> After I got back in the car, I said to [Tankleff] . . . [that] I did not know about any head injuries, and he said to me, "Oh, yeah. . . . It looked like someone took the handle of a knife and hit [his father] in the back of the head," and I asked him, "How do you mean?" And he said, "Like this," and he went like this [bringing the right hand forward in a downward motion] three times.

(T 3465, 3619).

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[7] McCready retired prior to the trial, and Rein became the lead detective. (T 2944, 3430).

McCready and Tankleff "also discussed . . . Jerry Steuerman." McCready testified that at that point he did not know Steuerman but knew that Doyle would order other detectives to interview Steuerman. Indeed, at about 9 a.m., Doyle instructed Detectives Anderson and Laghezza to interview the card players, and to interview Steuerman last. (T 2754-55, 2635, 3466, 3620-34).

McCready and Tankleff entered police headquarters at about 9:20 a.m. They went to McCready's office, where McCready asked Tankleff if he wanted a cup of coffee. According to McCready, Tankleff stated that he did, and McCready gave Tankleff a cup of coffee and "a seat in the interview room." (T 3357-60, 3467-68, 3573-76, 3641-42).

An ambulance carrying Seymour left Mather for Stony Brook Hospital at about 9:30 a.m. At about the same time, Steuerman called Bove. Bove told Steuerman, " 'I don't know what's happened but you're being accused of murdering Seymour and Arlene.' " Steuerman testified that in response he asked, "Vinny, what the hell are you talking about?" Bove handed the telephone to a detective, who made an appointment to interview Steuerman that afternoon. (T 83, 747-48, 904-05, 1084-85, 3988).

At about 9:35 a.m., in Tankleff's bathroom, Kosciuk observed water near the bathtub drain. Kosciuk also observed, atop one side of the tub, a wet sponge with a ring of water around it. Kosciuk then went to Tankleff's bedroom. According to

Kosciuk, the only house doorknob with blood on it was the one to Tankleff's bedroom. And just inside Tankleff's bedroom, Kosciuk observed, at the room's entrance, bloodstains on the light switchplate and on the wall near the switchplate. On Tankleff's bed, Kosciuk observed two towels, one of which was "slightly damp." Kosciuk also observed a pair of small barbells leaning against a wall. According to the housekeeper, on September 6, the barbells were lying down. (T 1579-81, 1695, 1702-04, 1732-33, 1762, 1775-77, 1868-69, 4394).

Rein arrived at headquarters. At about 9:40 a.m., he and McCready entered the interview room and made "small talk" with Tankleff. At about 9:45 a.m., Tankleff removed three tissues from one of his pockets and placed them on a desk. (T 2841-43, 3005-06, 3036-38, 3093, 3469-3470, 3512, 3520).

Detectives Rein and McCready Question Tankleff

According to Rein and McCready, Tankleff stated that, when he returned from the mall on September 6th, he ate, showered and went to bed. Tankleff also stated that he was adopted and was now an orphan. When Rein reminded Tankleff that Seymour was alive, Tankleff responded, "Well, if my father die[s], I'm an orphan." (T 2844-49, 3037-48, 3055, 3061, 3083-87, 3094-95, 3113-16, 3180-81, 3470-71, 3654-57, 3669-70, 3705).

According to Rein, Tankleff stated that Seymour had invested about $400,000 in Steuerman's stores. When Rein asked what would happen if

Steuerman were arrested and convicted, Tankleff answered that he would own everything because he was inheriting the family businesses. At trial, Tankleff conceded that his parents had bequeathed him the Belle Terre house and the family businesses. (T 2852-54, 3133, 4170, 4232-36).

Rein and McCready asked Tankleff to demonstrate how he had administered first aid to Seymour. Tankleff demonstrated on Rein. When Tankleff did so, McCready saw, through Tankleff's partially unzippered sweatshirt, blood on Tankleff's right shoulder. McCready asked Tankleff when he had showered, and Tankleff answered, "[L]ast night." (T 2867-70, 3168-70, 3177-79, 3199, 3473-75).

It was now about 11:15 a.m., or 95 minutes into questioning, and after witnessing blood on Tankleff's shoulder, Rein and McCready became accusatory. According to Rein, Tankleff stated that, on September 7, he got out of bed at 6:10 a.m., put on a towel and entered the doorway of the master bedroom. According to Rein, Tankleff said that the room "was dark and that he didn't see anybody." McCready interrupted that the drapes were open and facing a direction so that the room should have been illuminated. According to Rein and McCready, Tankleff responded that it was light enough that somebody would have seen him but that he did not see Arlene. (T 2870-72, 2941, 3184-87, 3215, 3476-78, 3517).

McCready asked Tankleff about the first aid that he had administered to Seymour. According to Rein, Tankleff answered that he was "covered with

blood." When Rein and McCready asked Tankleff why he had no blood on his clothes or at least on his sleeves, Tankleff answered that he had rolled up his sleeves. McCready replied, "But[] Marty[,] you have blood on your shoulder." Tankleff responded, "Before I helped my father, I dropped my sweatshirt around my elbows." Rein and McCready replied that what Tankleff was saying was "ridiculous." (T 2875-76, 3204-10, 3478-79, 3767-71). Rein pointed out:

> Now, that's absurd, Marty. . . . [Y]ou . . . dropped [the sweatshirt] around your elbows, making flippers out of your arms, rendering yourself totally ineffective to give first aid to your father? Your father could have been bleeding to death and you're concerned about getting blood on your clothes?

(T 2876). Tankleff replied that he had "put the sweatshirt on after the police arrived." But Rein and McCready reminded Tankleff that he was wearing the sweatshirt when the police arrived. (T 2876, 3206-08, 3775).

Rein and McCready asked Tankleff to repeat what he had done after rendering first aid to Seymour. Tankleff repeated that he had gone to the garage, opened the garage door and looked for Arlene's car. McCready reminded Tankleff that Tankleff had blood on his hands when the police arrived and yet there was no blood on the garage door. Tankleff did not reply. When Tankleff repeated that he had used the kitchen telephone or telephones, McCready responded, "There's no blood on those phones." Tankleff did not reply. When Tankleff repeated that he had cried his "heart out . . . before the cops arrived," Rein responded, "When you

cry, you wipe your eyes and dab your nose, and I don't see any blood on your face." Tankleff did not reply. (T 2877-81, 2900-01, 3200, 3227-32).

McCready left the room. In McCready's absence, Rein explained that in every excessive-bleeding case in which Rein had been involved, Rein got blood on his clothes. Rein told Tankleff that Rein found it hard to believe that Tankleff did not have blood on his clothes. Tankleff did not reply. (T 2882-86, 3243-47).

McCready reentered to the room. Employing a ruse, he told Tankleff that Seymour had regained consciousness and said that Tankleff had "beat and stabbed" him. Tankleff cracked, saying, "It's . . . like another Marty Tankleff that killed them. Could I be possessed?" McCready read Tankleff *Miranda* warnings. (T 2886-92, 3248-65, 3486-90, 3817-33).

Tankleff Confesses

Tankleff conceded at trial that Rein, the primary witness who testified to Tankleff's confession, was "[v]ery nice." (T 4170). According to Rein:

> [Tankleff] said, "My mother and father once had a very loving relationship but . . . they have been fighting, [and] I've been caught up in the middle." . . . [He] said that he wanted to go [away] to . . . college [but that] . . . his mother . . . wanted to keep him home under her thumb.

(T 2892-93). According to Rein:

> [Tankleff] said, "I really resented that . . . my father's partner at the health club was going to have to

> stay with me when they went on their cruise . . . and . . . when they went to Florida. . . ." We asked him if he had any [other] resentments, and he said, "Yeah," he really didn't like that crummy old Lincoln . . . [,] he really wanted a sportier car. And [he] said . . . he also resented that his parents wouldn't let him play ball. . . . And [he] also said that this past summer his use of [the] family boat and ATV, the all terrain vehicle, had been restricted.

(T 2894, 3278-80). According to Rein:

> [Tankleff] said, "About five years ago my parents separated . . . . They've been fighting ever since . . . ." [He] also said that because [they were] arguing . . . they would turn to him for attention, they were smothering him. He said it was a nightmare . . . . He said, "And the last straw was that I didn't set up the poker table."

(T 2893-94). According to Rein, Tankleff said, "I decided . . . after that business with the poker table . . . to kill them both." (T 2895).

According to Rein:

> [Tankleff] said that he . . . got out of bed [at 5:35 a.m.] He said he was naked . . . . [He] said he took [the bar from] a dumbbell from his room . . . . [H]e said he went into his mother's bedroom. . . . [He said that he] leaped across the bed . . . . [and] hit her on the head with the barbell . . . . He said his mother was screaming[,] . . . and he said he hit her on the head about four or five times and she fell onto the floor. [He] said that he thought the noise might attract his father or wake him up. . . . [He] said he ran into the kitchen and he found a knife on a counter by the watermelon. [He] said he took that knife and . . . cut her throat and . . . stabbed her.

(T 2895-96, 2928-29). According to Rein:

> [Tankleff] said that he then went . . . to his father's office, his father's awake [in the chair at his desk] . . . . [He] said he . . . went behind him and [] hit him on the head with the dumbbell and . . . "just knocked him silly." [He] said he then took the knife and he slashed his father's throat. . . . [He] said he then went to his bathroom, he showered and he washed off the barbell and the knife, and he said that when he finished showering he put the knife back on the counter by the watermelon and he put the barbell back in his room. . . . [He] said at about 6:10 a.m. he . . . walked . . . into his father's office. He said his father was still gagging. [He] said he went to . . . the master bedroom and his mother was dead. [He] said he called the 911 operator from the phone in his mother's room and he was instructed by the 911 operator to render first aid. [He] said he . . . pulled his father out of the chair, got him on the floor, put the towel on his neck . . . . Detective McCready asked him how he got the blood on his hands and [Tankleff] said that he put his hands in the blood to make it look as though he had given first aid to his father. And Detective McCready said, "And how about the blood on your shoulder?" And [Tankleff] said, "Well, I showered and I must have screwed up."

(T 2896-98, 3192). Rein also testified that Tankleff only "pretended to follow the instructions of the 911 or the emergency operator. . . . [Tankleff] sa[id] that he put the towel on his father's neck[] but . . . really did not apply pressure" and "thought his father would die before the police arrived." (T 3294-97).

Doyle assigned Detective James Barnes to be the case-scene coordinator at the Tankleff house. While Tankleff was confessing, Barnes was examining all the house windows and doors and finding no sign of intrusion. (T 1367-90, 2633).

McCready notified Doyle of Tankleff's confession. At about the same time, Detectives Anderson and Laghezza interviewed Steuerman and determined that Steuerman was not a suspect. (T 1085-89, 1136, 2628, 2762, 2804, 3496).

Tankleff agreed to give a written *and* videotaped statement. Tankleff executed a written waiver of his *Miranda* rights and, with McCready writing, began repeating his confession. But at 1:22 p.m., Fox called headquarters and told the detectives to stop interviewing Tankleff. The questioning and writing stopped after Tankleff admitted having cut Arlene's "throat and neck." (T 2900-11, 3273, 3305-06, 3313-14, 3505-11, 3528).

In his testimony, Tankleff contended that Rein and McCready pressured him into confessing. According to Tankleff, Rein and McCready declined his offer to "take a lie detector test" and stated, "We've got your hair in your mother's hand." Tankleff testified, "[T]hey were saying my father said I did this." According to Tankleff, he began believing that he "did it" and confessed to Rein and McCready because "that's what they wanted to hear." (T 4154-61, 4239-48).

Herbert Spiegel, a psychiatrist, testified that even though Tankleff had an average to well above average I.Q. of 124, Rein and McCready coerced or brainwashed Tankleff into believing that he had killed his parents. (T 4253, 4264-67, 4285-89, 4295-4302, 4309-10, 4322). Spiegel testified:

> [T]he shock of seeing . . . his . . . father dying and his mother dead, . . . the police . . . turning against him, . . .

> his sister's husband, Ron, arrives and then he's separated from [him], Uncle Mike [Fox] . . . leaves him . . . and then the ultimate thing, that phone call that his father . . . told the police that he did it, . . . it must have had him in such turmoil that he was willing to say anything . . . to get out of the mess that he was in. . . . Those are the circumstances in which forced confessions are made.

(T 4291-92).

The Physical Evidence is Consistent with the Confession

At Stony Brook Hospital, surgeon George Tyson operated on Seymour. Tyson testified that Seymour had sustained several "depressed [skull] fractures," "fracture[s] in which pieces of bone are . . . driven inward." According to Tyson, "The size and shape of the . . . fractures appeared to [have been] produced by a small, rounded, blunt object of which a hammer would be a good example." Tyson also testified that Seymour's neck wound was consistent with having been caused by a knife and that it could not have been caused if Seymour had been struggling. Tyson also opined that that whoever had inflicted the head and neck wounds was very angry and that a person who had the strength to lift Seymour from a chair would have had the strength to inflict the wounds. (T 4346-49, 4359-65).

At about 4 p.m., Kosciuk entered Seymour's office. According to Kosciuk, the blood patterns and the blood pooling showed that Seymour was sitting in his chair behind his desk when he was hit, in an up and down motion, with a blunt instrument that sent "cast off" blood to the ceiling. Kosciuk also testified that the

blood spatter on the office telephone and attached telephone cord showed that the telephone and telephone cord had not been disturbed after having been spattered. (T 1585, 1633, 1650-74, 1681, 1821-24, 1831, 1856, 4393).

In the kitchen, next to watermelon rinds, Kosciuk found a knife in a position different from the one in which Bove, the card game's last user, had left it. Bove testified, "I didn't lay the knife there." (T 734-40, 1706-07, 1840; A 3888).

Vernard Adams, the Suffolk County deputy medical examiner, arrived at the Tankleff house at about 4 p.m. He examined Arlene's injuries and the blood pooling in the master bedroom. He concluded that Arlene had suffered head injuries, moved and then suffered incised injuries. (T 3940-44, 3967, 4003-04).

On September 8, Adams performed an autopsy on Arlene. Adams testified that Arlene had suffered incised wounds, including defensive wounds to her hands and left forearm, from a sharp blade or blades. According to Adams, a blunt instrument had caused her skull wounds, which included five depressed fractures. Adams compared the fractures with one of Tankleff's barbells. Adams testified, "[T]he skull fractures [were] consistent with having been caused by the bar." Adams testified that he could not determine the time of death. (T 3945, 3954-57, 3963-68, 3974-78, 3989, 4005-09).

The only recovered fingerprints, other than those of the detectives and Seymour, Arlene and Martin, consisted of a Steuerman print on a water glass, a

Cecere print on an office chair and an unidentified print on the exterior of the front storm door. The police also recovered a safe containing cash and jewelry. (T 1370, 1399-1400, 2519-22, 2542-54).

Robert Baumann, a forensic serologist, analyzed the blood recovered from the Tankleff house. According to Baumann, except for a bloodstain on the exterior doorknob to Tankleff's room, there was no blood on the entranceway to any of the rooms. (T 2131, 2152, 2159-62, 2174, 2388-89, 2424).

According to Baumann, in the master bedroom, a wall contained a bloodstain consistent only with Seymour's blood. Baumann testified that the bed sheets, pillowcases, pillow shams and Arlene's fingernails contained bloodstains consistent with Arlene's blood and Martin's blood. According to Baumann, all the blood in the office was consistent only with Seymour's blood. Baumann also testified that Seymour's pants contained a wallet with a $100 bill. (T 2176-2204, 2212-17, 2268-69, 2297).

According to Baumann, a towel at the foot of Tankleff's bed contained bloodstains consistent only with Seymour's blood. Baumann testified that the bloodstains on the switchplate and on the wall in Martin's room were consistent with Arlene's blood and with Martin's blood. Robert Genna, of the Suffolk County crime lab, testified that the bloodstain on the switchplate, and some of the bloodstains in the master bedroom, were in a "chain link" or "honeycomb" pattern

consistent with the palm or grip areas of a latex or rubber glove used in house cleaning. The police did not recover any gloves. (T 1976, 2104, 2258-61, 2272-75, 2343-46, 2354, 2377-79, 2396, 2402, 2455-71, 2478, 2485-86).

According to Baumann, there were no bloodstains on Tankleff's shorts or undershorts. Baumann testified that there was one light stain on the right shoulder of the inside of Tankleff's sweatshirt, a stain that tested positive for the presumptive presence of blood but was so small that Baumann was unable to say so definitively. Baumann also testified that the blood from Tankleff's right shoulder was consistent only with Seymour's blood. (T 2262-68, 2294).

There was no blood on the barbells, on the kitchen knives, in the traps below the sinks and bathtub or on the bathtub sponge. But the sponge did have a five-inch slit, one that, according to Baumann's microscopic examination, had been caused by a sharp object. And one of the three tissues recovered from Tankleff contained blood consistent with only Arlene's blood. (T 2218-37, 2249-53, 2276-81, 2305-07, 2314-26, 2341, 2398, 2405, 2422-23, 2433; A 220).

Forensic scientist Susan Ryan compared crime-scene hairs with samples obtained from Arlene, Seymour, Martin and Steuerman. Ryan testified that hair examination associates people with hairs but "is not a means of identification like a fingerprint." Ryan testified that the hairs recovered from the master bedroom and from Arlene, including from the necklace that she was wearing, were similar to

Arlene's sample and dissimilar to the other samples. Ryan also testified that the bloodstained towel recovered from Martin's bed had hairs similar to Seymour's sample and dissimilar to the other samples. (T 1624, 1884-85, 1895-96, 1915-16, 1924-44, 1955-63, 1973-77, 2001, 2044-49, 2060-63, 2099-2100).

Seymour died on October 6, 1988. Adams performed an autopsy and determined that Seymour was five feet, eleven inches tall and weighed 213 pounds. Adams testified that although the partial healing of Seymour's wounds impaired Adams's ability to determine the weapon or weapons that had caused Seymour's death, Adams concluded that Seymour had suffered blows to the head from a blunt instrument or instruments and that the cause of death was a combination of impact head trauma and incised wounds of the neck. (T 3980, 3989, 3995-4001).

Other Evidence

On September 14, about five or six days after he withdrew $15,000 from an account that he shared with Seymour, Steuerman feigned his death and went to Los Angeles. (T 905-06, 1137-43, 1189-93). Steuerman testified:

> [M]y wife . . . passed away . . . . [O]ne of my children was in bad legal trouble . . . . [M]y . . . business was not what it used to be . . . . [T]he murder of Arlene[,] and Seymour [was "brain dead"] . . . . [A]nd the accusations by the son . . . . I thought everybody would be better off . . . without me.

(T 907, 978, 1136-37, 1151-56, 1191).

To show how Tankleff, as opposed to Steuerman, had hoped to benefit from the murders, the People elicited that Steuerman's contracts with Seymour survived Seymour's death. The People also elicited that, one week after Seymour's death, Tankleff told Stacy and Audra Goldschmidt that, "once he inherits that money," he would take them out "in a limousine." But to show how Tankleff could have slept through the murders, Tankleff called an expert who testified that, with the door to Tankleff's room closed, a scream in the master bedroom could be detected at Tankleff's bed only at the level of a whisper. (T 135-41, 148-54, 163-84, 193-94, 435-41, 897, 955-56, 971-77, 1019-27, 1097, 1215-25, 4451-56, 4499).

The Guilty Verdicts

After the close of evidence, Tankleff trial attorney Robert Gottlieb moved to dismiss the counts charging depraved-indifference murder. Judge Tisch denied the motion. The jury convicted Tankleff of the intentional murder of Seymour and the depraved-indifference murder of Arlene. (T 5030-33, 5138-39).

Post-Trial Proceedings

Tankleff filed a direct appeal to this Court. He also filed a CPL 440.10 motion in County Court. In his 440.10 motion, he alleged that Jerry Steuerman had used Hells Angels to end a labor dispute and that Collins had committed *Brady* and *Rosario* violations by concealing Steuerman's misconduct. Judge Tisch

denied the motion. Tankleff later filed two additional CPL 440.10 motions, but Judge Tisch denied those motions as well. (A 782, 789).

This Court affirmed the judgments convicting Tankleff. *See People v. Tankleff*, 199 A.D.2d 550 (2d Dep't 1993). So did the Court of Appeals. *See People v. Tankleff*, 84 N.Y. 992 (1994). The federal courts later denied Tankleff's petition.[8] Later still Tankleff moved to reargue his direct appeals. This Court denied Tankleff's reargument motion. *See People v. Tankleff*, Nos. 90-8937, 90-8938 (2d Dep't Feb. 16, 1999) (RA 22). The Court of Appeals granted reargument but adhered to its decision affirming the judgments of conviction. *See People v. Tankleff*, 93 N.Y.2d 1034 (1999).

Tankleff's First DNA Motion

On or about October 5, 2000, pursuant to CPL 440.30(1-a), Tankleff filed a "DNA testing" motion. Tankleff supported his motion with an affidavit from his trial attorney, Robert Gottlieb. (RA 190, 193). In his affidavit, Gottlieb stated:

> 1. I represent, along with Barry C. Scheck, Esq., Peter Neufeld, Esq. and Jane Siegel Greene, Esq., in their capacities as the Directors of the Innocence Project at the Benjamin N. Cardozo School of Law, the Petitioner Martin Tankleff.

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[8] *See Tankleff v. Senkowski*, 993 F. Supp. 151 (E.D.N.Y. 1997), *aff'd in part, vacated in part and remanded*, 135 F.3d 235 (2d Cir. 1998), *reh'g and reh'g en banc denied*, No. 97-2116 (2d Cir. Mar. 20, 1998), *on remand*, 3 F. Supp. 2d 278 (E.D.N.Y. 1998), *habeas corpus petition denied*, No. 98 CV-507 (E.D.N.Y. Dec. 9, 1998 & Jan. 4, 1999), *appeal dismissed*, No. 99-2130 (2d Cir. Apr. 7, 2000), *reh'g and reh'g en banc denied*, No. 99-2130 (2d Cir. May 30, 2000), *cert. denied*, 531 U.S. 1051 (2000).

. . . .

> 4. The instant CPL § 440.30(1-a) motion is . . . to have the biological evidence collected in . . . [this] action subjected to DNA testing that could support Petitioner's claim that he is innocent.

(RA 196-97).

Tankleff also supported his motion with a memorandum of law. In his memorandum, Tankleff highlighted what he claimed to be the lack of forensic evidence pointing to his guilt. For example, Tankleff claimed, "No hair or fiber evidence was recovered from Marty's person or from either room [in which the bodies were found]. Scrapings of Arlene's fingernails produced no sign of Marty's skin." (RA 214).

On November 15, 2000, County Court Judge Charles Cacciabaudo issued a memorandum and order on Tankleff's motion. After noting that the People had "consent[ed] to the testing," (A 1025), Judge Cacciabaudo stated:

> [D]efendant requests th[at] tests be conducted on all hair collected at the crime scene; known head hair samples collected from the victims, defendant, and Jerry Steuerman; a broken necklace containing several hairs; a stained magazine and "whatever other items that might contain genetic evidence."

(A 1026).

Ultimately, the only items that Tankleff selected for testing were crime-scene hairs. Tankleff retained a forensic DNA examiner, and in February 2001,

the examiner tested the hairs. The test results failed to support Tankleff's innocence claim: the hairs matched the hair samples of Arlene or Seymour Tankleff. (A 1026-31).

Background of the Current DNA Testing Motion

On October 2, 2003, Tankleff filed a CPL 440.10 motion in which he claimed that he was innocent and that Joseph Creedon and Peter Kent had murdered Arlene and Seymour at the behest of Seymour's business partner, Jerry Steuerman. (RA 135-43). Two years later, while the CPL 440.10 motion was still pending, Tankleff filed the DNA testing motion that gave rise to this appeal. Tankleff requested an order "directing the DA to provide [him] access to Trial Exhibit 125b, [Arlene Tankleff's fingernail clippings], as well as any existing known exemplars for the DNA of Joseph Creedon, Peter Kent, Jerry Steuerman, Martin Tankleff, and Arlene Tankleff." (RA 96-98).

The People conditionally opposed the motion.[9] The People pointed out that Tankleff's motion suffered from being a "successive motion" and argued that, to obtain additional DNA testing, Tankleff had to offer a valid explanation for his failure to seek fingernail testing as part of his first DNA motion. But in his reply

[9] Tankleff asserts that Respondent, "After indicating that it would probably provide . . . access [to DNA testing], . . . ultimately did not do so." (Def.'s Br. 7). Tankleff fails to cite anything in the record to support his assertion.

memorandum, Tankleff offered *no* explanation, let alone a valid one, for his prior failure. (RA 102-06).

The County Court denied Tankleff's motion. The court found that Tankleff had offered "no reason why the fingernails of Arlene Tankleff[] could not have been tested in 200[1] together with the other evidence tested." The court held that a defendant's right to DNA testing does not "authorize[] repetitive and successive motions . . . or . . . piecemeal applications." The court concluded, "If the defendant wanted his mother's fingernails tested, he could have had it done in 200[1] along with the other evidence tested." (DNA A 9).

This appeal followed.

ARGUMENT

TANKLEFF IS NOT ENTITLED TO ADDITIONAL DNA TESTING

Tankleff contends that he is entitled to DNA testing of Arlene Tankleff's fingernails. (Def.'s Br. 7). His contention is meritless. He had crime-scene hairs tested in February 2001, and he has not explained his failure to have the fingernails tested along with the hairs.

Standard of Review

This Court owes no deference to the County Court's legal conclusion. *See, e.g., People v. Adessa*, 89 N.Y.2d 677, 684-85 (1997). This Court should, however, ignore arguments that Tankleff supports with evidence from outside the record. *See, e.g., People v. Bramble*, 37 A.D.3d 484, 485 (2d Dep't 2007) (declining to consider defendant's contention involving juror note because contention was based on matter outside record). This Court should also ignore arguments that Tankleff raises for the first time on appeal. *See, e.g., People v. Thomas*, 50 N.Y.2d 467, 471 (1980) (holding that issues not raised at trial may not be raised on appeal); *People v. Esteves*, 152 A.D.2d 406, 412 (2d Dep't 1989) (holding that claim raised for first time on appeal was unpreserved for review).

Tankleff's Motion Suffers From Being a Successive Petition

Tankleff contends that he is entitled to additional DNA testing because CPL 440.30(1-a)'s "plain language" "does not impose a bar to second applications."

(Def.'s Br. 9-11). Tankleff's contention is meritless. The record contains nothing to justify additional DNA testing.

Tankleff is correct that subsection 1-a's "plain language" does not impose a second-application bar. But subsection 1-a's "plain language" also does not *permit* a second application. Thus, the answer to the second-application bar lies elsewhere. To find the answer, one must read and harmonize subsection 1-a with other subsections of CPL 440.30. *See, e.g.*, *Sanders v. Winship*, 57 N.Y.2d 391, 395-96 (1982) (holding that all parts of a statute "are to be harmonized to achieve the legislative purpose") (citing N.Y. Stat. §§ 97-98, 130) (McKinney 1971)). CPL 440.30, in turn, must be read and harmonized with other portions of the CPL. *See Roballo v. Smith*, 63 N.Y.2d 485, 489 (1984) (holding that different Penal Law sections "must be read together and harmonized, if possible, to achieve a reasonable result giving effect to each one"). And "[t]he courts should strive to avoid an interpretation of a statute where the literal application of one section will nullify the effect of another, especially when this produces an absurd result." *Id.*

CPL 440.30 consists of subsection 1-a and several other subsections, including subsection 1, which provides, "[A] defendant who is in a position to raise more than one ground [in his motion] should raise every such ground." Subsection 1 also cross-references CPL 440.10, which provides that a court may deny a motion to vacate a judgment when, "Upon a previous motion made pursuant to this

section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but failed to do so." CPL 440.10(3)(c). Read together and harmonized, CPL 440.10(3)(c), 440.30(1) and 440.30(1-a) provide that a court has the discretion to deny a DNA testing motion when, in a prior DNA testing motion, the defendant was in a position to raise the ground underlying his present DNA motion but failed to do so.

Tankleff filed his prior DNA motion on or about October 5, 2000. (RA 190, 193). Unlike less fortunate defendants, Tankleff proceeded with the assistance of four attorneys: his trial attorney, Robert Gottlieb, and Barry Scheck, Peter Neufeld and Jane Siegel Greene "in their capacities as the Directors of the Innocence Project." (A 196). Tankleff was well represented: the Innocence Project provides *pro bono* legal assistance to "prisoners for whom postconviction DNA testing can yield conclusive proof of innocence." (Innocence Project/Innocence Network Amici Curiae Br. 1).

In his prior DNA motion, Tankleff and his attorneys focused on Arlene's fingernails. Tankleff asserted in his motion, "Scrapings of Arlene's fingernails produced no sign of Marty's skin." (RA 214). Tankleff's assertion was probably based on the trial testimony of forensic serologist Robert Baumann. Baumann testified:

> Q . . . Did you . . . perform an analysis on the fingernail clippings from the left and right hand?

A Yes.

Q And did you achieve genetic marker results . . . ?

A Yes, I did.

Q And can you tell us please what those findings were?

A The human blood detected on the fingernail clippings . . . was consistent with Arlene Tankleff.

(T 2212-13).

It appears that the reason that Tankleff concluded that Arlene's fingernail scrapings produced no sign of Tankleff's skin was that Baumann's testimony established that the fingernail scrapings produced signs only of Arlene's blood and no signs of *anyone's* skin. This explains why Tankleff, who had selected crime-scene hairs for testing, declined to ask to have the fingernails tested along with the hairs.

Tankleff appears to have forgotten Baumann's testimony and even asserts that, at trial, "there was forensic testimony that Arlene struggled with her attacker(s)." (Def.'s Br. 12). Of course, Tankleff fails to cite the testimony that supports his assertion. This is unsurprising, because the testimony demonstrated that Arlene did not struggle *with* anyone. Instead, the testimony established that Arlene sustained defensive wounds in her struggle *against* a weapon. Vernard Adams, the Suffolk County deputy medical examiner, testified, "A defensive

wound is a wound which involves the forearms, especially on the outer aspect of the hands, either the back of the hands or the palm, incurred during a struggle *against some kind of weapon*" (emphasis added). According to Adams, the wounds that Arlene sustained to her hands and left forearm indicated that she struggled not *with* anyone or even any "thing," but against a sharp blade or blades. (T 4005-07).

In light of the above record, when in 2005 Tankleff filed his second DNA testing motion, Respondent conditionally opposed his motion. Respondent argued that unless Tankleff had a valid explanation for his earlier failure to request testing of Arlene's fingernails, he could not seek the relief that he could have sought in his prior DNA motion. In his reply papers, Tankleff had the opportunity to provide an explanation. But Tankleff failed to do so. Tankleff's failure left the County Court no choice but to find that Tankleff had offered "no reason why the fingernails of Arlene Tankleff[] could not have been tested in 200[1]." (A 9).

Because Tankleff failed to explain his procedural default, he is not entitled to additional DNA testing. *See People v. Pugh*, 288 A.D.2d 634, 634-35 (3d Dep't 2001) (holding that Section 440.30(1-a) does not grant defendant second opportunity to obtain DNA testing when defendant knew of possibility of seeking DNA testing before trial and in his prior new-trial motions), *cited with approval in People v. Keene*, 4 A.D.3d 536, 537 (2d Dep't 2004); *People v. Kellar*, 218 A.D.2d

406, 410 (3d Dep't 1996) (holding that Section 440.30(1-a) did not grant second opportunity to defendant who had explored using DNA testing prior to trial), *cited with approval in Keene*, 4 A.D.3d at 537; *cf., e.g., People v. Moolenaar*, 207 A.D.2d 711, 711 (2d Dep't 1994) (holding that lower court acted within its discretion in denying defendant's CPL 440.10 motion on ground that defendant was in a position to raise issue in his prior CPL 440.10 motion but failed to do so).

The law in other jurisdictions is the same. A defendant is not entitled to additional DNA testing absent a valid reason for his failure to seek such testing in a prior DNA application. *See, e.g., Alley v. State*, No. W2006-1179-CCA-R3-PD, 2006 WL 1703820, at *24 n.3 (Tenn. Crim. App. June 22, 2006) (unpublished opinion) (holding that while Tennessee's Post-Conviction DNA Analysis Act did not prohibit defendant from filing unlimited successive petitions, the court could not "condone such piecemeal litigation aimed at delaying the execution of a sentence"); *Commonwealth v. Donald*, 848 N.E.2d 447, 2006 WL 1543955, at *1 (Mass. App. Ct. 2006) (unpublished opinion) (affirming denial of motion for postconviction Y-chromosome DNA testing where results of other type of DNA testing had been introduced at defendant's trial); *Ex parte Baker*, 185 S.W.3d 894, 897-98 (Tex. Crim. App. 2006) (dicta) (observing that Texas DNA statute permits successive testing of material not previously tested if defendant blameless for prior failure to test and if interests of justice require testing); *Olvera v. State*, 870 So. 2d

927, 930 (Fla. Dist. Ct. App. 2004) (denying successive motion for DNA testing where defendant sought test of hair and retest of blood); *King v. State*, 808 So. 2d 1237, 1248 (Fla. 2002) (per curiam) (holding that Florida had no statute or rule requiring additional DNA testing and denying request for Short Tandem Repeat DNA testing of victim's fingernails).

Tankleff attempts to sidestep his procedural default by contending that since the year 2000, when he first requested DNA testing, "there have been revolutionary advances in DNA technology" such as Y-chromosome testing and "studies [that] have revealed the probative value of fingernail scrapings in homicide cases." (Def.'s Br. 15-17 & n.10). These *might* have been good arguments had he made them in County Court. He did not. (RA 98-105). He cannot make them successfully for the first time on appeal. *See* discussion *supra* p. 37; *see also People v. Byrdsong*, 33 A.D.2d 175, 177 n.1 (2d Dep't 2006) (observing that question related to the availability of evidence for DNA testing "should be determined by the motion court . . . and not for the first time on appeal").

It is also unclear whether, as Tankleff asserts, Y-chromosome testing was unavailable when he obtained DNA testing of crime-scene hairs. Even if this Court were to accept his representation that Y-chromosome testing became available only after the date he filed his DNA testing motion in October 2000, it

does not follow that Y-chromosome testing was unavailable on the date that he actually obtained DNA testing, which was on or shortly after February 1, 2001. This is a matter that would have to be litigated in County Court, because there is some authority suggesting that Y-chromosome testing was available as early as November 2000. *See The Future of Forensic DNA Testing Predictions of the Research and Development Working Group*, U.S. Dep't of Justice, at 2, 17-19, 49-50 (Nov. 2000) (RA 217, 229, 230-32). And the probative value of fingernail scrapings was definitely recognized prior to October 2000. *See Wilson v. State*, 752 A.2d 1250, 1253, 1257 (Md. Ct. Spec. App. 2000).

Wilson was a 1997 sexual assault and robbery case. Utilizing Short Tandem Repeat DNA testing, the police in *Wilson* "tested both fingernail scrapings and rectal swabs obtained from the victim and compared those samples with blood samples taken from the appellant." The court decided *Wilson* on June 7, 2000, a date about four months before Tankleff filed his prior DNA testing motion. *Id.* at 1250, 1253, 1257. The Innocence Project represented Tankleff in Tankleff's prior DNA testing motion, and it was probably aware of *Wilson*. It thus appears that the Innocence Project saw no value in testing Arlene's fingernails.

In January 2001, the County Court granted Tankleff access to DNA testing. Tankleff selected crime-scene hairs and considered and passed on Arlene's fingernails. When in September 2005 Tankleff filed a successive DNA motion, the

County Court properly denied it because Tankleff offered no explanation for waiting until September 2005 to seek DNA testing of an item that he could have had tested in January 2001.

If Tankleff is entitled to additional DNA testing without explaining his procedural default, that means that any defendant has a right to an unlimited number of DNA tests and retests. This cannot be the law. *See Roballo*, 63 N.Y.2d at 489 ("The courts should strive to avoid an interpretation of a statute where the literal application of one section will nullify the effect of another, especially when this produces an absurd result."). The procedural provisions of Article 440 have meaning, and under this record, Tankleff should be denied access to additional DNA testing.

Tankleff May Have Been Required to Exercise Due Diligence

Tankleff contends that CPL 440.30(1-a) has no due-diligence requirement. (Def.'s Br. 13). Had Tankleff made his motion under the 1994 DNA statute, he would be correct. But he made his motion under the 2004 DNA statute, and he may be incorrect.

Forensic DNA testing in New York began in 1988, when prosecutors used DNA to obtain convictions. *See People v. Wesley*, 140 Misc. 2d 306, 306-07, 331-32 (County Ct. Albany County 1988), *aff'd*, 183 A.D.2d 75 (3d Dep't 1992), *aff'd*, 83 N.Y.2d 417 (1994). Soon thereafter, defendants who had been convicted before

DNA testing became available began requesting postconviction DNA testing as a prelude to bringing CPL 440.10 motions to overturn their convictions. *See, e.g.*, *People v. Callace*, 151 Misc. 2d 464, 464-65, 467 (County Ct. Suffolk County 1991); *Dabbs v. Vergari*, 149 Misc. 2d 844, 846 (Sup. Ct. Westchester County 1990). But convicted defendants faced a hurdle: there was no statutory authority entitling them to postconviction discovery. *See, e.g.*, *Callace*, 151 Misc. 2d at 467; *Dabbs*, 149 Misc. 2d at 847. Nevertheless, DNA testing was of such importance that courts began to fill the statutory void with judicially created remedies. *See, e.g.*, *Dabbs*, 149 Misc. 2d at 847 (holding that due process required State to permit defendant postconviction access to DNA testing of preserved evidence having "high exculpatory potential") (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

Convicted defendants soon faced a new hurdle. As DNA testing became widely available, courts began denying access to postconviction DNA testing where "DNA testing was available at the time of investigation and trial but the defendant failed to avail himself of such procedures." *See, e.g.*, *People v. Brown*, 162 Misc. 2d 555, 558 (County Ct. Cayuga County 1994). Courts reasoned that because CPL 440.10 required a defendant to proceed with "due diligence," a defendant could not wait until after the trial to seek testing that he could have sought prior to trial. *See id.*; *see also Byrdsong*, 33 A.D.2d at 177 (observing that courts treated a "post-conviction application for DNA testing . . . as an application

for discovery in furtherance of a motion pursuant to CPL 440.10(1)(g)," which required the defendant to proceed with due diligence).

The Legislature needed to respond. *See id.* at 178. Thus, in 1994, it enacted legislation authorizing a defendant to seek postconviction DNA testing if such testing had been unavailable prior to conviction. *See Washpon v. District Attorney*, 164 Misc. 2d 991, 993-94 (Sup. Ct. Kings County 1995). To the Executive Law the Legislature added Article 49-B. *See* 1994 N.Y. Sess. Laws 1825, 1825-26 (McKinney) (codified at Exec. Law §§ 995 to 995-f) (McKinney 1996)). And to CPL 440.30 the Legislature added subsection 1-a. *See id.* at 1833.

The Legislature amended the Executive Law to "regulat[e] the quality of state and local government forensic laboratories and forensic DNA laboratories." CPL 440.30 note (McKinney 2005) (Peter Preiser Practice Commentaries at 47-48). According to Preiser:

> [T]his legislation created an administrative mechanism for establishing minimum scientific standards to be utilized in conducting forensic analyses and for monitoring and accrediting the laboratories that perform them. It also established authorization for a data bank ("DNA identification index") to record and store the DNA characteristics of certain criminal offenders convicted after January 1, 1996 (the projected date for operation of the DNA laboratory).

Preiser Practice Commentaries at 48. *See also People v. Tookes*, 167 Misc. 2d 601, 602 (Sup. Ct. N.Y. County 1996) (observing that Legislature enacted Executive

Law amendments "to establish standards for . . . forensic laboratories and to establish a DNA data bank for criminal identification purposes").

The Legislature amended CPL 440.30 to permit postconviction "DNA testing in support of a motion to vacate a judgment on the ground of newly discovered evidence." *Byrdsong*, 33 A.D.2d at 178 (internal quotation marks omitted). The amendment provided:

> In cases of convictions occurring before January [1, 1996], where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

1994 N.Y. Sess. Laws at 1833. The amendment applied only to defendants convicted prior to January 1, 1996. *See People v. Pitts*, 4 N.Y.3d 303, 309 (2005).

The Executive Law and CPL amendments became effective August 2, 1994. *See People v. Chichester*, 162 Misc. 2d 658, 659 (County Ct. Suffolk County 1994); 1994 Sess. Laws at 1825, 1833. The amendments provided defendants with access to DNA testing of evidence even though DNA testing laboratories had not yet received accreditation. *See Washpon*, 164 Misc. 2d at 995.

In addition to sharing the date August 2, 1994, the Executive Law and CPL amendments shared the date January 1, 1996, which was the projected date of DNA laboratory accreditation. *See id.*; 1994 Sess. Laws at 1833. The date January 1, 1996, was also the conviction cut-off date: the Legislature limited postconviction DNA testing to defendants convicted prior to that date. *See Washpon*, 164 Misc. 2d at 995; 1994 Sess. Laws at 1833. Because the Legislature passed the amendments in the same act, and because the amendments share the date January 1, 1996, the amendments must "be read and construed together to determine the legislative intent." N.Y. Stat. § 97.

It appears that the Legislature determined that a defendant who had been convicted prior to January 1, 1996, was not to be penalized for having failed to seek DNA testing from an unaccredited laboratory. It follows that a defendant convicted before that date also did not have to exercise "due diligence" in seeking DNA testing. *See* Preiser Practice Commentaries at 48. According to Preiser:

> [S]ubdivision 1-a [of CPL 440.30] gave persons convicted before that date the right to make a motion for DNA testing of evidence seized in connection with their crimes. This apparently represented a legislative determination that until that date DNA evidence . . . "could not have been produced by the defendant at the trial even with due diligence on his part."

Id. (quoting CPL 440.10(1)(g)). *See also Pitts*, 4 N.Y.3d at 306, 308, 310-11 & n.3 (holding that 1994 statute did not require defendant convicted in 1995 and

defendant convicted in 1987 to proceed with due diligence in seeking DNA testing).

In 2004, the Legislature amended the relevant portions of the Executive Law and the CPL. *See* 2004 N.Y. Sess. Laws 513 (McKinney). With respect to CPL 440.30(1-a), the Legislature deleted the clause limiting DNA testing to defendants convicted prior to January 1, 1996. *See id.* at 514. Thus, CPL 440.30(1-a), as amended, permitted "any defendant, regardless of the date of conviction, to move for a DNA testing order." *See Pitts*, 4 N.Y.3d at 309-10.

In *Pitts*, the Court of Appeals held that the lower courts "erred in interpreting CPL 440.30(1-a) to impose upon defendants a due diligence requirement limiting the time within which to make a CPL 440.30(1-a) motion." *Id.* at 310-11. But the "defendants [in *Pitts*] were convicted before January 1, 1996[, and they] made and the courts determined their motions under the [1994] version of the statute." *Id.* at 310 n.3. "Accordingly," the Court stated, "the 2004 amendment d[id] not affect the outcome of the[ir] cases." *Id.* [10]

The Court of Appeals in *Pitts* did not elaborate how the outcome of the cases before it would have been affected if the defendants had made, and the courts had

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[10] In *Byrdsong*, this Court denied the defendant's "DNA testing" motion because the defendant had pled guilty. And although this Court, in dicta, mentioned that the defendant had not been required to proceed with due diligence, the defendant had made his motion under the 1994 version of the statute. *See Byrdsong*, 33 A.D.3d at 176 (finding that defendant had moved for DNA testing in November 2000).

determined, the defendants' motions under the 2004 statute. But one commentator has suggested how the outcome would have been different. According to Preiser:

> In 2004 the [statute] was amended . . . . [T]he cut-off date of January 1, 1996, was eliminated, so it would appear that persons convicted prior to that date who have not previously taken advantage of the opportunity for DNA testing by accredited state or local laboratories during the eight year period from the 1996 accreditation of such laboratories will now have to show that failure to request testing was not caused by lack of due diligence.

Preiser Practice Commentaries at 48.

Preiser may be correct. When a defendant makes a motion, there are two possible outcomes: a court can grant the motion, or the court can deny the motion. So when the Court of Appeals in *Pitts* held that the lower courts should have granted the defendants' motions under the 1994 statute and that the 2004 amendment did not affect the outcome, it was implying that, had the defendants made their motions under the 2004 statute, the lower courts would have had the discretion to deny the motions.

Tankleff was convicted prior to January 1, 1996, and he submitted his DNA motion after subdivision 1-a was amended in 2004. If Preiser's view is correct, and if the *Pitts* footnote means anything, Tankleff may have to show that his failure to take advantage of the opportunity for DNA testing of Arlene's fingernail clippings until 2005 was not caused by a lack of due diligence.

CONCLUSION

In October 2000, Tankleff, with the assistance of his trial attorney and post-conviction DNA experts, moved for DNA testing of crime-scene hairs. Respondent consented to the testing, Tankleff selected hairs to be tested, and a judge ordered the testing of the hairs. Tankleff's forensic examiner thereafter tested the hairs, but the test results failed to exonerate Tankleff or to cast doubt on his guilt. On this record, Tankleff should be denied access to additional DNA testing.

Dated: Riverhead, New York
June 5, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 670.10.3(f)

Leonard Lato, an attorney admitted to practice in the New York State courts and of counsel to respondent Thomas J. Spota, District Attorney of Suffolk County, certifies that he prepared the foregoing memorandum using Microsoft Word. The memorandum's typeface is proportionally spaced Times New Roman font, in 14-point for text and in 12-point for footnotes, and is double-spaced in text (except for block quotes) and is single-spaced in footnotes. The number of words, inclusive of point headings and footnotes, but exclusive of the Table of Contents, Table of Citations, Proof of Service and Certificate of Compliance, is 12,710.

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CERTIFICATE OF SERVICE

Leonard Lato certifies as follows:

On June 5, 2007, by Express Mail, I served on Defendant-Appellant Martin H. Tankleff two copies of the foregoing Brief of Respondent and Appendix of Respondent. I enclosed the copies in an envelope addressed to Tankleff attorney Roberto Gonzalez, Wilmer Cutler Pickering Hale and Dorr LLP, 1875 Pennsylvania Avenue, N.W., Washington, DC 20006, and affixed to the envelope Express Mail postage and delivered the envelope to the United States Post Office located at 1210 West Main Street, Riverhead, New York 11901-3110.

Leonard Lato

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