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.
2006-3619

Suffolk County
Indictment No.
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 440.10(1)(h) motion to vacate a judgment entered in the same court on October 23, 1990 (Alfred C. Tisch, Judge). The judgment convicted Tankleff, after a jury trial, of the depraved-indifference murder of his mother and imposed a sentence of 25 years to life. This Court issued an order affirming the judgment, and the Court of Appeals affirmed this Court's order. Tankleff is serving his sentence consecutively to an equal-length sentence that a second judgment imposed upon his conviction for the murder of his father.

Tankleff contends that this Court must grant relief from the depraved indifference murder verdict that, he contends, was based on insufficient evidence. His contention is meritless.

STATEMENT OF FACTS

Introduction

On September 7, 1988, inside 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. (A 231-35).[1]

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

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

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).

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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[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; 2006-3717A 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 6. 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 7. 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 6, 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, Rein? 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 last user, had left it. Bove testified, "I didn't lay the knife there." (T 734-40, 1706-07, 1840; 2006-3617A 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 that "the 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; 2006-3617A 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

At the close of evidence, Tankleff's trial counsel moved to dismiss the depraved indifference murder counts. Counsel argued that there was no reasonable view of the evidence that would permit the jury to find Tankleff "innocent of the intentional crime and . . . guilty of the depraved crime." The trial court denied the motion. The jury found Tankleff guilty of the intentional murder of Seymour and the depraved-indifference murder of Arlene. (T 5030-33, 5138-39).

Post-Trial Proceedings

In his direct appeal to this Court, Tankleff asserted, among other claims, that the trial evidence was consistent only with a finding that he intended to kill his mother and inconsistent with a finding that he recklessly caused her death. This Court "agree[d] . . . that the evidence . . . [was] far more consistent with the conclusion that he intended to kill his mother than with the jury's conclusion that he killed her recklessly." Nevertheless, this Court stated, it could not substitute its

assessment of the facts for that of the jury. This Court also observed that "[t]he jury's conclusion . . . was certainly not the first one in which . . . [the] evidence would have supported [a] finding of intent yet [the] jury opted for [a] finding of recklessness." *People v. Tankleff*, 199 A.D.2d 550, 553-54 (2d Dep't 1993).

Tankleff raised the same claim in his direct appeal to the New York Court of Appeals. Tankleff asserted, "[N]o rational trier of fact could have concluded beyond a reasonable doubt that the murder of Arlene Tankleff was committed with the mens rea of recklessness. The evidence . . . pointed only to an intentional, premeditated murder. (A 41). In affirming the order of this Court, the Court of Appeals did not explicitly address Tankleff's depraved-indifference claim, but it did hold that it had "examined defendant's remaining contentions and [found] them to be either meritless or unpreserved." *People v. Tankleff*, 84 N.Y.2d 992, 995 (1994). Because Tankleff preserved his depraved-indifference claim, (A 39 & n.2), it appears that the Court of Appeals rejected his claim on the merits.

In March 2005, in County Court, Tankleff filed a CPL 440.10 motion for an order vacating his conviction of depraved-indifference murder. Tankleff contended, once again, that his "conviction . . . was based on legally insufficient evidence." (A 13, 23). The County Court denied the motion. The County Court held, "[T]his issue has already been reviewed on appeal, and since it is recognized

that it is as least possible that the evidence could support a finding of . . . depraved indifference murder," this court hereby denies the defendant's motion." (A 8-9).

This appeal followed.

ARGUMENT

TANKLEFF IS STILL GUILTY OF DEPRAVED-INDIFFERENCE MURDER

Tankleff asserts that his conviction for the depraved-indifference murder of Arlene must be vacated because the trial evidence established that, *if* he killed Arlene, he did so intentionally. He contends that recent New York Court of Appeals' decisions on depraved-indifference murder apply on collateral review and mandate granting the relief he requests. His contention is meritless.

Preservation and Standard of Review

By moving on specific grounds for a dismissal order, Tankleff's trial counsel preserved the depraved-indifference issue for appellate review. *See, e.g., People v. Gray*, 86 N.Y.2d 10, 18-19 (1995). Thus, *if* this Court were required to re-review the sufficiency of the evidence, it would " 'view[] the evidence in the light most favorable to the prosecution' " and determine whether " '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *People v. Contes*, 60 N.Y.2d 620, 621 (1983) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

This Court owes no deference to the County Court's legal conclusion denying Tankleff's motion. *See, e.g., People v. Adessa*, 89 N.Y.2d 677, 684-85 (1997). And the People concede that, if the jury had found Tankleff guilty under current depraved-indifference law, the verdict would be defective. Although

Tankleff, in murdering Arlene, acted with depravity, the only rational view of the evidence, under current law, is that he acted with the purpose to end her life. But Tankleff was convicted under an earlier depraved-indifference law, and under that law the jury properly found him guilty. Because the current law does not apply retroactively, this Court cannot reexamine Tankleff's sufficiency argument.

The Evolution of Depraved-Indifference Murder

Depraved-indifference murder existed in New York at the common law. *See People v. Enoch*, 13 Wend. 159, 176 (N.Y. 1834) (Westlaw, NY-CS Database). In 1829, the New York Legislature codified depraved-indifference murder by adopting the common-law definition of a " 'killing . . . by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.' " *Id.* at 162-65 (quoting 2 N.Y. Rev. Stat. 657 § 5(2) (1829)). The statute embraced two types of cases, with each type involving a danger to more than one person. One type involved a defendant who had a "general and indiscriminate" "intent to take life." The other type involved a defendant who "put[] the lives of many in jeopardy, under circumstances evincing great depravity and utter recklessness in regard to human life." The only mens rea of the crime was "a depraved mind, regardless of human life." *Darry v. People*, 10 N.Y. 120, 142-43, 146-47 (1854).

In 1909, the legislature enacted the Penal Law and, but for one variation, again adopted the common-law definition of depraved-indifference murder. The new statute defined the crime as " 'killing . . . [b]y an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual.' " *People v. Jernatowski*, 238 N.Y. 188, 190, 192 (1924) (citing Penal Law § 1044(2) (1909)). The new statute varied from its predecessor in that the new statute omitted the word "particular" before the word "individual." *Id.* at 192. The omission eliminated the prior statute's requirement that the defendant's conduct pose "a threat of danger to more than one person." *People v. Poplis*, 30 N.Y.2d 85, 89 (1972) (discussing *Darry*, 10 N.Y. at 147-48).

In 1965, the legislature revised the Penal Law and again modified the definition of depraved-indifference murder. The new statute stated, " 'A person is guilty of murder when[,] under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person[] and thereby causes the death of another person.' " *Id.* at 87 (quoting Penal Law § 125.25(2) (1965)). The statute superseded the mental state "depraved mind" with the mental state "recklessly." The statute also omitted the prior statute's clause, "without a premeditated design to effect the death of any individual." *Id.* at 88-89.

In 1983, the Court of Appeals interpreted the new statute when it decided *People v. Register*, 60 N.Y.2d 270 (1983). In *Register*, the defendant stated that he intended to kill someone and later shot and wounded two persons before shooting and killing a third person who had walked past him in a bar. *Id.* at 273-74. The court affirmed the conviction for depraved-indifference murder. The court stated:

> Defendant's awareness of and indifference to the attendant risks was established by evidence that he entered a crowded bar with a loaded gun [and] said that he was "going to kill somebody" . . . or similar words, several times . . . . Ultimately, he fired the gun three times in the "packed" barroom, conduct which presented a grave risk of death. . . . His conduct was well within that defined by the statute.

Id. at 275. In comparing the new statute with the prior statutes, the Court stated:

> [W]hereas the former penal statutes . . . defined [the] *mens rea* "as a depraved mind" and contained no references to recklessness . . . , the present statute defines the crime by reference to the circumstances under which it occurs and expressly states that recklessness is the element of mental culpability required. The concept of depraved indifference was retained in the new statute not to function as a *mens rea* element, but to objectively define the circumstances which must exist.

Id. at 277-78. The Court held that " 'recklessness' [was] . . . the only *mens rea* of the crime." The Court also held that if the phrase, "under circumstances evincing a depraved indifference to human life" "state[d] an element of the crime at all, it [was] not an element in the traditional sense but rather a definition of the factual setting in which the [defendant's] . . . conduct . . . occur[red]." *Id.* at 276-77.

In 2002, the Court of Appeals reaffirmed *Register* in *People v. Sanchez*, 98 N.Y.2d 373 (2002). The Court of Appeals also discussed how "the Legislature differentiated between the reckless state of mind sufficient to establish the mental culpability of [reckless] manslaughter and the *extreme* recklessness of [depraved indifference] murder." *Id.* at 380 (emphasis added). The court held, "*Register* does not hold that 'ordinary recklessness' is sufficient to establish depraved indifference murder. *Register* requires a significantly heightened recklessness." *Id.* The court also noted that a defendant whose "conduct involved such a high risk of death that it could lead to the conclusion that it was intentional supports rather than detracts from characterizing it as evincing depraved indifference to human life. . . . [P]urposeful homicide itself is the ultimate manifestation of indifference to human life." *Id.* at 384.

Prosecutors relied on *Register* to charge "depraved indifference murder [as] routine escorts to intentional murder counts," and the new charging tactic resulted in "a proliferation of depraved indifference murder prosecutions." Indeed, "in 1989 only 19% of all [murder] indictments contained a count of depraved indifference murder. By 2001, prosecutors charged depraved indifference murder in *70%* of all murder indictments. *Id.* (Rosenblatt, J., dissenting).

Although the Court of Appeals would not say so until years later, the law began to change in 2003. That year, in *People v. Hafeez*, 100 N.Y.2d 253 (2003),

the court began to curtail prosecutors' reliance on "twin count" murder indictments. In *Hafeez*, the defendant and his accomplice killed their victim with a "single deliberate" knife thrust to the victim's chest. The court held that the defendant lacked the mental culpability required for depraved-indifference murder where the only reasonable view of the evidence was that he acted with the intent to kill. *See id.* at 258-59.

In 2004, the Court of Appeals continued to retreat from *Register*. Early that year, the court overturned a conviction where the defendant intended to shoot and kill his victim. *See People v. Gonzalez*, 1 N.Y.3d 464, 466-68 (2004) (holding that defendant lacked mens rea required for depraved-indifference murder where "defendant . . . killed the victim by aiming a gun directly at him and shooting him 10 times at close range"). And in late 2004, the court overturned a conviction where the defendant, once again, intended to shoot and kill his victim. *See People v. Payne*, 3 N.Y.3d 266, 269-71 (2004) (holding that the "use of a weapon [such as a gun at point-blank range] can never result in depraved indifference murder when . . . there is a manifest intent to kill").

The Court of Appeals' retreat from *Register* represented a change in the law. But the court's failure to say so caused the federal courts to intervene. *See Policano v. Herbert*, 430 F.3d 82 (2d Cir. 2005). In *Policano*, the Second Circuit affirmed the judgment of a United States District Court that had granted a writ of

habeas corpus to a defendant convicted of depraved-indifference murder. *See id.* at 84. Under federal law, a defendant " 'is entitled to habeas corpus relief if . . . the record evidence adduced at trial [demonstrates that] no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' " *Id.* at 86 (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). According to the Second Circuit:

> Policano shot Phillips twice in the back of the head, once in the neck, and then once in the leg. The shooting took place six days after Policano and Phillips had had a fight in which Phillips struck Policano in the face with a pipe, sending him to the hospital . . . . Policano told [a] Police Officer . . . that he 'would take care of' the matter himself and did not require police involvement. . . . [T]hree days after the argument, Policano expressed continuing anger about the incident . . . . Policano crossed [the street] to reach Phillips [and] shot and killed Phillips at point-blank range.

Id. at 89. The Second Circuit held that the defendant in *Policano* had not committed depraved-indifference murder. The Second Circuit stated:

> [T]he evidence does *not* support a rational finding by a jury that Policano's firing of a nine-millimeter gun three times into Phillips's head and neck from close range was an act of "conscious[] disregard" of the risk that Phillips would die as a result. There is no evidence in the record that . . . Policano acted otherwise than with the deliberate intent to kill.

Id.

Policano's conviction became final in 2001. *Id.* at 85-86. Nevertheless, the Second Circuit held that the New York Court of Appeals' subsequent decisions in

cases such as *Gonzalez* and *Payne* applied in *Policano*. *See id.* at 92. According to the Second Circuit:

> *Gonzalez* and *Payne* represent not the creation of a new legal principle, but the application of long-settled New York law to new facts. The district court properly used them . . . as a means of understanding the applicable law as it existed at the time of Policano's trial and appeal.

Id. at 92. The Second Circuit lamented, "The result of these habeas corpus proceedings is, of course, disturbing. The defendant is set free *because* he meant to kill his victim."[8] *Id.* at 85, 93.

One week after the Second Circuit's decision, the New York Court of Appeals decided *People v. Suarez*, 6 N.Y.3d 202 (2005) (per curiam). In *Suarez*, the Court of Appeals implied that the law had changed. The court held, "We depart slightly from the *Register* formulation . . . in that we make clear that the additional requirement of depraved indifference has meaning independent of the gravity of the risk." *Id.* at 215.

Suarez caused the Second Circuit to withhold its mandate in *Policano*, and it precipitated an exchange between the Second Circuit and the New York Court of Appeals. *See Policano v. Herbert*, 453 F.3d 75, 75 (2d Cir. 2006) (per curiam). The Second Circuit recognized that "both the state and the clarity of relevant New

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[8] The Second Circuit distinguished the facts before it from the facts in *People v. Tankleff*. Referring to this Court's decision affirming Tankleff's direct appeal, the Second Circuit opined, "[T]he facts of *Tankleff* could have supported an inference of either intentional or reckless murder." *Id.* at 90-91 (dicta) (citing *People v. Tankleff*, 199 A.D.2d at 554).

York law *at the time of Policano's conviction* . . . [were] issues of state law as to which the New York Court of Appeals ha[d] not spoken [and would be] dispositive of the federal questions" confronting the Second Circuit in *Policano*. *Id.* at 75-76. The Second Circuit "certifie[d] . . . questions . . . to the New York Court of Appeals" "to obtain from New York's highest court its view of the relevant principles of New York law." *Id.* at 76.

The New York Court of Appeals accepted certification. *Policano v. Herbert*, 7 N.Y.3d 779, 779-80 (2006). But its answers were a foregone conclusion. The day before it accepted certification, it decided *People v. Feingold*, 7 N.Y.3d 288 (2006).

In *Feingold*, the Court of Appeals confirmed that the law had begun to change with *Hafeez*, and it overruled *Register* and *Sanchez*. *Feingold*, 7 N.Y.3d at 294, 296. The court stated, "While the *Suarez* Court did not explicitly overrule *Register* and *Sanchez*, . . . the law has changed to such an extent that . . . *Register* and . . . *Sanchez* should no longer be followed." *Id.* The court stated:

> After *Register* and *Sanchez*, and beginning in 2003, a number of decisions by this Court have pointed the law in a different direction. . . .
>
> . . . .
>
> . . . In earlier cases (*Hafeez*, *Gonzalez*, *Payne*, *Suarez*), we reversed depraved indifference murder convictions without having to discuss explicitly the question of mens rea. . . .

> Beginning with *Hafeez*, the *Register/Sanchez* rationale was progressively weakened so that it would no longer support most depraved indifference murder convictions, particularly one-on-one shootings or stabbings.

Id. at 292, 294. The court stated, "We thus confirm what is implicit in the line of cases from *Hafeez* to *Suarez*. . . . '[D]epraved indifference to human life' is a culpable mental state." *Id.* at 296. Thus, a person commits depraved-indifference murder only if his mental state includes the component "recklessly" *and* the component "depraved indifference to human life." *Suarez*, 6 N.Y.3d at 216. "[D]epraved indifference is best understood as an utter disregard for the value of human life – a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not." *Feingold*, 7 N.Y.3d at 296 (internal quotation marks omitted).

In November 2006, the Court of Appeals answered the Second Circuit's certified questions. *See Policano v. Herbert*, 7 N.Y.3d 588 (2006). The court answered that, on the date that Policano's conviction became final, "*Register* . . . governed the legal sufficiency of the evidence needed to establish guilt for depraved indifference murder." *Id.* at 600. The court stated:

> [U]nder *Register* – and until we started to recast "under circumstances evincing a depraved indifference to human life" post-*Sanchez* – where both intentional and depraved indifference murder were charged in one-on-one shootings or knifings, these counts were submitted to the

> jury for it to sort out the defendant's state of mind unless there was absolutely no evidence whatsoever that the defendant might have acted unintentionally.

Id. at 600-01. The court added:

> That a defendant's acts virtually guaranteed the victim's death did not, in and of itself, preclude a guilty verdict on a theory of depraved indifference. To the contrary . . . , under the *Register* formulation the very facts establishing a risk of death approaching certainty and thus presenting compelling circumstantial evidence of intent – for example, a point-blank shooting of the victim in the head – likewise demonstrated depraved indifference."

Id. at 601. The court observed that, although "under the law of New York today, a jury would not be permitted to find [Policano] guilty of depraved indifference murder," at "the time [Policano]'s conviction became final, . . . *Register* defined New York law" and concluded that, under *Register*, "the jury was permitted to find [Policano] guilty of depraved indifference murder." *Id.* at 601-02. The court concluded its opinion by stating that its "post-*Sanchez* case law" did not apply retroactively. *Id.* at 603.

The "*Hafeez*, *Gonzalez*, *Payne* and *Suarez*" "quartet of cases . . . represent[ed] a perceptible, evolving departure from the underpinnings of depraved indifference murder as expressed in *Register* and *Sanchez*." *Id.* And because Tankleff's conviction became final during the non-retroactive *Register* stage of the evolutionary cycle, the County Court was precluded from reexamining the jury's verdict.

Tankleff's Conviction Complies with Due Process

Tankleff contends that "the Court of Appeals' recent clarifications of depraved indifference murder show that the prosecution's trial evidence was legally insufficient to prove that Tankleff committed depraved indifference murder." According to Tankleff, his "conviction . . . is unsupported by legally sufficient evidence of recklessness" and, thus, "violates due process." (Def.'s Br. 18, 22). Tankleff's contention is meritless.

Tankleff's Motion Was Barred Procedurally

Tankleff filed his motion pursuant to CPL 440.10(1)(h), which authorizes a court to vacate a judgment "obtained in violation of a right of the defendant under the constitution of [New York S]tate or of the United States." Tankleff asserted in his motion that the jury verdict finding him guilty of depraved-indifference murder "violated his due process rights under the federal and state constitutions" because "there was no evidence presented at trial to prove . . . recklessness." (A 13).

Tankleff concedes that he raised his "recklessness sufficiency" argument in his direct appeal to this Court and in his direct appeal to the Court of Appeals. He concedes that this Court and the Court of Appeals rejected his argument. And he concedes that there has been no retroactively effective change in the law regarding recklessness. (Def.'s Br. 14-15, 35-36). CPL 440.10(2)(a) compelled the County Court to deny his motion.

As Respondent asserted in its opposition memorandum in County Court, CPL 440.10(2)(a) states that a "court must deny a motion to vacate a judgment when . . . [t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of the appellate determination there has been a retroactively effective change in the law controlling such issue." (A 40) (quoting CPL 440.10(2)(a)). Because Tankleff premised his "recklessness sufficiency" motion on what he contended was a recent clarification of the law as opposed to a retroactively effective change in the law, the County Court had to deny his motion. *See People v. Stewart*, 36 A.D.3d 1156, 1157, 1161 (3d Dep't 2007) (denying defendant's CPL 440.10 motion because defendant's contention "that he was guilty of an intentional crime or no other" was "the precise issue that we rejected on the merits upon his direct appeal") (internal quotation marks omitted). As the court held in *People v. James*, 15 Misc. 3d 1113(A), 2007 N.Y. Slip Op. 50635(U) (Sup. Ct. Kings County March 30, 2007):

> This Court may not vacate defendant's conviction on grounds that the element of recklessness was inadequately established unless there [has been] a retroactive change in law since the time the conviction became final. There has been no such change with regard to the recklessness element. Therefore, an argument that recklessness was inadequately supported by the evidence is precluded under C.P.L. § 440.10(2)(a).

2007 N.Y. Slip Op. 50635, at *3.

Neither the County Court nor this Court can abrogate a ruling of the New York Court of Appeals. Tankleff has brought the wrong motion in the wrong forum. If he chooses to seek relief, he must do so through a motion to reargue in the Court of Appeals. *See* N.Y. Ct. App. R. 500.24(b).

Tankleff's Motion Was Meritless

Tankleff contends that application of recent Court of Appeals' cases to his case shows that because the prosecution failed to prove recklessness, his conviction violates due process. (Def.'s Br. 19-22). His contention is meritless.

When a State convicts a defendant of violating a statute and the State's highest court thereafter interprets the statute in a manner inconsistent with the conviction, it matters whether the court clarifies the statute's meaning or creates new law. If the court clarifies the statute's meaning, the State cannot, "consistently with the Federal Due Process Clause, convict [a person] for conduct that its criminal statute, as properly interpreted, does not prohibit." *Fiore v. White*, 531 U.S. 225, 228 (2001). In contrast, if the court reinterprets a statute during an "evolutionary process" and creates new law, the Due Process Clause is satisfied. *Bunkley v. Florida*, 538 U.S. 835, 840-41 (2003) (per curiam).

Tankleff asserts that "the Court of Appeals [has] clarified the law of depraved indifference murder, including . . . the 'recklessness' element." (Def.'s Br. 26). According to Tankleff:

> At the time of Tankleff's conviction, the New York Court of Appeals [already] had established that it was error for a trial court to submit a depraved-indifference murder count to the jury based on legally insufficient evidence of recklessness.
>
> . . . .
>
> . . . [In *Policano*], the Court reaffirmed that "it has never been permissible . . . for a jury to find the recklessness element of] depraved indifference murder where the evidence . . . indicated that if the defendant committed the homicide . . . he committed it with the conscious objective of killing the victim." This principle should be apparent from a plain reading of he depraved indifference murder statute, but in *Suarez*, *Payne*, *Gonzalez*, and *Hafeez*, the Court of Appeals overturned a . . . convictions . . . because the convictions were not based on any evidence of recklessness.

(Def.'s Br. 26-27) (quoting *Policano*, 7 N.Y.3d at 600).

Tankleff's assertion is absurd. It is also false. His contention is absurd because a court does not "clarify the law" when it reaffirms its prior interpretation. His contention is false because in *Suarez*, *Payne*, *Gonzalez* and *Hafeez*, the Court of Appeals did *not*, as he asserts, cite as its reason for overturning the convictions in those cases "an absence of recklessness." *See Feingold*, 7 N.Y.3d at 294. In *Feingold*, the Court of Appeals stated:

> In earlier cases (*Hafeez*, *Gonzalez*, *Payne*, *Suarez*), we reversed depraved indifference murder convictions *without having to discuss explicitly the question of mens rea*. It was enough to say – and we said it repeatedly – that those defendants did not commit depraved

> indifference murder *because depravity or indifference was lacking.*

Id. (emphasis added).

The Court of Appeals, in *Feingold*, did not "clarify the law." It *changed* the law during an evolutionary process that culminated when it overruled *Register* and *Sanchez*. (*See* discussion *supra* pp. 36-45). But *Register* was the law the year that Tankleff murdered Arlene. *See, e.g.*, *People v. Davis*, 72 N.Y. 32, 36 (1988) (citing *Register*, 60 N.Y.2d at 277). *Register* was the law when Tankleff's direct appeals came to an end. *See, e.g.*, *People v. Cole*, 85 N.Y.2d 990, 992 (1995) (citing *Register*, 60 N.Y.2d at 270). Because Tankleff's conviction became final before the law changed, a reasonable jury could have found him guilty of depraved-indifference murder. *See Policano*, 7 N.Y.3d at 601-02 (answering the Second Circuit that a jury could no longer find Policano guilty but that under *Register* the jury "was permitted to find [Policano] guilty of depraved indifference murder." *Id.* at 601-02.

Depraved-indifference murder has been evolving in New York since 1834. The "*Hafeez*, *Gonzalez*, *Payne* and *Suarez*" "quartet of cases . . . represent[ed] a perceptible, evolving departure from the underpinnings of depraved indifference murder as expressed in *Register* and *Sanchez*." Tankleff was convicted during the *Register* stage of the evolutionary cycle. His conviction complies with due process.

The Change in the Law is Not Retroactive on Collateral Review

Tankleff's alternative argument is that the Court of Appeals "revised interpretation of depraved indifference murder law should apply retroactively to [his] conviction in order to rectify the 'miscarriage of justice' caused by reliance on the old standard." (Def.'s Br. 41-42). His contention is meritless.

Prior to *Feingold*, some lower courts held that cases such as *Payne* did not declare a retroactive change in the law but instead applied existing law to new facts. *See, e.g.*, *Parsons v. Walsh*, 21 A.D.3d 1169, 1169 (3d Dep't 2005). In light of *Feingold*, in which the Court of Appeals overruled *Register* and *Sanchez*, this proposition is now unsound. *See People v. Stewart*, 36 A.D.2d at 1158 n.2.

When the Court of Appeals overrules precedent, it establishes a " 'new' rule requiring analysis under [New York's retroactivity test]." *People v. Favor*, 82 N.Y.2d 254, 263 (1993). Retroactivity can be limited to cases on direct appeal or can extend to cases on collateral review, that is, after "[t]he normal appellate process [comes] to an end." *See People v. Pepper*, 53 N.Y.2d 213, 222 (1981). "[C]ases on direct appeal are generally decided in accordance with the law as it exists at the time the appellate decision is made." *See People v. Vasquez*, 88 N.Y.2d 561, 573 (1996). In contrast, absent a "manifest injustice," a defendant will *not* receive the benefit of a change if the change comes after he has exhausted his direct appeals. *See Pepper*, 53 N.Y.2d at 222.

The Court of Appeals has determined that cases on direct appeal will receive the benefit of its change to depraved-indifference murder. *See, e.g.*, *People v. Mancini*, 7 N.Y.3d 767, 768 (2006). The Court of Appeals has also determined that cases on collateral review will *not* receive the benefit of the change. *See Policano*, 7 N.Y.3d at 603 (answering the Second Circuit that "post-*Sanchez* case law" does not apply retroactively on collateral review). In *Policano*, the Court of Appeals stated:

> Under *People v. Pepper*, we must weigh three factors to determine whether a new precedent operates retroactively: the purpose to be served by the new standard; the extent of the reliance by law enforcement authorities on the old standard; and the effect on the administration of justice of a retroactive application of the new standard.

Id. at 605. In explaining its rationale for prospective-only application, the court stated:

> The purpose of our new interpretation of "under circumstances evincing a depraved indifference to human life" is to dispel the confusion between intentional and depraved indifference murder, and thus cut off the continuing improper expansion of depraved indifference murder. Moreover, in the words of the concurring Judges in *Suarez*, the goal is to "make future homicide prosecutions more sustainable, increasing the likelihood that defendants who are proven beyond a reasonable doubt to have committed intentional murder will be properly held to account for that crime." Further, "[d]efendants who commit[] vicious crimes but who may have been charged and convicted under the wrong section of the statute are not attractive candidates for

> collateral relief after their convictions have become final." In short, nonretroactivity poses no danger of a miscarriage of justice.
>
> Finally, the other two *Pepper* factors strongly favor nonretroactivity. For two decades prosecutors relied on *Register's* objectively determined degree-of-risk formulation when making their charging decisions. In addition, retroactive application would potentially flood the criminal justice system with CPL 440.10 motions to vacate convictions of culpable intentional murderers who were properly charged and convicted of depraved indifference murder under the law as it existed at the time of their convictions.

Id. at 603-604 (quoting *Suarez*, 6 N.Y.3d at 217-18) (G.B. Smith, J., Rosenblatt, J., and R.S. Smith, JJ., concurring) (alteration in *Policano*).

Tankleff asserts that the "Court of Appeals' refusal in *Policano* to retroactively apply" post-*Sanchez* law "to Policano's conviction does not preclude retroactive application to Tankleff's conviction." (Def.'s Br. 55 n.15). Tankleff's assertion is frivolous. A change in the law either is retroactive or it is not retroactive. The change cannot be retroactive in some cases and not retroactive in others. *See Commonwealth v. Brady*, 43 Pa. D. & C.2d 325, 332-33, 1967 WL 5829, at *5 (Pa. Quar. Sess. 1967) (holding that the court could not make "exclusionary rules . . . retroactive in some cases and not in others"). And post-*Policano*, New York's lower courts have held that the Court of Appeals' current interpretation of depraved-indifference murder does not apply retroactively to cases on collateral review. *See, e.g., People v. Stewart*, 36 A.D.3d at 1162-63

("inasmuch as the Court of Appeals has instructed us that the change in the law regarding depraved indifference is not retroactive, we must affirm the denial of defendant's CPL article 440 motion"); *People v. James*, 2007 N.Y. Slip Op. 50635, at *3 ("the change in [depraved indifference] law is not retroactive" to cases brought pursuant to CPL 440.10); *People v. Guttierez*, 14 Misc. 3d 1213(A), 2007 N.Y. Slip Op. 50010(U), at *3 (County Ct. Suffolk County Jan. 4, 2007) (denying defendant's CPL 440.10 motion on ground that current law of depraved-indifference murder is not retroactive).

Retroactive application on a case-by-case basis would cause a problem that the Court of Appeals has stated that it intends to avoid: "[a] flood [of] . . . CPL 440.10 motions . . . [from] culpable intentional murderers who were properly charged and convicted of depraved indifference murder under the law as it existed at the time of their convictions." *Policano*, 7 N.Y.3d at 604. Indeed, in the Second Department alone, the courts could face motions from nineteen defendants claiming that they should be set free because they intentionally killed their victims. *See People v. Crawford*, 295 A.D.2d 361, 361-62 (2d Dep't 2002) (one-on-one shooting in which defendant shot victim several times); *People v. McCarthy*, 293 A.D.2d 490, 491 (2d Dep't 2002) (one-on-one shooting in which defendant shot victim in face); *People v. Elkady*, 287 A.D.2d 518, 518 (2d Dep't 2001) (one-on-one stabbing in which defendant "stabbed and slashed" victim); *People v. Flowers*,

289 A.D.2d 504, 504 (2d Dep't 2001) (one-on-one shooting in which defendant shot victim in face at close range); *People v. Singh*, 276 A.D.2d 503, 503 (2d Dep't 2000) (one-on-one shooting in which defendant shot victim at close range); *People v. Porter*, 256 A.D.2d 363, 364 (2d Dep't 1998) (one-on-one shooting of "rival drug seller" and seller's girlfriend as they sat in parked car); *People v. Soto*, 240 A.D.2d 768, 768-69 (2d Dep't 1997) (one-on-one beating in which defendant punched victim then strangled her with shoelace); *People v. Artis*, 220 A.D.2d 441, 441-42 (2d Dep't 1995) (one-on-one shooting in which defendant shot victim in head); *People v. Morgan*, 207 A.D.2d 501, 501-02 (2d Dep't 1994) (one-on-one stabbing in which defendant stabbed victim multiple times in "chest, abdomen, and back"); *People v. Rivera*, 205 A.D.2d 807, 807-08 (2d Dep't 1994) (one-on-one stabbing in which defendant stabbed "unarmed decedent 13 times," including twice in heart); *People v. Wright*, 198 A.D.2d 249, 249-50 (2d Dep't 1993) (one-on-one vehicular assault in which defendant deliberately drove his car into victim "with enough force to crush [victim's] skull"); *People v. Lopez*, 197 A.D.2d 594, 594 (2d Dep't 1993) (street fight culminating in one-on-one shooting); *People v. Perez*, 196 A.D.2d 781, 781-82 (2d Dep't 1993) ("one on four" shooting in which "defendant lured four acquaintances to a secluded location, ordered them to their knees and fired 15 shots at them at close range"); *People v. Abney*, 173 A.D.2d 545, 545 (2d Dep't 1991) (one-on-one bludgeoning in which defendant repeatedly hit victim in

"face and head with an axe" and "stomped on and kicked [victim]"); *People v. Goode*, 175 A.D.2d 181, 181 (2d Dep't 1991) (one-on-one assault in which "defendant struck the 14-year-old victim with an automobile[] and then bludgeoned her head and face with a tire-jack"); *People v. Watson*, 156 A.D.2d 403, 403-04 (2d Dep't 1989) (one-on-one stabbing in which defendant embarked on "calculated and premeditated quest for revenge" and "armed himself with two long butchers' knives" and "repeatedly sliced and stabbed the victim"); *People v. Henry*, 132 A.D.2d 673, 674-76 (2d Dep't 1987) (one-on-one bludgeoning in which defendant hit victim "over the head twice with a cut-down mop handle" and placed her in trunk of car that he then abandoned); *People v. Languena*, 129 A.D.2d 587, 587 (2d Dep't 1987) (one-on-one shooting in which defendant argued with victim then drew gun and "shot her in the back"); *People v. Lucchese*, 127 A.D.2d 699, 700-01 (2d Dep't 1987) (one-on-one beating in which defendant assaulted wife for 90 minutes and stated, "I'm . . . gonna kill the bitch").

The Court of Appeals meant what it said. Its change in the law of depraved-indifference murder is not retroactive to cases on collateral review.

CONCLUSION

Tankleff bludgeoned and slashed his mother to death. His conviction complies with due process, and he is an unattractive candidate for collateral relief seventeen years after a jury found him guilty.

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 13,992.

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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 Scott J. Splittgerber, Clifford Chance US LLP, 31 West 52nd Street, New York, NY 10019, 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

Leonard Lato