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

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

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - MARTIN H. TANKLEFF, Defendant-Appellant.	AD Docket Nos. 2006-9042 & 2007-1292 (Consolidated) Suffolk County Indictment Nos. 1290-88, 1535-88

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BRIEF OF RESPONDENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

MARTIN H. TANKLEFF,

Defendant.

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PRELIMINARY STATEMENT

The Defendant-Appellant Martin H. Tankleff appeals from an order entered on April 27, 2006, and an order entered on January 3, 2007, in the County Court of Suffolk County (Stephen L. Braslow, Judge). Each order, which the County Court issued without conducting a hearing, related to separate CPL 440.10 motions that Tankleff filed to vacate two judgments entered against him on October 23, 1990, in the same court (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 he has presented newly discovered evidence of his actual innocence and entitlement to a new trial. He also contends that the prosecution committed a *Brady* violation. His contentions are meritless.

STATEMENT OF FACTS

Introduction

On page two of his brief, Tankleff refers to the factual history "discussed at length in his principal brief" in related appeal 2006-3617. That appeal stems from a County Court order that denied, after a hearing, Tankleff's October 2003 CPL 440.10 motion to vacate the judgments entered against him.

As Respondent stated on page two of its "principal brief" in appeal 2006-3617, Tankleff's recitation of the facts in his principal brief was inaccurate because the only evidence that he recited was the evidence that supported his theory. In his present brief, Tankleff continues to be inaccurate. According to Tankleff, "He was convicted of [his parents'] murders based on a false confession and in the utter absence of any corroborating evidence." (Def.'s Br. 2). Ignoring what he cannot refute, Tankleff has forgotten, among other things, the corroborating blood evidence that he once conceded "contributed mightily to the case against him." (Resp.'s Principal Br. 43). It is against *People v. Tankleff's* true factual history, a history that Respondent set forth in its principal brief, that Tankleff's "new evidence" must be measured.

The County Court Denies Tankleff's Prior CPL 440.10 Motion

In his CPL 440.10 motion that gave rise to appeal 2006-3617, Tankleff "insisted that he [wa]s innocent and that the likely murderers were . . . [Jerry]

Steuerman and others hired by . . . Steuerman." Tankleff supported his motion with an August 1994 affidavit from Karlene Kovacs and an August 2003 affidavit from Glenn Harris. The affidavits, "together with what he had known at the time of the trial, and what he learned thereafter, apparently led [Tankleff] to locate [] numerous other witnesses." (A 9-10).[1]

The County Court conducted a hearing on Tankleff's prior motion and rendered its decision. The County Court held that Tankleff had failed to exercise due diligence in acquiring the evidence that he presented at the hearing. The court found that Tankleff had been accusing Jerry Steuerman "since the date of the murders" and that he had been aware of Kovacs's statement implicating "a Steuerman" and Joseph Creedon since 1994. The court found that Tankleff had sat on the Kovacs statement until 2001 and had failed to obtain an affidavit from Harris until August 2003, a delay that the court found "bewildering." (A 11).

The County Court also found that most of the evidence that Tankleff had presented at the hearing would be inadmissible at trial. For example, the court found that statements that witnesses had attributed to Creedon, Steuerman, Harris and alleged accomplice Peter Kent were hearsay and would be inadmissible under the hearsay exception for declarations against penal interest. (A 12-13, 16-17, 21).

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[1] Parenthetical cites (i) to "A" refer to pages in Tankleff's Appendix in appeal 2006-3617, (ii) to "CA" refer to pages in Tankleff's consolidated 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.

Reaching the merits of Tankleff's claim, the County Court found that Tankleff's "[new] evidence . . . consisted mainly of the testimony [of] a cavalcade of nefarious scoundrels paraded before th[e] court by him." The court also found unpersuasive Tankleff's claim of Creedon's and Kent's involvement. Observing that nothing had been stolen from the Tankleff house, the court found "it hard to believe that characters such as Creedon and Kent" would have murdered the Tankleffs but would not have stolen from them. The court also found "it incredible that Creedon and Kent would have left a potential witness behind by not also murdering the defendant." The court, "[a]fter thoroughly reviewing" the trial and hearing evidence, "reache[d] the same conclusion that the jury reached seventeen years ago . . . . Martin Tankleff is guilty of killing his parents." (A 11, 24-26).

Tankleff Files a New CPL 440.10 Motion

Four days after the County Court issued its decision denying Tankleff's motion, Tankleff filed another CPL 440.10 motion. In his new motion, Tankleff contended that "[t]hree additional witnesses, Lisa Harris, William Sullivan and James Moore, ha[d] come forward not only with confessions from two of the three men who participated in the murders of Arlene and Seymour Tankleff, but also with information that challenge[d] the integrity of the police investigation of the murders – evidence that further demonstrate[d] a relationship between [Detective James McCready] and [Steuerman]." (A 3953).

Lisa Harris ("Which Story Should I Tell Today?")

On June 11, 2003, a date four months before Tankleff filed his prior CPL 440.10 motion, Tankleff investigator Jay Salpeter obtained a statement from Glenn Harris's wife, Lisa Harris. In her statement, Lisa Harris – who had a long criminal record – claimed that, in January 2003, Glenn told her "the kid or boy didn't do it" and "that he and Peter Kent were at the [Tankleff] house and [that] Peter Kent did it." Tankleff did not call Lisa Harris as a witness at the hearing. (A 3972-74; RA 66).

On March 17, 2006, Lisa Harris spoke with Walter Warkenthien, a special investigator in the Suffolk County District Attorney's Office. Warkenthien recorded the conversation. In their conversation, Lisa Harris claimed that Salpeter had recently left her a message that Glenn Harris was dead and that she had helped kill him. (A 3970). According to Warkenthien:

> She stated that, on her answering machine, Jay Salpeter had left a message that his "contacts" had told him that Glenn Harris was dead and that she and Peter Kent "had something to do with killing him." She also stated that Salpeter wanted her to take him to where Glenn Harris had lived. She stated, ". . . I don't want to be involved."

(A 3970). Warkenthien also "asked [Lisa] what Glenn had told her about the Tankleff murders." According to Warkenthien:

> She stated, "[E]verything. . . . He came and he cried to me and told me how he and Peter [Kent] and Creedon went and did a burglary and it went bad." I asked her if

she thought that Glenn or Peter had killed the Tankleffs. She answered, "Uh, no."

(A 3970). Warkenthien also asked Lisa if Glenn ever claimed that Salpeter had planted the pipe that Glenn also claimed was the murder weapon. Lisa answered, "Um, yeah, he did tell me that." According to Warkenthien, Lisa also stated, "Glenn . . . told me that Tankleff, um, offered him a million dollars to confess that he did the killing." (A 3970-71).

Six days later, on March 21, 2006, Tankleff filed his motion. He attached to his motion an affidavit of Lisa Harris. In her affidavit, Lisa claimed that Glenn had told her "that he had driven to the Tankleff home the night the parents were murdered." She also claimed that about two weeks later, "Glenn told [her] even more details." (A 3934). According to Lisa:

> 4. . . . [Glenn] said that he was waiting outside in the car and that Peter Kent and Joe Creedon had gone to the Tankleff house to do a robbery because there was supposed to be $400,000. Glenn said that when Joe Creedon and Peter Kent came out of the house, Peter was covered with blood and carrying a pipe. . . .
>
> . . . .
>
> 6. . . . Glenn . . . told me he had shown Jay Salpeter where the murder weapon was. He said that pipe had been used on her very bad. . . . He told me that the lady was so badly beaten and that her head was hanging off by a string.

(A 3934-35).

After he submitted his motion, Tankleff may have learned of Lisa Harris's conversations with Warkenthien. On March 23, 2006, only two days after he had submitted his motion, Tankleff attorney Bruce Barket faxed to the County Court "a second affidavit of Lisa Harris." In her second affidavit – which Tankleff claimed that Lisa had signed on the same date that she had signed her first affidavit – Lisa stated that, in November 2005, "Out of no where, Glenn said that Marty offered him a million dollars to say that Marty didn't do the murders and that Jay planted the pipe." Lisa claimed that she accused Glenn of "making this shit up [about the million dollars and the planted pipe]" and that Glenn, in response, implied that he indeed had made it up because he was afraid that if he told the truth "he would spend the rest of is life in jail." (RA 79-81).

James Moore ("I Thought Tankleff Was Getting Out")

In his affidavit supporting Tankleff's motion, Moore – another witness with a long criminal record – asserted that, on March 18, 2006, while he was watching television, he heard "[o]n the news . . . that Marty Tankleff got denied [a new trial]." According to Moore, in 2002, he and Kent worked for Truly Blue Pools and, while they were installing a pool, Kent admitted having "had killed the Tankleffs by beating them with a pipe." Moore asserted that he did not come forward earlier because he "didn't want to get involved" and because he thought Tankleff "would get out anyway." (A 3939-40; RA 66-67).

William Sullivan ("This Reminds Me of Starsky and Hutch")

In his affidavit supporting Tankleff's motion, Sullivan claimed, "In the 1980s," he worked "as a manager and event planner at Carrington's, a restaurant and night club." According to Sullivan, "[A]t Carrington's, [he] witnessed, on at least two occasions, Jerry Steuerman and Detective James McCready hanging out and having conversations together." Sullivan stated that "[he] thought of [Steuerman] as a real Starsky and Hutch kind of guy." (A 3936-37).

Recalling when in the 1980s he saw Steuerman and McCready together, Sullivan first claimed that it was "somewhere between the fall of 1987 and February of 1988" but then claimed that it was "before January 1988." Sullivan also claimed that he did not come forward at the trial because he "didn't follow the case" "[b]ack in the 80s when the Tankleff case was in the newspapers." But in the spring of 2005, he "happened to see a show on Court TV about the Tankleff case" and from "that show or . . . a Newsday [a]rticle about the case" he realized that he had "important" information. Nevertheless, Sullivan asserted, he waited another year to come forward. (A 3936, 3938).

Frank Messina Jr. ("Why Should I Swear to Tell the Truth?")

In his reply to Respondent's answering papers, Tankleff included the statement of another witness, Frank Messina Jr. Messina claimed, in an unsworn statement, that he once owned Truly Blue Pools and assigned Kent to help fix a

pool leak at the former Tankleff residence in Belle Terre. According to Messina, Kent told Messina that Kent once had "business" at the house. Respondent asked the County Court to disregard Messina's statement because it was not in the form of an affidavit. Respondent also noted that Messina, like most of Tankleff's other witnesses, had an extensive criminal record. (A 3942-45; RA 64-67).

The County Court Denies Tankleff's Motion

The County Court denied Tankleff's motion without granting a hearing. The court did not consider Messina's statement, which was not in affidavit form. With respect to Lisa Harris, the court held that Tankleff had failed to exercise due diligence in presenting her information to the court. (CA 21-23). The court held:

> [T]he defendant was in possession of a statement by Lisa Harris dated June 11, 2003 in which she asserts that her husband Glenn Harris told her and his mother that he and Peter Kent were at the Tankleff house the night of the murders and that Peter Kent murdered the Tankleffs.
>
> . . . [Lisa Harris] could have been called as a witness . . . at the prior hearing. Instead, the defendant now attempts to obtain a new hearing based on testimony he could have offered at the prior hearing . . . . In addition to having failed to exercise due diligence as held by the court in its decision dated March 17, 2006, the defendant has clearly failed to exercise due diligence in attempting to introduce this testimony at this time.

(CA 23).

The County Court also held that Lisa Harris's testimony would be inadmissible. (CA 22). Referring to decision of March 17, 2006, the court noted:

> This court has already determined . . . that declarations made by Glenn Harris against his penal interest pertaining to the Tankleff murders would be inadmissible at a new trial because Glenn Harris lacks credibility since he has equivocated as to his purported admissions and sought details pertaining to the Tankleff murders from the defendant's investigator.

(CA 22). The County Court also found that Moore's testimony would be inadmissible. (CA 23-24). Referring again to its prior decision, the court held:

> Moore claims . . . that Peter Kent told him . . . that Peter Kent killed the Tankleffs.
>
> As [previously] held by the court . . . , an alleged declaration against one's penal interest would not be admissible at a new trial when the declarant is available to testify. Peter Kent testified at the prior hearing before the court and the court has no reason to believe that he would not be available to testify at a new trial.

(CA 23-24).

With respect to Sullivan, the County Court held that its prior decision, and Judge Tisch's decision of October 4, 1990, precluded the court from entertaining Tankleff's "[repeated] argu[ment] that a relationship between Jerry Steuerman and Detective McCready existed before the murders." (CA 23).

Tankleff Files One More CPL 440.10 Motion

In October 2006, Tankleff filed another CPL 440.10 motion. In his latest motion, he contended that two more witnesses, Daniel Raymond and Patrick Touhey, had information implicating "the actual murderers." (A 3981-82).

Daniel Raymond ("I Can Swear to Anything")

On July 12, 2004, or one week before the hearing on Tankleff's October 2003 motion commenced, Raymond, while incarcerated at the Mohawk Correctional Facility in Rome, New York, gave an affidavit to Peter Kent. In his affidavit, Raymond admitted having used cocaine and heroin with Kent from the evening of September 6, 1988, through the early afternoon of September 7, 1988. Because the Tankleff murders occurred in the early morning of September 7, 1988, Raymond was asserting that Kent was with him, and not with Harris or Creedon, when the murders occurred. (A 4033).

In or about late July 2004, Kent and Kent's attorney gave Raymond's affidavit to the district attorney's office. On November 12, 2004, Warkenthien and other representatives of the district attorney's office interviewed Raymond, who by now had been released from prison. Raymond reiterated that Kent was with him during the Tankleff murders. According to Warkenthien, Raymond admitted having been arrested at his house in Moriches on September 11, 1988, after he and Kent had gone on a weeklong robbery-drug spree. (A 4030-32). According to Warkenthien:

> We showed Raymond a . . . document that we had obtained from parole. According to the document, Kent and Raymond committed five robberies between August 31 and September 7, 1988. After reviewing the document, Raymond stated that the document confirmed his belief that he and Kent were together in Moriches . . .

> at the time the Tankleff murders were committed. . . . Raymond stated that from August 31 through September 7, he and Kent were together all the time. They got money for drugs and alcohol, he said, got high, and went out and got more money and got high again.

(A 3102-04, 4032). According to Warkenthien, Raymond stated that, with respect to the morning of September 7, 1988, "there was no way that Kent was anywhere but in Moriches with him." (A 4032).

Court and district attorney records, which included Raymond's written, postarrest statements, confirmed that Raymond and Kent were committing robberies together from 11:40 p.m. on August 31, 1988, through 10:30 p.m. on September 7, 1988. All of the robberies occurred on Long Island's South Shore, not in Belle Terre, the North Shore location of the Tankleff murders. (A 3102-04, 4034-47).

Raymond's statements to Warkenthien were consistent with what Raymond had stated in his affidavit and with the evidence that had been introduced at the 440 hearing. At the hearing, Kent testified that, on the day of the Tankleff murders, he was living with his mother in Center Moriches and was committing armed robberies with Raymond. (H 1143-57, 1201-07, 1234-53). Even Harris, in a letter to Salpeter, acknowledged that Kent and Raymond were together when the Tankleffs were murdered. (A 4048-49). Harris wrote:

> I keep reading your letters . . . along with your articles and trying to come to some sort of conclusion. . . . Who

> am I to judge alibi via [Kent's] mother. But I'm not sure because at that point his mom may have been living in Center Moriches. I'm pretty positive that she was, and it's possible that he was still staying in Selden.
>
> I know between September 7th probably even earlier, . . . he was doing armed robberies."

(A 4048-49).

Twenty-one months later, in August 2006, Raymond gave an affidavit to Salpeter and Tankleff attorney Bruce Barket. Concealing that, in July 2004, he had sworn that he was with Kent on the night of the murders, Raymond asserted that he was not with Kent on the night of the murders. (A 4000, 4003). According to Raymond:

> [In July 2004,] I was serving a . . . sentence for grand larceny. Pete Kent [paid me] a surprise visit . . . .
>
> . . . I said, "What's up? I guess this is not a social call." He responded . . . , "I am in trouble and I need your help." He then went on to say that he was named as one of the murderers of Seymour and Arlene Tankleff. He then told me that he needed me to "be his alibi." . . .
>
> He then concocted the alibi where I was suppose[d] to say that I was with him during the murders. After we went over the alibi several times, and he came to believe that I was going to lie for him, he said "I am glad that you are going to help because there are serious people involved with this." He named Jerry Steuerman and Joe Creedon. He went on to say that, "They are watching your family." . . .
>
> . . . .

> After he left, I was absolutely stunned. I did not want to get involved but I was afraid for my family. I was unsure about what I was going to do. I hoped that the problem would somehow just go away and that I would not have to decide between either helping Kent or putting my family at risk.

(A 4000-02).

On October 17, 2006, Tankleff submitted his CPL 440.10 motion, to which he attached a copy of Raymond's affidavit. Ten days later, Respondent answered Tankleff's motion. Respondent attached to its answer the affidavit in which Raymond claimed that he was with Kent when the Tankleffs were killed. (A 3977-82, 4008, 4018, 4033; Def.'s Br. 12 n.13).

Tankleff tried to minimize the damage. He obtained from Raymond an affidavit in which Raymond claimed that what he had stated in his affidavit to Kent was untrue and that Warkenthien had misrepresented the substance of Raymond's meeting with the district attorney's office. Salpeter also obtained from Raymond's 91-year-old grandmother, Helen Bezgamblick, an affidavit in which Bezgamblick claimed that, while Raymond was incarcerated, "Danny . . . told me that Peter [Kent] would hurt his family if he didn't lie for him." (A 4081-82, 4084-85).

Patrick Touhey ("I Saw It on '48 Hours' ")

On August 29, 2006, Touhey gave an affidavit to Salpeter. In his affidavit, Touhey claimed that in 2004, he "was watching [the television show] '48 Hours.' " (A 4005-06). Touhey claimed that, on the show:

> I saw Glenn Harris speaking about how he knew that Martin Tankleff did not murder his parents. A couple of days later I remembered the conversation that I had with Glenn at Walkhill [Prison in 1996] when he asked me what I would do if I knew that someone was serving time for murder but did not do it.

(A 4006).

The district attorney's office performed a criminal background check on Touhey. On the date that he submitted his affidavit, Touhey had two felony convictions. He had been convicted of one count of criminal possession of a controlled substance in the second degree and one count of criminal possession of a controlled substance in the third degree. He was incarcerated or on parole from March 1992 until March 2002. (A 4029-30).

The County Court Denies Tankleff's Motion

The County Court denied the motion without granting a hearing. Referring to Raymond and Touhey, the court held, "As this court has found in its previous decisions in this case, the caliber of the witnesses produced by the defendant is strikingly poor." The County Court also noted how Raymond at first had sworn that he was with Kent on the night of the Tankleff murders but, in a later, "revised version of what he was doing that night sa[id] he d[id] not know where Kent was at the time that the Tankleffs were murdered." (CA 26). The County Court stated:

> There are a few things which are clear to the court concerning Daniel Raymond. During the period of time preceding and subsequent to the Tankleff murders he and

> Kent were on a robbery spree during which they would take the money they robbed and use it to buy cocaine and heroin, and that during that period of time they were under the influence of those substances. Because of this it is remarkable that Raymond can claim with any degree of certainty where he was and what he was doing while being in this drug induced haze for several days at a time eighteen years ago. Daniel Raymond would not be a reliable witness and lacks the credibility necessary to have any affect on the verdict in this case.

(CA 27). As for Raymond's grandmother, Bezgamblick, the County Court held that her testimony would be hearsay and inadmissible. (CA 27).

With respect to Patrick Touhey, the County Court found, "Touhey states that Harris told [Touhey] about an inmate who was falsely convicted but [that Harris] did not [identify the inmate]. Patrick Touhey assumes that Harris was talking about [Tankleff]. This is speculative at best." Recalling its previous finding that Harris lacked credibility, the County Court also stated, "In any event in it is clear to this court that what Harris has to say . . . is unreliable because he has equivocated numerous times as to his purported involvement in the Tankleff murders." (CA 27).

ARGUMENT

Tankleff contends that his March 2006 and October 2006 motions "presented strong, admissible evidence of his innocence." (Def.'s Br. 5, 7). Tankleff's contention is meritless.

Standard of Review

In the County Court, Tankleff had the burden of " 'prov[ing] by a preponderance of the evidence every fact essential to support [his] motion.' " *People v. Bridget*, 73 A.D.2d 291, 294 (2d Dep't 1980) (quoting CPL 440.30(6)). Tankleff's "burden [wa]s . . . a heavy one, and appropriately so, for judgments of long standing are not lightly to be overturned years . . . after the event." *People v. Kass*, 33 A.D.2d 515, 515-16 (1st Dep't 1969) (internal quotation marks omitted).

On appellate review, the question for this Court is whether the County Court abused its discretion in denying Tankleff's motion. *E.g.*, *People v. Barrero*, 137 A.D.2d 759, 759 (2d Dep't 1988). Although it owes no deference to the County Court's legal conclusions, *see, e.g.*, *People v. Adessa*, 89 N.Y.2d 677, 684-85 (1997), this Court must review the County Court's evidentiary rulings for an abuse of discretion, *see, e.g.*, *People v. Linyear*, 25 A.D.3d 811, 811 (2d Dep't 2006). This Court must also give "great weight" to the County Court's factual findings. *See, e.g.*, *People v. Garcia*, 149 A.D.2d 241, 247 (1st Dep't 1989).

This Court also should 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). Finally, this Court should ignore arguments that Tankleff makes for the first time on appeal. *See, e.g.*, *People v. Thomas*, 50 N.Y.2d 467, 471 (1980); *People v. Esteves*, 152 A.D.2d 406, 412 (2d Dep't 1989).

The County Court made the correct legal conclusions. It acted within its discretion in making its evidentiary rulings. And the record supports the County Court's factual findings.

Tankleff Failed To Exercise Due Diligence

Tankleff contends that he exercised due diligence in filing his CPL 440.10 motions. (Def.'s Br. 7 & n.5). His contention is meritless.

The power to vacate a judgment on the ground of newly discovered evidence rests within a hearing court's discretion. *See, e.g.*, *People v. Crimmins*, 38 N.Y.2d 407, 415 (1975). In the County Court,

> it was incumbent upon the defendant to establish that the "new evidence" had been discovered since the entry of his judgment [and] that it could not have been produced by him at the trial with due diligence on his part . . . . Further, the defendant was required to show that the motion was made "with due diligence after the discovery of the alleged new evidence."

People v. Boyette, 201 A.D.2d 490, 490-91 (2d Dep't 1994) (quoting CPL 440.10(1)(g)), *habeas corpus petition denied*, *Boyette v. Lefevre*, 1999 WL 890425

(E.D.N.Y. 1999), *rev'd on other grounds*, 246 F.3d 76 (2d Cir. 2001). Thus, the newly discovered evidence subsection of CPL 440.10(1) contains two due-diligence requirements. First, a defendant must show that, even if he had exercised due diligence, he could not have produced the new evidence at his trial. Second, he must also show that after he discovered his new evidence, he exercised due diligence in filing his motion. *See id.* at 490-91.

Respondent argued in appeal 2006-3617 that the County Court had acted within its discretion in concluding that, by sitting on Karlene Kovacs's statement for seven years and Glenn Harris's information for more than one year, Tankleff had failed to exercise due diligence. (*See* discussion in Resp.'s Principal Br. 81-82, 87). Tankleff's March and October 2006 motions suffer from the same flaw. (CA 23). Whatever factors led to Harris's and Kent's supposed confessions, and by implication whatever factors led Lisa Harris, Moore, Messina, Sullivan, Raymond, Bezgamblick and Touhey to come forward, would have existed ten or more years ago had Tankleff exercised due diligence.

In addition, as for Lisa Harris, there is no valid excuse for Tankleff's having failed to call her as a witness at the hearing that the County Court conducted on Tankleff's prior 440 motion. As the County Court found:

> [T]he defendant was in possession of a statement by Lisa Harris dated June 11, 2003 in which she asserts that her husband Glenn Harris told her and his mother that he and

> Peter Kent were at the Tankleff house the night of the murders and that Peter Kent murdered the Tankleffs.
>
> . . . [Lisa Harris] could have been called as a witness . . . at the prior hearing. Instead, the defendant now attempts to obtain a new hearing based on testimony he could have offered at the prior hearing . . . . In addition to having failed to exercise due diligence as held by the court in its decision dated March 17, 2006, the defendant has clearly failed to exercise due diligence in attempting to introduce this testimony at this time.

(CA 23).

Finally, with respect to Raymond, because at the hearing Kent testified that he and Raymond had committed robberies together on the day of the murders, Raymond's existence was known to Tankleff. Thus, Tankleff could have subpoenaed Raymond just as he could have subpoenaed Lisa Harris.

The Witnesses' Proffered Testimony Would Be Inadmissible

Tankleff fails to assert how Kent's alleged statements to Messina would be admissible. (Def.'s Br. 6-7 & n.5; Def.'s Principal Br. 105-06). As for the other witnesses, Tankleff contends that their statements would be admissible as non-hearsay or under hearsay exceptions. (Tankleff's Br. 7 & n.5). Tankleff's contention is meritless.

Declarations Against Penal Interest

Tankleff asserts that Kent's alleged statements to Moore and Raymond, and Harris's alleged statements to Lisa Harris, would be admissible as an exception to

the hearsay rule for statements against penal interest. (Def.'s Br. 16 n.18; Def.'s Principal Br. 105-08). But Tankleff did not raise this assertion in County Court. (RA 74-75, 83-94; A 3989-94 & nn.6-10, 4072-77). He is therefore precluded from raising it on appeal. (*See* discussion *supra* p. 17). In any event, for the reasons set forth in Respondent's principal brief, the alleged statements of Kent and Harris would be inadmissible as statements against penal interest. Kent's alleged statements would be inadmissible because Kent is available to testify. Harris's alleged statements would be inadmissible because Tankleff failed to show that Harris was aware that his statements were contrary to his penal interest, that Harris had competent knowledge of the underlying facts of which he spoke or that there was adequate independent evidence demonstrating that Harris's statements were trustworthy and reliable. (CA 22; *see* discussion Resp.'s Principal Br. 99).

Due Process

Tankleff asserts that Kent's alleged statements to Moore and Raymond, and Harris's alleged statements to Touhey, would be admissible "under the due process requirements of *Holmes v. South Carolina* and *Chambers v. Mississippi*." (Def.'s Br. 16 n.18, 28 n.33; Def.'s Principal Br. 105-08). But for the reasons set forth in Respondent's principal brief, all of the alleged statements of Kent and Harris would be inadmissible "under due process" because whereas the excluded testimony in *Chambers*, for example, "bore persuasive assurances of

trustworthiness and . . . was well within the basic rationale of the exception for declarations against interest," Kent's and Harris's alleged statements were untrustworthy and were not "within the basic rationale of the exception for declarations against interest." (*See* discussion Resp.'s Principal Br. 109-16).

Prior Inconsistent Statements

Tankleff asserts that Kent's alleged statements to Moore and Raymond "would be admissible as prior inconsistent statements." (Def.'s Br. 16 n.18, Def.'s Principal Br. 105). In County Court, Tankleff raised this assertion with respect to Raymond. (A 4072). But he failed to raise this assertion with respect to Moore. (RA 75-76, 83-94). He is therefore precluded from raising it on appeal. (*See* discussion *supra* p. 17). Moreover, because Respondent would not call Kent to testify at a trial, Tankleff could not call Kent to impeach him. And even if a trial court permitted Tankleff to elicit Kent's alleged prior inconsistent statements, the statements could be used solely to impeach Kent's direct testimony and would not constitute affirmative evidence of the facts contained in the inconsistent statements. (*See* discussion Resp.'s Principal Br. 107-08).

Prior Consistent Statements

Tankleff asserts that Glenn Harris's alleged statements to Touhey, and Raymond's alleged statements to Bezgamblick, would be admissible as prior consistent statements "to rebut the DA's charge" that Harris and Raymond

fabricated their stories. (Def.'s Br. 24, 28-29 & n.33). In his reply brief in County Court, Tankleff raised this assertion with respect to Touhey. (A 4073-74). He did not raise it with respect to Bezgamblick. (A 3989-94 & nn.6-10, 4074-75). He is therefore precluded from raising it on appeal. (*See* discussion *supra* p. 17).

Touhey's testimony also would be inadmissible. The New York Court of Appeals has held, "If upon cross-examination a witness' testimony is assailed . . . as a recent fabrication, the witness may be rehabilitated with prior consistent statements that predated the motive to falsify." *People v. McDaniel*, 81 N.Y.2d 10, 18 (1993). But Respondent never assailed Harris's testimony at the hearing because Harris refused to testify. Thus, as the Court of Appeals held in *McDaniel*, because "the [witness] ha[s] yet to be cross-examined, . . . any rehabilitation with consistent statements [i]s premature." *Id.* at 19-20.

State of Mind

Tankleff asserts that Raymond's testimony would be admissible to show Kent's consciousness of guilt and "*Raymond's* state of mind in executing [his] 2004 [affidavit]." (Def.'s Br. 16 n.18) (emphasis added). In County Court, Tankleff raised the "consciousness of guilt" assertion in his reply memorandum. He did not raise an assertion related to Raymond's state of mind. (A 4072-73). He is precluded from raising it on appeal. (*See* discussion *supra* p. 17).

In any event, Tankleff fails to explain how Kent's or Raymond's state of mind would be relevant to whether *Tankleff* murdered his parents. Tankleff's failure is understandable because Kent's and Raymond's "state of mind [i]s in no way relevant." *People v. Emick*, 103 A.D.2d 643, 659 (4th Dep't 1984).

Alibi Rebuttal

Tankleff asserts that Raymond's testimony would be admissible as "classic alibi rebuttal evidence." But it is unlikely that a court would permit Raymond's testimony to be introduced as alibi-rebuttal evidence, "classic" or otherwise.

"The collateral evidence exclusionary rule" prohibits a party from impeaching a witness with extrinsic evidence on a collateral issue. *People v. Cade*, 73 N.Y.2d 904, 905 (1989). If, in contrast, the issue is not collateral but material, a party may use extrinsic evidence. Thus, when a defendant calls an alibi witness to testify that the defendant was not present at the scene of the charged crime, the prosecution is permitted to impeach the alibi witness with extrinsic evidence. *See id.*; *see, e.g.*, *People v. Wilson,* 297 A.D.2d 298, 299 (2d Dep't 2002).

Tankleff's alibi-rebuttal theory is flawed. If Tankleff called Kent to testify, Tankleff would be prohibited from impeaching Kent. (*See* discussion *supra* p. 21). Moreover, unlike the defendant in *Cade*, Kent is not a defendant interposing an alibi defense. He is a witness, and his whereabouts at the time of the murders do not "go[] to a material, core issue in this case." *Cade*, 73 N.Y.2d at 905.

Bias

Tankleff asserts that Sullivan's testimony would be admissible to show McCready's alleged pretrial relationship with Steuerman notwithstanding Judge Tisch's 1990 decision that such testimony would be collateral and inadmissible. According to Tankleff, unlike the "meaningfully different kind" of evidence that he presented in 1990, Sullivan can provide eyewitness testimony of a pretrial McCready-Steuerman relationship. (Def.'s Principal Br. 143 n.116).

Tankleff fails to explain how his "meaningfully different kind" of evidence overcomes the procedural bar of CPL 440.10(3)(b), which provides that a court may deny a motion to vacate when the court has determined the issue on the merits in a prior motion. In any event, Tankleff's March 2006 motion was not meaningfully different from his 1990 motion. In his 1990 motion, Tankleff claimed that a student, Kirsten Stanton, heard McCready state, "[Steuerman] is a good friend of mine, I have known him for many years." Tankleff fails to explain how Sullivan's alleged eyewitness account is "meaningfully different" from Stanton's alleged earwitness account. It is not, and Sullivan's testimony would be inadmissible. (*See* discussion Resp.'s Principal Br. 172-74).

Tankleff's Witnesses Lack Credibility

Lisa Harris and Touhey assert that Glenn Harris made statements to them. But even if Lisa Harris and Touhey were to testify credibly, their testimony would

be unpersuasive because they would be testifying only to what Glenn Harris had claimed to be true. In denying Tankleff's prior 440 motion, the County Court found Harris to be "not worthy of belief." The court noted that Harris was mentally unstable, that Harris had recanted and that Harris's having sought details of the murders from Salpeter indicated that Harris probably had nothing to do with committing the murders. (A 12-13, 16-17, 21; CA 22). And Lisa Harris and Touhey would not testify credibly. Nor would Moore or Raymond testify credibly. Such individuals "ha[ve] always put [their] personal interests above society's" and would not "testify[] in favor of [Tankleff] out of some underlying need to see justice done." (A 15).

Lisa Harris also has a motive to fabricate. In his recantation letter to Salpeter of July 9, 2002, Glenn Harris discussed his conviction for assaulting a police officer and his conviction for assaulting Lisa Harris. Harris wrote:

> Yeah, okay, so I'm a "bad" person. One for ass[ault] w/ intent to cause phy[sical] inj[ury] to an off[icer], two for smacking a 5'11" 200 pound fucking beottch who snatched my chained [sic], lacerated my nose & neck, tried to rob my money[,] and I get arrested.

(A 335). In an undated letter to Salpeter, Harris attempted to explain why he "smacked" Lisa Harris. Glenn Harris wrote:

> Can ya get this letter to the whore for me?
>
> . . . .

> You weren't the one that has to see your "wife" all beat up and then sleepin' in bed with 2 niggers, 2 hamsters, one of which was the one that beat her up. What was I supposed to do? Grab a kitchen knife and do an O.J. on em? Call the police? Excuse me officer, my wife's in bed with 2 black men in her own apartment.

(A 3975-76). Lisa Harris had a motive to punish her tormentor.

Moore also had a motive to fabricate. Moore asserts that, while working with Kent, he and Kent got into a heated argument in which Kent threatened to kill Moore. (A 3939-40). Just as Lisa Harris had a motive to implicate Glenn Harris, Moore had a motive to implicate Kent.

The credibility of Lisa Harris and Moore is undermined further by their reference to the "pipe." Lisa Harris contends that Glenn Harris admitted having seen Kent carrying a pipe. (A 3934-35). Moore contends that Kent admitted having used a pipe. (A 3940). But Arlene and Seymour were not killed with a pipe, a hollow object that on cross-section resembles a circle. Vernard Adams, the Suffolk County Deputy Medical Examiner who performed the autopsy on Arlene, testified that she was killed with the end of the small, solid-core barbell that crime-scene personnel recovered from Tankleff's bedroom. And autopsy photographs show, as Adams testified, that the size and shape of the end of the bar[bell] are "roughly the same as the size and shape of the depressed fractures" in Arlene's skull. And although the partial healing of Seymour's skull prevented Adams from determining the weapon that had caused Seymour's skull injuries, George Tyson,

the surgeon who operated on Seymour, testified, "The size and shape of the . . . fractures appeared to [have been] produced by a small, *rounded*, blunt object." (Resp.'s Principal Br. 23-24, 31-32; A 3890-91) (emphasis added).

Raymond's latest version of events is so bad that it fails the laugh test. In July 2004, Raymond swore that before, during and after the murders, he was with Kent committing robberies and using cocaine and heroin. In November 2004, in the presence of representatives of the district attorney's office, Raymond reviewed court and district attorney records demonstrating that he and Kent indeed were committing crimes together, and he reiterated that he was with Kent when Arlene and Seymour were murdered. (*See* discussion *supra* pp. 10-12). Nevertheless, twenty-one months later, Raymond swore that he was *not* with Kent when the Tankleffs were murdered. He also swore that although Kent "came to believe that [Raymond] was going to lie for [Kent]," Raymond "hoped that the problem would somehow just go away and that [he] would not have to decide [whether to] . . . help Kent." But in late October 2006, Tankleff learned that Raymond had already "lied" to help Kent. So Tankleff tried to rehabilitate Raymond with another affidavit from Raymond and an affidavit from Raymond's 91-year-old grandmother. (*See supra* pp. 13-14).

Raymond made a bad impression on the County Court. The court found that, even though, "according to the defense, Raymond [wa]s now telling the

truth," Raymond's credibility was "strikingly poor." The court observed that Raymond had an extensive criminal record and found that, as Raymond had told Kent and the district attorney's office, "During the period of time preceding and subsequent to the Tankleff murders he and Kent were on a robbery spree" and were "under the influence of [cocaine and heroin]." (CA 26-27).

As for Touhey, although Tankleff claims that the County Court did not doubt the veracity of Touhey's testimony," (Def.'s Br. 28), Tankleff is inaccurate. In its decision denying Tankleff's motion, the County Court held, "As this court has found in its previous decisions in this case, the caliber of the witnesses produced by the defendant is strikingly poor because of their lack of credibility. This again is the case here." (CA 26).

The County Court was right about Touhey. Touhey claims that, while watching a "48 Hours" segment on the Tankleff case, he remembered that when he was incarcerated with Harris eight years earlier, Harris asked Touhey what Touhey would do if Touhey "knew that someone was serving time for murder but did not do it." As the County Court found, Touhey's "assum[ption] that Harris was talking about the defendant" was "speculative at best." Moreover, Touhey is a two-time drug felon, and his nearly decade-old, television-enhanced recollection of a conversation with Glenn Harris would not impress any rational factfinder. (*See supra* p. 14; A 4029-30; CA 27).

As for Sullivan, his Court TV enhanced or Newsday-enhanced recollection of having seen McCready and Steuerman seventeen years earlier is unpersuasive. And while Raymond had the good manners to wait until a subsequent affidavit to contradict himself, Sullivan contradicted himself in the same affidavit. In paragraph two of his affidavit, Sullivan claimed, "with specificity," that he had first seen McCready and Steuerman together "between the fall of 1987 and February 1988." But in paragraph four, he claimed that he had seen "the two men together . . . before January of 1988." Before signing his affidavit, Sullivan claimed that he had read it and had it read to him "paragraph by paragraph." Yet he failed to note that after claiming that he had first seen McCready and Steuerman together as late as February 1988, he claimed that he had first seen them together *prior to January 1988*, which is another way of saying "December 1987" or earlier. (*See supra* p. 7-8; A 3936). Sullivan, who thought of Steuerman "as a real Starsky and Hutch kind of guy," does not remember what he saw or when he saw it. (*See supra* pp. 7-8; A 3936-38).

Tankleff's Ever-Changing Theory

At his trial in 1990, Tankleff contended that Jerry Steuerman had killed Arlene and Seymour and that the murder weapon was "most likely . . . a hammer." But beginning with Kovacs's affidavit in 1994, Tankleff began adjusting his theory. Days after Judge Tisch denied a Tankleff CPL 440.10 motion, Kovacs,

who disliked Creedon and Steuerman, claimed that Creedon had told her "that he was involved in the Tankleff murders" "with a Steuerman." In 1997, only two weeks after United States District Judge Thomas C. Platt held that Respondent came close to committing a *Brady* violation for failing to disclose Steuerman's possible connection to the Hells Angels, Bruce Demps claimed that he had learned that Steuerman had hired a Hells Angel to kill the Tankleffs. In December 2001, less than two months after Glenn Harris entered the prison in which Tankleff was incarcerated, Tankleff asked Theresa Covais to put her trust in Salpeter, and in March 2002 Harris told Salpeter that Harris had driven Creedon and Kent to Belle Terre and that they had committed the Tankleff murders. But Harris was not about to implicate himself, and Tankleff was not about to jeopardize his investment in Harris. So Harris claimed that he had not known of Creedon's plan to murder the Tankleffs and in so doing insulated himself from a charge of felony murder. And Tankleff protected Harris by having a polygrapher opine that Harris did not know of the murders even when Harris, Creedon and Kent were leaving Belle Terre. (Resp.'s Principal Br. 42, 49-53, 92-93, 128, 135, 138-40, 145, 185; RA 141-43, 148).

Before the hearing began on Tankleff's prior 440 motion, Tankleff's multiple theories coalesced to form yet another theory: that Jerry Steuerman, through his drug-dealing son Todd, had met Creedon and that Creedon and Kent

had killed Arlene and Seymour with a pipe. By the time the hearing ended, however, Tankleff had deleted Todd's role and instead contended that Steuerman had asked Brian Glass to commit the murders and that Glass had "passed the hit" to Creedon. And trying to salvage Demps's Hells Angels' accusation notwithstanding that Creedon was not a Hells Angel, Tankleff claimed that it was reasonable for Demps to conclude that Creedon was a Hells Angel. When Joseph Guarascio surfaced after he had watched a "48 Hours" segment on the case, Tankleff adjusted his theory again: that Creedon and Kent had killed Arlene and Seymour with a knife, a bicycle cable and a gun. Deserted by Glenn Harris at the hearing, Tankleff also claimed that Harris knew of Creedon's plan to murder Arlene and Seymour and even referred to Harris as one of "the three killers." Tankleff was not done. Expanding his conspiracy theory still further, in December 2005 Tankleff claimed that McCready had accepted a $100,000 bribe in exchange for protecting Creedon and framing Tankleff. (H 1781-82; RA 68-69, 118-19).

In March 2006, only four days after the County Court denied Tankleff's prior 440 motion, Tankleff, still stung that Glenn Harris had deserted him, resurrected Lisa Harris in a new 440 motion. Tankleff and Lisa Harris claimed that Glenn Harris had entered the Tankleff house with Creedon and Kent and had helped kill the Tankleffs with a pipe. Tankleff now included Harris in the group of "true perpetrators" who needed to be "arrested," "indict[ed]" and "prosecuted."

But seven months later, in his next 440 motion, Tankleff decided that it made more sense to say nice things about Harris. Tankleff claimed that "unrebutted polygraph evidence" – which included Harris's *unawareness* of what Creedon and Kent had supposedly done – "show[ed] Harris' truthfulness." So in October 2003 Harris was a truthful lamb, in March 2006 he was an untruthful murderer, and in October 2006 he was a truthful lamb again. Thus, in reinventing "the oblivious Glenn Harris," Tankleff has come full circle or entered "a fruit loop" that is poised to begin anew. (Resp.'s Principal Br. 75, 129, 185-86; A 3988, 4025-26; RA 83, 87-88, 91-94).

CONCLUSION

As the Court of Appeals stated in *People v. Crimmins*, where the defendant supported his 440 motion with an affidavit of a "witness" recalling events of seven years earlier:

> However "understandable" affiant's reasons for the seven-year delay . . . , the fact remains that affiant's recollection of the events . . . must be recognized as inevitably influenced and inevitably colored by the passage of time and his acknowledged familiarity and undoubtedly obsessed concern with newspaper accounts.

38 N.Y.2d at 417.

Respondent will not consent to Tankleff's release or, as Tankleff once requested, arrest or prosecute Steuerman, Creedon, Kent or Glenn Harris. The trial evidence demonstrated that Tankleff killed his parents, and Tankleff's media-enhanced witnesses and ever-changing theory do not suggest otherwise.

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 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 7,993.

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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 Jennifer M. O'Connor, 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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