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.

----------X

AD Docket Nos. 2006-3617 & 2006-5031

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

RESPONDENT'S ANSWER TO THE AMICI CURIAE

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PRELIMINARY STATEMENT

The Defendant-Appellant Martin H. Tankleff appeals from, among other orders, two orders entered on March 17, 2006, in the County Court of Suffolk County (Stephen L. Braslow, Judge). One order, which the County Court issued after a hearing, denied Tankleff's CPL 440.10 motion to vacate two judgments entered in the same court on October 23, 1990 (Alfred C. Tisch, Judge). The other order denied Tankleff's CPL 440.30(1-a) motion for DNA testing.

Six amici curiae have submitted briefs on Tankleff's behalf. The amici are (1) The New York State Association of Criminal Defense Lawyers and others, (2) The Innocence Project and The Innocence Network, (3) Centurion Ministries, (4) a group that calls itself "Former New York Prosecutors, (5) a group that calls itself "Exonerated False Confessors" and (6) a group that calls itself "Martin Tankleff's Classmates." Some of the amici's arguments may be helpful to the Court. Most of the amici's arguments, however, will be unhelpful.

STATEMENT OF FACTS

Directly or implicitly, the amici incorporate into their briefs the statement of facts and procedural history Tankleff sets forth in his brief in appeal 2006-3617. But as Respondent stated on page two of its opposition brief, Tankleff's recitation of the facts was inaccurate because the only evidence that he recited was the evidence that supported his theory. Ignoring what he could not refute, Tankleff blamed his conviction on "a false confession" and in so doing overlooked, among other things, the corroborating blood evidence that he once conceded "contributed mightily to the case against him." (Resp.'s Br. 43). Respondent incorporates the statement of facts from its main brief into its answer to the amici curiae.

ARGUMENT

This Court, in its discretion, may permit a non-party to act as an amicus curiae ("friend of the court") and submit a brief in connection with a party's appeal. An amicus brief should not be for the benefit of a party, but "for the benefit of the court and for the purpose of assisting the court in cases of general public interest." *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991). Thus, a court may find helpful an organization's objective analysis of an important legal question. For instance, the Court permitted the New York State Defenders Association to file an amicus brief involving a question regarding a defendant's right to counsel. *See People v. Wilson*, 219 A.D.2d 164, 165 (2d Dep't 1996). Similarly, the Court permitted the Legal Aid Society to file an amicus brief on the question whether the Supreme Court's holding in *Batson v. Kentucky*, which curtailed the prosecution's discretion in its exercise of peremptory challenges, should also curtail a defendant's discretion to exercise peremptory challenges. *See People v. Kern*, 149 A.D.2d 187, 193, 230 (2d Dep't 1989). And the Court permitted the American Bar Association to file an amicus brief when the question was whether New York should adopt the federal good-faith exception to the exclusionary rule. *See People v. Lopez*, 95 A.D.2d 241, 247 (2d Dep't 1983).

In contrast, when an organization comes to a court not "with an objective, dispassionate, neutral discussion of the issues, . . . [but] as an advocate for one

side, having only the facts of one side," "it does the court, itself and fundamental notions of fairness a disservice." *Gotti*, 755 F. Supp. at 1158. Thus, "an amicus who argues facts should rarely be welcomed." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). So when "amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant[s'] brief[s]," they "are an abuse." *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997).

The only amici who come close to presenting "an objective, dispassionate, neutral discussion of [legal] issues" are the amici led by the National Association of Criminal Defense Lawyers and the amici led by the Innocence Project. Nevertheless, Respondent will answer all the amici.

The National Association of Criminal Defense Lawyers and Others

The National Association of Criminal Defense Lawyers [hereinafter the NACDL] and others "urge this Court to clarify the appropriate standard by which lower courts should judge post-conviction actual innocence claims." According to the NACDL, the County Court, "[a]lthough it properly acknowledged [Tankleff]'s right to bring an actual innocence claim, . . . applied the wrong legal standard when denying [Tankleff]'s motion to vacate his conviction." (NACDL Br. 6, 20). According to the NACDL, the County Court "incorrectly held that in order to prevail," Tankleff had to prove his innocence "by clear and convincing evidence."

Arguing that the County Court imposed too high a burden, the NACDL asserts that to prevail on a claim of actual innocence, a defendant need prove his innocence only by a preponderance of the evidence. (NACDL Br. 4-5). Acting as Tankleff's advocate, the NACDL goes on to assert that, even under a clear and convincing evidence standard, "Tankleff's hearing proof met this standard and [that] his motion [to vacate] should have been granted." (NACDL Br. 6).

The NACDL contends that the United States Supreme Court, in the context of habeas corpus jurisprudence, has created two types of actual-innocence claims: "a freestanding claim" and "a gateway claim." (NACDL Br. 7-10). The NACDL is mistaken. The Supreme Court, although it has created "a gateway claim," has "decline[d] to resolve the issue" whether freestanding innocence claims are possible." *House v. Bell*, 126 S. Ct. 2064, 2086-87 (2006). Nor has the Supreme Court determined the "burden [of proof that] a hypothetical freestanding innocence claim would require." *Id.* at 2087. The Court did note, however, that its prior decisions, which le[ft] unresolved the status of freestanding claims and . . . establish[ed] the gateway standard – implie[d] at the least that [a freestanding claim would] require[] more convincing proof of innocence than [a gateway claim]." *Id.* at 2087.

It is interesting that the NACDL claims that, in New York, "It is now *well-established* that a defendant may bring a post-conviction motion to vacate his

conviction based on a claim of actual innocence under . . . the New York State Constitution[] and CPL 440.10(1)(h)." (NACDL Br. 7) (emphasis added). There is no such "well established" right. Indeed, the NACDL contradicts its "well established" assertion when it acknowledges the scarcity of New York cases addressing a defendant's claim of actual innocence. According to the NACDL:

> Only two lower courts (and no appellate courts) in New York have directly addressed the question of whether an actual innocence claim exists under the State Constitution; both found that it does. The first case was *People v. Cole*, 1 Misc. 3d 531 [(Sup. Ct. Kings County 2003)]; the second was the lower court in this case, which adopted *Cole's* rationale.

(NACDL Br. 17). The hearing court in *Cole* addressed actual innocence in 2003. The hearing court in *Tankleff* addressed actual innocence in 2006. It is now 2007. Two lower court cases in New York history do not a "well established" right make.

The Gateway Claim of Actual Innocence

The Supreme Court discussed the gateway claim in *Schlup v. Delo*, 513 U.S. 298 (1995). In *Schlup*, the petitioner Schlup brought a second habeas corpus petition in which he claimed that he "was actually innocent of . . . murder, . . . that his . . . trial counsel was ineffective . . . and . . . [that] the State had failed to disclose critical exculpatory evidence." Schlup supported his petition with "affidavits from inmates attesting to Schlup's innocence." *Id.* at 307. But Schlup was "unable to establish 'cause and prejudice' sufficient to excuse his failure to

present [the affidavits] in . . . his first federal petition." Thus, Schlup's second petition ran afoul of the procedural obstacles barring federal courts from considering second petitions. *Id.* at 314.

The Supreme Court held that, notwithstanding the procedural obstacles, Schlup would be entitled to a review of his ineffective-assistance and exculpatory-failure claims if he could demonstrate that he was actually innocent of murder. *Id.* at 314-15. "Schlup's claim of innocence [was] thus 'not itself a constitutional claim, but instead a gateway through which [he had to] pass to have his otherwise barred constitutional claim considered on the merits.' " *Id.* at 315 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). To pass through this gateway, the Court held, Schlup was required to "present[] evidence of innocence so strong" that, coupled with "nonharmless constitutional error," it would shake a court's "confidence in the outcome of [Schlup's] trial." *Id.* at 316.

The Court also addressed the burden of proof to be applied in a gateway claim. The Court held that a petitioner must show that the constitutional error or errors "probably resulted in the conviction of one who is actually innocent." *Id.* at 326-27 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). "To establish the requisite probability," the Court held, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." In other words, the "petitioner must show that it is more likely

than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

The NACDL ignores the burden that the Court enunciated in *Schlup*. The NACDL asserts, "In 'gateway' claims . . . , a *reasonable possibility* of a more favorable outcome is all that must be shown." (NACDL Br. 12) (citing *Schlup*, 513 U.S. at 316) (emphasis added). But the NACDL's "reasonable possibility" phrase does not appear in *Schlup*. Nor does it appear in any other Supreme Court case or in any lower court case that the NACDL cites.

In considering a petitioner's "probably resulted" gateway claim, a hearing court "is not bound by the rules of admissibility that would govern at trial." *Schlup*, 513 U.S. at 327. The Court held:

> Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. . . . The [reviewing] court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (*but with due regard to any unreliability of it*) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.

Id. at 327-28 (emphasis added). The Court stressed that, to prevail on a gateway claim, the petitioner must present "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324.

In *Schlup*, because the reliability of the petitioner's new evidence had not been tested, the Court remanded the case for a hearing. The Court recognized "[t]he fact-intensive nature of the inquiry" awaiting the hearing court and accepted that the petitioner's new evidence could, "of course, be unreliable." *Id.* at 331-32. The Court therefore ordered the hearing court to "assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." The Court held that the hearing court, in making its determination, could "consider how the timing of the [petitioner's] submission and the likely credibility of [his witnesses] b[ore] on the probable reliability of [petitioner's] evidence." *Id.*

As set forth above, a gateway claim is not itself a constitutional claim. Instead, it is the opening "through which a habeas petitioner [who faces a procedural bar] must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404. The United States Court of Appeals for the Second Circuit discussed the gateway claim in *Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004). In *Doe*, the Second Circuit stated:

> The doctrine of actual innocence was developed to mitigate the potential harshness of the judicial limitations placed on a petitioner's ability to file successive or otherwise procedurally defaulted habeas petitions in the federal courts. . . .
>
> . . . "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a

> showing of cause for the procedural default." . . . Accordingly, a petitioner may use his claim of actual innocence as a "gateway," or a means of excusing his procedural default, that enables him to obtain review of his constitutional challenges to his conviction.

Id. at 160-61 (quoting *Carrier*, 477 U.S. at 496). The Second Circuit continued:

> The *Schlup* Court carefully limited the type of evidence on which an actual innocence claim may be based and crafted a demanding standard that petitioners must meet in order to take advantage of the gateway. The petitioner must support his claim "with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Because *Schlup* explicitly states that the proffered evidence must be reliable, the habeas court must determine whether the new evidence is trustworthy by considering it both on its own merits and, where appropriate, in light of the pre-existing evidence in the record.
>
> Once it has been determined that the new evidence is reliable, . . . [a] reviewing court[] [should] consider a petitioner's claim in light of the evidence in the record as a whole, including evidence that might have been inadmissible at trial . . . .
>
> . . . .
>
> . . . If the court then concludes that, in light of all the evidence, it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," a petitioner may invoke the actual innocence gateway and obtain review of the merits of his claims.

Id. at 160-62 (quoting *Schlup*, 513 U.S. at 324, 327). Thus, the Second Circuit stated in *Doe*, the gateway doctrine applies only to excuse a procedural default,

such as a statute of limitation, so that a petitioner may obtain a review of his claim on the merits.

According to the NACDL, "Because state-level claims of actual innocence do not implicate the statutory and procedural hurdles present in federal habeas litigation," "[t]here is no state . . . bar to consideration of actual innocence claims." (NACDL Br. 12). The NACDL paints with too broad a brush.

Although the federal courts developed the gateway doctrine, some state courts have also recognized the doctrine to excuse state-law procedural defaults. *See, e.g.*, *State v. Pope*, 80 P.3d 1232, 1241-44 (Mont. 2003); *Bates v. Commonwealth*, 751 N.E.2d 843, 845 & n.4 (Mass. 2001); *Clay v. Dormire*, 37 S.W.3d 214, 217-18 (Mo. 2000) (en banc). Implicit in the gateway doctrine, however, is that a petitioner is "confronted with a[] procedural impediment to review of his [constitutional] claim." *Rivera v. Commissioner*, 800 A.2d 1194, 1200 (Conn. App. Ct. 2002). But if a state's procedural rules permit a reviewing court to address the merits of a petitioner's constitutional claim, the petitioner is "in no need of a 'gateway.' " In such a situation, the reviewing court should "decline[] the petitioner's invitation to apply the federal gateway standard to his actual innocence claim." *Id.* In other words, "a petitioner [may not] disregard a State's established postconviction procedures – or render the State powerless to insist on compliance with its procedures – whenever a claim of actual innocence is

made." *Bates*, 751 N.E.2d at 845. Thus, as long as a petitioner can "seek relief through the appropriate procedural vehicle," he may not assert a gateway claim of actual innocence. *Id.*

In the County Court, pursuant to CPL 440.10(1)(g) and CPL 440.30, Tankleff obtained a review of his constitutional claims on the merits. This Court therefore need not decide whether New York should adopt a gateway doctrine in cases involving postconviction claims of newly discovered evidence. There also may not be a need for a gateway doctrine given that, under New York law, a defendant cannot be procedurally barred from bringing a newly discovered evidence motion. *See* CPL 440.10(3) (stating that "the court *may* deny a motion" on procedural grounds) (emphasis added); *see also Herrera*, 506 U.S. at 411 & n.11 (observing that New York is one of nine states that impose no time limit on a motion for a new trial based on newly discovered evidence).

The Freestanding Claim of Actual Innocence

Because there is no need for a gateway doctrine in New York, all that remains is whether New York should establish "a freestanding claim" of actual innocence. A freestanding claim of actual innocence is one in which the petitioner seeks not the "excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but . . . relief [based on] newly discovered evidence [that] shows that his conviction is factually

incorrect." *Herrera*, 506 U.S. at 404. As in a gateway claim, however, the need for a freestanding claim would arise only " '*if there were no state avenue open to process such a claim.*' " *House*, 126 S. Ct. at 2067 (quoting *Schlup*, 513 U.S. at 417) (emphasis added). But, as stated above, in New York there is a state avenue – codified in CPL 440.10(1)(g) and CPL 440.30 – to process a claim of newly discovered evidence of innocence. Tankleff availed himself of that avenue in the County Court. And even though not required to do so, the County Court also considered Tankleff's evidence in the context of a freestanding claim of actual innocence. (A 21).[1] In considering Tankleff's freestanding claim, the County Court accepted, as did the court in *People v. Cole*, "that the conviction or incarceration of a guiltless person . . . runs afoul of the Due Process Clause of the State Constitution." *Cole*, 1 Misc. 3d at 542.

A Defendant's Burden of Proof in a Claim of Actual Innocence

Even if this Court were to accept the NACDL's invitation to create some form of actual-innocence claim, the standard should not, as the NACDL asserts, require a defendant to prove by a preponderance of the evidence "a reasonable possibility of a more favorable outcome." (NACDL Br. 22) (citing *Schlup*, 513 U.S. at 316). First, as stated above, the NACDL's "reasonable possibility" phrase

[1] Parenthetical cites (i) to "A" refer to pages in Tankleff's appendix to his appeal in A.D. docket number 2006-3617, (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.

is its own creation. (*See supra* p. 8). Nevertheless, Respondent agrees that a preponderance standard would be the correct standard to apply, but only to a gateway claim. *See, e.g.*, *Doe*, 391 F.2d at 173 ("*Schlup* standard requires the . . . court to find, by a preponderance of the evidence, that no reasonable juror would find the petitioner guilty"). And while "[t]he preponderance showing is not in itself a high burden of proof, . . . the fact that the showing must establish that *no* reasonable juror would convict substantially increases that burden." Thus, "[e]ven if the [reviewing] court, as one reasonable factfinder, would vote to acquit, the court must step back and consider whether the petitioner's evidentiary showing most likely places a finding of guilt beyond a reasonable doubt outside of the range of potential conclusions that *any* reasonable juror would reach." *Id.* In other words, a defendant asserting a hypothetical gateway claim in New York would have to meet a higher standard than he otherwise would have to meet when asserting a newly discovered evidence claim under CPL 440.10(1)(g) and CPL 440.30. *See Summerville v. Warden*, 641 A.2d 1356, 1368 (Conn. 1994).

In Connecticut, as in New York under CPL 440.10(1)(g) and CPL 440.30, a defendant seeking to overturn his conviction on the ground of newly discovered evidence must prove, by a preponderance of the evidence, that the new evidence, if it had been introduced at his trial, probably would have resulted in a verdict more favorable to him. In Connecticut, as in New York, "the new evidence must not

have been discoverable and producible at the original trial by the exercise of due diligence, and must not be cumulative." *Id.* at 1370.

In *Schlup*, the Supreme Court held that a petitioner, to pass through the procedural-default gateway, "must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S. at 327. This is a standard higher than a petitioner would have to meet if his claim were not procedurally defaulted. As the Connecticut Supreme Court observed, prior to the time of a procedural default, "[a] petitioner's interests trump those of the public and the state. Beyond that period, however, the interests of the public and the state trump those of [a] petitioner." *Summerville*, 641 A.2d at 1371. If the standard were the same, "[a] petitioner who thinks that there is newly discovered evidence sufficient to overturn his verdict would have no incentive to bring that evidence before the court . . . , and there would be no consequence of his failure to do so." *Id.* 1372.

Although a preponderance standard would be the proper standard to apply to a gateway claim in New York, the burden of proof that a defendant would have to surmount in a hypothetical freestanding claim would have to be higher still. *See, e.g.*, *House*, 126 S. Ct. at 2087. The burden, as the Supreme Court stated, would have to be " 'extraordinarily high' " and would "require[] more convincing proof of innocence than [would a gateway claim]." *Id.* (quoting *Herrera*, 506 U.S. 417).

In other states, the courts that have recognized freestanding claims of actual innocence have held that a freestanding claim should not be granted unless the defendant establishes his innocence by clear and convincing evidence. *See, e.g.*, *State ex rel. Amrine*, 102 S.W.3d 541, 543 (Mo. 2003) (en banc) ("a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence."); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (en banc) ("the petitioner must show *by clear and convincing evidence* that no reasonable juror would have convicted him in light of the new evidence."). In New York, the court in *Cole* also "f[ound] that a movant making a free-standing claim of innocence must establish by clear and convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." *Cole*, 1 Misc. 3d at 543. Following the reasoning of the *Cole* court, the County Court, at Tankleff's hearing, applied the clear and convincing standard to Tankleff's freestanding claim of actual innocence. (A 22).

Although the County Court applied a clear and convincing standard, its decision would have been the same had it applied a lesser standard. Indeed, the County Court "reache[d] the same conclusion that the jury reached seventeen years ago . . . . Martin Tankleff is guilty of killing his parents." (A 26).

The Innocence Project and the Innocence Network

The Innocence Project and the Innocence Network "encourage the Appellate Division to adopt a rule, as have courts in other states, that where there is an unexcused failure to electronically record a custodial interrogation, the resulting confessions are inadmissible or in the alternative the jury must be instructed that such confessions are inherently unreliable." Acting as Tankleff's advocate, the Innocence Project and the Innocence Network also "urge this Court to reverse the County Court's ruling" on Tankleff's motion to vacate his conviction. The Innocence Project and the Innocence Network contend that the County Court's decision "was contrary to the weight of the relevant scientific evidence" regarding Tankleff's "uncorroborated and coerced confession" and that the court's decision "makes a mockery of our system of justice." (I.P./I.N. Br. 5). Finally, the Innocence Project and the Innocence Network "address [what they contend was] the County Court's erroneous denial of Marty Tankleff's motion for DNA testing on fingernail scrapings from Mrs. Tankleff and the broad concerns that it raises about the County Court's objectivity." Impugning the County Court's integrity, the Innocence Project and the Innocence Network assert, "[T]he County Court's decision to summarily deny DNA testing is a disturbing indication that the County court did not wish to learn the truth in this case." (I.P./I.N. Br. 5-6).

Creating a Rule to Record Custodial Interrogations

The Innocence Project and the Innocence Network "urge this Court to take a step that will dramatically reduce the prevalence of convictions based on false confessions: the adoption of a rule that requires law enforcement to electronically record all custodial interrogations." The Innocence Project and the Innocence Network contend that this Court, using its "supervisory power to fashion rules ensuring fairness," should "act to insure the fair administration of justice by requiring electronic recording of all custodial interrogations." To support its contention, the Innocence Project and the Innocence Network note that, since 1985, "several state courts have . . . acted to remedy the problems of unrecorded interrogations in their jurisdictions." (I.P./I.N. Br. 19-22). But by implication, if only "several" state courts have so acted, "the majority of [state courts] have declined to [so act]." *People v. Owens*, 185 Misc. 2d 661, 662 (Sup. Ct. Monroe County 2000). The *Owens* court, noting that most jurisdictions have declined to adopt a recording requirement, held that because there was no federal or state "statutory or constitutional authority" to mandate a recording requirement, the court would not "prescribe [one]." *Id.*

In any event, even if this Court were to mandate a recording requirement, the mandate would apply only prospectively and not to Tankleff's confession on September 7, 1988. And there is no logic to the Innocence Project's and Innocence

Network's assertion that, were this Court to enact a recording rule, such a rule would entitle Tankleff "to a new trial pursuant to [CPL] 440.10" because, under the rule, he "would be entitled to have . . . his confession excluded from evidence or, in the alternative, . . . to a jury instruction warning jurors that [unrecorded] confessions . . . must be viewed with great caution." (I.P./I.N. Br. 24).

Tankleff brought his motion to vacate under CPL 440.10(1)(g), which states in pertinent part:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> . . . .
>
> . . . New evidence has been discovered . . . which could not have been produced by the defendant at the trial . . . and which is of such character as to create a probability that *had such evidence been received at the trial* the verdict would have been more favorable to the defendant.

CPL 440.10(1)(g) (emphasis added). Thus, the focus under the statute is whether the verdict probably would have been more favorable if the new evidence had been available at a trial held long ago. The focus does not involve returning to the day of the trial, retrieving the evidence and taking the evidence back to the future.

The Alleged Uncorroborated and Coerced Confession

The Innocence Project and the Innocence Network contend that, in their view, the hearing testimony of false-confession expert Richard Ofshe would

probably result in a more favorable verdict. (I.P./I.N. Br. 6). In their opinion, a jury, after hearing Ofshe's testimony, "would . . . have ample reason to doubt [the] voluntariness" of Tankleff's confession. Their opinion is irrelevant.

If the Innocence Project and the Innocence Network had argued that this Court should adopt a rule empowering a trial court to permit the testimony of a false-confession expert such as Dr. Ofshe, its argument would be welcome. Instead, however, the Innocence Project and the Innocence Network offer their opinion regarding the value of Ofshe's testimony in Tankleff's case and "strongly urge this Court to reverse the denial of Marty Tankleff's motion." (I.P./I.N. Br. 6-10, 18). The Innocence Project and the Innocence Network, as "friends of the court," should present "an objective, dispassionate, neutral discussion of [an] issue" and should not argue facts or act as Tankleff's advocate. (*See* discussion *supra* pp. 3-4). Their input regarding the strength of Respondent's case is meaningless.

DNA Testing

According to the Innocence Project and the Innocence Network, "Mr. Tankleff sought [DNA] testing pursuant to C.P.L. § 440.30(1-a), at his own expense, on fingernail scrapings taken from his mother." The Innocence Project and the Innocence Network assert that because "[a] number of recent studies evidence the probative value of fingernail scrapings in homicide and/or sexual

assault cases," Arlene Tankleff's "[fingernail] scrapings could well contain DNA, deposited during the course of the grisly pre-mortem struggle, from the individual(s) who bludgeoned Mr. Tankleff's parents to death." (I.P./I.N. Br. 26 & n.6). "[F]or whatever reason," the Innocence Project and the Innocence Network assert, the County Court "became more fixated on justifications to deny relief than ways to find the truth" and "simply denied testing of the fingernail scrapings without substantive explanation on the ground that the testing was not specifically requested in 2000 when Marty Tankleff conducted testing on other evidence (the results of which proved inconclusive)." (I.P./I.N. Br. 27-28).

Notwithstanding the Innocence Project and Innocence Network's accusation, the County Court was not fixated on ways to suppress the truth. The County Court, in denying Tankleff's motion, found that Tankleff had offered "no reason why the fingernails of Arlene Tankleff[] could not have been tested . . . together with the other evidence tested" when Tankleff sought and obtained DNA testing years earlier. The court held that a defendant's right to DNA testing does not "authorize[] repetitive and successive motions . . . or . . . piecemeal applications." The court concluded, "If the defendant wanted his mother's fingernails tested, he could have had it done . . . along with the other evidence tested." (A 28).

Although the Innocence Project and the Innocence Network assail the County Court's decision, they fail to address the legal basis upon which the County

Court relied in reaching its decision. As set forth below, however, the County Court's decision was correct.

Tankleff's Prior DNA Motion

Tankleff first sought DNA testing in his motion of October 5, 2000. Unlike less fortunate defendants, Tankleff proceeded with the assistance of four attorneys: his trial attorney, Robert Gottlieb, and three attorneys with the Innocence Project. Respondent consented to Tankleff's application, and Tankleff selected crime-scene hairs for testing. On or shortly after February 1, 2001, Tankleff's expert tested the hairs. (A 1025-29; RA 203, 214). Contrary to the contention of the Innocence Project and the Innocence Network, the test results did not "prove[] inconclusive." (I.P./I.N. Br. 27). All the hairs that survived testing matched the hair samples of Arlene or Seymour Tankleff. (A 1031).

Although Gottlieb and the Innocence Project attorneys requested testing only of crime-scene hairs, they also focused on Arlene Tankleff's fingernails. The attorneys asserted in their motion, "Scrapings of Arlene's fingernails produced no sign of Marty's skin." (A 224). Their assertion probably was based on the trial testimony of forensic serologist Robert Baumann. Baumann testified:

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

A Yes.

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

A Yes, I did.

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

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

(T 2212-13). It appears that the reason that Tankleff's attorneys concluded that Arlene's fingernail scrapings produced no sign of Tankleff's skin was that Baumann's testimony established that Arlene's fingernail scrapings produced signs only of Arlene's blood and no sign of *anyone's* skin. This explains why the attorneys, who had selected crime-scene hairs for testing, declined to ask to have the fingernails tested along with the hairs.

In their brief, the Innocence Project and the Innocence Network omit that the Innocence Project had represented Tankleff. They also contend, without providing support for what they contend, that Arlene Tankleff had engaged in a "grisly pre-mortem struggle [with] the individual(s) who bludgeoned [her]." (I.P./I.N. Br. 26). But the trial testimony demonstrated that Arlene did not struggle *with* anyone. Instead, the testimony established that Arlene had sustained defensive wounds in her struggle *against a weapon.* According to the trial testimony of Vernard Adams, the Suffolk County deputy medical examiner, "A defensive wound is a wound which involves the forearms, especially on the outer aspect of the hands, either the back of the hands or the palm, incurred during a struggle *against some*

kind of weapon." (T 4005) (emphasis added). According to Adams, the wounds that Arlene sustained to her hands and left forearm indicated that she struggled not *with* anyone or even any "thing," but *against* a sharp blade or blades. (T 4005-07).

The Probative Value of Fingernail Scrapings

There is no merit to the Innocence Project and Innocence Network's implication that only recently have litigants become aware of "the probative value of fingernail scrapings in homicide and/or sexual assault cases." (I.P./I.N. Br. 26 n.6). Litigants recognized the probative value of DNA testing of fingernail scrapings long before Tankleff filed his prior DNA motion. *See, e.g.*, *People v. Rokita*, 736 N.E.2d 205, 211-12 (Ill. App. Ct. 2000) (murder); *Wilson v. State*, 752 A.2d 1250, 1253, 1257-58 (Md. Ct. Spec. App. 2000) (sexual assault); *Barnett v. State*, 757 So.2d 323, 326, 331 (Miss. Ct. App. 2000) (murder); *United States v. Cuff*, 37 F. Supp. 2d 279, 280-83 (S.D.N.Y. 1999) (murder); *State v. Bush*, 951 P.2d 1249, 1253-54, 1260 (Idaho 1997) (sexual assault); *State v. Whitlow*, 949 P.2d 239, 243 (Mont. 1997) (sexual assault); *State v. Avery*, 570 N.W.2d 573, 575-80, (Wis. Ct. App. 1997) (sexual assault); *People v. Palumbo*, 162 Misc. 2d 650, 652-55 (Sup. Ct. Kings County 1994) (murder).

DNA Summary

The Innocence Project and the Innocence Network contend that the County Court's decision is "squarely contrary to" a recent Court of Appeals holding "that

there is *no* time limit or 'due diligence requirement' on filing motions for post-conviction DNA testing." (I.P./I.N. Br. 27) (citing *People v. Pitts*, 4 N.Y.3d 303, 310-11 (2005)). The Innocence Project and the Innocence Network omit that the County Court cited *Pitts*. They also omit why the County Court found that *Pitts* did not control the outcome in Tankleff's case. The County Court held, "This court does not read *People v. Pitts* . . . as authorizing repetitive and successive motions for DNA testing, or that it authorizes piecemeal applications." (A 28) (citing *People v. Pugh*, 288 A.D.2d 634, 635 (2d Dep't 2001)). The County Court's decision and the *Pugh* Court's decision are consistent with the decisions in other jurisdictions. *See, e.g.*, *Alley v. State*, No. W2006-1179-CCA-R3-PD, 2006 WL 1703820, at *24 n.3 (Tenn. Crim. App. June 22, 2006) (unpublished opinion) (holding that while Tennessee's Post-Conviction DNA Analysis Act did not prohibit defendant from filing unlimited successive petitions, the court could not "condone such piecemeal litigation aimed at delaying the execution of a sentence"); *Commonwealth v. Donald*, 848 N.E.2d 447, 2006 WL 1543955, at *1 (Mass. App. Ct. 2006) (unpublished opinion) (affirming denial of motion for postconviction Y-chromosome DNA testing where results of other type of DNA testing had been introduced at defendant's trial); *Ex parte Baker*, 185 S.W.3d 894, 897-98 (Tex. Crim. App. 2006) (dicta) (observing that Texas DNA statute permits successive testing of material not previously tested *if* defendant blameless for prior

failure to test and if interests of justice require testing) (emphasis added); *Olvera v. State*, 870 So. 2d 927, 930 (Fla. Dist. Ct. App. 2004) (denying successive motion for DNA testing where defendant sought test of hair and retest of blood); *King v. State*, 808 So. 2d 1237, 1248 (Fla. 2002) (per curiam) (holding that Florida had no statute or rule requiring additional DNA testing and denying request for Short Tandem Repeat DNA testing of victim's fingernails).

The Innocence Project and the Innocence Network fail to discuss the legal basis for permitting successive petitions. Their failure is unfortunate.

Centurion Ministries

According to Centurion Ministries, eighteen "wrongfully convicted and subsequently exonerated" individuals "authorized Centurion Ministries to file [an amicus curiae] brief on their behalf." (Centurion Ministries' Br. 2). The 324-word "brief" Centurion Ministries has filed may be summarized as follows: "Centurion Ministries adopts the Brief for the Innocence Project and Innocence Network Amici Curiae." (Centurion Ministries' Br. 2). In other words, Centurion Ministries is saying, "What the Innocence Project and Innocence Network say goes for us, too." Their brief is unhelpful.

Former New York Prosecutors

The Former New York Prosecutors contend that, in the County Court, Tankleff presented evidence of his innocence that, "together with the

circumstances of his confession and the lack of evidence directly linking him to the crimes[,] weigh heavily in favor of retrying his case." According to the Former Prosecutors, "Tankleff's conviction depended almost entirely on his confession," which Tankleff's false confession expert opined was false. (Former Prosecutors' Br. 9-10).

The Former Prosecutors' brief is unhelpful. They come to this Court not "with an objective, dispassionate, neutral discussion of the issues," but "as an advocate for one side, having only the facts of one side." (*See* discussion *supra* pp. 3-4). For instance, they rely on Tankleff's direct examination at trial to assert that a detective used "hair" and "humidity test" falsehoods to get Tankleff to confess. (Former Prosecutors' Br. 9) (citing T 4151-52). They also assert that newly discovered evidence, in the form of credible witness testimony that Tankleff presented at the hearing, "supports the theory, maintained from the beginning by Tankleff, that Jerry Steuerman . . . was responsible for the murders." (Former Prosecutors' Br. 12 & n.5). "Taken together," the Former Prosecutors contend, "the strength of the evidence that Tankleff [has] presented in support of his section 440.10 motion combined with the weakness of the evidence supporting his conviction significantly undermine confidence in the verdict and strongly favor a new trial." (Former Prosecutors' Br. 13). This Court is "not helped by an amicus

curiae's expression of a 'strongly held view' about the weight of the evidence." *Ryan*, 125 F.3d at 1064.

Exonerated False Confessors

The Exonerated False Confessors "are persons who falsely confessed or made false incriminating statements to police after being interrogated." (Exonerated False Confessors' Br. 1). According to the Exonerated False Confessors:

> Amici come to this Court to take issue with two statements made by the Honorable Stephen L. Braslow in its Order . . . : 1) that "none of the conduct engaged in by the detectives . . . would have rendered a false confession"; and 2) that false evidence ploys like those used by Detective McCready . . . are the "least likely" kinds of tactics to lead to false confessions."

(Exonerated False Confessors' Br. 1-2) (quoting A 18-19).

According to the Exonerated False Confessors, four of them confessed after being "interrogated under similar circumstances to Mr. Tankleff and like Mr. Tankleff were charged with or convicted of killing loved ones." (Exonerated False Confessors' Br. 1). The Exonerated False Confessors "urge this Court to reevaluate Mr. Tankleff's confession in light of . . . new scientific advances." "In particular," they contend, "the lower court's finding that the detectives engaged in 'no conduct that would have rendered the defendant's confession false' is belied by

both . . . new psychosocial research and their own personal stories." (Exonerated False Confessors' Br. 4-5).

The Exonerated False Confessors' brief is unhelpful. They argue facts, not law. Moreover, there is a problem with their facts. Although the attorney who filed the brief on their behalf asserts that four of the exonerated confessors – Peter Reilly, Gary Gauger, Beverly Monroe and Michael Crowe – confessed "under strikingly similar circumstances to Mr. Tankleff," the attorney's knowledge comes from questionable sources. For instance, the attorney's knowledge of the Tankleff trial comes not from the trial transcript, but in large part from a 1996 affidavit that Tankleff appended to his habeas corpus petition. (Exonerated False Confessors' Br. 1, 10-13). And the attorney's knowledge of the confessions of Reilly, Monroe, Gauger and Crowe comes not from court transcripts or from court opinions, but from five books. (Exonerated False Confessors' Br. 13-28) (citing books). At least one book, or the attorney's reading of the book, is flawed: Monroe did not confess. *See* Brief of Beverly Anne Monroe at 5, *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003) (Nos. 02-6548, 02-6625), 2002 WL 32728563 (Monroe asserting in her brief that "[t]he Commonwealth's case against her was entirely circumstantial").

The Exonerated False Confessors also should have done a little more research before crediting the County Court, as opposed to crediting a higher court,

for opining that, in *People v. Tankleff*, "none of the conduct engaged in by the detectives . . . would have rendered a false confession." The County Court was not the first court to state this. The honor belongs to the New York Court of Appeals. *See People v. Tankleff*, 84 N.Y.2d 992, 994 (1994) (holding that the detectives made "no promise or threat that could [have] induce[d] a false confession") (internal quotation marks omitted).

Martin Tankleff's Classmates

"Martin Tankleff's Classmates" are fifty-three "former high school classmates of Martin Tankleff." They "come before this Court to take issue" with the portion of the County Court's decision that recounts Tankleff's lack of emotion and "conflicting and confusing accounts to the police of what he did [on the] morning [of the murders]." (Classmates' Br. 2-3). The Classmates' brief is unhelpful. The Classmates cite no legal authority, and they refer to "facts" that do not appear in the record.

According to the Classmates, they "would like to add a perspective on Port Jefferson and Suffolk County – the area in which [they] grew up – and to explain how this connects to Marty's case and [their] belief that he deserves a new trial." That perspective, they contend, is that although they once assumed that police officers were honest, they now know that "the Suffolk County homicide bureau was among the most aggressive and corrupt in the nation." (Classmates' Br. 4).

The Classmates contend that, rather than "accepting as fact" the detectives' and officers' trial testimony, the County Court should have read the "the lead editorial from the September 1988 issue" of the Classmates' "high school newspaper, *The Purple Parrot*." (Classmates' Br. 4). The Classmates do not explain why the County Court should have rendered a decision based not on sworn testimony that had been subjected to cross-examination, but on an editorial contained in a high school newspaper.

In any event, there is no merit to the Classmates' accusation that the County Court based its decision "entirely on speculation, conjecture, and a pseudo-psychological understanding of what 'should' have been Marty's 'level of emotion.' " This is so notwithstanding the Classmates' view of Tankleff as "a very calm person" who "usually kept a very even keel, even in the face of upsetting information," and who "was not someone . . . prone to expressive outbursts." (Classmates' Br. 7-8). First, the Classmates fail to cite any evidence in the record to support their assertion. Second, their assertion contradicts the trial testimony, and not just the testimony of the police. About sixteen hours before the murders, at Liberty Auto Repair, Tankleff and his father had an ugly argument after his father told Liberty's owner, Peter Cherouvis, not to repair the exhaust system on Tankleff's car. According to Cherouvis, a "belligerent," "loud and [] mad" Tankleff responded that he did not "want to drive that piece of shit to school" – it

was the eve of Tankleff's senior year in high school – and that "he wasn't a fucking nigger." (T 171-84, 4372-74, 4634-44, 4662-72). So much for Tankleff's "even keel."

The Classmates assert that what they knew of Tankleff's peaceful character "is not necessarily new" but that, unfortunately, "none of [them] were asked to testify by Marty's trial lawyer." (Classmates' Br. 7-8). The Classmates are inaccurate. Although Tankleff's trial attorney, Robert Gottlieb, may not have asked any of them to testify, other classmates did testify. One such classmate was Dara Schaeffer. (Trial Tr. 547-49). Schaeffer testified what Tankleff had said to her, and the manner in which he had said it, on the morning of the murders. According to Schaeffer:

> I said, "Hey Marty, how's it going?" And he said, "Last night, someone killed my mother, tried to kill my father and molested [or missed] me." And I – and I couldn't believe it. I was – just started to cry. And he said something about, you know, his father was in the hospital and being stabbed, his parents being stabbed, and I was just – I couldn't believe anything. I was crying. And then I said, "I'm really sorry. Is there anything I can do for you?" You know, "Whatever you want, I'll do it." And he said, "Well, can you just tell – go into school and tell [the principal] I'm not in school and tell him what happened," and I said, "Sure."

(T 552-53, 555-61, 4131, 4192). When asked to describe the manner in which Tankleff had spoken with her, Schaeffer testified, "He just said it. He – he really –

there wasn't any emotions. He just kind of said it. He just told me how it happened." (T 553).

Schaeffer was but one of three of Tankleff's high school classmates who testified. The other two were Zachery Suominen and one of Tankleff's best friends, Mark Perrone. (T 4484-85, 4569-70). So much for Gottlieb's alleged failure to ask any of Tankleff's former classmates to testify.

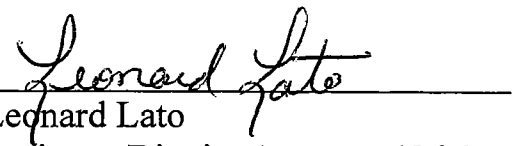
CONCLUSION

Some of the amici's arguments are helpful. Unfortunately, most of their arguments are not.

Dated: Riverhead, New York
June 5, 2007

Respectfully submitted,

THOMAS J. SPOTA
District Attorney of Suffolk County

By: 

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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 7,643.

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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 Respondent's Answer to the Amici Curiae. 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.

On June 5, 2007, by First Class Mail, I also served two copies of the brief on the amici curiae. I enclosed the copies in an envelope addressed to:

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