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

To Be Argued By:
ROBERTO J. GONZALEZ
Pro hac motion to be filed

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15 Minutes Requested

PEOPLE OF THE STATE OF NEW YORK

- against –

Docket No. 2006-05031

Suffolk County Indictment
Nos. 1290/88 & 1535/88

MARTIN H. TANKLEFF,

Defendant-Appellant.

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REPLY BRIEF FOR DEFENDANT-APPELLANT MARTIN TANKLEFF

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INTRODUCTION

Bucking the trend of enlightened prosecutors nationwide who recognize the societal value of DNA testing as a check on the potential for error in the criminal justice system, the Suffolk DA has said "no" to Marty Tankleff's request for such testing in his case. The DA's steadfast refusal to allow this testing, despite the defense's willingness to pay for it, reflects a truly cynical approach to the duties of a public prosecutor. The DA is more concerned with retaining the judgment of conviction he obtained against Marty at trial than risking the possibility that readily available and unimpeachable scientific evidence might undermine that result. This is exactly the opposite of how the New York State Legislature, and the people of New York, want him to behave.

FACTS

Marty makes three straightforward arguments for why the County Court erred in denying his motion for access to trial exhibits: (1) that neither the plain language of C.P.L. § 440.30(1-a),[1] nor the case law interpreting the statute, support

[1] § 440.30(1-a)(a) ("Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.).

the lower court's importation of § 440.10(3)(c)[2] into the requirements set out in § 440.30(1-a); (2) if this Court were to impose a procedural obstacle that is not in the text of § 440.30(1-a), it should do so only prospectively, so as not to upset Marty's reasonable reliance on the plain words of that statute; and (3) even if § 440.10(3)(c) somehow applied to this motion, it should not preclude relief given the circumstances of this case. The DA provides no valid reasons for rejecting these arguments and, instead, uses the first thirty-seven pages of his fifty-two page brief to recite a number of one-sided, often inaccurate, and self-serving facts from Marty's trial, the vast majority of which are irrelevant to the issue before the Court on this appeal. The facts recited in the DA's opposition brief will be dealt with directly in the reply brief to be filed on Marty's new evidence claims.[3]

The limited facts relevant to this DNA appeal are undisputed. Since the age of 18, and for nearly seventeen years, Marty Tankleff has been incarcerated in a New York state correctional facility for murdering his parents, Seymour and Arlene Tankleff. Since the moment of his convictions in 1990, Marty has been relentless in his efforts to prove that he is actually innocent of these horrible

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[2] § 440.10(3)(c) ("Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when . . . [u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not to do so.").

[3] *See People v. Tankleff*, App. Div. Nos. 2006-3617, 2006-9042, and 2007-1292.

crimes, and he has now developed extraordinary new evidence of his innocence not heard by the jury at his original trial.

After his collateral attacks on his convictions proved unsuccessful in state and federal court,[4] Marty filed an application in 2000 pursuant to C.P.L. § 440.30(1-a) (subsequently amended in 2004) with the County Court to conduct DNA testing on specified evidence that was collected at the crime scene. *See* Suffolk County Court's Order to Show Cause of Oct. 11, 2000 (Cacciabaudo, J.). The DNA analysis revealed that the hairs tested from the crime scene belonged to Seymour and Arlene Tankleff. Letter from Mitotyping Techns., L.L.C. to Robert C. Gottlieb & John B. Collins (Feb. 26, 2001).

In 2003, after learning of powerful evidence that another man, Joseph Creedon, and his associate, Peter Kent, killed Seymour and Arlene Tankleff, Marty filed a motion pursuant to § 440.10 to vacate his convictions. In addition, Marty filed a motion pursuant to C.P.L. § 440.30(1-a) for access to trial exhibit 125b (Arlene's fingernail clippings), as well as any known exemplars for the DNA of Joseph Creedon, Peter Kent, Jerry Steuerman, Marty Tankleff, and Arlene Tankleff for the purpose of DNA testing.[5] The County Court denied Marty's request based

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[4] *See generally Tankleff v. Senkowski*, 135 F.3d 235, 254 (2d Cir. 1998).

[5] Marty filed his § 440.10 motion in 2003. During the course of the 440 hearing Marty repeatedly asked the DA for access to trial exhibit number 125b for the purpose of performing DNA testing on the fingernail clippings. After indicating that he probably would provide such access, the DA ultimately did not do so. As a result, Marty filed the present motion in 2005.

on its creation of procedural obstacles that are contrary to the plain text of C.P.L. § 440.30(1-a), contrary to Court of Appeals and Second Department case law that assiduously interprets that statute according to its clear terms, and contrary to logic. *See* Suffolk County Court's Denial of Motion Pursuant to C.P.L. § 440.30(1-a) of Mar. 17, 2006 (Braslow, J.). Pursuant to C.P.L. § 450.10(5), Marty appealed the decision by right.

The DA's steadfast opposition to Marty's efforts to test DNA evidence to bolster the new evidence that he has found is not only contrary to law, but is also representative of a greater issue in this case: the DA's stubborn resistance to using DNA as a tool to determine who actually killed Seymour and Arlene Tankleff. Jurists and lawmakers have recognized that justice often may require the traditional adversarial stance of a prosecutor and a defense lawyer to be cast aside when matters of DNA testing are at issue. "No one, regardless of his political, philosophical, or jurisprudential disposition, should otherwise be troubled that a person who was convicted in accordance with law might thereafter be set free . . . because of evidence that provides absolute proof that he did not in fact commit the crime for which he was convicted." *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J. concurring) (respecting the denial of rehearing *en banc*).

Indeed, the President of the United States has recognized the importance of DNA testing. In 2003, the President authorized an initiative known as the

President's DNA Initiative that "provides funding, training, and assistance . . . to ensure that forensic DNA reaches its full potential to solve crimes, protect the innocent, and identify missing persons." President's DNA Initiative, http://www.dna.gov/info (last visited June 19, 2007). Specifically in cases of postconviction DNA testing, the President has recommended that "prosecutors and defense counsel should concur on the need for DNA testing . . . [in] cases in which biological evidence was collected and still exists" and in which "DNA testing or retesting [could produce] exclusionary results [that] will exonerate the petitioner." President's DNA Initiative, http://www.dna.gov/uses/postconviction/prosecutors (last visited June 19, 2007).[6] Marty's request fits into this category as the biological evidence that Marty seeks is still in possession of the government, it has never been tested, and testing DNA from the evidence could provide proof to exonerate Marty. Accordingly, in the interest of adhering to the strict letter of the law and in the interest of justice, the County Court's decision should be reversed.

[6] With special significance for this case, the President also recommends that "[a]s officers of justice, prosecutors have an interest not only in exonerating the wrongly accused, but in bringing the guilty to justice. A groundless conviction means that the real perpetrator is probably still at large. DNA testing assists law enforcement because it may identify the true culprit in the case being challenged . . . and prevent future criminal acts." http://www.dna.gov/uses/postconviction/prosecutors (last visited June 19, 2007).

ARGUMENT

I. Marty has satisfied the requirements of § 440.30(1-a) and is therefore entitled to the access to trial exhibits that he now seeks.

Pursuant to the plain language of § 440.30(1-a), once a petitioner requests access to specified evidence for DNA testing, the statute provides only two prerequisites after which "the court shall grant the application": the court must (1) determine that DNA evidence was secured in connection with the trial resulting in the judgment; and (2) find that "if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant." C.P.L. § 440.30(1-a)(a). It is undisputed that Marty satisfied these two prerequisites.[7]

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[7] Although the DA does not contest that these prerequisites were satisfied, the DA speculates that there is likely no useful DNA evidence underneath Arlene's fingernails. (Resp. Brief at 40-41). The DA argues that the trial testimony of forensic serologist Robert Baumann established that Arlene's fingernails produced "no signs of *anyone's* skin" and that the testimony of the Suffolk County deputy medical examiner was that Arlene had not struggled with "anyone or even any 'thing,' but against a sharp blade or blades." (Resp. Brief at 40-41) (emphasis in original). This argument is inaccurate and nonsensical. The testimony that the DA cites to support his position does not support it. Dr. Bauman testified that the genetic markers from blood testing were consistent with Arlene's blood. Dr. Bauman did not say that he found no skin, and he also did not say that the only genetic markers that he found were Arlene's blood. Moreover, it is disingenuous to argue that the testing that Dr. Bauman had at his disposal in 1990 is anything like the advanced testing that is available today. *See infra* pp. 17-18. The testimony of Mr. Adams is also not relevant here because "[a]ccording to Adams, the wounds that Arlene sustained to her hands and left forearms indicated that she [ ]struggled with . . . a sharp blade or blades.". (Resp. Brief at 41). Mr. Adams testified as to *wounds* on Arlene's *forearms, palms, and the back of her hand*, not her fingernails. (Resp. Brief at 41) (emphasis added). Given the undisputed evidence that Arlene resisted and fought her attacker(s), it is certainly possible that her fingernail clippings contain valuable genetic information.

Despite this showing under the plain language of § 440.30(1-a), the DA contends that Marty should nevertheless be denied access to evidence for DNA testing because he did not satisfy two additional requirements: (1) provide an explanation to overcome a judicially created bar on second applications for postconviction DNA testing and (2) exhibit due diligence. Neither barrier to relief has any basis in the law.

A. There is no basis for rewriting the plain terms of § 440.30(1-a) by importing CPL 440.10(3)(c).

The DA argues that "a court has the discretion to deny a DNA testing motion when, in a prior DNA testing motion, the defendant was in a position to raise the ground underlying his present DNA motion but failed to do so." (Resp. Brief at 39). The DA concedes that "Tankleff is correct that subsection 1-a's 'plain language' does not impose a second-application bar." (Resp. Brief at 38). This should be the end of the inquiry. "'Where a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'" *People v. Jackson*, 87 N.Y.2d 782, 788, 665 N.E.2d 172, 175, 642 N.Y.S.2d 602, 605 (1996) quoting *Matter of Jose R.*, 83 N.Y.2d 388, 394, 610 N.Y.S.2d 937, 940, 632 N.E.2d 1260, 1263 (1994); *see Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583, 696 N.E.2d 978, 980, 673 N.Y.S.3d 966, 968 (1998) citing *Tompkins v. Hunter,* 149 N.Y. 117,

43 N.E. 532 (1896). The Legislature surely knew how to impose a procedural obstacle such as § 440.10(3)(c) if it wanted to: its choice to not do so in § 440.30(1-a), should be respected.[8] *See Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *see also Lenard v. 1251 Americas Assocs.*, 241 A.D.2d 391, 393, 660 N.Y.S.2d 416, 418 (1st Dep't 1997).

Rather than adhering to the plain language of the statute, the DA urges this Court to engage in a complicated (and selective) process of "harmonizing" § 440.30(1-a) with §§ 440.10(3) and 440.30(1). (Resp. Brief at 39). The DA's invitation to rewrite the statute under the guise of "harmonization" should be rejected. The Legislature drafted § 440.30(1-a) differently than C.P.L. 440.10 and 440.20 precisely so that motions for DNA testing would be governed by a unique set of standards. Not only are the requirements set out in § 440.30(1-a) notably different than those set out in §§ 440.10 and 440.20, but there is other indicia that the Legislature intended for motions pursuant to § 440.30(1-a) to be unique. For

[8] The Legislature could have done so either by setting out the procedural bar in the text of § 440.30(1-a) or by using an explicit cross-reference. For example, when the Legislature wanted to apply the procedural bars set out in § 440.10(2),(3) to certain motions brought pursuant to § 440.20, the Legislature explicitly stated in § 440.20 that the courts were to "apply subdivisions two and three of section 440.10 . . .in determining the motion." § 440.20(1).

instance, unlike § 440.10 and § 440.20 motions, § 440.30(1-a) motions are appealable by right. § 440.10[5].[9]

Additionally, courts recognize that motions for DNA testing pursuant to 440.30(1-a) are a unique species, not to be conflated with motions under other statutes. For example, in *People v. Pitts*, the New York Court of Appeals stated that § 440.30(1-a) "set[] forth a standard *different* from that applied in other CPL article 440 motions to vacate convictions involving newly discovered evidence and expanding the class of defendants to whom testing is available." 4 N.Y.3d 303, 310, 828 N.E.2d 67, 71, 795 N.Y.S.2d 151, 155 (2005) (emphasis added); *see also People v. Byrdsong*, 33 A.D.3d 175, 178, 820 N.Y.S.2d 296, 298 (App. Div. 2d Dep't 2006) (citing *Pitts* and holding that CPL § 440.30(1-a) has broader application than CPL § 440.10(g)). Thus, contrary to the DA's argument, case law reinforces that § 440.30(1-a) was meant to be *different* from, rather than "harmonized" with, other CPL article 440 motions.

Tellingly, the case law that the DA provides to support his argument fails to do so. The DA cites *People v. Pugh*, 288 A.D.2d 634, 634-35, 732 N.Y.S.2d 673

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[9] C.P.L. § 450.10 provides that an appeal to an intermediate appellate court may be taken as a right by the defendant from the judgment, sentence or order of a criminal court for "[a]n order denying a motion, made pursuant to subdivision one-a of section 440.30, for forensic DNA testing of evidence."

(App. Div. 3d Dep't 2001),[10] *People v. Keene*, 4 A.D.3d 536, 537, 772 N.Y.S.2d 337 (App. Div. 2d Dep't 2004),[11] *People v. Kellar*, 218 A.D.2d 406, 410, 640 N.Y.S.2d 908 (N.Y. App. Div. 3d Dep't 1996), [12] and *People v. Moolenaar*, 207 A.D.2d 711, 711, 616 N.Y.S.2d 590 (App. Div. 1st Dep't 1994)[13] for the proposition that "because Tankleff failed to explain his procedural default [when applying for a second motion pursuant to § 440.30(1-a)] he is not entitled to additional DNA testing."[14] (Resp. Brief at 41). These cases do not support the existence of an implied bar to second applications for testing under § 440.30(1-a) because none holds that there is an additional procedural obstacle for defendants who have already successfully availed themselves of § 440.30(1-a). Absent a valid argument that § 440.30(1-a) contains such an obstacle to second applications for

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[10] § 440.30(1-a) application rejected because DNA evidence "would not have exonerated or tended to exonerate," the defendant. *Pugh*, 288 A.D.2d at 634-35, 732 N.Y.S.2d 673. To the extent *Pugh* stated in *dicta* that there was a due diligence requirement, that *dicta* pre-dated the Court of Appeals' holding in *People v. Pitts*, 4 N.Y.3d 303, 828 N.E.2d 67, 795 N.Y.S.2d 151 (2005).

[11] § 440.30(1-a) application for retesting of DNA evidence was granted where "evidence still exists and is sufficient for testing" and where a probability of a favorable verdict was more probable if the DNA results negated defendant's guilt. *Keene*, 4 A.D.3d at 537, 772 N.Y.S.2d 337.

[12] § 440.30(1-a) application rejected because "defendant failed to show that there exists a reasonable probability that the verdict would have been more favorable if DNA testing had been performed." *Kellar*, 218 A.D.2d at 409, 640 N.Y.S.2d 908.

[13] This case is not related to § 440.30(1-a) or DNA testing. *Moolenaar*, 207 A.D.2d at 711, 616 N.Y.S.2d 590.

[14] The DA also cites cases that are from other jurisdictions that are not based on this statute and are certainly not binding on this Court. Other jurisdictions are free to impose additional barriers to DNA testing; that fact provides no basis for ignoring the choices that the New York legislature has made.

DNA testing, the lower court should not have imposed an additional requirement on Marty's application for DNA testing under the statute.[15]

B. There is no due diligence requirement in § 440.30(1-a).

The DA also argues, oddly, that "Tankleff *may* have to show that his failure to take advantage of the opportunity for DNA testing of Arlene's fingernail clippings until 2005 was not caused by a lack of due diligence." (Resp. Brief at 51) (emphasis added). The DA's lack of confidence in his argument is obvious from his choice of words. In any event, as with the previous argument, the DA and Marty agree on one thing: The text of § 440.30(1-a) does not contain a due diligence requirement. Again, the inquiry should have ended here, especially in light of case law from New York's highest court expressly rejecting such a requirement in this very statute. Granting a defendant's motion for post-conviction DNA testing thirteen years after the defendant's conviction and six years after the

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[15] The DA argues that, if § 440.10(3)(c) is not imported into the statute, then "any defendant [would have] a right to an unlimited number of DNA tests and retests." (Resp. Brief at 45). This argument is a red herring. First, Marty is not seeking to retest any evidence—the evidence that he seeks to test has *never* been tested. Second, the statute does not permit DNA testing where the defendant is not able to meet the two prerequisites of the statute. In fact, there are several cases—including *People v. Pitts*, 828 N.E.2d 67, 4 N.Y.3d 303, 828 N.E.2d 67, 795 N.Y.S.2d 151—in which the court found that while there was no due diligence requirement, the defendant had not met the two prerequisites in the statute and therefore was properly denied relief. Third, the risk of improper or abusive filings imagined by the DA is unlikely to materialize, as prisoners generally have no illegitimate incentive to refrain from accessing DNA evidence as early as possible. Finally, and in any event, the courts are already equipped to deal with abusive or frivolous motions either by rule-making or by resort to their inherent powers. *See People v. Vonwerne*, 155 Misc. 2d 311, 314-15, 588 N.Y.S. 2d 533 (Sup. Ct. 1992); *In re Diane D.*, 161 Misc. 2d 861, 615 N.Y.S.2d 607 (Sup. Ct. 1994); *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 503 N.E.2d 681 (1986).

passage of § 440.30(1-a), the Court of Appeals in *Pitts* rejected the DA's argument that the motion was untimely and concluded that the lower courts "erred in interpreting CPL 440.30(1-a) to impose upon defendants a due diligence requirement." *Pitts*, 4 N.Y.3d at 310, 828 N.E.2d at 71, 795 N.Y.S.2d at 155.

Yet, rather than acquiesce to the plain language of the statute and the relevant case law, the DA acknowledged the court's rejection of a due diligence requirement in *Pitts*, but argued that it did not apply to Marty because the defendants in *Pitts* had filed their motions for DNA testing prior to 2004, when the statute was amended. (Resp. Brief at 48-51). The plain language of the 2004 amendment does not support the State's argument. The 2004 amendment to § 440.10(1-a) governing the availability of post-conviction DNA testing only removed the language "[i]n cases of convictions occurring before January first, nineteen hundred ninety-six," which had barred access to postconviction DNA testing for those persons who were convicted after that date. Far from making the statute more restrictive, the amendment did the opposite. As explained in *Pitts*, "the Legislature amended CPL 440.30(1-a) to allow any defendant regardless of the date of conviction, to move for a DNA testing order . . . reflect[ing] the vital importance and potential exonerating power of DNA testing." *See Pitts*, 4 N.Y.3d at 309-10, 828 N.E.2d at 71, 795 N.Y.S.2d at 155.

The language of the amendment does not explicitly or implicitly impose a new burden on defendants to show that they were diligent in moving for testing. If the Legislature had intended to create a due diligence burden, it would have been perfectly capable of crafting language that explicitly created one. *See, e.g.,* Innocence Protection Act of 2004, 18 U.S.C. § 3600 (explicitly creating a presumption of untimeliness for motions for DNA testing that are made more than sixty months after enactment of statute, but allowing such presumption to be rebutted through, among other factors, a showing of good cause).

In addition to having no basis in the actual text of the statute, the DA's argument also makes no sense. The 1996 cut-off date that the Legislature removed in the 2004 amendment never had anything to do with a defendant's diligence in bringing a motion for DNA testing post-conviction. As the DA himself recognizes, the cut-off date reflected the determination by the 1994 legislature that defendants convicted after 1996 would have the benefit of a certain standard of DNA testing at the time of trial. The 2004 amendment was necessary because the Legislature in 1994 could not, and did not, foresee the incredible strides that DNA testing would make in the intervening years, with new DNA technology developed even in the last five years far surpassing the rudimentary standard of DNA testing that was available in 1996. *Using DNA to Solve Cold Cases, Nat'l Instit. of Just.*, U.S. Dept. of Just., Pub. No. NCJ 194197, at 5-7 (July 2002). The DA gives no

explanation as to why the removal of the 1996 cut-off date—which merely reflects the Legislature's determination that a past Legislature was wrong as to when effective testing would have been available *at trial*—should be read to reflect a determination as to how quickly a defendant should file a motion for DNA testing *post-conviction.*[16] Moreover, if the DA's argument were correct, it would absurdly mean that while expanding access to DNA testing to new defendants, the Legislature simultaneously—without ever explicitly saying so—limited the access of the very class of defendants that the statute was initially passed to benefit.[17]

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[16] The DA also argues that Preiser's commentary supports the notion that persons who were convicted prior to 1996 must show due diligence under the 2004 amendment. (Resp. Brief at 49). Preiser, however, offers only speculation in support of his interpretation, and, in any event, his commentaries are not binding on this court. *See, e.g., People v. Bell*, 132 Misc. 2d 573, 576, 504 N.Y.S.2d 991, 993 n.4 (Sup. Ct. 1986) (rejecting Preiser's commentary on a statute as inaccurate); *Agin v. Krest Assocs.*, 157 Misc. 2d 994, 996, 599 N.Y.S.2d 367, 369 (Sup. Ct. 1992) (rejecting Practice Commentary's position and refusing to read into an amended statute an additional restriction).

[17] The DA also places great weight on a footnote in the *Pitts* opinion—a weight it simply cannot bear—which notes that "the 2004 amendment does not affect the outcome of these cases." *Pitts*, 4 N.Y.3d at 310 n.3, 828 N.E.2d at 71 n.3, 795 N.Y.S.2d at 155 n.3. The amendment did not apply because the defendants in Pitts were convicted prior to 1996 but brought their motions before the statute was amended in 2004. The DA asserts that "if the Pitts footnote means anything," the Court of Appeals must have meant to imply that "had the defendants made their motions under the 2004 statute, the lower courts would have had the discretion to deny the motions" if the defendants had not exercised due diligence. (Resp. Brief at 51). This leap in logic is utterly unpersuasive and is yet another example of the DA's penchant to discover restrictions on DNA access where none exists. In any event, assuming an explanation of the footnote is even necessary, the far more straightforward one is that, in describing the purpose and workings of the statute, the Court of Appeals described both the original enactment and the 2004 amendment, and then dropped the footnote to clarify that, despite its reference to the 2004 amendment, only the original enactment would govern the motions at issue; otherwise, the implication might have been that the 2004 amendment had retroactive effect. Of course, if the court in *Pitts* meant that its unanimous holding regarding due diligence had no enduring significance because it was impliedly undone by the 2004 amendment, one would have expected the court to have explicitly said so.

Thus the DA's attempt to add a due diligence requirement to § 440.30(1-a) should be rejected because the plain language *and* the highest court's interpretation of that plain language is contrary to such a requirement.

II. Even if this Court reads § 440.30(1-a) to contain procedural obstacles, those obstacles should not apply in this case.

Importantly, the DA ignores Marty's argument that even if § 440.30(1-a) contains procedural obstacles, not only should the obstacles not apply because of the circumstances of this case, but they should at most apply prospectively. *See, e.g., People v. Favor*, 82 N.Y.2d 254, 261-62, 624 N.E.2d 631, 635, 604 N.Y.S.2d 494, 498 (1993) (noting that the Court had "reaffirmed the principle of prospective application of decisional law"). Marty's reasonable reliance on the plain terms of § 440.30(1-a) and the administration of justice require such a result. *See, e.g., People v. Martello*, 93 N.Y.2d 645, 651, 717 N.E.2d 684, 695 N.Y.S.2d 525 (1999) (affirming the importance of reliance on an old rule and the administration of justice in deciding whether a new rule requires only prospective application). The history of Marty's relentless pursuit of proving his innocence makes it clear that had he *any idea* that New York law would require him to ask for all DNA testing at once, he would have gone to great lengths to test all available DNA. As it was, in 2000 Marty relied on the plain language of the statute and the available case law in deciding which evidence demanded DNA testing at that time, and justice requires that he not be punished for doing so.

III. Even if additional obstacles exist, they provide no basis for denying relief in the circumstances of this case.

The DA is correct that Marty did not explain his reasons for not testing Arlene's fingernail scrapings in 2000 to the lower court. Marty did not explain his reasons because the plain meaning of the statute does not require him to explain, and so he did not think that he was required to explain. But, even if the discretionary procedural bar of § 440.10(3)(c)[18] applied here, there would be no proper basis for denying relief.

Marty's reason for limiting his DNA testing in 2000 can be summed up in one word—money. The DA paints a false picture of a wealthy defendant with unlimited access to financial resources, (Resp. Brief at 39), when in fact, the only way that Marty was able to conduct DNA testing in 2000 was through funding from FOX television. In 2000, as a result of a TV program that FOX had produced relating to Mitochondrial DNA testing and Marty's case, FOX agreed to pay for DNA testing for Marty, but FOX *only* agreed to pay for DNA testing on hair. FOX would not pay for any additional testing.[19] For this reason alone, even if this Court

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[18] § 440.10(3)(c) ("Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when . . . [u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.").

[19] Facts unquestionably show that Marty had little reason to pursue access to Arlene's fingernail scrapings before filing his § 440.10 motion in 2003. By testing Arlene's fingernail scrapings Marty hopes to find a match between the DNA underneath Arlene's fingernails and the DNA of either Creedon or Kent to support his new evidence claims. When Marty conducted DNA testing in 2000, the only piece of evidence that Marty knew that connected Creedon to the murder was

reads § 440.30(1-a) to require an explanation for why Marty did not test Arlene's fingernail scrapings in his first § 440.30(1-a) motion, or a showing of due diligence, Marty has satisfied the requirements.

Additionally, the DA concedes that Marty's arguments relating to the advances in DNA technology "*might* have been good arguments" to satisfy a procedural bar. (Resp. Brief at 43). The DA's contention that the Y-chromosome DNA testing that Marty now seeks to conduct may have been available during Marty's 440.30(1-a) motion in 2000 is wrong. *See* John Butler, *Forensic DNA Typing*, 207 (Elsevier Academic Press 2d ed. 2005) (showing that Y-chromosome testing was not available commercially in 2002 by writing that "[a]t the beginning of 2002, only about 30 Y-STRs were available for researchers") (emphasis added). The first commercially available Y-STR kit was not validated until 2003. *See id.* at 209 (stating that the first commercially available Y-STR kit was "Y-PLEX™ 6 from ReliaGene Technologies"); Sudhir K. Sinha, *et al., Development and Validation of a Multiplex Y-Chromosome STR Genotyping System, Y-PLEX™ 6 for Forensic Casework*, 48 J. Forensic Sci. 93 (2003) (reporting and writing about the validation of Y-PLEX™ 6 in 2003). As described in Marty's opening brief to this

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the lone 1994 statement from Karlene Kovacs, and Marty did not even know that Kent existed at the time. The mountain of evidence that Marty has uncovered pointing to the involvement of Creedon and Kent since 2000 was a result of the efforts of the private investigator that Marty's family hired after 2000 to help find the true murderers. While the DA makes blanket assertions that Marty was not diligent in requesting DNA testing, and that he did not explain why he failed to test Arlene's fingernail scrapings earlier, nothing in the DA's brief takes issue with these critical facts.

court, and as the DA does not contest, the advantages of Y-STR testing over the DNA testing available in 2000 are significant for testing DNA from fingernail scrapings where the assailant is male and the victim is female, and for cases with multiple male assailants. *See* Butler, *supra*, at 215. Hence, the testing that Marty now seeks to conduct was not possible in 2000, so he cannot now be faulted for failing to conduct it at that time.

Finally, in determining whether to exercise discretion under § 440.10(3)(c), a court should consider the equities of the particular case. Here, the DA claims no concrete prejudice that would result from complying with Marty's request for access to his mother's fingernail scrapings, particularly given that Marty will bear the costs of DNA testing. Nor has the DA claimed any pattern of repeated or abusive DNA testing motions by Marty: indeed, Marty has only filed one previous DNA testing motion and, in filing that motion, Marty was limited financially and he understandably relied on the plain text of the statute, which imposed no limit on a second petition. On the other side of the ledger, Marty has come forward with an extraordinary amount of powerful evidence (including multiple witnesses, false confession experts, undisputed polygraph tests, and evidence of police perjury) showing that he is absolutely innocent of the heinous murders of his parents. Given all these circumstances, there is every reason to provide Marty full access to

the specified trial evidence for purposes of DNA testing, and there is no reason (other than a desire to impede the revelation of the truth) to oppose such access.

CONCLUSION

For the foregoing reasons, the decision of the County Court should be reversed. The case should then be remanded to the County Court for the entry of an Order mandating that the DA produce the evidence in question for prompt DNA testing.

Dated: June 19, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f), counsel for Defendant-Appellant certifies that this brief complies with the applicable rules. This brief has been prepared using Microsoft Word in a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14 (body); 12 (footnotes)

Line spacing: Double (body); single (footnotes)

This brief contains 5,762 words, excluding the parts of the brief exempted by 22 NYCRR § 670.10.3(a)(3).

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CERTIFICATE OF SERVICE

I, Jennifer O'Connor, certify that on June 19, 2007, I caused to be served upon District Attorney Thomas J. Spota two copies of this brief and appendix via Federal Express at the address that appears below:

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