To be argued by:
SCOTT J. SPLITTGERBER
(15 Minutes)

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

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MARTIN H. TANKLEFF,

Defendant-Appellant.

Appellate Division
Docket Number
2006-03619

Suffolk County
Indictment Numbers
1290/88 & 1535/88

REPLY BRIEF FOR DEFENDANT-APPELLANT MARTIN H. TANKLEFF

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DEFENDANT-APPELLANT MARTIN H. TANKLEFF'S REPLY BRIEF

INTRODUCTION

Marty Tankleff demonstrated in his original brief that he stands convicted of a crime that, when properly interpreted in light of subsequent decisions by the Court of Appeals, is legally impossible, based on the prosecution's evidence at trial.

The Suffolk County District Attorney fails to point to any evidence in the trial record to refute this claim.[1] Nor does the District Attorney attempt to explain

[1] In his recitation of the facts, the Suffolk County District Attorney only highlights evidence relevant to motive and planning (Respondent's Brief at 3-4, 23-24, 32), and inherently intentional acts (*id.* at 24-26, 28-29, 31).

That is not to say that the Respondent's Brief accurately conveys the trial evidence. On the contrary, the brief recites a number of one-sided and self-serving facts from Marty's trial, most of which are simply irrelevant to the depraved indifference issue before the Court on this appeal. Accordingly, those facts will be addressed directly in the reply brief to be filed on Marty's principal appeal in support of a new trial, rather than herein.

how a rational jury could have found recklessness based on this record, under an "earlier depraved-indifference law." (Respondent's Brief at 36).

Instead, the District Attorney tries to elevate form over substance, by claiming that this Court cannot consider the merits of Marty's constitutional claim. The District Attorney's reliance on the purported procedural bar is neither compelling, nor correct. This Court clearly is empowered with the authority to review the merits of this case; it could address the merits of the case even *if* this motion were procedurally barred, either to prevent manifest injustice, or to, among other things, decide a question of law that may be raised repeatedly unless the lower courts are provided with sufficient guidance.[2]

[2] Practically speaking, a failure to address the merits of this claim would simply shift the forum for deciding this issue to the federal courts.

ARGUMENT

MARTY TANKLEFF'S CONVICTION OF DEPRAVED INDIFFERENCE MURDER VIOLATES DUE PROCESS.

Because the prosecution failed to elicit *any* evidence at trial to show that Arlene Tankleff's killer acted recklessly, rather than with a manifest intent to kill, it failed to prove beyond a reasonable doubt an essential element of the crime of depraved indifference murder. Accordingly, Marty Tankleff's conviction for depraved indifference murder violates due process and should be vacated.

A. AS THE SUFFOLK COUNTY DISTRICT ATTORNEY CONCEDES, THE ONLY RATIONAL VIEW OF THE EVIDENCE ADDUCED AT TRIAL IS THAT THE KILLER OF ARLENE TANKLEFF ACTED "*WITH THE PURPOSE TO END HER LIFE*."

The Suffolk County District Attorney concedes that Marty Tankleff's conviction for depraved indifference murder could not stand, were he convicted today, because the "*only rational view of the evidence*" presented at trial is that the killer of Arlene Tankleff "*acted with the purpose to end her life*." (Respondent's Brief at 36) (emphasis added). That fact is indisputable. However, the District Attorney also asserts that under the standards articulated in *People v. Register*, 60 N.Y.2d 270 (1983), *cert. denied*, 466 U.S. 953 (1984), *overruled by People v.*

Feingold, 7 N.Y.3d 288 (2006), and *People v. Sanchez*, 98 N.Y.2d 373 (2002),[3] evidence that only shows a manifest intent to kill nevertheless could support a conviction of depraved indifference murder. That claim is unsupportable.

The District Attorney fails to acknowledge that, just like the current standard, *Register* (and the Statute, on its face) required proof of recklessness as a precondition for a conviction of depraved indifference murder. *See Register*, 60 N.Y.2d at 277 (stating "recklessness is the element of mental culpability required"); *see also* P.L. § 125.25(2) ("recklessly engages in conduct"). Evidence demonstrating that the person who killed Arlene Tankleff acted with "the purpose" (*i.e.*, intent) to "end her life" (*i.e.*, kill) is, and always should have been recognized as, incompatible with proof that the killer acted recklessly. *See People v. Gallagher*, 69 N.Y.2d 525, 529-30 (1987) ("One who acts intentionally in shooting a person to death . . . cannot at the same time act recklessly. . . . The act is either intended or not intended; it cannot simultaneously be both."); *see also Register*, 60 N.Y.2d at 279 (stating that depraved indifference murder "is not and never has been considered as a substitute for intentional homicide").

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[3] In *Policano*, the Court of Appeals characterized *Sanchez* as the "epitome[e] of [its] depraved indifference jurisprudence under the *Register* regime." *Policano*, 7 N.Y.3d at 599. Consequently, any clarifications of the law regarding the sufficiency of the proof for depraved indifference murder in *Sanchez* should be applied to Marty Tankleff's conviction on collateral review.

Moreover, the District Attorney's argument that "a reasonable jury could have found [Tankleff] guilty" based on the evidence at trial (Respondent's Brief at 50), is unsupported by anything other than his bald assertion, and is fundamentally at odds with the Court of Appeals' explicit statement that it "adhered to a *mens rea* of recklessness" in its recent cases, prior to *Feingold*. *See Policano v. Herbert,* 7 N.Y.3d 588, 603 (2006). Indeed, the Court of Appeals meant what it said in *Policano* when -- in response to a question posed by the United States Court of Appeals for the Second Circuit -- it clarified once and for all that "it has never been permissible in New York for a jury to convict a defendant of depraved indifference murder 'where the evidence produced at trial indicated that if the defendant committed the homicide at all, he committed it *with the conscious objective of killing the victim.*'" *Policano*, 7 N.Y.3d at 600 (emphasis added).

In light of the Court of Appeals' statement in *Policano*, the District Attorney's concession would seem to foreclose any further argument for upholding Marty Tankleff's conviction on the depraved indifference murder

count.[4] Evidence showing only a manifest intent to kill negates the possibility of sufficient proof of recklessness, regardless of whether that evidence was presented to a jury in 2007 or 1990.[5]

B. THIS COURT IS AUTHORIZED TO REVIEW THE MERITS OF MARTY TANKLEFF'S DUE PROCESS CLAIM.

The District Attorney nevertheless tries to preserve this wrongful conviction by claiming that Marty Tankleff's claim is procedurally barred and, therefore, "this Court *cannot* reexamine Tankleff's sufficiency argument." (Respondent's Brief at 36) (emphasis added).

The District Attorney's reliance on the purported procedural bar is misplaced. This Court is vested with the authority to examine both the law and the

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[4] Taken to its logical conclusion, the District Attorney's position means that either the jury got it wrong at the time, or, as the District Attorney seems to imply at certain points in his brief (Respondent's Brief at 36, 50), the law regarding proof of the recklessness element has changed. A change of the law defining "recklessness" would have far-reaching implications -- extending into other areas of the Penal Law. If the recklessness requirement has remained constant, *see, e.g., People v. Stewart*, 36 A.D.3d 1156, (3d Dep't 2007) ("we note that it has long been established that, as the statute states on its face, recklessness is one of the elements of depraved indifference murder"), it stands to reason that a finding today that the evidence is inconsistent with recklessness, should mean that is was inconsistent with recklessness under *Register*.

[5] Otherwise the crime would be superfluous and the statute would be rendered unconstitutionally vague; there would be absolutely no distinction between intentional murder and depraved indifference murder. Proof of purposeful conduct designed to kill a victim always would satisfy all of the elements of the crime, thereby "convert[ing] every intentional homicide into a depraved indifference murder." *People v. Gonzalez*, 1 N.Y.3d 224, 227 (2004); *see Sanchez*, 98 N.Y.2d 373, 403 (2002) (Rosenblatt, J., dissenting) ("[I]f intentional murder qualifies as depraved indifference murder, there is nothing left of the depraved indifference murder statute.").

facts at issue in this motion. *See* C.P.L. § 470.15(1). Additionally, a post-conviction motion in the trial court is the preferred method to raise the instant due process claim. *See* C.P.L. § 440.10(1)(h); *People v. Pepper*, 53 N.Y.2d 213, 222 n.2 (1981); *see also People v. Pohl*, 23 N.Y.2d 290, 292 (1968) (stating further review after the normal appellate process has run should be brought in form of motion for writ of error *coram nobis* [now codified at C.P.L. art. 440] in trial court, rather than pursuant to motion for reargument in appellate courts); *People ex rel. Figueroa v. Walsh*, 834 N.Y.S.2d 493 (3d Dep't May 17, 2007) (rejecting habeas corpus petition because claim that trial evidence was insufficient to prove reckless element of depraved indifference could have been raised in "CPL article 440" motion).

1. C.P.L. § 440.10(2)(a) Does Not Bar Marty Tankleff's Due Process Claim

The District Attorney's view of "retroactivity" under C.P.L. § 440.10(2)(a) is based on an improperly narrow reading of the language of the statute. (*See* Respondent's Brief at 47 [stating that because the motion is based on "a recent clarification of the law as opposed to a retroactively effective change in the law, the County Court had to deny [this] motion"]). Contrary to the prosecutor's argument, decisional law may be given retroactive effect under C.P.L.

§ 440.10(2)(a) pursuant to *either* New York's retroactivity analysis *or* federal constitutional principles. *See* Preiser, Practice Commentary, McKinney's Cons. Laws of N.Y., Criminal Procedure Law § 440.10, Book 11A, p. 249 (2005); *see also People v. Eastman*, 85 N.Y.2d 265 (1995) (applying "the principles of retroactivity developed by the Supreme Court in construing Federal constitutional law" on motion to vacate pursuant to C.P.L. § 440.10); *People v. Kenneth A.*, 36 A.D.2d 859, 860 (2d Dep't 1971) (*coram nobis* relief available where "the relevant occurrences were not considered violations of due process at the times of trial or appeal from the judgment, but were so held in subsequent decisions handed down after the normal appellate processes had been concluded").

In any event, as Marty Tankleff stated in his initial brief, his legal sufficiency claim is subject to collateral review pursuant to the federal due process analysis articulated by the United States Supreme Court in *Fiore v. White*, 531 U.S. 225 (2001) (finding due process violation on collateral review where the

prosecution "presented no evidence whatsoever to prove [a] basic element").[6] It is well-established that "[d]ecisions of the Supreme Court defining the scope of the due process clause in the Federal Constitution are binding upon every court in every State." *Central Savings Bank in the City of New York v. City of New York*, 280 N.Y. 9, 10 (1939).[7]

2. The United States Supreme Court's Due Process Analysis Compels Retrospective Application of a State High Court's Clarification of Law that Renders an Earlier Conviction Legally Insufficient.

In *Fiore*, the United States Supreme Court stated that federal due process law compels retrospective application of the law where a State's high court clarifies a substantive criminal law statute in a way that calls into question the validity of a prior conviction. *See Fiore*, 531 U.S. at 227-28; *see also Dixon v.*

[6] None of the cases cited by the District Attorney hold otherwise. Indeed, this is an issue of first impression, as the due process analysis in *Fiore* was not discussed in any of those decisions. Moreover, each of those cases are factually and procedurally distinguishable. For example, in *Stewart*, the Appellate Division, Third Department, only considered the defendant's claim that "the new rules" should be applied retroactively. *See Stewart*, 828 N.Y.S.2d at 672-73. In *People v. James*, 2007 WL 959712, at *1 (N.Y. Sup. Ct., Kings Cty. March 30, 2007), the defendant who was seeking collateral review already had raised a post-*Payne* challenge to his conviction in this Court, prior to filing his C.P.L. § 440.10 motion. *See James*, 2007 WL 959712, at *1.

[7] If C.P.L. § 440.10(2)(a) truly barred application of the federal due process test, because a clarification of a statute could not qualify as a "retroactively effective change in the law controlling such issue," the statute would be contrary to federal constitutional law as articulated by the Supreme Court. *See American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 177 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent states from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions.")

Miller, 293 F.3d 74, 79 (2d Cir. 2002), *cert. denied sub nom. Dixon v. Keane*, 537 U.S. 955 (2002) (holding that the New York Court of Appeals' interpretation of a *mens rea* element in *People v. Ryan*, 82 N.Y.2d 497 (1993), was a clarification of the law that applied to cases on collateral review).

Retrospective, or retroactive, application of the law in this context does not depend on whether, as the District Attorney argues, the law has changed (Respondent's Brief at 47). Rather, the issue is whether the subsequent case law makes clear that, at the time of the conviction, the prosecution failed to prove beyond a reasonable doubt all of the elements of the crime required for the conviction. *See Bunkley v. Florida*, 538 U.S. 835, 840 (2003) (stating that application of *Fiore* analysis in order to prevent violations of due process renders traditional retroactivity analysis "unnecessary").

3. The Court of Appeals Clarified the Law of Depraved Indifference Murder in Several Respects which Render Marty Tankleff's Conviction of Depraved Indifference Murder Legally Insufficient

The District Attorney alternatively argues that *Fiore* does not apply in this case because the Court of Appeals did "not clarify the law" of depraved indifference murder in any respects, it only changed the law through an

"evolutionary process" culminating in *Feingold.* (Respondent's Brief at 50). The District Attorney is wrong.

Essentially, the District Attorney tries to circumvent *Fiore*'s due process analysis by conflating two aspects of the Court of Appeals' recent case law. He blurs the distinction between (1) the Court's clarifications regarding sufficient proof of recklessness and (2) *Feingold's* redefinition of "depraved indifference" as an aspect of the crime's *mens rea.* (*See* Respondent's Brief at 50). While it is uncontested that the change in the law making "depraved indifference" a culpable mental state is not retroactive, that fact does not close the door on the issue of whether there was sufficient proof of recklessness at trial in this case.

As Chief Judge Kaye explained in her partial dissent in *Policano*, there are *two* distinct threads running through the Court of Appeals' decisions from *Sanchez* to *Feingold.* Each thread impacts the legal sufficiency analysis differently.

> The first line of cases holds that evidence of a manifestly intentional killing cannot sustain a conviction for depraved indifference murder and is based--as we made clear in the Court's unanimous opinion in [*Gonzalez*]--on the well-established rule of [*Gallagher*] that intentional murder and depraved indifference are inconsistent crimes.

Policano, 7 N.Y.3d at 605 (Kaye, C.J., dissenting in part) (citations omitted). This rule was consistently applied in *Hafeez*, *Gonzalez*, *Payne*, *Suarez* and, in the Chief Judge's view, by the Second Circuit in *Policano v. Herbert*, 430 F.3d 82, 92 (2d

Cir. 2005). *See id.* That line of the recent cases is consistent with the Court's prior holding in *Sanchez*, and did not change the law. On the contrary, those cases represent "the application of long-settled New York law to new facts." *Id.* (quoting *Policano*, 430 F.3d at 92). The "second, separate thread of the [Court's] developing depraved indifference murder jurisprudence" involves the change in the law making depraved indifference a culpable mental state. *Id.*

Here, Marty Tankleff relies on the first thread in the Court of Appeals' recent depraved indifference cases.[8] While the District Attorney denies that that thread exists, this Court has acknowledged that under the recent teachings of the Court of Appeals evidence resulting in a conviction of depraved indifference murder may be found legally insufficient for one of two separate reasons. The evidence may be insufficient because it demonstrates a manifest intent to kill, thereby "negating the core element of recklessness," or because it failed to establish the requisite level of depravity and indifference. *People v. Hawthorne*, 35 A.D.3d 499, 501 (2d Dep't 2006); *People v. McMillon*, 31 A.D.3d 136, 139 (2d Dep't 2006); *see also People v. Garrison*, 39 A.D.3d 1138, 834 N.Y.S.2d 430, 431

[8] The majority and partial dissenters all agree that a mens rea of recklessness was required in *Hafeez*, *Gonzalez*, *Payne* and *Suarez*. *See Policano*, 7 N.Y.3d at 603. The difference between the majority and the dissenters in *Policano* amounts to their dispute over the sufficiency of the proof of recklessness required for a conviction under *Register*. In the context of this case, that dispute is immaterial, as the evidence in Marty Tankleff's case fails even under the majority's test in *Policano*.

(4th Dep't 2007) (trial evidence establishing defendant's "manifest intent to kill" negates "the essential elements of *recklessness and depraved indifference* and render[s] the evidence legally insufficient to support a conviction of depraved indifference murder") (emphasis added).

At the time of Marty Tankleff's conviction, the distinction in the first thread of the recent cases -- between recklessness and intentional conduct under the statute -- had not been clearly addressed by the Court of Appeals in *Register* or any prior cases, in the actual context of depraved indifference murder. Since Marty's conviction, however, the Court of Appeals has clarified that depraved indifference murder requires a showing of recklessness, as that term has generally been understood under New York criminal law. *See generally* Brief for Defendant-Appellant at 26-33.

4. The Suffolk County District Attorney's Argument is Dependent on His Mischaracterization of *Hafeez*, *Gonzalez*, *Payne* and *Suarez*

In any event, the District Attorney's argument conflating the two threads in the Court's recent depraved indifference murder jurisprudence cannot withstand close scrutiny. It hinges entirely upon his misreading of a quotation from *Feingold*, and his mischaracterization of what the Court of Appeals actually said in its prior cases.

The District Attorney claims that Marty's contention that the Court of Appeals clarified the law regarding proof of recklessness is "absurd" and "false" because "in *Suarez*, *Payne*, *Gonzalez* and *Hafeez*, the Court of Appeals did *not*, as [Marty] asserts, cite as a reason for overturning the convictions in those cases 'an absence of recklessness.'" (Respondent's Brief at 49) (emphasis in original). In support of that proposition he cites to *Feingold*. (*Id.*). In *Feingold*, however, recklessness was not at issue, it was presumed.

Moreover, the quoted portion from *Feingold* is used out of context. The Court actually was commenting on whether "depraved indifference" properly should be viewed as part of the *mens rea* for the crime -- something it did not directly address in any of the prior cases -- and not whether recklessness had been addressed in the prior cases. *See Feingold*, 7 N.Y.3d at 294.

This is clear from the language and discussion surrounding the quote. In *Feingold* the Court stated:

> We say today what the Court in *Suarez* stopped short of saying: depraved indifference to human life is a culpable mental state. . . . In earlier cases (*Hafeez*, *Gonzalez*, *Payne*, *Suarez*), we reversed depraved indifference murder convictions without having to discuss explicitly the question of *mens rea*. It was enough to say -- and we said it repeatedly -- that those defendants did not commit depraved indifference murder because depravity or indifference was lacking.
>
> . . .

> In *Suarez*, it was not necessary for us to state explicitly whether depraved indifference is a mental state (*mens rea*). In the case before us, however, the trial judge rendered his verdict in a way that requires us to address directly the question of *mens rea*.

Feingold, 7 N.Y.3d at 294.

Furthermore, the text of the earlier decisions show that the District Attorney's claim about "those cases" having nothing to do with proof of a reckless *mens rea* is demonstrably false. *Hafeez* and *Gonzalez* are instructive. In *Hafeez*, the primary issue was whether the defendant shared his co-defendant's "*culpable mental state*" and not, as the District Attorney claims, the issue of whether there was sufficient evidence of depravity or indifference. *Hafeez*, 100 N.Y.2d at 258 (emphasis added). The Court explained that:

> "[T]he actions of both defendants were focused on first isolating, and then intentionally injuring, the victim. From this record there exists no valid line of reasoning that could support a jury's conclusion that defendant possessed the *mental culpability* required for depraved indifference murder. The 'heightened *recklessness*' required for depraved indifference murder was simply not present. (*see Sanchez*, 98 N.Y.2d at 380)"

Hafeez, 100 N.Y.2d at 259 (emphasis added; parallel citations omitted).

In *Gonzalez*, the Court similarly rejected a number of the District Attorney's speculative arguments that were intended to show that the defendant "acted

recklessly." *See Gonzalez*, 1 N.Y.3d at 467-68. In response to those arguments, the Court stated, among other things, that:

> "When a defendant's *conscious objective* is to cause death, the depravity of the circumstances under which the intentional homicide is committed is simply irrelevant. Nor can the wanton disregard for human life inherent in every intentional homicide convert such a killing into a *reckless* one."

Id. at 468 (emphasis added).

Viewed in context, the District Attorney's claim that the Court of Appeals has not clarified the distinction between proof of a manifest intent to kill and proof of recklessness required for a conviction of depraved indifference murder strains credulity.

C. GRANTING MARTY TANKLEFF'S MOTION TO VACATE HIS WRONGFUL CONVICTION OF DEPRAVED INDIFFERENCE MURDER WILL NOT REQUIRE THIS COURT TO GRANT A "FLOOD" OF SIMILAR MOTIONS.

Because both the factual circumstances and procedural posture of this case are exceedingly rare -- if not entirely unique -- there is little if any likelihood that a "flood" of similar motions challenging depraved indifference murder convictions would be successful on collateral review.

First, in Marty Tankleff's case there simply is no plausible theory of recklessness, not even an abstract, *ex post facto* rationalization that could be

supported by the evidence adduced at trial. Indeed, Marty's case is perhaps the *only* case that can meet the standards of the federal due process test articulated by the United States Supreme Court, in light of the Court of Appeals' decision in *Policano*.

Second, Marty raised this claim at trial, prior to the Court of Appeals' authoritative clarifications and reinterpretation of the law. Thus, this is not a case where a defendant suddenly conjured up a new argument out of whole cloth, in an attempt to invalidate a long-settled conviction. Rather, it is a case where an individual who steadfastly has maintained his innocence -- and challenged the propriety of this conviction from the start -- is proven right by subsequent clarifications of the law.

The case of *Dixon v. Miller* demonstrates why Marty Tankleff uniquely qualifies for post-conviction relief.[9] In *Dixon*, the United States Court of Appeals for the Second Circuit found a due process violation on collateral review, based on the New York Court of Appeals' clarification of the elements of the crime after Dixon's conviction. Nevertheless, the court denied Dixon's petition for a writ of

[9] This fact alone distinguishes this case from most other *Register/Sanchez*-era case.

habeas corpus because he had failed to adequately preserve the issue at the time of his conviction, as required by New York law. *See Dixon*, 293 F.3d at 79-80.

Lastly, and most importantly, Marty is factually innocent of all of the crimes of which he was convicted. Although, for purposes of this motion, we must address the evidence in the light most favorable to the prosecution, this motion is filed in conjunction with other motions to vacate his convictions based on his actual innocence. Those companion claims are supported by a staggering amount of newly discovered evidence showing that Marty was not responsible for the death of his parents. Indeed, much of that evidence, which was presented to the court below, points to the likely killers.[10]

Furthermore, in the almost two decades since Marty was arrested based on his purported confession, an extensive and ever-growing body of literature has recognized that in many circumstances it is *entirely rational* for a person to confess to a crime that she or he did not commit, particularly when the person who

[10] *See* the reply briefs filed under Appellate Division docket numbers 2006-03617 and 2006-0531.

confesses is a minor.[11] The number of recent exonerations due to, among other things, improved DNA evidence strikingly confirm this research.[12]

Thus, although the subject matter of those motions is not addressed herein, Marty's actual innocence claims undermine any public policy basis for refusing to address this motion. Unlike, in *Hafeez*, *Gonzalez*, *Payne*, *Suarez* or *Policano*, this is not a case where the defendant is claiming that *he* actually intended to kill the victim; on the contrary, Marty Tankleff has always maintained his complete innocence.[13] This case therefore involves the very danger of "miscarriage of justice" that collateral review is meant to prevent.

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[11] *See, e.g.,* Wisconsin Criminal Justice Study Commission, *Study Suggests Causes of and Ways to Prevent False Confessions*, Wisconsin Lawyer, May 2007, at 9 (also available at http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=64880) (noting that of the 125 proven false confessions in the study's sample group, approximately one-third (40) of the persons who made confessions were *juveniles*). As the late Justice O'Brien noted in his dissent in this Court, special care should be taken in cases where a minor is a criminal suspect, but the Suffolk County "police improperly isolated [Tankleff] from his family for the purpose of interrogation, questioned him in an increasingly accusatory manner for hours without advising him of his Miranda rights, and employed a ruse to extract inculpatory statements." *People v. Tankleff*, 199 A.D.2d 550, 554 (1993) (O'Brien, J., dissenting). Each of the problems Justice O'Brien listed are variables that correlate strongly with false confessions among minors. *See* Wisconsin Criminal Justice Study Commission, *Study Suggests Causes of and Ways to Prevent False Confessions*, Wisconsin Lawyer, May 2007, at 8-9, 61.

[12] The case of Christopher Ochoa is instructive. Under pressure from police, Ochoa falsely confessed to a rape and murder that he did not commit. He later was exonerated after DNA testing was performed. Although the real killer previously had informed the authorities that Ochoa was innocent, that evidence "was ignored [prior to the involvement of law students] because Ochoa's confession seemed airtight." *Id.* at 6.

[13] Thus, the Court of Appeals' statement in *Policano* that non-retroactivity "poses no danger of a miscarriage of justice" does not apply under the circumstances of this case. *See Policano*, 7 N.Y.3d at 604.

Under all of these circumstances, the words of one of this country's most-distinguished State court judges are instructive:

> I do not wish to be understood to tolerate abuse of [collateral appeals]. During almost 30 years on this court, I have refused to allow such conduct. I will not permit it now. But I know of only one sure way to discover abuse without defeating justice: to examine each petition on its own facts. True, scrutiny of this sort requires the expense of considerable judicial resources. . . . That, however, is the cost of justice. Out of fidelity to our judicial oath, we must pay the price. I have and I shall."
>
> . . .
>
> . . . To deny relief on procedural grounds to one who can persuasively demonstrate innocence, or whose guilt or punishment was determined in a manner that was grossly unfair would betray traditional and deeply held convictions of our society."

In re Clark, 855 P.2d 729, 766, 769 (Cal. 1993) (Mosk, J., concurring and dissenting).[14]

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[14] The District Attorney, on the other hand, claims all C.P.L. § 440.10 motions raising challenges to depraved indifference murder convictions must be barred. His argument in favor of inflexible formalism is unconvincing. In exceptional circumstances it is "better to tolerate a certain degree of ambiguity than to bind ourselves in a rigid framework that will preclude relief when it is clearly warranted." *In re Clark*, 855 P.2d at 771. Nor can the purported procedural bar be justified on efficiency grounds in this case. A State's legitimate interest in judicial efficiency often can be "cancelled out by another State interest." *Read v. State*, 430 So.2d 832, 841 (Miss. 1983). For example, where there otherwise would be "no meaningful opportunity for vindication . . . surely the State's interest in judicial efficiency manifest in its . . . procedural bar is stalemated and loses its force." *Id.*; *see also In re Turay*, 101 P.3d 854, 861 (Wash. 2004) (Chambers, J., concurring) (voicing frustration that, rather than allowing collateral motions to serve the purposes of justice and equity, reflexive use of procedural bars "has mutated to serve a new purpose; docket management. Dismissing a case on [procedural bars] has become essentially an administrative function, allowing courts to winnow down their dockets. While I have great sympathy for the expanding work load of the judiciary, . . . the touchstone should be equity . . . .").

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE COUNTY COURT'S ORDER SHOULD BE REVERSED, AND MARTY TANKLEFF'S CONVICTION OF DEPRAVED INDIFFERENCE MURDER SHOULD BE VACATED.

Dated: New York, New York
June 20, 2007

Respectfully submitted,

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Scott J. Splittgerber