COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

THE PEOPLE OF THE STATE OF NEW YORK, **Indictment Nos. 1290/88 & 1535-88**

Respondent,

- against -

MARTIN H. TANKLEFF,

Defendant.

----------X

THE PEOPLE'S POST-HEARING MEMORANDUM IN OPPOSITION TO MARTIN TANKLEFF'S C.P.L. § 440 MOTION TO VACATE HIS MURDER CONVICTIONS

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ISSUES PRESENTED

There are two issues. The first is whether the defendant Martin H. Tankleff has exercised due diligence and has discovered new, admissible evidence that would entitle him to a new trial. The second is whether, irrespective of Tankleff's due diligence or the admissibility or "newness" of his evidence, he has demonstrated that he is "actually innocent" and is entitled to a new trial.

THE CASE

Introduction

On June 28, 1990, following nine weeks of testimony and eight days of deliberations, a jury convicted Tankleff of the 1988 second-degree murders of his parents, Arlene and Seymour Tankleff. The trial judge, Alfred C. Tisch, sentenced Tankleff to two consecutive, 25-years-to-life prison terms. The New York appellate courts affirmed the convictions and the sentences, the federal courts denied his habeas petitions, and the New York appellate courts denied his motions to reargue his state appeals.

In addition to filing unsuccessful appeals and habeas petitions, between 1992 and 2001 Tankleff filed four 440 new-trial motions, each of which a judge denied without granting a hearing. On October 2, 2003, Tankleff filed the current 440 motion, claiming that "new evidentiary materials . . . establish that two other young men actually murdered [his] parents." (Def.'s Mem. of 10/2/03, at 1).

Tankleff's moving papers rested primarily on the affidavit of Karlene Kovacs and the affidavit of Glenn Harris. Kovacs stated in her affidavit that Joseph Creedon had admitted to her that he and "a Steuerman" had committed the murders, and Harris stated in his affidavit that he had driven Creedon and Peter Kent to the Tankleff house and that they had committed the murders. (*See id.* Exs. 1, 2).

Notwithstanding that it had no obligation to do so, the Suffolk County District Attorney's Office investigated Tankleff's claims and issued a report of its findings. In its report, the Office asked the Court to deny Tankleff's motion without granting a hearing on the ground that Kovacs's testimony would be inadmissible at trial and on the ground that Harris, through his attorney, Richard Barbuto, had informed the Office that Harris would exercise his Fifth Amendment right and decline to testify unless the Office granted him immunity, which the Office was unwilling to do. (*See* Report of the People's Investigation of 12/18/03, at 2-4, 65-67).

In May 2004, Barbuto and Tankleff attorney Bruce Barket informed the Court and assistant district attorney Leonard Lato that Harris had dropped his immunity demand and had agreed to testify. The Office consented to a hearing. (*See* Letter from Lato to Court of 5/12/04, at 1; Letter from Barbuto to Court of 5/13/04, at 1). The hearing began on July 19, 2004, and, following several interruptions, concluded on February 4, 2005.

Pretrial Proceedings

On September 7, 1988, inside the Belle Terre house of Arlene, Seymour and Martin Tankleff, police officers discovered the body of Arlene Tankleff, the living but mortally wounded Seymour Tankleff and the uninjured Martin Tankleff. Martin Tankleff confessed to killing Arlene and injuring Seymour, detectives

arrested him, and a grand jury charged him with the second-degree intentional murder and second-degree depraved-indifference murder of Arlene and the attempted second-degree murder and first-degree assault on Seymour. On October 6, 1988, Seymour died of his wounds, and a grand jury charged Tankleff with the second-degree intentional murder and second-degree depraved-indifference murder of Seymour. (A 1-5).[1] Shortly thereafter, with the assistance of retained counsel Robert Gottlieb, Tankleff posted a $1 million bond and was released on bail.

Tankleff submitted a motion to suppress his confession and his other statements to the police, and Judge Tisch scheduled a hearing. But on March 6, 1989, just before the hearing commenced, Tisch held a conference with Gottlieb and assistant district attorney John Collins because Gottlieb had stated that he had announced his candidacy to run for district attorney as a Democrat and that he was aware that Tisch was a potential candidate to run for district attorney as a Republican. Nevertheless, Gottlieb stated that he was comfortable with having Tisch preside at the hearings. (A 6-8).

The hearings began shortly thereafter and concluded on March 30, 1989. Although Tisch reserved decision, Gottlieb may have thought that the hearing had gone poorly for Tankleff because, on April 10, 1989, Gottlieb's law partner, Ronald Sussman, appeared before Tisch and, referring to a newspaper article

[1] Parenthetical references to "A" and a number refer to pages in the attached Appendix.

stating that the Republican Party had announced that it would recommend Tisch as its candidate for district attorney, argued that, if the newspaper article were true, the Code of Judicial Conduct required Tisch to recuse himself in Tankleff and to resign as a judge. Tisch ruled, however, that because he was not yet a candidate for district attorney and because the Code of Judicial Conduct required a judge to resign only upon becoming "a candidate," Sussman had demonstrated no basis requiring Tisch to recuse himself. (A 8-10).

On April 23, 1989, a person who some fourteen years later would become a central figure in Tankleff's current 440 motion provided an affidavit to Detective Richard Auspaker. The person, Joseph Creedon, stated in his affidavit:

> Sometime around April 10, 1989[,] . . . I met Todd [Steuerman] in the Strathmore Bagel shop . . . in St. James, NY. Todd owns the bagel shop. Todd wanted to talk to me about collecting money that some people owed him. Todd is a drug dealer . . . . Todd also told me that I should talk to his father [Jerry Steuerman] about cutting Marty Tankleff's tongue out of his mouth. He also told me he that he wanted somebody wacked [sic] for ten grand but wouldn't tell me who. . . .
>
> On . . . April 23 . . . Todd called me on the telephone and told me that he wanted to meet me. . . . I met Todd at the shopping center. . . .Todd and I talked for a few minutes. . . . Todd . . . shot me in the right forearm near the elbow.

(*See* Report of the People's Investigation of 12/18/03, at A 30-31).

On May 5, 1989, Tisch ruled on Tankleff's motion to suppress his confession and his later statements, in the presence of the police, to his sister, Shari

Rother. Tisch found the testimony of each of the People's sixteen witnesses to be candid and trustworthy and the testimony of defense witness Shari Rother to be candid. (A 11-14). As for the only other defense witness, Tankleff family attorney Myron Fox, who testified that when he arrived in front of the Tankleff house on the morning of the murders he did not see or speak with Tankleff and instructed the police not to question Tankleff, Tisch found:

> The testimony of . . . Fox . . . impressed this Court as wholly without candor, incredible to a large degree in the face of overwhelming evidence to the contrary and generally unworthy of belief.

(A 14). Tisch found that Tankleff and Fox had exchanged greetings and that "Fox asked the defendant if he was okay and the defendant said yes." Tisch denied Tankleff's motion to suppress his confession but granted his motion to suppress his statements to Rother. (A 22, 36, 40-42, 45).

On June 2, 1989, James Scarmozzino, an assistant district attorney, interviewed Creedon at the district attorney's office. Creedon provided Scarmozzino with an affidavit in which Creedon stated:

> [On] April 23, 1989, . . . I was shot by Todd Steuerman [and] . . . gave a statement to the Suffolk . . . P.D. concerning the shooting . . . .
>
> . . . I also told the Suffolk Police about previous conversations I had with Todd Steuerman. One of those conversations took place around April 10, 1989. During that conversation Todd told me that I should talk to his father, Jerry Steuerman, about cutting Marty Tankleff's

> tongue out of his mouth. He also told me that he wanted somebody whacked for 10 grand . . . .
>
> Today I have told ADA Scarmozzino and Inv. Ed Fitzgerald that I've had no conversation with Jerry Steuerman concerning Marty Tankleff. *In fact I've never personally spoken to Jerry Steuerman.* I've also had no further conversations with Todd Steuerman concerning Marty Tankleff and [Todd's] father.

(*See* Report of the People's Investigation of 12/18/03, at A 33) (emphasis added).

Trial Evidence

A. Events Leading Up to the Murders

In the early 1980s, Jerry Steuerman owned and operated bagel stores on Long Island. Seymour Tankleff was one of his customers, and in or about 1983 they became friends. In 1985 and 1986, Steuerman was having a house built in Belle Terre, and to help finance the construction he borrowed $350,000 from Seymour. Steuerman testified that, as collateral for the loans, he gave Seymour a fifty-percent interest in two bagel stores and that, pursuant to written agreements containing provisions that would survive Seymour's death, Steuerman repaid the loans in weekly installments, with the repayments starting at $1,000 and graduating to $2,500. Steuerman testified that he and Seymour also "owned a few racehorses together" and that every Saturday night he and the Tankleffs, including Marty, went to the racetrack for dinner. According to Steuerman, he and Seymour became "very close[;] Seymour was like a father to me," and toward the end of 1986 he accepted Seymour's invitation to join "The After Dinner Club," an informal

association whose members played poker together every Tuesday evening. (T 884-88, 892-93, 896-97, 922-25, 937-41, 943-52, 956-57, 960-65, 968-70, 984-86, 998, 1011-12, 1018, 1216, 1221-27).[2]

Although Steuerman considered Seymour to be "a shrewd businessman," club member Joseph Cecere considered Seymour to be an amoral businessman. According to Cecere, in early 1988, after he and Seymour reached an oral agreement on a real estate project, Seymour prepared a written agreement containing terms more favorable to Seymour than what they had agreed to orally. (T 672, 688-92, 716-18, 935, 938, 946).

In or about July 1988, a business dispute damaged Steuerman's friendship with Seymour. Steuerman opened a bagel store for his son Todd, and Seymour objected that Steuerman had not asked Seymour to be a partner. According to Steuerman, Seymour contended that they were partners in everything and wanted half the store. Steuerman refused. According to Steuerman, "Seymour was a very close friend and – and that friendship was beautiful, and it just disintegrated." (T 894-96, 969, 997-98, 1080-82, 1214).

Tankleff relative Michael McClure also testified about the decline in Steuerman's relationship with Seymour. According to McClure, who with his wife Marianne and their daughter Jennifer spent ten days at the Tankleff house in July

[2] Parenthetical references to "T" and a number refer to pages in the trial transcript.

1988, Seymour complained about the store that Steuerman had established for Todd and Steuerman's repayment of the loans. According to McClure:

> Seymour told me that . . . Jerry asked him if he could avoid paying him the – that was either $2,000 or $2,500 weekly – in vig, as Seymour referred to it, and whether he could skip the payments or not pay them for a while, and Seymour told me that he told Jerry, "I want you to pay me. I want you to pay me weekly. I want it in cash. . . . Jerry, don't fuck with me. I want my payment and I want my money on time."

(T 4623, 4625).[3] Nevertheless, McClure testified that the Tankleffs were a great family and that Seymour and Arlene adored Marty; Marianne McClure, in her testimony, described the relationship between Marty and his parents as "very loving." (T 4505, 4621-23).

Marty's close friend, Mark Perrone, shared the McClures' opinion. Perrone testified that in the summer of 1988, he saw the Tankleffs often and that it appeared to him that Marty and his parents "had a very loving and caring relationship." But according to Marty's friend Lance Kirshner, during the summer of 1988, Marty, after having complained earlier in the year that his 1978 Lincoln was "a piece of shit," stated "that if . . . his parents weren't alive . . . he could get anything he wanted." On August 27, 1988, the day after Marty received "a nose

[3] Tankleff testified that Seymour and Steuerman had been fighting over Todd's store and that, about three to four weeks before the murders, his mother told him that Steuerman had threatened the family and that she and Seymour worried that Steuerman might break into the house and steal business documents. Tankleff also testified that a $50,000 promissory note that Steuerman had given Seymour had become due the week of the murders. (T 4168-69).

job," Marty said something similar to his friend Audra Goldschmidt, her sister Stacy and Stacy's friend, Danielle Makrides. According to the Goldschmidts and Makrides, during a conversation about cars, Marty said, in a "weird tone," that "[i]f [his] parents were killed," or "if he could have a hit on both of his parents," then "he could get any car that he wanted." At trial, Tankleff gave a softer version. He testified that he had told Makrides and the Goldschmidts, "Well, if my parents weren't around, I could have any car I wanted." (T 135, 138-41, 163, 165-66, 168-69, 174, 188-89, 191-93, 593-94, 597, 4092, 4096, 4404-05, 4488-89).

B. Eve of the Murders

At about 8:30 a.m. on September 6, 1988, house cleaner Marie Vieira arrived at the Tankleff house. According to Vieira, Marty and Arlene appeared friendly to each other and ate breakfast together. Between 10 and 11 a.m., Seymour and Marty brought Marty's Lincoln to Liberty Auto Repair and asked Liberty's owner, Peter Cherouvis, to examine the Lincoln's exhaust system. Seymour and Marty left the Lincoln with Cherouvis and went home, where Vieira observed Marty and Seymour kidding about whether $20 was enough to pay for Marty's haircut. At about 2 p.m., Seymour and Marty returned to Liberty, where Cherouvis told Seymour that repairs to the Lincoln would be expensive. According to Cherouvis, Seymour stated, "Leave it be," because Seymour was going to buy Marty a Porsche or a Mercedes at an upcoming auction. Cherouvis

testified that, in response, Marty said that he did not "want to drive that piece of shit to school" – it was the eve of Marty's senior year in high school – and that "he wasn't a fucking nigger." According to Chervouvis, Marty "was belligerent," "kind of loud and [] mad." (T 171-73, 177, 181, 184, 4372-74, 4634-35, 4638-44, 4662, 4666, 4669-72).[4]

Zachary Suominen, a friend of Marty's, testified that he arrived at the Tankleff house at about 4 p.m., where Seymour was "very friendly." Suominen testified that he and Marty stopped by Perrone's house and thereafter went with Margaret Barry to the Smithaven Mall. According to Suominen, Barry, Perrone and Perrone's father, Marty was "friendly" and "talkative" and appeared to be in a good mood. (T 4424-27, 4494-96, 4500, 4560, 4572-76, 4582).

The poker game of Tuesday, September 6, 1988, took place at the Tankleff house. Player Joseph Cecere, driving 95-year-old player Al Raskin, arrived first, followed by players Steuerman, Peter Capobianco, Robert Montefusco and Belle Terre's mayor, Vincent Bove. According to the players, the game started in Seymour's office at about 7:30 p.m. and was a game like any other, with no arguments or "harsh words." The players testified that Seymour appeared to be in good spirits, with one exception. According to Cecere, Bove and Steuerman,

[4] At trial, Tankleff admitted that his Lincoln had a problem with the seal on the exhaust manifold but denied that he and Seymour had gone to Liberty or that he and Seymour had argued. He testified that he got a haircut in the early afternoon and that, for most of the afternoon, he was installing a stereo in the Lincoln. (T 4097-98, 4182, 4184-86).

during the game Seymour stated that he wanted to "go down to Atlantic City and get out of the area for a while" because he and Arlene were having problems and were "at each other's throats." The only other noteworthy event came when Seymour made a phone call. According to Bove, when Seymour hung up, Seymour said to Steuerman, "He's in. We need a check." According to Steuerman, the "he" was a horse that he and Seymour owned, and Seymour was informing him that the horse was "in" an upcoming race. (T 621, 623, 628-31, 657, 669, 673-77, 682, 693, 719, 721-22, 724-26, 729-31, 897-900).

The poker game was still underway when Tankleff, Suominen and Barry left the mall. Tankleff dropped them off and returned home at about 9:30 p.m., where he interrupted the game to get keys to a car that was blocking his car. According to Tankleff, he ate dinner, put away some clothes, showered, wrapped himself in a towel and put a second towel on the pillow on his bed because his hair was still wet. He testified that, when he was dry, he threw the first towel at the foot of his bed and went to his parents' bedroom, where he gave his mother a hug and a kiss goodnight. He testified that he went to his room, closed his door, set his alarm for 5:35 a.m. so that he could finish working on his car before school and went to bed. (T 631-32, 658-59, 677-78, 703, 731-32, 899-900, 4101, 4107-11, 4191).

Capobianco left the card game early, but the game continued until about 3 a.m., with Montefusco winning about $2,000. Except for the late hour, the game

broke up like it had on any other night. According to Bove, he left the office and passed through the kitchen, where he removed a knife from a knife block, removed the plastic wrap that was covering a watermelon, cut himself a piece, re-covered the remaining watermelon, "laid [the knife] perpendicular to the watermelon, right on the edge of the counter," and ate the piece that he had cut for himself on his way out. (T 632-34, 663-64, 677, 682, 732-36, 740, 900).

Montefusco and Steuerman left last. According to Montefusco, as he was leaving, Steuerman was having a private conversation with Seymour. Steuerman testified, "I spoke with Seymour for a minute or two, like we always do after a card game, about how much he had won or lost." Moments later, Montefusco and Steuerman were outside, as were Cecere and Raskin, in cars preparing to leave. (Seymour remained in the house.) Some cars blocked others, and the players, with one exception, departed in reverse order from which they had arrived. After Montefusco left, only Steuerman, Cecere and Raskin remained. Cecere, who arrived first, expected Steuerman to be next.[5] But because Steuerman's car was alongside Cecere's car rather than blocking it, Steuerman did not have to leave next, and, according to Steuerman and Cecere, Steuerman waved to Cecere to go first, which he did. Steuerman testified that he was being polite because Cecere

[5] Tankleff testified that he deduced from the way that the cars were parked that Steuerman had been the last player to leave the house after the card game. (T 4248).

had the 95-year-old Raskin in his car. Steuerman testified that he followed Cecere out, although Cecere testified that he did not notice Steuerman's car behind him. (T 634-35, 664-65, 683-84, 707-13, 898, 900-01, 1150-51).

Steuerman testified that he "went straight home." He also testified that because he had forgotten his house keys, he rang the doorbell and that his daughter, Bari Steuerman, opened the door. When the doorbell rang, Bari was in bed, and her digital clock read 3:17 or 3:18 a.m. She testified that she opened the door for her father and returned to bed. (T 818, 820-21, 824-25, 901-02, 1103-04).

Belle Terre had a constabulary, and one constable or deputy constable patrolled the village at all times. According to Donald Hines, the village's chief constable and Seymour's friend (Seymour was the constable commissioner), there were three shifts: noon to 8 p.m., 8 p.m. to 4 a.m. and 4 a.m. to noon. Hines testified that at 4 a.m. on September 7, he relieved the deputy working the prior shift and began patrolling the streets. (T 496-500).

At about 5:30 a.m., at the Steuerman house, Jerry Steuerman awoke and got out of bed. At about 5:35 a.m., at the Tankleff house, Marty awoke and got out of bed. But where Steuerman testified that he washed and dressed, Marty testified that he was too tired to work on his car and, after shutting off his alarm, went back to bed. According to Bari and Jerry, Bari asked Jerry to start her car, which he did.

Jerry testified that he left for work at about 6 a.m., the same time that Hines stopped home to change into a warmer shirt. (T 500, 825-26, 902-03, 4112, 4198).

C. Morning of the Murders: 6 a.m. to 8:40 a.m.

According to Tankleff, he got out of bed at around 6:05 a.m. and put on underwear and shorts but did not put on his glasses or contact lenses. He testified that he walked to his parents' bedroom, looked in and, seeing that "[n]o one was there," walked down the lighted hallway to the front door, which was open. He testified that the kitchen lights and his father's office lights were on and that he entered his father's office and saw his father behind the desk, seated upright in a reclining chair, with blood on him. He testified that he ran up to his father screaming, "Dad, dad, dad," and, seeing that Seymour's throat had been cut, called 911 from the office telephone. (T 4112-16, 4199-4200, 4202).

At 6:11 a.m., emergency-services dispatcher Patricia Flanagan received a 911 call. She testified that the caller, Marty Tankleff, said that he had found his father bleeding from the neck. According to Flanagan, she told Tankleff, who sounded excited but not upset or "sobbing," that an ambulance was coming and to elevate Seymour's feet and to apply pressure to Seymour's wounds with a clean towel or cloth. Flanagan testified that the call ended at 6:12 a.m. and that she called for an ambulance. (T 64-65, 70-72, 83, 86-87, 89).

Tankleff testified that he retrieved a pillow from his room and a clean towel from the linen closet and returned to his father. He testified that he pulled the chair out from behind the desk, turned it 90 degrees, tried to get it to recline by using the chair's lever but that, when he tried, the chair tipped forward, causing Seymour to slide a little in the chair. He testified that he put his right arm around Seymour's shoulder, his left arm under Seymour's legs and pulled Seymour off the chair and placed him on the floor.[6] He testified that Seymour and the chair were covered in blood and that he got blood on his hands, on his shoulders and on his lower leg, but not on his shorts. He testified that he put the pillow under Seymour's feet and the towel over the neck wound and that he pushed down once on the towel and ran. (T 4117-19, 4203-11).

Tankleff testified that he thought that his mother might have gone out for milk and that he went to the garage to look for her car. He testified that he did not remember if the garage door had been locked but that he did remember turning the garage door handle and opening the door. Finding his mother's car inside, he testified that he closed the door, reentered the house and went to his parents'

[6] Tankleff testified that on September 7, 1988, he stood five feet, seven inches tall and weighed 150 pounds. (T 4210). Through the testimony of others, he attempted to show that he lacked the strength to overcome Arlene and Seymour. Suominen testified that he lifted weights with Tankleff and that Tankleff was "slightly weak." (T 4569, 4571). Mark Perrone testified that "we wrestled and he never won." (T 4489). Mark Perrone and Frank Perrone testified that they and Tankleff had gone fishing and that Tankleff was too weak to reel in a bluefish. (T 4489-90, 4558). But Tankleff testified that he possessed the strength to lift Seymour from the chair and place him on the floor, and the deputy medical examiner testified that, on the date of his death, Seymour weighed 213 pounds. *See infra* pp. 63-64.

bedroom and, upon entering, saw his mother, dead, on the floor. According to Tankleff, he ran to the kitchen and, from the main kitchen telephone, called his sister Shari and told her, "Get over here. I think mom and dad have been murdered." He testified that he returned to the office, where Seymour was gagging, and then to the kitchen, when the telephone rang. He testified that it was Shari and that he told her, "[J]ust get over here." He testified that he hung up and called the Perrone house, that Mark Perrone's mother, Linda Perrone, answered and that he told her, "I think my mother and father have been murdered."[7] He testified that he returned to his room, wiped off his hands (and only his hands) on the towel at the foot of his bed, put on a sweatshirt and ran out of the house, down his driveway to the street and up the driveway of next-door neighbor Morton Hova. Hova, who was sitting on the toilet, heard someone screaming, and he got off the toilet and opened the door. According to Hova, he saw Marty, "a nice kid that lived next door," running toward him. Hova testified that he and Marty, who was wearing shorts and a zip-up sweatshirt but was barefoot, ran "to the street, through [Marty's] driveway [and] to the front door of his house." It was now 6:17 a.m.,[8] and Police Officers James Crayne and Daniel Gallagher, who had received a radio transmission directing them to respond to the Tankleff house, had just pulled in.

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[7] Linda Perrone testified that the call came later, at about 6:20 a.m. *See infra* p. 20.

[8] Although sunrise would not occur until 6:25 a.m., Crayne and Gallagher testified that, when they received the radio transmission at about 6:14 a.m., it was already daylight.

Tankleff ran past their vehicles saying, "Somebody murdered my parents." (T 92-94, 100-04, 248-53, 256, 286-87, 289, 316-17, 324, 328-31, 369-70, 3478, 4119-25, 4209-21).

Crayne and Gallagher testified that Tankleff appeared upset or "agitated" and that they observed blood on his palms, on the right side of his face, on his right calf and on his right foot. Crayne, Gallagher and Hova followed Tankleff into the house, where Tankleff said, "My mother's in the bedroom." Gallagher went to the master bedroom, and Crayne, Tankleff and Hova went to the office. According to Hova, Tankleff kept saying, "Murder, murder," and Hova, who "just couldn't imagine" that Seymour and Arlene had been attacked, asked Tankleff if someone had murdered the dog. Hova testified that Tankleff answered, "No, they murdered . . . my parents. . . . Both of them." Hova testified, "I said, 'Who did it?' [And Tankleff] said, 'My father's business partner . . . Jerry.'" (T 104-06, 256-59, 318-19, 332-34, 357-59, 372).

In the office, Crayne observed that Seymour was on the floor, that his feet were propped up on a pillow, that his clothes were saturated with blood and that there was a towel "laying over his neck," or "draped over the neck." According to Crayne, he administered first aid to the unconscious Seymour by applying pressure to Seymour's neck wounds. (T 335, 343-44).

While Crayne was with Seymour, Gallagher reached the master bedroom. According to Gallagher, from the bedroom threshold he observed that "the T.V. was on," that "the drapes were open on the middle window allowing sunlight in" and that "[i]t was light in the room." Gallagher testified that he also observed, on the floor, "[Arlene]'s head partially sticking out from the end of the bed." According to Gallagher, from the threshold he did not see blood on the floor or the extent of Arlene's injuries. (Gallagher's view was depicted in People's Trial Exhibit 7. (A 212)). Gallagher testified that he observed Arlene's injuries only when he stood directly over her, at which point he concluded that she was dead. (T 259-61, 266, 270-72, 293-300).

Gallagher exited the master bedroom, walked past Marty and Hova and entered the office, where Crayne asked Gallagher to bring oxygen for Seymour. Gallagher went to his vehicle, and while he was outside, Crayne tried to get a response from Seymour. According to Crayne, "I asked [Seymour], 'Who did this?' . . . The victim didn't answer but the defendant stated to me, 'I know who did this. It was Jerry Steuerman.'" (T 271-73, 344-45).

Gallagher returned with the oxygen and, after speaking with Crayne, spoke with Tankleff in the kitchen. According to Gallagher, Tankleff's eyes contained blood spots, and when he asked Tankleff about the blood spots, Tankleff answered that "he had recently had a nose job." According to Gallagher, Tankleff, who "was

composed," "said he woke up that morning, the lights were on in the house, the alarm was turned off and he found his father [] and . . . that the only person who had the motive to do this was Jerry Steuerman." (T 274-77, 320-22).

While Tankleff remained in the house, Hova exited the house and spoke with John McNamara, who was on a morning walk. McNamara observed that Hova "was . . . very upset . . . visibly upset." (T 107, 110-11, 776-78).

Linda Perrone, Mark Perrone's mother, testified that, at about 6:20 a.m., she received a telephone call from Marty. She testified that Marty, who was a "very gentle type person," was crying and said, "I won't be coming to pick up Mark. I think someone murdered my parents." According to Linda Perrone, Marty stated that Ron (his brother-in-law) was on the way over and that Seymour was going to the hospital. (T 4591-92, 4597).

According to Mark Perrone, his mother entered his room and said that Marty had called and that someone had killed his parents. According to Perrone, he "rolled over and went back to sleep for a couple of minutes and then woke up and called [Marty] back and spoke to him." Perrone testified, "I asked him what happened and he told me, 'Someone killed my parents and there's a lot of people here now.'" According to Mark Perrone, Marty was speaking very fast and seemed to be excited. (T 4490-91).

At about 6:27 a.m., Police Officer Edward Aki arrived in front of the Tankleff house, as did an ambulance with nurse Ethel Curley, who observed Tankleff waiting in the driveway and "waving [at] us [] vigorously." A few minutes later, Ron Rother arrived and spoke with Tankleff in the sunroom. According to Crayne, Rother "was very upset and he was crying, just visibly shaken." (T 83, 278-79, 315-16, 347, 375-76, 415, 421-23, 464-66).[9]

Tankleff exited the house, where Aki observed that Tankleff had blood on his hands. According to Aki, Tankleff asked if he could wash his hands at a spigot on the side of the house, but Aki answered that the house was a crime scene and that it would be inadvisable for Tankleff to return to the house. According to Aki, Tankleff told him "that a Jerry Steuerman had done this . . . to his parents." At about the same time, Hines arrived in front of the house, where he observed Rother "crying [] uncontrollably and . . . visibly shaking" and where, along with Aki, he observed Tankleff bending down by a puddle in front of Aki's vehicle and washing the blood from his hands. (T 381, 388-89, 392-98, 407, 501-04).[10]

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[9] Tankleff testified that he had a "[v]ery loving relationship" with Rother and spoke with him until a police officer separated them and "put [Tankleff] in the back of a police car." (T 4127-28).

[10] Tankleff testified that he started gagging and spitting up because of the blood and asked Aki if he could go up to the house and wash up. He testified that Aki said no but gave Tankleff permission to wash his hands in a puddle. He testified that Aki also retrieved a paper towel or a tissue from the glove compartment of his car and gave it Tankleff before he washed up. (T 4129).

Hines testified that Tankleff "noticed me and I noticed him" and that "[w]e immediately converged." Hines asked Tankleff what happened, and Tankleff answered that Jerry Steuerman had murdered or killed his mother and father. According to Hines, Tankleff entered Hines's vehicle and said that there was bad blood between the Tankleffs and the Steuermans and that, about two weeks ago, his mother stated that she thought that Jerry Steuerman was going to do something terrible. According to Hines, to whom Seymour and Arlene had never expressed a fear of Steuerman, Tankleff said that Steuerman was the last to leave the card game and that he "killed my mother and my father." But when Hines "advised [Tankleff] that his father was still alive and that should he regain consciousness the police would be able to verify if Jerry was indeed the perpetrator," Tankleff's demeanor changed. (T 504-07, 523-24, 526-28). Hines testified:

> Well, up until that time [] Marty was looking . . . at the ground, at his feet, at the floor of the car, at something other than me. He had his head down. When I made that statement, he picked his head up and he looked directly at me. His eyes widened, he stopped talking and didn't say another word.

(T 506-07, 526).[11]

Tankleff exited Hines's vehicle and had the first of what would be three conversations with McNamara.[12] According to McNamara:

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[11] Tankleff testified that he did not recall speaking with Hines, whom he conceded was a family friend. (T 4129-30, 4188-89).

> [Tankleff] sa[id] that his parents had been murdered and that . . . Jerry Steuerman committed the murder. . . . [H]e proceeded to outline how he had woken up that morning and came out of his bedroom and noticed that there were lights on in the house, which he thought was unusual, and he went to his mother's bedroom, looked in his mother's bedroom and saw nothing unusual, then went to the kitchen and from the kitchen he told me that he saw his father sitting in a chair in the den and that the father was bleeding very heavily[. He said that] he went to the father and saw . . . that he was in bad shape and then proceeded to dial 911 and after saying that an emergency had happened and so on, then he left the house, ran out of the house screaming that his parents had been murdered.

(T 779-80). McNamara testified that after Tankleff told him what had happened, "I asked him that – if he had lifted his father onto the floor why didn't he have any blood on him. . . . He looked at me and did not reply. . . . He walked away and walked back towards his house." (T 780-81, 812).

At about 6:42 a.m., the ambulance took Curley and Seymour to Mather Memorial Hospital. McNamara testified that at about the time the ambulance was leaving, Tankleff "came back to where [McNamara] was standing." According to McNamara, he and Tankleff had the second of their three conversations. (T 83, 782). According to McNamara:

> [Marty stated] that Jerry Steuerman had murdered his parents, and I said to him that it appears that his father is not dead . . . . And then he told me – he went through the same scenario, but there was a little more to it, that he

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[12] Tankleff testified that knew McNamara but did not recall speaking or even seeing him that morning. (T 4131, 4190-91).

> had been sleeping in the – in the nude and that when he woke up he put his shorts on and his sweatshirt, looked outside the door, saw the lights on, thought that was unusual, he went to the entrance to the – to his mother's bedroom again, saw nothing unusual in his mother's bedroom, went to the kitchen, saw his father []. He said he saw his father sitting in the chair in a den bleeding very heavily, and he went to his father and . . . called 911 and they said to place him on the floor, place a towel over his wound and press it . . . . [H]e was concerned that his mother was not around and he went to the garage and opened the garage door to see if his mother's car was in there because . . . occasionally his mother goes out early for breakfast – for bread or milk and then he closed the garage door and he went out of the house screaming that a murder had been committed.

(T 782-83, 812).

At about 7 a.m., Hines notified Bove what had happened to Arlene and Seymour. Bove testified that he got dressed and drove to the Tankleff house and that, as he was exiting his car, Tankleff came up to him. According to Bove, Tankleff said, "Vinny, somebody murdered my mother and my father. . . . Jerry Steuerman did it." Bove responded, "[M]arty, what makes you say that? We played cards last night and nothing took place at the card game." According to Bove, Tankleff stated that he woke up and saw the lights on, that he went into his mother's bedroom but did not see her in bed, that he went to the card room and saw his father in a chair with blood all over him, that he ran back to the bedroom and, seeing his mother lying between the bed and the door, called 911. According to Bove, Tankleff said that his father was still breathing and that the 911 operator

told him what to do and that he did it, including wrapping a towel tightly around Seymour's neck. (T 741-43).[13]

Robert Doyle, a sergeant in the Suffolk County Police Department Homicide Bureau, received notice of Arlene's homicide at about 7:05 a.m. At about 7:15 a.m. he spoke with Homicide Detective Norman Rein, and at about 7:20 a.m. he spoke with Homicide Detective James McCready, and told them to report to the Tankleff house. (T 2602, 2604, 2607-08, 2831, 3431).

At about 7:20 a.m., Dara Schaeffer, an acquaintance of Marty's, was driving past the Tankleff house when she saw Marty and stopped. Unfazed by the presence of police cars because Seymour "was the Police Commissioner of Belle Terre," she testified that she asked Marty, "Hey Marty, how's it going?" According to Schaeffer, Marty answered, "Last night someone killed my mother, tried to kill my father and molested me.[14] . . . "He just said it. He – really – there really wasn't any emotions. He just kind of said it," although she agreed that he looked as if he were in shock. (T 547-53, 555-58, 572-73, 580-81).

A short time later, McNamara had his third conversation with Tankleff. According to McNamara, Tankleff "started again with the same scenario," but this time said that, after he saw that his mother's car was in the garage, he "went to his

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13 Tankleff testified that he did not recall speaking with Bove. (T 4191).

14 Tankleff testified that he had told Schaeffer, "They . . . must have *missed* me." (T 4131, 4192) (emphasis added).

mother's bedroom, stood at the entrance to his mother's bedroom and he saw his mother this time and . . . realized his mother was dead and he was too scared to go in – into the bedroom and ran out of the house screaming." (T 784-85, 812).

McCready testified that he arrived in front of the Tankleff house at 7:39 a.m. and, after speaking with Aki, Crayne and other police officers, entered the house. According to McCready, he briefly examined the office and the master bedroom, where he observed that the television was on and that the drapes were open about three feet. McCready exited the house and, at about 7:50 a.m., introduced himself to Tankleff and asked Tankleff what had happened. As McCready and Tankleff walked toward McCready's vehicle, Hines interrupted them, and at McCready's request, Tankleff waited in McCready's vehicle while McCready spoke with Hines. At about 7:55 a.m., McCready entered his vehicle and resumed his conversation with Tankleff. According to McCready, Tankleff, who appeared "excited," said that Jerry Steuerman had done this because Steuerman and Seymour had been fighting for the past ten weeks. (T 3431-33, 3435-37, 3447, 3519, 3551-52, 3593, 3599).

According to McCready, Tankleff said that, with respect to the evening of September 6th, he returned from the mall and asked for "Cappy's" car keys because he thought that Cappy's car was blocking the driveway. According to McCready, Tankleff said that he spoke with his mother, ate, put some clothes away, took a

shower and, at about 11:15 p.m., said good night to his mother, set his alarm for 5:35 a.m. and went to bed. (T 3437-39).

According to McCready, Tankleff said that he awoke at 5:35 a.m. but stayed in bed until about 6:10 a.m., when "he got dressed in a sweatshirt and shorts," turned on the light in his bedroom and saw that lights were on in the house. According to McCready:

> He said . . . that he went into his mother's bedroom, that he looked into his mother's bedroom, that he could not see anybody in his mother's bedroom. He said that it was dark. He said that the drapes were drawn and that he could not see anything. . . . He said that he entered in as far as what he described as the alarm wall. . . . [H]e said that the alarm was not set. . . . He said that having not seen anyone in his mother's bedroom he started to walk towards the office – gym-office area of the house because he said that – all the lights were on in the house. . . . He said that he entered the gym-office area and that he saw his father bleeding and gagging. . . . He said that he immediately called 911. . . . He said that he went to the linen closet, that he got a clean towel, that he went into his room, that he got a pillow, that he returned to the office-gym area, that he got his father on the floor, that he elevated his feet and that he placed a towel around his father's neck. . . . He told me that he used the phone in the office right on the desk.

(T 3439-41). According to McCready:

> He said that inasmuch as he had not seen his mother in the bedroom earlier he decided to go look in the garage to see if his mother's car was there. . . . He . . . opened the garage door . . . and he looked in and saw that his mother's car was, in fact, in the garage. He said he then went back down to his mother's room and that he then

> stood in the doorway of his mother's room and he saw his mother laying on the floor. . . . He said that he went to the kitchen, that he called his sister Shari. . . . He said that, "I told my sister I think mom and dad have been murdered." He then said that he . . . called Mark Perrone's house and . . . got Mark Perrone's mother on the phone. . . . He said, "I told her the same thing." . . . When he hung up with Mrs. Perrone, he said that Mark Perrone had called back about five minutes later, that he spoke to Mark and told Mark what had happened. . . . He had told me that he had called [Shari and Mrs. Perrone] from the kitchen.

(T 3442-43). McCready, who observed that the only blood on Tankleff was a blood spot on his right calf and a blood spot on his right instep, asked Tankleff, "Do you have blood on you from, after you helped your father?" According to McCready, Tankleff answered, "My hands were covered with blood" and "I washed them in a puddle." According to McCready, he left Tankleff in the vehicle and returned to the house, where he observed that there were unsmeared blood spatters on the office telephone, that there was no blood on the three telephones in or near the kitchen or on the garage door and that the drapes in the master bedroom were open. (T 3444-48, 3451, 3560, 3562, 3565).

Doyle arrived in front of the Tankleff house at about 8 a.m. Doyle entered, walked through and exited the house and exchanged greetings with McCready, who also had just exited the house. Doyle and McCready walked toward McCready's vehicle, and, as they were doing so, Tankleff was exiting McCready's vehicle. McCready introduced Doyle to Tankleff and told Tankleff, "Tell the

sergeant what you had just been telling me." According to Doyle, Tankleff, while leaning or half-seated on McCready's vehicle, began with the evening of September 6th. (T 2609, 2611-14, 2638, 2655, 2665, 2671, 3451-52).

According to Doyle, Tankleff said that he had come home at about 9:10 p.m., spoke with his mother, went to his room and put some clothes away and returned to his mother's room to say goodnight, but did not say goodnight because his mother was already asleep. (T 2615-16, 2696-99, 2701-02).

Doyle testified that, with respect to September 7th, Tankleff said that he awoke at 5:35 a.m. but stayed in his room until 6:16 a.m., then passed by his mother's room, did not see her and went to his father's office, where he saw his father seated in a chair with lots of blood. According to Doyle, Tankleff said that he called 911, ran to his room and got a towel and a pillow and returned to his father and administered first aid. Doyle testified that Tankleff said that he returned to his mother's room, looked in and saw that this mother was dead. According to Doyle, Tankleff also stated that he thought that Jerry Steuerman had done it. Doyle testified, "I asked him why Jerry Steuerman would do this, and he said because he owed his father a lot of money." According to Doyle, Tankleff did not appear "upset or emotional." (T 2615-19, 2621, 2673, 2679, 2683-84, 2698, 2749-51, 2800-01).

Doyle and McCready testified that Tankleff spoke of "Uncle Mike Fox" and that, moments later, Fox arrived in front of the house. According to McCready, Tankleff said, "There's my Uncle Mike now." McCready walked toward Fox. According to McCready, Fox introduced himself and asked McCready, "'How's it going?' I said, 'Fine. The kid is telling us everything that he knows.'" According to Doyle and McCready, Fox asked Tankleff, "Marty, are you okay?" and, after Tankleff answered, "Yeah, I'm okay" or "fine," Fox left. (T 2620, 3452-54, 3531-33, 3537, 3540-41, 3546, 3548, 3923-24). [15]

Rein arrived in front of the Tankleff house and observed Tankleff speaking with Doyle and waving and exchanging greetings with Fox. Rein approached Doyle, and McCready walked up to Charles Kosciuk, a Suffolk County detective with the crime-scene laboratory and an expert in crime-scene analysis and reconstruction. After Rein spoke with Doyle, Doyle asked Tankleff to tell Rein what Tankleff had told Doyle. (T 1573-75, 2831-33, 2957-60, 2965-66, 3455).

Doyle sent Detectives Pfalzgraf and Carmody to Mather Hospital, and they arrived there at about 8:20 a.m. According to Pfalzgraf, he asked a Mather doctor to remove some dried blood from Seymour's forearm and a gold bracelet from Seymour's wrist. Pfalzgraf obtained the items and later gave them to Kosciuk's crime-scene personnel. (T 1468-72, 1595-96).

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[15] Tankleff testified that he had a "loving" relationship with Fox and saw but did not speak with Fox before Fox drove off. (T 4132-36, 4224-25, 4227). Fox did not testify at the trial.

According to Rein, from about 8:20 to 8:35, Tankleff, while seated on the hood of a police car, told Rein in a voice that was calm and business-like what happened on the evening of September 6th. According to Rein, Tankleff stated that he had arrived home at about 9:10 p.m., greeted his mother, entered the office where his father was having the weekly poker game and "greeted the players and his father and . . . gave his father a hug and a kiss." (T 2833, 2842, 2862, 2945, 2984, 3455-56). Rein testified that Tankleff said that he took a shower at about 11 to 11:15 and that, after he showered,

> he went into his mother's room, and he said his mother was drawing close the drapes. . . . He said when she pulled the drapes closed his mother got into bed and that he went over and kissed her good night, and he walked out of the room. As he walked out of the room, he noticed that the television was on. . . . [T]he defendant went into his own bedroom. He said he set an alarm clock for 5:35 a.m. [] and . . . went to bed.

(T 2834). According to Rein, Tankleff stated that he awoke in the middle of the night, looked out toward the driveway and saw lights on and went back to sleep. (T 2834, 2977, 3026).

Rein testified that, with respect to September 7th, Tankleff stated that the alarm went off at 5:35 a.m. but that he remained in bed until 6:10 a.m. According to Rein:

> The defendant said that he walked to his bathroom, and he saw the light was on in the bathroom. He recalled that he had shut it last night when he took a shower. The

> defendant said that he notice[d] that there were other lights on in the house. He looked into the master bedroom and he said it was totally dark, and he did not see either one of his parents in bed. The defendant said he then walked into his room as far as the wall in which the house alarm is located. He said he looked at the alarm and the alarm . . . was not activated or had not been set. The defendant said that he then went into the living area of the house and as he saw the door was open wide enough that someone could have passed through it. He said he also looked outside at that time and he saw that the outside lights, the driveway lights were on, and he said from the kitchen he looked into the office and he noticed that the office lights were on. The defendant said as he looked into the office he saw his father in his father's office chair at the desk. He said his father's bloody. He said he was gagging. He says his throat was cut all around. The defendant said he immediately went into the office and he dialed 911 from his father's office phone. He spoke to the emergency operator and the emergency operator instructed him on how to administer medical assistance.

(T 2835-36). According to Rein, Tankleff stated that he followed the operator's instructions and then went to look for his mother. According to Rein:

> [The defendant] said he went to the garage and he opened the door thinking that perhaps his mother had gone out for milk. But, when he looked in the garage, he found that his mother's car was still there. The defendant said he then ran down to the master bedroom again, and he went in as far as the wall in which the alarm is located and when he looked in he saw his mother. He said she was lying on the floor – on the far side of the bed. He said her throat was cut. He thought she was dead. He told me that he was afraid that someone might be in the room, . . . so he ran from the room. He said he ran into the kitchen, and he telephoned his sister Shari. He said he told the sister that he thought both his parents were

> killed, murdered, and that he asked her to come over to the house right away. The defendant said then he went to the office, and he rechecked on his father. He said his father was still gagging. At that time the telephone rang. The defendant said he ran back into the kitchen and he answered the telephone. It was his sister. Once again he repeated to his sister that he thought both his parents were murdered and that he wanted her just to get over to the house right away. The defendant said he then ran from the house and went to his next door neighbor[,] Mr. Hova. The defendant said that while he was at Mr. Hova's house the police arrived at his own house. The defendant said he ran back and he met the police officers.

(T 2836-37). According to Rein, Tankleff also stated that he had asked police for a towel and that because he did not get one, he washed off the blood on his hands in a puddle. It was now just past 8:30 a.m., (T 2861-62, 2838, 2987), and George Tyson, a surgeon, had just arrived at Mather. According to Tyson, Seymour was in a "deep coma." (T 4342, 4357).

Rein left Tankleff seated or leaning on the police vehicle and met with Doyle and McCready. According to Doyle, Rein and McCready, based on the discrepancies in Tankleff's statements to them and his behavior and appearance – Tankleff's "lack of emotion" and "whole demeanor" – Doyle directed McCready to ask Tankleff to accompany detectives to headquarters. Doyle also assigned McCready to be the lead detective. According to McCready, Detective Carmody had been scheduled to be the "lead detective," but because McCready arrived first,

Doyle reassigned the lead to McCready.[16] But Doyle was still in charge. (T 2625, 2627, 2889-91, 2991-94, 3456-57, 3524-25, 3612, 3627, 3786).

According to McCready, "I asked [the defendant] if he would come to police headquarters with me. I told him that I wanted to speak to him further about what he had been telling us and I wanted to speak to him about Jerry Steuerman." According to McCready, Tankleff said, "Fine," and "he got in the right front passenger seat of my police car, I got in the driver's seat and we left." It was now about 8:40 a.m. (T 3458, 3607-08).

At about the same time, Doyle went to the bathroom near Tankleff's bedroom, where he observed water droplets in the bathtub and, resting on the bathtub, a sponge that was wet at the bottom. (T 2624, 2735).

McCready received a radio message to call Pfalzgraf at Mather. According to McCready, he stopped at a pay telephone and, at exactly 8:42 a.m., called Pfalzgraf, from whom McCready learned that Seymour had suffered "extensive head injuries" and was being transferred to Stony Brook Hospital. (T 3463-65, 3609-10). According to McCready:

> After I got back in the car, I said to [the defendant] . . . [that] I knew about cuts on his father but I did not know about any head injuries, and he said to me, "Oh, yeah." He said, "It looked like someone took the handle of a knife and hit him in the back of the head," and I asked

[16] McCready retired prior to the trial, and Rein became the lead detective and assumed responsibility of the case. (T 2944).

> him, "How do you mean?" And he said, "Like this," and he went like this [bringing the right hand forward in a downward motion] three times.

(T 3465, 3619). According to McCready, he told Tankleff that Seymour was being transferred to Stony Brook and that, in response, Tankleff "acted happy about that." But McCready also testified that "[Tankleff] asked me if an autopsy could be performed on his mother . . . and I looked at him and I said, 'Why?' And he said, 'Because you can establish the time of death.'" (T 3466-67, 3618).[17]

McCready "also discussed with [Tankleff] Jerry Steuerman." According to McCready, Tankleff said that his father had loaned Steuerman $400,000, that in July 1988 the loan repayments were supposed to have increased from $2,000 a week to $2,500 a week and that there was "a dispute over that," and that "I'm not sure if it was at that time or not – he told me that Jerry Steuerman – his mother had . . . warned his father two weeks earlier that something like this was going to happen." McCready testified that at that point he did not know Steuerman but was aware from his conversation with Doyle that Doyle "was going to send people to talk to Jerry Steuerman." Indeed, at about 9 a.m., Doyle instructed Detectives Anderson and Laghezza to interview the card players, and to interview Steuerman last. (T 2754-55, 2635, 3466, 3620-22, 3625-26, 3631-32, 3634).

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[17] Tankleff testified that McCready stated, "I didn't know about your father's head injuries," and that, in response, Tankleff stated, "Well, I saw them that morning when I helped my father." Tankleff testified that he did not recall speaking with McCready about an autopsy on Arlene. (T 4144-45, 4236).

Shortly after 9 a.m., McCready pulled in and parked "to the rear of police headquarters" in Yaphank. According to McCready, he and Tankleff exited McCready's vehicle, and, while walking to headquarters, Tankleff "was dragging his right foot across the grass."[18] George Horvath, a detective sergeant assigned to headquarters, noted their arrival at about 9:20 a.m. McCready testified that they went to McCready's office, where, according to McCready, he asked Tankleff if he wanted a cup of coffee. According to McCready, Tankleff stated that he did, and McCready gave Tankleff a cup of coffee and "gave him a seat in the interview room." (T 3357, 3360, 3467-68, 3573, 3575-76, 3641-42).

An ambulance carrying Seymour left Mather for Stony Brook Hospital at about 9:30 a.m. (T 83, 3988). At about the same time, Steuerman, who had heard from his accountant of an occurrence at the Tankleff house, called Bove. According to Bove, "'Well, I don't know what's happened but you're being accused of murdering Seymour and Arlene.'" Steuerman testified that in response he asked, "Vinny, what the hell are you talking about?" Bove handed the telephone to a detective, who made an appointment to interview Steuerman that afternoon. (T 747-48, 904-05, 1084-85).

At about 9:35 a.m., in Tankleff's bathroom, Kosciuk observed inside the bathtub some water near the drain and, atop one side of the tub, a wet ring around a

[18] Tankleff testified that he walked softly on the grass because his feet began to hurt. (T 4146-47).

sponge, (A 220), that was wet at the base. Kosciuk testified that from there he went to Tankleff's bedroom, where he found two towels on the bed, with one being "slightly damp," and a pair of small barbells leaning against the wall. (According to Vieira, the barbells were lying down when she left on September 6th.) Kosciuk also observed staining – which subsequent tests showed to be blood – on the wall light switch and on the wall near the light switch. According to Kosciuk, of all the doorknobs in the house, the only one with blood on it was the one to Tankleff's bedroom. (T 1579-81, 1695, 1702-04, 1732-33, 1762, 1775, 1777, 1868-69, 4394).

By now Rein had arrived at headquarters. According to McCready:

> I discussed with Detective Rein the fact that [Tankleff] had no blood on his clothing. I told him about dragging the foot. I discussed with Detective Rein the fact that [Tankleff] had told me about the head injuries to his father . . . . Additionally, I told Detective Rein about the father being transferred to Stony Brook Hospital.

(T 3037-38, 3469).

Rein and McCready interviewed Tankleff in the interview room, which measured about 10 feet by 10 feet. No one else was present. The interview started with "small talk" at about 9:40 a.m." At about 9:45 a.m., Tankleff removed from one of his pockets three tissues and put them on the desk. (T 2841, 2843, 3005-06, 3036, 3093, 3470, 3512, 3520).

D. Rein and McCready Question Tankleff

According to Rein and McCready, Tankleff stated that he enjoyed cooking and liked cars but was unhappy with his Lincoln, that he didn't have many friends and that he didn't have much luck with girls. According to Rein and McCready, Tankleff also stated that he and his parents were concerned about safety and that they were always reminding each other to lock up the house. The conversation then turned to the evening of September 6th. According to Rein, Tankleff said that he had gone to the mall and that, when he returned home, he needed to move a car that was blocking his access to the garage. Rein and McCready testified that Tankleff said that he greeted the players and his mother and that he ate, showered and went to bed. According to Rein and McCready, Tankleff said that he was adopted and that he and his parents had a very close and loving relationship but that, now that he was an orphan, he did not know what was going to happen. When Rein reminded Tankleff that his father was still alive, Tankleff responded, "Well, if my father died, I'm an orphan." (T 2844-47, 2849, 3037-38, 3041, 3045-46, 3048, 3055, 3061, 3083-84, 3087, 3094-95, 3113, 3116, 3180-81, 3470-71, 3654-57, 3669-70, 3705).

Rein testified that Tankleff said that Steuerman and his father owned horses, that his father had invested about $400,000 in Steuerman's bagel stores and that Steuerman was repaying his father in weekly amounts of $2,500. Rein testified

that Tankleff said that Steuerman and his father were arguing and only pretending to like each other. Rein testified that Tankleff also said that, if his father died, Steuerman would own everything, but when Rein asked Tankleff what would happen if the police arrested Steuerman and Steuerman got convicted, Tankleff said that he would get everything because he was familiar with his parents' wills and that he was being left all the family's business interests. Rein testified that Tankleff also said that his father had large life insurance policies on himself. (T 2852-54, 3133).[19]

Rein and McCready asked Tankleff to show them how he had administered first aid to his father. At Rein's request, Tankleff demonstrated on Rein, and while he was doing so McCready pointed to his own right shoulder and then to Tankleff and said, "[B]lood." Rein looked at Tankleff, and saw, through Tankleff's partially unzippered sweatshirt, that there was blood on his right shoulder. According to Rein, McCready asked Tankleff when he had showered, and Tankleff answered that he had showered "last night" and that he had not showered since. (T 2867-70, 3168-70, 3177-79, 3199, 3473-75).

It was now about 11:15 a.m., or some 95 minutes into questioning, and after witnessing the blood on Tankleff's shoulder, Rein and McCready became

[19] Tankleff testified that, with respect to his parents' wills, his father told him that Hofstra University was going to get the Tankleffs' personal assets and the proceeds of a life insurance policy and that he would get the house and the businesses. (T 4170, 4232-36).

accusatory. Rein testified that he and McCready again asked Tankleff what he did after he said goodnight to his mother. According to Rein, Tankleff answered that he had set his alarm for 5:35 a.m. and went to sleep, that he awoke in the middle of the night because he slept lightly during poker games and that when he awoke he looked outside and saw lights on in the driveway. According to McCready, Tankleff also said that when he looked outside he did not see any cars but that he had surmised that Steuerman had been the last to leave "[b]y the way the cars were parked," which he had observed upon returning from the mall. (T 2870-71, 2941, 3184-87, 3733-36).

According to Rein, with respect to the morning of September 7th, Tankleff said that he awoke at 5:35 a.m. but remained in bed until 6:10 a.m. According to Rein, Tankleff said that he got out of bed, put a towel around his waist, turned on his room light and entered the hallway, where he saw the light on in his bathroom and other lights on in other parts of the house. According to Rein, Tankleff said that he went to the master bedroom and entered as far as the wall containing the house alarm, but that "it was dark and that he didn't see anybody." McCready interrupted, "But Marty, . . . I was up at ten minutes to 6:00 this morning," and "at ten minutes to 6[] it was a bright, sun shiny day, it was a very clear day." According to McCready, he also told Tankleff that no one had touched the drapes in the master bedroom, which were open about three feet and facing a direction so

that the room should have been illuminated. According to Rein and McCready, Tankleff responded that it was light enough that somebody would have seen him, but that he did not see his mother.[20] According to Rein, Tankleff said that he did not see his mother until he returned to the master bedroom after finding his father in the office and his mother's car in the garage. (T 2871-72, 3215, 3476-78, 3517).

Rein and McCready asked Tankleff to repeat everything. According to Rein, Tankleff stated that after he had put on a towel, he turned on his room light, got dressed in shorts and a sweatshirt, called 911 from his father's telephone, retrieved a pillow from his room and a towel from the linen closet. According to Rein, Tankleff said that this was the only time that he went back to his room. (T 2873-75, 3783).

According to Rein, McCready asked Tankleff about the first aid that he had administered to his father, and Tankleff, showing his hands, answered that he was "covered with blood." When Rein and McCready asked Tankleff why he had no blood on his clothes or at least on his sleeves, Tankleff answered that he had rolled up his sleeves. When McCready, pointing to the blood on Tankleff's shoulder, said, "But[] Marty[,] you have blood on your shoulder," Tankleff said that he knew how that had happened: "Before I helped my father, I dropped my sweatshirt around my elbows." Rein and McCready replied that what Tankleff was saying

[20] Ophthalmologist Aaron Wigdor testified that Tankleff was nearsighted and that his uncorrected vision was 20/100 in one eye and 20/200 in the other. (T 4414-15, 4419).

was "ridiculous." (T 2875-76, 3204-05, 3210, 3478-79, 3767-68, 3771). Rein testified:

> I said to him, "Now, that's absurd, Marty. You're telling us that in a moment of your father's most critical life threatening situation you took the sweatshirt and you dropped it around your elbows, making flippers out of your arms, [] rendering yourself totally ineffective to give first aid to your father? . . . Your father could have been bleeding to death and you're concerned about getting blood on your clothes?" And the defendant said, "No. Maybe I put on my sweatshirt after I gave first aid to my father." And we said to him, "You have blood on your hands, you have blood on your shoulder. When did you have time to get a sweatshirt? Where was it? Did you go back to your room? You never went back to your room. You would have gotten blood on it." And the defendant said, "I put the sweatshirt on after the police arrived." And we told him he was wearing a sweatshirt when the police arrived. . . . And we said to the defendant, "You've told us five different stories all in the course of this short matter of time."

(T 2876-77, 3207, 3212, 3775). Rein testified that he told Tankleff, Let's go on . . . and we'll get back to that."

According to Rein:

> We asked the defendant what he did after he gave first aid to his father. . . . The defendant said he ran to the garage door and opened the garage door and looked for his mother but his mother's car was there, which meant to him that his mother was home. And . . . McCready said to the defendant, "You're talking about the door that leads from the house to the garage, the one that has a lever and has a dead bolt lock and has a key?" And the defendant agreed . . . . And Detective McCready says, "Well, I checked that after I had spoken to you back in

> the street," and . . . [t]here's no blood on that at all." The defendant [made no comment.]

(T 2877-78, 3227, 3230).

According to Rein, Tankleff said that he then went to his parents' bedroom, where he saw that his mother's throat had been cut. When McCready asked how Tankleff knew this, Tankleff said that he saw it from where he was standing, "by the wall in which the alarm was located. McCready replied, "I had to walk to your mother and stand over her to see that her throat was cut" (as depicted in People's Trial Exhibit 16) (A 213)). (T 2878, 3483-84).

According to Rein, Tankleff said that he then "rushed into the kitchen and he telephoned his sister" and that he had blood on his hands, but McCready replied, "I went in the house and I looked at the phones in the kitchen and there's no blood on those phones." Rein testified that Tankleff said that he "went back to his father's office and checked on his father" and that the telephone rang and that "[h]e went back into the kitchen and [] answered the phone and it was his sister Shari." But, according to Rein, "McCready again stated, 'There's no blood on those phones and you said you had blood on your hands.' And we asked the defendant to explain these inconsistencies to us [], and the defendant did not explain." (T 2878-79, 3232).

According to Rein, he and McCready asked Tankleff to explain how he could have blood on his hands and on his shoulder but not on his clothes.

(People's Exhibit 11 is a picture of Tankleff showing the absence of blood on his clothes, and People's Exhibit 150 is a picture of Tankleff showing the presence of blood on his right shoulder. (A 214-15)). According to Rein, Tankleff did not explain. According to Rein, "I also said to the defendant, 'you told us you cried your heart out at the house before the cops arrived.' I said, 'When you cry, you wipe your eyes and dab your nose.' I said, 'I don't see any blood on your face.' . . . And the defendant didn't answer us." (T 2880-81, 2900-01, 3200).

According to Rein, at about 11:45 a.m., he asked Tankleff to draw a diagram how his mother appeared to him in the master bedroom that morning. Tankleff drew a diagram indicating where he was standing. Shortly after 11:45 a.m., McCready left the interview room, but deliberately left the door ajar. While McCready was away, Rein told Tankleff that, prior to the use of protective gear, Rein had been involved in ambulance and rescue work involving excessive bleeding and that in every case blood transferred from the victim to Rein's clothes. According to Rein, when he told Tankleff that he found it hard to believe that Tankleff did not have blood on his clothes, Tankleff did not respond. (T 2882-83, 2885-86, 3243-47).

According to Rein, through the partially open door "I heard Detective McCready talking, and it seemed to me that he was receiving a progress report from the hospital. . . . It sounded real." McCready reentered the room and said that

he had just spoken with Detective Pfalzgraf at the hospital and that Pfalzgraf had said that the doctors had "pumped [Seymour] full of adrenalin" and that he came of the coma and said that Marty "beat and stabbed" him. According to Rein, who now surmised that McCready had staged the call, Tankleff responded, "Well, if my father said that, it's because I'm the last person he saw." Rein then asked Tankleff if he had done this, and after remaining silent for about 10 seconds, Tankleff said he would take a lie detector test, "but I said we wouldn't give him one." Rein asked, "[W]hat should we do to a person who did this to your parents?" Tankleff answered, "Whoever did this to them needs psychiatric help." According to Rein and McCready, Tankleff then said, "Could I have blacked out and done it?" Rein asked Tankleff "if he thought that is what happened." According to Rein, Tankleff answered, "It's not likely it's me but it's like another Marty Tankleff that killed them. . . . Could I be possessed? . . . It's coming to me." (T 2886-88, 3248-61, 3265, 3486-87, 3817, 3820-27).

According to Rein and McCready, at 11:54 a.m., McCready asked Tankleff if he knew where he was. Rein testified that Tankleff answered that he knew that he was at police headquarters speaking to two homicide detectives about what had happened to his mother and father. Rein testified that McCready read Tankleff *Miranda* warnings, after which Tankleff agreed to continue speaking. (T 2888-91, 3261-62, 3264, 3488-89, 3828).

E. Tankleff Confesses

McCready asked Tankleff, "'Tell us what happened to your parents.'" According to Rein:

> the defendant said he needed psychiatric help. He said it was like someone else inside of him, another person who did it to his parents. And he said, "My mother and father once had a very loving relationship but since then they have been fighting, [and] I've been caught up in the middle . . . . What do you want me to tell you?" And Detective McCready said, "Did you kill [or murder] your mother and did you hurt your father?" And the defendant says, "Yeah, I did it."

(T 2892, 3490, 3832-33). It was 11:56 a.m. (T 2892).

McCready asked Tankleff, "[T]ell us what happened." According to Rein:

> the defendant said that he wanted to go to a junior college in Florida for two years, and he wanted to live in his family's condominium there and that when he completed the two years he wanted to attend the University of Pennsylvania and complete his degree, and he said his mother didn't want him to go away to college, she wanted to keep him home under her thumb.

(T 2893). McCready asked Tankleff, "Is that why you killed your mother?" According to Rein:

> the defendant said, "Not entirely. . . . About five years ago my parents separated . . . . They've been fighting ever since . . . And because I'm adopted, I don't know what's going to happen to me if they separated or broke up." The defendant said he was very confused about his father . . . . He said it used to be that if there was an issue concerning him, his mother would side with him even if his father didn't and the defendant said lately, with all

> their fighting, he couldn't depend on that, his mother didn't always side with him. The defendant also said that because of his mother and father arguing . . . they would turn to him for attention, they were smothering him. He said it was a nightmare and finding it very difficult to cope with that. And the defendant said that it was that issue of those chores that was posted on the refrigerator as well. He said, "And the last straw was that I didn't set up the poker table."

(T 2893-94, 3491-92). McCready replied, "'Marty, tell us what happened to your parents.'" According to Rein:

> [H]e said, "I really resented that Dan Hayes, my father's partner at the heath club[,] was going to have to stay with me when they went on their cruise in October and then later when they went to Florida. My parents didn't think I was responsible enough to stay by myself and I really resented that." We asked him if he had any resentments, and he said, "Yeah," he really didn't like that crummy old Lincoln he had to drive. The defendant said this is the first day of school as a senior [] and he really wanted a sportier car. And the defendant said . . . he also resented that this parents wouldn't let him play ball. He sa[id] his mother wouldn't let him play any contact sports, and he said he really wanted to play either baseball or soccer. And the defendant also said that this past summer his use of family boat and ATV, the all terrain vehicle, had been restricted.

(T 2894, 3278-80, 3493, 3839-40).

According to Rein, McCready asked, "Tell us what happened to your parents," and Tankleff said, "I decided after that business with the poker table . . . [t]hat I was going to kill them both." (T 2894-95). According to Rein:

> The defendant said that he had set his alarm clock for 5:35 a.m., and he said he got out of bed. He said he was naked and he remained that way, didn't want to get blood on his clothes. The defendant said he took a dumbbell from his room and he went to the master bedroom. He was going to kill both his parents. But he said he was surprised that there were lights on in the house, and he was surprised not to see his father in bed. The defendant said he walked down to his father's office and saw his father sleeping in the chair at his desk. And we asked the defendant what he did next, and he said he decided he was going to kill his mother first. And we asked him what he did, and he said he then walked down to [] – the master bedroom, and we asked him what he had with him, and he said a dumbbell. And Detective McCready asked him, "The dumbbell, the whole bell?" And the defendant said, "No the bar," and Detective McCready said, "You mean the barbell." We asked him what he did, and he said he went into his mother's bedroom. He said she was sleeping on her back. And the defendant said that he leaped across the bed and he got to her quickly. The defendant said he hit her on the head with the barbell and his mother started fighting with him. He said his mother was screaming out, "Why" and "Stop" and he said his mother was in a lot of pain and she kept fighting, and he said he hit her on the head about four or five times and she fell onto the floor. The defendant said that he thought the noise might attract his father or wake him up. So, the defendant said he started looking for a knife, he said, to cut his mother and stop the noise. The defendant said he ran into the kitchen and he found a knife on a counter by the watermelon. The defendant said he took that knife and he ran back into his mother's room and he cut her throat and he stabbed her.

(T 2895-96, 2928-29). According to Rein:

> We asked him what he did next. The defendant said he left the master bedroom and as he did his mother was still moving. The defendant said that he then went down the

> hall . . . to his father's office, his father's awake and [] said, "What are you doing?" And the defendant said he didn't say anything. He had the dumbbell and the knife behind his back. The defendant said he walked up to his father, went behind him and [] hit him on the head with the dumbbell and his father said, "Why are you doing this?" And the defendant said, "I just knocked him silly." The defendant said he then took the knife and he slashed his father's throat. He said he couldn't believe all the blood. . . . And we asked him what he did next. The defendant said he then went to his bathroom, he showered and he washed off the barbell and the knife, and he said that when he finished showering he put the knife back on the counter by the watermelon and he put the barbell back in his room. The defendant said he went into his room and he laid down on the bed and thought what to do next. The defendant said at about 6:10 a.m. he got out of bed and he walked down to the hall and into his father's office. He said his father was still gagging. The defendant said he went to . . . the master bedroom and his mother was dead. The defendant said he called the 911 operator from the phone in his mother's room and he was instructed by the 911 operator to render first aid. The defendant said he took a towel from the linen closet and [] a pillow from his room and [] went to his father's office, and [] pulled his father out of the chair, got him on the floor, put the towel on his neck, lifted up his feet and out the pillow under his feet. []Detective McCready asked him how he got the blood on his hands and the defendant said that he put his hands in the blood to make it look at though he had given first aid to his father. And Detective McCready said, "And how about the blood on your shoulder?" And the defendant said, "Well, I showered and I must have screwed up."

(T 2896-98, 3192, 3294-95, 3301-02, 3495-96). According to Rein, Tankleff "said he . . . pretended to follow the instructions of the 911 or the emergency operator. . . . I remember the defendant saying that he put the towel on his father's neck, but he

really did not apply pressure," and "that he thought his father would die before the police arrived." (T 3294-95, 3297).

While Rein and McCready questioned Tankleff at headquarters, Doyle assigned Homicide Detective James M. Barnes to be the case-scene coordinator at the Tankleff house. Barnes testified that he asked an identification crew to dust the house for fingerprints and that he examined all the house windows and doors. According to Barnes, the windows and doors were undamaged, and there was no sign of a break-in. (T 1367-70, 1372-85, 1389-90, 2633).

Rein testified that Tankleff agreed to give a written and videotaped statement, and that at about 12:28 p.m. McCready notified Doyle of the oral confession and of Tankleff's willingness to give the written and videotaped statement. According to Barnes and Doyle, Doyle told Barnes to check for blood in the traps, on the garage door handle, on the telephone in the master bedroom and on the towels in the hall bath near Tankleff's room, and to seize a knife from the kitchen and the dumbbells from Tankleff's room. At about the same time, Detectives Anderson and Laghezza interviewed Steuerman, and based on that interview *they* (not Rein or McCready) concluded that Steuerman should not be considered a suspect. (T 1085-86, 1089, 1136, 1385-86, 1392, 2628, 2633-34, 2748-49, 2757, 2762, 2804-05, 2823, 2898, 3313, 3496-97, 3882).

Tankleff executed a written waiver of his rights, and, with McCready writing, repeated his statement beginning "at about the time that [he] had come home from the mall the night before." But at about 1:22 p.m., Fox called headquarters and told the detectives to stop interviewing Tankleff. The questioning and writing stopped at the point that Tankleff admitted to having "cut at [Arlene's] throat and neck." After the interview ended, McCready took the three tissues that Tankleff had placed on the desk at about 9:45 a.m. and invoiced then for forwarding to the police laboratory. Later that day, Tankleff thanked Rein "for being polite and considerate." (T 2903-04, 2910-12, 3273, 3305-06, 3313, 3364, 3372, 3505, 3510-12, 3520, 3528).[21]

In his testimony, Tankleff admitted that he had confessed but that he did so only after Rein and McCready ignored his six requests to speak with Fox. Tankleff testified that McCready told him, "If you want to speak to your Uncle Mike, you're a criminal, we're going to lock you up." (T 4149-50, 4245).

Tankleff also testified that McCready, after staging the call to the hospital, reentered the interview room and

> turned to me. He was standing. He had his finger pointed towards me. . . . "Marty," he said, "Get off the fuckin' bullshit about Jerry Steuerman because I just got

[21] Tankleff testified that Rein was "[v]ery nice. . . . I trusted him." Tankleff testified that he also trusted, but did not like, McCready, and on cross-examination testified that, after he confessed, McCready choked him in front of Rein and Doyle. This was news to Gottlieb, who had not elicited the "choking" accusation on direct examination of Tankleff or on his cross-examination of McCready, Rein or Doyle. (T 4157, 4170, 4240-42).

> off the phone with the detective at the hospital and they shot your father full of [a]drenalin," and he said, "You beat and stabbed him, Marty." He said, "You did it, Marty." And he continued to say, "And your father said just tell us what we want to hear and help us."

(T 4154). According to Tankleff, he replied, "I can't believe that," but that the detectives replied, "Well, why would your father say that?" Tankleff testified that he answered, "Because I helped him that morning." According to Tankleff:

> And then they continually said, "[Y]our father wouldn't lie about that." And I said, "Well, I'll take a lie detector test." And they stated to me, "We're not going to give you one now. . . ." And they said, "Well, Marty, you know your father said you did this. We've got your hair in your mother's hand. Just say you did it."

(T 4156). Tankleff testified that he asked if he could "have blacked out" because "I started believing them that I did do this" and "[b]ecause they were saying my father said I did this [and] [m]y father never lied to me." According to Tankleff, "they" then said, "Marty, you know, there's – there's a Marty inside of you that knows what happened and have that Marty tell us what happened." Tankleff testified that he then admitted, "Yeah, I did it," that he was naked when did so, that he used a barbell and a knife, which he later washed off, because "[t]hey had me believing that I did it and that's what they wanted to hear." (T 4156, 4159-61, 4239-40, 4242, 4247-48).

Herbert Spiegel, a psychiatrist, testified that even though Tankleff had an average to well above average I.Q. of 124, Rein and McCready coerced or

brainwashed Tankleff into believing that he had killed his parents. (T 4253, 4264, 4266-67, 4285-87, 4289, 4295, 4297, 4299, 4302, 4309-10, 4322). Spiegel testified:

> [T]he shock of seeing . . . his . . . father dying and his mother dead, the calling the police, hoping to get help and instead their turning against him, . . . his sister's husband, Ron, arrives and then he's separated from [him], Uncle Mike who had a brief visual contact with him but leaves him . . . , being told that his – his hair was found on his mother's hands and being told that there was a – a scientific test that proved that he lied about the use of the shower and then the ultimate thing, that phone call that his father . . . told the police that he did it, that was such a sequence of events it must have had him in such turmoil that he was willing to say anything at all to get out of the mess that he was in. And having established that . . . there was some other evil person that could have done something like this he was willing to say, yes, . . . but . . . he knew within himself he didn't do it. Those are the circumstances in which forced confessions are made . . . .

(T 4291-92).

Spiegel conceded that his opinion was not the only viable explanation for Tankleff's actions and that it was possible that Tankleff's statements about blacking out were an attempt to minimize his guilt. (T 4311, 4318, 4323, 4328).

According to Rein, at about 6 p.m., Tankleff was reading a Playboy magazine and asked if he could speak with Shari. The call was placed at 6:37 p.m. (T 4693-94, 4704-05). According to Rein, Tankleff told Shari:

> I need help. I need help. I need help. I need to see a psychiatrist. I want to make sure to tell you that I'm sorry for what I did. I acknowledged to the police that I did it. I need to see you tonight.

(T 4694).[22]

F. Medical Efforts to Save Seymour

At Stony Brook Hospital, Tyson operated on Seymour. According to Tyson, during the operation he observed several "depressed [skull] fractures," "fracture[s] in which pieces of bone are actually detached from the rest of the skull and driven inward." According to Tyson, "the injuries had been caused by a hammer or an object similar to a hammer. . . . The size and shape of the scalp lacerations as well as the underlying depressed fractures appeared to be produced by a small, rounded, blunt object of which a hammer would be a good example." Tyson also testified that one of the fractures, a common fracture on the side of the head, was different from the others and could have been caused by a number of things, including a fall. (T 4346-47, 4360, 4364-65).

Tyson testified that the neck injury "was a very deep cut that went all the way around the neck or almost all the way around the neck" and that it was "difficult or impossible for [the] wound[] to have [been] caused if Seymour had

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[22] Tankleff testified that, prior to the call, Rein told him, "You're going to tell your sister that you're sorry, you're going to tell your sister that you need psychiatric help, you're going to tell your sister what you did and you're going to tell your sister that you are really, really sorry." Tankleff admitted that he told Shari that he was sorry and that he needed psychiatric help but that the reason that he confessed was "[b]ecause they made me." (T 4166-67, 4244).

been struggling." Tyson testified, "The wound appeared to me to be deeper than would be necessary simply to kill someone" and gave him "the impression that someone had tried to cut Mr. Tankleff's head off." Tyson expressed the opinion that the neck wound was consistent with having been caused by a knife and that whoever inflicted these injuries was very angry, and he agreed that a person who had the strength to lift Seymour out of a chair and get him to the floor would have had sufficient strength to inflict the wounds. (T 4348, 4349, 4359-60, 4362).

G. Crime Scene

At about 2 p.m., at the Tankleff house, Kosciuk entered the master bedroom. Kosciuk testified that the pooling of blood on one corner of the bed and the adjacent flooring showed that Arlene had "spent some time in that area" bleeding. According to Kosciuk, he and members of his staff also removed loose hairs from Arlene, including hairs from her hands. (T 1585, 1593-95, 1611-14, 1617, 1835-36).

At about 4 p.m., Kosciuk exited the master bedroom and entered Seymour's office. According to Kosciuk, the blood patterns and the pooling of blood showed that Seymour was sitting in his chair behind his desk when he was hit with a blunt instrument that sent "cast off" blood to the ceiling. (When a bloodied instrument is moved up and then down, some of the blood continues upward and is "cast off" the instrument). According to Kosciuk, "the blow direction would be by raising the

implement behind the head in a northerly direction and striking in a southerly direction." (T 1585, 1633, 1650-53, 1657-59, 1663, 1665-66, 1668; 1681, 1821, 1831, 1856).

According to Kosciuk, Seymour's chair showed evidence of dripping and pooling of blood and contained slits from a sharp object such as a knife. (According to Vieira, the slits in Seymour's chair were there before September 6th.) Kosciuk also testified that the blood spatterings on the telephone and attached telephone cord on Seymour's desk showed that the telephone had not been moved and that the cord had not been pulled or stretched after the blood had been spattered on them. (T 1653-55, 1659-60, 1672-74, 1823-24, 4393).[23]

In the kitchen, Kosciuk found a knife next to watermelon rinds. Depicted in People's Trial Exhibit 23, (A 216), the knife was not in the position that Bove, the last known user, had left it. According to Bove, "I didn't lay the knife there. I laid it perpendicular to the watermelon, right on the edge of the counter." (T 734-36, 740, 1706-07, 1840).

The only recovered fingerprints, other than the prints of the detectives, Seymour, Arlene and Marty, consisted of a Steuerman print on a water glass in the study, a Cecere print on a chair around the card table in the study and an unidentified print on the exterior of the front storm door. A K-9 unit also searched

[23] Tankleff testified that he did not know how he failed to disturb the blood when he placed the 911 call from the office telephone. (T 4203).

the house perimeter, but the results were negative. (T 1370, 2519-22, 2542-43, 2545-50, 2552-54).

Vernard Adams, the Suffolk County deputy medical examiner, arrived at the Tankleff house at about 4 p.m. He observed Arlene's body on the master-bedroom carpet and examined her injuries and the blood pooling, and he concluded that she had received her head injuries prior to receiving her incised injuries, which came within several minutes, and that she had moved after sustaining the head injuries. (T 3940-41, 3944, 3967, 4003-04).

The police removed Arlene at 4:55 p.m. but remained at the house until 10:25 p.m. Barnes returned the next day, and the police searched the bluff and the storm sewer drain in front of the garage and used a metal detector to search the surrounding area. The search produced no results. (T 1393, 1395-1398).

On September 8th, Adams performed an autopsy on Arlene. According to Adams, Arlene was five feet, six inches tall and weighed 191 pounds. Adams testified that a sharp blade or blades had caused her incised wounds and that she had suffered defensive wounds to her hands and forearms. Adams testified that a blunt instrument had caused the scalp wounds, which were depicted in People's Trial Exhibit 181, (A 217), that the scalp wounds consisted of eleven lacerations and that the skull wounds, depicted along with the barbell in People's Trial Exhibits 182 and 183, (A 218-19), consisted of multiple fractures, including five

depressed fractures. Adams testified, "In my opinion the skull fractures are consistent with having been caused by the bar in the photograph." "[T]he size and shape of the bar are roughly the same as the size and shape of the depressed fractures." Adams testified that he could not determine the time of death, but that the primary cause of death was the incised wound of the neck and that a contributory cause was the multiple blunt impacts to the head. (T 3945, 3954-57, 3963-65, 3968, 3974-78, 3989, 4005-06, 4008-09).

On September 9th, the police returned to the Tankleff house opened a safe in the linen closet, where they found cash and jewelry. (T 1399-1400).

H. Jerry Steuerman's Disappearance

On September 10th, Rein and McCready interviewed Steuerman, and on September 14th, about five or six days after he withdrew $15,000 from the "horse account" that he shared with Seymour, Steuerman feigned his death and left New York for Los Angeles. Steuerman testified:

> [M]y wife . . . passed away a year before. I was married for twenty-nine years. . . . And one of my children was in bad legal trouble and . . . my cash flow and my business was not what it used to be and then the murder of Arlene and Seymour [(Steuerman knew that Seymour was "brain dead")], after that and the accusations by the son just . . . got to me. I thought everybody would be better off . . . without me . . . .

(T 905-07, 978, 1090-91, 1133-34, 1136-43, 1151-52, 1155-56, 1180, 1191, 1208-10, 3883-86).

At the trial, after three days of cross-examination, an exasperated Steuerman stated:

> I staged the scenario because I did not want to go through what I'm going through here. Three days on the witness stand and I didn't do a thing. And it's not fair. It's not fair that I'm put through this. And Marty Tankleff sitting over there is accused of this and I'm not. And I'm sitting here for three days bearing my so[ul] to the world and it's not fair.

(T 1134).[24]

I. Crime Scene: Laboratory Results; Steuerman Found

Between September 27, 1988, and October 4, 1988, Robert Baumann, a forensic serologist, analyzed the blood recovered from the Tankleff house. According to Baumann, except for a smudge on the exterior doorknob to Tankleff's room that tested positive for the presence of blood, there was no blood on the entranceway to any of the rooms. (T 2131, 2152, 2159-62, 2174, 2388-89, 2424).

According to Baumann, in the master bedroom, a wall stain contained blood consistent only with Seymour's blood. Baumann testified that the bed sheets,

[24] At a sidebar, Gottlieb asked permission to cross-examine Steuerman with respect to whether Steuerman had offered Joseph Creedon money to "drop charges" against Todd Steuerman involving an incident in which Todd had shot Creedon. Gottlieb asked Steuerman if he was aware of a legal dispute involving his son Todd and Joseph Creedon. Steuerman testified that he was unaware of such a dispute and denied offering Creedon $10,000 to "drop charges" against Todd. Gottlieb did not ask Steuerman whether Steuerman knew Creedon. (T 1159-60, 1166-67, 3855-58).

pillowcases, pillow shams and Arlene's fingernails contained bloodstains, with all but one consistent with Arlene's blood and with some of those also consistent with Marty's blood. Baumann testified that an ottoman at the foot of the bed contained a small stain that he could test for only one genetic marker, and that the marker was present in Arlene's, Tankleff's and Steuerman's blood as well as the blood of 88 percent of all Caucasians. According to Baumann, Seymour's shirt and pants were saturated with blood and all the blood in the office was consistent only with Seymour's blood. Baumann testified that Seymour's pants also contained a wallet, which in turn contained a $100 bill. (T 2176-85, 2188-93, 2195-99, 2201, 2204, 2212-17, 2268-69, 2297).

According to Baumann, the towel at the foot of Tankleff's bed contained bloodstains consistent only with Seymour's blood and with the largest stain measuring four and one-half inches by three and one-half inches. The bloodstain on the switch plate and the bloodstain on the wall in Marty's room was consistent with Arlene's blood or with Marty's blood, but the sample could be tested for only one genetic marker, a marker found in 10 percent of the population. Robert Genna, an assistant chief of the Suffolk County crime lab, testified that the blood stain on the switch plate, and the blood stains on the sheet, pillowcases and comforter on the master bed, were in a "chain link" or "honeycomb" pattern consistent with the palm or the grip areas of a latex or Platex rubber glove used in house cleaning,

although he could not eliminate that some type of tight-knit fabric weave glove could have caused the same pattern. The police did not recover any gloves. (T 1976, 2104, 2258-61, 2272-75, 2343-46, 2354, 2377-79, 2396, 2402, 2455-71, 2478, 2485-86).

According to Baumann, there were no bloodstains on Tankleff's shorts or under shorts and there was one light stain on the upper right shoulder of the inside of Tankleff's sweatshirt. Baumann testified that the stain tested positive for the presumptive presence of blood but that it was so small that he was unable to say so definitively. Baumann also testified that the blood from Tankleff's right shoulder contained blood consistent only with Seymour's blood. (T 2262-64, 2266-68, 2294).

Tankleff's two tissues contained blood, with one being consistent with only Tankleff's blood and the other being consistent with only Arlene's blood. According to Baumann, there was no detectable blood recovered from the traps (which had a capacity of five to eight ounces of liquid) below the sinks and bathtub near Tankleff's bedroom. Baumann also testified that there was no blood on the barbells or on any of the kitchen knives or on the sponge recovered from the bathtub, but that the sponge did have a five-inch slit running along its length, a slit that was not natural but was a cut based on microscopic examination of the edges

of the sponge's fibers.[25] (The sponge is depicted in People's Trial Exhibit 88.) (A 220)). (T 2218-21, 2224-26, 2230-31, 2235-37, 2249-53, 2276-78, 2280-81, 2305-07, 2314-18, 2323-26, 2341, 2398, 2405, 2422-23, 2433).

Susan Ryan, a forensic scientist for the Suffolk County Crime Laboratory, examined hairs that Kosciuk had recovered from the Tankleff house. Ryan testified that, unlike fingerprints, hair examination is "associative" in that "[i]t associates people with question hairs. It is not a means of identification like a fingerprint." Ryan testified that all the hairs recovered from the master bedroom and from Arlene, including from the necklace that she was wearing, were consistent with Arlene's hair. Ryan testified that all the hairs were dissimilar to Seymour's, Marty's or Steuerman's hair, which was "markedly different" from Arlene's hair. (T 1624, 1884-85, 1895-96, 1915-16, 1924, 1927-29, 1932-37, 1943-44, 1955-63, 2001, 2044-45, 2099-2100).

With respect to Seymour's office, Ryan testified that, of the hairs recovered from Seymour's desk, four were consistent with Arlene's hair and inconsistent with the other samples. (T 1963-66, 1973, 1976, T 2049, 2073, 2100, 2107-08). Defense witness Richard Bisbing, a microscopist, disagreed with Ryan. He testified that the hairs were similar to Seymour's and dissimilar to Arlene's. (T 4524, 4530-35).

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[25] Tankleff testified that the sponge came with the cut. (T 4108).

With respect to hairs recovered from Seymour's clothing and hospital gurney, all were consistent with Seymour's hair and dissimilar to the other samples, but with respect to the hairs from the gurney towels and sheets, some were consistent with Arlene's and inconsistent with the others, and one was consistent with Seymour's and dissimilar to the others. (T 1973-76, 2049).

Ryan also testified that the towel recovered from the foot of Marty's bed – the one that Baumann testified contained Seymour's blood – contained hairs similar to Seymour's and dissimilar to the hairs of the others. (T 1976-77, 2060-63).

On September 27, 1988, Doyle, McCready and the chief of the district attorney's office homicide bureau located Steuerman in California. Doyle testified that Steuerman was upset and was crying, and on September 30th voluntarily returned with them to New York. According to Steuerman, the detectives "were angry with me and they had a right to be. I did a foolish thing." (T 1184-85, 1197, 1199-1201, 1206, 1211-12, 2766, 2768-69, 2772-74, 2782, 2787-88, 2796, 2818, 3902, 3905, 3917).

Seymour died on October 6, 1988. Adams performed an autopsy on Seymour the next day. According to Adams, at the time of his death, Seymour was five feet, eleven inches tall and weighed 213 pounds. Adams testified that the partial healing of Seymour's wounds impaired Adams's ability to determine the

weapon or weapons that had caused Seymour's death but that he could still conclude that Seymour had suffered five blows to the head from a blunt instrument or instruments and that the cause of death was a combination of impact head trauma and incised wounds of the neck, with the primary cause being the head trauma. (T 3980, 3989, 3995, 3999-4001).

J. Other Evidence

On October 12, 1988, Tankleff called Stacy Goldschmidt and asked to speak with Stacy's sister Audra. Stacy testified that she had told Tankleff that Audra was at a concert and that, in response, Tankleff stated that "in a certain amount of time he would be able to take us all [] in a limousine to a concert." On October 13, 1988, Tankleff called Audra Goldschmidt, and according to Audra Goldschmidt, Tankleff stated that "once he inherits that money he'll be able to take us out[]" "[i]n a limousine." (T 135, 138, 140-41, 148-49, 154; 163-66, 168, 171-73, 177, 181, 184, 193-94).

Defense witness Bonnie Schnitta-Israel, a specialist in "signal processing," performed an audibility test at the Tankleff house to determine whether a scream emitted in the master bedroom could be heard in Tankleff's bedroom. According to Schnitta-Israel, with the doors to both bedrooms closed, a scream in the master bedroom could not be detected by Tankleff's bed, and with the door to the master bedroom open and the door to Tankleff's room closed, at Tankleff's bed the

scream could be detected, but only at the level of a whisper. (T 4435, 4440-41, 4451, 4454-56, 4499).

According to Steuerman, he did not benefit from the Tankleffs' deaths, although he admitted that, on the advice of his attorney, he ceased making weekly payments to Seymour after the attacks and that he and the Tankleffs' estate sued one another. (T 897, 955-56, 971-77, 1019-20, 1022-23, 1026-27, 1097, 1215-17, 1220-25).

K. The Verdict

The jury convicted Tankleff of the second-degree, intentional murder of Seymour and the second-degree, depraved-indifference murder of Arlene.[26]

[26] In his latest brief, Tankleff stated that "the jury struggled" and convicted Tankleff of the first-degree murder of his father and, in a compromise verdict, of the second-degree murder of his mother. (Def.'s Mem. of 3/21/05, at 6, 10-11). The grand jury charged Tankleff with the second-degree intentional, and the second-degree depraved-indifference, murder of his mother and father, and convicted Tankleff of the second-degree intentional murder of his father and the second-degree depraved-indifference murder of his mother. Although the trial jury may have "compromised" in concluding that Tankleff acted with depraved indifference in killing his mother, the jury did not "struggle." (*See* A 49) (Tisch finding that "[t]here was no report by the jury, during deliberations, of any deadlock").

Post-Trial Proceedings

Tisch originally scheduled Tankleff's sentencing for August 28, 1990. On that date, however, Gottlieb stated that he needed to investigate information that he had just uncovered and that was in the nature of newly discovered evidence that would tend to prove Tankleff's innocence. (A 46). Tisch adjourned sentencing to September 27, 1990. On September 27th, Gottlieb, having failed to provide Tisch with the new evidence, instead filed a motion to set aside the verdicts on different grounds, a tactic that resulted in Tisch's "question[ing] whether fraud [had been] perpetrated on th[e] Court." (A 46-47, 50).

In his motion, Gottlieb contended, among other things, (1) that juror Frank Spindel had engaged in misconduct by giving hand signals during the trial to ADA Collins, (2) that McCready had admitted prior to trial that he and Steuerman were good friends,[27] (3) that he had spoken with a confidential informant who claimed that Rein and McCready had interviewed the informant about a business partner who had disappeared right after the Tankleff murders, (4) that Rein and McCready had taken notes of the interview and that the prosecution had failed to disclose the notes, and (5) that the prosecution had failed to disclose a conversation between

[27] Gottlieb obtained an affidavit from a student who claimed that McCready had told her, "[Steuerman's] a good friend of mine, I have known him for many years." (A 59-60).

Steuerman and Joseph Creedon.[28] Tisch ordered a hearing on the jury-misconduct allegation, held that Gottlieb had been aware of the alleged Steuerman-Creedon conversation and "attempted to proffer it during the course of the trial," ruled that the alleged McCready-Steuerman connection was a collateral matter that would have been inadmissible at the trial and directed the prosecution to turn over for in-camera inspection any written material relating to Rein's and McCready's alleged interview of the informant. (A 49, 52-58).

Tisch also expressed his displeasure with Gottlieb and the defense's conduct in the post-trial proceedings. Tisch wrote:

> This case has been unique. . . . We were not dealing with the usual situation of an indigent defendant who remained incarcerated throughout the proceedings represented by assigned counsel . . . who could see his client at the jail only for brief periods of time and was

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[28] In his motion, Gottlieb included a September 17, 1990, affidavit from Creedon. In his affidavit, Creedon stated:

> 2. On [April 23, 1989], I gave an affidavit to the Suffolk County Police Department . . . . Included in my sworn statement were details concerning Todd Steuerman's statement to me that "I should talk to his father about cutting Marty Tankleff's tongue out of his mouth."
>
> 3. Several weeks later I received a subpoena to report to the District Attorney's Office in Riverhead and was met there by Assistant District Attorney Scarmozzino. . . . He asked me did I ever meet Jerry Steuerman. . . . It became clear . . . that he did not believe what I had said concerning Todd Steuerman. . . .
>
> . . .
>
> 5. After Todd Steuerman was arrested for shooting me, I called Jerry Steuerman to let him know that I would not accept $10,000 to drop charges and he (Jerry) went so far as to say, "You're fucking with the wrong people."

(*See* Def.'s Mem. of 10/2/03, Ex.15 §§ 1-3, 5).

limited in investigatory remedies to the expenditure of meager handouts by the County.

Here we dealt with a defendant who almost immediately posted a huge sum of money to gain his freedom pending trial making him constantly available for consultations with counsel and who was able to employ a "defense team including a number of experienced lawyers, investigators, etc.

. . .

The defense with its apparently unlimited resources available has chosen to attempt to portray the defendant as the victim of the great "Frame Up." The defendant, convicted by a panel of jurors he chose, confounded by a verdict he was apparently assured by counsel was unlikely if not impossible, now seeks to attribute this conviction to every possible hypothesis but his guilt.

We have had allegations and innuendos of misconduct about virtually everyone connected with this matter. Allegations have run the gamut from police collusion to jury tampering by the prosecutor. This week we were treated to character assassination of the Presiding Judge based on specious if not ludicrous grounds clearly attempting to intimidate the Court and to dissuade it from carrying out its sworn duty. [(Tisch was referring to Tankleff's recusal motion in which Gottlieb's law partner, Ronald Sussman, contended that he and Gottlieb had witnesses who stated that, after the verdict, Tisch attended a victory luncheon with Collins, McCready and Rein and golfed at the Port Jefferson Country Club with McCready and Bove. (A 61-63) (Sussman Aff. ¶¶ 3-4.)]

. . .

Apparently we have embarked upon a new and dangerous era; the era of jury bashing. . . . Now, with the expectation that after a verdict they may be subject to investigation, harassment and pursuit by private detectives, subpoenaed into court and vilified because of their verdict, the task of providing a panel of willing jurors will become difficult, if not impossible.

> In this case, in the presence of and with the apparent acquiescence of defense counsel, a disgraceful, cruel and heartless comment has publicly been made by a member of the family of the defendant, wishing the jurors to suffer nightmares for returning a verdict of guilty.
>
> . . . The Court, with its many years of trial experience is aware of the pressures of jury service . . . Certainly there will be lingering animosity, even after the verdict, between those who were most vociferous on behalf of the majority and those in the minority who ultimately yielded and joined in the unanimous verdict.
>
> . . . [But] [t]here was no report by the jury, during deliberations, of any deadlock. Disgruntled jurors are not permitted by law to impeach their own verdicts solely due to second thoughts, emotional stress or post verdict coercion by others.

(A 47-49).

Tisch held a hearing at which nine of the twelve Tankleff jurors testified. On October 23, 1990, Tisch denied Tankleff's motion to set aside the verdict and found, among other things, that there was no merit to Gottlieb's contentions. (A 66-67, 69-70).

Tankleff filed a direct appeal with the Appellate Division, and while that appeal was pending, he filed a 440 motion. In his motion, Tankleff contended that the People had committed *Brady* and *Rosario* violations for failing to disclose that McCready had told journalist Fred Rosen that Jerry Steuerman had once hired

Hells Angels to settle a labor dispute.[29] On October 28, 1992, Tisch denied Tankleff's motion.[30]

On April 9, 1993, Tankleff arrived at Clinton Correctional A.P.P.U., a "kind of protective custody unit." (HT of 12/16/04, at 542-43, 551; People's Exhibit O-4).[31]

On December 27, 1993, the Appellate Division denied Tankleff's direct appeal. A divided court held that Detectives Rein and McCready properly *Mirandized* Tankleff before they began custodial interrogation and that Tankleff confessed voluntarily. The court also rejected Tankleff's contention "that there was insufficient evidence to support the jury's verdict finding him guilty of 'depraved mind' murder with respect to the death of his mother" or that "this verdict [wa]s inconsistent with the one finding him guilty of intentional murder with respect to the death of his father." *See People v. Tankleff*, 199 A.D.2d 550, 552-54 (2nd Dep't 1993).

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[29] In their 440 motion of October 1, 2003, Tankleff's attorneys stated that "the [People] failed to provide [the Hells Angels] information as *Brady* material," (Def.'s Mem. of 10/1/03, at 15), even though Tisch had stated that the information "was not *Brady* material" and that there was no evidence "when McCready was first possessed of this information or whether it was even prior to the trial of this matter," (A 75, 82).

[30] The Appellate Division and the Court of Appeals denied Tankleff's leave applications. *See People v. Tankleff*, 81 N.Y.2d 848 (1993).

[31] Parenthetical references to "HT" and a number and date refer to pages in the 440 hearing transcript held before the Court in 2004 and 2005.

Tankleff filed his second 440 motion in 1994. In that motion, Tankleff contended that the People had committed *Brady* and *Rosario* violations because the prosecutor had failed to give him a copy of an audiotape that the medical examiner had allegedly made during the course of the autopsies. On July 28, 1994, Tisch denied the motion. Tisch held that Article 440 "incorporates a provision which is 'aimed at discouraging motion proliferation and dilatory tactics'" and that Tankleff could have, and should have, raised his contentions in his first Section 440 motion. (A 87) (quoting C.P.L. § 440.10 practice commentaries).

Within a few days of Tisch's decision, a new name entered the Tankleff case. Karlene Kovacs, an employee at a car dealership in Long Island, told her service manager, the son of Tankleff private investigator William Navarra, that she had some incriminating information on Joseph Creedon. Kovacs met with Navarra, who took her to Gottlieb's office. Gottlieb spoke with Kovacs and prepared an affidavit for her signature. (HT of 7/21/04, at 3-4, 12-13). In the affidavit, which is dated August 10, 1994, Kovacs stated:

> 3. After the Tankleff murders on a subsequent Easter Sunday I was with John Guarascio . . . . He and I went to his sister[] [Terry's] house . . . . Terry was married to Joe [Creedon]. . . . John warned me about Joe, telling me that he was deeply involved in pot and [] was a trouble maker.
>
> 4. While at the house we went into a bedroom and smoked a joint. While there, Joe told me, in essence, that he was involved in the Tankleff murders in some way. I recall him saying something about hiding behind trees

> and bushes at the Tankleff house during the time of the murders and that he was with a Steuerman. He did not give the first name of the Steuerman he was with. After the murders he described how they had to make a quick dash to avoid being caught. It was dark outside at that time and he described how his adrenalin was flowing and that he was afraid about being caught and therefore had to get out of town and that they were moving to the Carolinas.

(Def.'s Mem. of 10/2/03, Ex. 1 (Aff. ¶¶ 3-4)).

On September 7, 1994, Navarra brought a copy of Kovacs's affidavit to Thomas McDermott, a detective investigator with the district attorney's office. On September 21, 1994, McDermott interviewed John Guarascio, to whom Kovacs had referred in her affidavit, and asked Guarascio if he "recall[ed] being with Karlene smoking pot at [his sister Terry's] house with a guy named Joe." According to McDermott, Guarascio said that "Joe was probably Joseph Creedon," that Creedon was "a B.S. artist" and that "[Guarascio] did not like Joseph Creedon." According to McDermott, Guarascio "said he knew nothing about Joseph Creedon and the Tankleff murders" and that although he vaguely recalled that "Creedon had said something about cutting or slashing somebody's tongue out, he did not connect Creedon's statement to the Tankleff murders. According to McDermott, Guarascio said that all he knew of the Tankleff case was that "A Current Affair" had been trying to contact Creedon and Guarascio's sister Terry. According to McDermott, Guarascio also said that if Creedon *had* implicated

himself in the Tankleff murders, Guarascio would have called the police. (HT of 7/22/04, at 52-53; HT of 12/14/04, at 390-95, 404, 406, 408-09, 411-12, 419-20).

On October 13, 1994, McDermott interviewed Guarascio's sister, Terry Covias. According to McDermott, Covias said that she knew "nothing of [Kovacs's] statement" or of the information contained therein and that she had never heard about Creedon being involved in the Tankleff murders. (HT of 12/14/04, at 395-97, 413).

On December 22, 1994, the Court of Appeals unanimously affirmed Tankleff's conviction and sentence. *See People v. Tankleff*, 84 N.Y.2d 992, 994 (1994).

On January 4, 1995, McDermott interviewed Creedon, who was in prison. According to McDermott, Creedon said that Todd Steuerman had shot him and that he "remembered something to the effect that Todd said that Todd's father would pay a lot of money to have Tankleff's tongue cut out." According to McDermott, Creedon said that the only thing he knew of the Tankleff case was that "A Current Affair" had asked to speak to him about the murders. (HT of 12/14/04, at 397-99, 400, 402, 415-16).

After speaking with Creedon, McDermott re-contacted Terry Covias. According to McDermott, Covias stated that she was afraid of Creedon, that she had an order of protection against him and that she was happy that he was in jail.

When McDermott asked her if she had ever heard Creedon mention anything about a tongue being cut out, she said that Creedon once said that a person – she thought that Creedon had said Jerry Steuerman – had said something about cutting somebody's tongue out. (HT of 12/14/04, at 400-02, 413, 416).

On September 26, 1995, inmate Bruce Demps joined Marty at Clinton A.P.P.U. (HT of 12/16/04, at 544; People's Exhibit O-3).

On February 7, 1996, Tankleff filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. Tankleff incorporated into his petition a declaration from Richard J. Ofshe, who at the time was a professor of sociology at the University of California at Berkeley. (*See* Def.'s Mem. of 10/2/03, Ex. 6 ¶¶ 1, 3). In his affidavit, Ofshe stated:

> 17. I have reviewed the testimonial facts surrounding the admission and post-admission narrative of Martin H. Tankleff . . . .
>
> . . .
>
> 20. . . . [T]he physical evidence presented at trial, which does not corroborate the post-admission narrative, leads me to conclude that Mr. Tankleff's admission was coerced.
>
> . . .
>
> 36. My training indicates that if Mr. Tankleff gave a voluntary statement and did in fact commit the crimes for which he was convicted, then his description of these crimes should fit well with the physical facts of the crime scene.
>
> 37. If, on the other hand, Mr. Tankleff's admission was coerced and Mr. Tankleff is innocent (and therefore possessed no knowledge of the events of the crimes except for what was provided by the police), then his

> narrative of the crime had to have been guesswork, invented and likely to contain gross discrepancies when compared with the undisputed facts of the crime.
> 38. In this case Mr. Tankleff's confession does not fit with the physical evidence presented during the trial. . . .
> . . .
> 49. In my opinion the foregoing . . . indicates that Mr. Tankleff's narrative, whether voluntary or coerced, is unreliable. In light of the undisputed testimony as to what happened during the interrogation and the weight of the evidence that counters Mr. Tankleff's post-admission narrative, in my opinion Mr. Tankleff's narrative is <u>both</u> unreliable <u>and</u> involuntary.

(*Id*. ¶¶ 17, 20, 36, 37, 49).

On January 29, 1997, the United States District Court denied the petition. The court rejected Tankleff's objections to the admissibility of his confession, to the selection of the jury and to the prosecutor's summation and found that the prosecution did not commit a *Brady* violation in failing to disclose "that Jerry Steuerman had previously resorted to violence to settle a business dispute." *See Tankleff v. Senkowski*, 993 F. Supp. 151, 154-58 (E.D.N.Y. 1997).

On March 15, 1997, inmate Demps provided an affidavit to a Washington, D.C., law firm representing Tankleff.[32] In his affidavit, Demps stated that, in 1990, he and Todd Steuerman were inmates at Clinton. (HT of 7/26/04, at 52, 58, 64-65; Def.'s Mem. of 10/2/03, Ex. 17 ¶ 4). According to Demps:

[32] In 1986, Demps was convicted of, and incarcerated for, "[r]obbery, rape, sodomy, burglary [and] kidnapping." (HT of 7/26/04, at 52).

> 6. The following was disclosed to me during [my] conversations [with Todd Steuerman]:
>
> . . .
>
> b) Todd Steuerman explained that Martin Tankleff[']s parents were murdered and Martin Tankleff had no involvement and was wrongly accused, charged and convicted for these crimes.
>
> c) Todd Steuerman explicitly told me that he knew for a fact that Martin Tankleff had not committed these crimes and that a Hell's Angels friend of his father[']s had indeed committed these crimes. . . .

(Def.'s Mem. of 10/2/03, Ex. 17 ¶¶ 6(b) – 6(c)).

On January 12, 1998, the United States Court of Appeals for the Second Circuit affirmed all but one of the district court's holdings. The Second Circuit held that although the detectives had elicited Tankleff's pre-confession statements in violation of *Miranda*, under federal law Tankleff's *Mirandized* confession rendered harmless the admission of the pre-*Miranda* statements. The court also rejected Tankleff's objection to the prosecutor's summation and rejected his allegation that the prosecution had committed a *Brady* violation by failing to disclose "evidence that twelve years earlier, Steuerman had hired Hell's Angels to attack union protestors outside his bagel store." Nevertheless, the court remanded the matter to the district court with respect to Tankleff's contention that the prosecution had violated *Batson* by impermissibly using its peremptory challenges to exclude African-Americans from the jury. *See Tankleff v. Senkowski*, 133 F.3d 235, 245-46 (2d Cir. 1998).

On or about January 26, 1998, Tankleff petitioned the Second Circuit for a rehearing or, in the alternative, for a "suggestion for a rehearing en banc." On March 20, 1998, the Second Circuit denied the petition. (A 89).

On the *Batson* remand, Judge Platt directed the state court to conduct a hearing. *See Tankleff v. Senkowski*, 3 F. Supp.2d 278, 280 (E.D.NY. 1998). Justice Michael Mullen conducted the hearing, and on October 28, 1998, rejected Tankleff's *Batson* claim. (A 90-92).

By order dated December 9, 1998, the district court adopted Justice Mullen's Findings of Fact and Conclusions of Law and denied Tankleff's habeas petition. (A 93-94). It restated its holding in a memorandum and order dated January 4, 1999. (A 95-96). The district court denied Tankleff's application for a certificate of appealability, and although Tankleff sought a certificate of appealability from the Second Circuit, it, too, denied his application.

Based on the Second Circuit's dicta regarding the pre-*Miranda* violation, Tankleff moved to reargue his direct appeals. The Appellate Division denied his motion to reargue on February 16, 1999, and the Court of Appeals denied his motion to reargue on September 14, 1999. *See People v. Tankleff*, 93 N.Y.2d 1034, 1034 (1999). The Court of Appeals held, "[T]he motion is denied on the ground that the Court of Appeals did not overlook or misapprehend any relevant

material of legal issue with respect to the subject now reiterated on this Court's decision on the direct appeal of this case." *Id.*

On December 11, 2000, the United States Supreme Court denied Tankleff's petition for a writ of certiorari to the Second Circuit. *See Tankleff v. Senkowski*, 531 U.S. 1051 (2000).

Tankleff thereafter filed his third 440 motion. In this motion, Tankleff requested that the court order the prosecution to re-analyze the unmatched fingerprint found at the Tankleff residence. On April 2 and 3, 2001, Judge Charles Cacciabaudo denied the motion, and the Appellate Division denied Tankleff's leave application. (A 97-100).

Tankleff then filed his fourth 440 motion. In this motion, he requested that the prosecution provide certain hair samples to his DNA experts. The district attorney's office consented, but Tankleff thereafter abandoned his motion.

The Current 440 Motion

In June 2001, Tankleff and his attorney Barry Pollack retained private investigator Jay Salpeter. A retired New York City homicide detective, Salpeter disliked the Suffolk County District Attorney's Office and ADA John Collins. (HT of 7/19/04, at 14-15, 77, 177, 181-82).

A. Background

Salpeter reviewed Tankleff's attorneys' files and read Kovacs's 1994 affidavit implicating Creedon in the Tankleff murders. According to Salpeter, Kovacs's affidavit was his "beginning point," and he interviewed her in August 2001. Soon thereafter Salpeter discovered that Creedon and Glenn Harris[33] had once burglarized Strathmore Bagels, although he conceded that any qualified private investigator aware of Kovacs's affidavit could have made this discovery in 1994. (HT of 7/19/04, at 15-19, 63-65, 75, 81, 85-86, 213, 227).

On December 28, 2001, Tankleff wrote a letter to Terry "Guarascio."[34] Tankleff wrote:

> I apologize for intruding upon your life, especially during the holiday and new year season, but our lives intertwined several years ago. . . .
>
> I'm sure you know that I have been incarcerated in a New York State prison for almost 12 years for a crime I had nothing to do with. . . .
>
> . . . I know in your heart, you would like the truth to be known.
>
> . . .
>
> I entrusted Jay to work on my case and search for the truth. I believe that the road starts and possibly ends with you. Please put your faith and trust in Jay.

(A 101-02).

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[33] Harris has three felony convictions involving burglaries.

[34] Tankleff was unaware that Terry Guarascio had married and changed her name to Covias.

On or about January 2, 2002, Salpeter spoke with Harris's mother, Virginia Harris. According to Salpeter, he told her that he wanted to speak with Glenn about the Tankleff murders. About a week later, according to Salpeter, Virginia Harris called him and told him to contact Glenn at the Clinton Correctional Facility, which, according to Darren Ayotte of the Department of Correctional Services, Harris had entered on November 7, 2001. (HT of 7/19/04, at 19, 83, 85, 192-93; HT of 12/16/04, at 537-41, 544-45; People's Exhibit O-2).

B. Harris's Letters

In late January 2002, Salpeter wrote Glenn Harris a letter asking to speak with Harris about Tankleff but cautioned, "[P]lease do not waste my time." (HT of 7/19/04, at 20, 84-85). In his earliest or one his earliest responses, Harris wrote, "I have some info" and "I believe my 'theory' to be correct." Harris also wrote, "I am lookin' for redemption and I don't know if I will find it through Martin but it can't fuck me up more than I already am!" (A 103-05).

On February 18, 2002, Harris, who was still in Clinton General, wrote a letter to *Tankleff,* who was still in Clinton A.P.P.U. In his letter, Harris asked Tankleff if he knew "Joey Creedon" and told Tankleff that if he "truly didn't commit this atrocious act, hang in there and have faith." (A 107-08). On February 19, 2002, in an envelope addressed to Salpeter, Harris wrote another letter to Tankleff, and in this letter Harris wrote, "Help me get a life! Are you gonna pay

me my $30,000 in child support arrears I owe? Are you gonna pay for my drug treatment and mental health care I'm gonna need? . . . Did you get my message? . . . I found out we are going to receive a visit shortly . . . I will see you then and hopefully can relay this letter to you. I will see you? Where, in visiting area?" (A 109-12).

On February 26, 2002, Harris wrote Salpeter three letters. Harris acknowledged that he had received the articles that Salpeter had sent him and stated that he wanted to "share in Martin's glory" and "be on a winning team for once."[35] Harris pleaded to Salpeter, "You said you'd help me. I never had a father Jay." (A 113-16).

On February 27, 2002, Harris wrote Salpeter a letter in which Harris stated, "I'm a criminal, a drug addict, I'm mentally ill. I'm a deadbeat dad. By society's standards, basically a good ole piece o shit." Harris also asked, "[I]f I cooperate why shouldn't I be rewarded, why shouldn't I be compensated[?]" (A 117-20).

In a letter to Salpeter that Harris started on or about March 8, 2002, and continued on March 9, 2002, Harris asked, "Is Martin denying any and all involvement in this thing? You are gonna have to take me through this from beginning to end and I doubt we will accomplish that on [March] 13th" (the date of Salpeter's scheduled visit). Harris also wrote, "I saw the doctor here today. . . .

[35] Ram and Salpeter used the "winning team" or "winning side" phrase in conversations with Peter Kent. *See infra* pp. 141-42.

She put me on Lithium. I'm also on zyprexa. The zyprexa is for psychosis and I'm not psychotic." (A 121-23). In the margin on page two of the letter, someone other than Harris wrote, "psychotic disorder," "distortion in reality," "false ideas" and "dillusional [sic] memory." Although Salpeter testified that he did not remember writing the comments and said, "I don't think this is my handwriting," a comparison of that handwriting with other known samples of Salpeter's handwriting shows that he wrote the comments.[36] (HT of 7/19/04, at 111-12, 174).

In an undated letter to Salpeter that Harris started on March 12 and continued on March 13, 2002,[37] Harris wrote, "If I remember correctly from the news accounts some sort of dumbbell was used, no? That was used in the bludgeoning? No, or yes? I need to know. . . . If I am correct I remember seeing Creedon in or around the bushes, shrubbery. I was trying not to look cause I didn't want to know I possibly knew. I was scared of him and I was afraid of what I was possibly involved in, how I was used." Harris also asked, "What was the link between Joey & Jerry? . . . I don't know where this comes from Jay, but I remember twilight. Maybe it was lights on in the house, outside lights and I recall

[36] Tankleff's attorneys provided the prosecution with a book containing copies of Salpeter's notes and Harris's letters. In his notes, (A 124-28), Salpeter misspelled words and mixed uppercase and lowercase letters, but always wrote the letter "e" in lowercase and, when he wrote the letter "F" in uppercase, it looked like the number "7." The same identifying characteristics are present in the writing in the margin of Harris's letter.

[37] The People determined the dates from Harris's pre-visit statement, "I'll see ya tomorrow Jay," and from Harris's post-visit statement, "Jay, I just got back from our meeting." (A 131, 133).

facing the water facing where the house would be on my right facing towards the water I guess the direction would be N. And it wasn't too far into Belle Terre. It might even been on Belle Terre Road right inside the gates." Harris drew a diagram indicating the approximate location of the house. (A 134-36).

On March 13, 2002, Salpeter drove Virginia Harris to Clinton and visited Glenn Harris. According to Salpeter, during the visit, Harris stated that Creedon and Peter Kent had committed the Tankleff murders. Salpeter testified that he sent Tankleff's attorneys a memo memorializing Harris's statements: according to the memo, Harris stated that the Tankleff house was on the right side of the community, that Harris had seen Creedon enter the house and emerge about 20 minutes later carrying a pair of rubber gloves and that the three of them left at about 5 a.m. (HT of 7/19/04, at 20-21, 87, 102, 109-11, 142, 144, 155, 165, 189-93, 195-97).

After the visit, Harris wrote Salpeter a letter about the day of the attacks, asking if Kent was "still living in Selden." Harris also asked, "Listen, what was used to kill the Tankleffs? I need to know. Did they pinpoint the murder weapon? Was it actually a dumbbell? Was it left at the scene? Were they stabbed? What kind of wounds, if so? Slash or puncture?" Harris also wrote that he "always disliked" Kent and that, after the murders, they returned to Selden, where Kent

burned his clothes on the side of Kent's house. Harris also asked, "Who was this girl?" (Harris was probably asking about Kovacs.) (A 137-40).

On March 14, 2002, Harris wrote Salpeter two letters. In his 10 a.m. letter, Harris asked, "Jay, was it an attempted burg gone awry? Was it planned? Was Jerry involved? . . . What was Joey [Creedon], like a middle man in this thing?" Harris also asked, "Time: Early evening, late at night. September 7th, what time? Long night? Short night?" (A 141-44). In his 10 p.m. letter, Harris asked if Salpeter had "f[ou]nd anyone," including "the Rams," and also asked, "[W]as there physical evidence?" Toward the end of the letter, Harris stated," I'm on psych meds. . . . This shit is making me hallucinate. . . . I take liquid Lithium w/ Cogentin for side effects. . . . My psych folder is like an inch thick." (A 145-48).

On or about March 17, 2002, Harris wrote Salpeter several letters. In one of the letters, Harris wrote, "I keep reading your letters over and over along with your articles and trying to come to some sort of conclusion. . . . Who am I to judge alibi via [Kent's] mother. But I'm not sure because at that point his mom may have been living in Center Moriches. I'm pretty positive that she was, and it's possible that he was still staying in Selden. . . . I know between September 7th probably even earlier, and December 29th[,] he was doing armed robberies."[38] (A 149-52).

[38] Harris was correct. Kent testified that, on the day of the Tankleff murders, his mother was living in Center Moriches, and he was committing armed robberies. *See infra* pp. 157-58.

On or about March 18, 2002, Harris wrote Salpeter four letters. In the first letter, Harris asked, "The [Tankleff] house, was it right on Belle Terre Rd. or just off it? If I recall it was not far inside the gates and it was a quick turn-around to get out." (A 153). In the second letter, Harris wrote, "I may have assumed they were goin' to do a burglary. I can't remember if it was discussed or not. I assumed it wasn't cause I think I woulda recalled it. I've been up to Belle Terre numerous times over the years. *The road goes straight to the white painted rocks and to the circle overlooking the sound, the bluffs*. . . . I'm not sure. It coulda been one of the first lefts and on the right. I remember however I was parked it was on the right." (A 154) (emphasis added). In the third letter, Harris wrote, "You said I can be the hero in all this. Am I gonna? Is it gonna change my life for the better? . . . Jay, I didn't know I had this in my closet. It had to be probed. The mind is a terrible thing to waste! And mine is shot! But it is starting to reawaken, to rejuvenate, to be re-born." (A 155-57).

On or about March 19, 2002, Harris wrote Salpeter three letters. In one letter, Harris wrote, "Just received your letter. Thanks for writing." Harris also wrote, "I walked by APPU and screamed out Martin Tankleff is innocent!" (A 158-60). In a second letter, Harris wrote, "Joey said if I could give him a ride to pick up some money or something to that effect. I remember Joey getting out and

Peter saying, 'I'll go with you,' hesitatingly like. I think he did it to like dupe me, and all along they knew what the plan was." (A 161).

On or about March 21, 2002, Harris wrote Salpeter two letters. In one letter, Harris wrote, "I Glenn Harris give attorney Stephen B. Braga permission to view my psych record" and observed, "Jay, my psych record is gonna show I was fucked up before I retained this knowledge." (A 162-64). In the other letter, Harris wrote, "5 minutes ago I wanted to die! Now I wanna live. This is a funny disease!" Harris also wrote that his needs included "treatment," "any open warrants cleared up," "freedom" and "learn[ing] how to function like a normal human being." (A 165-68).

On or about March 24, 2002, Harris wrote Salpeter two letters. Harris asked Salpeter the dates that Harris had burglarized "the pet shop (dog & bird)," "the Post Office"[39] and "the Bagel Boy" and also asked, "Where was the bagel truck found?" Harris also asked, "What was it that Terry [Covias] said? Or was it another girl [Kovacs]? You said something about someone saying that Joey was in the bushes or something to that effect. You said something about a Spanish dude,

[39] Kent testified that, inside the Post Office, Harris was juggling grapefruits instead of helping to open the safe. (HT of 12/14/04, at 255-56, 314).

or Puerto Rican who is now deceased. Who is he, who killed him, why is he dead?"[40] (A 169-70).

In early April 2002, Harris wrote Salpeter a letter in which Harris asked Salpeter additional questions about the Tankleff murders. Harris asked:

> There was no sign of a forced entry?
> Were they returning from somewhere[?]
> Was it an invasion?
> Where was Marty when this took place?
> Who found the bod[ie]s?
> W[ere] there 9-1-1 tapes?
> Did Marty ever confess?
> No physical evidence?
> He was totally not guilty?
> He wasn't into drugs?
> Didn't he have a black girlfriend or something?
> No purported coerced confession[?]
> What time was estimated to be the time of crime?
> Did whoever gain access to the safe? . . .
> *Was safe taken? No, right?* . . . .

(A 171-73) (emphasis added).

On April 22, 2002, polygraph examiner Joel Reicherter administered a polygraph examination to Kovacs. (HT of 7/19/04, at 14-15, 21-22; Def.'s Mem. of 10/2/03, Ex. 1 (Polygraph Report)). According to Reicherter, "Kovacs answered the [following] relevant questions [] truthfully":

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[40] Harris was asking about Jerome Martino, who in a letter to ADA Collins claimed that, after Tankleff was convicted, Tankleff admitted to Martino that Tankleff had killed Arlene and Seymour. Martino died on December 2, 2000. (*See* Report of the People's Investigation of 12/18/03, at 42-44).

> 1. Did Joe Creedon tell you he and a Steuerman were hiding in the bushes on the Tankleff property the night of the murders? ANS: YES
> 2. Did Joe Creedon tell you they were full of blood and had t get rid of their clothes the night of the murders? ANS: YES
> 3. Did Joe Creedon tell you he was scared and his adrenaline was flowing and had to get out of there (Tankleff property)? ANS: YES

(Def.'s Mem. of 10/2/03, Ex. 1 (Polygraph Report at 2)).

On June 25, 2002, Reicherter administered a polygraph examination to Harris. (HT of 7/19/04, at 21-22; Def.'s Mem. of 10/2/03, Ex. 2 (Polygraph Report)).

Reicherter administered two examinations, each of which consisted of three questions. In the first examination, Reicherter asked: First, "Did you drive Kent and Creedon to the Tankleff residence the night they were killed?" Second, "Did you see Kent burn his jeans and a black hooded sweat shirt at his house after the Tankleff stabbings?" Third, "Did you see gloves in Creedon's left pocket when he got out of your car at the Tankleff property?" According to Reicherter, Harris answered "Yes" to each question. Based on the results of the examination, Reicherter opined that Harris had answered each question truthfully. (Def.'s Mem. of 10/2/03, Ex. 2 (Polygraph Report at 2-3)).

In the second examination, Reicherter asked: First, "Did you know before you arrived at the Tankleff house that Steuerman wanted the Tankleff[]s killed?"

Second, "When you were driving Kent and Creedon to the Tankleff house, did you know they were going to kill the Tankleffs?" Third, "When you, Kent and Creedon left the Tankleff [h]ouse that night, did you know then [that] the Tankleffs had been stabbed?" According to Reicherter, Harris answered "No" to each question. Based on the results of the examination (which Reicherter appears to have designed to exculpate Harris), Reicherter opined that Harris had answered each question truthfully. (*Id.* at 3).

On or about July 8, 2002, Harris wrote two letters to Salpeter. In the longer of the two, Harris wrote that what he had said about the Tankleff murders was untrue. Harris wrote:

> Jay,
>
> Yes! I lied Jay! I received your last letter requesting the truth. The truth is, is that I lied. I lied, fabricated, concocted the whole fuckin' story!
>
> What started out as wanting to help you, wanting to help Marty, just snow-balled on me. Why, I don't know. I had good intentions, I wanted to be of help. I wanted to be part of something greater than, better than I.
>
> Do I say I'm sorry? . . . I sincerely, genuinely wanted to help Marty.

(A 174). Harris explained:

> . . . I felt so strongly about Creedon's involvement and along with that, Marty's innocence. I still feel somehow, some way, he [Creedon] was involved.
>
> . . . There was no ride in a car, no idea of committing a burglary! All I know is what he [Creedon] said driving the burglary. Was he someone I feared or looked up to[]? Hardly! He was just someone who had a

> negative influence on me, over me, along with Kent. He [Kent] was just thrown in as an afterthought, two pieces of shit who all they wanted to do was commit crimes, smoke crack, and be a derelict. As did I. . . . I'm trying to right a wrong, rectify a mistake. I was elated at first that I could possibly help, ecstatic, good fortune or whatever. Then after you came up I panicked, became manic, hysterical. I couldn't live with it, especially after I implied that I drove. I wanted to nail Creedon's ass as much as you did as I felt strongly of his involvement and I went as far as to tell a lie. I believed it and I built up such a disdain for him. The speculation that he killed [Michael] Sinclair also played a part too.
>
> All I can say is I'm a fucking lying idiot. . . .
>
> . . .
>
> . . . I feel I'm in deep, I'm in way too deep, I went as far as to lie for Marty! (to you!) and I can't do it!! (Not that I don't want to, I can't!) And for that, I am sorry. I would like for nothing more to see Marty go free for killing his parents and Creedon be held responsible if that is in fact what happened.

(A 175-78). Harris continued:

> I led you to believe in me, you said you know what I need, that you'd be there for me, you know what's good for me, remember my tomorrows. . . .

(A 181). Explaining why he was able to make the lie convincing, Harris wrote:

> It wasn't so much as fabricated by me as it fabricated itself. It had its own dynamic, my involvement with him [Creedon], the burglary, what he said driving it, Jerry's disappearance, Creedon getting shot, the possible police misconduct or improprieties [in the Tankleff case].
>
> My sympathy for Marty, my disdain for Creedon, the proximity to the crime, it being Belle Terre . . . .
>
> I knew Belle Terre. I used to fish there as a kid. I knew it had gates. I knew a constable was posted. I

> knew once inside the gates at Belle Terre there w[ere]n't many places to go to the left. Lucky guess I guess.
>
> No gloves, no Creedon, no Kent, no fire. I don't believe he [Kent] was living at that address where I think he was at the time. When I first got involved in crime I always fantasized about committing a crime in Belle Terre, going up the bluffs and "scoring" big, but it never happened. It was fantasy. That's why I said we went up under the auspices of a burglary. As I told you, I wasn't "taken for a ride" by Creedon & Kent as you said. Nor did I knowingly or unknowingly take them for a ride. I'm sorry Jay. I gotta go.
>
> Take care
> Good Luck
> Glenn Harris

(A 183-84). At the hearing, Salpeter admitted that he had read all of Harris's letters but that he did not remember this one.[41] (HT of 7/19/04, at 108, 228-29).

Harris left Clinton General and was paroled on December 16, 2002. But Harris violated parole, and by April 30, 2003, was in custody, and on June 25, 2003, arrived at the Sing Sing Correctional Facility (HT of 12/16/04, at 544-45; People's Exhibit O-2).

According to John Nolan, a lieutenant investigator with the Suffolk County Sheriff's Office, on August 19, 2003, Harris's wife, Lisa Harris, visited Peter Kent, who was incarcerated at the Suffolk County jail. (HT of 12/9/04, at 223, 225-28).

[41] Although many of Harris's letters are undated, it appears that some 16 months passed before Harris wrote Salpeter again.

On August 29, 2003, some 13 months after Harris had recanted, Salpeter and Tankleff attorney Bruce Barket interviewed Harris at Sing Sing and obtained from Harris an affidavit. In his affidavit, Harris stated:

> . . . [I]n early September 1988 . . . I ran into Peter Kent and Joseph Creedon at Billy Ram[']s house. While there we were using crack. The party ended I don't recall what time – Creedon says that he knows where there is a safe – myself, Creedon and Kent went to a house in Bel[le Terr]e where Creedon directed me to – It was a gated community – Creedon directed me to the house – I parked my car on the street where Creedon told me to stop. Creedon and Kent got out of the car and walked towards the house on the grass. At this time I lost sight of them towards the rear of the house – Anywhere from 10 min[ute]s [] to half of an hour they came running to the car – Creedon opened the front door[,] flipped the seat back and Peter went into the back – I saw Joey having gloves in the left hand pocket of his wind breaker – Joey said "let[']s go" – They were both nervous and Peter was winded – I drove away and left the same way I entered – Joey said take me to my mother[']s – which was [in] the same vicinity where Kent lived, about three houses away from each other. . . . Creedon said he had to take care of something and walked towards his mother[']s house – At this time Kent also said he had to do something and went to a house – I got into the back seat of my car to rest – I couldn't sleep and sat up and I s[aw] Peter move [to] the side of the house – he looked suspicious so I got out of my car and walked over and noticed that he was burning his clothes on the ground – I noticed jeans and a sweatshirt smoldering . . . – I asked him what happened?, what are you doing and he said never mind – I just walked away from him and went back to my car – At that time I realized that something more than a burglary occurred – I went back to my car and wanted to get some rest – I couldn't sleep so I turned the radio on – It was then that I heard that something

> happened to an elderly couple in Bel[le Terr]e – I put two and two together that I might have been involved with something that happened in Bel[le Terr]e – I was on parole at the time and was afraid to go to the police – This bothered me for a long time and when (Jay Salpeter) contacted me it gave me the opportunity to tell the truth.

(Def.'s Mem. of 10/2/03, Ex. 2 (Affidavit)). Salpeter testified that he had asked Harris, and that Harris had denied, the presence of a weapon or the presence of blood in the car, on Creedon or on Kent. (HT of 7/19/04, at 22, 117, 119-20, 221).

Later in the day on August 29, 2003, Tankleff's attorneys provided the district attorney's office with a draft of Tankleff's 440 motion. (Def.'s Reply Mem. of 4/16/04, at 2).

In an undated letter that Harris wrote between September 2, 2003, and September 6, 2003,[42] Harris stated:

> I know what the law says but it don't always go as planned. Is my story gonna mesh? We'll see.
>
> What about perjury? I gotta deal with that I know. Paul [Ram] and/or Billy Ram. All they gotta attest to is . . . Glenn Harris, Joey Creedon and Sinclair . . . , did they ever have drug relations at the[ir] house. That was where I met Creedon. Kent was picked up later on. Creedon asked me to give him a ride. . . . He said to pick up some money. I asked where to? He said he was gonna do a burglary in Belle Terre, that he knew where a safe was . . . .

[42] Harris did not write the letter before September 2nd, because page three of the letter is a computer printout bearing the date "09/02/03," and he probably did not write the letter after September 6th, because on page 4 he wrote of the "nearly 15 years" since the murders. The 15-year anniversary of the murders was September 7th.

> Physical Evidence – No mystery footprints Jay?[43] . . . I'm saying they went in under the auspices to commit a burg. That is my contention. I knew nothing else! I figured it out later? And after nearly 15 years I recalled it and lived with it? How come I didn't put it together sooner? I knew but I was scared? I didn't wanna admit it for my own sanctity, for my own peace of mind, so I stuffed it into my own sub-conscience? *It ain't gonna wash*. . . . .

(A 186-87) (emphasis added).

On or about September 14, 2003, Harris wrote Barket a letter in which Harris stated, "I had no knowledge what was gonna take place. I thought it was a burglary or some type of drug deal. I had no idea that 2 elderly people . . . were gonna get snuffed out . . . I'm gonna be found just as guilty and held accountable as the perpetrators! You'll tell me no. But my feelings, my intuition, my instinct, rationale, if I got any, tells me otherwise." Harris also wrote that Salpeter had told him that, "on a scale of 1 to 10," the chance of Harris's story being proven was "7 or 8" and the chance of Harris "not getting caught up" was "8 or 9." (A 188-91).

On or about September 24, 2003, Harris wrote Salpeter a letter in which Harris again referred to the letter that Salpeter had sent him. Harris wrote, "I read your letter. Often. Trying to put my fears to rest." (A 192-93). On or about

[43] Tankleff's attorneys contended in their 440 motion that there were mud stains in Seymour's office. (*See* Def.'s Reply Mem. of 4/16/04, at 13-14).

September 25, 2004, Harris wrote Salpeter, "I know how bad you want this Jay. Your letter was well written. You even typed it ya fuck!"[44] (A 194).

C. Post-Filing, Prehearing Events

On October 2, 2003, Tankleff's attorneys filed their current 440 motion. That same day, at prosecutor Leonard Lato's request, Detective Investigator Walter Warkenthien[45] and Detective Investigator Robert Flood interviewed Kovacs at her house. (HT of 12/21/04, at 601; HT of 2/4/05, at 4-5, 10, 13, 15). Warkenthien testified that he also interviewed Guarascio on October 1st and that Guarascio provided him with an affidavit in which Guarascio stated:

> Sometime about ten years ago, I'm not sure of the year, I went with my girl friend Karlene Kovacs to my sister[']s house . . . . When we arrived at the house there was Joe Creedon, a friend of Joe's, I don't know his name[,] and my sister Theresa. About an hour later [] Karlene, Joe and the guy . . . and myself went into Theresa & Joe's bedroom to smoke a joint. After a few minutes Joe took a rifle out of his closet and started talking to us. I heard him say they were hanging out smoking in the bushes watching guys play cards. . . . I did not know what Joe was talking about.

(*See* Report of the People's Investigation of 12/18/03, at A 11).

On October 6, 2003, Warkenthien and Flood interviewed Harris at Sing Sing. According to Warkenthien, Harris stated that he had just gotten off the

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[44] Salpeter admitted that he had written Harris "a couple" of letters but claimed that he did not keep copies. (HT of 7/19/04, at 103-05, 107, 176-77).

[45] Warkenthien reported directly to Spota except when Spota assigned him to work for others. (HT of 2/4/05, at 73-74).

phone with Barket and that Barket had advised him that he should have an attorney before "speaking to us." Warkenthien advised Harris of his rights, and Harris responded that "he didn't want to have an attorney, that he didn't do anything and [that] he would be happy to talk to us." (HT of 12/21/04, at 605-06).

Warkenthien testified, "I told him I wanted to talk to him about his statement that implicated Kent and Creedon as coconspirators in a murder." (T 606). According to Warkenthien:

> He told me he wasn't sure of the day, this all happened sometime in September, maybe the 2nd or 3rd. He was with Creedon at Billy Ram's house doing drugs and things like that, and Creedon approached him and said, "Listen, I got a house that has a safe. You want to take a ride with me," and he agreed to do that.
>
> And they went outside, got in Harris's car and Creedon had said, "Let's pick up Kent around the corner," which they did.
>
> Harris then told me that he drove those guys to Belle Terre, that he knew the way there, that his mother used to take him there when he was a kid.
>
> He explained that when he got to Belle Terre, he drove past the guard shack and he didn't see that any guard was in the shack.
>
> He continued to say that they drove down this long, winding road, the same road that his mother would take him down during the summer, *and they parked at the end of the bluffs*[46] where he used to go down and look at the ships and things like that.

[46] Tankleff contends that residents of Belle Terre refer to the houses along Seaside Drive as "the bluffs." (*See* Def.'s Mem. of 3/21/05, at 18 n.18). Perhaps they do. Harris was not. *See supra* p.85 (Harris writing on March 18, 2002, "I've been up to Belle Terre numerous times over the years. The road goes straight to the white painted rocks and to the circle overlooking the sound, the bluffs.")

> He goes, it was pitch-black out, he couldn't see a light or a house with a light on at that spot where they parked the car –
>
> . . .
>
> [At] [t]he bluffs.
>
> He said there was no place to park so he had to park in the street.
>
> He said Harris and Kent got out of the car and just vanished into the dark –

(HT of 12/21/04, at 607-09) (emphasis added).

Thus, according to Warkenthien, Harris stated that upon entering Belle Terre, he drove down one long road, that he did not turn onto other streets and that there were no houses where they parked. (Warkenthien testified that he drove to and took a helicopter flight over the area, and that there are no houses at the end of the "long road" and that there are houses all along Seaside Drive, the street on which the Tankleff house was located. (T 66-68, 72).[47] According to Warkenthien:

> So anyway, [Harris stated that] after Kent and Creedon disappeared, they came back to the car all out of breath in less than ten minutes, he tells me this. He says he didn't know the way home, but he took him back to the same place they left from, parked the car. . . .
>
> He said both these guys got out of the car and disappeared. He said it was about three o'clock in the morning, something like that, and that he was getting tired so he decided to get in the back seat of the car and try and catch some sleep. He was unable to do so, and so he decided to put the radio on to hear some music.

[47] Cliff Road is the main road into Belle Terre, the end of which is six-tenths of a mile from what had been the Tankleff house. (HT of 12/21/04, at 609: HT of 2/4/05, at 27, 29, 33-34).

> He tells me it's about . . . between 5:00 and 6:00 in the morning, he knew that because he heard the time on the radio station. And during the music, he heard the news that two people were murdered in Belle Terre, and he put two and two together and he figured that it was Kent and Creedon that did this.[48]

(HT of 12/21/04, at 609-10). Warkenthien testified that the only time that Harris looked at him was when Harris "told me about his mother taking him to Belle Terre when he was a little kid." And according to Warkenthien, when he advised Harris that his statement was different from the one that he had given to Salpeter, Harris responded, "Well, I think maybe now I need to have an attorney." Warkenthien testified that the interview ended but that, as he was leaving, he said to Harris, "You know, when a nonparticipant . . . during a felony gets killed, . . . all the persons involved in the felony are guilty. . . . So if the statement that you gave to Mr. Salpeter is true, . . . you may be very well changing places with Marty Tankleff." According to Warkenthien, Harris "sat back in the chair, his mouth wide-open, he was red as an apple as he was during most of that entire interview, and we left." (HT of 12/21/04, at 612-13, 36-37).

On or about October 7, 2003, Harris wrote a letter to Salpeter in which Harris asked, "I'd like you to contact the Catholic chaplain here [Father Lemmert].

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[48] It is unlikely that, between 5 and 6 a.m. on September 7th, any news program reported "that two people were murdered in Belle Terre." Marty did not call 911 until 6:11 a.m. on September 7th, and Seymour lived until October 6th.

He seems willing to help me . . . . He said Suffolk Co. is one of the most corrupt co[unties] around." (A 195-98).

On October 14, 2003, Detective Robert Trotta received a telephone call from Gaetano Foti, also known as "Tommy the Beard," a former reliable informant who, according to Trotta, used "as much [drugs] as he could get" and whom Trotta had arrested at least two or three times for dealing. According to Trotta, Foti said that he had read an article on Tankleff and that it reminded him that, at the Gallery Pub in or about 1993, he and Creedon had spoken about the case, with Foti saying, "Too bad about the kid" and Creedon responding, "Oh, the kid didn't do it" "cause I was there." Trotta brought Foti to the district attorney's office on October 16, 2003, where Lato interviewed Foti in Trotta's presence. According to Trotta, Foti repeated that Creedon had stated, "[T]he kid didn't do it" "cause I was there." (HT of 12/16/04, at 557-60, 564, 568-78; *See* Report of the People's Investigation of 12/18/04, at 11).

On October 22, 2003, Suffolk County deputy sheriffs picked up Harris from Sing Sing and transported him to the Suffolk County Jail. Deputies brought Harris to the district attorney's office, where Warkenthien and Flood advised Harris of his rights. Harris asked for a lawyer. But, according to Warkenthien, Harris also stated, "Hey, Wally, how about if Bob [Flood] is my lawyer." Warkenthien testified that he told Harris that Flood could not represent him. Warkenthien also

testified that Harris did not say anything about being scared or intimidated. (HT of 12/21/04, at 614-615; People's Exhibit O-2).

On October 30, 2003, Warkenthien and Lato re-interviewed Kovacs. According to Warkenthien, Kovacs confirmed in part and contradicted in part what she had said in her 1994 affidavit and what she had told him on October 1st. According to Warkenthien, Kovacs claimed that she was "a hundred percent sure" that she and the others had smoked marijuana outside and that, while doing so, Creedon said that, after the murders, he had blood on his clothes, which contradicted her earlier statements that they had smoked marijuana in the bedroom and in which she omitted Creedon having mentioned anything about blood. According to Warkenthien, when he showed Kovacs her 1994 affidavit, she stated that she had told Gottlieb about the blood and could not understand why it had been omitted from her affidavit. (HT of 12/16/04, at 603-04, 15).

On October 31, 2003, the Suffolk County Sheriff reported that, earlier that day, Harris had assaulted another inmate, had threatened a nurse, had thrown chairs and, in response to an officer's direction to get off the floor, had stated, "Fuck you, get me up." The officers used force to move Harris, and they placed him in a detention cell. According to one officer, "Harris continued to be loud and abusive, threatening to 'get anyone who came near him'" and "flooded out [the] cell by

shoving his shoe down the toilet." (*See* Report of the People's Investigation of 12/18/04, at 18).

According to Warkenthien, in November 2003, two inmates at the Suffolk County Jail informed him that Harris had admitted to fabricating his story about the Tankleff murders. But Warkenthien was not going to take the inmates' word, and, at his direction, one inmate recorded a conversation with Harris on November 5th, and the other inmate recorded a conversation with Harris on November 18th.[49] (HT of 2/4/05, at 51-52, 63, 69).

In or about January 2004, Salpeter placed a telephone call to Florida resident Steven Saperstein. According to Salpeter, Saperstein stated he had owned a store with Steuerman, that McCready had been in the store prior to the murders and that Steuerman and McCready had known each other years before the murders. But when Salpeter went to Florida and interviewed Saperstein, Saperstein stated that he had made a mistake. (HT of 7/19/04, at 32-33).

According to Salpeter, while he was in Florida, a woman named Nancy Barton told him that two cooks, "Sean" and "Scott," had told her that Jerry Steuerman had stated in their presence, "So what? I slit their throats. What are they going to give me; fifty years at this age?" But in a recorded statement that she

[49] In the November 18th conversation, Harris stated, "I didn't see Kent, but I seen Joey because he was sitting in the front seat next to me, and then when Peter got out of the back seat of the car, he fuckin bent down and grabbed like an 18-inch-long pipe out of the back seat." (*See* Report of the People's Investigation of 12/18/03, at 38). This is the first time that Harris mentioned a pipe.

had given to Salpeter some two months earlier, when Salpeter asked her if she recalled the name of the person who told her of Steuerman's purported statement, "I slit their throats," she answered, "No I don't . . . . I'm not really sure who mentioned it to me." (HT of 7/19/04, at 24-25, 28-30; 195-97).

On January 23, 2004, the Department of Correctional Services re-paroled Harris. According to Salpeter, on March 21, 2004, he drove Harris to Belle Terre, where Harris directed him to 29 Seaside Drive. According to Salpeter, Harris said that that was where Creedon and Kent had exited Harris's car and, from the property's rear, entered the Tankleff property, 33 Seaside Drive. According to Salpeter, he and Harris then drove onto Crooked Oak Road and headed toward the main road (Cliff Road). According to Salpeter, before they reached the main road, they stopped at 61 Crooked Oak Road, because Harris said that that was where Creedon had exited the car and thrown a pipe. (HT of 7/19/04, at 34-35, 40-41, 43, 56, 150-51, 153; People's Exhibit O-2).

In February 2004, Harris moved into a sober house. John Kelly, who has a 1988 conviction for possession of burglar's tools or burglary and a pending drug case, testified that he managed the house during Harris's stay. According to Kelly, Harris told the house's occupants how he had driven two people to the Tankleff house but "didn't know what they did when they went into the house" because "[Harris] never got that much into detail." According to Kelly, Harris's

involvement in Tankleff made "a lot of guys in the house [] nervous. (HT of 12/20/04, at 630-31, 635-39, 642-43, 646-48).

On March 24, 2004, Salpeter obtained a recorded statement from Terry Covias. Covias stated that Creedon had the nickname "Joey Guns" because "I believe he liked guns," that in "86" she had accompanied Creedon to Strathmore Bagels, where Creedon and Todd went "in the back room." Covias also stated that Jerry was in the store "but I don't believe he was in the back room." (A 200-02).

As far as Creedon having done "collections" or "beat[ing] up people," Covias said, "That was – whatever he did with that was way before I even met him, that's all hearsay that's all what I heard he didn't do that when I was around." Covias also stated that in 1995 "detectives [had] come to my house and ask[ed] me about the Tankleff case but I didn't know – I had nothing to tell them." (A 202**)**

In April 2004, Salpeter received a telephone call from Mike D'Andrea. According to Salpeter, D'Andrea said that the night before the trial, Bari Steuerman had told Timothy Henfling "that she was very upset that she was going to have to go to court the next day to lie for her father." But when Salpeter spoke with Henfling, Henfling stated that he did not know what Salpeter was talking about.[50] (HT of 7/19/04, at 57-58, 161-62).

[50] Salpeter and Tankleff's attorneys faced a similar obstacle when they subpoenaed Danny Cicciaro. Barket told Cicciaro, "[W]e have five witnesses . . . that said they overheard you talking and implicating Joe Creedon [in] this." Cicciaro replied, "Bullshit. No fucking way,"

On April 7, 2004, CBS's 48 Hours Mystery aired a segment on Tankleff. *See* www.cbsnews.com/sections/48hours/main3410.shtml. According to Kelly, he and other occupants of the sober house watched the segment, and the house's occupants became even more nervous that "the two guys supposedly that Glenn was with" would "com[e] to the house and do[] something to Glenn." According to Kelly, the house's occupants wanted Harris to leave. (HT of 12/20/04, at 631, 646-47).

According to Kelly, when he asked Harris why he was helping Tankleff, Harris "made statements that his family would be taken care of"; Kelly said that he once saw Harris with "[c]lose to a thousand dollars" that Harris claimed to have received from Harris's brother. But Kelly also said that Harris saw Salpeter a lot and always "seemed to come back with money when he went to go see him." And in late May 2004, when Kelly got arrested after he and Harris had used drugs for three days, Harris was carrying a lot of money. (HT of 12/20/04, at 632-33, 638-41, 644-45, 650-52, 654).

On May 25, 2004, Kovacs, a registered user on martytankleff.org, posted a message on that site in which she stated, "I will be there for Marty" and "I hope

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and asked Barket for names, and Barket said, "Well, I can't tell you that." (HT of 12/15/04, at 482-85, 495). Barket does not have "five witnesses." Indeed, he has none. Even defense witness Zachary Suominen (who testified at Marty's trial) said that, when he spoke with Cicciaro about Creedon, Cicciaro offered his opinion that his friend "Joey Guns" had *not* committed the murders. (HT of 12/21/04, at 760-66).

one day I will be able to meet Marty and give him a big hug." (HT of 7/21/04, at 38-40, 48).

In late May 2004, Salpeter drove Harris to Long Island Jewish Hospital, where Harris checked himself into a drug rehabilitation clinic and remained there for ten to eleven days. According to Salpeter and Father Lemmert, upon his release Harris went to live with Lemmert until June 16th, and shortly thereafter violated parole and was reincarcerated. (HT of 7/19/04, at 59-61; HT of 7/27/04, at 12, 23).

In an undated letter that Harris wrote to Salpeter between mid-June and mid-July 2004,[51] Harris stated that he was "nervous, worried, concerned," but "not scared," about the upcoming hearing and proclaimed, "Bring Lenny [Lato] on and his band of fucken Keystone Kops. . . . I can't wait to see long-faced yuck-mouth Wally Wa[r]kenthien. . . . Wally straight up lied about things he said I said when him & Flood came to Sing Sing." (A 203-09).

Salpeter testified that he returned to 61 Crooked Oak Road, the home of Mr. and Mrs. John Trager, several times, the final time being June 27th with retired crime-scene detective Charles Haase. According to John Trager, his property was heavily wooded and thick and looked the same way in 1988. (HT of 7/19/04, at 43, 46, 48, 131, 151).

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[51] The People determined the date from Harris's questions, "[W]hen's this [the hearing] gonna happen? The 19th, 20th, 21st? Are you gonna be there? Is Marty?"

According to Salpeter, after about three hours, he "took a walk in the woods" and, while Haase, who had a metal detector, was searching, Salpeter "found a pipe" "sunken a little into the ground." Salpeter described the pipe as being about three feet long and appearing "rusted," "aged" and "weathered." According to Salpeter, he continued to search the area, but "[n]o further item was found relevant to the investigation." Salpeter seized the pipe on June 29th and sent it to a California laboratory. (HT of 7/19/04 at 46-49, 56-57, 151, 153-54, 205-06). Tankleff has never disclosed the lab results but has conceded that "[t]he pipe tested negative for biological material." (*See* Def.'s Mem. of 3/21/05, at 30 n.34).

About eight weeks later, Warkenthien went to the Trager property, where Trager pointed to a piece of plastic covering the area where Salpeter had recovered the pipe. (HT of 12/20/04, at 615-19; HT of 2/4/05, at 39-40, 44, 48; People's Exhibit Q). According to Warkenthien, while standing at the plastic, which was about forty to fifty yards from Crooked Oak Road with "very dense trees" in between, he observed a half-buried pipe about thirteen feet away, and he later found three additional half-buried rusty pipes "in clear view." Warkenthien stated that the pipes appeared to be galvanized "well pipes," one and one-half inches in diameter and of "exactly the same type." Warkenthien took photographs of each of the pipes, (People's Exhibits R, S, T and U), and drew a diagram showing their

location on the property, (People's Exhibit V). (HT of 12/20/04, at 619-25, 649; HT of 2/4/05, at 40-43).

D. The Hearing Begins

On July 19, 2004, the 440 hearing commenced, and Barket told the Court, "I'm fairly certain Mr. Harris is going to be testifying here. That is what we've all been told for several months now . . . . [I]f Mr. Harris doesn't testify, we'll deal with that . . . but I can't imagine that happening. (T 223-24).

On July 20, 2004, Tankleff's attorneys called Creedon to testify. Creedon admitted that he had been convicted of assault in 1978, of rape in 1982 and of grand larceny in 1996. He also admitted that between 1986 and 1991, he collected money for drug dealers, including, between late 1988 and early 1989, for Todd Steuerman. Creedon admitted that he used force – punching people in the face and pulling a gun – as his tools. (HT of 7/20/04, at 7-13, 15, 21-22, 52, 56-57).

Creedon testified that one of his crimes involved Strathmore Bagels. According to Creedon, he knew that Todd Steuerman had sold drugs from Strathmore and that Strathmore had a safe that, in December 1988, he and Harris attempted to open during a burglary. Creedon testified that their attempt failed and that they stole a Strathmore truck, rammed it into a Fayva shoe store and stole Fayva's safe. As for Tankleff, Creedon testified that his only involvement came in or about April 1989, when Todd Steuerman told him that he should talk to Jerry

Steuerman about cutting out Marty's tongue (after which Todd shot Creedon), and in or after June 1989, when the police charged him with the Fayva burglary and he went to see Gottlieb. (HT of 7/20/04, at 13-17, 19-20, 24, 36, 53-55, 59-60, 62**)**.

According to Creedon, Gottlieb prepared an affidavit that stated, "After Todd Steuerman was arrested for shooting me, I called *Jerry* Steuerman to let him know I would not accept $10,000 to drop charges and he went so far as to say, 'You're fucking with the wrong people.' " (Def.'s Mem. of 10/2/03, Ex. 15 ¶¶ 3-4) (emphasis added)). Creedon testified that, to help Tankleff, Gottlieb misled Creedon into confusing Jerry with Todd and even arranged for "A Current Affair" to interview Creedon. (HT of 7/20/04, at 23-27, 29, 31-32, 37-40, 42-43, 55**)**.

According to Gottlieb, however, Creedon contacted him not in 1989, but on April 26, 1990, when Gottlieb was engaged in the Tankleff trial. According to Gottlieb, Creedon said that Todd had shot Creedon and that afterward, Jerry, whose voice Creedon recognized from at least two prior telephone conversations, had offered Creedon $10,000 to drop the charges and said, "What are you, fucking crazy? You're dealing with the wrong person. I can have you dead." Gottlieb testified that he drafted a memo to the file summarizing his conversation with Creedon and that he tried to use the information at the Tankleff trial, but that Tisch precluded it. Gottlieb also testified that, after the jury convicted Tankleff, he

moved for a new trial and prepared and included in his motion Creedon's affidavit of September 17, 1990. (HT of 7/22/04, at 6-8, 10-12, 14-24).[52]

Tankleff's attorneys also called as a witness Terry Covias, the sister of John Guarascio and Creedon's former girlfriend. Appearing pursuant to a Florida-enforced New York subpoena, Covias testified that she lived with Creedon from 1986 to 1994, that they had two children, Joseph and Crystal, and that she did not like Creedon. Covias testified that Creedon was cruel to her, that he hit her over little things and that she saw him beat up many people. She testified that Creedon admitted that he had set someone's face on fire and that he would do the same to her if she ever told anyone. She also testified that Creedon had guns. (HT of 7/20/04, at 3, 101, 106-07, 119, 122-23, 204-05).

Covias testified that in late 1987 or in early 1988, after she became pregnant with Joseph, she went to live with her ex-boyfriend because Creedon was not around much. She testified, however, that she moved back with Creedon after she gave birth to Joseph in July 1988. But, she testified, Creedon once again was not around much and disappeared for days or even a week at a time, although she remembered that, close in time to the Tankleff murders, Creedon and Harris came

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[52] The Gottlieb-prepared affidavit reveals that Gottlieb may have misled Creedon. The affidavit, referring to Creedon's statements to ADA Scarmozzino, states in paragraph three, "ADA Scarmozzino asked me did I ever meet Jerry Steuerman." (Def.'s Mem. of 10/2/03, Ex. 15 ¶ 3). But the affidavit *omits* that Creedon answered, "I've had no conversation with Jerry Steuerman concerning Marty Tankleff. *In fact I've never personally spoken to Jerry Steuerman.*" (*See* Report of the People's Investigation of 12/18/03, at A 33) (emphasis added).

over with a dog and a bird after one or both of them had stolen the animals from a retarded boy.[53] Covias also testified that although she had gone to Strathmore Bagels with Creedon, when she did she saw Creedon speaking only to Todd, not to Jerry. Similarly, she testified that although she remembered that Creedon once said something about being offered money to cut out Marty's tongue, she did not remember who Creedon said had made the offer. (HT of 7/20/04, at 80, 82-84, 87-91, 93, 112-15, 119-20).

Covias testified that in 1995, she had had enough of Creedon and moved away with the children. She testified that she now lives in Florida with her children and with her husband. She also testified that she wanted to erase any memories the children had of their father and that she changed the children's last names, and she admitted that Creedon did not learn of his children's whereabouts until early 2004, when "Carol," who cut Joseph's hair, told Creedon where his children were. Nevertheless, Covias testified, "I don't see why [Creedon would not like me]. I never did anything to him." (HT of 7/20/04, at 77, 93-100, 106).

Covias testified that April 2004 was the first time that she had seen Creedon since moving away in 1995. She testified that she was in New York to attend the funeral of Guarascio's wife and saw Creedon at the house of Creedon's sister, Maryann Testa. Covias testified that although they did not speak much, Creedon

[53] Kent testified that Harris had stolen a dog and a bird from an autistic child. (HT of 12/14/04, at 257).

admitted to her that he was doing "some collecting."[54] (HT of 7/20/04, at 79-80, 100-01, 103, 106-07).

Maryann Testa, Creedon's younger sister, testified that she had never seen Creedon abuse Terry. She also testified that Terry had more contact with Creedon than Terry had admitted. According to Testa, in early March 2004, after "Carol" had told Creedon where his children were, Creedon asked Testa to visit them. According to Testa, in March, she and her father went to Florida and spent the weekend with Terry and the children. (HT of 12/20/04, at 657-59, 668-70, 676).

According to Testa, while in Florida, Terry had a telephone conversation with Creedon, and the next day Creedon came to Florida and, at a mall, met with Testa, Creedon's and Testa's father, Terry and the children. According to Testa, everyone, including Creedon and Terry, got along so well that "Terry took off from work every day and made excuses to her husband and stayed with us." Testa also took pictures, introduced as People's Exhibits W an X, of Creedon, the children and a smiling Terry. (HT of 12/20/04, at 659-64, 671-72).

According to Testa, when Terry and the children came to New York for the funeral of Guarascio's wife, at first Terry and the children stayed with Guarascio,

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[54] Covias denied that she had ever said that she had only "heard" that Creedon had done collecting. But when confronted with the audiotaped statement that she had given to Salpeter, in which she stated that *if* Creedon had done collecting and administered beatings then it had occurred before they met and was all "hearsay," she first acknowledged, "I might have said this," and then acknowledged, "I probably said it." She testified that she did not know why she had used the word "hearsay." (HT of 7/20/04, at 103, 105, 121).

but, after the funeral, when Creedon picked up his son from Guarascio's house, Guarascio became unhappy because, according to Testa, Guarascio did not like Creedon. According to Testa, Guarascio told Terry that, if Terry permitted Creedon to see his son, then Terry and the children were not welcome at his house. Thus, according to Testa, Terry and the children spent the rest of their stay with Testa, as did Creedon, and "[i]t was like a big family reunion." According to Testa, however, things soured when, one night, Creedon went to bed in a bedroom and Terry followed him in, but Joe came out. (HT of 12/20/04, at 664-67, 672-74).

On July 21, 2004, Tankleff's attorneys called Kovacs as their first witness.[55] According to Kovacs, she dated Guarascio and accompanied him to Terry's house for Easter dinner in 1990 or 1991. Kovacs testified that she was able to approximate the year because she went to the dinner before November 1991, when she hit "rock bottom" from using cocaine and entered a rehabilitation clinic. (HT of 7/21/04, at 4-7, 9, 25-26, 45-46).

On direct examination, Kovacs testified that, at Terry's house, she, Guarascio and Creedon took "a joint," walked through a bedroom and went outside and smoked it, thinking that smoking marihuana at a family gathering, with young children home, was okay. According to Kovacs, while they were smoking,

[55] Kovacs testified that she had never met or written to Marty, that she had "better things to do" than testify and that she was doing her civic duty. On cross-examination, however, she admitted that, on martytankleff.org, she had posted a message that she "will be there for Marty . . . and can't wait to give him a hug." (HT of 7/21/04, at 38-40, 48).

"[Creedon] kind of started about something about being at the Tankleff house with a Steuerman,[56] and at that point I can remember, he said that – something about his adrenaline was flowing and they had to get rid of their clothes and that they had to move out of town; that they were leaving to the Carolinas." Kovacs testified that, on the ride home with Guarascio, they did not discuss Creedon's statement. (HT of 7/21/04, at 8-10, 21, 24, 35-38, 43, 47, 49).

When confronted on cross-examination with the inconsistencies in her 1994 affidavit, Kovacs testified, "There were a few things on [the affidavit] that were wrong that I pointed out to Mr. Gottlieb." And when asked if she told Warkenthien that Creedon had said that he had blood on his clothing, Kovacs stated that she did not remember and was unsure whether she had mentioned anything about blood to Gottlieb. Kovacs testified, "That might have been one of the things I expressed to Mr. Gottlieb that might have been left out of the statement." Nevertheless, Kovacs maintained, "This is [a] very basic [affidavit]." "I had a discussion with Mr. Gottlieb [that] there were a lot of inconsistencies on there, [but] I signed it anyway." (The next day, however, Gottlieb testified that the information in Kovacs's affidavit came from Kovacs, that he did not put in her affidavit things that she did not say and that he had no recollection of her talking

[56] Kovacs testified that Creedon did not say which Steuerman he was with, but that she thought that he was talking about Jerry Steuerman, because she had met Jerry at Infinity and every time he came in he gave her a nervous feeling. But when asked if she had told Warkenthien that she thought that the Steuerman was Todd, she testified, "I don't remember," and then testified, "I said it could have been [Todd]." (HT of 7/21/04, at 11, 27-29).

about blood, stating that if she had said it, it would have gone into the affidavit. (HT of 7/21/04, at 10-14, 17-21, 23, 25, 27-33, 36, 42, 44, 46).

Tankleff witness John Guarascio agreed in part with Kovacs's version and disagreed in part. Guarascio testified that he dated Kovacs for a few weeks in 1991 and that, on what he believes was Easter Sunday that year, he took Kovacs to visit with Terry and Creedon. Guarascio testified that one of Creedon's friends was also there. According to Guarascio, Creedon took a rifle out of the closet and said, "I'm known as Joey guns on the street." According to Guarascio, later, in a bedroom, Guarascio, Kovacs, Creedon and Creedon's friend smoked a joint. According to Guarascio, Karlene and Creedon "seemed to hit it off," and Guarascio remembered that Creedon was "saying to the three of us about being in some bushes, watching a card game. I guess, I don't know how he put it – pumped up, whatever at the time. . . . Once Joe said that, I kind of tuned him out because the less you know, the better you are with a guy like that." Guarascio testified that he had thought that Creedon was talking about one "of his robberies and drug deals," because Creedon had a reputation for violence with drug dealers. (HT of 7/22/04, at 39-44, 47-49, 53, 55-57).

With respect to his 1994 interview with McDermott, at first Guarascio testified that he did not remember whether he had stated that he would have notified the police if Creedon had admitted involvement in the Tankleff murders.

But then he testified, "And why I did not say nothing at that time was because I didn't want to be bothered, Joe terrorizing my family or abusing my sister over something that would come back." (HT of 7/22/04, at 36-37, 50-54, 56-57, 604-05, 17-18).

Tankleff's attorneys also called Richard Ofshe as a witness. A professor emeritus of sociology at Stanford University, Ofshe testified that for the past fifteen years he has worked principally on the study of influence in police interrogation leading to true and unreliable confessions. Ofshe admitted, however, that he had interrogated only one person and had never sat in as police or prosecutors conducted an interrogation. (T 51-52, 89, 97-98).

According to Ofshe, confessions are evidence of innocence "if they are rife with errors about how the crime occurred, about things the perpetrator should know." Most important, according to Ofshe, is to see the interrogation, what *led* to the confession, as opposed to the confession. Nevertheless, Ofshe testified that, although he felt comfortable offering a conclusion about a confession's truthfulness in his profession,[57] he felt uncomfortable offering a conclusion in court.[58] (HT of 7/21/04, at 58, 67, 73, 82, 85-86, 92).

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[57] Ofshe included the Tankleff case as one of 60 in a study of false confessions. (HT of 7/21/04, at 85-86). *See* Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 458-59 (1998).

[58] In *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), the court stated, "Dr. Ofshe's testimony, assuming its scientific validity, would [] let the jury know that a phenomenon known

Ofshe testified that he began looking at the Tankleff case "in the last part of 1995," when "I was asked to review part of the case file" by Tankleff's lawyers, who were preparing a federal habeas petition. Ofshe testified that he had reviewed only the trial and pretrial testimony of Tankleff and Detectives Rein and McCready and thus did not review the expert medical testimony or any of the testimony concerning the physical evidence. (HT of 7/21/04, at 55-56, 99-100, 104-05, 108, 112).

Notwithstanding Ofshe's stated reluctance to express an opinion whether, in a particular case, the police elicited a false confession, on direct examination Ofshe testified that "[t]he interrogation in the Tankleff case fits well within the normal

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as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *Id.* at 1345. But:

> Dr. Ofshe cannot explicitly testify about matters of causation, specifically, whether the interrogation methods used in this case caused Hall to falsely confess. . . . Dr. Ofshe will simply provide the framework which the jury can use to arrive at its own conclusions.
>
> Just as important, Dr. Ofshe cannot testify about the specifics of the post-admission narrative statement in this case. Such an endeavor would require Dr. Ofshe to assess the inconsistencies between Hall's statements to the police and the evidence presented at trial. Dr. Ofshe has no more expertise to perform this task than any juror.

United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997), *aff'd*, 165 F.3d 1095 (7th Cir. 1999).

When in later cases a defendant sought to have Ofshe express an ultimate opinion, the courts precluded Ofshe from doing so. *See, e.g., United States v. Mamah*, 332 F.3d 475, 476 (7th Cir. 2003) (holding that there was no link between Ofshe's research on false confessions and his opinion that Mamah had falsely confessed).

A judge found Ofshe not credible in *Florida v. Brinkle*, No. CRC99-18956CFANO, http://64.233.161.104/search?q=cache:XajmImRPrBEJ:www.reid.com/educational_info/criticnbrinkley.html+ofsh+brinkle&hl=en, at 4-5 (Fla. Cir. Ct. July 3, 2002) (finding Ofshe to be "disingenuous" and his "testimony to lack credibility").

confines of what one sees in interrogation" and opined that the confession was false. (HT of 7/21/04, at 58, 67, 85-86).

According to Ofshe, he compared Tankleff's version of his confession to Rein's and McCready's version and determined that where their versions coincided, the statements contained therein became facts. Ofshe testified, however, that even though Tankleff's version differed in many respects from Rein's and McCready's version, it did not matter which version was correct because neither version fit the facts. Ofshe testified that it was "clear [that] whoever introduced these facts appears not to have known anything about how this crime occurred. There appears to be a statement. It fails to corroborate, it doesn't fit the facts of the crime. It demonstrates, if anything, lack of knowledge by the person who generated the statement." As examples, Ofshe stated that, according to Rein and McCready, Tankleff had confessed to using a watermelon knife, to assaulting Seymour first and to taking a shower in the morning, when the physical evidence demonstrated that the killer or killers had not used a watermelon knife or assaulted Seymour first and that Tankleff's damp, as opposed to wet, towel demonstrated that he had not showered in the morning. Ofshe also stated that, according to McCready and Rein, Tankleff never mentioned using gloves, but the physical evidence demonstrated that the killer or killers had used gloves. Yet Ofshe admitted that he had never read the testimony about the physical evidence,

that his knowledge of such evidence had come from Tankleff's attorneys and that if such evidence indeed did match the confession, then his conclusion would be reversed. (HT of 7/21/04, at 74-80, 83-85, 105-06, 108, 122-23).[59]

On July 23, 2004, the fifth day of the hearing, Tankleff's attorneys scheduled Glenn Harris as their only witness. Tankleff's attorneys informed the Court, however, that Harris was refusing to testify, and the Court adjourned the hearing to Monday, July 26. (HT of 7/23/04, at 3).

On Monday, July 26th, Tankleff's attorneys started the day not with Harris, but with Gaetano Foti, who was appearing pursuant to a subpoena that Tankleff's attorneys had served on him outside New York State. According to Detective

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[59] Tankleff contends that, at a retrial, his confession would be inadmissible. But the issue before this Court is *whether* Tankleff is entitled to a new trial, not whether, at such a trial, his confession would be admissible. In any event, Tankleff's reliance on the Supreme Court's holding in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), is misplaced. Contrary to Tankleff's assertion, the circumstances of his interrogation differ from those in *Seibert* in two crucial respects. In *Seibert*, the defendant was placed in custody and questioned *before* receiving *Miranda* warnings. After she made admissions, she was given a 20-minute coffee break. The interrogating officer then gave her *Miranda* warnings. After resumption of the questioning, she again confessed. *See id.* at 2611-13.

In attempting to analogize these facts to those surrounding his interrogation, Tankleff ignores that the New York courts rejected his claim that he was in custody before administration of *Miranda* warnings. Thus, the Appellate Division, in affirming Judge Tisch's suppression ruling, found that defendant was *not* in custody before being given "the benefit of *Miranda* admonitions" *People v. Tankleff*, 199 A.D.2d 550, 552-53 (2d Dep't 1993). The Court of Appeals affirmed, noting that the record supported the "undisturbed finding of the trial court that defendant was not in custody and thus, was not entitled to *Miranda* warnings at any point before he indicated his desire to tell the police what really had happened." *People v. Tankleff*, 84 N.Y.2d 992, 993 (1994). Five years later, the Appellate Division and the Court of Appeals rejected Tankleff's attempt to reargue this issue.

Moreover, Tankleff has not adduced any evidence to suggest "that the police used [his] pre-warnings statement to obtain the post-warnings statement, or that the police deliberately withheld warnings in order to obtain a preliminary statement that would lead to a later statement." *See People v. Cowell*, 11 A.D.3d 292, 293 (1st Dep't 2004).

Trotta, prior to the hearing, Foti called Trotta and said that he had been served with a subpoena and was unsure whether he had to comply because he was in another state. According to Trotta, after speaking with Lato, Trotta told Foti that Foti should comply and testify.[60] (HT of 12/16/04, at 560-61).

Foti testified that he knew Creedon in the 1990s and that Creedon admitted to him that he made a living extorting money from drug dealers. Foti testified that Creedon always carried guns and beat and shot people if a drug dealer didn't pay, and even observed Creedon shoot "a friend of mine." (HT of 7/26/04, at 5-7).

Foti testified that he had watched the whole Tankleff trial and that after the jury had convicted Tankleff, Foti was in the Gallery Pub with Creedon. Foti testified, "I don't know if [Tankleff] came up on the news, but I know it came up and I said it was a shame. I thought that the kid was innocent and he was in jail, and [Creedon] said to me he is innocent because I did it." Foti also testified, "A couple of months later [Creedon] was [at the Gallery] during the day again, and I think he was telling my friend, Billy, somebody owed him money and he was going to take care of him. If he had to shoot him, he would do it. . . . Billy told me that he was involved in the Tankleff *shooting*, killing.[61] Creedon just shook his head yes and said yes, I did" (emphasis added). But Foti admitted that when he

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[60] Tankleff contends that the district attorney's office intimidated Foti. (*See* Def.'s Mem. of 3/21/05, at 37-38). According to Trotta, however, Foti did not complain that anyone from the district attorney's office or the police department had intimidated him. (HT of 12/16/04, at 578).

[61] The Tankleffs were bludgeoned and cut, not shot.

spoke with Trotta, twice, in October 2003, he might have said only that Creedon had said, "The kid didn't do it, I was there." When asked if his memory of what Creedon had said were now different, he said, "I guess so." (HT of 7/26/04, 8-16).

Tankleff next called Glenn Harris. On the advice of his attorney, Richard Barbuto, Harris asserted his Fifth Amendment right not to incriminate himself. Barket argued that Barbuto was interfering with Harris's wishes and that it was up to Harris, not to Barbuto, to assert the right.[62] Barket also argued that Harris had waived the right because he had spoken about Tankleff with Salpeter and others. Barket then argued that the district attorney's office should be compelled to give Harris immunity because "the witness has taken the Fifth largely because they threatened him with incarceration knowing that they're not going to prosecute him."[63] Barket argued, "They intimidate him, put him in circumstances to allow him to be threatened, both with prosecution" and by "using jailhouse informants to threaten [him]" that he "might get killed by Creedon." Barket also argued that Harris's letters prove that he's telling the truth, "which is why I asked that they all be admitted,"[64] and argued that Harris's July 9, 2002, recantation letter was the result of "a man torn between someone who wants to come forward to do the right

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[62] At Barbuto's request, the Court ordered that no one other than Barbuto speak with Harris. (HT of 7/26/04, at 47).

[63] Barket, referring to Warkenthien's October 6, 2003, interview with Harris, accused Warkenthien of threatening Harris that "he is going to jail." (HT of 7/26/04, at 40, 42 ; HT of 7/27/04, at 26).

[64] Although on July 26, 2004, Barket asked that *all* of Harris's letters be admitted, he later changed his mind and declined to offer into evidence *any* of Harris's letters.

thing, . . . [and] of the very fear of prosecution that Mr. Lato, Mr. Warkenthien and their agents have instilled upon him." (HT of 7/26/04, at 23-32, 34, 39-42, 44-45).

Lato responded that the district attorney's office, when it filed its response to Tankleff's motion in December 2003, opposed Tankleff's request for a hearing and declined to grant Harris immunity, and reminded Barket that, based on Barket's representation in May 2004 that Harris would testify without immunity, the office had dropped its opposition to the hearing. After Barbuto agreed with Lato, (HT of 7/26/04, at 72-73), Lato also pointed out:

> The hearing began last week. Mr. Barket said Harris is going to testify and he's going to testify last. . . . .
>
> Now, nothing new happened in the last week. . . .
>
> . . . All this stuff about the threats, none of that [came out prior to today]. When it is show time, right before he is supposed to take the stand, . . . he doesn't want to testify.
>
> It is my opinion that Harris made up this entire thing, either because he is crazy, a liar or both. I think over a period of time, he always planned that he never would have to testify.

(HT of 7/26/04, at 73-75).

After Harris refused to testify, Tankleff's attorneys called Father Lemmert, a Catholic chaplain at Sing Sing. According to Lemmert, Harris called him on Friday, July 23rd, and said that "he was unwilling to testify." According to Lemmert, Harris said that other inmates had threatened him and that one of the investigators at the district attorney's office had told him that he would be

spending the rest of his life in prison and that this terrified him. Lemmert also testified that on Sunday, July 25th, Harris called him again and said that Salpeter's retrieval (about four weeks earlier) of the murder weapon, a pipe, made him "much more liable than ever before." (HT of 7/27/04, at 15-17, 22).

Lemmert testified that Harris had told him about Tankleff in October 2003. According to Lemmert, he was watching the news and saw Harris's name mentioned in connection with Tankleff, and approached Harris. According to Lemmert, Harris told him that he had driven two other gentlemen to a house on Long Island. (HT of 7/27/04, at 6-8, 11). Lemmert testified:

> He told me they directed him to a wealthy looking house which they were going to presumably rob because they wanted money for drugs, and he told me that he stayed in the car and those two other gentlemen went in . . . and when they came back . . . he said they were visibly agitated. They were upset. He said it was obvious that it wasn't a regular robbery, and he said he saw blood on them. They got into the car and they drove away.

(HT of 7/27/04, at 9-10, 18). Lemmert testified that Harris had said that he was afraid to go to the police because he was on parole. Lemmert conceded, however, that Harris had admitted having personal problems, a drug addiction and a long psychiatric history. (HT of 7/27/04, at 3-5, 8, 11, 20).

With perhaps two exceptions, all of Tankleff's remaining witnesses came forward only after the 440 hearing had started. On Tuesday, July 27th, Neil Fischer, a cabinetmaker, testified that he came forward because, on Monday

evening (July 26th), his wife, after speaking with "a lawyer friend," told him to do so. (HT of 7/27/04, at 40, 45-46).

Fischer testified that he started his cabinet business in 1988 and that Jerry Steuerman was one of his best customers, although he claimed that one time he had to chase Steuerman down in a parking lot to get paid and claimed that another time he had to take Steuerman to small claims court. (HT of 7/27/04, at 46-47, 53).

Fischer testified that in late June or early July 1989, he was installing counters at Steuerman's Oakdale store and recalled Steuerman screaming at a bagel-oven seller that the oven "wasn't functioning the way that Jerry had wanted it." According to Fischer, Steuerman "said something to the effect that he had already killed two people and that it wouldn't matter to him if he killed him." Fischer conceded, however, that he was paying attention to what he was doing, that the oven was not his concern, that he "didn't hear the entire conversation" and that he heard the above when his head was "inside [a] cabinet." (HT of 7/27/04, at 43-45, 48-50, 54).

Fischer testified that he did not come forward earlier because Steuerman was a good customer and because he feared retaliation from the Steuerman family. Fischer admitted, however, that he had followed the Tankleff case closely in the media and knew that Tankleff was claiming that Steuerman was the killer. (HT of 7/27/04, at 50-51, 53-54).

On August 3, 2004, before the hearing resumed, Barbuto had an ex parte conference with the Court. Thereafter, the Court reminded Barket of the Court's order barring Barket from speaking with Harris. Barket contended that the order violated Tankleff's due process rights. Barket argued, "I have an obligation to Mr. Tankleff to take the call and speak to [Harris]." Barket claimed, "[Harris] is not Dick Barbuto's child," and argued that although Barbuto can give Harris advice, he should not "use as a coercive tactic orders from the Court." Barket also argued that the Court had abused its discretion by not directing the district attorney's office to grant Harris immunity. Nevertheless, Barket agreed to follow the Court's order, but told the Court that he could not prevent Salpeter from speaking with Harris because Salpeter doesn't work for him and "was hired through the Tankleff family." (HT of 8/3/04, at 4-7). (Salpeter testified that the Tankleff family *and* Pollack's law firm had retained him.) (*See supra* p. 78).

Tankleff's first witness on August 3 was Joseph Graydon. After the court clerk swore in Graydon, the clerk asked Graydon for his address, and Graydon answered, "I reside upstate New York." The clerk asked, "Can I have the town please?" and Graydon answered, "No." Barket interjected, "Can we have a local address? [Graydon] has some fears about these individuals, as some people have expressed." But when asked on cross-examination if one of the reasons that he declined to give his home address was because he was scared of Creedon, Graydon

answered, "I'm scared? I'm more scared of you people [the district attorney's office] than I am of Joey Creedon." Indeed, when asked, "Are you scared of Joe Creedon?" Graydon answered, "No." (HT of 8/3/04, at 9-10, 56).

Graydon testified that he had a 1980 conviction for obstructing government administration, a 1996 conviction for possessing cocaine and a 1996 conviction for possessing someone else's bankcard. Graydon also testified that, beginning in 1987, he and Creedon "sold drugs, we did drugs,[65] we robbed drug dealers. We got into a lot of fights in places together." (HT of 8/3/04, at 11-12, 24-32). But when asked on cross-examination if he had committed crimes with Creedon, the following exchange took place:

> Q You and Creedon both committed crimes together, right?
> A Crimes? Robbing a drug dealer is a crime? No.
> . . .
> Q . . . [D]id you commit crimes together, yes or no?
> A Legal crimes, no.
> Q Legal crimes?
> A I'm sorry. Okay. If robbing a drug dealer is a crime, yes, we did.

(HT of 8/3/04, at 40-41). Graydon then admitted that the reason that they robbed drug dealers was because a drug dealer was unlikely to report a robbery to the police. Graydon also testified that Creedon, or "Joey Guns," usually carried a gun

[65] When asked how much crack he had smoked in his life, Graydon answered that he did not know. "I don't put stuff on a scale," he said. (HT of 8/3/04, at 66).

and that he observed Creedon "beat the shit out of" and "stomp" someone. (HT of 8/3/04, at 32, 41-42, 44, 68-69).

Graydon testified that in "summer 1988," he had a $6,000 gambling debt,[66] and Creedon offered him an equal share of $25,000 if he would drive Creedon to kill someone. According to Graydon, Creedon said that one Strathmore partner wanted to eliminate the other because "one owed the other money." According to Graydon, Creedon said that "the guy to be eliminated" picked up money at Strathmore on Friday, Saturday and Sunday, and that they agreed to kill the partner and steal "the weekend money" to make the murder look like a robbery. Graydon admitted, however, that he and Creedon had never robbed a businessman or killed anyone before and knew that, unlike the robbery of a drug dealer, the police would investigate the robbery and murder of a businessman. (HT of 8/3/04, at 12-16, 31, 43-45, 50, 54-55, 70-72).

According to Graydon, on "a Sunday" in "July or early August," right after Graydon had catered a June wedding, he drove Creedon to the shopping center in which Strathmore Bagels was located. According to Graydon, it was about 8 p.m., and it was twilight, or getting dark. According to Graydon, Strathmore was closed, and Creedon got "kind of pissed off." Graydon testified that he drove with

[66] Graydon still has a gambling debt. Detectives Blase Cimilluca testified that, during the week of July 20, 2004, he and Detective Al Grammatico interviewed an illegal-gambling target who stated that he was placing illegal bets for his friend, Joseph Graydon, and that Graydon would be at the target's house on the weekend. (HT of 12/15/04, at 440-42).

Creedon to the shopping center's closed stationary store, where Creedon "jumped out, threw a can through the window. It was a glass door actually a window." According to Graydon, Creedon "came out with a little black box that [] had, I guess money in it which was anywhere between $200 and $500" (direct examination), or "$250 to $500" (cross examination). When asked if Creedon also stole cigarettes, Graydon first answered that that was a possibility, but then said no. (HT of 8/3/04, at 12, 14-15, 18, 33, 42-43, 46-48, 56-57, 59, 66-67).

When asked on cross-examination if he and Creedon had gone to the shopping center for the specific purpose of breaking into the stationary store to steal cigarettes and to obtain money to buy crack, Graydon said:

> A Never happened. I never robbed for drugs. I can – personally, I wouldn't do burglaries. You know my record. What does my record consist of; destroying government property, disorderly conduct, resisting arrest? Do I got burglaries up and down my thing? I'm not a burglar. I'm not a robber.
>
> There are times when, yes, I did a few stupid things, but I'm not one to go through a store to go rob money to smoke crack, no. . . .
>
> Q That wouldn't be right; you're not that type of guy?
>
> A Not to do that.
>
> Q But you were the type of guy to rob drug dealers?
>
> A Yes. . . .
>
> . . .
>
> Q Were you the type of guy in 1988 to burglarize the place to take cigarettes or cash?
>
> A No.
>
> Q But you were the type of guy on the very same night to kill somebody, correct?

A I wasn't doing the killing. Stop saying that, please. I was driving.
Q You were going to be the driver for a guy who was going to shoot somebody?
A Yes.

(HT of 8/3/04, at 60-61). When asked if instead of having attempted to carry out a robbery and murder in June or July 1988 he and Creedon had burglarized the stationary store on November 30, 1988, or months after the murders, Graydon answered no. (HT of 8/3/04, at 61-62, 66-67). But Florine Goldstein, who managed the stationary store, contradicted Graydon's account.

Goldstein testified that from about 1974 to 1994, she managed the Triple H Stationary Store, which was the only stationary store in a strip mall that also contained Strathmore Bagels. Goldstein testified that the store had been burglarized several times, but there was only one time in which the bottom half of the glass on the front door was broken to gain access. According to Goldstein, the burglary occurred in the middle of the night on November 30, 1988, and that whoever broke in stole money, cigarettes and a Lotto machine (which was recovered in the woods). (HT of 12/16/04, at 507-08, 510-12, 517-20).[67]

[67] Brian Glass also contradicted Graydon's account. Glass testified that he, Creedon and Graydon once "[r]obbed a stationary store" that "was . . . right down from the bagel store," "[l]ike . . . about six stores down, eight stores." Glass testified, "It was "[a]t night," and it was not in July or August because "I think it was cold out." Glass testified that there no one was in the store, and, while Graydon stayed in the car, he and Creedon threw a garbage can threw the window, entered the store and stole cigarettes and Lotto money, which Creedon dropped. (HT of 12/6/04, at 48-50, 78-80).

Kathy Stillufsen, a clerk in the Suffolk County Police Department Central Records section, testified that she ran a computer search for burglaries reported at the Triple H for all of 1988, and that the only report (People's Exhibit N) of a burglary that year occurred on November 30, 1988. According to Stillufsen, she also manually checked, for July and August 1988, the department's microfilm roll and the desk blotter of the Sixth Precinct, in which the Triple H was located. Stillufsen testified that those two searches revealed that, other than a false alarm report on August 9, 1988, there were no incidents at the store. In her testimony, Goldstein recalled the false alarm. She testified that the store had a panic button that, when activated, called the police, and that in the summer of 1988, an employee had accidentally activated it. (HT of 12/16/04, at 508-10, 526-30, 532).

According to Graydon, "[a] few weeks," but "less than five weeks," after the stationary store burglary, Creedon again asked Graydon to drive Creedon to Strathmore, but, according to Graydon, this time he refused. "I didn't want no part of it," he testified. Graydon testified that, shortly after he refused, he heard about the Tankleff murders. Graydon testified, "[I]t was all over. Everyone was talking about it." Yet even though Graydon admitted that he had read in the newspapers that one of the victims had been a partner at Strathmore Bagels, he did not connect the murders to Creedon because Creedon had wanted it to look like a robbery and did not want to do it in the guy's house and never mentioned killing the partner's

wife. (HT of 8/3/04, at 12-13, 16, 18-19, 49, 51-52, 54-55, 67-68). On cross-examination, Graydon testified:

> A . . . I just didn't think a man actually can go and kill a lady. . . .
>
> I mean, I don't even hit a woman. Therefore, I could never, you know. Understand what I'm saying?
>
> A I understand.
>
> You wouldn't hit a woman?
>
> A I wouldn't hit a woman.
>
> Q But you would kill a businessman?
>
> . . .
>
> A Yes. . . .

(HT of 8/3/04, at 52-53).

Graydon testified that he also did not connect Creedon to the Tankleff murders in 1992 or 1993, when, at Sullivans Bar in Centereach, he and Creedon got into an argument over who had the right to sell drugs at Sullivans Bar and Creedon admitted that he had gotten away with a couple of killings. Graydon testified that he did not connect Creedon to the Tankleff murders until October 2003, when Graydon read newspaper accounts connecting Creedon to the Tankleff murders. Graydon testified that he still declined to come forward at that time, however, because "I thought [Creedon] was getting blamed for it and I thought the kid was getting out." (HT of 8/3/04, at 17-20, 34-35, 52, 63-65, 69-70).

Graydon testified that he changed his mind after "I read the paper last week. I saw this poor little old lady," whom Graydon thought might be Tankleff's grandmother or aunt. According to Graydon, he spoke with his pastor, listened to

his conscience and called the district attorney's office. On direct examination, Graydon testified that he told the district attorney's office that he had information about Creedon and asked for Barket's number, but, "He [a male employee] wouldn't give it to me." But on cross-examination he testified that when he called the district attorney's office, he had told "[s]ome lady" that he "want[ed] to speak to somebody – that has to do with the Tankleff trial," that she had asked "[W]hy?" and that he had answered, "Because . . . I might have some information. . . . and I think I talked to you [Lato], and I think I talked to some guy, Walter." (HT of 8/3/04, at 21-23, 33, 36, 38, 65, 70). Graydon testified:

> I said I used to live with Joey Creedon. He said did you see him do it? I said no, I did not see him do it. Then whatever was said, that is speculation. I turned around, I said no, it is not. *Two plus two is four. The kid didn't do it*, and then somebody started getting wise and angry, like you are. My good guess is it is going to be you [Lato] that I was talking to because I asked for Barket's number and you wouldn't give it to me. Thank you.[68]

(HT of 8/3/04, at 37-38) (emphasis added). According to Graydon, he then spoke with Barket, and, after speaking with Barket, "Walter called me back, asked for my Social Security number" and "hung up on me." (HT of 8/3/04, at 23, 36, 38).

Warkenthien testified to a different version. According to Warkenthien, paralegal Susan Bosco told him that Graydon had called on Tankleff and left his

[68] The Court, attempting to get Graydon to answer questions without arguing, asked Graydon, "Do you want to argue with me now, too?" (HT of 8/3/04, at 39).

number. Warkenthien testified that he called Graydon, identified himself and asked Graydon what information he had on Tankleff. According to Warkenthien, Graydon "said that he just got off the phone with Mr. Barket [and that] Mr. Barket told him he shouldn't talk to me, but [that] he has a First Amendment right and he'll talk to whoever he wants whenever he wants." (HT of 12/20/04, at 682-83).

According to Warkenthien, he spoke about Tankleff with Graydon for about fifteen minutes, and at the end of the conversation asked Graydon if he had a criminal record. According to Warkenthien, Graydon said, "I'm sure you know what that's all about." Warkenthien testified that he told Graydon that he would try to identify Graydon's criminal background, and the conversation ended. (HT of 12/20/04, at 683-84).

Warkenthien testified that he performed a computer search of Graydon, but having found "other names like Graydon[']s," called Graydon back and said, "I don't want to get your record mixed up with anyone else's. I need your date of birth and social security number." According to Warkenthien, Graydon said, "No problem," and furnished Warkenthien with the information. (HT of 12/20/04, at 684-85).

Tankleff's attorneys called as their next witness Leonard Lubrano. Lubrano testified that in July 2004, he and his wife watched a Court TV segment on

Tankleff and realized that he had information to provide. According to Lubrano, he called Gottlieb, who forwarded him to Salpeter. (HT of 10/27/04, at 7-8).

Lubrano testified that McCready had known Steuerman for years prior to the murders. Lubrano testified that until 1984, he owned a wholesale baking company and that every day he bought products from Jerry Steuerman's Stony Brook store. Lubrano testified that, in 1984, he opened "an Italian restaurant pizzeria" and that McCready became a customer. Lubrano testified, "I knew that I knew him from somewhere" and was unsure from where at first. (HT of 8/3/04, at 75-77, 80-81; HT of 10/27/04, at 8-11, 14, 77). According to Lubrano:

> I believe that I had seen him a number of times in the bagel shop in Stony Brook in Strathmore bagels, and the thing that stuck out in my mind was that I liked watches and he had a Rolex watch on his hand when, I believe, he was conversing with Mr. Steuerman and I remembered that, and when he came to my restaurant, he still had the same watch on and I always admired it. That is the only thing that ever really stuck out, and that he was a very polished dresser.

(HT of 8/3/04, at 77-78). Lubrano testified, however, "I'm not a hundred percent" sure if I knew him from Strathmore, and "that was one of the reasons why I waited a while to come forward because it had been over twenty years." "I was trying to collect those thoughts," he testified. When asked how many times between the Tankleff murders in 1988 and the Court TV episode of July 2004 he had thought about from where he knew McCready, he answered, "Probably never," and when

asked if perhaps he knew McCready from somewhere else, he said, "That – that could be." (HT of 10/27/04, at 15-17).

After Lubrano testified, Pollack told the Court that Lubrano's testimony "calls into question whether or not Detective McCready knowingly gave perjured testimony" when he denied knowing Steuerman prior to the murders. Pollack asked the Court to adjourn the hearing to enable Tankleff's attorneys to file a motion to disqualify the district attorney's office on the ground that "Mr. Spota, the Suffolk County District Attorney, represented Detective McCready in the early nineties" and had "a clear conflict in proceeding with this case." (T 82, 84). The Court adjourned the hearing, and Tankleff's attorneys filed a motion to disqualify the district attorney's office.

While the hearing was adjourned, Barket asked the Court to issue a material witness warrant for Brian Glass, (*see* Letter from Barket to Court of 10/21/04, at 1), and Salpeter located William Ram after looking for him "off and on" for a year. According to Salpeter, he spoke with Ram twice and then went to Florida where, on September 29, 2004, he obtained from Ram a recorded statement. Salpeter also testified that on October 12, 2003, Ram came to New York, that Barket interviewed him and that he returned to Florida on October 13th. (HT of 12/21/04, at 688-89, 698, 700-01, 712-14).

The hearing resumed on October 26th with the testimony of Ram. Ram testified that he had prior felony convictions for forgery and sale of a controlled substance, that he was on lifetime parole and that had violated parole several times. Ram testified that he was reparoled in December 2003 and that, since then, he had been selling timeshares in Florida. (HT of 10/26/04, at 3-4, 6, 46-49).

Ram testified that he worked on commission and was losing money by testifying because he was losing out on future business "by not being at work today." Ram testified that he was not getting anything for his testimony, that his employer was not paying him for lost work and that Tankleff's defense had promised him reimbursement only for out-of-pocket expenses and for the money he lost for not being at work on the day of his testimony. Similarly, Salpeter testified that when on October 12, 2003, Ram came to New York and Barket interviewed him, the Tankleff defense paid for Ram's plane ticket and one-night stay in a hotel. Salpeter testified that, as of October 13, Ram had neither asked for nor received reimbursement for lost wages. (HT of 10/26/04, at 4-5, 20-21; HT of 12/21/04, at 689, 697-98, 705, 712-15).

Ram testified that, prior to 1988, he had done some burglaries with Harris and Kent, that in 1988 he dealt "drugs" with Creedon and that, to collect drug debts owed to him, "[m]aybe [] took [Creedon] along once or twice [to collect money because of his reputation]. I don't think I paid him." Ram testified that he,

Creedon, Kent and Harris had used a lot of cocaine and that he had also used crack several times. Ram testified that he no longer used drugs. (HT of 10/26/04, at 7-8, 38, 44-45, 50).

Ram testified that he remembered an evening when Harris, Creedon, Kent and Gary Johnson were at his house. According to Ram, Creedon offered him money to help Creedon "straighten out" "a Jew in the bagel business" who lived in Belle Terre, but that he declined. Ram testified that he did not like to hurt people and did not want to bother a legitimate person who, unlike a drug dealer, did not assume the risk of getting hurt. Ram testified that Creedon, Kent and Harris left. (HT of 10/26/04, at 8-13, 29-31, 45-46).

According to Ram, the next day Harris came over and talked about the prior evening. According to Ram, Harris said:

> [H]e thinks he's going to be in trouble. He thinks they did something bad.
>
> He went -- I think he went in with the mind that they were doing a burglary, or something; not going to do what they did.
>
> And he said, "They came running out of the house. They had blood on them. Peter was white as a ghost. Something bad happened."
>
> They drove away. And after that, they went and burned their clothes.[69]

(HT of 10/26/04, at 13-14).

[69] In his recorded statement, Ram stated that Creedon had burned his clothes. He did not say that *Kent* had burned his clothes. (HT of 10/26/04, at 34-35; A 210-11).

According to Ram, later that day he saw reports that the Tankleffs had been killed in Belle Terre and "put two and two together."[70] (HT of 10/26/04, at 15-16, 27).

Ram testified that he saw Kent "more than a week" later, but that Kent didn't say anything. Ram also testified that a year or two later, he ran into Creedon, who asked Ram whether he thought Harris and Kent were snitching on each other after a recent arrest. Ram testified that he had told Creedon, "You know, if they were snitching you would be in jail for murder, you know? So obviously they're not snitching." According to Ram, Creedon replied, "Well, I guess your right." (HT of 10/26/04, at 16-19, 35-36, 39).

Ram's girlfriend, Heather Paruta, testified that in or about 1999, they were speaking about the death penalty, "and [Ram] shared with me about a case in Belle Terre where somebody was getting twenty five to life for killing their parents and they didn't do it and that he knew who did it." On direct examination, Paruta testified that Ram said that he knew who "did it" "because they told him." On cross-examination, however, she admitted that she was unsure whether Ram had told her how he knew. She testified, "I'm not sure at that time. I don't think so at that time." Paruta testified that "almost a year ago," Ram was talking about "this crew of guys" from the neighborhood and Creedon's name came up and that Ram

[70] The phrase "put two and two together" is the one that Harris used in his August 29, 2003, affidavit and in his October 6, 2003, conversation with Warkenthien.

told her that Creedon had committed the murders. (HT of 10/27/04, at 19-22, 24-25-31; HT of 12/21/04, at 689).

Ram also testified that on Sunday night (October 24, 2004), he asked Kent what he was going to do and that Kent said, "They're looking to get me to trade places with Marty Tankleff because of Glenn running his mouth" and complained that "Cr[e]edon has to talk about every crime he ever committed." (HT of 10/26/04, at 22).

Ram may have confused Sunday night with Monday night, October 25th. On October 25th, Ram appeared at the house of Sadie Konopski, a close friend and former girlfriend of Kent's. According to Konopski, Ram said that he was a childhood friend of Kent's and wanted to get in touch with him. According to Konopski, Ram left, and she called Kent. Konopski testified, however, that while she was on the phone, Ram returned, and she put Ram on the phone with Kent. According to Kent, Ram said, "[W]e need to talk, hang out and get high for old times' sake." (HT of 12/9/04, at 267-68, 381-82, 384-87).

Ram picked up Kent and, according to Kent, they went to the city (Manhattan). (HT of 12/9/04, at 269). According to Kent, on the way:

> We spoke about how he was supposed to be the go-between man between me and the Tankleff guy [] Jay Salpeter [who] had set up an account for some money . . . – for me to take and he could get – if he could get me to take his money, he was going to get more money because he was getting paid for his statements. Because he said

> for me not to worry about nothing, that he wasn't going to say nothing – nothing bad about me so there was no reason for a bad vibe to be between me and him.

(HT of 12/9/04, at 269-270).

According to Kent, when they reached the city, "We copped some heroin and cocaine" and got high. According to Kent, "[Ram] kept rambling on about how I should get this money, take this money, it's a window opportunity, just take it and join the *winning team*, get a hold of that cash cow while you can get it" (emphasis added). According to Kent, although he did not know how much money Ram had received, "[Ram] said he was getting ten grand, and he said he had an account number for Western Union numbers set up to receive fifty thousand dollars." Kent also testified that Ram had stated that Salpeter had rented the car that they were in.[71] (HT of 12/9/04, at 270-72, 321) (emphasis added).

According to Kent, when they returned to Long Island, they stopped in front of the Ronkonkoma house of Robert Mineo, Kent's friend and Brian Glass's cousin. It was about 11 p.m., and, according to Kent and Mineo, Kent entered Mineo's house to get some water so that Ram could use some heroin. (Mineo has one felony conviction, a 1989 conviction of attempted criminal sale of a controlled

[71] Salpeter had rented a car for Ram and had given Ram $1,000 via Western Union. Salpeter conceded that, other than by Ram telling Kent, Salpeter did not know how Kent could have learned that Ram had received money via Western Union. (HT of 12/21/04, at 722).

substance in the third degree, a Class C felony.[72] (HT of 12/9/04, at 272-74, 307-08, 449-52, 455, 458-59, 461-62, 473).

According to Kent he exited Mineo's house and, with Mineo following, Kent reentered Ram's car while Mineo "was laying in the cut" ("a dark area") about five feet away. Mineo testified that, although he followed Kent out, he was not in "any cut." According to Kent, the car windows were open, and "[Ram] continued to tell me about the cash cow. He kept saying, 'Let's get your cousin [Mineo]. . . [A]sk him to tell us where a Western Union machine is so we can get this money.' " According to Mineo, "[A]s I got to the back passenger side back seat, I heard Billy Ram discussing about a cash cow, and I stood right there and listened for a minute." Mineo testified that Ram asked, "Why don't you come to the winning team?" According to Mineo, Ram "asked Peter if he knew where a Western Union was, that he could have fifty thousand dollars within an hour because he had a cash cow and he wanted him to come to the winning team." (HT of 12/9/04, at 274-75; HT of 12/15/04, at 456-57, 467-68, 470-71).

According to Kent and Mineo, Mineo approached the car and told Kent, "[G]et the fuck out of the car," or "[G]et out of the fucking car," and directed Ram

[72] Mineo testified that he used "cocaine and pot," but was never addicted, and in or about September 2004 tried heroin for the first time and overdosed on it. (HT of 12/15/04, at 450-51, 458, 463-65).

to leave. Kent and Mineo testified that Kent exited the car, and Ram left. (HT of 12/9/04, at 276-77; HT of 12/15/04, at 457-58, 468-70, 472).

Kent testified that, later that day, he was watching the news and saw Ram walking down the courthouse hallway. Kent testified that he called the number that Ram had given him, but that a person he believed to be Salpeter answered. According to Kent, he hung up and, when he received a return call, he refused to answer and was left a voice-mail. (HT of 12/9/04, at 277-81, 323). The caller, Jay Salpeter, left the following message:

> Hi Peter, it's Jay. Apparently, you don't want to speak to me, so maybe you can listen to my message. I'm sure you know what happened today in Court. Bill [Ram] testified and, of course, we have knowledge of what happened that evening that you were at Billy's house and you left with Joe. More or less we're just interested in possibly you know, if you want to come aboard before people get arrested here. I will be more than willing to speak to you without looking, you know, to give you grief but unfortunately things happened and if you want to speak to me you can call me at 516-466-8877 and you know myself and the attorneys are willing to sit down with you. The truth is now coming out, there's no doubt about it and believe me Peter, there is more to come. So we'd love to have you aboard and I think Billy broke the ice with you regarding that the other day that you probably better off with being on the winning side[73] so please give me a call, love to speak with you, be with you and discuss this. Think about this.

[73] Kent testified that he could not think how confessing to the Tankleff murders would put him on the winning side. (HT of 12/9/04, at 373). But Barket may have thought how during his cross-examination of Kent, when Barket suggested that although Kent had accompanied Creedon into the Tankleff house, only Creedon committed in the murders. Barket asked Kent isn't it true that "Joe Creedon, in your presence, killed Marty's parents"? (HT of 12/9/04, at 365).

(HT of 12/9/04,at 281-83; People's Exhibits H & I).

Kent testified that he called Salpeter back and that, when he did, Salpeter denied offering money in exchange for Kent's cooperation. (HT of 12/9/04, at 284-85, 323-24).

Ron Falbee, Tankleff's cousin and the executor of the Tankleffs' estate, testified that Salpeter had asked that he reimburse some witnesses "for travel expenses" "and whatnot," and that because Ram was going to lose income by testifying, Falbee decided to pay him because "he was going to be out of work for two days." Falbee stated, however, that no witness was paid for his testimony. Falbee testified that he had sent Salpeter a check and that Salpeter had reimbursed Ram. (HT of 12/9/04, at 146, 171, 174, 188, 193-94).

The prosecution called Salpeter, who testified that, at the defense's request, Ram and Paruta came to New York on Thursday, October 21st. Salpeter testified that the defense had paid for their airfare and hotel stay from October 21st until they left on or about October 27th. According to Salpeter, before coming up, Ram requested that he also be paid for lost wages and showed Salpeter pay stubs from his employer, Trader Services.[74] (HT of 12/21/04, at 689-90, 695, 702, 714-15).

[74] Cicciaro testified that Salpeter "said he would pay me for my time." (HT of 12/15/04, at 478, 494, 498-99).

Salpeter admitted that he had rented a car for Ram to use and that in the six days that Ram was in New York he had driven about 1,400 miles. Salpeter also admitted that he paid Ram "lost wages" as follows: on October 19th (before Ram arrived), $1,000 via Western Union to reimburse Ram for his prior trip; on the 22nd (the day after Ram arrived), $1,000 in cash; on the 25th (the day before Ram testified), $500 in cash; on the 27th (the day after Ram testified), $500 in cash; and after Ram returned to Florida, $1,000 in money orders. (HT of 12/21/04, at 690-99, 702-05).

The hearing was in recess between October 28 and December 5, 2004. During the recess, Barket asked the Court to conduct a hearing "to determine what, if any, improper influence caused Brian Scott Glass to refuse to provide the exculpatory evidence he possesses." (Letter from Barket to Court of 11/3/04, at 1). Barket also "inform[ed] the Court that Glenn Harris has contacted Mr. Salpeter and indicated that he now wishes to testify without immunity. We are asking that Mr. Harris be brought back down from the state Prison System and held locally until he can be brought to Court to testify." (Letter from Barket to Court of 11/12/04, at 1).[75]

[75] The Court, stating that there was no indication in Barket's letter that Barbuto was aware of Harris's "change of position," declined Barket's "application to have Mr. Harris produced." (Court's Order of 11/16/04, at 1).

The hearing resumed on December 6, 2004. Tankleff's attorneys called Brian Glass, who appeared voluntarily with his attorney, William Wexler. Glass testified that he had two prior felony convictions, that he has known Creedon since 1986 and Todd Steuerman since 1988 and that he had collected money for drug dealers, including Todd Steuerman, and that he had robbed drug dealers, including Todd Steuerman. He testified that he knows Graydon at least since 1988,[76] but that he has not spoken with Graydon in years. Glass testified, however, that Graydon "called my house prior to him coming to see you" and left a message on "my answering machine." (HT of 12/6/04, at 11-13, 17-18, 48-50, 75, 81-82, 85).

Glass and Salpeter testified that in July 2004, Salpeter, looking to speak with Glass about Tankleff, called Glass's mother several times. According to Glass, "I called Jay Salpeter to ask him not to call my house anymore, that I didn't know nothing about [Tankleff]." But according to Glass and Salpeter, Salpeter learned that Glass was in trouble for a robbery and was looking for an attorney. According to Glass, Salpeter said that he would help Glass obtain an attorney if Glass agreed to help Tankleff. (HT of 12/6/04, at 18-19, 67-70, 90-91, 96-98).

According to Glass and Salpeter, on July 26, 2004, Salpeter picked up Glass and drove him to Barket's office. Glass testified that, during the ride, Salpeter

[76] Glass testified that he and Graydon smoked pot and used cocaine together and once robbed a pot dealer, but stated that Graydon was of little help in robbing drug dealers. (HT of 12/6/04, at 15, 80).

stated “that Harris was going to flip” and that Graydon had “come down to talk or something like that.” According to Glass, Salpeter also stated “that I would be helped with an attorney . . . free of charge. That’s what I was assuming.” Salpeter, testified, however, that he had offered Glass nothing and had told Glass that he would have to speak with Barket and Pollack about obtaining an attorney, and that he had not discussed Graydon with Glass because Salpeter did not learn of Graydon until July 29th or July 30th. (HT of 12/6/04, at 5-6, 71-73, 76, 82-84, 92-93, 98-99).

According to Glass, he concluded even before they reached Barket’s office that they would never help him, but decided to meet with them anyway. Glass testified that, at Barket’s office, Barket offered to find him an attorney and, because Glass told “[Barket] I didn’t have no money,” assumed that Barket was offering to find Glass an attorney at no charge. Salpeter testified that Barket offered to provide Glass with the names of attorneys but could not get Glass an attorney. (HT of 12/6/04, at 53-54, 81, 93).

According to Glass, Salpeter and Tankleff’s attorneys stated their theory how the murders occurred, and Glass, who testified that he had been following the hearing in the newspaper, “[f]illed in the blanks.” According to Glass, he told Barket, Salpeter and Pollack that Jerry Steuerman had asked Glass “to do a piece of work,” or to physically intimidate or harm Steuerman’s business partner, so that

Steuerman's partner would pay the debt that the partner owed Steuerman. According to Glass, he told Barket, Salpeter and Pollack that he had declined Steuerman's offer but later mentioned it "in passing" to Creedon, who "picked it up." Glass testified, "[They were j]erking me off," and "I was jerking [them] off." (HT of 12/6/04, at 6-7, 9-11, 72-77).

Glass testified that when he got home, he obtained a $5,000 check from his mother and retained Wexler to represent him on the robbery. According to Glass, on August 18, 2004, he surrendered, was arraigned on the robbery charge and was released without bail. (HT of 12/6/04, at 18-20, 23, 44-46, 54-55, 77-78).

According to Glass, on October 22, 2004, he met with Wexler, Lato and an investigator with the district attorney's office. According to Glass, this was the first time that he had ever discussed Tankleff with anyone from the district attorney's office. Glass told Lato and the investigator on October 22nd, and testified on December 6th, that everything that he had told to Salpeter and Tankleff's attorneys was untrue and that he had never spoken with Jerry Steuerman. Glass also testified that he had never intended to help Tankleff and had agreed otherwise because he "was bored" and "just wanted to get in [the defense's] pocket" by obtaining a lawyer at no charge. Glass testified, "You [Barket] told me you'd get me a lawyer." "You said you wouldn't be able to represent me but you would have someone that could." "Listen. You were

bullshitting me and I was bullshitting." "You were lying to me and I was lying to you. Let's face it. So was Jay [Salpeter]. Come on." (HT of 12/6/04, at 15-17, 22-23, 50-54, 67, 74-75).

In response to Glass's testimony that he "had made it all up," Barket asked for an immediate *Hemstreet* hearing, at which he would call Wexler as his first witness, to determine if the district attorney's office had exerted "undue influence" on Glass to get him to change his story.[77] The Court stated that Barket's request was premature because Barket had not asked Glass "whether he was a product of undue influence." The Court asked Barket why he had declined to ask Glass this question, but Barket refused to answer. (HT of 12/6/04, at 33, 37). Lato interjected:

> . . . [The reason why [Mr. Barket] won't answer [the Court's] question is because he knows the witness is going to say I wasn't intimidated and would like to try to prove intimidation by calling everyone and examining everyone except the person who was supposedly intimidated.

(HT of 12/6/04, at 37-38). Barket still refused to answer the Court's question or to ask Glass whether he was unduly influenced. Instead, Barket told the Court, "My

[77] In *Hemstreet v. Greiner*, 378 F.3d 265 (2d Cir. 2004), the Second Circuit affirmed (but later vacated its decision affirming) a district judge's decision to grant a habeas petition on, among other grounds, "trial counsel's [ineffectiveness for] fail[ing] to seek relief for the intimidation of . . . a crucial defense witness" who had "became unavailable as a witness because she had been threatened by detectives from the prosecutor's office," *id.* at 267.

request, Judge, is to start with Mr. Wexler who made the deal for him." (HT of 12/6/04, at 40). Barket stated:

> Mr. Glass's account of this is incredible on its face. He's telling the Court that he was willing to posit some story about Mr. Steuerman in exchange for me getting him, quote/unquote, a free lawyer.
>
> Three weeks later, he ends up in court with the son of a federal judge, the good friend of Mr. Lato and an ROR after making a deal with the D.A.'s Office.

(HT of 12/6/04, at 56, 59). And even though Wexler informed the Court that Glass came to him not through Wexler's father or through Lato but through a referral from another lawyer, Barket maintained, "I want to put Mr. Wexler on the stand." The Court denied Barket's application. (HT of 12/6/04, at 55-57, 61).

To rebut Glass's claim that he had not been pressured into changing his story, Tankleff's attorneys called Mark Callahan, a felon with ten to fifteen prior convictions who admitted to having robbed drug dealers with Glass and who, on the day of is testimony, was serving a nine-month sentence at the Nassau County Correctional Facility, the same facility at which Tankleff was incarcerated. On direct examination, Callahan testified that on August 23, 2004, before he was arrested, he spoke with Glass, who stated that Tankleff's attorneys had contacted Glass and that he was thinking about helping them. On cross-examination, however, Callahan admitted that he never asked Glass why Glass was considering helping Tankleff even though Callahan knew Glass to be a violent felon who had

no conscience and who looked out only for himself, "[j]ust like [Callahan] did." When asked if it thus seemed strange to him that Glass wanted to help Tankleff, Callahan testified, "Oh, not at all." (HT of 12/21/04, at 732-34, 738-42, 744-48, 752-54).

Callahan testified that he knew Glass and "Joey Guns" Creedon and that he looked up to them because they "had beautiful girls, they had endless amount of parties, drugs." Callahan testified that "like a month after the first time I hung out with [Glass]," in or about 1990 or 1991, Glass told him, "Listen, it was two people . . . he said he had something to do with it [the Tankleff murders], You could end up like that if you ever turned on me. Those weren't his exact words." According to Callahan, at a later date, Glass told him that "he passed that down, you know? He passed it down. He could have had the chance to do it himself but he passed it down" to "Joey Guns."[78] (HT of 12/21/04, at 733-34, 737-39, 740, 753).

Callahan testified that he was arrested on October 24, 2004, for violating an order of protection and was in a Central Islip court holding cell on October 25, 2004, waiting to be arraigned. According Callahan, he ran into Glass, who, after being arrested for harassment, was also waiting to be arraigned. According to

[78] Barket used the phrase "passed it down" in his letter requesting a *Hemstreet* hearing. (*See* Letter from Barket to Court of November 3, 2004). In addition, on November 7, 2004, the day after Glass testified and two weeks before Callahan testified, a Newsday reporter covering the hearing wrote, "Glass . . . told the [Tankleff] lawyers that he declined the job but *passed it on* to Joseph Creedon." Zachary R. Dowdy, *Witness: I Lied to Defense,* Newsday December 7, 2004 (emphasis added).

Callahan, Callahan brought up Tankleff, and "[Glass] said he's not going to go through with what he originally was going to go through, and that was helping you guys. . . . [He pretty much put it that . . . Suffolk's District Attorney[] is putting pressure on him to change his statement and he's looking at a lot of time because . . . he was charged with an armed robbery." According to Callahan, "[Glass] didn't exactly say who, but he said somebody . . . told him that if he goes through with it, they're going to make it tough for him." Callahan testified that he did not know "what story" Glass was not going to go through with and did not connect what Glass was saying to Glass's statement years earlier that he had "passed that down to Joey Guns." (HT of 12/21/04, at 734-36, 740-41, 750-52).

Callahan testified that he came forward by writing a letter to Tankleff after he and Tankleff were incarcerated (in different buildings) together at the Nassau County Correctional Facility. In his letter, Callahan wrote that, like Tankleff, he, too, was innocent. (HT of 12/21/04, at 743, 746).

According to Callahan, he has never seen or spoken with Tankleff and had "absolutely nothing to gain here today" by testifying. And he denied being mad at "the system," even though he felt that he was innocent of the crime to which he pleaded guilty. (HT of 12/21/04, at 731-32, 743, 746-48, 754-55). Callahan testified:

> It's okay for you guys to give those orders of protection out to all these people, but you guys don't see

> the other hand. . . . So what am I, innocent or guilty today? . . . You answer that.
>
> . . .
>
> My wife, . . . read my criminal record, we've been through this several, several times, me and my wife. She'll take me back, I come home, but now they use it as weapons; okay? . . .
>
> My wife, I got out here in August, I moved right in with her with an order of protection. Okay?
>
> Now these things are played on me as a – as a joke; okay? All right?
>
> . . .
>
> . . . You could think what you want, but the truth is I was innocent, okay?

(HT of 12/21/04, at 747-49).

On or about December 15, 2004, Warkenthien called the Department of Corrections in Florida. According to Warkenthien, the Corrections Department told him that Ram had been in a shootout with the Hillsborough County Sheriff's Office after having committing several armed robberies.[79] Salpeter testified that he had spoken with Paruta and with Ram's family and that they attributed Ram's actions to his relapse into using drugs. (HT of 12/20/04, at 626; HT of 12/21/04, at 721).

[79] According to the Tampa Tribune, on December 13th, Ram, armed with a handgun, committed a robbery at a Babies R Us, and, on December 14th, committed a carjacking, a robbery at a Starbucks and a robbery at a Tampa bank and was critically injured in a shootout with detectives. The Tribune reported that Ram was also a suspect in two armed robberies committed on December 7th and an armed robbery committed on December 10th. Anthony McCartney & Keith Morelli, *Suspect in Crime Spree Shots Himself in Head,* Tampa Tribune, December 15, 2004, (Metro), *available in* Westlaw, 2004 WL 86442168.

Tankleff's attorneys also called Paul Lerner. According to Lerner, during the summer of 1988, when he was at a racetrack with Seymour and Jerry Steuerman, Seymour "indicated" that Steuerman owed Seymour a lot of money and was not making payments on the debt. Lerner testified that, several weeks later, he and Seymour (but not Steuerman) returned to the racetrack, where Seymour stated that he was mad at Jerry and wanted nothing more to do with him because, even though Jerry was his business partner and owed Seymour a lot of money, Jerry, on his own, bought a yearling for $30,000. According to Lerner, Seymour said that he would make sure that he got paid, that he would push Jerry out of the bagel business and that he was preparing papers to close up the bagel stores.[80] According to Falbee, Seymour also threatened to attach Jerry's horses, which was sure to anger Jerry because Jerry loved his horses. (HT of 12/6/04, at 103-09, 113-15, 117-22; HT of 12/9/04, at 189).

Lerner admitted that he never told the above to Gottlieb, to Tankleff or to Tankleff's relatives prior to or during Tankleff's trial, which he watched every day. Lerner testified that he was convinced from the trial testimony that there was no need to come forward because he believed that Tankleff was innocent and that he expected him to be acquitted. According to Lerner, "It looked cut and dried. He couldn't have done it," and he attributed Tankleff's conviction to "a miscarriage of

[80] Neither at the trial nor at the hearing did Tankleff's attorneys introduce any documents demonstrating that Seymour had prepared papers to close the bagel stores.

justice. . . . To my knowledge, he was railroaded. . . . And it was part of the D.A.'s office that did it to him. From the first day." Yet Lerner admitted that he also did not come forward after Tankleff got convicted, or even after Tankleff's October 2003 new-trial motion, of which he was aware, and instead waited until July 2004 because he was certain that Tankleff would get a new trial. (HT of 12/6/04, at 109, 111-13, 115-16, 124-29).

Falbee also testified that, some months prior to the murders, Seymour told him that Seymour's relationship with Steuerman was slowly deteriorating and that by July 1988, when Falbee was at the Tankleff house for a family reunion, "it seemed to be almost out of control." According to Falbee, he "heard Seymour having a very angry, loud, aggressive conversation on the phone" and Arlene saying, "That son of a bitch Steuerman." According to Falbee, Arlene stated how they were having problems with Steuerman and "that he had threatened them, that she was -- she was getting fearful, she was getting very frightened." According to Falbee, after Seymour got off the phone, he said, "[W]e're breaking up the partnership." (HT of 12/9/04, at 148-51, 181).

According to Falbee, some weeks after the murders, immediately after the Tankleff house ceased to be a crime scene, he and Mike Fox went to the Tankleff house and "found some notes in Arlene's handwriting that basically laid out some of the problems that they were having [with Steuerman]." Falbee also testified that

they found on Seymour's desk a carbon copy of an unsigned June 29, 1988, letter that Seymour had sent to Steuerman. The letter demanded payment on a 1986, $50,000 note and threatened legal action. Falbee testified that he had given the documents to Gottlieb prior to Tankleff's trial,[81] which he attended every day (but at which he did not testify). (T 150-56, 160-61, 163-64, 166, 177-79, 187, 190-91; Def.'s Exs. 24, 25).

Although Falbee testified that he believed that Steuerman had never repaid the debt, he admitted that he did not, as executor of the estate, come across any follow-up letters demanding payment or any papers showing that Seymour had taken any legal action, and he admitted that he did not know if Seymour had changed his mind. (HT of 12/9/04, at 166, 178-79, 190).

Falbee also admitted that the Tankleff murders did not exonerate Steuerman's debts.[82] Falbee testified that the Tankleff estate and Steuerman litigated the large debt that Steuerman owed but that the estate had leverage because the estate and Steuerman were partners in a few bagel stores. Falbee testified that the estate and Steuerman settled on many issues but that, after the

[81] At trial, Tisch denied Gottlieb's application to admit the demand note, Defendant's Exhibit O for identification, as evidence of Steuerman's motive to commit the murders, because there was no evidence that Steuerman had ever read the note. (HT of 12/9/04, at 158-59).

[82] Falbee admitted that, according to the Tankleffs' wills, Marty was the primary beneficiary and that the Tankleffs could have changed the wills at any time prior to the murders. (HT of 12/9/04, at 170-73).

murders, Strathmore was far more successful than it had been prior to the murders. (HT of 12/9/04, at 165-68, 170, 180-81, 189-90).

After Falbee testified, Barket informed the Court that Harris had tried to contact members of the defense team about wanting to testify, and Barket renewed his request that the Court order the district attorney's office to grant Harris immunity. Once again, however, there was no evidence that Barbuto, Harris's attorney, was aware of Harris's desire to testify. The Court declined Barket's request. (HT of 12/9/04, at 197-99, 203-04, 211-15).

Kent, a cocaine and marijuana addict who on occasion uses heroin, testified that he had used drugs with Creedon, Harris and Ram and that he had committed between five and ten burglaries with Ram and about fifty burglaries with Harris,[83] but that, drug use aside, he had never committed a crime with Creedon. Kent admitted that he has a long criminal record, including parole violations, and that he stole even from his family. (HT of 12/9/04, at 245-47; HT of 12/14/04, at 298-302, 304, 308-11, 313, 340-41, 354-55, 374-75).

Kent testified that, in 2003, when he was incarcerated at the Suffolk County Jail "for D.W.I.," Lisa Harris, his ex-girlfriend and Harris's wife, visited him.

[83] Kent testified that Harris sometimes drove to the location to be burglarized but never stayed in the car and, indeed, "was the first one in." Kent also testified that, because he had committed the burglaries to support his drug habit, he always stole cash and any valuables that he could carry, and he recalled a burglary in which Ram was the driver and in which he and Harris broke into a pet store and stole two Macaws and gave them to drug dealers in exchange for cocaine. (HT of 12/9/04, at 255; HT of 12/14/04, at 370-71, 376, 378).

According to Kent, Lisa told him that Glenn Harris had given a statement implicating Kent and Creedon in the Tankleff murders. According to Kent, at the "end of October, November, something like that, "[r]ight after [Harris] had an incident on the floor,"[84] Kent had a verbal altercation with Harris in the jail's yard (they were separated by a fence). According to Kent, he asked Harris, "Why the fuck would you do this to me?" Kent testified that Harris answered, "Listen to me. You fucked my old lady. You were doing my wife." (Kent testified that he indeed was having sex with Lisa -- and using drugs with her -- when Glenn was in prison.) (HT of 12/9/04, at 247-52; HT of 12/14/04, at 329-30, 332-36, 367-68).

Kent testified that Harris continued, "I was propositioned while I was upstate in Clinton in the year 2000 . . . through a third-party to find another party to tie up with Creedon that had involvements, already gave statements, onto this Tankleff case." Kent testified that Harris had said that "he couldn't think of another better than me to fulfill . . . his vendetta onto me, because, you know, he was hurting over the fact that I was doing his old lady." According to Kent, Harris also "told me that he was propositioned that if he could find somebody to hold down his statement with him that he – he would be well taken care of, and his kids would be taken care of and he wouldn't have to worry about them." Kent also

[84] Harris's incident occurred on October 31, 2004. (*See* Report of the People's Investigation of 12/18/03, at 18).

testified that Harris had said, "I want to try to help somebody out and do the right thing for once in my life." (HT of 12/9/04, at 251-53).

Kent testified that although he believes that Tankleff is innocent, he did not commit the Tankleff murders and was not in Belle Terre on September 7, 1988. Kent testified that on the date of the murders, he was living with his mother in Center Moriches and was committing crimes with his next-door neighbor, Danny Raymond. Kent testified, "We were using drugs and we were doing armed robberies. I was convicted of doing armed robberies the 7th." Kent reviewed People's Exhibit G, a parole worksheet, and from the worksheet he was able to recall that, from August 31, 1988, to 9 p.m. on September 7, 1988, he and Raymond committed ten robberies, all on the South Shore of Long Island, and used the money they had obtained during the robberies to buy small amounts of drugs in Bellport and larger amounts of drugs in Manhattan at "real good wholesale prices." Kent testified that his mother's birthday was on September 3rd and that his sister's birthday was on September 7th, and that in 1988, as always, the family celebrated the two birthdays on the 7th. Kent testified that after the birthday celebration ended on the 7th, he and Raymond committed two robberies, the first one occurring at 9 p.m. Kent testified that between 3 and 5 a.m. on September 7, he and Raymond

were in the city using cocaine and heroin.[85] (HT of 12/9/04, at 253, 258-67; HT of 12/14/04, at 311-13, 317, 344-45, 349, 352-53, 356-59, 363).

[85] Kent admitted that, toward the end of his week-long spree, he was afraid that the police would catch him, so on September 6th and 7th he had Raymond drop him off at his sister's house in Ronkonkoma. As for Harris's claim that, after the Tankleff murders, Kent burned his clothes at his mother's house in Selden, Kent testified, "I find that impossible[], because my mother's house wasn't there. It was in Center Moriches. . . . [A]t that time on that date when this kid's family was murdered, my mother was not living in Selden." (HT of 12/9/04, at 258-59).

SUMMARY OF ARGUMENT

On the morning of September 7, 1988, Martin H. Tankleff, who only weeks earlier had spoken of killing his parents, murdered his mother and mortally wounded his father. Minutes after reporting the crime, Tankleff's attempt to frame Jerry Steuerman began to unravel, as family friends and neighbors pointed out the flaws in parts of his story. When detectives arrived, they, too, saw through Tankleff's lies, and by noon Tankleff had confessed. Contrary to Tankleff's claims, the physical evidence matched his confession and contradicted the testimony that he gave to the jury, which had no choice but to reject his testimony and convict him.

By the end of the trial, Tankleff and his attorneys had already begun their crusade of impugning the integrity of the detectives who investigated him, the office that prosecuted him, the jury that convicted him and the judge who sentenced him. And when he saw that the New York appellate courts and the Federal courts would not undo a just prosecution, verdict and sentence, he induced others to implicate innocent persons for murders that he had committed.

But unlike the evidence that the People produced at trial, the evidence that Tankleff produced at the 440 hearing should never reach a jury. Tankleff failed to exercise due diligence in acquiring his "new evidence," nearly all of it unreliable and inadmissible hearsay from "witnesses" who have come forward as much as

sixteen years after the murders. The Court should deny Tankleff's new-trial motion on procedural grounds and because it rests on the testimony of witnesses who lack credibility.

ARGUMENT

Tankleff contends that his conviction should be vacated because he has shown by clear and convincing evidence . . . that no reasonable juror could convict him of murdering his parents" and "that he is actually innocent." (Def.'s Mem. of 3/21/05, at 41). He also contends that "this Court should set aside the judgment of conviction pursuant to C.P.L. § 440.10(g) because [his] new evidence is legally and factually sufficient to warrant a new trial." (Def.'s Mem. of 3/21/05, at 52). His contentions are meritless. His "new evidence" is bogus, and he is "actually guilty."

Actual Innocence

In December 2003, the People set forth the circumstances under which a defendant may bring a claim of actual innocence. (*See* Report of the People's Investigation of 12/18/03, at 67-69; People's Mem. of 12/5/03, at 54-57). The only important case that a court has decided since then – a case that Tankleff fails to cite in his recent brief – is *Doe v. Menefee,* 391 F.3d 147 (2d Cir. 2004). In *Menefee,* 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.
>
> . . .
>
> The [Supreme] 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." . . .
>
> 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.
>
> . . .
>
> It is worth noting, moreover, that the Supreme Court has recently counseled lower courts to avoid extending the actual innocence exception to new contexts if there are "other grounds for cause to excuse the procedural default."

Id. at 160-62, 174 (citations omitted).

The court stated in *Menefee* that the doctrine of actual innocence applies only to enable a petitioner to excuse a procedural default, such as a statute of

limitation, as "a gateway" to obtain a review of his claim on the merits. Thus, this Court need consider Tankleff's actual-innocence claim only if it determines that Tankleff is procedurally barred from bringing his 440 motion. But under New York law, a defendant *cannot* be procedurally barred from bringing a 440 motion. *See* C.P.L. § 440.10(3) (stating that "the court *may* deny a motion" on procedural grounds) (emphasis added)). The Court need not and should not consider Tankleff's claim of actual innocence. In any event, as the People demonstrate, *infra,* Tankleff has "presented no new reliable evidence of his factual innocence." *Menefee*, 391 F.3d at 172.

Newly Discovered Evidence and Due Diligence

The power to vacate a judgment upon the ground of newly discovered evidence and grant a new trial rests within this Court's discretion.[86] *See People v. Crimmins*, 38 N.Y.2d 407, 415 (1975). In addition,

> it [i]s incumbent upon the defendant to establish that the "new evidence" ha[s] been discovered since the entry of

[86] Citing *People v. Cole*, 1 Misc. 3d 531 (Sup Ct. Kings County 2003), Tankleff contends that this Court's discretion is "'unlimited." (Def.'s Mem. of 3/21/05, at 53) (quoting *Cole,* 1 Misc. 3d at 535). The court in *Cole,* relying on *Crimmins* and *People v. Baxley*, 84 N.Y.2d 208 (1994), did say this. But the Court in *Cole* was incorrect. In *Crimmins*, the Court of Appeals stated, "It has been repeatedly held that . . . discretion is unlimited in *the lower courts* and thus this court has no power in a noncapital case to review their exercise of discretion." *Crimmins*, 38 N.Y.2d at 415. In *Baxley*, the Court of Appeals stated that it is "the general rule that the power to vacate a criminal conviction and grant a new trial for newly discovered evidence rests within the unlimited discretion of *the lower courts* and is, thus, beyond review by this Court." *Baxley*, 84 N.Y.2d at 212. Thus, the Court of Appeals stated that the lower courts – the trial courts and the courts of the appellate division – had a discretion beyond the review power of the Court of Appeals, not that a trial court had a discretion beyond the review power of a court in the appellate division.

> his judgment, that it could not have been produced by him at the trial with due diligence on his part, and that it [i]s 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 him. . . . Further, the defendant [i]s required to show that the motion [has been] made "with due diligence after the discovery of the alleged new evidence."

People v. Boyette, 201 A.D.2d 490, 490-91 (2d Dep't 1994) (quoting C.P.L. § 440.10(1)(g)). As this Court has held:

> This means that at the time the motion is filed [the defendant] claims he has the evidence necessary to be granted the relief sought which in this case is the vacatur of the judgment of conviction or a finding of actual innocence by the court. In a C.P.L. § 440 motion, the burden is on the defendant to demonstrate to the court that there is either new evidence warranting a new trial, or perhaps outright dismissal of the charges. . . . It is the obligation of the defendant to come forward with evidence that he is entitled to a new trial or exoneration.

(Court's Mem. of 9/21/04, at 6). A court may find that a defendant has failed to exercise due diligence where, after discovering new evidence, he waits more than one year to make a new-trial motion. *See People v. Stuart*, 123 A.D.2d 46, 54 (2d Dep't 1986) (holding that 440 motion "made more than one year after the discovery of the purported new evidence . . . support[ed] the County Court's determination that the motion was not made with due diligence"); *People v. Huggins*, 144 Misc.2d 49, 51 (Sup. Ct. N.Y. County 1989) (holding that newly

discovered evidence motion made 20 months after discovery of new witness who exculpated defendant did not satisfy statute's due-diligence requirement).[87]

Gottlieb became aware, prior to the end of Tankleff's trial, of Creedon's possible connection to Jerry Steuerman. And some four years later, on August 10, 1994, Kovacs provided Gottlieb and Tankleff investigator Navarra with an affidavit implicating Creedon in the Tankleff murders. Yet it was not until August 2001 that Tankleff, through Salpeter, attempted to use Kovacs's affidavit to develop leads to Creedon's former criminal associates. As Salpeter admitted at the hearing, a private investigator could have made this attempt, and located Glenn

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[87] To support his position that "C.P.L. § 440.10(1)(g) does not set forth a bright-line time limit for filing, but merely requires due diligence," (Def.'s Mem. of 3/21/05, at 61-62), Tankleff relies on *People v. Bell*, 179 Misc. 2d 410 (Sup. Ct. N.Y. County 1998), and *People v. Farrell*, 159 Misc. 2d 992 (Sup. Ct. Richmond County 1992). But in *Bell* and *Farrell*, the defendants brought a *Brady/Rosario* claim under subsection (f) of C.P.L. § 440.10(1), which has no due-diligence requirement, as opposed to a newly discovered claim under subsection (g) of C.P.L. § 440.10(1), which has two due-diligence requirements. *See Bell*, 179 Misc. 2d at 412, 415-16; *Farrell*, 159 Misc. 2d at 993-94. Tankleff's reliance on *People v. Hildenbrant*, 125 A.D.2d 819 (3d Dep't 1986), is also misplaced. In that case, the court held, "[T]his [due diligence] requirement must be measured against the limited resources generally available to the defense. Here, since defendant was unable to raise bail, he remained in custody and was unable to assist in his own defense. Further, he was represented by the Public Defender and not by retained counsel. . . . [A]nd there is nothing in the record to indicate that the failure to discover the witness was unreasonable." *Id.* at 819-21. In contrast, as Judge Tisch held, Tankleff "almost immediately posted a huge sum of money to gain his freedom pending trial making him constantly available for consultations with counsel and who was able to employ a defense team including a number of experienced lawyers, investigators, etc." Similarly, in *People v. Maynard*, 183 A.D.2d 1099 (3d Dep't 1992), the court excused a two-year delay because the court accepted assigned counsel's explanation that the delay was unavoidable because it took him a year to obtain the trial transcripts and, because he was a solo practitioner involved in unrelated trials and appeals, another year to read the transcripts and prepare the 440 motion. *See id.* at 1103. Tankleff's reliance on *People v. Wise*, 194 Misc. 2d 481 (Sup. Ct. N.Y. County 2002), is also misplaced, because *Wise* involved a question of materiality, not a question of due diligence. *See id.* at 493-94.

Harris, in 1994. Tankleff has the burden of providing an explanation for the seven-year delay, and he has failed to do so.

Salpeter found Glenn Harris in January 2002, interviewed him on March 13, 2002, and had Reicherter administer a polygraph to Harris on June 25, 2002. But it was not until October 2, 2003, that Tankleff's attorneys filed the current 440 motion. Tankleff's explanation for waiting nearly nineteen months after meeting Harris to file his motion was that "the Tankleff defense team continued its investigation, locating and interviewing additional witnesses." (Def.'s Reply Mem. of 4/16/04, at 25). But Tankleff does not identify any witness he located or interviewed during that nineteen-month period. A more credible explanation for the delay was Harris's recantation letter of July 9, 2002, and the absence of contact between Harris and the Tankleff defense between then until on or shortly before August 29, 2003.

In sum, the Court should deny Tankleff's 440 motion because he had failed to exercise due diligence.

Evidence Admissibility

Tankleff concedes that his new evidence must be, and contends that it would be, admissible at trial. (Def.'s Mem. of 3/21/05, at 55) (citing *Boyette*, 201 A.D.2d

at 491). He contends that the testimony of Foti, Ram, Kovacs[88] and Graydon concerning Creedon's statements, the testimony of Demps concerning Todd Steuerman's statements and the testimony of Fischer concerning Jerry Steuerman's statements would "most likely be admitted based on Mr. Tankleff's due process rights." (Def.'s Mem. of 3/21/05, at 59-60, 63, 67, 69). He also contends that Harris's affidavit and Harris's statements to Salpeter, Lemmert and Kelly "meet the standard for admissibility as statements against his penal interest." (*Id.* at 56).

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. *People v. Brensic,* 70 N.Y.2d 9, 14 (1987). Generally, a hearsay statement "may be received in evidence only if [it] fall[s] within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable." *Id.* One recognized exception is a statement against penal interest, *id.* at 14, and another recognized exception is a statement of a then-existing state of mind,[89] *see People v. Reynoso,* 73 N.Y.2d 816, 819 (1988). But "the hearsay rule may not be applied mechanistically to defeat the ends of justice," and in a rare instance due process may require that a hearsay statement that falls outside a recognized exception be received in evidence. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

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[88] Tankleff failed to mention Guarascio, who at the hearing provided testimony similar to that of Kovacs. Because this failure may be an oversight, the People will incorporate Guarascio's testimony into its discussion.

[89] It is questionable whether the state-of-mind exception requires a demonstration of reliability. *See infra* p. 185 n.94.

A. Declaration Against Penal Interest

Tankleff contends that "Harris' affidavit and the testimony of Salpeter, Lemmert and Kelly regarding Harris' statements to them indicate that Harris was an eyewitness to, and participant in (albeit unwittingly), the Tankleff's murders."[90] (3/21/05 Br. at 54). According to Tankleff, "Harris' statements meet the standard for admissibility as statements against his penal interest." (*Id.* at 56). Tankleff's contention is meritless.

In *People v. Thomas*, 68 N.Y.2d 194 (1986), the Court of Appeals held:

> Hearsay evidence is admissible as a declaration against penal interest only if four prerequisites are met: (1) the declarant must be unavailable to give testimony, whether by reason of absence from the jurisdiction, refusal to testify on constitutional grounds or death; (2) the declarant must have been aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability.

Id. at 197 (citing Fed. R. Evid. 804(b)(3)). The fourth prerequisite is "the most important inquiry . . . : whether circumstances independent of the hearsay declaration itself are present which fairly tend to support the assertions made and thereby assure their trustworthiness and reliability." *Id.* at 200.

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[90] In his statement of facts, Tankleff discusses Harris's statements to Ram, (Def.'s Mem. of 3/21/05, at 19), but in his "statement against penal interest" argument, Tankleff fails to argue that Harris's statements would be admissible through Ram. In the event that this was an oversight, the People will respond as if Tankleff were relying on Ram.

"When the declaration is offered by the People to inculpate the defendant," "the trial court must find that the interest compromised is 'of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify.'" *Id.* at 198). But when the declaration is exculpatory, "a less exacting standard applies. . . : it is enough that the supportive evidence establishes 'a *reasonable possibility* that the statement *might* be true.'" *People v. Darrisaw,* 206 A.D. 661, 664 (2d Dep't 1994) (quoting *People v Settles,* 46 N.Y.2d 154, 169-70 (1978)). Nevertheless, the court must be satisfied that "there is other evidence tending to show that the declarant or someone he implicates as his accomplice actually committed the crime." *Settles,* 46 N.Y.2d at 169. *See also United States v. Bahadar,* 954 F.2d 821, 829 (2d Cir. 1992) (holding that to prevent fabrication there must be "corroboration of both the *declarant's* trustworthiness as well as the *statement's* trustworthiness"). "Indeed, certain considerations may be fatal to the reliability of a declaration and thereby render the out-of-court statement inadmissible." *People v. Shortridge,* 65 N.Y.2d 309, 312-13 (1985).

> These considerations include the declarant's motivation – e.g., whether the statement was designed to exculpate a loved one or inculpate an enemy. Important also is the declarant's personality – e.g., whether he suffers psychological or emotional instability or whether he is a chronic or pathological liar. Additionally, the declarant's spontaneity or hesitancy, promptness or tardiness in making the statement may shed light on its authenticity. Likewise, the internal consistency and coherence of the declaration, or its lack thereof, may

> reflect on its bona fides. Most critical in some cases, is the availability of supporting evidence – that is, some proof, independent of the declaration itself, which tends to confirm the truth of the facts asserted therein. Regardless of how self-incriminatory a particular declaration against penal interest might be, all or any of the foregoing may affect its reliability.

Id. at 313. "[T]he presence of a strong motivation to fabricate or the absence of supporting evidence can, without more, be sufficient to render a declaration inadmissible." *Id.* In addition, "[a] statement which is largely exculpatory and made under circumstances which suggest that it is intended to minimize the declarant's criminal involvement is not 'clearly opposed to the declarant's interest.'" *People v. Raife,* 250 A.D.2d 864, 865 (2d Dep't 1998) (quoting *People v. Crimi,* 137 A.D.2d 702, 702 (2d Dep't 1988)).

Moreover, when a declaration contains parts that are incriminating and parts that are not incriminating, a "careful parsing of the various parts of the declarant's statements is required." *People v. Johnson,* 92 N.Y.2d 976, 978 (1998). The court "should admit only the portion of that statement which is opposed to the declarant's interest," *Brensic,* 70 N.Y.2d at 16, "because "neutral and self-serving statements do not bear the same guarantee of reliability as do the disserving ones contained in the same declaration," *People v. Maerling,* 46 N.Y.2d 289, 299 (1978). Nevertheless, the disserving portion may not be admitted out of the context in which it was given, and to prevent unfair prejudice the court should admit "so

much of the remainder [of the statement] as places [the disserving portion] in an accurate perspective." *Id.* at 298-99.

1. Unavailability and "Against Penal Interest"

Tankleff contends that Harris's invocation of his Fifth Amendment right not to testify renders him unavailable. (Def.'s Mem. of 3/21/05, at 56). The People agree. *See Settles*, 46 N.Y.2d at 167 (holding that declarant is unavailable if he invokes his right against self-incrimination). But the People disagree with Tankleff's contention that "Harris was aware at the time he signed his affidavit and made his statements to Salpeter, Lemmert and Kelly that they were against his penal interest." (Def.'s Mem. of 3/21/05, at 56).

Harris's statements to Kelly were not "contrary to [Harris's] penal interest." According to Kelly, Harris said that although he had driven two people to the Tankleff house, he "didn't know what they did when they went into the house."

Harris's affidavit was also not "contrary to [Harris's] penal interest." Harris claimed that he drove Creedon and Kent to a house at which Creedon claimed there was a safe, that Creedon and Kent exited the car and that Harris lost sight of them at the rear of the house. Harris also claimed that when they returned to the car they were nervous and that Peter was winded, that he drove them to the vicinity of Creedon's mother's house and Kent's mother's house, where he claimed that he saw Kent burning his clothes and asked Kent, "[W]hat happened?" Harris claimed

that it was only *then* that he "realized that something more than a burglary [had] occurred" and that it was not until hours later, after listening to the radio, that he "put two and two together" and deduced that he "*might* have been involved with something that [had] happened in Bel[le Terr]e" (emphasis added). Thus, contrary to Tankleff's claim that Harris "was admitting his involvement in two brutal murders," (Def.'s Mem. of 3/21/05, at 56), Harris was admitting his involvement in a burglary and was *denying* "his involvement in two brutal murders." The statute of limitation for all degrees of burglary expired on September 7, 1993, *see* Penal L. §§ 140.20, 140.25 and 140.30; C.P.L. § 30.10(2)(b), nearly ten years before Harris provided Salpeter and Barket with an affidavit. And even though there is no statute of limitation for felony murder, *see* P.L. §§ 125.25(3), C.P.L. § 30.10(2)(a), Harris's affidavit sets forth the four criteria of the affirmative defense to felony murder. Harris:

> (a) [d]id not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) [w]as not armed with a deadly weapon, or any instrument . . . readily capable of causing death or serious physical injury . . . and (c) [h]ad no reasonable ground to believe that any other participant was armed with such a weapon . . . and (d) [h]ad no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

People v. Caicedo, 234 A.D.2d 379, 380 (2d Dep't 1996) (alteration in original) (quoting Penal L. § 125.25(3)).

Although in his affidavit Harris omitted having observed blood or a weapon and denied to Salpeter the existence of either, (HT of 7/19/04, at 22, 117, 119-20, 221), Lemmert, Ram and Salpeter testified that Harris later revealed the existence of both. But Harris's revelation was not contrary to his penal interest. Harris admitted to having observed blood only *after* Creedon and Kent returned from the Tankleff house to the car, and he admitted to observing a pipe even later, on the ride home.

According to Lemmert, Harris told him that Creedon and Kent had "directed [Harris] to a wealthy looking house which they were going to presumably rob," that he "stayed in the car and [that] those two other gentlemen went in" and that "*when they came back* . . . he saw blood on them." (HT of 7/27/04, at 9-10, 18) (emphasis added). Similarly, according to Ram, Harris said, "[H]e went in with the mind that they were doing a burglary, or something; not going to do what they did. . . . They came running out of the house. They had blood on them." (HT of 10/26/04, at 13-14). And according to Salpeter, Harris mentioned seeing the pipe when Harris, Creedon and Kent were *leaving* Belle Terre. (HT of 7/19/04, at 41, 153).

Irrespective whether Harris's affidavit and statements to others were, in fact, against his penal interest, he was unaware that this was so. Although Tankleff contends that "Harris was aware at the time he signed his affidavit and made his

statements to Salpeter, Lemmert and Kelly that they were against his penal interest," (Def.'s Mem. of 3/21/05, at 56), he undercuts this contention by also contending that "Harris' affidavit and the testimony of Salpeter, Lemmert and Kelly regarding Harris' statements indicate that [he] was an eyewitness to, and participant in (*albeit unwittingly*), the Tankleff's murders," (*id.* at 54) (emphasis added). Moreover, Reicherter's polygraph examination, Harris's letters to Salpeter, Salpeter's assurances to Harris and Harris's stunned look when Warkenthien told him that he might be trading places with Tankleff demonstrate that Harris believed that he was *not* incriminating himself.

In administering the polygraph examination, Reicherter asked Harris: (1) "Did you know before you arrived at the Tankleff house that Steuerman wanted the Tankleff[]s killed?"; (2) "When you were driving Kent and Creedon to the Tankleff house, did you know they were going to kill the Tankleffs?"; and (3) "When you, Kent and Creedon left the Tankleff [h]ouse that night, did you know then [that] the Tankleffs had been stabbed?" Regardless of Reicherter's or the Tankleff defense's reason for asking these questions, Reicherter's opinion that Harris's truthful "No" answer to each question would have led Harris to conclude that he was insulated from criminal liability.

Harris expressed his innocence in an early September 2003 letter to Salpeter, writing, "I'm saying they went in under the auspices to commit a burg. . . . I knew

nothing else!" He maintained his innocence in a September 14, 2003, letter to Barket, writing, "I had no knowledge what was gonna take place. I thought it was a burglary or some type of drug deal. I had no idea that 2 elderly people . . . were gonna get snuffed out." And although, in his letter to Barket, Harris expressed being *worried* that he was going to "be found just as guilty . . . as the perpetrators," he also wrote that Salpeter had assured him that, "on a scale of 1 to 10," the chance of Harris "not getting caught up" was "8 or 9." And at the hearing, Salpeter conceded that it was "very possible" that he had told Harris that he had nothing to worry about. (HT of 7/19/04, at 168-69, 200, 220-21). It may not have been until October 6, 2003, when Warkenthien shared his understanding of felony murder with Harris and told Harris, "[Y]ou may be very well changing places with Marty Tankleff," that anyone had told Harris that the chance of his "not getting caught up" in the murder were not as good as he had believed.

2. Competent Knowledge of the Facts

Tankleff contends that Harris "was personally involved in the murders and therefore had competent knowledge of the facts." (Def.'s Mem. of 3/21/05, at 56). But in his letters, in his affidavit and in his statements to others, Harris *denied* being personally involved in the murders and, other than his statement that Creedon returned to the car with gloves, he has demonstrated an ignorance of the facts.

In his letters to Salpeter, Harris wrote that the Tankleff house "wasn't too far into Belle Terre," "right inside the gates," either "on Belle Terre Road" or "just off it," and that "it was a quick turn-around to get out." And in one letter he wrote, "It coulda been one of the first lefts and on the right." But the Tankleff house was deep into Belle Terre, well past the gates. It was not on Belle Terre Road, but on Seaside Drive, and the only way to get there was via Cliff Road, which begins at the border of Port Jefferson and Belle Terre, to Crooked Oak Road and then to Seaside Drive. It was not until March 21, 2004, with Salpeter accompanying him, that Harris correctly identified the Tankleff house.

Harris was also ignorant about the date and time of the murders. In his affidavit, Harris stated that the murder occurred "in early September 1988," and he told Warkenthien that "this all happened sometime in September, maybe the 2nd or 3rd, even though in a letter that preceded the affidavit and interview with Warkenthien he had given the correct date of September 7th. As for the time of day, in one letter he stated that he did not recall the time, and in another letter he stated, "I don't know where this comes from Jay, but I remember twilight."

Moreover, neither in his affidavit nor in his conversations with others has Harris ever stated how the murders occurred. Indeed, in one letter to Salpeter, Harris asked if there was a "sign of a forced entry," if it was "an invasion," if there was any "physical evidence" and if the "safe [was] taken." In another letter to

Salpeter Harris wrote, “If I remember correctly from the news accounts some sort of dumbbell was used, no? That was used in the bludgeoning? No, or yes? I need to know.” And still in another letter Harris asked, “Listen, what was used to kill the Tankleffs? I need to know. Did they pinpoint the murder weapon? Was it actually a dumbbell? Was it left at the scene? Were they stabbed? What kind of wounds, if so? Slash or puncture[?]”

3. Corroboration

The fourth prerequisite of admissibility for a declaration against penal interest – “whether circumstances independent of the hearsay declaration itself are present which fairly tend to support the assertions made and thereby assure their trustworthiness and reliability” – is “the most important inquiry.” *Thomas,* 68 N.Y.2d at 200. And although when the declaration is exculpatory it is sufficient if the supportive evidence establishes ‘a *reasonable possibility* that the statement *might* be true,’” *Darrisaw,* 206 A.D. at 664 (quoting *Settles*, 46 N.Y.2d at 169-70), “certain considerations may be fatal to the reliability of a declaration and thereby render the out-of-court statement inadmissible,” *Shortridge*, 65 N.Y.2d at 312-13. The court in *Shortridge* held that “[t]hese considerations include the declarant's motivation – e.g., whether the statement was designed to exculpate a loved one or inculpate an enemy,” and “the declarant's personality – e.g., whether he suffers psychological or emotional instability.” The court held that “*the presence of a*

strong motivation to fabricate or the absence of supporting evidence can, without more, be sufficient to render a declaration inadmissible" (emphasis added). *Id.* at 313.

In his letters, Harris wrote that he "always disliked" Kent and that he had "disdain for Creedon." He admitted that he was "a criminal, a drug addict [and] mentally ill." Indeed, he admitted that he was taking medication – Lithium and Zyprexa – for his mental illness, and that the medication was "making [him] hallucinate.

Harris has been inconsistent with respect to the date and time of day of the murders. He knew nothing of the details of the crime. Indeed, his letters to Salpeter are replete with *questions* how the crime occurred. Harris even wrote, "Jay, I didn't know I had this in my closet. It had to be probed. The mind is a terrible thing to waste! And mine is shot! But it is starting to reawaken, to rejuvenate, to be re-born."

Moreover, after writing Salpeter daily or at least weekly for several months, on or about July 9, 2002, Harris wrote his "I lied Jay" recantation letter, in which he stated that he had made up everything and explained his motivation for doing so. Although over a year later Harris reverted to his pre-recantation story, he was seeking, and receiving, assurances that he could help Marty without exposing himself to criminal liability.

Tankleff's reliance on *Darrisaw,* 206 A.D.2d 661, and on *People v. Fonfrias,* 204 A.D.2d 736 (2d Dep't 1994), is misplaced. In *Darrisaw,* the evidence showed that only the defendant Darrisaw, or his friend, the declarant Maiola, or both, committed the crime. Within days of Darrisaw's arrest, Maiola provided an affidavit in which he stated, under the penalties of perjury, that the drugs were his and not Darrisaw's. After obtaining counsel, Maiola retracted his statement, but independent evidence corroborated the information contained in his affidavit. *Darrisaw,* 206 A.D.2d at 663-65. In *Fonfrias,* the declarant "made . . . declarations to an individual . . . a day after the shooting; he subsequently repeated them to several members of the defendant's family and, yet again, to an investigating detective after having been advised of his *Miranda* rights. These declarations were each made within a short time after the crime, and at least two of the declarations were taped." *Fonfrias,* 204 A.D.2d at 738. In contrast, Harris provided an affidavit and gave statements to others[91] more than thirteen years after the murders, after he demonstrated an ignorance of the murders, after he pumped Salpeter for details and after he had recanted. *See United States v. Bahadar,* 954 F.2d 821, 826-27, 829 (2d Cir. 1992) (upholding district judge's ruling denying admission of exculpatory affidavit from an unavailable witness who was "all over

[91] Ram testified that Harris said something about the murders about a year after the murders occurred. The People discuss Ram's testimony, *infra.*

the place" and whose repeated changes . . . would properly make any district judge suspicious of the statement's reliability."

Tankleff's reliance on *People v. Robinson*, 89 N.Y.2d 648 (1997), and *People v. James*, 242 A.D.2d 389 (2d Dep't 1989), is also misplaced. The court in *Robinson* and the court in *James* held that "*Grand Jury testimony adduced by the prosecution*" may be admitted at trial as an exception to the general prohibition against hearsay where the testimony "bears sufficient indicia of reliability." *Robinson*, 89 N.Y.2d at 654; *James*, 242 A.D.2d at 389 (emphasis added). Harris has not testified in the grand jury. As for Tankleff's reliance on the Federal Rules of Evidence, here, too, his reliance is misplaced. Tankleff contends that Harris's statements would be admissible under Rule 807, the residual-exception rule,[92] because Harris's statements were trustworthy coconspirator statements made during the course of and in furtherance of a conspiracy. (*See* Def.'s Mem. of 3/21/05, at 57 n.53) (citing Fed. R. Evid. Rules 801(d)(2)(e) and 807). But Harris gave his declarations more than 13 years after the conspiracy he claims to have existed had ended. Thus, he did not make his statements during the course of or in furtherance of a conspiracy. *See United States v. Bahadar*, 954 F.2d at 829 (holding that because exculpatory "statement lacked 'corroborating circumstances'

[92] It is questionable whether New York has a residual-exception rule. *See People v. Brown*, 166 Misc. 2d 539, 543 (Sup. Ct. Kings Co. 1995) (holding that "in New York there is no residual, or 'catch-all,' exception"); *see also Triple A Auto Driving School v. Foschio*, 107 A.D.2d 641, 641 (1st Dep't 1985) (holding that "the residual evidence rule, if ever it had validity in this State, no longer [does]").

clearly indicating its trustworthiness as required [of a statement against penal interest], the statement obviously lacks 'equivalent circumstantial guarantees of trustworthiness' . . . [to] have been admitted under . . . the 'residual exception'").

And contrary to Tankleff's contention, *Morales v. Portuondo,* 154 F. Supp. 2d 706 (S.D.N.Y. 2001), did not involve statements "similar to the [statements] in this case." (Def.'s Mem. of 3/21/05, at 58). In *Morales,* shortly after the defendant was convicted and before he was sentenced, another person told a priest that two of his *friends* had been convicted of a murder that he and two others had committed. After speaking with the priest, Fornes repeated his statement to the defendant's mother and then to the defendant's lawyer, but after obtaining an attorney he refused to testify at a hearing. *Id.* at 711-14. Here, Harris waited nearly fifteen years to provide an affidavit, he provided the affidavit thirteen months after he had recanted, he inculpated not his two friends but two persons he disliked and did so while implicating himself, at most, in a time-barred burglary. Harris's statements fail to qualify as declarations against penal interest.

B. Statements Not Offered for Their Truth

Tankleff contends that Graydon's testimony that Creedon told Graydon that one Strathmore partner had hired Creedon to kill the other partner "will be admissible because it will not be offered for [the] truth . . . but . . . to show [that] the mere fact that it was made . . . tends to implicate Creedon in the Tankleff

murders." (Def.'s Mem. of 3/21/05, at 63). Tankleff also contends that Ram's testimony that Creedon asked Ram to help Creedon "harm 'a Jew in the bagel business'" and that Harris admitted to Ram that Harris, Creedon and Kent "had done something bad" will be admissible because "they will be offered not for the[] truth . . . but rather to show that these statements were made on the night before and the day after the Tankleff murders." (*Id.* at 65). Tankleff's contentions are meritless.

The hearsay rule is not implicated unless a statement is offered for the truth of the matter asserted. *See, e.g., People v. Goodman,* 59 A.D.2d 896, 897 (2d Dep't 1977).[93] But Graydon's claim that, weeks before the murders, Creedon told him that one Strathmore partner had hired Creedon to kill the other partner would "implicate Creedon in the Tankleff murders" only if Creedon's statement were offered for the truth that Steuerman had hired Creedon to kill the Tankleffs and that Creedon had intended to do so. And Ram's claim that, the night before the murders, Creedon requested his assistance to harm "a Jew in the bagel business," and his claim that, the day after the murders, Harris stated that he thought that Harris, Creedon and Kent had done something bad, would be irrelevant unless offered to show that Creedon wanted to harm "a Jew in the bagel business" and

[93] A statement is not hearsay when "it is offered solely to show its effect on the person who heard it," *People v. Weinberg,* 190 A.D.2d 767, 768 (2d Dep't 1993), such as when, in a defense to burglary and possession of stolen property, a defendant seeks to establish that, based on what another person had told him, "he believed he had permission to enter the complainant's apartment and remove her property," *People v. Martinez,* 154 A.D.2d 401, 401 (2d Dep't 1989).

that Harris had thought that he, Creedon and Kent had done something bad. *See People v. Emick*, 103 A.D.2d 643, 645, 647-48, 659 (4th Dep't 1984) (rejecting argument that statement hours before murder that defendant had no choice but to kill her abusive husband was offered not for its truthfulness but to show climate hours before shooting); *see also Reynoso*, 73 N.Y.2d at 819 (holding inadmissible defendant's statement that his victim had been armed because it "was irrelevant unless offered to prove the truth of the matter asserted – that defendant believed [that his] victim [had been] armed"); *People v. Middleton*, 143 A.D.2d 1053, 1055 (2d Dep't 1988) (finding unpersuasive defendant's contention that his statement that he had not committed the crime was being offered for a reason other than for the truth).

C. State of Mind

Tankleff has *not* contended that Creedon's alleged statements to Graydon and to Ram would be admissible to show Creedon's state of mind. But the People feel obligated to inform the Court that Tankleff could have made a good-faith state-of-mind argument with respect to *some* of Creedon's alleged statements.

Statements "may be received to show the declarant's state of mind at the time the statement[s] w[ere] made." *Id.* "The reasons for the state of mind exception focus on the contemporaneity of the statement and the unlikelihood of deliberate or conscious misrepresentation," and "a determination of whether a

statement falls within the state of mind exception requires a predicate finding as to whether the statement relates to a then existing state of mind or to a past memory or belief offered to prove the fact remembered or believed." *People v. Cardascia,* 951 F.2d 474, 487-88 (2d Cir. 1991); *see Reynoso,* 73 N.Y.2d at 819 (holding that defendant's statement to his sister that he believed that his victim had been armed was inadmissible because its only relevance would have been to support his justification defense and to establish the past fact of his prior beliefs); *People v. Sostre,* 70 A.D.2d 40, 42-43, 45-46 (2d Dep't 1979) (holding inadmissible defendant's statement minutes after event that "complainant shot him for nothing").

Creedon's alleged statements to Graydon that, at the request of one Strathmore partner, Creedon had asked Graydon to rob and murder the other Strathmore partner would be inadmissible because they would be offered to prove "the past fact" that Steuerman had hired Creedon. Similarly, Harris's alleged statements to Ram that Harris believed that he, Creedon and Kent *had done* something bad the prior evening would be inadmissible because they, too, would be offered to prove a past fact.

But although the state-of-mind exception does not apply to prove a fact remembered, it may apply to a "statement of intention to perform a subsequent act" to show "that the act was in fact performed." *People v. Bongarzone,* 116 A.D.2d

164, 169 (2d Dep't 1986). Graydon testified that Creedon had offered him an equal share of $25,000 if he *would* drive Creedon to kill a Strathmore partner and steal "the weekend money" to make the murder look like a robbery. Similarly, Ram testified that Creedon had requested Ram's assistance to harm "a Jew in the bagel business." Creedon's alleged statements to Graydon could be offered to show that Creedon intended to kill a Strathmore partner, and Creedon's alleged statements to Ram could be offered to show that Creedon intended to "straighten out" "a Jew in the bagel business" who lived in Belle Terre[94]

Although, in the People's view, Graydon and Ram testified falsely, their testimony might still be admissible under the hearsay exception for statements of intention to perform a subsequent act.

D. Due Process

Tankleff contends that Harris's affidavit and statements to others, and Creedon's alleged statements to Graydon, would also be admissible, as would Creedon's alleged statements to Kovacs, Guarascio, Foti and Ram, and Todd Steuerman's alleged statements to Demps, and Jerry's Steuerman's alleged statements to Fischer, "based on [] Tankleff's due process rights."[95] Tankleff cites

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[94] Because Creedon's alleged statements do not implicate a third person, there is no requirement that Creedon be unavailable or of independent evidence of reliability. *See People v. James,* 93 N.Y.2d 620, 632-35 (1999); *Bongarzone,* 116 A.D.2d at 169.

[95] Although Graydon's and Ram's testimony concerning Creedon's statements to them might be admissible to show Creedon's intent, the Court may disagree. The People therefore

Chambers v. Mississippi, 410 U.S. 284 (1973), and New York cases that rely on *Chambers*, to support his contention. (Def.'s Mem. of 3/21/05, at 57-58, 60, 63, 65-67). But *Chambers* does not does not support his contention, and his contention is meritless.

In *Chambers*, the defendant Leon Chambers was on trial for shooting and killing a policeman with a .22-caliber revolver during a melee in June 1969. Five months later, Gable McDonald, a man who was present during the melee, told three friends and then Chambers' attorneys that he had shot and killed the policeman. McDonald provided the attorneys with a written confession, which the attorneys turned over to the police. But one month later, McDonald repudiated his confession. At Chambers' trial, although the trial court permitted Chambers' attorneys to call McDonald as a witness and to introduce his confession into evidence, under Mississippi's rules of evidence the court prevented Chambers' attorneys from treating McDonald as a hostile witness and from calling as witnesses the friends to whom McDonald had confessed. The Mississippi courts ruled that McDonald's statements were hearsay and that, because Mississippi lacked a hearsay exception for declarations against penal interest, the courts could not admit the statements under that exception. The Supreme Court held that Mississippi had denied Chambers "a trial in accord with traditional and

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address independently whether such testimony would be admissible based on Tankleff's due process rights.

fundamental standards of due process." *See id.* at 285-94, 298-99, 302. The Court stated:

> Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. at 302. The Court found that "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." The Court explained:

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case – McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest. McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must

> have been aware of the possibility that disclosure would lead to criminal prosecution.

Id. at 300-01.

Tankleff contends that "testimony regarding Creedon's admissions to involvement in the Tankleffs' murders" "is almost identical to the testimony the U.S. Supreme Court determined was improperly excluded in violation of the defendant's rights in *Chambers.* (Def.'s Mem. of 3/21/05, at 60). But whereas the excluded testimony in *Chambers* "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest," Harris's affidavit and statements to others, and the testimony that Tankleff elicited from Kovacs, Guarascio, Foti, Ram, Graydon, Demps and Fischer, were untrustworthy. In *Chambers*, "each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred." In Tankleff, each of Creedon's alleged statements, and Todd Steuerman's and Jerry Steuerman's alleged statements, though made spontaneously, was made to a person the declarant barely knew or did not like, or to a person who did not like or no longer likes the declarant, and, in most instances, years after the murders.[96] In *Chambers*, each statement "was corroborated by some

[96] Graydon testified that Creedon made statements about five weeks before, and again shortly before, the murders; Ram testified that Creedon made statements the day before, and a year or two after, the murders; and Fischer testified that Jerry Steuerman made statements about nine or ten months after the murders. Yet neither Graydon, Ram nor Fischer came forward until 2004, after the current 440 hearing started. Kovacs and Guarascio testified that Creedon made

other evidence in the case – McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon." In Tankleff, each statement was corroborated only by the other statements, and even then only in part: Kovacs testified that Creedon implicated only himself and "a Steuerman," Demps testified that Todd Steuerman implicated only Jerry Steuerman and an unidentified member of the Hells Angels, and Fischer testified that, with his head inside a cabinet, he heard Jerry Steuerman threaten to kill a bagel-oven seller just like he had killed two other people.

Compared with McDonald's confessions in *Chambers*, Todd Steuerman's statements were neither incriminatory nor against his interest, and each of Creedon's statements was not obviously "incriminatory and against his interest." (Def.'s Mem. of 3/21/05, at 61, 67). In *Chambers*, "McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution." But "confessions of criminal activity are often motivated by extraneous considerations," *Chambers*, 410 U.S. at 299-300, and, unlike in

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statements in 1990 or 1991, but Kovacs remained silent until 1994, and Guarascio stated in 1994 that Creedon *had not* made any statements. Foti testified that Creedon made statements sometime in the 1990s, but Foti did come forward until 2003. Demps testified that Todd Steuerman made statements in 1990, but Demps did not come forward until 1997.

Chambers, and Creedon did not make the alleged statements under circumstances that would have led him to think that the statements would lead to a criminal prosecution. *See People v. Esteves*, 152 A.D.2d 406, 414 (2d Dep't 1989) (holding that "an exculpatory hearsay statement which does not fall within the specified categories of hearsay exceptions may be admissible *provided the statement is critical to the defense and is otherwise reliable and trustworthy*").

Merits

Tankleff recognizes "that any effort to vacate convictions for murders . . . almost 17 years ago[] is a 'long shot' in our judicial system." But he contends that, based on the evidence that he presented at the 440 hearing, "this Court should step in and do the right thing" because "the odds that any 'reasonable juror' . . . 'could convict [him]'" after hearing such evidence "is absolutely[] and unequivocally[] 'zero.'" (Def.'s Mem. of 3/21/05, at 1, 6). According to Tankleff:

> At [his] trial, the jury was given scant evidence upon which to base its verdict. The physical evidence connecting him to the murders was absolutely nonexistent. The motive offered was paper-thin. The confession presented was false, had been elicited . . . through coercive tactics, and he [] immediately disavowed it. . . . [T]he jury struggled with the case; after a full week of deliberations, it ultimately convicted him through a compromised verdict, which was based almost exclusively on the false "confession."

(*Id*. at 6). Tankleff contends that "[t]he jury was not . . . privy to the substantial body of evidence recently presented at [his] 440 hearing," evidence that, according

to Tankleff, "demonstrated that he is actually innocent of the crimes of which he was convicted" and that "Peter Kent and Joseph Creedon murdered Seymour and Arlene Tankleff[] at the behest of Jerry Steuerman." (*Id.* at 6-7).

A. Tankleff's Guilt

Tankleff's contentions are just additional short stories in the book of myths that he began writing shortly after "finding" his parents on the morning of September 7, 1988. On that day, he called 911 at 6:11 a.m., and by 6:27 a.m. he was stating with certainty that Jerry Steuerman had committed the "murders," even though an "innocent" Marty who had slept through the attacks should have had no idea who had attacked his parents and even though Seymour was still alive. But by 6:40 a.m. Tankleff realized that framing another for one's own murderous acts would become difficult if one of the victims survived, and when family friend Donald Hines told Tankleff that Seymour had never expressed a fear of Steuerman and might regain consciousness and identify his attacker, Tankleff's eyes widened, and he exited Hines's vehicle without uttering a word and walked away.

Tankleff had a few minutes to think, and he tried a refined version of his story on John McNamara, who was on a morning walk. But a few minutes proved to be insufficient, because when Tankleff told McNamara how Tankleff had lifted the heavily bleeding Seymour and placed him on the floor, McNamara asked

Tankleff why he did not have any blood on him. Once again, Tankleff walked away without uttering a word.

Possessing an I.Q. of 124, Tankleff was not stupid, and he knew that his statements to Hines and McNamara lacked credibility. So Tankleff kept refining his story, but each time he did so he ran into new difficulties. And it was not until he spoke with Mayor Bove – after one conversation with Hines and two conversations with McNamara – that Tankleff mentioned finding Arlene. But Tankleff's version to Bove contradicted the version that Tankleff had just given to McNamara. Tankleff told Bove "that he went to the card room and saw his father in a chair with blood all over him, that he ran . . . to the bedroom and, seeing his mother lying between the bed and the door, called 911." But minutes earlier Tankleff had told McNamara that, after finding Seymour, "[h]e . . . called 911 and[,]. . . concerned that his mother was not around[,] . . . went to the garage and opened . . . and . . . closed the garage door and . . . went out of the house screaming." And Steuerman was already proving to be a more difficult person to frame than Tankleff had predicted. When Tankleff told Bove, "Jerry Steuerman did it," Bove replied, "[M]arty, what makes you say that? We played cards last night and nothing took place at the card game."

One problem that needed explaining was why on his initial trip to his parents' bedroom Tankleff failed to see Arlene on the floor only a few feet in front

of him.[97] And at about 7:55 a.m., Tankleff offered an explanation to Detective McCready. Tankleff stated that the bedroom "was dark" and "that the drapes were drawn and that he could not see anything." But, unbeknownst to Tankleff, McCready had just come from the bedroom and knew what Officer Gallagher had learned upon entering the bedroom shortly after 6:17 a.m.: that the drapes were open and that it was light outdoors *and* inside the bedroom.

Tankleff was lying, and when he stated that he had rendered first aid to Seymour, McCready, who observed that the only blood on Tankleff was a blood spot on his right calf and a blood spot on his right instep, became more suspicious. As McNamara had asked Tankleff about an hour earlier, McCready asked Tankleff, "Do you have blood on you from, after you helped your father?" But whereas Tankleff had declined to answer the question of McNamara, a man on a morning walk, Tankleff was not about to decline to answer an important question from a homicide detective. So Tankleff answered, "My hands were covered with blood" and "I washed them in a puddle," thinking that his answer would satisfy McCready. But Tankleff also stated that he had called 911 from the office telephone, that he had called Shari and Mark Perrone from the kitchen telephone and that he had checked the garage for his mother's car, and McCready returned to

[97] Although Tankleff was not wearing his glasses or contact lenses when, according to him, he checked the bedroom, he also was not wearing his glasses or contact lenses when, in front of his house, he saw – and identified – Myron Fox.

the house to see if Tankleff's statements squared with the physical evidence. The telephone in Seymour's office had unsmeared bloodstains, which meant that no one had used that telephone after the attacks. The kitchen telephones and the garage door contained no blood, which meant that Tankleff did not get blood on his hands until after he called Shari and Perrone and went to the garage, that is, *if* he went to the garage. Indeed, when a few minutes later Tankleff attempted to recite the morning's events to Sergeant Doyle, Tankleff did not mention having gone to the garage.

In explaining events to Detective Rein, Tankleff once again struggled to explain how he did not see Arlene on the floor. Unaware that the drapes were open, Tankleff stated that when he entered his parents' bedroom it was "totally dark." But when he said that he could tell that his parents were not in bed, he made a mistake: whatever amount of light enabled him to observe that his parents' were not in bed was enough for him to observe his mother on the floor.

Rein, Doyle and McCready conferred, and based on the discrepancies in Tankleff's statements and his "lack of emotion" and "whole demeanor," Doyle directed McCready to ask Tankleff to accompany detectives to headquarters. And although Tankleff and his attorneys have always contended that the detectives almost immediately suspected Tankleff and never suspected Steuerman, Tankleff's lack of emotion and series of false statements would have led *any* rational detective

to suspect him. But Doyle did not focus only on Tankleff, and Doyle directed other detectives to interview all of the card players. And in directing the detectives to interview Steuerman last, Doyle was at least considering Tankleff's accusation against Steuerman.

Although the detectives suspected Tankleff, they treated him well, and when McCready and Tankleff reached police headquarters, McCready gave Tankleff a seat in an interview room and gave him a cup of coffee. The interview started at about 9:40 a.m., and McCready and Rein did not become accusatory until 11:15 a.m., when McCready observed something underneath Tankleff's partially unzippered, clean sweatshirt: a large bloodstain on Tankleff's right shoulder. And after Tankleff repeated his story of what happened, Rein and McCready showed Tankleff that his statements contradicted the physical evidence. Tankleff said that when he entered his parents' bedroom at about 6:10 a.m. the drapes were closed and it was dark, but McCready interrupted that when he awoke at ten minutes to six it was already light out and that the bedroom drapes were open about three feet. So Tankleff backpedaled, responding that it was light enough that somebody would have seen him but that he did not see his mother.

But when Rein and McCready asked Tankleff how he could have administered first aid to his father without getting blood on his clothes or at least on his sleeves, Tankleff answered that he had rolled up his sleeves. But when

McCready replied, "Marty[,] you have blood on your shoulder," a desperate Tankleff said, "Before I helped my father, I dropped my sweatshirt around my elbows." Tankleff's explanation deepened the hole that he was digging for himself. Rein pointed out:

> I said to him, "Now, that's absurd, Marty. You're telling us that in a moment of your father's most critical life threatening situation you took the sweatshirt and you dropped it around your elbows, making flippers out of your arms, [] rendering yourself totally ineffective to give first aid to your father? . . . Your father could have been bleeding to death and you're concerned about getting blood on your clothes?"

When Tankleff came back with, "No. Maybe I put on my sweatshirt after I gave first aid to my father," Rein and McCready pointed out, "You have blood on your hands, you have blood on your shoulder. When did you have time to get a sweatshirt? Where was it? Did you go back to your room? You never went back to your room. You would have gotten blood on it." So Tankleff tried, "I put the sweatshirt on after the police arrived," but Rein and McCready reminded him that he was wearing a sweatshirt when the police arrived.

Rein and McCready asked Tankleff to repeat what he did after rendering first aid to his father, and Tankleff, who said that he had blood on his hands, repeated that he had gone to the garage, opened the garage door and looked for his mother's car. But when McCready replied, "Well, I checked that after I had spoken to you back in the street," and . . . [t]here's no blood on that at all,"

Tankleff had no response, because he knew that no explanation could account for the lack of blood on the garage door. And when Rein and McCready had Tankleff repeat that he "rushed into the kitchen and he telephoned his sister" and, after checking on Seymour, "went back into the kitchen and [] answered the phone," McCready pointed out, "'There's no blood on those phones and you said you had blood on your hands.'" Once again, Tankleff was silent. Rein then reminded Tankleff that Tankleff had said that he had cried his "heart out at the house before the cops arrived," but Rein pointed out, "When you cry, you wipe your eyes and dab your nose," and "I don't see any blood on your face." Once again, Tankleff was silent.

Observing that Tankleff was at the brink, McCready left the room and staged a call to the hospital. During McCready's absence, Rein explained that in every excessive-bleeding case in which Rein was involved, blood transferred from the victim to Rein's clothes. And when Rein told Tankleff that Rein found it hard to believe that Tankleff did not have blood on his clothes, Tankleff, now out of explanations, was silent. McCready then returned to the room and told Tankleff that Seymour had regained consciousness and said that Tankleff had "beat and stabbed" him. Moments later, Tankleff cracked, saying, "It's not likely it's me but it's like another Marty Tankleff that killed them. . . . Could I be possessed? . . . It's

coming to me." McCready read Tankleff *Miranda* warnings and Tankleff confessed.

Tankleff has always argued that the detectives coerced him into confessing. Every judge that has considered the coercion question has disagreed, and in 1997 U.S. District Judge Thomas C. Platt best described what happened on the morning of September 7th:

> Normal behavior on the part of [Tankleff] would not follow the pattern that occurred here culminating in a full confession after *Miranda* warnings.
>
> Appropriate professional behavior on the part of the police, on the other hand, would have followed the practice that occurred here. There was no leap to a premature conclusion, there was an opportunity given to a possible suspect away from the highly charged, stressful scene to offer whatever explanation he wished to give and there was a test made of his explanation which revealed to the son the futility of his position. Thereafter, the arrest was made, warnings were given and a voluntary confession was given by the son which was corroborated by the scene at the crime itself.

Tankleff v. Senkowski, 993 F.Supp. 159, 159-60 (E.D.N.Y. 1997).

One of the enduring myths is that Tankleff's confession did not match other evidence in the case, including the physical evidence. Contrary to the testimony of Tankleff's relatives, who in July 1988 spent ten days at the Tankleff house, Tankleff was not fond of his parents and his parents were not fond of each other. In late August 1988, Tankleff spoke of having his parents killed so that "he could get any car that he wanted," and on the eve of the murders – which was also the

eve of Tankleff's first day of school – Tankleff complained that he did not "want to drive that piece of shit [Lincoln] to school" and that "he wasn't a fucking nigger."[98] And just hours before the murders, Seymour stated that he wanted to "go down to Atlantic City and get out of the area for a while" because he and Arlene were having problems and were "at each other's throats." And when Tankleff confessed, "My mother and father once had a very loving relationship but since then they have been fighting, [and] I've been caught up in the middle," and that he resented having to drive "that crummy old Lincoln," he was telling the detectives something that matched other testimonial evidence to which the detectives were not privy. He confessed to attacking his parents with a barbell and the "knife on a counter by the watermelon," and crime scene detectives found the barbell in a position different from where Viera had last seen it and the knife in the kitchen in a position different from where Bove had left it. And even though neither the barbell nor the knife had any traces of blood, Tankleff confessed to having washed them in the shower, and Baumann testified that the sponge recovered from Tankleff's bathtub contained a five-inch slit running along its length. Although Tankleff has contended that the barbell and the knife, and the trap beneath the bathtub, should have contained traces of blood, (Def.'s Mem. of

[98] Although one could argue that when Tankleff spoke of having his parents killed so that he could get a better car he was trying to be funny, there was nothing funny when, just seven days after Seymour died, Tankleff told Audra Goldschmidt that "once he inherits that money he'll be able to take [Audra and her sister Stacey] out[]" "[i]n a limousine." (T 171-73, 177, 181, 184, 193-94).

10/2/03, at 40), neither at the trial nor in any of his post-trial motions – including the current 440 motion – has he offered any scientific evidence to support his contention.[99]

Moreover, the confession matched the crime scene and Arlene's and Seymour's wounds. Tankleff admitted that he attacked his mother in her bed with the barbell, that she fell to the floor and that he used the knife to cut her throat and stab her. Deputy medical examiner Vernard Adams concluded that Arlene had received her head injuries just prior to receiving her incised injuries and that she had moved after sustaining the head injuries. Tankleff confessed that, as Seymour sat in his chair, Tankleff came from behind and, using the barbell, "just knocked him silly" and then used the knife to slash Seymour's throat. Crime-scene detective Charles Kosciuk testified that the blood patterns and the pooling of blood showed that Seymour was sitting in his chair behind his desk when he was hit, in an up and down motion, with a blunt instrument that sent "cast off" blood to the ceiling. Deputy medical examiner Vernard Adams testified that a sharp blade or blades had caused Arlene's incised wounds and that her "skull fractures [were] consistent with having been caused by the bar[bell]" and that "the size and shape

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[99] Contrary to Tankleff's contention, his failure during his confession to mention whether he wore rubber gloves while committing the attacks or while cleaning up afterward does not exculpate him. (Def.'s Mem. of 3/21/05, at 40). When Tankleff confessed, Rein and McCready were unaware that the killer had worn gloves and never asked Tankleff whether he had worn gloves or, if he did, what he did with them.

of the bar[bell were] roughly the same as the size and shape of the depressed fractures." With respect to Seymour's wounds, although Tankleff contends that George Tyson, the surgeon who operated on Seymour, "testified that he believed that [Seymour's] wounds were most likely caused by a hammer"[100] and that Adams "conceded that the wounds were consistent with having been inflicted by a hammer," (Def.'s Mem. of 10/2/03, at 12-13), these contentions, like most of Tankleff's contentions, are misleading. Tyson testified that Seymour's wounds "had been caused by a hammer *or an object similar to a hammer*. . . . The size and shape of the scalp lacerations as well as the underlying depressed fractures appeared to [have] be[en] produced by a small, rounded, blunt object *of which a hammer would be a good example*" (emphasis added). In his brief, Tankleff left out that Tyson had admitted to having no training in forensic pathology and having conceded that, with respect to the cause and instrumentality of Seymour's death, he would defer to Adams. Adams testified that that Seymour had suffered blows to the head from a blunt instrument or instruments but that the partial healing of Seymour's wounds impaired Adams's ability to determine the weapon or weapons that had caused Seymour's death.[101]

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[100] Tankleff's claim that the killer or killers used a hammer does not square with his claim that Creedon and Kent used a pipe.

[101] Tyson treated Seymour's symptoms in an attempt to save Seymour's life; he was not examining the wounds so that he could predict the cause of death. "[M]istakes in judgments from [hospitals] are exactly why we have autopsies." *See* Gerald Posner, *Case Closed* 309 (1993) (quoting Dr. Michael Baden, chief forensic pathologist for the House Select Committee

Seymour's shirt and pants were saturated with blood, yet Tankleff's sweatshirt, shorts and under shorts contained but one stain on the upper right shoulder of the inside of the sweatshirt, a stain so small that although it tested positive for the presumptive presence of blood, forensic serologist Robert Baumann was unable to say so definitively. The only way that Tankleff could have Seymour's dried blood underneath his sweatshirt and not have it soak through, and have Seymour's blood on a towel at the foot of his bed, would be if, as he said in his confession, he was naked when he attacked Seymour and that he showered and dried himself with the towel but "screwed up."

But the evidence that, probably more than any other evidence, led to the jury's verdict is evidence that Tankleff would like to forget, evidence that he fails to address in his 440 briefs. He testified in his own behalf. And the only way that the jury would have convicted him is if they did not believe him. *See* Robert Gottlieb, *CEO's "Dummy Defense" Was Not So Smart*, Newsday, March 21, 2005, at A38. Gottlieb wrote:

> At the time of [Tankleff's] trial, I believed that calling Tankleff to the stand was the right decision. But over the years, on reflection, I have concluded that it was a mistake.

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on Assassinations). But even Tyson's testimony was consistent with Tankleff's confession. Tyson testified that Seymour had "a very deep cut that went all the way around the neck or almost all the way around the neck" and that it would have been "difficult or impossible" for Seymour's attacker to have caused such wounds if Seymour had been struggling. Tyson also expressed the opinion that the neck wounds were consistent with having been caused by a knife and that whoever inflicted these injuries was very angry.

> Once Tankleff testified, the jury no longer had to decide whether the prosecution proved its case beyond a reasonable doubt but, rather, whether they believed Tankleff. Factors beyond my control -- such as Tankleff's physical appearance on the stand, demeanor, facial reactions, lack of emotion[102] -- all came into play and left a lasting negative impression on the jurors who convicted him.

Id.

Although Tankleff's current attorneys accuse Rein and McCready of "elicit[ing] a fantastical tale of how he allegedly killed his mother and attacked his father," (Def.'s Mem. of 3/21/05, at 10), the only "fantastical tale" told at the trial came from Tankleff's lips. Tankleff denied arguing with Seymour at Liberty Auto Repair. He did not recall speaking with Hines, McNamara or Bove. He testified that he did not know how he managed not to smear the blood on the office telephone or how he managed not to disturb the telephone cord. He could not explain the absence of blood on the other telephones. He testified that he did not know how his father's blood got on his shoulder or how his mother's blood got on his wall or on a tissue in his pocket. To explain how his father's blood got on the towel at the foot of his bed, he testified that he wiped his bloodied hands on the

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[102] Tankleff contends that he was a "[g]entle person" who "had a wonderful, loving relationship with parents," that "[h]e had no motive to kill them" and that, in the "[w]eeks up to murders, [there was] no hostility, no arguing, no threats. (Def.'s Mem. of 3/21/05, at 11-12). But a gentle person who had a wonderful, loving relationship with his parents and who lacked a motive to kill them would not speak of having them killed or of going to a concert in a limousine after they had been killed. But a killer who stood to inherit millions of dollars and who felt that his parents were smothering him would say such things and would have difficulty during his testimony in displaying the love of his parents that he claimed that he had.

towel before putting on his sweatshirt and running out of the house, which would have explained why he did not get blood on his sweatshirt were in not for his showing up at Hova's house with bloodied hands. But perhaps Tankleff's biggest problem, as ADA Collins pointed out in summation, was Tankleff's timeline. The 911 call ended at 6:12 a.m., and the police met Tankleff in front of the Tankleff house at 6:17 a.m. Tankleff, who said he called 911 from Seymour's office, had five minutes to do the following: retrieve a pillow from his room and a towel from the linen closet, return to the office, pull out his father's chair, turn it ninety degrees, try and fail to lift Seymour's legs using the chair lever, lift the 230-pound Seymour out of the chair and place him on the floor, place the pillow under Seymour's feet and a towel over Seymour's neck, run to the garage, turn the garage-door lever, open the door, check for his mother's car, close the door, reenter the house, run to his parents' bedroom, see his mother on the floor, return to the kitchen, call Shari, check on Seymour, answer a call from Shari, call the Perrone house, return to his room, wipe his hands, put on a sweatshirt, run out of the house to Hova's house, wait for Hova to get off the toilet and answer the door and return with Hova to the front of the Tankleff house. And Tankleff had to do all this without getting blood on the garage door, or on any save one doorknob inside the house, or on any of the telephones.

The jury saw Tankleff's testimony for what it was: a lie. Tankleff did not do what he testified that he did, but what Rein and McCready testified that he did: attacked his parents, showered, dressed, called 911, dumped Seymour on the floor, used the telephone and, just before running out of house, dipped his hands in his father's blood to make it appear as if he had rendered first aid to his father. And although Tankleff claims that "[h]e instantly repudiated confession, which remained unsigned and unrecorded," (Def.'s Mem. of 3/21/05, at 10), the reason that the jury did not have the benefit of seeing a written or videotaped confession is that, shortly after executing a *written* waiver of his rights, Fox called headquarters and told the detectives to end the interview, which they did.

At the 440 hearing, Tankleff family friend Paul Lerner testified that he watched Tankleff's trial every day and expected Tankleff to be acquitted, but the combination of physical evidence and the testimony of the witnesses, including the testimony of Tankleff, left the jury with little choice. Unable to accept the jury's verdict, Tankleff, his attorneys and his family members began a crusade to impugn the integrity of anyone who stood between Tankleff and the verdict to which he presumed that he was entitled. They claimed that McCready had admitted prior to trial that he and Steuerman were good friends, they accused a juror of misconduct and Collins of jury tampering and of failing to disclose a conversation between Steuerman and Creedon, and they contended that Tisch had played golf with

McCready and Bove and had attended a post-trial Tankleff victory luncheon with Collins, McCready and Rein. And in Gottlieb's presence, and with his apparent acquiescence, a Tankleff family member wished "the jurors to suffer nightmares for returning a verdict of guilty." When these attacks failed, Tankleff filed a 440 motion in which he accused Collins of committing *Brady* and *Rosario* violations for failing to disclose that McCready knew that Steuerman had once hired Hells Angels to settle a labor dispute, even though Tankleff had no evidence demonstrating that Collins knew this or that McCready had acquired such knowledge before or during the trial.[103]

After the Appellate Division denied Tankleff's direct appeal, Tankleff filed his second 440 motion and again accused Collins of misconduct for failing to disclose an audiotape that the medical examiner had allegedly made during the course of the autopsies. On July 28, 1994, Tisch denied the motion and held that C.P.L. § 440 "incorporates a provision which is 'aimed at discouraging motion proliferation and dilatory tactics'" and that Tankleff could have, and should have, raised his contentions in his first 440 motion. But Tankleff is unconcerned with

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[103] Tankleff contends that, "[s]hortly after the trial, Mr. Tankleff discovered that McCready had known before trial that Jerry Steuerman had, in the past, hired Hell's Angels to rough up his employees," and that the "prosecution team['s . . . fail[ure] to disclose [such] exculpatory evidence" violated its *Brady* obligations. (*See* Def.'s Mem. of 3/21/05, at 89 n.64). Tankleff devoted seven pages of argument to an alleged McCready-Steuerman connection, (*see id.* at 88-95), yet omits that he included this argument in his first 440 motion and that Tisch, in rejecting the argument, found that the alleged McCready-Steuerman connection was not *Brady* material and that, as stated in the text, Tankleff had not even established that McCready had acquired such information prior to or during the trial.

procedural rules, and in his current 440 motion he contends that, "at least around the time when Mr. Tankleff was tried and convicted," "the dramatic differences between Suffolk County and every other New York County in it administration of justice . . . violate[d] the equal protection clause by arbitrarily depriving Suffolk County Criminal defendants of the safeguard available to criminal defendants in other counties." (*See* Def.'s Mem. of 3/21/05, at 98-99). In other words, *all* convictions in or about 1990, not just Tankleff's conviction, should be vacated. Tankleff could have raised this contention on his direct appeals, in his habeas petitions or in any of his prior 440 motions. He did not do so, and he is barred from doing so now. *See* C.P.L. §§ 440.10(3)(a), 440.10(3)(c)).[104]

He is also barred from regurgitating his theory, this time courtesy of Lubrano and Salpeter, "that McCready . . . was a friend and associate of Jerry Steuerman's long before the murders." (*See* Def.'s Mem. of 3/21/05, at 89). Tisch rejected this argument before imposing sentence, and Tankleff declined to pursue it

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[104] Tankleff bases his equal-protection argument on the 1989 report of the New York State Commission of Investigation. Tankleff unsuccessfully sought to introduce the S.I.C. Report at his trial. And in affirming his conviction, the Appellate Division rejected his challenge of that evidentiary ruling.

A court may deny a 440 motion where, having had an adequate opportunity to do so, a defendant failed to raise the present claim in a prior C.P.L. § 440.10 motion. Because Tankleff was aware of the existence of the S.I.C. Report both during his trial and when he filed his prior 440.10 motions, his attempt to rely on the Report to support yet another new theory should be rejected.

As for Tankleff's alternative contention that the Court violated his due process and equal protection rights by "refus[ing] to compel witnesses," by "fail[ing] to order the District Attorney to grant Harris immunity" and by "fail[ing] to disqualify Spota," (Def.'s Mem. of 3/21/05, at 97, 100), Tankleff does not articulate the relief that he seeks for the Court's alleged violation. Even with his history of making frivolous arguments, these arguments are a stretch.

on direct appeal.[105] *See, e.g., People v. Glinton,* 74 N.Y.2d 779, 780 (1989) (holding that "Supreme Court acted within its discretion in denying defendant's motion" where "merits of the 'newly discovered evidence' issue . . . were previously decided on a prior C.P.L. 440.10 motion"); *People v. Graves,* 7 Misc. 3d 1014(A), 2005 WL 937658, *13 (Sup Ct. Queens Co. 2005) (barring defendant's 440 motion because court had decided the issue in defendant's prior 440 motion); *People v. Webb,* 3 Misc. 3d 1105(A), 2004 WL 1152748, at *3 (Sup Ct. Kings County 2004) (barring defendant's 440 motion based on *Brady, Rosario* and prosecutorial misconduct claims that defendant had raised in post-trial, presentencing 330 motion).

B. Timing Matters

Several days after Tisch denied Tankleff's second 440 motion, Karlene Kovacs was telling Tankleff investigator William Navarra that, "[a]fter the Tankleff murders on a subsequent Easter Sunday," she was with John Guarascio at

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[105] At the hearing, Lubrano and Salpeter testified that McCready and Steuerman had known each other for years before the Tankleff murders, in contradiction of McCready's trial testimony. Tankleff asserts that this information is "classic" *Brady* material that should have been disclosed to defendant at trial.

Although Tankleff relied on a different source for the allegation, the claim that McCready and Steuerman were good friends was one of the allegations that he advanced in support of his first 440 motion. Tisch denied the motion on the merits.

C.P.L. 440.10(3)(b) provides that a motion to vacate a judgment may be denied when the "ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding" unless there has been an intervening retroactive change of law. Tankleff does not suggest that such a change of law has occurred.

Guarascio's sister's house where Creedon had told her, "in essence, that he was involved in the Tankleff murders in some way" "with a Steuerman."

Timing may not be everything, but it is something, and it is interesting that Kovacs came forward just days after Tisch denied Tankleff's second 440 motion. What is equally interesting is that although Kovacs gave her affidavit to Gottlieb on August 10, 1994, Gottlieb and Navarra waited until September 7, 1994, to give a copy of the affidavit to the district attorney's office and thereafter did not incorporate the affidavit into a 440 motion. Given the low level of information that Gottlieb had required to prepare Tankleff's prior 440 motions, the logical inference is that Gottlieb and Navarra had investigated Kovacs's claims and that they concluded, as Detective Investigator Thomas McDermott would conclude, that Kovacs's claim was false. At the hearing, McDermott testified that he interviewed Creedon and that Creedon "remembered something to the effect that Todd said that Todd's father would pay a lot of money to have Tankleff's tongue cut out" but that the only thing he knew of the Tankleff murders was that "A Current Affair" had asked to speak with him about the murders. Of course, Creedon had a motive to lie, so it was important for McDermott to interview the others who had heard or learned of Creedon's alleged statement. So McDermott interviewed Guarascio and his sister Terry Covias, neither of whom disliked Kovacs but did dislike Creedon – and they corroborated Creedon's statement. Guarascio "said he knew nothing

about Joseph Creedon and the Tankleff murders" and that although he vaguely recalled that "Creedon had said something about cutting or slashing somebody's tongue out, he did not connect Creedon's statement to Tankleff and that all he knew of the Tankleff case was that "A Current Affair" had been trying to contact his sister Terry and Creedon. Terry Covias also told McDermott that she knew "nothing of [Kovacs's] statement" and that she had never heard from Creedon – with whom she had lived with from 1986 to 1994 – or from anyone else that had been involved in the Tankleff murders. And Guarascio even went so far as to tell McDermott that if Creedon *had* ever implicated himself in the Tankleff murders, Guarascio would have called the police.

At the hearing, Guarascio admitted that he had made these statements to McDermott but testified that he did so to protect his family and Terry from Creedon and that the "truth" is that Creedon had admitted "to . . . being in some bushes, watching a card game[,] . . . pumped up . . . at the time." Covias admitted at the hearing that she had told McDermott in 1994, and indeed still maintained, that neither Creedon nor anyone else had ever told her that Creedon had been involved in the Tankleff murders. Nevertheless, she offered, for the first time since 1994, that that Creedon was doing "collecting," that she saw him beat up many people, that he had also hit her and that he had threatened to set her face on fire. But several months before the hearing, in a recorded statement, Covias stated

that, as far as Creedon having done "collections" or having "beat[en] up people," "that was way before I even met him, that's all hearsay[,] that's all what I heard[,] he didn't do that when I was around."

At the hearing, Covias's hatred of Creedon was obvious from her demeanor and from the content of her testimony, which included her acknowledgement that she had changed her children's last names in an attempt to erase Joseph Creedon from their memories. But Covias lied when she stated that the first contact that she had had with Creedon since moving to Florida in 1995 was at Creedon's sister's house in April 2004 when she came to New York to attend the funeral for Guarascio's wife. Creedon's sister, Maryann Testa, testified that the month before the funeral, she, Creedon and their father went to Florida and visited with Creedon's children and Covias. According to Testa, everyone, including Creedon and Covias, got along so well that "Terry took off from work every day and made excuses to her husband and stayed with us." And although Tankleff would ordinarily have cause to accuse Testa of being biased in favor of her Creedon, Testa took pictures, with Florida's palm trees in the background, of Creedon, the children and a smiling Terry.

C. "If the Facts Don't Fit the Theory, Change the Facts"

Although in August and September 1994 Tankleff and Gottlieb thought so little of Kovacs's credibility that they did not use her affidavit as the basis to file a

new 440 motion, Tankleff's hope of obtaining his freedom, already having partially faded when a divided Appellate Division affirmed his conviction, further dwindled in December 1994 when the Court of Appeals unanimously affirmed his conviction. But some fourteen months later, in February 1996, Tankleff retained new counsel[106] and filed a habeas petition in the United States District Court for the Eastern District of New York. In his petition, Tankleff contended that his confession was elicited in violation of *Miranda* and, incorporating Ofshe's declaration into his argument, also asserted that it was involuntary. Tankleff also asserted, among other things, that the People withheld *Brady* material for failing to disclose that McCready had learned that Steuerman had used the Hells Angels to "settle" a labor dispute.[107] But on January 29, 1997, the district court denied his petition and diminished further Tankleff's dwindling chances of overturning his conviction. The district court rejected Tankleff's objections to the admissibility of his confession and found that the prosecution did not commit a *Brady* violation in failing to disclose "that Jerry Steuerman had previously resorted to violence to settle a business dispute." *See Tankleff v. Senkowski*, 993 F. Supp. 151, 154-58 (E.D.N.Y. 1997). But on February 28, 1997, the district court granted Tankleff's motion for a certificate of appealability because it found the alleged Hells Angels

[106] Tankleff retained Miller, Cassidy, Larroca & Lewin. Member Stephen L. Braga and associate Barry J. Pollack, who still represent Tankleff, helped write the habeas petition.

[107] Tankleff buttressed his contention by omitting that, as Tisch had found years earlier, there was no evidence demonstrating that McCready had acquired such knowledge prior to or during the trial.

Brady violation to be a "close call." *See Tankleff v. Senkowski*, 993 F. Supp. 159, 160 (E.D.N.Y. 1997).

It was not a coincidence when, on March 15, 1997, only two weeks after the district court's decision to grant a certificate of appealability, Tankleff fellow inmate Bruce Demps gave to one of Tankleff's attorneys a written statement in which Demps affirmed, under federal penalty of perjury, that when he had been incarcerated with Todd Steuerman in 1990, "Todd Steuerman explained that Martin Tankleff[']s parents were murdered" and that "he knew for a fact that Martin Tankleff had not committed these crimes and that a Hell's Angels friend of his father[']s had indeed committed these crimes." Demps had joined Tankleff at Clinton A.P.P.U on September 26, 1995, some eighteen months earlier, but it was not until a federal judge determined the Hells Angels *Brady* issue to be a "close call" that he disclosed that he had learned that Jerry Steuerman had hired the Hells Angels to kill the Tankleffs. So now Tankleff's theory was that Jerry Steuerman did not kill Arlene and Seymour but that he hired a Hells Angel to kill them.

Similar to the way that Kovacs, Guarascio and Covias had used the passage of time to embellish their stories, Demps used the passage of time to modify his story. Because Tankleff's attorneys have now abandoned Demps's "Hells Angels theory," at the hearing Demps played along, testifying that Todd Steuerman had told him that Todd's father's "friends," whom Demps only *assumed* were the Hells

Angels, had killed the Tankleffs. And because at the hearing Tankleff's attorneys emphasized Jerry Steuerman's financial motive to kill the Tankleffs, Demps testified that Todd Steuerman had told him that Todd's father had owed money to the Tankleff family, even though in his 1997 statement Demps omitted any reference to a financial debt.

Tankleff's Hells Angels' *Brady* argument did not impress the United States Court of Appeals for the Second Circuit, which held:

> Steuerman's credibility was already thoroughly undermined on cross-examination by evidence that he had threatened other people with whom he had business relationships. Moreover, Steuerman's bizarre behavior right after the murders also called his innocence into doubt. Similarly, the defense did cross-examine Detective McCready at trial regarding his failure to pursue Steuerman as a suspect.
>
> When a witness's credibility has already been substantially called into question in the same respects by other evidence, additional impeachment evidence will generally be immaterial and will not provide the basis for a *Brady* claim. . . .
>
> There is no reasonable probability that the additional piece of evidence not disclosed by the [prosecution] would have tipped the jury over to Tankleff's side. The [prosecution]'s failure to disclose this evidence, standing alone, does not, therefore, warrant reversal.

Tankleff v. Senkowski, 135 F.3d 235, 250-51 (2d Cir. 1998). But the Second Circuit found merit in Tankleff's *Miranda* argument, stating in dicta that detectives had subjected Tankleff to custodial interrogation prior to advising him of his

Miranda rights and that the State courts should have suppressed his confession as having been elicited in violation of State law. *Id.* at 244. The Second Circuit also found merit in his *Batson* argument, holding that he had made a prima facie showing that the prosecution had engaged in a pattern of racial discrimination during jury selection. *Id.* at 247-48. But although the Second Circuit remanded the matter for a hearing on Tankleff's *Batson* claim, *id.* at 250, 254, it held that he was not entitled to habeas relief on his *Miranda* claim because, under federal law, the detectives' subsequent reading of *Miranda* warnings and Tankleff's knowing and voluntary waiver rendered harmless the trial court's admission of his earlier, pre-*Miranda* statements, *id.* at 244-46.

Because the Second Circuit found some validity in Tankleff's *Miranda* claim, Tankleff petitioned the Second Circuit for a rehearing. But the Second Circuit denied his petition, and when the County Court and the U.S. District Court rejected his *Batson* challenge, and when the Appellate Division and the Court of Appeals denied his motion to reargue the *Miranda* issue, and when the United States Supreme Court denied his petition for a writ of certiorari, it appeared that Tankleff and his attorneys had exhausted all possible avenues of relief. Nevertheless, he still managed to file two additional 440 motions, but the County Court denied one and Tankleff abandoned the other.

There was more to come. In June 2001, Barry Pollack and members of Tankleff's family retained private investigator Jay Salpeter to look for new ways to help Tankleff, and, according to one journalist, "[A] miracle happened. . . . Salpeter obtained a written statement from a career criminal, Glenn Harris, that he had driven his longtime crime partner, Joseph Creedon, and an acquaintance Peter Kent to the Tankleff house that night." *See* Scott Christianson, *After 14 Years, Another Crack at Justice,* N.Y. Times, Jan. 30, 2005, § 14 (Long Island), at 13. There was no miracle. For several months, Salpeter reviewed files and spoke with Kovacs, a "witness" whom Tankleff and his attorneys had long ago abandoned, and nothing happened. But things changed in November 2001, when Harris joined Tankleff at Clinton.

Although Harris was in Clinton General and Tankleff was in Clinton A.P.P.U. and the two should have been kept separate, there were ways for them to communicate, and Harris demonstrated one such way by using Salpeter as a conduit to get letters to Tankleff. And just as it was no coincidence that Tankleff had received a statement from Demps after Demps had arrived at Clinton, it was no coincidence that Tankleff would one day receive a statement from Harris.

Salpeter did not attempt to contact Harris until January 2, 2002, the date that he spoke with Harris's mother. But five days *earlier,* on December 28, 2001, Tankleff wrote Terry Guarascio:

> I apologize for intruding upon your life, especially during the holiday and new year season, but our lives intertwined several years ago. . . .
>
> I'm sure you know that I have been incarcerated in a New York State prison for almost 12 years for a crime I had nothing to do with. . . .
>
> . . . I know in your heart, you would like the truth to be known.
>
> . . .
>
> I entrusted Jay to work on my case and search for the truth. I believe that the road starts and possibly ends with you. Please put your faith and trust in Jay.

(A 101-02).

It would be five days before Salpeter would attempt to contact Harris, it would be another two and one-half months before Harris would tell Salpeter that he drove Creedon and Kent to the Tankleff house, yet Tankleff knew to contact Creedon's former girlfriend and state that their lives had intertwined several years ago and that the road to the truth started with her. This is not a coincidence. Tankleff knew to contact Creedon's former girlfriend because he knew that fellow inmate Harris was prepared to implicate Creedon in the murders.

But although Tankleff and Harris had reached an accord, Harris lacked something important: any knowledge how the Tankleff murders occurred. So Harris wrote letters to Tankleff and Salpeter requesting information, and Salpeter furnished him with "articles" and "t[ook him] through this from beginning to end." But whereas Demps needed little help in crafting his story, Harris needed a lot of help: by his own admission, Harris was a mentally ill, drug-addicted

criminal or, as he eloquently put, "By society's standards, basically a good ole piece o shit."

As his letters demonstrate, Harris was looking for a financial reward – "[I]f I cooperate why shouldn't I be rewarded, why shouldn't I be compensated[?]" he asked, but his primary motivation was to "share in Martin's glory" and "be on a winning team for once." Harris wrote Salpeter, "You said you'd help me[,] I never had a father Jay," and Salpeter, recognizing Harris's vulnerability, became Harris's "white knight" and helped teach Harris what Harris needed to know.

And Harris had a lot to learn. In one letter he asked, "What time was estimated to be the time of crime?" In another letter he asked, "Time: Early evening, late at night. September 7th, what time? Long night? Short night?" And in a third letter he wrote, "I don't know where this comes from Jay, but I remember twilight." In other words, Harris had no idea *what* time of day the murders were committed. Similarly, in one letter he asked, "The [Tankleff] house, was it right on Belle Terre Rd. or just off it?" In another letter he wrote, "It *coulda* been one of the first lefts and on the right" (emphasis added). In a third letter he wrote, "[I]t wasn't too far into Belle Terre. It might even been on Belle Terre Road right inside the gates," and he drew a diagram indicating the approximate location of the house. He was not even close.

The Harris who one year later would swear in an affidavit that Creedon directed him to drive to a Belle Terre house at which "Creedon sa[id] . . . there [was] a safe" asked Salpeter in one letter, "I may have assumed they were goin' to do a burglary. I can't remember if it was discussed or not. I assumed it wasn't cause I think I woulda recalled it." The same Glenn Harris asked Salpeter in another letter, "Was safe taken? No, right?" In other words, the Glenn Harris who in his affidavit stated that he saw Creedon return to the car with "gloves in the left hand pocket of his windbreaker" did not know whether Creedon and Kent were carrying a safe.

With respect to the murder weapon, the Harris who two years later directed Salpeter to the Trager property in search of a pipe asked Salpeter, "If I remember correctly from the news accounts some sort of dumbbell was used, no? That was used in the bludgeoning? No, or yes?" In another letter he asked, "[W]hat was used to kill the Tankleffs? I need to know. . . . Was it actually a dumbbell? Was it left at the scene? Were they stabbed? What kind of wounds, if so? Slash or puncture?"

Salpeter testified at the hearing that he did not furnish Harris with any details, but on or about March 17, 2002, just days after Salpeter's initial visit, Harris wrote, "I keep reading your letters over and over along with your articles and trying to come to some sort of conclusion." One difficulty Harris faced – and

one he shared with Salpeter – was how to frame Peter Kent. Harris wrote, "Who am I to judge alibi via his [Kent's] mother. . . . [A]t that point his mom may have been living in Center Moriches. I'm pretty positive that she was, and it's possible that he was still staying in Selden. . . . I know between September 7th probably even earlier, and December 29th[,] he was doing armed robberies." Harris was correct. At the hearing, Kent testified that, on the day of the Tankleff murders, his mother was living in Center Moriches, and he was committing armed robberies.

Salpeter testified that he never gave Harris any details, but Harris acted as if Salpeter had given him a lot of details. On or about March 24, 2002, Harris asked Salpeter in a letter, "What was it that Terry [Covias] said? Or was it another girl [Kovacs]? You said something about someone saying that Joey was in the bushes or something to that effect."

The Salpeter who read all of Harris's letters and who viewed Harris as "the glue" in Tankleff's new-trial motion of October 2, 2003, testified at the hearing that he did not remember Harris's recantation letter of July 9, 2002, even though the letter was the last that Harris would write for over a year and one that, temporarily, ended Tankleff's quest for a new trial. And when Harris resumed writing in early September 2003 – only days after he provided Salpeter and Barket with an affidavit – he asked Salpeter, "What about perjury? I gotta deal with that I know." Harris was a mentally ill drug user, but he was not stupid, and he

recognized that, should he testify at a hearing, the Court would not believe him. Harris wrote:

> I'm saying they went in under the auspices to commit a burg. That is my contention. I knew nothing else? I figured it out later? And after nearly 15 years I recalled it and lived with it? How come I didn't put it together sooner? I knew but I was scared? I didn't wanna admit it for my own sanctity, for my own peace of mind, so I stuffed it into my own sub-conscience? *It ain't gonna wash.*

(A 183) (emphasis added).

Harris also expressed skepticism of Salpeter's odds that, "on a scale of 1 to 10," the chance of Harris "not getting caught up" in the murders was "8 or 9." True, the statute of limitation for burglary had expired and someone with above-average knowledge of the Penal Law walked Harris through the affirmative defense to felony murder, but as Harris wrote Barket on September 14, 2003 – some three weeks before Warkenthien "intimidated" him – "I'm gonna be found just as guilty and held accountable as the perpetrators! You'll tell me no. But my feelings, my intuition, my instinct, rationale, if I got any, tells me otherwise."

Tankleff contends that Harris refused to testify at the hearing in July 2004 because Warkenthien and the "two inmates" that Warkenthien "wired" had

instilled such fear in Harris "that he once broke out in hives over his entire body."[108] (*See* Def.'s Mem. of 3/21/05, at 33-34 & n.36).

The chronological history of this case demonstrates that Tankleff's contention is false. Warkenthien interviewed Harris in October 2003, and the two inmates recorded Harris in November 2003. Yet several months later, in May 2004, Barket and Harris's attorney agreed that Harris would testify. And just before the hearing started Harris wrote Salpeter "that he was "nervous, worried, concerned," but "not scared," about the upcoming hearing and proclaimed, "Bring Lenny [Lato] on and his band of fucken Keystone Kops. . . . I can't wait to see long-faced yuck-mouth Wally Wa[r]kenthien. . . . Wally straight up lied about things he said I said when him & Flood came to Sing Sing." Harris's words are not the words of a frightened, hive-stricken man. And on July 19, 2004, the first day of the hearing, Barket told the Court, "I'm fairly certain Mr. Harris is going to be testifying here. That is what we've all been told for several months now," and Barket repeated this assurance in chambers on July 22nd, the fourth day of the hearing and the eve of Harris's expected testimony. It was not until the morning of

---

[108] Tankleff contends that Lemmert testified that Harris had told Lemmert that the two inmates that Warkenthien had wired threatened Harris, "[W]e know where your children live and we're going to get them." (Def.'s Mem. of 3/21/05, at 34). Lemmert did not say this. Lemmert testified that Harris had told him that one of the reasons that Harris did not want to testify "was that people had come to him, *other* inmates[,] and said we know where your children live, we're going to get them" (HT of 7/27/04, at 15) (emphasis added). Lemmert's testimony is devoid of any reference, direct or indirect, to the two inmates who had taped Harris in November 2003.

Harris's scheduled testimony on July 23rd that Tankleff's attorneys informed the Court that Harris was refusing to testify and that Warkenthien was the cause.

D. "No Man Has a Good Enough Memory to be a Successful Liar"

As for Warkenthien having told Harris in October 2003 that if what Harris stated in his affidavit were true he might be trading places with Tankleff, Warkenthien said this to Harris because Harris had given Warkenthien details materially inconsistent with the details Harris had given in his affidavit and had acted as if he had done nothing wrong. Notwithstanding Tankleff's contention that "Harris told Warkenthien the same story he has told time and again," (Def.'s Mem. of 3/21/05, at 33), Harris – who by then had repeated his "story" "time and again," could not even remember the date of the murders. And whereas in his affidavit he contended that he parked near the Tankleff house and that "Creedon and Kent got out of the car and walked towards the house on the grass" and "lost sight of them" only when they reached "the rear of the house," to Warkenthien Harris stated that they "drove down this long, winding road, the same road that his mother would take him down during the summer[] and . . . parked at the end of the bluffs where he used to go down and look at the ships and things like that, that it was pitch-black out and couldn't see a light or a house and that Kent got out of the car and vanished into the dark." And whereas in his affidavit Harris stated that after returning to Selden he turned on his car radio and "heard that something happened

to an elderly couple in Beltaire [sic]," to Warkenthien Harris stated that between 5 and 6 in the morning he heard on the news that two people were *murdered* in Belle Terre. But there could have been no news report until some time after 6:11 a.m., when Tankleff called 911, and it is unlikely that there had been a news report of two persons having been murdered because Seymour lived until October 6th.

E. "It Ain't Gonna Wash"

But the greatest impediment to Harris's credibility comes from Harris, in his own words, in his "pre-intimidation" recantation letter to Salpeter of July 9, 2002. Although Tankleff contends in his brief that "for years [Harris's] story has remained consistent" and that "[t]he prosecution has made much of Harris' . . . supposed recantations of his story" and "has attempted to impeach Harris' credibility based on . . . statements taken out of context from excerpts of letters he has written," (*id.* at 20 & n.22), in his 108-page brief, Tankleff does not even mention Harris's recantation letter. Although set forth earlier in this memorandum, Harris's "supposed recantation[]" of his story is repeated in even more detail here, in its full "context," edited only because of its length.

> Jay,
>
> Yes! I lied Jay! I received your last letter requesting the truth. The truth is, is that I lied. I lied, fabricated, concocted the whole fuckin' story!
>
> What started out as wanting to help you, wanting to help Marty, just snow-balled on me. Why, I don't know. I had good intentions, I wanted to be of help. I wanted to be part of something greater than, better than I.

Do I say I'm sorry? Sorry isn't gonna make anything any better. Do I say I'm sorry to you, Marty, Joel, Steven, Barry? I am sorry but saying sorry isn't going tot change anything. I sincerely, genuinely wanted to help Marty. For whatever reasons, they are mixed. Yes, I'm fucked up in the head. I regret getting involved from the outset. All I had or knew is what I truly had or knew. I can understand from your viewpoint as an investigator how I misconstrued things, by the way I said things or worded things.

The shit happened along time ago, I remembered what I remembered, some I forgot, and I turned it into a lie. I felt so strongly about Creedon's involvement and along with that, Marty's innocence. I still feel somehow, some way, he was involved.

You referred to the weasel as my friend. But he ain't, isn't nor never was! There was no ride in a car, no idea of committing a burglary! All I know is what he said driving the burglary. Was he someone I feared or looked up too? Hardly! He was just someone who had a negative influence on me, over me, along with Kent. He was just thrown in as an afterthought, two pieces of shit who all they wanted to do was commit crimes, smoke crack, and be a derelict. As did I. Your right. I know the difference between right and wrong. Now, as I did then. I'm struggling now also, as I did back then and I still have bigger & better aspirations. I'm trying to right a wrong, rectify a mistake. I was elated at first that I could possibly help, ecstatic, good fortune or whatever. Then after you came up I panicked, became manic, hysterical. I couldn't live with it, especially after I implied that I drove. I wanted to nail Creedon's ass as much as you did as I felt strongly of his involvement and I went as far as to tell a lie. I believed it and I built up such a disdain for him. The speculation that he killed Sinclair also played a part too.

All I can say is I'm a fucking lying idiot. I don't want sympathy nor am I looking for it.

I've had time to reflect and contemplate my actions. In a way I would expect them to be understood

but in another way not. Undoubtably [sic] (I feel) there is going to be consequences & ramifications to be paid and if so, so be it.

I couldn't expect you to put yourself in my shoes Jay.

I just wanted to clear this up so I can live with myself. So I can live with myself.

I wrote you a 28 page!!! letter I have here that I wrote a few days back. It was mostly psycho-babble, this is just a condensed version of the same.

I feel I'm in deep, I'm in way too deep, I went as far as to lie for Marty! (to you!) and I can't do it!! (Not that I don't want to, I can't!) And for that, I am sorry. I would like for nothing more to see Marty go free for killing his parents and Creedon be held responsible if that is in fact what happened. It appears there is more to this than what meets the eyes. Even I can see that but who am I? No better or worse one, for lying! I'm just Glenn Harris, trying to change, trying to become, to be a better person.

I know all this doesn't matter to you, but to me it does. I made a decision. I made a decision to tell a lie Jay, and it was wrong!

I've tried to give you my best explanation and I know in the end it's not good – good enough – to justify my actions. . . .

. . .

I'm gonna "try" to wrap end this, to wrap it up, to part as amicably as possible, tell you why. I don't know if we are considered friends considering what brought us to come to know each other, why we did & do what we do & did.

I will say I was intrigued by you. I looked up to you. I respected what you did and I don't expect you to feel the same about me. But I do know I can (now) look at you in the eye without feeling like a piece o shit, without guilt or shame.

I led you to believe in me, you said you know what I need, that you'd be there for me, you know what's good for me, remember my tomorrows.

. . .

> It wasn't so much as fabricated by me as it fabricated itself. It had its own dynamic, my involvement with him, the burglary, what he said driving it, Jerry's disappearance, Creedon getting shot, the possible police misconduct or improprieties.
>
> My sympathy for Marty, my disdain for Creedon, the proximity to the crime, it being Belle Terre, an exclusive community. . . .
>
> I knew Belle Terre. I used to fish there as a kid. I knew it had gates. I knew a constable was posted. I knew once inside the gates at Belle Terre there w[ere]n't many places to go to the left. Lucky guess I guess.
>
> No gloves, no Creedon, no Kent, no fire. I don't believe he [Kent] was living at that address where I think he was at the time. When I first got involved in crime I always fantasized about committing a crime in Belle Terre, going up the bluffs and "scoring" big, but it never happened. It was fantasy. That's why I said we went up under the auspices of a burglary. As I told you, I wasn't "taken for a ride" by Creedon & Kent as you said. Nor did I knowingly or unknowingly take them for a ride. I'm sorry Jay. I gotta go.
>
> Take care
> Good Luck
> Glenn Harris

Harris was right: "It ain't gonna wash." And the question is not whether Harris drove Creedon and Kent to Belle Terre on September 7, 1988, but what could have possessed Barket, in his September 30, 2003,[109] meeting with District

[109] According to Spota, "Mr. Barket, referring to a draft of the motion papers that he had given me weeks earlier, asked me to vacate Martin Tankleff's murder convictions." (*See* The People's Mem. in Opp. to Def.'s Motion to Disqualify the Suffolk County District Attorney's Office, Spota Aff. ¶ 3).

Attorney Thomas Spota, to use Harris's affidavit as a basis to ask Spota for his consent to vacate Tankleff's convictions.

Because Harris lied, any other witness who "corroborated" Harris also lied. One such witness was William Ram. Ram testified that, on September 7, 1988, just hours after the attacks on Arlene and Seymour, Harris told him that Harris "went in with the mind that they were doing a burglary[] or something," "not . . . to do what they did," that Creedon and Kent "came running out of the house" and "had blood on them" and that "they went and burned their clothes." Ram, a lifetime drug user who had not repeated Harris's details in some sixteen years, testified as if had been reading from Harris's affidavit. And Ram unwittingly confirmed that he had read Harris's affidavit, or that he had had someone read it to him, when he testified that, on September 7th, after he spoke with Harris, he saw reports that the Tankleffs had been killed and "put two and two together." The phrase "put two and two together" is the one that Harris used in his affidavit and in his October 6, 2003, conversation with Warkenthien, and just as it was unlikely that on September 7th Harris had heard on a news program between 5 and 6 a.m. "that two people were murdered in Belle Terre," Ram could not have seen reports "later that day" that the Tankleffs had been killed because, as stated above, Seymour lived until October 6th.

Although several factors may have motivated Ram to lie, the factor that stood out at the hearing was money. Ram testified that his "conscience" compelled him to come forward, that he was losing money "by not being at work today" and that he was not getting anything for his testimony except for reimbursement for out-of-pocket expenses and the money that he lost for not being at work on the day of his testimony. Ram lied. After Falbee testified that the Tankleff family decided to pay Ram because "he was going to be out of work for *two* days," the People requested of Tankleff's attorneys all payments to and on behalf of Ram; Barket and Pollack disclosed that, in addition to paying for Ram's hotel room, Salpeter rented a car for Ram and paid him $4,000 for *eight* days' lost work.

Although Tankleff contends that "the suggestion that [Ram's] testimony was influenced by his renumeration is ludicrous," (Def.'s Mem. of 3/21/05, at 22 n.23), there appears to be no legitimate reason for Tankleff's attorneys, who had subpoenaed Covias and who had interviewed Ram in person just two weeks before his testimony, to bring him to New York *five* days before he testified and pay him for each day. And even if Tankleff's attorneys could craft a reason more believable than needing "to prepare [Ram] for his testimony," who was a short "fact" witness, Tankleff's attorneys have not even attempted to explain the *manner* in which Salpeter paid Ram: on October 19th, before Ram arrived, $1,000 via Western Union to reimburse Ram for his prior trip, on the 22nd (the day after Ram

arrived), $1,000 in cash; on the 25th (the day before he testified), $500 in cash; on the 27th (the day after he testified), $500 in cash; and after Ram returned to Florida, $1,000 in money orders. After ADA Lato elicited this testimony, it is not surprising that an irate Barket yelled, "Don't accuse us of bribery." Of course, Lato did not accuse anyone of bribery. To Barket, it just looked like bribery.

Whatever Salpeter's, Barket's and Pollack's intentions, Ram, a drug user with a long criminal record who, after his testimony, committed several armed robberies and was nearly killed in a shootout with the police, agreed to help Tankleff because, as he told Kent in Mineo's presence, the Tankleff case was "a cash cow." And although Kent and Mineo, like almost every witness who testified at the hearings, had reasons to be less than credible, Kent and Mineo testified about something that even Salpeter conceded that they could not have known unless Ram had told them: that Salpeter had sent Ram money via Western Union.

Ram, a drug user and a violent man, testified not because of his "conscience" but because of the all-expenses paid vacation courtesy of the Tankleff defense. And the some 1,400 miles that he accumulated in Salpeter's rental car probably had less to do with preparing for his testimony or with visiting friends than it did with, as Kent testified, driving to locations such as Manhattan to purchase cocaine and heroin.

Graydon's testimony that, about five weeks before the murders, he drove Creedon to Strathmore to kill one of the Strathmore partners did not pass the laugh test. Graydon started his testimony by refusing to give his address, not because he feared Creedon, but, he contended, because he feared the district attorney's office. Graydon was just being belligerent. Given his criminal record and his familiarity with the criminal justice system, he knew that the district attorney's office either already had his home address or could easily obtain it.

Trying to impress everyone in the courtroom that he was "a tough guy," Graydon testified that in the late 1980s he and Creedon "got into a lot of fights," used drugs, sold drugs and robbed drug dealers. But then he testified that he and Creedon did *not* commit crimes together, at least not *legal* crimes. Thus, on cross-examination:

> Q You and Creedon both committed crimes together, right?
> A Crimes? Robbing a drug dealer is a crime? No.
> . . .
> Q . . . [D]id you commit crimes together, yes or no?
> A Legal crimes, no.
> Q Legal crimes?
> A I'm sorry. Okay. If robbing a drug dealer is a crime, yes, we did.

So Graydon testified that, as Ram would later testify, he committed crimes only against criminals and did not, as the People contended, participate with

Creedon and Glass in the burglary of the Triple H Stationary Store. According to Graydon:

> A . . . I never robbed for drugs. . . . I wouldn't do burglaries. You know my record. What does my record consist of; destroying government property, disorderly conduct, resisting arrest? Do I got burglaries up and down my thing? I'm not a burglar. I'm not a robber.
>
> There are times when, yes, I did a few stupid things, but I'm not one to go through a store to go rob money to smoke crack, no. . . .
>
> Q That wouldn't be right; you're not that type of guy?
>
> A Not to do that.
>
> Q But you were the type of guy to rob drug dealers?
>
> A Yes. . . .

Beyond being comical, Graydon's testimony that he robbed drug dealers but "never robbed for drugs" is a lie, because the only reason that a drug user like Graydon, who could not remember how much crack he smoked in his life, would rob a drug dealer would be to obtain drugs or to obtain drug money to buy drugs. So Graydon either did rob for drugs or, notwithstanding the tough-guy image he sought to convey, he did not rob drug dealers, a crime for which the applicable statute of limitation had expired. But even more comical was his contention that he was too civilized to burglarize the Triple H but, on the same night, just several stores away in the same strip mall, he was willing to assist Creedon in "a contract hit." Thus:

> Q Were you the type of guy in 1988 to burglarize the place to take cigarettes or cash?

A No.
Q But you were the type of guy on the very same night to kill somebody, correct?
A I wasn't doing the killing. Stop saying that, please. I was driving.
Q You were going to be the driver for a guy who was going to shoot somebody?
A Yes.

Similarly, Graydon testified that after he heard about the Tankleff murders, he did not connect the murders to Creedon because Creedon had wanted to kill only the business partner and never mentioned killing the partner's wife. Graydon testified:

A . . . I just didn't think a man actually can go and kill a lady. . . .
I mean, I don't even hit a woman. Therefore, I could never, you know. Understand what I'm saying?
A I understand.
You wouldn't hit a woman?
A I wouldn't hit a woman.
Q But you would kill a businessman?
. . .
A Yes. . . .

Graydon testified in the manner in which he did not because on or shortly after July 25, 2004, he "read the paper" and took pity on "this poor little old lady" whom he thought might be Tankleff's grandmother or aunt or because he spoke with his pastor or because he listened to his conscience. Graydon testified in the manner in which he did because, on July 25, 2004, he was displeased with the gambling-related conversation that he had with Detectives Cimilluca and

Grammatico, to whom Graydon boasted that he did not have to repay gambling debts because he was "with" people in organized crime. Or perhaps he testified in the manner in which he did because he was displeased with his subsequent conversation with Warkenthien, or perhaps because he is a drug using, gambling-addicted blowhard.

The reasons do not matter. What does matter is proof of Graydon's lies. The testimony of Triple H former manager Florine Goldstein and the testimony of police records' clerk Kathy Stillufsen demonstrated that the Triple H burglary in which Graydon participated occurred on November 30, 1988, nearly four months after the Tankleff murders. Graydon testified that Creedon gained access to the store by breaking the glass on the front door, but Goldstein testified that in the twenty-year period from 1974 to 1994 in which she had managed the store the only burglary in which the glass on the front door was broken to gain access occurred on November 30, 1988. And Stillufsen testified that the only police department computer record of a burglary at the Triple H in 1988 is one from November 30th, and that when she manually checked other police records of July and August 1988, the only additional incident she uncovered was, as Goldstein testified, the false-alarm report of August 9, 1988. Although Tankleff contends that "Graydon was unequivocal that he and Creedon went to the . . . store in June 1988" "because he had just catered a wedding for a friend of his," (Def.'s Mem. of 3/21/05, at 17

n.16), his contention is disingenuous. Graydon testified that the burglary occurred right after he had catered a June wedding, and he was specific that the burglary occurred on "a Sunday" in "July or early August." He also testified that "[a] few weeks," but "less than five weeks," after the stationary store burglary, Creedon again asked him for a ride to Strathmore and that, shortly after he refused, he heard about the Tankleff murders.

Finally, Graydon's testimony that he had told Warkenthien that he had deduced that Creedon had killed the Tankleffs because "[t]wo plus two is four" is reminiscent of Harris and Ram deducing Creedon's involvement by putting "two and two together." And Graydon's testimony that he also told Warkenthien, "The kid didn't do it," is the exact language that Gaetano Foti used when he testified a few days before Graydon testified.

As for Foti, Tankleff contends that "Robert Trotta, a detective in the Suffolk County Police Department, felt [Foti] to be a reliable witness." (*Id.* at 37-38). Once again, Tankleff misrepresents the hearing testimony to support his contention. Trotta testified that after he had arrested Foti, also known as "Tommy the Beard," the second or third time, Foti became a reliable *source*, not a reliable *witness.* Trotta also testified that whenever Foti acted as a source, he was providing "recent information," not information that he had acquired some years earlier. And with respect to Tankleff, Trotta testified that Foti contacted him in

October 2003 to report that, at a bar some *ten years earlier*, Foti told Creedon, "Too bad about the kid," and that Creedon responded, "Oh, the kid didn't do it" "[c]ause I was there." (HT of 12/16/04, at 557-60, 564, 568-78).

The passage of time would affect any person's recollection of a barroom conversation, and it probably affected Foti's more than that of the average person given that, as Trotta testified, Foti had used "as much [drugs] as he could get," given that, as Foti testified, Creedon had shot Foti's friend and given that Foti had watched the entire Tankleff trial. It is therefore understandable that Foti's recollection of what Creedon had stated morphed, it just nine months, from "the kid didn't do it [c]ause I was there" to the kid "is innocent because I did it." As the Court of Appeals stated in *People v. Crimmins,* 38 N.Y.2d 407 (1975), in which the defendant's 440 motion consisted of an affidavit of a "witness" recalling events that had occurred seven years earlier, *id.* at 409:

> However "understandable" affiant's reasons for the seven-year delay in disclosure may be regarded, the fact remains that affiant's recollection of the events of the early morning of July 14, 1965 must be recognized as inevitably influenced and inevitably colored by the passage of time and his acknowledged familiarity and undoubtedly obsessed concern with newspaper accounts of the case.

Id. at 417.

Contrary to Tankleff's unsupported allegation that "The Suffolk County District Attorney's office's feeble response to [his] . . . witnesses is that they are all

lying," the Office recognizes that, in the years following a high-profile case, a witness's recollection becomes affected by media coverage and by conversations with others. Thus, just as a prior or subsequent inconsistent statement affects a witness's credibility, so too does the passage of time, and a statement that a witness gives closer in time to the occurrence of an event must be given greater weight than an embellished statement that the witness gives years later.

Thus, although witnesses such as Demps, Graydon, Ram and Callahan – another inmate who came forward only after being incarcerated with Tankleff – lied at the hearing, witnesses such as Ram girlfriend Heather Paruta, carpenter Neil Fischer and restaurateur Leonard Lubrano may have been merely mistaken. At the trial, Tankleff relatives Michael, Marianne and Jennifer McClure testified, and Tankleff family friend Paul Lerner and Tankleff relatives Ron Falbee and Marcella Alt Falbee could have testified, but they did not testify.[110] Now, some fourteen years later, Falbee contends that Tankleff was "unjustly convicted," and Lerner contends that Tankleff was "railroaded." (*See supra* pp. 153-54; Def.'s Mem. of 3/21/05 Ex. A) (Falbee Aff. ¶ 7; Alt Falbee Aff. ¶ 10)).

[110] In his latest brief, Tankleff asserts that Gottlieb was ineffective because he failed to deliver on his opening-statement promises that he would prove that Steuerman killed Arlene and Seymour and that he would call certain witnesses "who were prepared to testify that Mr. Tankleff had a loving relationship with his parents and had no motive to attack them." (Def.'s Mem. of 3/21/05, at 102-03). Tankleff is repeating assertions that he has already made in the current 440 proceeding. (*See* Def.'s Mem. of 10/2/03, at 47; Def.'s Reply Mem. of 4/16/04, at 44). The People will rely on their previous brief. (*See* People's Mem. of 12/5/03, at 51-53).

But no credible evidence connects anyone other than Martin Tankleff to the murders of his parents. An identification crew dusted the Tankleff house for fingerprints, and the crime-scene coordinator examined the house windows and doors. There were no strange prints inside the house, the windows and doors were undamaged, and there was no sign of a break-in. There was no evidence of anyone hiding in the bushes, of mud stains in the office or of blood outside the house.

Moreover, contrary to Tankleff's inference that Steuerman lagged behind the others after the poker game ended, he and Cecere were outside the house moments after the game ended. Steuerman did not open a door for Creedon, and Creedon, or Joey "Guns," did not kill two people with a blunt instrument and a knife, and lifelong burglar Peter Kent did not leave behind the jewelry that the police found on Arlene and Seymour, the $100 bill in Seymour's wallet, or the safe containing additional cash and jewelry. In contrast, Tankleff spoke of killing his parents weeks before the murders, he had an ugly argument with Seymour hours before the murders, he walked away from Hines when Hines stated that Seymour might identify his attacker, he walked away from McNamara when McNamara questioned why Tankleff had no blood on him, and he confessed to Rein and McCready and he lied to the jury. And the physical evidence, such as the blood on his shoulder, his pristine sweatshirt and shorts, the cut in the sponge, the relocated watermelon knife and the barbell-caused skull fractures, confirmed his guilt.

CONCLUSION

Tankleff's supporters see "Marty" as a young man who "had it all," and they cannot accept that he is guilty of matricide and patricide. They prefer a darker truth, one involving a conspiracy between drug users, a bagel-store owner and the police. And because *People v. Tankleff* is a high-profile case, persons who had no information to provide when the crime was committed have surfaced as much as sixteen years later with statements that "prove" Tankleff's innocence. If the Court denies Tankleff's 440 motion, there will be another 440 motion with affidavits from new "witnesses" who will provide ever-changing, outrageous stories of conspiracy and cover-up. But the truth is incontrovertible. The truth is that, on September 7, 1988, Martin H. Tankleff, acting alone, murdered his parents. And resurrecting discredited theories and accusing an innocent Steuerman for yet another generation are not a substitute for real evidence, which a jury heard and carefully considered before rendering its verdict.

Dated: Hauppauge, New York
June 14, 2005

Respectfully submitted,

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By: _____
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APPENDIX