COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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PEOPLE OF THE STATE OF NEW YORK

Index Nos.: 1535-88/1290-88

–against–

REPLY MEMORANDUM

MARTIN H. TANKLEFF,

Defendant.
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REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY DISTRICT ATTORNEY THOMAS J. SPOTA AND THE OFFICE OF THE DISTRICT ATTORNEY AND TO APPOINT A SPECIAL PROSECUTOR

The prosecutor's response to the motion to disqualify the District Attorney does not dispute the facts alleged by Mr. Tankleff to support the motion. Indeed, the District Attorney offers new facts establishing additional serious conflicts of interest. The District Attorney misstates the applicable law, and proposes an illegal resolution of the conflicts. Given the prosecutor's response, this Court is left with no alternative but to disqualify the prosecutor's office and refer the matter to the Supervising Justice of the Second Department for the appointment of a Special District Attorney.

Remarkably, in opposition to the motion to disqualify him, Mr. Spota for the first time revealed that his law firm represented Todd Steuerman and that his former law partner separately represented both Jerry and Todd Steuerman, while Mr. Spota and his former partner shared office space. Thus, Mr. Spota concedes not only the conflict raised by Mr. Tankleff -- Mr. Spota represented the lead detective, who as new evidence demonstrates likely perjured himself at Mr. Tankleff's trial -- but Mr. Spota also reveals additional and even more serious conflicts, the representations of Todd and Jerry Steuerman. Mr. Spota and his office cannot continue its involvement in this case.

INTRODUCTION

What is far more telling than what the District Attorney contests in his opposition to the motion to disqualify, is what he does not contest, and what he discloses for the first time. Mr. Spota does not dispute that he represented Detective James McCready before the State Investigation Commission or that he represented Detective McCready in a highly charged and protracted criminal proceeding shortly after the Tankleff murders. Mr. Spota in his Affirmation does not deny that he and Detective McCready discussed the Tankleff murders, McCready's testimony in the Tankleff trial or McCready's relationship with Jerry Steuerman. Mr. Spota does not produce an affidavit from Detective McCready to rebut the sworn testimony of Leonard Lubrano that, contrary to McCready's testimony in at the Tankleff trial that he had never even heard of Jerry Steuerman (*see* H.H. at 104 - 05; Tr. at 3626), McCready had, in fact, known Steuerman for years prior to the Tankleff murders. Nor does Mr. Spota produce any independent evidence to cast doubt on Mr. Lubrano's testimony. Instead, Mr. Spota demonstrates that his conflicts of interest are far more severe than Mr. Tankleff had realized when he filed the motion to disqualify. Now, for the first time, Mr. Spota has revealed that his former law partner, with whom he at the time shared office space, separately represented both Todd Steuerman and Jerry Steuerman in criminal cases. Further, Mr. Spota has revealed that his law firm separately represented Todd Steuerman in a criminal narcotics case.[1] Thus the need for

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[1] The prosecutor's memorandum in opposition to the motion to disqualify, which was filed on August 17th, did not refer to Mr. Spota's former partner's representation of Todd and Jerry Steuerman or Mr. Spota's law firm's separate representation of Todd Steuerman. Attached to the memorandum was an affidavit from Mr. Spota, dated August 17th. That very morning, hours before the memorandum and affidavit were filed, Mr. Salpeter had an investigator in the District Court searching court records for attorneys who had represented either Todd or Jerry Steuerman. In his affidavit, Mr. Spota disclosed what had been omitted from the memorandum, but what he may have believed Mr. Salpeter was about to discover: Mr. Spota's former partner represented the Steuermans. The affidavit did not disclose Mr. Spota's own firm's representation of Todd Steuerman. When Mr. Lato appeared in court, he orally disclosed for the first time that Mr. Spota's law firm represented Todd Steuerman while Mr. Spota was still with the firm. Because the District Attorney's Office omitted any discussion of these representations from their memorandum, the prosecutors have not argued that they can continue in this matter given Mr. Spota's representation of Todd Steuerman and his former partner's representations of both Steuermans. Nor will they make such an argument, as Mr. Lato repeatedly informed the Court on

a special prosecutor is more urgent now than when the original motion was filed.

What is equally as disturbing as the new evidence of serious conflicts, is the tardiness of this disclosure. Counsel for Martin Tankleff put Todd Steuerman on his witness list, which was given to Mr. Lato before the start of the hearing. Not only did Mr. Spota fail to disclose at that time his prior representation of Todd Steuerman, but Mr. Spota also stood silent in this proceeding as Mr. Tankleff has adduced evidence that Jerry Steuerman's son, Todd Steuerman, was running a cocaine business from the bagel stores owned by Jerry Steuerman and Seymour Tankleff; that Joseph Creedon was an enforcer for Todd's drug business; that Joseph Creedon had a conversation with Todd Steuerman about cutting out Marty Tankleff's tongue at the behest of Jerry Steuerman; that Creedon, shortly before the Tankleff murders, solicited Joseph Graydon to assist him in killing Seymour Tankleff at the behest of Jerry Steuerman; that Glenn Harris has admitted that he took Creedon and Peter Kent to the Tankleff residence the night of the murders; that he saw them return with blood on their clothes and helped them dispose a murder weapon; that Creedon has admitted to several people that he was involved in the Tankleff murders; that Jerry Steuerman has admitted to killing two people and that Todd Steuerman told Bruce Demps that he knew Marty Tankleff did not kill his parents, because friends of his father did.

Thus, there has been extraordinary evidence placing Todd Steuerman at the center of the conspiracy to kill the Tankleffs, as the person who provides the link between Jerry Steuerman and Joseph Creedon. Yet, only after the motion for disqualification based on Mr. Spota's prior representation of Detective McCready was made, did Mr. Spota reveal that his firm represented Todd Steuerman. One is left to wonder why Mr. Spota did not reveal earlier that his firm represented Todd Steuerman in a narcotics case. Mr. Spota had an obligation to reveal his representation of

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the record that he will not respond to this pleading.

Todd Steuerman to the Court and to Mr. Tankleff as soon as it became apparent that Todd would be a witness at the hearing. Instead, Mr. Spota waited until the 11th hour, on the very day defense investigators began reviewing court documents and may have discovered this fact on their own, to disclose to this Court his legal relationship with Todd Steuerman. Mr. Spota's failure to disclose his conflicts in a timely manner is further reason he should be disqualified from this case.

I. Mr. Spota Makes Partial Disclosure of His Prior Relationships

In his opposition to the motion to disqualify, Mr. Spota notes that he met with Mr. Barket, one of Mr. Tankleff's attorneys, on September 30, 2003, "some weeks" after he was first provided a draft of Mr. Tankleff's 440 motion. *See* Opp. at 2. Mr. Spota does not dispute that no one in his office had made any effort whatsoever to investigate the claims made in Mr. Tankleff's 440 motion in the "some weeks" that Mr. Spota's office had the motion prior to this meeting, nor does he offer any explanation for this shocking dereliction of duty.

During the meeting, Mr. Spota acknowledged his prior representation of Detective McCready. At that time, Mr. Tankleff had no reason to believe that Detective McCready's conduct would be directly at issue in this proceeding. As Mr. Spota notes, a witness, Steven Saperstein, had told Mr. Tankleff's investigator that McCready and Steuerman had a relationship prior to the Tankleff murders. However, Mr. Saperstein subsequently recanted these statements. Therefore, Mr. Tankleff did not believe that there would be any direct testimony at this proceeding establishing the McCready-Steuerman relationship.

While Mr. Tankleff's counsel believed that Mr. Spota had a potential conflict of interest based on his prior relationship with McCready, Mr. Tankleff did not move for disqualification. This decision was based in part on the deference to which an elected District Attorney is entitled and in part on the reasonable belief that Mr. Spota's former client would not be the focus of the new

evidence.[2]

In electing not to move to disqualify Mr. Spota and his office at that time, Mr. Tankleff did not explicitly waive any potential conflict of interest. Nor could he have implicitly waived any conflict based on facts not then known to him. Not only did he not know at that time that McCready's conduct would be put at issue in this proceeding, but he also did not know that Mr. Spota had represented Todd Steuerman in a criminal case. He could not have known this, because Mr. Spota chose not to reveal this information.[3]

II. Mr. Spota's Office Demonstrates Its Bias and Prejudices Against Mr. Tankleff

As the case progressed, Mr. Spota's office, with the assistance of a former homicide division colleague of McCready's, Walter Warkenthein,[4] took numerous steps that call into question the

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[2] In the District Attorney's opposition papers, he notes that in October 2003, Mr. Barket described Mr. Spota as a fair man. Mr. Spota may indeed be fair, as Mr. Barket believes (although one would have trouble finding support for that belief in the context of this litigation), but, based on Mr. Lubrano's testimony and Mr. Spota's belated disclosures of his prior relationships, he also labors under a conflict of interest and must be disqualified. Mr. Spota's fairness has been demonstrated in other cases where he has agreed to the appointment of a special prosecutor when conflicts have arisen. His unexplained unwillingness to agree to do so in light of the grave conflicts here, illustrates his lack of objectivity in this case. Similarly, Mr. Lato may be entitled to the respect Mr. Barket has for him, but he works for Mr. Spota and therefore cannot be the special prosecutor needed in this case.

[3] Mr. Spota asserts that in this meeting, in addition to revealing his relationship with McCready, he revealed that his former partner "may" have had an attorney-client relationship with Jerry or Todd Steuerman years after he and his partner were no longer practicing together. *See* Spota Affirmation at ¶ 5. Mr. Barket does not recall this disclosure. Obviously, if Mr. Barket was aware of this information it would have been included in the original motion to disqualify. Further, if Mr. Spota had made that disclosure previously, one would have expected the District Attorney's memorandum of law to refer to it. Instead, it appears only in the last paragraph of an affidavit executed by Mr. Spota on the day the memorandum of law was filed. At any rate, Mr. Spota does not claim that he revealed to Mr. Barket in September 2003, or to anyone prior to August 17, 2004, that he was sharing office space with his former partner at the time his former partner represented both Todd and Jerry Steuerman or, more significantly, that his firm separately represented Todd Steuerman while Mr. Spota was a partner in the firm.

[4] Mr. Lato accurately points out that Mr. Tankleff has known from early on of Mr. Warkenthein's involvement in this case. However, Mr. Tankleff could not have known that McCready's conduct would become central to this proceeding or that the actions Mr. Warkenthein would take would call into question his objectivity. Mr. Spota wants to have it both ways. He argues that Mr. Tankleff somehow waived his rights to have Mr. Spota disqualified, because he did not move to disqualify him earlier in the proceedings. At the same time, he argues that Mr. Tankleff is not entitled to relief until the conflict has manifested itself in actions that prejudice Mr. Tankleff. In Mr. Warkenthein's case, Mr. Tankleff did not presume a bias and assume it would lead to misconduct. Unfortunately, Warkenthein's actions throughout these proceedings have demonstrated his lack of objectivity and revealed his bias. His lies to Harris demonstrates that his lack of objectivity and his bias have led him to engage in misconduct.

objectivity of Mr. Spota's office in this matter. First, as referenced above, the District Attorney's Office failed to investigate the new evidence provided by Mr. Tankleff weeks before this proceeding became a matter of public record. Mr. Spota's office has offered no excuse for its inaction. Any objective prosecutor would have investigated the allegations. Indeed, Mr. Lato himself concedes that he considered Mr. Harris' affidavit, which had been provided to Mr. Spota weeks earlier, "important" and worthy of investigation. *See* Opp. at 3.

Second, Mr. Warkenthein, when he was finally dispatched to interview Mr. Harris, gave Harris an inaccurate rendition of the law, claiming that Mr. Harris had criminal exposure for merely being present at a crime scene. Warkenthein then threatened Mr. Harris by stating that he might be trading places with Marty Tankleff. At the time Martin Tankleff was serving a 50 year to life sentence for murder and Mr. Harris was serving a ten month sentence for a parole violation.

The District Attorney in his opposition does not contest that Mr. Warkenthein, an agent of the prosecutor, gave Mr. Harris inaccurate information misleading him into believing he could be prosecuted for murder despite Harris' claim to have believed that only a burglary was to take place.[5] Rather, the District Attorney's Office simply argues that these actions could not have impacted Mr. Harris' ultimate decision to assert his Fifth Amendment rights made several months after the threat. This argument simply ignores the repeated out of court statements made by Harris that, as his testimony approached, the threat of prosecution made by the District Attorney's Office and its agents weighed heavily on him.

It is critical, in recognizing the bias of Mr. Spota's office, to learn that at the first opportunity, and under the ruse of "investigating" the new evidence, a colleague of James McCready who coincidentally is the investigator assigned to assist Mr. Lato with his "independent investigation,"

[5] The inaccuracy of the information Warkenthein provided certainly explains why Mr. Harris "appeared stunned" as if no one else had advised him that being present at a crime scene is itself a crime. *See* Opp. at 4.

lied to Mr. Harris in a deliberate attempt to frighten Mr. Harris out of testifying.[6] This is simply not the conduct of a professional and objective prosecution team. It reeks of bias and reveals a visceral reaction to protect the conviction at all costs. That the person perpetrating the fraud on Mr. Harris is one of McCready's former colleagues creates the impression that the prosecutor is more interested in protecting a homicide detective, and former client, than determining whether or not an innocent man is in jail while several murders are free.

Of course, Warkenthein was not selected by Mr. Lato, the person "in charge of the investigation," but assigned to him by Thomas Spota, James McCready's former lawyer. Is it that no investigators who did not know and work with McCready were available? The public should have no confidence that this matter is being handled by a prosecutor in a professional and objective manner. Any observer would rightly be outraged that McCready's lawyer appointed McCready's former colleague to investigate McCready and that the first thing the investigator did was attempt to intimidate the person then viewed as the chief witness for the defense.

Third, the District Attorney does not dispute that, at a time he knew that this Court had appointed counsel for Mr. Harris, he had two different agents speak to Mr. Harris while secretly recording him.[7] Nor does the District Attorney's Office dispute that its agents repeated the threat that Harris would be prosecuted and even told him that his life would be in danger for coming forward. This action is telling for two reasons. Not only does it show a willingness by Mr. Spota's office to skirt ethical rules in an effort to discredit witnesses that have information favorable to Marty

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[6] In any other context this would be considered witness tampering. See P.L. Sec. 215.10(b). One could imagine the results if Mr. Salpeter had lied to a prosecution witness by threatening the witness with 50 years in jail in an attempt to keep that witness from testifying.

[7] Mr. Lato concedes that on October 22, 2003, he tried to interview Harris, but Harris asserted his right to counsel and Mr. Lato aborted his attempted interview. Mr. Lato does not explain why, after Harris has asserted his right to counsel and after the Court appointed counsel for him, Lato had his agents speak to Harris. While Lato criticizes Mr. Barket for speaking to Harris when Harris reached out to Barket (*see* Opp. at 10 n. 8), Mr. Lato has no explanation for repeatedly surreptitiously recording Harris after Harris declined to talk to Lato.

Tankleff, but it also stands in stark contrast to its lack of efforts to take similar measures to investigate those people implicated by Mr. Tankleff's defense team in the murders. Mr. Spota did not even attempt to interview either Creedon or Kent after he received the motion, but before it was filed and before Kent or Creedon obtained lawyers. At that time, they would have had no reason to be guarded in conversations about the Tankleff murders. It would have been interesting to hear what Creedon and Kent had to say if the District Attorney had chosen surreptitiously to record them instead of Glenn Harris.

Fourth, the District Attorney's explanation for its refusal to grant Mr. Harris immunity picks up where Warkenthein's threat ends. It is a decision without a rational basis other than top keep Mr. Harris from testifying. Once Mr. Harris, through his counsel and over the objections of Mr. Tankleff, refused to testify unless he received use immunity, Mr. Lato was faced with a choice. He could grant that immunity, leaving open his option to prosecute Mr. Harris, if proof other than Harris' in court statements established his guilt of a prosecutable offense, while leaving open his option to prosecute Harris for perjury if he lied. Or, Mr. Lato could refuse to grant use immunity and thereby deprive the Court of Mr. Harris' testimony, testimony that he has characterized as "important."

In choosing the latter option, Mr. Lato claims, with no support, that no prosecutor, state or federal, ever offers use immunity to a witness that does not first submit to a proffer with the prosecutor. *See* Opp. at 8. Indeed, every day prosecutors are faced with witnesses who assert their Fifth Amendment rights and refuse to do proffer sessions with the prosecutor. In New York, every time a prosecutor decides nonetheless that the witness's testimony is important and he puts the witness in the grand jury, he by statute grants that witness immunity. *See* CPL §190.40. In the federal system, prosecutors routinely compel witnesses to testify before a grand jury by granting the

witness informal letter immunity or by obtaining a judicial order of immunity. *See* 18 U.S.C. §§ 6001-03.

Further, in this case, there was every reason for Mr. Harris not to submit to a proffer session with Mr. Lato. Mr. Lato had publicly stated that he would only grant Mr. Harris immunity for his testimony in this proceeding if Mr. Lato believed what Mr. Harris had to say at a proffer session. Yet, Mr. Lato had also already stated publicly and repeatedly that he does not believe what Mr. Harris had to say.

Indeed, in the opposition to the motion to disqualify, the District Attorney again dismisses Mr. Harris' statements, based on a single letter Mr. Harris wrote to Mr. Tankleff's investigator, Mr. Salpeter, which the District Attorney quotes out of context. *See* Opp. at 6-7. Mr. Tankleff's counsel voluntarily turned all of Mr. Harris's letters over to the District Attorney's Office. When Mr. Lato attempted to take one letter out of context during his cross-examination of Mr. Salpeter, Mr. Tankleff moved all of the letters into evidence. What the letters reveal is remarkable consistency in Mr. Harris' rendition of the events on the night of the murders, beginning even before he met Mr. Salpeter. The letters also reveal a consistent fear of prosecution and retaliation. On one occasion, when these fears got the better of him, Mr. Harris told Mr. Salpeter that he did not, in fact, drive Creedon and Kent to the Tankleff's that night. Mr. Harris subsequently, despite his fears, explained what happened the night of the Tankleff murders in a sworn affidavit. Mr. Harris also passed a polygraph test and revealed the location where Creedon discarded the weapon.

Had Mr. Lato granted him immunity, his sworn testimony at this proceeding would have again demonstrated that he drove Creedon and Kent to the crime scene. Mr. Harris has repeated this in numerous settings where he had no incentive to lie, including to his priest, and two of Mr. Lato's own agents. Mr. Lato's unwillingness to believe Harris is not surprising: he has also concluded that

Karlene Kovacs, John Guarascio, Gaetano Foti, Joseph Graydon and Neil Fischer are all lying. *See* Opp. at 13.[8] And, he has concluded that Creedon has lied each and every time he has admitted to being involved in the Tankleff murders. Mr. Lato's unwillingness to believe any witness who has testimony inconsistent with Mr. Tankleff's guilt is itself compelling evidence of the lack of objectivity of District Attorney's Office in this case.

Under these circumstances, premising immunity on a proffer in which Mr. Lato would have to believe Mr. Harris was the functional equivalent of refusing immunity, since Mr. Lato had admittedly already pre-judged Mr. Harris' credibility. In doing so, Mr. Lato substituted his judgment for that of the fact-finder by depriving the Court of Mr. Harris' testimony.

This crucial prosecutorial decision by Mr. Lato was not made outside the knowledge of Mr. Lato's boss, Mr. Spota. Despite Mr. Spota's assertion at the outset of this case that he would turn the reins over to Mr. Lato and would have no involvement in the case, neither Mr. Lato nor Mr. Spota has denied that Mr. Lato discussed with Mr. Spota his refusal to grant Mr. Harris immunity for his testimony before announcing his final decision on this issue to the Court. While they go to great lengths to note that it was mere happenstance that Mr. Spota was in the right place at the right time to have this conversation with Mr. Lato, neither denies that the conversation occurred. *See* Opp. 8-9; Spota Affirmation at ¶ 7-10.[9]

Fifth, and, finally, as other witnesses have come forward who have corroborated Harris' out

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[8] Even Mr. Lato has not suggested the priest to whom Mr. Harris confided is lying.

[9] In light of the media coverage of this case, Mr. Lato knows that whether or not he discusses any particular prosecutorial decision with Mr. Spota, it is likely just a matter of time before Mr. Spota learns of the decision. However, Mr. Spota's interest in this case is such that he has not always waited for the media to keep himself apprised of the proceeding's progress. While Mr. Spota asserts it was mere happenstance that he was outside the courtroom on the day and time that Mr. Harris was expected to testify, numerous witnesses have observed Mr. Spota listening to testimony in this proceeding on several different occasions. *See* Affirmations of Kurt Paschke, Colleen Paschke, Kelli Paschke, Ana Candella and Irene Meyer, attached at Exhibit A

of court statements, the District Attorney's Office has refused to consider them or to re-visit its decisions with respect to Harris. After Harris refused to testify, contrary to the District Attorney's characterization, Mr. Tankleff's case did not deteriorate. *See* Opp. at 18. Indeed, it got stronger.

Mr. Tankleff produced yet another eyewitness to the Steuerman-Creedon conspiracy to kill Seymour Tankleff. When this witness, Joseph Graydon, tried to provide his crucial eyewitness testimony to the District Attorney's Office, Mr. Warkenthein dismissed it out of hand, because Mr. Graydon did not claim to be present when the actual murders occurred. No objective law enforcement office would have had this reaction to Mr. Graydon. His testimony is remarkable standing alone, but truly extraordinary when viewed in conjunction with Mr. Harris's statements and Mr. Creedon's own admissions.

The defense has now produced eleven witnesses who have, to one degree or another, implicated Jerry Steuerman and Joseph Creedon in the murder of the Tankleffs. These witnesses do not know each other and/or did not know of the other evidence corroborating their testimony. For example, Harris had no idea that Graydon would come forward to tell of Creedon's failed attempt to on Mr. Tankleff's life. Graydon never met Mr. Fisher who testified about Jerry Steuerman's admission that he killed two people. These witnesses come to court from different walks of life and include a stay at home mother, a self-employed cabinet maker, convicted felons, a retired homicide detective, informants for the District Attorney's Office and past associates of Jerry Steuerman and Joseph Creedon. In Mr. Lato's world, each of the eleven witnesses (except the priest) is a liar, insane or horribly mistaken. Despite Mr. Lato's view, it is ridiculous to believe that all these witnesses (and those yet to testify) are wrong and that only Mr. Lato and Mr. Spota know the truth about what happened to the Tankleffs on September 7, 1988.

The District Attorney's Office begins its opposition to the motion to disqualify by citing Judge Tisch who complained in 1990 that Martin Tankleff "attributes his conviction to every possible hypothesis but his guilt." Of course, Judge Tisch made this statement well before the new evidence was discovered. It seems to have not occurred to the District Attorney's Office that Martin Tankleff seeks a hypothesis for the murder of his parents other than his guilt because he is not guilty. Given the current state of evidence, Judge Tisch's criticism of Martin Tankleff would be better aimed at the Suffolk County District Attorney's Office, which seems willing to reject every hypothesis of Martin Tankleff's innocence, no matter the quantity or quality of the evidence supporting that hypothesis. It leads one to believe that the prosecutor in this case is not and cannot be objective.

III. Mr. Spota's Former Clients' Conduct Is Put at Issue in the Hearing

A. Todd Steuerman

From almost the beginning of this proceeding, it has been clear that Todd Steuerman would be a focus of Mr. Tankleff's new evidence. Mr. Creedon himself testified that Todd Steuerman was running a cocaine business from the bagel stores owned by Jerry Steuerman and Seymour Tankleff. Creedon also testified that he acted as an enforcer for Todd Steuerman in that drug business. Mr. Creedon testified that Todd Steuerman tried to solicit him on behalf of Jerry Steuerman to cut out Marty Tankleff's tongue. Mr. Creedon had previously stated in a sworn affidavit that he had been in direct contact with Jerry Steuerman when Jerry Steuerman tried to buy his silence after he had been shot by Todd Steuerman.[10] Mr. Gottlieb, Marty Tankleff's trial counsel, testified that he had a

[10] Todd Steuerman shot Creedon shortly after Creedon refused Jerry Steuerman's request, conveyed through Todd, that Creedon cut out Marty Tankleff's tongue. Even Creedon, given the publicity surrounding Marty Tankleff's trial, was not prepared to undertake this assignment from Jerry Steuerman. However, Todd's reaction, shooting Creedon, demonstrated that the Steuermans were not people to whom you could safely say no.

contemporaneous memorandum to his files from a conversation months prior to Creedon's execution of the affidavit in which Creedon had also acknowledged his direct contact with Jerry Steuerman. Indeed, Gottlieb asked Creedon how he could be sure it was Jerry Steuerman's voice and Creedon stated he recognized it, because he had spoken to Jerry Steuerman by telephone previously.

At this proceeding, Mr. Tankleff has adduced extraordinarily important evidence about Todd Steuerman not heard by the jury at trial: Todd's drug dealing, Creedon's relationship with Todd, Creedon's relationship through Todd with Jerry Steuerman, and admissions by Todd Steuerman (to Bruce Demps), Jerry Steuerman (overheard by Neil Fischer) and Creedon (to Karlene Kovacs, John Guarascio, Gaetano Foti, and co-conspirator statements to Joseph Graydon). While Mr. Tankleff has established that Todd Steuerman was at the center of the conspiracy to murder Mr. Tankleff's parents, Mr. Spota stood silent and failed to disclose that his law firm had represented Todd Steuerman on drug charges. It is not known, because Mr. Spota still has not disclosed, what conversations Todd Steuerman had with his lawyers in the course of his representation on drug charges that may be relevant to this case, where Todd's drug dealing relationships are at the heart of a murder conspiracy. Regardless, Mr. Spota has a duty of loyalty to his former client, Todd Steuerman, that is inconsistent with investigating whether he conspired to commit murder and assessing the significance of evidence that he did so for purposes of this proceeding.

B. Detective McCready

While Mr. Spota failed to reveal his relationship with Todd Steuerman, his previously disclosed relationship with McCready became far more crucial as the hearing progressed. Leonard Lubrano testified that he had seen Detective McCready in one of Jerry Steuerman's bagel stores on numerous occasions years before the Tankleff murders. Lubrano also testified he saw McCready and

Steuerman speaking to each other.[11] Contrary to the District Attorney's characterization that Mr. Lubrano was "less sure" about whether he saw McCready and Steuerman speaking with each other (*see* Opp. at 10 n. 9), Mr. Lubrano testified that he was "absolutely" sure about this point. *See* Transcript of August 3, 2004 at 78-79.[12] Mr. Lubrano also testified that Detective McCready told him he had done construction for Steuerman's business. It was this point on which Mr. Lubrano candidly stated he was less sure, but nonetheless, this was his best recollection. *Id.* at 77-78. The District Attorney ignores this testimony altogether. Mr. Lato inaccurately claims that the court adjourned the matter without giving him "an opportunity" to cross examine Mr. Lubrano (*see* Opp. at 10). This is simply false. Mr. Lato explicitly passed on his "opportunity" to cross examine Mr. Lubrano. *See* Tr. at 86-87.

Even ignoring the professed business relationship between McCready and Jerry Steuerman, a casual friendly relationship of numerous visits by McCready to Steuerman's bagel store and conversations with Steuerman is flatly inconsistent with McCready's sworn trial testimony. At trial, Detective McCready went out of his way to testify that he did not know Steuerman, had never met him, had never spoken to him and knew nothing about him. Lubrano's testimony, which is corroborated by other witnesses who have not yet testified, demonstrates that McCready lied at trial in order to downplay his relationship with the most logical suspect in the Tankleff murders. This

[11] While conceding that Lubrano's testimony came long after the hearing commenced, the District Attorney suggests, without any support, that Mr. Tankleff may have known about him earlier and sat on the information. *See* Opp. at 12. While it has been the practice of the District Attorney to sit on highly probative evidence, that has not been the practice of the defense. As set forth in the attached Affirmation by Bruce Barket, Mr. Tankleff learned of Mr. Lubrano just days before he testified and his counsel first interviewed him on August 3rd. After interviewing him, Mr. Tankleff called Mr. Lubrano as the very next witness in the proceeding. While the District Attorney is correct that Tankleff previously knew about Saperstein, Lubrano was the first witness to come forward who was willing to testify to the McCready-Steuerman relationship.

[12] In this regard, it is telling that the District Attorney makes no assertions about McCready's relationship with Steuerman. The District Attorney does not provide an affidavit from Mr. McCready (the People's investigator) disavowing the relationship described to this Court in the sworn testimony of Mr. Lubrano, much less does the District Attorney present any independent evidence contradicting or undermining Mr. Lubrano's testimony.

fact alone is significant new evidence not known to the jury at trial.

The new information must be investigated. The McCready-Steuerman relationship must then be assessed in the context of this hearing and will affect crucial prosecutorial decisions, such as which witnesses should receive immunity and, ultimately, whether the prosecutor agrees that Martin Tankleff has adduced sufficient new evidence that he is entitled to a new trial.

IV. Expert Testimony Corroborates Existence of Conflict As a Result of Mr. Spota's Prior Attorney-Client Relationships

Mr. Tankleff retained, on a pro bono basis, one of the leading experts regarding New York's ethical rules governing lawyers and asked that he provide an expert opinion as to whether the Suffolk County District Attorney's Office has a conflict of interest pursuant to New York's rules of professional responsibility. The District Attorney's Office has repeatedly, without any support, asserted that the motion to disqualify is "frivolous" and is being made for strategic advantage. Such claims are easily made, but they are not supported by the record or a fair review of the facts. While, obviously, the Court will need to decide the legal issues raised by the motion to disqualify, Professor Simon's expert opinion demonstrates that a leading expert on New York's ethical rules not only dismisses the notion that the claims raised are frivolous, but concludes that Mr. Spota's office has conflicts of interest that are so severe that they cannot be reconciled with that office's continued involvement in this case. Professor Roy D. Simon, Jr. is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law, where he teaches Legal Ethics & Economics and serves as the Director of Hofstra's Institute for the Study of Legal Ethics. Professor Simon is the author of three books on legal ethics, including *Simon's New York Code of Professional Responsibility Annotated* (West), a widely used commentary on the New York Code of Professional Responsibility and related rules and regulations.

Professor Simon concluded that Mr. Spota's former representations -- individually, through his former law firm, and by imputation through his former law partner -- of key witnesses and potential co-conspirators (McCready, Todd Steuerman, and Jerry Steuerman) creates a serious conflict of interest that disqualifies Mr. Spota from handling the 440 proceeding. *See* Affirmation of Professor Roy D. Simon, Jr. (attached as Exhibit "B") at ¶ 19a. Professor Simon also concluded that Mr. Spota's disqualification is imputed to the rest of the Suffolk County District Attorney's Office, so the entire office is disqualified from handling the 440 proceeding. As set forth below, the case law fully supports Professor Simon's expert opinions. *Id.* at ¶ 19b.

ARGUMENT

I. The Motion to Disqualify is Timely and the Right to a Disinterested Prosecutor Has Not Been Waived

A defendant enjoys the right to be prosecuted by a "disinterested prosecutor." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) ("It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters.") While a prosecutor's "paramount obligation is to the public, he must never lose sight of the fact that a defendant, as an integral member of the body public, is entitled to a full measure of fairness. Put another way, his mission is not so much to convict as it is to achieve a just result ….. These are more than noble sentiments." *People v. Zimmer,* 51 N.Y.2d 390,393, 434 N.Y.S.2d 206, 207 (1980*),* citing *Berger v. United States* 295 U.S. 78, 88 (1935).

The District Attorney's Office in its opposition to the motion to disqualify contends that Mr. Tankleff has somehow implicitly waived his right to a disinterested prosecutor. However, it is axiomatic that for a defendant to waive a conflict, the waiver must be knowing and intelligent and

the defendant must have been sufficiently informed of the consequences of his choice. *People v. Holman,* 89 N.Y.2d 876, 878, 653 N.Y.S.2d 93, 94 (1996) (To be enforceable, a waiver must be knowing, voluntary and intelligent. When accepting a waiver, a trial court must consider the reasonableness of the bargain, its appropriateness under the circumstances and the effect on the integrity of the judicial process.")

The District Attorney's Office contends Mr. Tankleff waived his right to a disinterested prosecutor by not moving to disqualify the District Attorney's Office following a September 30, 2003 meeting between Mr. Spota and Mr. Barket, one of Mr. Tankleff's lawyers. However, even accepting Mr. Spota's recollections of that meeting in their entirety, that meeting could not have provided a basis for Mr. Tankleff knowingly and intelligently to waive the conflicts that are now apparent.

Mr. Spota told Mr. Barket at that meeting that he had previously represented Detective McCready. However, Mr. Spota does not contend, and cannot contend, that he informed Mr. Barket that there was evidence that Detective McCready perjured himself at trial when he testified that he did not know Jerry Steuerman prior to the Tankleff murders. Nor does Mr. Spota contend that he informed Mr. Barket at that meeting that his law firm represented Todd Steuerman, who, based on the evidence presented to date in the 440 hearing, was a central player in the conspiracy to murder the Tankleffs.

Mr. Spota concedes that, at the September 30, 2003 meeting, he told Mr. Barket that he believed that no conflict existed. *See* Opp. at 11 ("Mr. Spota told Mr. Barket that there was no conflict, but to assuage Mr. Barket's concerns and with his approval, removed himself from the investigation and put [Mr. Lato] in charge.") (Emphasis added.) Necessarily, Mr. Tankleff could not have been presented with a conflict and apprised of the consequences of waiving the conflict at a

time that no conflict had been identified.

Given this history, the District Attorney's reliance on *People v. Holmes* for the proposition that Mr. Tankleff waived his right to make a disqualification motion is misplaced. In *People v. Holmes*, the defendant expressly consented to the prosecutor's participation in the case after the conflict was made known. *People v. Holmes,* 117 A.D.2d 480, 484, 504 N.Y.S.2d 245, 248 (3d Dep't 1986). Moreover, Holmes demonstrated neither actual prejudice nor a substantial risk thereof. *Id.*

In contrast, on September 30, 2003, Mr. Spota denied any conflict existed. It would have been impossible for Mr. Tankleff to consent to the prosecutor's participation in the face of one conflict – as a result of the prior representation of Detective McCready -- that the prosecutor denied existed and the extent of which was unknown at the time and a second conflict -- the prior representation of Todd Steuerman -- that was never revealed.

In further contrast to *Holmes*, Mr. Tankleff has expressly identified the actual prejudice he has suffered and continues to suffer. *See* Introduction, Section II, *infra* (discussing examples of actual prejudice experienced by Mr. Tankleff in this proceeding due to the lack of a disinterested prosecutor). For each of these reasons, Mr. Tankleff has not waived the present conflicts under the standard set forth in *Holmes*

Nor, as the Suffolk County District Attorney suggests, does *People v. Paperno* establish a bright line rule that all motions to disqualify a prosecutor on the basis of a conflict must be made "at the pre-trial stage." Such a holding would deny due process and justice in an infinite number of factual scenarios, including the one presented here, where the facts that give rise to the conflict are

not known to the defendant prior to trial.[13]

The *Paperno* case involved a situation where the facts giving rise to the conflict were known prior to trial and raised prior to trial. Not only did the court not purport to establish a bright line rule that motions to disqualify must be raised pre-trial regardless of what facts are known at that time, but also the Court specifically recognized that subsequent developments may demonstrate that the defendant was deprived of a fair trial. *Paperno,* 54 N.Y.2d at 304. This holding demonstrates that a motion's timing is not a bar to granting a motion made in good faith where the prosecutor's continued involvement will prejudice the defendant. *See also People v. McLaughlin,* 662 N.Y.S.2d 1019, 1023 (Sup. Ct. 1997) (disqualifying defense counsel despite Government's delay in bringing motion).

The flaw in the District Attorney's purported understanding of waiver law is further illustrated by *United States v. Brinkworth,* 68 F.3d 633 (2d Cir. 1995), another case cited in the District Attorney's opposition. *Brinkworth* holds that, in the context of disqualifying a judge, "[a] party must bring a disqualification motion at the earliest possible moment **after** obtaining knowledge of facts demonstrating a basis." *Id.* at 639 (emphasis added).[14] In conformity with *Brinkworth,* Tankleff's motion is made in good faith and was filed immediately after adducing evidence that put the conduct of Mr. Spota's former client, Detective McCready, directly at issue in this proceeding.

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[13] Indeed, this rule would perversely reward a District Attorney for intentionally failing to disclose facts that give rise to a conflict until after the trial commences. Fortunately, this is not the law. Indeed, if the magnitude of the present conflict was as apparent in September 2003, as the Suffolk County District Attorney now maintains, then it also had an obligation, which it breached, to inform the court of the conflict. *See People v. Wandell,* 75 N.Y.2d 951, 953 (1990) "[B]oth defense counsel and the prosecution were acutely aware that a conflict existed by virtue of defense counsel's representation of the prosecution's chief witness . . . Their failure to bring the underlying facts to the court's attention is inexcusable.").

[14] In *Brinkworth*, the defendant sought to recuse the judge before trial based upon a rumor (that the defendant admitted in his motion was untrue) that the judge's wife and the defendant had been involved romantically. *Id.* at 636. It was clear from the circumstances that the motion was made in bad faith to harass the judge and to transfer the case to a more favorable judge. *Id.* Nevertheless, and despite the motion's untimeliness, the trial judge ultimately transferred the case to a different judge for sentencing. *Id.*

Indeed, Mr. Tankleff asked the Court immediately to adjourn the proceedings after the testimony calling into question McCready's conduct was elicited from Mr. Lubrano so that there could be no question that, in light of the newly learned facts, Mr. Tankleff was not waiving the conflict those facts presented. While Mr. Lato initially objected and stated that he wanted to cross-examine the witness despite the fact that the conflict had been raised, he ultimately changed his position and agreed that the issue of the conflict was now ripe for resolution.

The second conflict presented by Mr. Spota's representation of Todd Steuerman has also been raised by Mr. Tankleff "at the earliest possible moment after obtaining knowledge of facts demonstrating a basis." Mr. Tankleff was unaware of that facts demonstrating that conflict until Mr. Spota disclosed them for the first time, through Mr. Lato, after the District Attorney's Office filed its opposition to the motion to disqualify based on the McCready conflict. Mr. Tankleff is raising the Todd Steuerman conflict in this reply, which is the earliest possible moment since he only learned of the conflict.

Accordingly, Mr. Tankleff's motion to disqualify is timely. Mr. Tankleff could not have knowingly and intelligently waived a conflict before learning of the facts giving rise to the conflict. As soon as he learned information that suggested that Mr. Spota's office could not act as a disinterested prosecutor in this case, he raised these issues with the Court. Finally, because he has demonstrated actual prejudice from actions taken by Mr. Spota's Office, he has been, and is being, denied a fair proceeding. Accordingly, even if he had not raised the issue at the earliest possible moment, he would be entitled to disqualification at this time.

II. The Suffolk County District Attorney's Office Must Be Disqualified for Actual or Apparent Conflict, Potential Prejudice, Appearance of Impropriety, and Risk to Client Confidentiality

A. There is No Requirement of Actual Prejudice

Although Martin Tankleff has demonstrated actual prejudice resulting from Mr. Spota's continued role as prosecutor in this case, actual prejudice is not one of the requirements of disqualification. Indeed, the District Attorney's Opposition Memorandum is flat wrong and patently misleading in stating that the Court of Appeals has established an "actual prejudice requirement." Opp. at 16. Instead, the Court of Appeals has stated unequivocally that "the practical impossibility of establishing that [a] conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." *Zimmer,* 51 N.Y.2d at 395. Not a single one of the cases cited by the District Attorney in an effort to support its fictitious "actual prejudice" requirement holds otherwise. *See* Opp. at 14-15. For example, *People v. Krstovich* does not even discuss actual prejudice. *See* 72 Misc.2d 90, 338 N.Y.S.2d 132 (Co. Ct., Greene Co. 1972). To the contrary, it explicitly recognizes the need to avoid even an appearance of a conflict:

> The District Attorney is a public officer. His duties are quasi-judicial in nature. His obligation is to protect not only the public interest but also the rights of the accused. In the performance of his duties he must not only be disinterested and impartial but must also appear to be so. His primary duty is to see that justice is done. Because he is presumed to act impartially he has a wide latitude to determine whom, whether and how to prosecute. Public confidence in the office in the exercise of those broad powers demands that there be no conflict of interest or the appearance of a conflict.

72 Misc.2d at 93-94 (emphasis added; internal citations omitted). Indeed, the *Krstovich* court held that the court has the "obligation on its own initiative to correct real or apparent improprieties which would tend to lower esteem for the system of justice." *Id.* at 94 (emphasis added).

Similarly, *People v. Schrager* (Opp. at 15) does not mention prejudice at all, but instead reiterates the requirement that there be no "conflict of interest or the appearance of a conflict." 74

Misc.2d 833, 346 N.Y.S.2d 101 (Sup. Ct. Queens Co. 1973). The court thus held that due to "personal and professional relationships" between the District Attorney and the defendant, disqualification was proper. *Id.*

The District Attorney also relies on *Zimmer* (Opp. at 15), which, as discussed above, is based on a "reasonable potential for prejudice," not, as the District Attorney argues, "actual prejudice." *See* 51 N.Y.2d at 395. *Zimmer* goes a step farther, however, to buttress its "reasonable potential for prejudice" analysis with a second and independent basis for disqualifying a prosecutor -- the appearance of a lack of impartiality:

> It was important that these responsibilities, carried out in the name of the State and under the color of the law, be conducted in a manner that fostered rather than discouraged public confidence in our government and the system of law to which it is dedicated. The concern that those occupying prosecutorial office be jealous of the evidences as well as the substance of integrity was not to be discounted. In particular, the District Attorney, as guardian of this public trust, should have abstained from an identification, in appearance as well as in fact, with more than one side of the controversy.

Zimmer, 51 N.Y.2d at 395-96 (internal citations omitted; emphasis added).

Along the same lines, in *People v. Shinkle* (Opp. at 15), the Court of Appeals explicitly rejected the argument made by the District Attorney there that disqualification is not appropriate absent actual prejudice. 51 N.Y.2d 417, 419 (1980). Instead, the Court of Appeals relied on an "unmistakable appearance of impropriety" in requiring that the District Attorney be disqualified. *Id.* The Court of Appeals held that "the risk of prejudice attendant on abuse of confidence, however slight" is another, independent basis for disqualification of a District Attorney in circumstances where the District Attorney is forced to prosecute or, by analogy, investigate, a former client. *Id.* at 421.

Finally, *People v. Paperno* (Opp. at 15) does not hold that a defendant seeking the disqualification of a District Attorney must show "actual prejudice." Instead, it holds merely, in circumstances not relevant to the instant hearing, that "where the defendant, prior to trial, makes a significant showing that the prosecutor's prior investigative or prosecutorial conduct will be a material issue at the trial, the prosecutor should be recused." 51 N.Y.2d 294, 298 (1981).

In sum, there is no actual prejudice requirement. Rather, under the very cases cited by the District Attorney, Mr. Tankleff is entitled to the disqualification of Mr. Spota if he can show any of the following: 1) a "conflict of interest or the appearance of a conflict," *Krstovich*, 72 Misc.2d at 93-94; *Schrager*, 74 Misc.2d 833; 2) "reasonable potential for prejudice" stemming from Mr. Spota's conflicts, *Zimmer*, 51 N.Y.2d at 395; 3) the "appearance of impropriety," *Shinkle,* 51 N.Y.2d at 419; *Zimmer,* 51 N.Y.2d at 395-96; or 4) the risk, "however slight" of an abuse of confidence where the District Attorney is investigating or prosecuting a former client, *Shinkle,* 51 N.Y.2d at 421. While any of these individually would warrant disqualification, all of these problems are present in the pending 440 proceeding.

B. The District Attorney Misunderstands the Conflicts

1. Mr. Spota's Representation of McCready

The District Attorney mistakenly asserts that he need be disqualified "only if McCready could demonstrate the need for a special district attorney in a potential prosecution based on his alleged perjury." *See* Opp. at 14. But this is not the problem at issue. First, to conceive of the problem this way assumes that Mr. Spota has already properly investigated McCready's lies and the reasons for them and made a decision to prosecute him, and the only remaining question is whether Mr. Spota

can continue that prosecution.[15] But this is not the current state of play. The problem in our current circumstance is that Mr. Tankleff and the People are entitled to an impartial prosecutor who will vigorously pursue the apparent lies by McCready and their connection to his decision as the lead detective not to investigate any murder suspect other than Mr. Tankleff, even if such investigation could ultimately inculpate McCready in some way. *See Zimmer*, 51 N.Y.2d at 393 ("prosecutor's mission is not so much to convict as to achieve a just result" and prosecutor must ensure that defendant receives "a full measure of fairness"). Due to his close relationship with Detective McCready -- which he does not contest in either his Opposition Memorandum or his attached affidavit -- it is unlikely he would be inclined to pursue a vigorous investigation of McCready's conduct. It is also unlikely he could objectively assess the significance of the evidence adduced about McCready in making prosecutorial decisions in this proceeding.

Mr. Spota does not dispute, as argued in Mr. Tankleff's opening Affirmation and Memorandum, that the Disciplinary Rules prohibit him from investigating allegations his former client committed perjury. *McLaughlin*, 662 N.Y.S.2d at 1020 ("One can imagine no greater instance of disloyalty to a former client" than to suggest he is implicated in crimes alleged in a later case where the attorney represents a new client"). Nor does Mr. Spota alleviate the concern that he might hold back in his pursuit of McCready due to his relationship with him. *Cf. State v. Needham,* 688 A.2d 1135, 1137 (N.J. Super 1996) (attorney might not vigorously cross-examine a former client testifying for the other side). Finally, Mr. Spota does not contest that, necessarily, his views of Detective McCready are colored by his previous representation of Detective McCready. At bottom,

[15] Even if the District Attorney were correct and this were the only point of the proceedings from which the conflict would need to be judged, there would be a conflict of interest. The District Attorney's representation of the People would appear to be, or actually could be, "impaired by the loyalty he owes a former client." *People v. McLaughlin*, 662 N.Y.S.2d 1019, 1022 (Supr. N.Y. Co. 1997). Further, Mr. Spota might use against McCready confidential information he learned from McCready during the prior representations. *See Shinkle*, 51 N.Y.2d at 419-20.

the District Attorney does not contest that his relationship with Detective McCready poses the conflict of interest presented in Mr. Tankleff's opening Affirmation and Memorandum.

2. Mr. Spota's Firm's Representation of Todd Steuerman

Second, Mr. Spota ignores that his relationship with Detective McCready is not the only conflict at issue. Mr. Tankleff and the Court have now learned that Mr. Spota also has a conflict of interest stemming from his relationships with Todd and Jerry Steuerman. Mr. Spota revealed for the first time that his small law firm represented Todd Steuerman in a criminal matter a few years before the Tankleff murders.

Mr. Spota still has not disclosed whether he personally represented Todd Steuerman. Regardless, the firm's representation of Todd Steuerman gives rise to a conflict. The client confidences that create a conflict of interest with regard to Mr. Sullivan's representation of Todd Steuerman are imputed to Mr. Spota. "[F]or the purpose of disqualification of counsel, knowledge of one member of a law firm will be imputed by inference to all members of that law firm." *People v. Wilkins,* 28 N.Y.2d 53, 56 (1971) (citing *Laskey Bros. of W.Va. v. Warner Bros. Pictures*, 224 F.2d 824, 826 (2d Cir. 1955)); *accord People v. Mattison,* 67 N.Y.2d 462, 471 (1986). The rule recognizes that there is a "free flow" of confidential client information between law partners. *Wilkins,* 28 N.Y.2d at 56. Once knowledge of confidential information is imputed to a partner, he or she is deemed to retain that knowledge for the purpose of disqualification even after the partnership dissolves. *Laskey Bros.,* 224 F.2d at 826-27. Where smaller law firms are concerned, the imputation of knowledge is a matter of law and irrebuttable. *Solow,* 83 N.Y.2d at 311. Because the Sullivan and Spota law firm apparently had few if any partners other than Messrs. Spota and Sullivan, there is no question that Mr. Sullivan's representation of Todd Steuerman is imputed to Mr. Spota for

conflicts purposes.

3. Mr. Sullivan's Representations of Todd and Jerry Steuerman

In addition, Mr. Spota recently disclosed for the first time that his former partner represented both Todd and Jerry Steuerman a few years later, while Mr. Spota was still sharing office space and other resources with him. The client confidences that Mr. Sullivan obtained from both Todd and Jerry Steuerman shortly after the Tankleff trial may also be imputed to Mr. Spota. In certain circumstances, client confidences may be imputed for purposes of disqualification where a group of solo practitioners share office space and other resources, even where they did not commingle client files, and did not share costs, assets, and income. *See Moore v. Margiotta,* 581 F. Supp. 649, 650-51 (E.D.N.Y. 1984). Mr. Spota has not provided sufficient information regarding the circumstances under which he practiced law with Mr. Sullivan after their "partnership" ended as a legal matter. However, he did state that when he asked his staff to search his files, they found files relating to Mr. Sullivan's representation of Jerry and Todd Steuerman. This suggests that even after they were no longer "partners" as a legal matter, their close working quarters and their sharing of office space and other resources also included some sharing of client files and confidences. If confidential client information was shared, then the conflict from Mr. Sullivan's later representation of both Steuermans is also imputed to Mr. Spota. *See Anwar v. United States,* 648 F.Supp. 820, 827-28 (N.D.N.Y. 1986).

In short, at issue is whether the public and Mr. Tankleff can have faith that Mr. Spota will vigorously investigate Mr. McCready's lies at the Tankleff trial, McCready's relationship to Jerry Steuerman, and Martin Tankleff's allegation that Todd and Jerry Steuerman were co-conspirators in the Tankleff murders, when Mr. Spota previously represented two of these three individuals and may

have an imputed conflict with regard to the third. Plainly under these circumstances, Mr. Spota is not, and cannot be, a "disinterested prosecutor."

C. Mr. Spota Must Be Disqualified

1. There is a Conflict of Interest Between Mr. Spota's Representation of the People and His Prior Representation of Detective McCready and Todd Steuerman

A "conflict of interest exists when an attorney's current representation is impaired by the loyalty the owes a former client." *McLaughlin*, 662 N.Y.S.2d at 1022. The District Attorney does not contest that Mr. Spota's representations of Detective McCready and Todd Steuerman create a conflict. Rather, the District Attorney's Office argues only that a conflict is not sufficient to require disqualification unless actual prejudice is demonstrated. As discussed above, this is not the law. The conflict stemming from Mr. Spota's representations of Detective McCready and Todd Steuerman mean that he can not zealously represent the People in this proceeding. To do so would require, at a minimum, investigating McCready and Todd Steuerman, and evaluating the significance of their conduct for purposes of making prosecutorial decisions in the pending proceeding. Further, Mr. Spota may be called upon to discredit his former clients. Mr. Spota can not investigate, evaluate or discredit his former clients in an objective manner, because of his loyalty to his former clients and because doing so may require using confidences he gained during his representation of them.

2. There is a Reasonable Potential for Prejudice to Mr. Tankleff Stemming from Mr. Spota's Conflicts of Interest

As discussed above, a "reasonable potential for prejudice" to Mr. Tankleff requires Mr. Spota's disqualification. *Zimmer*, 51 N.Y.2d at 395. Mr. Spota does not contest that a reasonable potential for prejudice exists; he only argues that absent "actual prejudice," he may continue as the prosecutor in this case. Opp. at 16. But there is in fact far more than a reasonable potential for

prejudice here. Mr. Spota does not deny that Detective McCready did, as Mr. Lubrano testified, have a relationship with Jerry Steuerman and thus apparently lied at Mr. Tankleff's trial. Mr. Tankleff will be prejudiced if the District Attorney does not investigate these lies. There is a "reasonable potential" that Mr. Spota will not vigorously do so, because of loyalty to his former client, or because he is biased towards his former client such that he is colored in his assessment of whether McCready committed perjury at Mr. Tankleff's trial.

The same problem is at issue with Mr. Spota's conflicts regarding Todd and Jerry Steuerman. Indeed, the conflict here is even more severe, as there has been substantial evidence presented in the pending proceeding that both Todd and Jerry Steuerman were among the actual perpetrators of the scheme to murder the Tankleffs.

In any event, it is difficult to deny that Mr. Tankleff has already suffered actual prejudice due to Mr. Spota's conflicts. Mr. Spota's office initially failed to investigate Mr. Tankleff's new evidence of actual innocence for weeks, until Mr. Tankleff filed his motion. Mr. Spota's agent, Mr. Warkenthein, gave Mr. Harris an inaccurate description of the law and threatened him with jail if he were to testify as to his knowledge of the Tankleff murders. Despite knowing that Mr. Harris had counsel, Mr. Spota sent two different jailhouse agents to speak to Mr. Harris and secretly record him. While doing so, they told him he was not only at risk for prosecution, but that his life would be in danger if he testified about what he knew. Mr. Spota refuses to immunize Mr. Harris even though, as discussed above, there is no possible prejudice to his office from doing so. Mr. Spota has not denied that when Mr. Graydon came forward to provide eyewitness testimony that Joseph Creedon had asked him to participate in the murder of Seymour Tankleff at the behest of Jerry Steuerman, his office dismissed Graydon out of hand, refused to assist him in providing the information to Mr. Tankleff's counsel, and instead asked for his social security number so that it could attempt discredit

him in these proceedings.

It is impossible to analyze these actions by Mr. Spota and conclude that he is objective with regard to Mr. Tankleff's case. He is plainly not zealously pursuing the truth of what happened the night of the Tankleff murders. Accordingly, he must be disqualified because there is a reasonable potential (indeed a virtual guarantee) that his lack of objectivity will prejudice Mr. Tankleff.

3. Mr. Spota's Conflicts Create an Appearance of Impropriety

The Court of Appeals has held that defendants and the public are "entitled to protection against the appearance of impropriety" and has disqualified prosecutors on that basis. *Shinkle*, 51 N.Y.2d at 421. In the face of this rule, the District Attorney does not contest that there is an appearance of impropriety stemming from his continued role in this case, given his representations of Detective McCready and Todd Steuerman. Instead, he unsuccessfully attempts to distinguish relevant case law. *See* Opp. at 17.

First, Mr. Spota notes that in *People v. Gallagher*, the District Attorney was not disqualified, because he applied for an order for a special prosecutor. Opp. at 17. That, unlike Mr. Spota, the prosecutor in *Gallagher* recognized his duty to step aside, does not change the court's analysis as to why the standards for disqualification were satisfied. The Court found the standards for disqualification were met to disqualify two different prosecutors. *Gallagher*, 533 N.Y.S.2d 554, 556 (2d Dept. 1988). With regard to the disqualification of the second prosecutor, the court held that disqualification was justified in part because "widespread [media] coverage" "ran the further risk of jeopardizing the public's confidence in the investigation." *Id.* The same plainly holds true in this case.

Second, Mr. Spota argues that *People v. Dellavalle* does not provide support for the standard, enunciated by the Court of Appeals in *Shinkle*, that an appearance of impropriety is a sufficient basis to disqualify a district attorney. *See* Opp. at 17. However, the District Attorney does not and cannot deny that the court in *Dellavalle* decided the appearance of impropriety and the risk of undermining the public's confidence in the District Attorney's Office warranted disqualification of that office:

> County Court, agreeing that the facts of the case created an appearance of impropriety and "a substantial risk that, absent disqualification of the District Attorney's Office, public confidence in our criminal justice system could be undermined" dismissed the indictment, [and] appointed [a] Special Prosecutor" 687 N.Y.S.2d 199, 200 (3d Dept. 1999) (denying appeal of appointment of special prosecutor on the basis that there is no right of direct appeal of a disqualification order).

In any event, the Court of Appeals has articulated the appearance of impropriety as one of the bases for disqualification. *Shinkle,* 51 N.Y.2d at 421. Mr. Spota does not contest that there is an appearance of impropriety here. There clearly is one. The District Attorney used to represent one of the people implicated by the new evidence in the Tankleff murders. His former law partner, with whom he shared office space, represented a second individual implicated in the murders. In addition, Mr. Spota represented the lead detective in the Tankleff case, who new testimony demonstrates had a relationship with the prime suspect and lied at the Tankleff trial about that relationship. Further, Mr. Spota has not denied that he and that detective may have discussed the Tankleff trial in the context of their attorney client relationship. There can be no dispute that there is an appearance of impropriety in Mr. Spota continuing to represent the People, who are entitled, as is Mr. Tankleff, to a disinterested prosecutor in these proceedings.

4. There is a Risk of Abuse of Confidence if Mr. Spota Is Not Disqualified

There is a significant likelihood that the District Attorney's Office, whether intentionally or unintentionally, will use confidential information acquired from Detective McCready or Todd Steuerman to Mr. Tankleff's disadvantage or will be impaired from properly investigating these individuals and evaluating their conduct due to an inability to use such confidential information. The New York Court of Appeals has articulated the abuses that can arise when a prosecutor has formerly represented a government witness; namely, the prosecutor may express his personal beliefs on facts elicited from the witness, may find himself vouching for the witness's credibility, and may suggest during examination the existence or absence of facts not in evidence. *Paperno,* 54 N.Y.2d at 300-01; *accord Anwar v. United States,* 648 F. Supp. 820, 826-27 (N.D.N.Y. 1986) (A district attorney who has formerly represented a key government witness may fail to cross examine the witness for fear of misusing confidential client information, may in fact misuse that information, may be required to testify about material aspects of the witness's testimony, or may place his own credibility in dispute by cross examining the witness.). These actions by the prosecutor amount to testimony against the defendant who may not have an effective way for confronting the statements. *Paperno, 54 N.Y.2d* at 301. The purpose of disqualification is to protect client confidences against these adverse uses. *See* DR 4-101(b); DR 5-108(a)(2); *Solow v. W.R. Grace & Co.,* 83 N.Y.2d 303, 309 (1994).

Any risk, "however slight" of an abuse of confidence is grounds to disqualify the District Attorney. *Shinkle*, 51 N.Y.2d at 421. Such a risk is present here. Mr. Spota does not deny that Detective McCready may have discussed the Tankleff trial with him in the context of their attorney client relationship. Accordingly, were Mr. Spota to play the role required of the District Attorney, and investigate Detective McCready, he might rely on information Detective McCready previously

told him. If Mr. Spota ultimately were to question Detective McCready, he may also need to rely on confidential information in order to impeach him. Alternatively, Mr. Spota may be making prosecutorial decisions now, such as not zealously to investigate the Lubrano evidence, based on what Detective McCready has told him or out of a sense of loyalty to McCready. This is more than a "slight risk" of abuse of confidence.

Similarly, Mr. Spota's prior representation of Todd Steuerman was in the context of a drug case. The new evidence presented in the current proceeding reveals that an "enforcer" for Todd's drug business participated in the Tankleff murders, and that it is likely he did so at the behest of Todd or Jerry Steuerman. What Mr. Spota learned on a confidential basis about Todd's drug business may be useful to either an investigation of Todd as a suspect in the Tankleff murders, or to an impeachment of Todd as a witness. Accordingly, for Mr. Spota properly to represent the People, he may have to rely on confidential information he learned in his prior representation of Todd. Additionally, he may not zealously investigate Todd Steuerman or dispassionately weigh the significance of evidence implicating him, as a result of his loyalty to a former client. This loyalty may affect prosecutorial decisions he will need to make in this proceeding, such as whether to re-visit granting Harris immunity in light of the evidence adduced through Graydon corroborating Harris, or whether, ultimately, to agree with Mr. Tankleff he is entitled to a new trial.

D. The Suffolk County District Attorney's Office Must Be Disqualified

As discussed above, there are multiple overlapping reasons why Mr. Spota must be disqualified. If he must be disqualified, so too must his office. Mr. Spota does not dispute: 1) absent the appointment of a special prosecutor, he may not transfer the "fundamental responsibilities of his office" to anyone else, *Schumer,* 69 N.Y.2d at 53; 2) he has authority over hiring, promotions and

investigatory resources for all of his staff; and 3) the high profile nature of this case is such that his staff knows he is aware of all of their decisions in the case. *See* Tankleff's Affirmation and Memorandum at 33-34. Accordingly, no firewall would be effective or legal. *See Shinkle,* 51 N.Y.2d at 420-21; *People v. Wyatt,* 530 N.Y.S.2d 460, 461-62 (Crim. Ct. Bx. Co. 1988); *McLaughlin,* 662 N.Y.S.2d at 1022-23. Thus, since Mr. Spota must be disqualified, the Suffolk County District Attorney's Office must likewise be disqualified.

Ignoring the conflicts that are known today that were unknown in October 2003, the District Attorney's Office spends a great deal of effort in its opposition papers trying to establish that they have adhered to the procedure established by Mr. Spota and that Mr. Lato, and not Mr. Spota, is in charge of the investigation.[16] The District Attorney argues that even if there is now a known conflict, it is cured by the wall built around Mr. Spota. Although the defense submits that the "wall" is nothing more than a thin veil, which has not and cannot work in the practical world, the more important point is that any attempt by Mr. Spota to divest himself of his power and deliver it to Mr. Lato is specifically prohibited by the controlling law. In *Schulmer v. Holtzman,* 60 NY 46 (1983), the Court of Appeals specifically barred then District Attorney Holtzman from doing exactly what Mr. Spota is trying to do now. Mr. Spota cannot divest himself of his constitutional duties outside of the parameters of section 701 of the County Law. Once he is removed pursuant to statute and order of the court the power to appoint a special prosecutor is reserved for the courts to exercise. Therefore, the District Attorney's solution to the conflict -- that Mr. Lato "is in charge of the case"--

[16] In this context, Mr. Lato claims that the motion to disqualify is really directed at him personally, and is motivated, in Mr. Lato's view, by the fact that Mr. Lato has done such a good job in discrediting the defense witnesses. *See* Opp. at 11). Although Mr. Lato is a smart, well prepared lawyer, it is ludicrous to believe that the defense has filed this motion with the hope that no where on all of Long Island would the Court find a special prosecutor as talented as Mr. Lato. This argument may reveal much about Mr. Lato's view of himself, but offers no support for his position that Mr. Spota can avoid disqualification despite his legal relationships with Jerry Steuerman, Todd Steuerman and James McCready -- all central figures in the matter before the court. Nor does this argument support the notion that, given Mr. Spota's conflicts, he can appoint one of his subordinates as a *de facto* special prosecutor.

is barred. Even if Mr. Lato could establish that he has the ability to act without the approval of the elected District Attorney -- which he has been unable to do -- all he will have done is flagrantly and illegal usurped power to which he is not entitled. Finally, the argument that the defense consented to this process is without merit. The defense has no more authority to consent to an illegal transfer of power than does District Attorney.

The most interesting point made by Mr. Spota's attempt illegally to transfer power to Mr. Lato is that it reveals that even Mr. Spota recognizes a problem. If he truly had no conflict and the motion was actually frivolous, Mr. Spota would not be claiming to have turned over this case to Mr. Lato.

CONCLUSION

For all of the reasons set forth in Mr. Tankleff's motion to disqualify and appoint a special prosecutor, as well as for all of the reasons above, the Suffolk County District Attorney's Office must be disqualified from any further participation in this case. The appointment of a special prosecutor is the only way to ensure that the victims of the Tankleff murders are served by a disinterested prosecutor, and the people of Suffolk County can have confidence that the prosecutor in this case will pursue, without distraction or bias, the sole objective of obtaining a just result.

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Respectfully submitted,

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