COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

**PEOPLE OF THE STATE OF NEW YORK**

**REPLY MEMORANDUM**
Indictment Nos.: 1535-88/1290-88

- against -

**ORAL ARGUMENT REQUESTED**

**MARTIN H. TANKLEFF,**

Defendant.

----------X

**REPLY MEMORANDUM OF LAW**
**IN SUPPORT OF DEFENDANT'S MOTION**
**TO VACATE HIS CONVICTIONS PURSUANT TO C.P.L. § 440**

Recognizing that "[t]he duty of a prosecutor is to seek justice, not merely to convict," the web site for the Suffolk County District Attorney's Office proudly proclaims its promise to "enforce the law with temperance and without malice, to seek truth and not victims, to serve the law and not fractional purposes and to approach these tasks with humility and respect." See http://www.co.suffolk.ny.us/da/message.htm. Sadly, in the case of the People v. Martin H. Tankleff, the DA has failed miserably. Rather than seek the truth, the DA has taken the position that it has no duty to investigate substantial evidence demonstrating that an innocent man sits in prison while violent murderers remain free. Rather than approaching new evidence that Mr. Tankleff was wrongly prosecuted with humility and respect, the DA has engaged in name calling, heaping scorn on citizens who have come forward to testify about their knowledge of these crimes.

The DA, based on nothing more than an unwillingness to accept the import of their testimony, asks this Court to find that each and every witness in the hearing before it

intentionally lied or was naively mistaken about the events to which they have given sworn testimony. Further, the DA asks the Court to judge the new evidence not against the actual record of the original trial, where the evidence of Mr. Tankleff's guilt was scant at best, but rather, against the DA's revisionist and misleading mischaracterization of the trial evidence.

"It is important that [the District Attorney's] responsibilities, carried out in the name of the State and under the color of the law, be conducted in a manner that foster[s] rather than discourage[s] public confidence in our government and the system of law to which it is dedicated." People v. Baker, 99 A.D.2d 656, 472 N.Y.S.2d 57 (4th Dept. 1984). In order for justice finally to be served in this case, the Court cannot accept the DA's invitation to mischaracterize the trial evidence and to ignore the new evidence. Justice can only be served in this case, and the citizens of Suffolk County can only have their confidence in their justice system restored, if the Court grants Mr. Tankleff's motion, either finding Mr. Tankleff innocent, or, at a minimum, ordering a new trial so that a jury can hear all of the evidence and render its own conclusions.

## SUMMARY OF ARGUMENT

In any post-judgment motion to vacate or for a new trial, it is difficult to imagine stronger evidence than an admission by someone other than the defendant that he is the one who actually committed the crimes. In the extraordinary evidentiary hearing held before this Court, there has been that, and so much more.

Marty Tankleff, as well as many of his relatives, have from the day of his parents' murders suspected that Jerry Steuerman, Seymour Tankleff's business partner, was behind the murders. Steuerman was at the crime scene the night of the attacks and had an obvious motive to murder the Tankleffs. As demonstrated at the hearing before this Court, Joseph Creedon is an

admitted criminal associate of Todd Steuerman, the son of Jerry Steuerman. Creedon has admitted to Karlene Kovacs (in the presence of John Guarascio) that he was involved in the Tankleff murders. Creedon has made the same admission to Gaetano Foti, someone who the Suffolk County DA's Office (the "DA") has long considered a reliable source. Creedon has also admitted his involvement to Billy Ram. Lastly, and most recently, Creedon has admitted his involvement in the Tankleff murders to his own son.[1]

However, Mr. Tankleff's petition is not supported solely by Creedon's multiple after-the-fact admissions. During the course of and in furtherance of the conspiracy to murder the Tankleffs, Creedon discussed the scheme with Jerry Steuerman, Brian Scott Glass, Joseph Graydon, Billy Ram, Glenn Harris and Peter Kent. Harris has given sworn testimony about the conspiracy, which was corroborated in court by Graydon and Ram. Glass corroborated Harris' testimony with out-of-court statements. And, Kent admitted in court his criminal relationship with Harris and Creedon, admitted that he was in the middle of a violent, drug-induced crime spree the week of the Tankleff murders, and placed himself near the crime scene the night before and day after the murders.

The DA appears to recognize the combined weight of this extraordinary evidence and that it lacks any evidence to contradict it. Thus, in response, the DA engages in two strategies. First, it attacks each witness individually, trying to cast doubt on that witness' testimony. If the DA were only facing one or two witnesses, this strategy might be effective. However, there were approximately 20 witnesses at the hearing. The DA is therefore left asking this Court to find, without any evidence, that all 20 either knowingly perjured themselves or were simply mistaken about the facts to which they gave sworn testimony. Second, the DA attempts to avoid

[1] This admission, set forth in a sworn affidavit from Creedon's son, is the subject of a separate pending 440 petition, which requests that the Court consolidate that petition with this one and re-open the evidentiary hearing so that Creedon's son can testify in open court.

the new evidence altogether by trying to convince the Court that the evidence at trial against Mr. Tankleff was overwhelming. However, the DA can only make this argument by mischaracterizing and distorting the trial record.

As both dissenting members of the original appellate panel in this case recognized, without Tankleff's confession, the DA lacked sufficient evidence to even present to a jury. People v. Tankleff, 606 N.Y.S.2d 711, 712 (App. Div. 1993) (O'Brien, Eiber, J.J., dissenting) ("In view of the absence of any other evidence connecting the defendant to the murders, except for the confession which he disavowed at trial, the indictments should be dismissed.") In fact, the physical evidence totally undermined Tankleff's confession.

For example, the DA can argue all day about where on the kitchen counter the knife referenced in the confession was last seen, but the forensics evidence demonstrated that the knife could not have been the murder weapon. It had not a single trace of blood or human tissue on it. Rather, it had a pink watermelon-like residue on it. For it to be the murder weapon, Tankleff would have had to thoroughly clean it of blood -- which would have involved taking apart and reassembling the handle of the knife -- and yet somehow leave watermelon on it. According to the DA, Tankleff used a shower sponge to clean the knife; yet, the DA's own microscopic forensic examination of the sponge demonstrated that it likewise did not have a trace of blood or human tissue on it. Further, Tankleff would have done so without any trace of the blood or human tissue being left behind in the drain, which was clogged with hair and other debris. Moreover, he would also have had to perform the same feat with the blunt instruments used as the murder weapons. In short, he would have had to do the impossible. The knife and barbells referenced in Tankleff's confession were not the murder weapons.

Similarly, the DA can argue all day that Marty's father's blood should have transferred from Marty to various door handles he says that he touched. However, the undisputed facts demonstrate otherwise. It is undisputed that Marty had blood on his hands when he left the house and went outside.[2] Yet, Marty left no trace of blood on the front door, which he had to have opened in order to leave the house. It is therefore apparent that the blood was sufficiently coagulated that it was not subject to transference by the time Marty discovered his parents' bodies.

Likewise, the DA can argue all day that the blood on the doorknob to Marty's room and near his light switch was not left by an intruder who had just killed Marty's mother and was checking to see if Marty had heard anything, but rather, that it was inexplicably left there by Marty who had otherwise fastidiously cleaned the *entire house* of blood. However, if Marty killed both of his parents and therefore had both of his parents' blood on him (and the physical evidence suggests, contrary to Marty's confession, that his father was killed first), the DA has no explanation why only Arlene's blood is on the doorknob to Marty's room and near his light switch.

The fact of the matter is that, despite the DA's best efforts to re-cast the trial evidence, the physical evidence did not corroborate the People's theory that Marty was the murderer. The jury convicted Marty Tankleff, not because of the physical evidence, but in spite of it. The jury convicted because Marty confessed.

Yet, this Court, unlike the trial jury, has heard from a false confessions expert concerning the unreliability of that confession. The original jury did not hear from Dr. Ofshe or a similar expert in interrogation techniques who would explain that false confessions are a "regularly

---

[2] Marty testified this was from attempting to perform first aid on his father. According to the DA's theory, Marty had blood on his hands when he left the house because he dipped his hands in his father's blood to make it appear that he had rendered first aid to his father.

occurring phenomenon." H.T. 7/21/04 at 59 (Citations to "H.T." refer to the transcript of the hearing before this Court. Citations to "Tr." refer to the original trial transcript.)

Nor did the jury at trial learn that Todd Steuerman was running a drug operation out of the bagel stores Jerry Steuerman owned with Seymour Tankleff. It did not hear that Creedon has confessed his involvement in the Tankleff murders on multiple occasions. It did not hear from eyewitnesses and criminal associates of Creedon like Ram, Graydon and Harris. And, it did not hear that Kent has admitted that he was a criminal associate of Creedon and Harris and that he was committing violent crimes that week and was near the crime scene at precisely the time he would have needed to be in order to commit these murders with Todd Steuerman's henchman, Joseph Creedon.

Martin Tankleff should not be imprisoned. His convictions will continue to lack validity unless and until a jury privy to *all* of the evidence convicts him of these crimes -- something that no reasonable jury would do.

## ARGUMENT

The DA spends a mere 30 pages of its 239-page brief discussing the legal claims in the motion at bar. The People's Post-Hearing Memorandum In Opposition To Martin Tankleff's C.P.L. § 440 Motion To Vacate His Murder Convictions ("DA Opp.") at 161-90. Mr. Tankleff, in the main, will rely on his explanations of the law and arguments as set forth in the Memorandum of Supplemental Authority in Support of Defendant Marty Tankleff's Motion to Vacate his Convictions under C.P.L. § 440 filed 3/21/2005 ("Memo") at 25-59.[3] As the DA only makes a few points as to the substance of the claims, only a few points of clarification are necessary.

[3] Citations to "Memo" refer to Mr. Tankleff's Memorandum of Supplemental Authority in Support of Defendant Marty Tankleff's Motion to Vacate his Convictions under C.P.L. § 440 filed 3/21/2005.

## I. The Conviction and Incarceration of Someone Who Is Actually Innocent Violates the New York State Constitution

As set forth more fully in Mr. Tankleff's Memo, Tankleff has shown that his conviction should be vacated because he is actually innocent and because his continued incarceration violates the New York State Constitution. N.Y. Const. Art. I, §§ 5-6; People v. Valance Cole, 1 Misc. 3d 531 (S. Ct., Kings County, Sept. 12, 2003); Memo at 25-31. The DA's legal argument to the contrary is frivolous.[4]

The one case cited by the DA, Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004), is irrelevant to Tankleff's actual innocence claim under the New York State Constitution.[5] Menefee involved the doctrine of actual innocence under *federal law* and its relation to tolling the limitations period of the Anti-Terrorism and Effective Death Penalty Act. Id. at 160-62. Under federal law, a habeas petitioner's claim of innocence is "'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" Schlup v. Delo, 513 U.S. 298, 315 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)). However, the New York State Constitution provides greater rights to innocent individuals than the U.S. Constitution, and it prohibits the conviction and continued punishment of an innocent person. Cole, 1 Misc. at 542. Accordingly, the People's reliance on federal habeas case law is misplaced.

In considering an actual innocence claim, the court may consider "any reliable evidence whether in admissible form or not . . . because the focus is on factual innocence and not on whether the government can prove the defendant's guilt beyond a reasonable doubt." Id.; see

---

[4] There is no due diligence requirement for an actual innocence claim brought pursuant to C.P.L. § 440.10(1)(h). See People v. Valance Cole, NYLJ, 9/20/02 at pg. 20, col. 6 (Even if a defendant were not diligent in pursuing his claim of actual innocence, the incarceration of an actually innocent person would violate the New York State Constitution.). The DA cannot and does not argue to the contrary.

[5] It is also irrelevant to this Court's ability to grant relief to an actually innocent defendant pursuant to Judiciary Law § 2-b(3).

also State ex rel. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003) (en banc) (claim of factual innocence "must be assessed in light of all of the evidence now available"); Miller v. Commissioner of Correction, 700 A.2d 1108, 1130-31 (Conn. 1997) (court must consider all of the evidence). Tankleff has shown by clear and convincing evidence that "no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." Cole, 1 Misc. at 543.

In this case, as set forth more fully below, the evidence from trial and the 440 hearing includes evidence of Jerry Steuerman's motive for killing the Tankleffs -- he owed the Tankleffs several hundred thousand dollars and had been feuding with the Tankleffs in the weeks leading up to the murders -- and of his opportunity to kill the Tankleffs -- he was the last to leave the Tankleffs' home at 3:00 a.m. the morning of the murders, just three hours before Mr. Tankleff discovered his parents' bodies.

It also includes evidence: of Jerry and Todd Steuerman's connections to a crime gang, including Creedon, Kent, Harris, Ram, Graydon and Glass; of Creedon's admission he worked as the enforcer of Todd Steuerman's drug trade; of Creedon, Kent, Harris, Ram, and Glass' admissions they committed crimes together; that Jerry Steuerman tried to solicit Glass to kill his business partner; that Glass declined the offer, but passed it on to Creedon; that Creedon solicited Graydon to assist in the murder of Steuerman's business partner, but the attempt was unsuccessful; that Creedon solicited Ram to murder Steuerman's partner at his home in Belle Terre, but Ram declined; of Harris' admissions to Father Lemmert, Salpeter, Ram, Sister Angeline Mattero, and Kelly that he drove Creedon and Kent from Billy Ram's house to the Tankleffs' house on the night of the murders; the results of Harris' polygraph, which verify the truth of his statements; of Ram's testimony that Creedon, Kent and Harris left his house that

evening and that Harris returned the next day and admitted his involvement in what was obviously the Tankleff murders; of Creedon's admissions that he killed the Tankleffs to Karlene Kovacs (in the presence of John Guarascio and verified by Kovacs' polygraph test), Gaetano Foti, Billy Ram and, most recently, to Joseph Guarascio, Creedon's own son; of Kent's admissions that he was involved in a violent crime spree the week of the Tankleff murders and was near Ram's house the night of the murders and the day following the murders; and that after the Tankleff murders, Jerry Steuerman and Todd Steuerman attempted to hire Creedon to cut out Marty's tongue and kill someone.

Additionally, it includes evidence of Jerry Steuerman's consciousness of guilt. Just one week after the attacks and after withdrawing $15,000 from his and Seymour Tankleff's joint bank account, Jerry Steuerman feigned his own death and fled New York; he was subsequently found living under an alias, having changed his appearance, and later admitted his involvement in the murders. And it includes statements by Todd Steuerman that Marty Tankleff is innocent and that Jerry Steuerman had hired someone to kill the Tankleffs. Finally, it includes evidence -- for example Dr. Ofshe's testimony, Dr. Leo's affidavit, the results of Mr. Tankleff's polygraph test, and the physical evidence (or lack there of) of the crime -- that Mr. Tankleff's "confession," the lynchpin of the case against him at trial, is unreliable.[6]

---

[6] Pursuant to C.P.L. § 440.10(1)(h), this Court should vacate Mr. Tankleff's conviction based on the erroneous admission of Mr. Tankleff's "confession" in violation of his federal and state constitutional rights. U.S. Const. Amend. 5; N.Y. State Const., art. 1, § 6. The New York courts in this case previously incorrectly determined that, under federal and state law, Mr. Tankleff was not in custody during his pre-Miranda-warning statements. See People v. Yukl, 25 N.Y.2d 585, 589 (N.Y. 1969) (definition of custody under New York law is the same as the definition of custody under the U.S. Constitution); Tankleff v. Senkowski, 135 F.3d 235, 244 (2d Cir. 1998) (holding that Mr. Tankleff was in custody during his pre-warning statements). A unanimous panel of the United States Court of Appeals for the Second Circuit held that Tankleff was in custody during his pre-Miranda-warning statements, and opined that the New York courts had incorrectly held that he was not in custody under the federal and state standards. Id. The Second Circuit also opined that, under New York law, the belated provision of the warnings could not, without any pronounced break in the interrogation, cure the Miranda violation. Id. Accordingly, under New York law, all of Tankleff's statements should have been suppressed. Id. (citing People v. Bethea, 502 N.Y.S.2d 713, 714 (1986); People v. Chapple, 378 N.Y.S.2d 682 (1975)). However, confined to

The DA simply ignores New York constitutional law and the standards thereunder, but this Court cannot. Viewing all of the reliable evidence as a whole, it is clear that Mr. Tankleff has shown that he is actually innocent and therefore his conviction and continued incarceration violate the New York State Constitution. Accordingly, Mr. Tankleff's conviction must be vacated.

## II. The DA's Procedural Arguments Are Without Merit and, at a Minimum, This Court Should Order a New Trial Based on New Evidence

As discussed in Mr. Tankleff's Memo, the new evidence in this case meets the requirements of C.P.L. § 440.10(1)(g) and People v. Salemi, 309 N.Y. 208, 216 (1955). Memo at 31-51.[7] The DA takes issue with two prongs of these requirements: (1) that Mr. Tankleff exercised due diligence with respect to some of the new evidence; and (2) that some of the new evidence will be admissible at a new trial. The DA's arguments are unavailing.

---

addressing violations of federal rights, the Second Circuit did not offer relief for the apparent violation of New York state constitutional law. Id.

In addition, the Second Circuit incorrectly held (prior to the Supreme Court's decision in Missouri v. Seibert, 124 S. Ct. 2601 (2004)) that Mr. Tankleff was not entitled to relief based on the federal Constitution. It is clear from the facts, as explained in Mr. Tankleff's Memo (at 41-49), that the "Miranda warnings delivered midstream could [not] have been effective enough to establish their object," Seibert, 124 S. Ct. at 2612 (plurality), and that the "two-step interrogation technique was used in a calculated way to undermine the Miranda warning," id. at 2616 (Kennedy, J., concurring in the judgment). Accordingly and as explained in Mr. Tankleff's Memo, under Seibert, 124 S. Ct. 2601, and People v. Chapple, 38 N.Y.2d 112 (1975), his confession is inadmissible as in violation of both the federal and state constitutions.

The DA claims that whether Mr. Tankleff's "confession" would be admissible at a new trial is irrelevant. DA Opp. at 117 n.59. However, not only is it relevant to his claim that the confession violated both his state and federal constitutional rights, a look at the standards for actual innocence and new evidence reveals that the reliability of the confession is relevant to those claims as well. According to Cole, an actual innocence claim must meet the clear and convincing evidence standard: "a movant making a free-standing claim of innocence must establish by clear and convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." People v. Valance Cole, 1 Misc. 3d 531, 543 (S. Ct., Kings County, Sept. 12, 2003). Similarly, the standard for determining whether evidence is newly discovered includes an inquiry into the probability that the evidence would change the result if a new trial was granted. People v. Salemi, 309 N.Y. 208, 216 (1955). Accordingly, whether Mr. Tankleff's confession would be admissible at a new trial is a factor which this Court can and should consider to determine whether a reasonable juror could convict Mr. Tankleff and the probability that newly discovered evidence would change the result at a new trial.

[7] "New" evidence generally is any evidence not adduced at trial. See, e.g., Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir.2003) ("new" evidence does not need to be newly available, just newly presented); Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003) (same); Garcia v. Portundo, 334 F. Supp. 2d 446, 454 (S.D.N.Y. 2004) (same).

### A. Mr. Tankleff Has Met C.P.L. § 440.10(1)(g)'s Due Diligence Requirements with Respect to All of the New Evidence

It is undeniable that C.P.L. § 440.10(1)(g) does not set forth a bright-line time limit for filing. The statute merely requires due diligence.[8] As detailed in Mr. Tankleffs' Memo, Mr. Tankleff has met C.P.L. § 440.10(1)(g)'s due diligence requirements with respect to all the new evidence. The DA claims that the motion should be denied because (1) "Creedon's possible connection to Steuerman" surfaced prior to the end of Mr. Tankleff's trial; (2) Kovacs provided an affidavit to Tankleff in 1994 indicating that Creedon had admitted to killing the Tankleffs; (3) Harris should have been discovered after receipt of Kovacs' affidavit; and (4) there was a delay between the time when Jay Salpeter found Glenn Harris in January 2002 and the time when Mr. Tankleff filed the instant petition in October 2003. DA Opp. at 165-66.

---

[8] What constitutes due diligence, generally, is a fact-intensive, case-by-case determination. See, e.g., Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278, 289 (7th Cir. 1990); People v. Hildenbrant, 125 A.D.3d 819, 821 (3d Dept. 1986) (opining that the court must look at "the practicalities of the situation" when making the due diligence determination). The DA is correct that the courts in People v. Stuart, 123 A.D.2d 46 (2d Dep't 1986), and People v. Huggins, 144 Misc. 49 (Sup. Ct. N.Y. Cty. 1989), held that motions filed one year and 20 months, respectively, after the discovery of the new evidence were not filed with the requisite due diligence required by the statute. But those cases do not create a bright-line rule under the statute. In fact, Huggins specifically says as much -- "there is no statutory time limitation for making [a C.P.L. § 440.10(1)(g)] motion," id. at 50-51 -- and recognizes that "there is no definitive appellate resolution as to what 'due diligence' is," id. at 51. And other cases show that, where the facts so warrant, courts have found due diligence after longer delays than in Stuart and Huggins. See, e.g., People v. Maynard, 183 A.D.2d 1099, 1103-1104 (3d Dept. 1992) (holding that a two-year delay did not constitute a lack of due diligence). Factors that courts take into consideration in these determinations include whether the prosecution discovered the evidence, see, e.g., Hildenbrant, 125 A.D.2d at 822, and whether the People have shown prejudice because of the delay, see, e.g., Maynard, 183 A.D.2d at 1104. As discussed in detail in Mr. Tankleff's Memo, most of the new evidence presented in this case was not discovered by the prosecution, demonstrating that Mr. Tankleff's failure to find this evidence earlier is not unreasonable. In addition, the DA has failed to show any prejudice based on any alleged delay in filing.

The DA is incorrect that People v. Bell, 179 Misc. 2d 410, 416 (N.Y. Sup. Ct. 1998) ("[A]fter more than 20 years, it is difficult to see how the additional five years since 1992 would dim memories disproportionately. The interests of justice, as perceived by this court, has required resolution of defendants' claims on the merits."), and People v. Farrell, 159 Misc. 2d 992, 994 (N.Y. Sup. Ct. 1994) (considering the merits of § 410.10 motion despite delay in bringing claim because, "[t]aking into account the nature of the dispute, the interests of justice require the court to resolve substantive questions rather than reject the application for technical procedural reasons"), fail to support Mr. Tankleff's claims of due diligence. Bell and Farrell, as C.P.L. § 440.10(1)(f) cases, were subject to the due diligence requirement provided in C.P.L. § 440.10(3)(a). These cases are important support for Tankleff's petition for (at least) two reasons: (1) to show that a prosecutor is not necessarily prejudiced by a delay in filing; and (2) to show that courts, in the interests of justice, will "resolve the substantive questions rather than reject the application for technical procedural reasons," Farrell, 159 Misc. at 994.

### 1. Creedon's Tie to Steuerman

With respect to "Creedon's possible connection to Steuerman," it is not entirely clear what the DA is referring to because it fails to elaborate or provide any legal authority. However, it appears that the DA is referring to Jerry Steuerman's attempt to hire Creedon to cut out Mr. Tankleff's tongue and have someone killed, and Todd Steuerman's subsequent shooting of Creedon. The DA fails to explain how the facts that Steuerman attempted to hire Creedon for violence and murder and that Todd Steuerman shot Creedon, all *after the Tankleff murders*, make any of the following untimely: Harris' sworn statements and the testimony of other witnesses regarding Harris' sworn statements tying Creedon directly to the Tankleff murders; Foti's, Ram's, and Kovacs' testimony and Joseph Guarascio's (Creedon's son) sworn statements that Creedon admitted his involvement in the Tankleffs' murders; Graydon's testimony regarding his participation in Creedon's first attempt to kill Seymour Tankleff; Ram's testimony that Creedon and Kent were together with him the night before the murders, that Creedon asked him to help "rough somebody up" -- "a Jew in the bagel business" -- at the behest of someone in the bagel business for money, and that Harris described to him the events of that night; Demps' testimony regarding Todd Steuerman's statements to him about Jerry Steuerman's involvement in the Tankleffs' murders and that Mr. Tankleff was innocent; Fischer's testimony that Jerry Steuerman admitted that he had killed two people; and Ofshe's testimony that Mr. Tankleff's confession was false. At best, the DA is trying to argue that all of these witnesses should have been discovered at the time of Mr. Tankleff's trial because Mr. Tankleff's attorney became aware that Jerry Steuerman tried to hire Creedon for violence and murder and that Todd Steuerman shot Creedon after the Tankleff murders.

This argument is unreasonable, illogical, and against the interests of justice. Tankleff's counsel lacked sufficient evidence to prove that Jerry Steuerman's tie to Joseph Creedon established that Steuerman had hired Creedon to commit the Tankleff murders. Likewise, the prosecution wholly failed to consider this connection as relevant to the Tankleff case. See People v. Hildenbrant, 125 A.D.3d 819, 821 (3d Dept. 1986) ("The existence of the witness was not uncovered by the police and there is nothing in the record to indicate that the failure to discover the witness was unreasonable. Thus, it can hardly be said that defendant should be charged with a lack of due diligence in finding the witness."); see also People v. Wise, 194 Misc. 481, 494 (Sup. Ct., Dutchess County, 2002) ("It is well recognized that the prosecution has a great advantage over the defendant in the fact-gathering process due to his superior manpower and access to other law enforcement facilities."). The fact that Mr. Tankleff's attorney became aware that Jerry Steuerman tried to hire Creedon for violence and murder and that Todd Steuerman shot Creedon after the Tankleff murders does not change the analysis or conclusion that the new evidence tying Creedon to the Tankleff murders (or any of the other new evidence) could not have been produced at trial through the exercise of due diligence, see C.P.L. § 440.10(1)(g); Salemi, 309 N.Y. at 215, and that the C.P.L. § 440.10(1)(g) motion was made with due diligence after discovery of the new evidence.

**2. Karlene Kovacs**

With respect to Kovacs' 1994 affidavit, the DA fails to explain how that affidavit makes any of the other above-mentioned new evidence untimely. That is because it does not. As discussed in Mr. Tankleff's Memo, the Court should consider Kovacs' testimony regarding Creedon's admission to his participation in the Tankleffs' murders because the prosecution has not been prejudiced by the delay; the testimony is strong evidence of Creedon's guilt, especially

in light of Joseph Guarascio's sworn statement and Ram's and Foti's testimony regarding Creedon's admissions to involvement in the Tankleffs' murders; and Mr. Tankleff attempted to present evidence sufficient for C.P.L. § 440.10(1)(g) in the aggregate. Memo at 37; id. at n.56. Even assuming, arguendo, that Kovacs' testimony does not qualify as new evidence pursuant to the standard of C.P.L. § 440.10(1)(g) or Salemi, that has no effect on the fact that Mr. Tankleff exercised due diligence with respect to all of the other new evidence.[9]

### 3. The Discovery of Glenn Harris

With respect to the failure to discover Harris after receipt of Kovacs' affidavit, the DA misunderstands the requirements of C.P.L. § 440.10(1)(g), which has two separate due diligence requirements: (1) the evidence must not have been able to be produced by the defendant at the trial even with due diligence; and (2) the motion must be made with due diligence after discovery of the new evidence. Kovacs' affidavit did not mention Harris. Jay Salpeter, an extremely experienced private investigator and former detective, searched Creedon's criminal history after reading Kovacs' affidavit and discovered Creedon's association with Harris. The DA contends that because Salpeter testified that this work could have been done by a private investigator in 1994, this evidence fails the due diligence test. DA Opp. at 165.

The DA's contention is inconsistent with the statute. Even assuming that a private investigator could have done this work in 1994, it would not have been able to be produced at Mr. Tankleff's trial. And the fact that a private investigator could have done this work in 1994 does not make the pending motion untimely under the terms of the statute, because the statute

[9] Regardless, Tankleff had no duty to file a § 440 motion based solely on the affidavit of Ms. Kovacs. Standing alone, it would not warrant granting a new trial. It was only after the corroborating evidence was obtained that the significance of Ms. Kovacs' affidavit became apparent. It is the evidence in aggregate that is compelling.

only requires that the motion be made with due diligence after the discovery of the new evidence.[10]

Moreover, again the DA fails to explain how the failure to discover Harris after receipt of Kovacs' affidavit makes Harris' sworn testimony untimely when the DA did not discover Harris prior to trial, nor at any time prior to being informed of Harris by Tankleff. See Hildenbrant, 125 A.D.3d at 821; see also Wise, 194 Misc. at 494.

**4. There was No Delay Between Obtaining Harris' Sworn Testimony and Filing the § 440 Petition**

With respect to the delay between the time Mr. Tankleff became aware of Harris (January 2002) and the filing of the instant motion before this Court (October 2003), as discussed in Mr. Tankleff's Memo (at 34-35), the "delay" was a result of Mr. Tankleff's diligence. During that time, Mr. Tankleff investigated Harris' new evidence by, inter alia, locating and interviewing additional witnesses and by administering to Harris a polygraph, which he passed, to corroborate his statements.

Most significantly, what the DA ignores is that Harris did not give Tankleff his *sworn* testimony until he executed an affidavit in August 2003. Tankleff promptly provided the information contained in that affidavit to the DA, delaying the filing of the instant motion for only a matter of weeks to provide the DA time to perform an investigation. This investigatory time period does not constitute a lack of due diligence and did not prejudice the government. See Maynard, 183 A.D.2d at 1103-04. Inexplicably, the DA failed to use this period to conduct

[10] The statute looks at the due diligence of a reasonable defendant, here an indigent incarcerated defendant. The DA inappropriately tries to transform that inquiry into what a reasonable well-trained, well-funded private investigator might be able to discover. There is no statutory or other basis for setting this much higher bar. Further, as Mr. Salpeter explained in his testimony, the fact that he was able to obtain certain evidence years after the fact does not mean that this evidence could have been obtained earlier. With the passage of time, relationships change and people who were unwilling to come forward earlier in time become willing to talk after years have passed. H.T. 7/19/04 at 16-17.

*any* investigation whatsoever. Upon learning that the DA was not conducting an investigation, Tankleff filed this petition in October 2003.

Accordingly, the DA's arguments regarding due diligence are without merit and provide no basis for denying Mr. Tankleff's motion. Tankleff plainly acted with due diligence and Harris' sworn statement plainly constitutes new evidence.

### B. Mr. Tankleff's New Evidence Will Be Admissible at a New Trial

Likewise, the DA's muddled discussion of the admissibility of the new evidence provides no basis for denying Mr. Tankleff's motion. For the reasons discussed in Mr. Tankleff's Memo, all of the new evidence will be admissible at trial. Memo at 32-40, 49-50.[11]

The DA makes three main arguments with respect to the admissibility of Tankleffs' new evidence: the DA argues that: (1) Harris' statements are not admissible as statements against his penal interest; (2) Mr. Tankleff is incorrect that two statements Creedon made to Graydon and Ram will be admitted because they will not be offered for their truth, but that they may be admissible to show the declarant's state of mind; and (3) the evidence that Mr. Tankleff asserts is admissible pursuant to Chambers v. Mississippi, 410 U.S. 284 (1973), is not. [12]

#### 1. Harris' Statements Are Admissible as Statements Against His Penal Interest

The DA's first argument is that Harris' sworn statements and his statements to Salpeter, Lemmert, and Kelly do not qualify as statements against his penal interest. The DA argues that

---

[11] The most recent new evidence -- Joseph Guarascio's (Creedon's son's) sworn statements that Creedon admitted to his involvement in the murders -- will be admissible for the reasons discussed with respect to Creedon's admissions to the murders to Foti, Ram, and Kovacs. Memo at 35. The Court has not ruled on the motion to reopen the evidentiary hearing to take testimony from Joseph Guarascio, but, even assuming arguendo the Court were to deny the motion, there is no indication that Joseph Guarascio would be unavailable to testify at a new trial.

[12] The DA makes no argument with respect to the following pieces of new evidence and, accordingly, Mr. Tankleff assumes that he concedes their admissibility: Graydon's testimony that he drove Creedon to Strathmore Bagels in the weeks before the Tankleff murders to commit the murder for hire of Seymour Tankleff; Ram's testimony that Creedon and Kent were together with him the night before the murders; and Dr. Ofshe's testimony regarding Mr. Tankleff's false "confession."

(1) Harris' statements were not actually against his penal interest; (2) Harris did not have competent knowledge of the facts; and (3) Harris' statements are not corroborated.

**a. Harris' Statements Were Against His Penal Interest**

With respect to the DA's argument that Harris' statements were not actually against his penal interest, the DA is simply incorrect. 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. He was admitting his involvement in two brutal, felony murders.[13] There is no legitimate argument that when a declarant admits to involvement in murder he does not know that it is against his penal interest. See People v. Fonfrias, 204 A.D.2d 736, 737 (S. Ct. App. Div. 2d Dep't); see also People v. Egan, 78 A.D.2d 34, 36 (S. Ct. App. Div. 4th Dep't 1980); Morales v. Protuondo, 154 F. Supp. 2d 706, 726 (S.D.N.Y. 2001).

The DA's argument that Harris' admissions to the involvement in these felony murders establish an affirmative defense to felony murder is incorrect. DA Opp. at 172. The two final elements for the affirmative defense to felony murder are that the defendant "(c) [h]ad no reasonable ground to believe that any participant was armed with" a "deadly weapon, or any instrument . . . readily capable of causing death or serious physical injury" 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) (quoting Penal L. § 125.25(3)). As the DA repeatedly recognizes in its memorandum,

---

[13] In addition, as the DA recognizes, Harris was admitting that he was involved in a burglary. The DA argues that this is irrelevant because the statute of limitations for prosecution of a burglary had run at the time that Harris gave his affidavit. However, the fact that the limitations period has expired does not necessarily mean that a statement otherwise against penal interest is rendered unreliable. See Sellars v. Estelle, 450 F. Supp. 1262, 1263 (S.D. Tex. 1978) (noting that even though the statute of limitations had run on the crime, the statement against penal interest was still regarded as reliable). The DA fails to cite any case to the contrary. In the absence of evidence that the declarant had actual knowledge of the statute of limitations, the statement is still reliable, because of the underlying "assumption that a person would not ordinarily make a statement which jeopardizes his interest by subjecting himself or herself to criminal prosecution and incarceration." People v. Settles, 46 N.Y.2d 154, 168 (N.Y. 1978).

Joey "Guns" Creedon was known to always carry a gun and was known for beating people. DA Opp. at 103, 109, 119, 125-26, 210, 238. There is no way that Harris could satisfy the final two elements of the affirmative defense to felony murder because Harris clearly had a reasonable ground to believe that Joey "Guns" Creedon was carrying a gun, or that Joey "Guns" Creedon intended to engage in conduct likely to result in death or serious physical injury, or both. Whether or not Harris was acknowledging his direct knowledge of a murder plot, he was acknowledging his involvement in a burglary at a private home in the wee hours of the morning, when he knew that both of the individuals entering the home were violent felons. Under such circumstances, where the burglary led to the death of occupants of the home, Harris could hardly be confident in his defense to felony murder.[14]

The DA also cites Harris' shock at being threatened by Warkenthien, and Salpeter's alleged assurance that, "on a scale of 1 to 10," the chance of Harris "not getting caught up" was "8 or 9" as evidence that Harris did not believe his statements were against his penal interest. The comment regarding "8 or 9" actually shows that there was a chance, as recognized by both Harris and Salpeter, that Harris could be prosecuted and incarcerated for felony murder. DA Opp. at 175 (citing H.T. 7/19/04 at 169). If Harris agreed with Salpeter, he was acknowledging a 10-20% chance he would be prosecuted for felony murder. Further, as noted by the DA, Harris wrote to Mr. Barket telling him that he was skeptical of these odds and that, in fact, he believed his chance of getting in trouble for coming forward was greater. DA Opp. at 175.[15] Given that Harris knew he might be prosecuted, his supposed shock in response to Warkenthien's threats was not a response to the possibility of prosecution, but rather a reaction to the fact that

[14] Note also that, in order for this argument to succeed, the Court would have to assume that the declarant had detailed knowledge of the law and affirmative defenses. The DA has offered no evidence of this.

[15] Note that if the Court accepts the DA's argument that Harris was somehow aware of the statute of limitations regarding burglary, then Harris' concerns regarding prosecution must relate to felony murder.

Warkenthien would threaten Harris in such an obvious attempt to suppress Harris from testifying, and Warkenthien's contentment with allowing an innocent man to stay in jail.

Finally, even the DA seems to acknowledge that following the conversation with Warkenthien, Harris knew that implicating himself in the Tankleff murders was against his penal interest. After this point, Harris made statements about his involvement in the Tankleff murders to Father Lemmert, Sister Angeline, John Kelly, and two wired jailhouse agents of the DA. See People's Report at 16, 21, 27; H.T. 7/27/04 at 11; H.T. 12/20/2004 at 631. Plainly, Harris implicated himself knowing it was against his penal interest to do so. His statements implicating himself are therefore undoubtedly reliable.

**b. Harris Had Competent Knowledge of the Facts**

Harris was personally involved in the felony murders and thus has competent knowledge of the facts to which he was a witness. The DA's argument seems to be that because Harris does not have competent knowledge as to the facts of the events *inside* the Tankleff house, Harris' statements should not be admitted as statements against his penal interest. This argument is wholly without merit. Harris has competent knowledge of the facts during the time immediately preceding and succeeding the events that occurred inside the Tankleff house, which are clearly relevant. At a new trial, Tankleff would seek to admit *these* statements, not statements by Harris about what transpired inside the Tankleff home.

**c. Harris' Statements Are Corroborated**

The DA recognizes, as it must, that if a declaration against penal interest is offered by the defendant as exculpatory evidence, the reliability requirement is met if the evidence "establishes a reasonable possibility that the statement might be true." Darrisaw, 206 A.D.2d at 664 (internal quotations and citations omitted). A plethora of corroborating evidence exists -- independent of

Harris' declarations -- that ensures their trustworthiness. And it cannot be said that there is not, at the very least, a reasonable possibility that Harris' affidavit and statements to Salpeter, Lemmert, and Kelly were true. See Fonfrias, 204 A.D.2d at 423 (noting that, even though the declarant recanted his confession to the crime for which he was on trial, there remained sufficient indicia of reliability to allow the jurors to hear the evidence and assess credibility).[16]

This evidence includes that, on at least eight separate occasions to eight different listeners, Harris admitted his involvement in the Tankleffs' murders.[17] "'The sheer number of independent confessions provide[] additional corroboration for each.'" Id. (quoting Chambers, 410 U.S. at 300). Moreover, Harris took a polygraph test, the results of which verify the truth of his statements.[18] Additionally, his statements are consistent with the crime (for example, Harris stated that Creedon had gloves; and the perpetrator wore gloves) and are corroborated by, inter alia, Creedon's admissions of guilt to Joseph Guarascio, Foti, Kovacs, and Ram. The DA completely fails to address this evidence, which corroborates and demonstrates the

---

[16] Here, Harris has not recanted since giving his sworn statement. Rather, he has invoked his Fifth Amendment rights. Further, contrary to the DA's suggestion, Harris' sworn statement is not the product of any effort by Jay Salpeter to feed him the facts. Indeed, Harris' correspondence demonstrates that Harris supplied Creedon's and Kent's names to Salpeter before Harris and Salpeter first met in person, not the other way around. While the DA seizes on a single subsequent letter that Harris wrote to Salpeter, in which Harris purports to recant, the DA ignores the scores of letters both before and after that letter affirming that the statements are true and that the "recantation" was made merely because Harris was having second thoughts about testifying. After the false "recantation," Harris affirmed the truth of the statements under oath in an affidavit. Harris has passed a polygraph examination. And, as set forth throughout this memorandum, the truth of Harris' statement is demonstrated through the witnesses who testified at this proceeding, including Ram, Foti, Graydon and Creedon's and Kent's own admissions.

[17] The eight different listeners are Harris' mother, Salpeter, Ram, Father Lemmert, Sister Angeline, John Kelly, and the DA's two confidential informants.

[18] Even though polygraphs may not be admissible at trial, they add weight to the reliability of statements and can, and should, be considered by the Court. See People v. Miller, 2 Misc. 3d 1006(A), 784 N.Y.S.2d 923, 2004 WL 615136, *4 (N.Y. S. Ct., Chemung County, 2004) (unpublished) ("Although not admissible at trial, polygraph evidence does serve a purpose, and is relied upon, within the criminal justice system."); In re McKenzie "FF", 2 Misc. 3d 1012(A), 784 N.Y.S.2d 921, 2004 WL 877578 (N.Y. Fam. Ct., Fulton County, 2004) (unpublished) (receiving testimony of a certified polygraph examiner with the N.Y State Police, explaining that "polygraph exams are used widely throughout the country as an investigative tool to determine if a person is deceptive or truthful and also to determine whether criminal charges should be pressed").

trustworthiness of Harris' statements. These statements easily meet the standard of establishing a reasonable possibility that they are true.

It is clear that Harris' affidavit and his statements to others admitting his involvement in the Tankleffs' murders will be admissible at Mr. Tankleff's new trial as statements against Harris' penal interest.

### 2. Graydon's and Ram's Testimony Regarding Creedon's Statements to Them About Being Hired to Perform the Hit on Seymour Tankleff Will Be Admissible Because They Will Not Be Offered for Their Truth and Because They Show Creedon's State of Mind

Graydon testified that Creedon told him that he was hired by one business partner of Strathmore bagels to kill the other business partner. Ram testified that Creedon asked him to help "rough somebody up" -- "a Jew in the bagel business," told him that Creedon was working for someone in the bagel business, and told him that they both would be compensated. As discussed in Mr. Tankleff's Memo (at 37-39), the truth of Creedon's assertions are irrelevant. The fact that these comments were made, as well as the timing of when they were made, tends to establish a connection between Creedon and the Tankleff murders. Thus, for example, it does not matter whether or not Creedon really wanted Ram to rough up a Jew in the bagel business. The fact that Creedon made the statement demonstrates that before the Tankleff murders, he was aware of Jerry Steuerman's business partner, Seymour Tankleff, and was discussing a scheme to have him murdered.

Such declarations are also admissible to show a declarant's state of mind because they are not offered for their truth. See, e.g., People v. Ricco, 56 N.Y.S.2d 340, 345 (1982) ("[A] relevant extrajudicial statement introduced for the fact that it was made rather than for its contents, as here for the purpose of proving its maker's state of mind, is not interdicted by the hearsay rule." (citation omitted)); see Memo at 38. Mr. Tankleff agrees with the DA that

Graydon's testimony that Creedon offered him money to help murder a Strathmore bagel business partner, as well as Ram's testimony that Creedon offered him money to help rough up "a Jew in the bagel business," will be admissible to show the declarant's state of mind (or statements of intention to perform a subsequent act). DA Opp. at 184-85.

### 3. The New Evidence Is Admissible under Chambers

As discussed in Mr. Tankleff's Memo, the new evidence, if not otherwise admissible, will be admissible under the due process requirements described in Chambers. Memo at 33-41. Mr. Tankleff will not repeat those arguments here, but will simply note that the DA argues that (1) all of the testimony of the new witnesses is inadmissible under Chambers because it is untrustworthy and insufficiently corroborated, and (2) Todd Steuerman's, Jerry Steuerman's, and Creedon's admissions are inadmissible under Chambers because they made them to people they "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." DA Opp. at 188-89. These arguments are unsupported and unavailing.[19]

The DA has no legitimate basis for calling all of this evidence untrustworthy and insufficiently corroborated. As discussed above and in Mr. Tankleff's previous pleadings, the new evidence bears sufficient indicia of reliability and is corroborated. See Memo at 33-41.

With respect to Todd Steuerman's, Jerry Steuerman's, and Creedon's admissions to involvement in the murders, the DA's argument is not persuasive. The DA provides no authority for its contention that the nature of the declarant-listener relationship and the timing of the

[19] Since filing the DA's Opposition, Assistant DA Leonard Lato appears to have conceded that Creedon's admissions are admissible pursuant to Chambers. See "Tankleff Again Seeks Retrial; Latest Affidavit Claims Teen's Father Confessed to Killings," New York Law Journal, August 9, 2005 ("In the same interview, conducted via speaker phone from Mr. Lato's office, the prosecutor said the statement may be admissible for a different reason. Under the U.S. Supreme Court's 1973 ruling in *Chambers v. Mississippi*, 410 U.S. 284, state rules of evidence do not trump a defendant's right to put on exculpatory evidence, he said.")

admissions should prove dispositive to the Court's analysis. In fact, the relationships between the declarant and listener, and the timing of the declarations do not diminish their reliability in this case in light of all of the corroborating testimony and evidence, including, in Creedon's case, his admissions to (at least) four different listeners on four different occasions. Moreover, Creedon made the same admission to his son, Joseph Guarascio, and provided him with corroborating details.

All of the new evidence, if not otherwise admissible, would be admissible at a new trial under Chambers. As such, the DA's arguments with respect to admissibility provide no basis for denying Mr. Tankleff's motion.

In sum, the DA's arguments with respect to the new evidence are meritless. The totality of the new evidence described above and in Mr. Tankleff's Memo demonstrates that Martin Tankleff is innocent and satisfies the Salemi criteria and the requisites of C.P.L. § 440.10(1)(g) and warrants a new trial. The Court may vacate Mr. Tankleff's conviction based on any single piece or sub-group of the evidence. Even assuming, arguendo, the Court finds that any one piece or subgroup of evidence does not justify vacating his conviction, the mosaic of new evidence in the aggregate clearly justifies vacating Mr. Tankleff's conviction and ordering a new trial. See, e.g., Kyles v. Whitley, 514 U.S. 419, 421 (1995) (materiality of evidence "turns on the cumulative effect of all such evidence"). Accordingly, Mr. Tankleff's conviction should be vacated and, at a minimum, the Court should order a new trial.

## III. The Evidence at the § 440 Hearing Overwhelmingly Supports Tankleff's Claims of Actual Innocence and His Entitlement to a New Trial

Over the course of several months, the Court heard from a total of 20 witnesses during an evidentiary hearing in support of Mr. Tankleff's pending 440 petition. This Court has heard the following evidence, none of which was available to the jury that convicted Mr. Tankleff: (1)

false confessions are a common phenomenon and there is substantial reason to doubt the reliability of the confession taken from Mr. Tankleff;[20] (2) Jerry Steuerman, who had the greatest motive to murder the Tankleffs and who was alone in the house hours before Mr. Tankleff found his parents' bodies, had a son, Todd, who was dealing drugs out of the bagel stores owned by Jerry Steuerman and Seymour Tankleff; (3) Joseph Creedon, a violent felon, was Todd's enforcer; (4) Creedon had dealings with Jerry Steuerman; (5) Glenn Harris has told numerous people that he drove Creedon and Peter Kent, another violent felon, to the Tankleff residence the night of the murders, having left from Billy Ram's house in Selden (a few miles from Belle Terre); (6) Ram has corroborated Harris by testifying that Creedon spoke that night of harming a "Jew in the bagel business" and that Creedon, Kent and Harris all left his house together that evening; (7) Creedon over a period of years has admitted his involvement in two murders to multiple people in a variety of settings; (8) Jerry Steuerman made a statement implicating himself in the Tankleff murders; and (9) Kent admits that he was in the middle of a crime spree the week the Tankleffs were murdered, was within a couple miles of Ram's house in Selden on the night Ram and Harris both say Kent and Creedon were at Ram's house, was coming from Selden the day after the Tankleff murders, and cannot account for his whereabouts on the night of the murders.

That Mr. Tankleff has produced this evidence without the assistance of the DA, and indeed in the face of strenuous efforts by the DA to preclude this evidence from being adduced and to minimize and obfuscate its importance, is nothing short of astounding. "[P]roving one's

---

[20] The DA has not produced an expert to contradict or undermine the testimony of Dr. Richard Ofshe with respect to the unreliability of the confession. Rather, the DA points to a single court that, in a single case, found his testimony lacked credibility. The DA ignores the scores of courts that have accepted Dr. Ofshe's testimony and found it credible, and it offers no reason why this Court should fail to credit Dr. Ofshe. Further, Dr. Ofshe's testimony is supported by Dr. Leo, another expert in interrogation techniques, who has provided a sworn affidavit in support of Mr. Tankleff, which was appended to Mr. Tankleff's Memorandum of Law in Support of his § 440 Petition.

innocence after a jury finding of guilt is almost impossible." Furman v. Georgia, 408 U.S. 238, 367 (1972)(Marshall, J. concurring). Given our system of criminal justice where reviewing courts are often hesitant to disturb a jury's interpretation of the evidence and prosecutors may be reluctant to see convictions they labored to secure overturned, "if an innocent man has been found guilty, he must ... depend on the good faith of the prosecutor's office to help him establish his innocence." Id.[21]

The DA, ignoring its obligations, takes the position that Mr. Tankleff's convictions should not be vacated, that a new trial should not be granted, and that no jury should ever be given the opportunity to assess the new evidence presented at the hearing, arguing that all 20 witnesses were lying or were mistaken. The DA bases this remarkable assertion solely on the fact that the witnesses have given testimony that is inconsistent with the DA's theory of Mr. Tankleff's guilt and therefore none of them should, in the DA's opinion, be believed.

Indeed, the DA spends the bulk of its lengthy opposition not discussing the new evidence, but rather, explaining why it believes the original jury was justified in convicting Mr. Tankleff based on the evidence available to it at that time. This argument is entirely beside the point. As the DA concedes, the real issue that this Court must resolve is whether the new evidence is of such character that had the jury had the new evidence available to it at trial, there is a probability that the outcome of the trial may have been more favorable to Mr. Tankleff. See DA Opp. at 164 (citing People v. Boyette, 201 A.D.2d 490, 490-91 (2d Dep't 1994) (quoting C.P.L. § 440.10(1)(g))).

---

[21] It is well recognized that the District Attorney's fundamental obligation is to seek justice, not to merely obtain and maintain convictions. See, Code of Professional Responsibility, EC 7-13, Canon 9; ABA Standards, The Prosecution Function §§ 3-1.1[c], 5.7[a], 5.8, 5.9; ABA Project on Standards for Criminal Justice, The Prosecution and Defense Function, Part I [1.2] [(a)], [(b)]. A prosecutor's mission is not so much to convict as it is to achieve a just result. (Berger v. United States, 295 U.S. 78, 88; People v. Petrucelli, 44 A.D.2d 58, 59; Code of Professional Responsibility, EC 7-15)." People v. Zimmer, 51 N.Y.2d 390, 393, 434 N.Y.S.2d 206, 414 N.E.2d 705 (N.Y. 1980). See also People v. Miller, 149 A.D.2d 439, 539 N.Y.S.2d 782 (2nd Dept. 1989); People v. Baker, 99 A.D.2d 656, 472 N.Y.S.2d 57 (4th Dept. 1984).

While the DA may believe that 20 witnesses were all lying or mistaken, there is simply no basis to determine as a matter of law that a jury would necessarily reach the same conclusion. To the contrary, the sheer number of witnesses, the varied backgrounds of these witnesses and the admissions of Messrs. Creedon and Kent themselves all cast considerable doubt on the validity of Mr. Tankleff's convictions. Mr. Tankleff's fate should not be determined by a jury that heard none of this evidence. Nor should this Court alone conclude that the convictions are correct and that Tankleff should remain imprisoned. Rather, this Court should find Tankleff actually innocent or should allow a new jury to hear all of the evidence now available, and that jury alone should decide whether or not the entire body of evidence establishes Mr. Tankleff's guilt beyond a reasonable doubt.

**A. Creedon's Admissions**

Standing alone, the admissions of Joseph Creedon, both in court and out of court, none of which were considered by the trial jury, warrant a new trial. Mr. Creedon made numerous admissions under oath at the 440 hearing that should lead any neutral observer to conclude he should be a suspect in the Tankleff murders.

On July 20, 2004, Tankleff's attorneys called Creedon to testify. As the DA acknowledges, Creedon admitted that he had been convicted of assault in 1978, of rape in 1982 and of grand larceny in 1996.[22] Creedon 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. H.T. 7/20/04, at 7-13, 15, 21-22, 52, 56-57; DA Opp. at 107.[23]

---

[22] The DA neglects a 1987 conviction for violent assault. H.T. 7/20/04 at 21-22.

[23] While Creedon has never been convicted of murder, numerous people who knew him well testified that he was capable of murder. See, e.g., H.T. 7/22/04 at 57 (John Guarascio); H.T. 12/14/04 at 309 (Peter Kent).

Creedon's admission at the 440 hearing that he repeatedly committed acts of violence at the behest of Todd Steuerman must be considered in conjunction with the other evidence adduced about Creedon. Creedon signed an affidavit in 1990 under oath stating multiple times that, in addition to his relationship with Todd Steuerman, he had spoken directly with Jerry Steuerman.

Mr. Creedon stated under oath that Jerry Steuerman engaged in witness tampering by offering Creedon $10,000 to agree not to press charges against Todd following an incident in which Todd had shot Creedon. When Creedon declined, Jerry Steuerman threatened Creedon, who testified that Jerry Steuerman told him he was "fucking with the wrong people."

The sworn affidavit states not once, but twice, that Creedon spoke directly to Jerry Steuerman. At the 440 hearing, rather than admit his relationship with Jerry Steuerman, Creedon perjured himself by claiming that he had in fact told Robert Gottlieb, who prepared the affidavit, that the conversations were with Todd, not Jerry Steuerman, and that he simply failed to notice either reference to Jerry Steuerman before executing the affidavit. Not only is this testimony incredible on its face, but also Mr. Gottlieb testified at the 440 hearing that he is certain that Creedon told him the conversations were with Jerry Steuerman. In fact, Creedon told him that he recognized Jerry Steuerman's voice because he had spoken with him previously.

The DA's response to Mr. Gottlieb's testimony is to suggest to the Court that in assessing the respective credibility of Mr. Gottlieb, an officer of the Court, and Joey "Guns" Creedon, a career violent felon, the Court should resolve the disputed testimony in favor of Creedon. See DA Opp. at 108-09. In making this remarkable suggestion, the DA simply ignores the fact that Mr. Gottlieb's recollections are supported by his contemporaneous notes, which were introduced into evidence. The DA also asks the Court to conclude that Creedon is telling the truth and that

Mr. Gottlieb perjured himself, in spite of the fact that the DA has implicitly recognized that Creedon separately perjured himself at the 440 hearing by claiming that he has never told anyone that he was involved in the Tankleff murders.[24]

Needless to say, the Court should decline the DA's invitation to credit Creedon over Mr. Gottlieb's sworn testimony and contemporaneous notes. The Court must instead conclude that Creedon had multiple telephone conversations with Jerry Steuerman and perjured himself at this proceeding about that fact. It is not surprising that Creedon would want to claim that he had no direct relationship with Jerry Steuerman, but the evidence to the contrary is overwhelming.

In addition to Creedon's sworn testimony at this proceeding that he was a violent criminal who committed acts of violence at the behest of Todd Steuerman and his obvious connection through Todd to Jerry Steuerman, numerous witnesses testified that on multiple occasions in a variety of settings and over a period of years, Creedon has admitted his involvement in the Tankleff killings. The DA goes to great lengths to cast doubt on the credibility of the witnesses to whom Creedon has made such admissions. Yet, these efforts, which descend to little more than childish name calling, are nothing more than a side show. The DA has already conceded that even it believes that Creedon has made such admissions. See Report of the People's Investigation of 12/18/03 at 60.[25]

For example, the DA picks at minor inconsistencies in the various statements that Karlene Kovacs has made over the years about Creedon's admissions to her on Easter Sunday in 1990 or 1991. The DA tries to cast doubt on her credibility by noting that in 2004, she posted a message on a web site maintained by supporters of Mr. Tankleff. Yet, Ms. Kovacs first came

---

[24] See Report of the People's Investigation of 12/18/03 at 60, and discussion below.

[25] As set forth in Mr. Tankleff's recent petition to vacate his convictions pursuant to § 440.10(1)(H), Creedon's own son must now be added to the list of people to whom Creedon has admitted his involvement in the Tankleff murders.

forward in 1994. Since that time, she has never wavered from the fundamental point that Creedon admitted to her his involvement in the Tankleff murders. (Of course, it is not surprising that it is this point that has stayed with her over the years, and not such arcane details as those highlighted by the DA, such as whether she smoked a single joint of marijuana outside the house or in the bedroom.) Regardless, the DA fails to explain how the fact that Ms. Kovacs posted a note on a web site in 2004 can possibly cast doubt on the reliability of a statement that she first made a decade earlier.

Ms. Kovacs' then-boyfriend, John Guarascio, who had not seen or spoken with Ms. Kovacs in well over a decade, corroborated the Easter Sunday visit at which Kovacs spoke to Creedon. See H.T. 7/22/04 at 39-40 (Guarascio stating that he dated Kovacs for a short period of time in 1991 and has not spoken to her since). Guarascio also recalled statements made by Creedon that demonstrate that he was, whether or not Guarascio recognized it at the time, talking about his participation in the Tankleff murders. See DA Opp. at 114 ("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. (H.T. 7/22/04, at 39-44, 47-49, 53, 55-57)").

Again, the DA has already conceded that it believes the fundamental aspect of the testimony of both Kovacs and Guarascio, that Creedon implicated himself in the Tankleff murders to them in the early 1990's. See Report of the People's Investigation of 12/18/03 at 60.

In making this concession, the DA also implicitly concedes that Creedon perjured himself before this Court when he flatly denied making such admissions. See H.T. 7/20/04 at 54-55, 59-60.

Nor are Kovacs and Guarascio alone. Gaetano Foti likewise testified that Creedon admitted to him on multiple occasions Creedon's involvement in the Tankleff murders. See H.T. 7/26/04 at 8-9. In attempting to avoid the obvious import of Foti's testimony, the DA resorts to a familiar pattern. The DA highlights supposed inconsistencies between various statements made by the witness over time that in reality demonstrate nothing more than any witness' lack of verbatim recall. For example, the DA highlights Mr. Foti's testimony that a friend of Creedon's named Billy stated that Creedon was involved in the Tankleff killings and Creedon, in Foti's presence, acknowledged he "did it." DA Opp. at 119.[26] In previously relaying this incident to Suffolk County Detective Trotta, Foti said that Creedon had said that he "was there" (meaning when the Tankleffs were murdered), rather than he "did it." DA Opp. at 118-19.

As with the other witnesses to Creedon's admissions, it was not significant to Foti the precise words used by Creedon, what was significant was that Creedon was implicating himself in the Tankleff murders. It is not surprising, therefore, that it is the admission, rather than the verbatim quote, that has stuck with Foti all these years. Nor is the distinction highlighted by the DA of any significance to this proceeding. Creedon testified in this proceeding that he has never been to the Tankleff home, had nothing to do with the Tankleff murders, and has never told anyone he did. This testimony is flatly inconsistent with that of Kovacs, Guarascio and Foti.

Finally, the DA gets so carried away with its ability to find meaningless inconsistencies and attack the character, integrity and motive of every witness, that the DA has lost sight of the

---

[26] Foti apparently misspoke in relaying the incident by saying that Billy referred to them as the Tankleff "shootings" rather than killings. Foti immediately corrected the word "shooting" to the word "killing." However, even if Billy had said "shooting," this would merely demonstrate that *Billy* did not understand the circumstances of the Tankleff murders. It says nothing about what Creedon understood. Creedon's response was simply that he committed the murders. Creedon did not state how the killings occurred.

fact that the DA has already conceded that the DA credits Foti's testimony and disbelieves Creedon.[27]

John Guarascio is a municipal employee who has no history of drug or alcohol abuse and no criminal record. He has not seen or spoken to Karlene Kovacs in years. Ms. Kovacs has no criminal record, first came forward with the admissions made to her by Creedon over a decade ago and is corroborated by Guarascio.[28] Foti knows neither Guarascio nor Kovacs, is considered reliable by the DA and likewise says that Creedon implicated himself in the Tankleff murders to him. It is not surprising therefore that the DA concluded long ago that it was not likely that each of these witnesses was lying or mistaken.

Finally, and most recently, Creedon has made another out-of-court admission of his involvement in the Tankleff murders, this time to his own son. This most recent admission was accompanied by more detail, further corroborating each of Creedon's previous admissions.

Creedon's admissions -- on the stand that he committed violent crimes for Todd Steuerman, to Gottlieb that he on multiple occasions dealt directly with Jerry Steuerman, and to several others including his own son that he was involved in the Tankleff murders -- standing alone would plainly warrant a new trial for Marty Tankleff. However, Creedon's admissions do not stand alone.

---

[27] The DA takes issue with the fact that Foti was considered a reliable witness by Suffolk County Detectives by noting that rather, he was merely considered a "reliable source." Presumably, Suffolk County deemed him sufficiently reliable to obtain search and arrest warrants based on things he said, but yet now tries to argue that he is somehow unreliable as a witness. Not only does this fail the straight face test, it ignores the DA's own concession that it believes the fundamental point to which he testified as a witness in this proceeding: in Foti's presence, Creedon implicated himself in the Tankleff murders.

[28] While the DA alludes to Kovacs' prior drug use, Guarascio confirmed that on the Easter Sunday when Creedon made his admissions, no one present consumed excessive amounts of alcohol and no drugs were used other than the sharing by four people of a single joint of marijuana. H.T. 7/22/04 at 40, 42.

### B. Kent's Admissions

The DA called as a witness, and therefore vouched for the credibility of, Peter Kent. See ABA Standard 3-5.6(a) ("Presentation of Evidence") ("A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to see withdrawal thereof upon discovery of its falsity"). Peter Kent is a career violent felon who showed nothing but contempt for this Court and the proceedings before it. During the course of his testimony, Mr. Kent admitted to knowing Creedon, Harris and Ram. H.T. 12/9/04 at 245.[29] He admitted to committing approximately 50 felonies with Harris and five to ten felonies with Ram. Id. at 246-47.

Nonetheless, Kent denied participation in the Tankleff murders, claiming that he had an "alibi." Kent's "alibi," however, not only fails to exonerate him, it serves to corroborate both Harris and Ram that Kent was involved in the Tankleff murders.

Mr. Kent conceded that the week of the Tankleff murders, he was engaged in a string of violent felonies. Indeed, Kent admitted to having committed ten armed robberies that week. See H.T. 12/9/04 at 263. Kent was charged for five of these offenses, as corroborated by court records. However, unfortunately for Mr. Kent, none of these crimes occurred at the same time as the Tankleff murders. Nor do they establish, as he testified, a pattern or practice that kept him off of Long Island during the early morning hours of that week. Instead, the court records and Kent's own testimony places him in exactly the right place and at exactly the right time to commit the Tankleff murders.

Kent testified that he could not possibly have committed the Tankleff murders because he distinctly recalls that each day that first week of September 1988, he would commit armed robberies on the south side of Long Island in the late evening hours, obtain drugs on the south

[29] Kent, Harris, Ram and Creedon all grew up together. See H.T. 12/14/04 at 298-304.

side of Long Island and then travel into Manhattan in the early hours of the morning to do more drugs. Thus, Kent claims, he could not have been at the Tankleff residence in the early morning hours of September 7, 1998.

While it is certainly true that Kent was engaged in a violent (and probably drug-induced) crime spree that week, his court records disprove his "alibi." Just four days before the Tankleff murders, Kent committed an armed robbery in Suffolk County at 3:00 a.m. H.T. 12/14/04 at 357-58. This destroys the notion that Kent had a pattern that week of being in Manhattan in the early hours each morning. Further, Kent conceded in his testimony that he was dropped off at his sister's house in Ronkonkoma on the evening of September 6th, because Kent was making a mark for himself in Center Moriches on the south side of Long Island. H.T. 12/14/04 at 362-63. Ronkonkoma is just seven miles from Selden, the home of Billy Ram, and much closer to Selden than to Center Moriches. Id. at 363-64. Of course, both Harris and Ram have said that Kent came to Ram's house in Selden that evening.

Kent was not arrested for or convicted of any offenses the evening of September 6th or morning of September 7th and therefore cannot account for his whereabouts during the Tankleff murders. The evening of the 7th, Kent committed an armed robbery in Farmingville, just three miles from Selden. His co-defendant in that offense, Danny Raymond, told the police that he and Kent were coming from Selden when they committed the offense in Farmingville.

Thus, contrary to Kent's testimony, he was committing offenses in northern Long Island that week and he was not going into Manhattan every night. He places himself near Selden on the evening of the 6th and his co-defendant places him in Selden on the 7th. In sum, Kent has no alibi whatsoever. He plainly could have been in Selden at Ram's house on the night of the 6th, committed the Tankleff murders early that morning, returned to Selden afterwards, burned his

clothes and then hours later headed out with Raymond to commit more crimes. Indeed, Kent and his co-defendant, Raymond, serve only to corroborate both Harris and Ram by placing Kent near Selden precisely when Harris and Ram say he was there.[30]

### C. Harris' Admissions

The DA spends considerably more time attacking Harris, who did not testify, than acknowledging the crucial testimony elicited from Creedon and Kent, who did.[31] The fact of the matter is that, even were the Court to ignore Harris' statements altogether, the admissions of Creedon and Kent taken together are easily sufficient to warrant a new trial. Unbeknownst to the trial jury, a career criminal with ties to the Steuermans has admitted his involvement in the Tankleff murders and another career criminal associated with the first, was in the middle of a crime spree in the area precisely when the murders occurred.

But Harris' statements should not be ignored. It is not mere coincidence that his statements are corroborated by Creedon and Kent themselves.

---

[30] The DA makes much of Kent's testimony that his mother lived in Center Moriches at the time and was not living in Selden. Thus, the DA reasons, Kent could not, contrary to Harris' statements, have been burning his clothes at his mother's house in Selden. Again, the DA focuses on the fly to the exclusion of the elephant. Creedon, Kent and Harris all lived in Selden. Whether or not Harris was correct as to whose house was used to burn the clothes matters little. Kent places himself near Selden, not Center Moriches, on the evening of the 6th, his co-defendant places him in Selden, not Center Moriches, on the 7th. Indeed, Kent does not deny that he burned his clothes that night, rather, he merely testifies that it is impossible that he did so at his mother's house. See H.T. 12/09/04 at 258:

Q. Now, Mr. Kent, you're aware...Mr. Harris has alleged that after the Tankleff murders, you burned your clothes at your mother's house in Selden; are you aware of that?
A. Yeah, I'm aware. I'm aware.
Q. All right --
A. I find that impossible though, because my mother's house wasn't there. It was in Center Moriches.

[31] The DA rejects the notion that its investigator intimidated Harris, resulting in his decision not to testify. Harris could not have been intimidated by Detective Warkenthien, the DA reasons, because Harris never told Warkenthien that he felt intimidated by him. See DA Opp. at 99-100. The DA ignores the testimony of Father Lemmert, the chaplain at Sing Sing, that Harris told him four days before Harris' scheduled testimony that he had decided not to testify because other inmates (the wired agents of the DA) had suggested his family would be in danger if he testified and because the DA's investigator told him he would spend the rest of his life in prison. See H.T. 7/27/04 at 15-17. The DA disregards the testimony of each and every witness by stating they are lying or mistaken, but cites only three witnesses as falling in the latter category. See DA Opp. at 237 (Paruta, Fischer and Lubrano). Presumably, the DA asks this Court to conclude that Father Lemmert lied.

There is no question that Harris is himself a career criminal. And there is no question that he has a history of drug abuse. He has also been treated for mental illness. However, there is no reason to believe that Mr. Harris is unable to recall and relate that he drove two of his criminal associates to the Tankleff residence in 1988.

The DA frequently brings cases using witnesses like Mr. Harris, explaining to juries that the witness might have a criminal record, drug or alcohol problems, or mental illness, but these are exactly the type of people who commit crimes and therefore are in a position to give testimony about what happened at a crime scene. Indeed, the witnesses used by the DA's office in such circumstances have incentives to fabricate, because they are cooperating with the DA and are looking for leniency. Mr. Harris, on this score, is in the exact opposite position. He has no incentive to implicate himself in a double murder. Indeed, the DA concedes that Salpeter told Harris there was a 10 – 20% chance he would be putting himself in legal jeopardy and that Harris disbelieved Salpeter and thought the odds much greater. DA Opp. at 221 ("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.'") Harris had no reason falsely to implicate himself in a murder scheme. Yet, the DA has decided that because Harris is not pure as the driven snow, he should not be believed.

The DA relies heavily on a series of letters written by Harris in its effort to demonstrate that Harris concocted his entire story. The DA insinuates that because Harris and Tankleff were for a time both incarcerated in the same institution that Harris and Tankleff communicated.[32]

---

[32] The DA also notes that Harris and Tankleff were both incarcerated at one time in Clinton Correctional Facility. The DA concedes that Tankleff was in the A.P.P.U. and that Harris was in the general population and accordingly, the two would not have been in contact with each other. DA Opp. at 216. Nonetheless, the DA suggests there may somehow have been indirect communication between the two. The DA has not supported this suggestion with *any* evidence. See H.T. 12/16/04 at 550, 552 (Darren Ayotte of NYS Department of Corrections explaining that great care is taken to preclude contact between A.P.P.U. inmates and inmates in the general population and noting that the DA never asked him to research whether Harris and Tankleff communicated with

The DA alternatively posits that Harris had no independent knowledge of the Tankleff murders and was fed all of the information he purported to have by Jay Salpeter. The letters fail to support these theories.

While Harris addressed letters to Marty, he sent these letters to Salpeter, who did not deliver them to Tankleff. Harris in his initial letter introduces himself to Marty and asks rudimentary questions he would not have needed to ask had he ever communicated with Marty. For example, Harris asks Marty if Marty knows Creedon or is himself a drug user. See Letter from Harris to Tankleff, dated February 18, 2002 (Exhibit 6 in the book of Harris letters).

Significantly, this letter is written before Salpeter ever meets Harris. Yet, Harris is already implicating Creedon in the murders. Indeed, in several of Harris' early letters he implicates Creedon and Kent. See Harris Exhibits 4, 8 and 9.[33] These initial letters also make

---

each other while at Clinton). This effort to discredit witnesses not through evidence, but rather through the mere insinuation that because the witness was incarcerated in the same facility as Tankleff the witness should be disbelieved, is a recurring theme throughout the DA's pleading.

The DA notes that another witness, Mark Callahan, was in the Nassau County Detention Center at the same time as Tankleff. Id. at 148. Not only does the DA offer no evidence that Callahan ever communicated with Tankleff, but the DA simply asks the Court to ignore the sworn testimony of Callahan that he did not. See H.T. 12/21/04 at 732 (Callahan stating that he never met Tankleff). Indeed, while Callahan and Tankleff were both incarcerated in Nassau County, they were housed in separate buildings. Id.

Similarly, the DA notes that Bruce Demps and Marty Tankleff were both incarcerated together at Clinton. The DA says that Demps "played along" with Tankleff's attorneys by giving sworn testimony that Todd Steuerman told him that Hell's Angels friends of his father committed the Tankleff murders. Demps readily admitted he knew Tankleff from being incarcerated with him at Clinton. See H.T. 7/26/04 at 54. Equally, he knew Todd Steuerman from being incarcerated with him. Id. The DA speculates that Tankleff's counsel were looking for a Hells Angels tie to bolster a Brady claim that had recently been litigated in a federal habeas and that this "explains" why Demps gave his affidavit, but that Tankleff's counsel are no longer pursuing a Hell's Angels angle, which "explains" why Demps testified in this proceeding that the reference to Hell's Angels was a conclusion he had drawn rather than a verbatim quote from Todd Steuerman. See DA Opp. at 213-14. Yet, the DA offers no basis for believing that the fact that Demps and Tankleff once served in the same institution gave Demps an incentive to "play along" by committing perjury in an affidavit and years later committing perjury before this Court, exposing himself to further incarceration just as his current sentence is concluding. See 7/26/04 at 53. Creedon has been described as someone who rides a motorcycle and has numerous tattoos. Demps testified that Todd Steuerman told him about his use of Hell's Angels. It is not much of a leap for Todd Steuerman to describe him in a manner that would lead Demps to conclude that Creedon was a member of Hell's Angels. See 7/26/04 at 55. At any rate, the DA's innuendo and speculation that three different witnesses each committed perjury because at one time or another they served time in the same prison as Tankleff is just that -- innuendo and speculation. The DA provides not a shred of evidence, because there is none.

[33] Harris refers to articles Salpeter sent to Harris before they met. These were not, as the DA implies, articles about the Tankleff case. Rather, they were articles about Salpeter sent by Salpeter to Harris by way of introduction.

clear that Salpeter found and reached out to Harris, not that Harris reached out to Salpeter. See Harris Exhibit 4 ("what took you so long to find me?")

Harris also states that Creedon knew Jerry Steuerman. Indeed, Creedon learned from Jerry Steuerman of the existence of the safe at the Strathmore Bagels that Harris and Creedon later attempted to burglarize. See Harris Exhibits 9, 42.[34]

The DA ignores all of the facts supplied by Harris in his initial letters and ignores his subsequent sworn statement, instead focusing on a single letter in which Harris is having second thoughts about exposing himself to criminal liability and purports to recant. The DA claims that Harris stops writing letters for a thirteen-month period following this recantation.

However, the DA does not offer any evidence this is true. Harris' letters are largely undated and the DA simply speculates as to their sequence.

In fact, there is no thirteen-month gap, or any other lengthy gap, in the Harris letters. Both immediately before and immediately after his "recantation," Harris re-affirms the truth of his statements. Harris passed a polygraph examination. He subsequently committed his statements into a sworn affidavit under the penalty of perjury.

If Harris were Tankleff's only witness, the DA's arguments about Harris' checkered history and momentary recantation might have more force. But, the DA simply asks the Court to ignore those witnesses who corroborate Harris. If Harris were, as the DA suggests, randomly implicating Kent because of an old grudge, how could Harris have known that his statement that he drove Creedon and Kent from Billy Ram's house into Belle Terre by the guard house, and that

---

They did not reveal any facts about the Tankleff case to Harris. While the DA cites Harris' initial coyness in sharing what he knows with Salpeter as evidence that Harris did not know the facts of the Tankleff murders, in fact, Harris states that he drove Creedon and Kent to the Tankleff house that night. What he does not know is how *Marty* was involved. Similarly, Harris purports not to know and expresses curiosity about what happened inside the house that night. For example, Harris does not know if Creedon broke into a safe inside the home, something that obviously would have been of interest to Harris, who would have expected a share of any money taken.

[34] It was during the commission of this burglary that Creedon threatened Harris by telling him to remember what happened in Belle Terre.

there was no one on duty, would be corroborated by Jeffrey Ciulla, the Constable of Belle Terre, who would testify that the Constable's log book shows that no one was on duty at the guard station from 2:10 a.m. through 6:15 a.m. the morning of the Tankleff murders?[35] How could Harris have known that Kent would be wholly unable to account for his whereabouts on the night of the Tankleff murders and would indeed place himself near Ram's house in Selden that night? And how could Harris have known that Salpeter would find Ram in Florida and that Ram would corroborate Harris' statements?[36]

Harris is corroborated by Ram, and by Creedon's and Kent's own admissions. The DA is unable to rebut the admissions of Creedon and Kent that corroborate Harris. Accordingly, the DA ignores those admissions and focuses his fire on Ram. The basis of the DA's attack is that Ram was supposedly paid for his testimony. However, the DA never proves this allegation and ignores Ram's sworn testimony to the contrary. See H.T. 10/26/04 at 21.

While the DA heaps sarcasm on Ram, the DA never demonstrates that he was paid anything beyond lost wages and expenses. The payment of such amounts, by definition, only ensures that the witness does not lose money by testifying. It does not give anyone an incentive to testify, much less testify falsely.[37]

Kent testified that Ram told Kent that there was $50,000 in a Western Union account waiting for Kent if Kent would only implicate himself in the Tankleff murders. Putting aside Kent's general lack of credibility, his testimony is absurd on its face. Western Union is not a

---

35 H.T. 12/16/04 at 592-93.

36 In one of his early letters, Harris tells Salpeter that Ram knows what happened and asks Salpeter if he has found Ram yet.

37 The DA, who often criticized Tankleff for offering hearsay during the evidentiary proceeding, cites newspaper accounts of trouble Ram got into after he returned home to Florida. DA Opp. at 151, n.79. Rather than cast doubt on Ram's veracity, these accounts, if true, only demonstrate that Ram, by leaving a stable life of gainful employment in Florida (verified by the testimony of Heather Paruta), and returning to his drug lifestyle past with the likes of Peter Kent, paid dearly.

bank. It has no such accounts.[38] Nor was anyone offering Kent a bribe. The DA has tried to bootstrap the fact that Ram received payment of $1,000 by Western Union for lost wages onto some massive scheme to bribe witnesses. The reason the DA adduced no evidence of such a scheme, however, is because no such scheme existed.[39]

Ram was no more "bribed" for his testimony than was retired Detective McDermott, whose time and travel expenses were paid for by Suffolk County. Ram's demeanor on the stand was that of a witness telling the truth. He withstood rigorous cross-examination and never wavered. He had no incentive to fabricate (whatever value having his expenses paid to Long Island had to him, that benefit had already been realized before he testified).

More significantly, his testimony is corroborated by his girlfriend, Heather Paruta, who testified that his statements on the stand are consistent with things he has told her for years, long before the 440 petition was filed, much less before there was any discussion of Ram receiving payment for expenses incurred in testifying.[40] The DA's charge of recent fabrication based on a financial motive falls apart when Paruta's testimony is considered. And even the DA does not accuse Paruta of lying. See DA Opp. at 237.

---

[38] H.T. 12/21/04 at 704.

[39] It is ironic that while accusing Tankleff and his supporters of being conspiracy theorists attempting to impugn the Suffolk County justice system, it is the DA who, without any evidence whatsoever, has accused Tankleff's trial counsel of suborning perjury and his *pro bono* 440 counsel and investigator of bribing witnesses. Seeing conspiracy behind every corner, the DA ominously notes that Ram and Harris both used a common phrase, "putting two and two together." DA Opp. at 228. The DA even notes that Mark Callahan said that Brian Glass used the same phrase -- that Creedon "passed on the work" to Glass -- with him that Tankleff's counsel, Bruce Barket, told Newsday Glass used with him. In this instance, it would appear that because Callahan, a witness with nothing to gain, corroborated Glass' consistent statements implicating Creedon (at least up until the time he worked a sweetheart deal with the Suffolk County DA's Office), Glass did not, in fact, make the statements at all. One cannot help but noticing the Alice in Wonderland quality to the DA's arguments.

[40] Paruta testified that Ram told her that Creedon killed the Tankleffs before Ram or Paruta were ever contacted by Salpeter. H.T. 10/27/04 at 22, 28-29, 31. Ram gave Salpeter an audio taped statement in Florida on September 29, 2004 consistent with his subsequent testimony at the hearing. H.T. 12/21/04 at 688. On October 12, 2004, Ram was interviewed in New York by Tankleff's counsel and again corroborated Harris' statements. Id. at 688-89. Thus, before Ram returned to New York to testify, and before there was any discussion of Ram being paid for lost wages, Ram had made statements to Paruta, Salpeter and Tankleff's counsel, all consistent with his ultimate testimony.

In sum, the DA's insinuation that Ram's testimony was influenced by payments he received for his expenses and lost wages is yet another side show to distract from the fact that a crucial component of Harris' statements have been corroborated by the one witness in the unique position to corroborate them.

Not only do Creedon and Kent make admissions that demonstrate their involvement, but both Ram and Harris place them at Ram's house the night of the murders. Ram testified Creedon wanted his assistance straightening out "a Jew in the bagel business," that Ram declined to join him, and that Creedon left with Kent and Harris. See H.T. 10/26/04 at 9-13. Ram then saw Harris the next day, shaken from the events of the night before. Id. at 13-14. This testimony corroborates Harris' sworn affidavit, as well as statements made by Harris under circumstances when he had no incentive to fabricate, such as when he was speaking to Father Lemmert, the chaplain at Sing Sing. See H.T. 7/27/04 at 10, 13.

**D. Steuerman's Admission**

At trial, Jerry Steuerman conceded that he had far more than a financial incentive to murder Seymour Tankleff. As Steuerman put it, the problem with Seymour was not that he believed he owned one-half of the business, but that Seymour "believed he owned one-half of me." Tr. at 998.[41]

After the Tankleff murders, and unbeknownst to the trial jury, Steuerman in a heated discussion, admitted his role, saying that he had already killed two people. Steuerman was overheard by Neil Fischer. Even the DA seems to concede that Fischer had no motive

[41] At the hearing before this Court, Paul Lerner testified that Seymour Tankleff told him shortly before he was murdered that he and Jerry Steuerman had had a falling out and that he was planning on calling in Steuerman's debt to him. H.T. 12/6/04 at 106-08. Ron Falbee also testified about the deterioration of Seymour Tankleff's relationship with Jerry Steuerman during the summer of 1988. Falbee found on Seymour's desk, spattered with blood, yet undisturbed by any of the detectives that searched the Tankleff residence following the attacks, a demand note from Seymour Tankleff to Jerry Steuerman for part of the debt. H.T. 12/9/04 at 156-61.

whatsoever to lie. Nonetheless, the DA disbelieves Fischer's testimony. See DA Opp. at 237 (listing Fischer as one of three witnesses who may not have lied, but rather, in the DA's view, were merely mistaken).

In doing so, the DA points out that Fischer readily conceded that he was working on a cabinet at the time and did not hear the entire conversation. However, Fischer's candor that he did not hear the entire conversation is no reason to doubt that portion that he unequivocally says that he did hear. To the contrary, as the DA implicitly and grudgingly concedes, Fischer was a credible witness: he knows what he heard. H.T. 7/27/04 at 48-50. And what he heard was memorable. Jerry Steuerman -- the man who had the most motive to kill the Tankleffs, who took money from the account he shared with Tankleff, committed insurance fraud and fled the jurisdiction while Seymour Tankleff still lay in a coma -- in an unguarded moment admitted that he killed two people. H.T. 7/27/04 at 43-44.[42]

Like Creedon's admissions implicating himself in the Tankleff murders, Steuerman's admission, standing alone, would warrant a new trial. When considered in conjunction with Kent, Harris and Ram, the evidence that people other than Marty Tankleff killed his parents is simply overwhelming. Yet, no jury has heard this evidence.

**E. Other Witnesses**

But even that is not all. Joseph Graydon testified that he was solicited by Creedon to kill a partner in the bagel store during the summer of 1988, but the plan went awry. See H.T. 8/3/04 at 12-13; 44-45.[43]

---

[42] Jerry Steuerman's admission must be considered in conjunction with Todd Steuerman's statement to Bruce Demps that he, Todd, knew for a fact that Tankleff did not commit the murders because they were committed by friends of his father. H.T. 7/26/04 at 54-55.

[43] Brian Glass testified that he told Tankleff's counsel that Jerry Steuerman attempted to solicit him to harm or intimidate Seymour Tankleff, that Glass turned down the work, but mentioned it to Creedon, a criminal associate of his. H.T. 12/6/04 at 6-11. Glass claimed in his testimony that he fabricated this story because Jay Salpeter and/or Bruce Barket offered him a free attorney to assist him with a pending robbery charge. Id. at 16. The DA invites the

Again, the DA seeks to ignore the import of this testimony. Demonstrating that a stationary store in the same shopping center as the bagel store was burglarized in November of 1988, the DA claims that everything Graydon testified about occurred in November, after the Tankleffs were murdered. Yet, Graydon testified about events that plainly occurred in the summer.[44] The events of the November break-in do not match the events about which Graydon testified.[45]

Graydon had no incentive to testify falsely. Having no evidence that actually contradicts Graydon's testimony, the DA again simply resorts to name calling. Indeed, having previously publicly called the witnesses in the 440 hearing "misfits," Zachary R. Dowdy, "'Misfit' Talk Riles Tankleff Witnesses," Newsday, March 30, 2005, A15, the DA posits that Graydon came forward and perjured himself, "because he is a drug using, gambling-addicted blowhard." DA Opp. at 234. Adding to the adage that if you do not have the facts, argue the law and if you do

---

Court to credit this testimony by a life-long felon. To do so requires the Court not only to disbelieve the testimony of Mark Callahan -- who testified Glass told him in 1990 or 1991 that Glass had the opportunity to commit the Tankleff murders but gave the work to Creedon, and told him in 2004 that he was not going to testify about his conversation with Steuerman because the DA's office would put him away on the robbery charge, H.T. 12/21/04 at 735-36, 740 -- but also to disbelieve the testimony of Jay Salpeter, who testified that neither he nor Barket ever offered Glass a free attorney, see H.T. 12/6/04 at 93.

[44] Graydon testified that he is sure that they occurred in June. H.T. 8/3/04 at 66-67. Despite this testimony, the DA had Kathy Stillufsen, a clerk in the DA's Central Records Section, search for records of break-ins at the stationary store in July and August 1988. H.T. 12/16/04 at 526. No search was done to find records from the incident in June about which Graydon testified. Id. at 535.

[45] Graydon testified that after the failed hit on the bagel partner, Creedon threw a trashcan through a store window and came out with a box of money. H.T. 8/3/04 at 14-15; 46-47. The stationary store owner, who conceded that her store had been broken into on numerous occasions, H.T. 12/16/04 at 512, 517, testified that in the November burglary glass in a door had been broken, but there was no trashcan or anything else inside the store. Id. at 517-18. She also testified that in the November break-in, a lotto machine was stolen as were cartons of cigarettes. H.T. 12/16/04 at 510-11. Brian Glass testified that he recalled participating in a break-in at a stationary store to steal cigarettes and lotto money. He testified on direct that he participated in this burglary with Joseph Graydon. H.T. 12/6/04 at 13-14. On cross, he testified that he participated in this burglary with Joseph Creedon and that Graydon was in the car. Id. at 78-79. Both Graydon and Glass testified that the two of them and Creedon were friends and committed many crimes together. It is possible that the incident recalled by Glass is the November incident about which the stationary store owner testified. However, it is plainly a different incident from the June 1988 incident about which Graydon testified, where: Glass was not present, no lotto machine or cartons of cigarettes were stolen, and a trash can was thrown through a window.

not have the law, argue the facts, the DA demonstrates that if you have neither, engage in sophomoric adolescent name calling.

If the DA is frustrated with the lack of respect that certain members of the public (including the victims of the Tankleff murders -- the family members) have given to the DA with respect to this case, the DA need look no further than its own conduct to ascertain the reason. It is sad that the DA has become so personally vested in this matter that it has strayed so far from fulfilling its mandate to see justice served.

## IV. The New Evidence Must Be Evaluated in Light of the Evidence at Trial, Which, Despite the DA's Mischaracterizations, Was Exceedingly Weak

As discussed above, rather than focus on the extraordinary new evidence in this case, the DA used the bulk of its 239-page memorandum to give its spin on the evidence at Marty Tankleff's 1990 trial. In an increasingly desperate attempt to bolster its ever-weakening case against Tankleff, the DA cites "facts" that are nothing more than half-truths and innuendo, absurdly proposing that there is no possible explanation -- *other than its own* -- for what happened on September 7, 1988. The DA does not want to let the evidence get in the way of Tankleff's conviction. The evidence, however, ably demonstrates the truth of Marty Tankleff's innocence.

### A. The Evidence Shows That in the Hours Leading Up to the Murders, There Was No Tension Between Marty and His Parents

Around 8:30 on the morning of September 6, 1988, Marie Vieira, the Tankleffs' housekeeper, arrived at their house, just as she had each Tuesday and Friday for four years. Tr. at 4369-70. Vieira testified at trial that, shortly after she got there, Marty and Arlene came in from a morning walk, part of their regular routine, and then sat and ate breakfast together. Tr. at

4373. According to Vieira, Marty and Arlene were nice and friendly with each other, "like they always were." Tr. at 4373.

Larry Kadan, Marty's cousin, arrived at the Tankleffs' house around 10:30 a.m. Kadan Aff. ¶ 4 [appended hereto as Attachment A]. Kadan stated that he frequently went to the Tankleffs' to help Seymour with various repairs, and that he was there on September 6 to work on a leak in the Tankleffs' pond. Id. Kadan stayed for approximately two to two-and-a-half hours. Kadan went to the store with Marty and Seymour to buy the supplies they needed. Marty and Seymour "acted completely normal." Id. When they returned to the house, Seymour went inside, and Marty stayed outside with Kadan to work on the pond together. Id. Before leaving, Kadan had lunch with Marty, Seymour and Arlene. Id. at ¶ 5. Kadan said that he did not sense "any tension whatsoever" between Marty and his parents, much less see them argue. Id. at ¶ 6.

Later in the day, around 1:00 p.m., Vieira was cleaning Seymour's office when Marty came in and asked Seymour for money for a haircut. Tr. at 4374. After some teasing and "joking around" about how much Marty's haircut should cost, Marty left the house and Seymour returned to his office. Tr. at 4374-75.[46] According to Dorothy Depping-Ball, a friend of Arlene who was over playing bridge, Marty came home an hour to an hour and a half later, and showed off his haircut to his mother and her friends. Tr. at 4680, 4684-85. Depping-Ball noted that everyone was in a good mood and that she heard no arguments between Marty and his parents while she was there. Tr. at 4685-87.

---

[46] At trial, Vieira testified that she saw a set of barbells laying on the floor in Marty's room on September 6. Tr. at 4371. When she was presented with a photograph of the barbells that showed them upright, she stated that they were in a different position than she remembered seeing them. Tr. at 4394. The DA uses this as supposedly conclusive proof that the barbells were used to bludgeon Seymour and Arlene Tankleff, yet Vieira admitted that she had no idea who else might have gone into Marty's room after she left for the day, or whether forensic experts or police officers moved the barbells before photographing them. Tr. at 499. The barbells might not have been where Vieira remembers seeing them, but that does not make them murder weapons. Indeed, the forensic evidence conclusively demonstrated that they were not. See Section IV(H)(3)(a), infra.

This sentiment was echoed by Marty's friend Zach Suominen, who testified that he dropped by the Tankleffs' around 4:00 that afternoon to confirm that Marty was still planning on going to the mall that evening. Suominen testified that he found Marty in the garage, installing new speakers in his car. Tr. at 4571-72. Suominen also testified that sometime during the hour that he was there, Seymour went to the garage to check on the stereo installation and they all chatted for a while. According to Suominen, Seymour was "very friendly," and even "cracked a couple of jokes." Tr. at 4573.

Later that afternoon around 6:00 or 6:30, Marty and Zach went to the home of Mark Perrone, Marty's best friend. Mark testified that he was outside working on his own car, and that the three of them also spent some time joking around. Tr. at 4494-95, 4574.

That evening, Marty went to the mall with Suominen and their friend Margaret Barry, to do some last-minute shopping for school clothes. Tr. at 4425-26, 4574-76. Suominen and Barry both testified that during the two-and-a-half hours they spent together, Marty continued to be "friendly," "comical," "happy," and "talkative." Tr. at 4425-26, 4430, 4575-76.

And even upon Marty's return home, the evidence shows that the mood remained jovial; there were no signs of discord or unhappiness between Marty, Arlene, and Seymour. Seymour's regular card game had begun while Marty was at the mall, and all of the card players who testified at trial stated that Seymour and Arlene were getting along well when they arrived at the house. Tr. at 656-57, 662, 700, 766. Moreover, they all said that, once Marty got home, they heard no fighting or harsh words between Marty and Arlene or between Marty and Seymour. Tr. at 661-62, 703, 705-707, 765-66.[47]

---

[47] This was in keeping with the Tankleffs' relationship in general. No fewer than ten friends and family members have stated under oath that Marty, Arlene and Seymour had a loving, happy rapport. See Tr. at 4373 (Vieira); 4505 (Marianne McClure); 4623 (Mike McClure); 4488-89, 4502 (Mark Perrone); Diamond Aff. ¶ 4, 5, 6,

Later, Marty stopped by Seymour's office while the card players were there. Marty had recently had surgery on his nose,[48] and Vincent Bove testified that he asked to see how it turned out.[49] Marty complied, talked with "the fellows," then asked to borrow Peter Capobianco's keys so that he could move his car. Tr. at 631, 678, 731-32, 765-66. Bove, Cecere and Montefusco all testified that Seymour and Marty got along perfectly fine during his brief visit to the office. Tr. at 661, 702-703, 705, 764-65.

There was absolutely nothing unusual about Marty's relationship with his parents in the hours before they were brutally attacked.

### B. Neither Marty's Car nor the Family Boat Established a Motive for Double Murder

Marty's parents were generous to him. They bought a 1978 Lincoln for him and regularly permitted him to take the family's boat out on the sound. Marty liked his car and in addition to installing the stereo, he was working hard to restore it. Jennifer Johnson testified at trial that Marty planned to repair and clean the upholstery. Tr. at 4478. She also testified, along with Marty's uncle Mike McClure and Dorothy Depping-Ball, that Marty wanted to paint the car as well. Tr. at 4478, 4622-23, 4687-88. In fact, Mark Perrone testified that Marty wanted to "mint it out" -- meaning make it "perfect" by "totally, complete[ly]" fixing it up.[50] Tr. at 4486-87.

---

7; C. Falbee Aff. ¶ 3, 7; R. Falbee Aff. ¶ 3, 4; Alt Falbee Aff. ¶ 4, 9; B. Strockbine Aff. ¶5, 6, 7; W. Strockbine Aff. ¶ 5.

[48] Dr. Stuart Arnold testified that on August 26, 1988, he corrected Marty's deviated septum and reconstructed a bump on his nose. Tr. at 4405. Arnold stated that Marty spent one night in the hospital, and that Marty went home the next day -- August 27 -- with a cast or splint on the outside of his nose and spongy packing and tubes on the inside. Tr. at 4405. Arnold said that he removed the packing on August 29. Arnold testified that it is normal for someone who has undergone this type of surgery to have bruises around the nose and eyes. He also stated that the eyes can appear to be bruised or bloodshot, a side effect that can last several weeks. Tr. at 4407.

[49] Bove testified that on the evening of September 6, he "noticed [Marty] just had two red spots in his eyes." Tr. at 731-32.

[50] Peter Cherouvis is the one and only witness who testified that Marty did not like his car. Cherouvis, a mechanic at Liberty Auto Repair, claims that Seymour and Marty once argued about the Lincoln, with Marty supposedly calling the car a "piece of shit" and referring to it in a derogatory manner. Tr. at 4642-44. Cherouvis

In addition, Mark Perrone testified at trial that he and Marty spent the whole summer of 1988 together -- he was at the Tankleffs' house "constantly." Tr. at 4485, 4488. He and Marty drove around in the Lincoln, and they went out on the Tankleffs' boat at least once or twice a week. Tr. at 4485-86. According to Suominen, Mark Perrone, Frank Perrone, Linda Perrone and Jennifer McClure, Marty never complained about the boat. Tr. at 4479-80, 4485-86, 4502-4503, 4557, 4570, 4591. To the contrary, Marty enjoyed using the boat and was encouraged to do so. See Tr. at 4479 (Jennifer Johnson testifying that Seymour "always encouraged" Marty to take her boating).

Despite this overwhelming evidence, the DA states that Marty was "not fond of his parents and his parents were not fond of each other." DA Opp. at 198.[51] The DA claims that

---

admitted, however, that Al Healy, also working at Liberty that day, did not recall hearing Marty say anything of the sort. Tr. at 4651-52.

Cherouvis claimed that this argument took place on September 6, 1988, also making him the one and only witness to testify that Marty and Seymour were not getting along the day before the murders. According to Cherouvis, Marty and Seymour dropped off the Lincoln that morning around 10:00 or 11:00, and returned for it around 2:00 or 3:00 that afternoon. Tr. at 4669-70. It was supposedly on their return to the auto shop that Marty and Seymour exchanged words about the car.

Even assuming arguendo that this argument actually happened, it did not take place on September 6. Other witnesses testified that on September 6, Marty was getting his hair cut and actually working on his car at that specific time. See Tr. at 4374-75, 4680, 4684-85 (Vieira and Depping-Ball testifying that Marty left around 1:00 p.m. to get his hair cut); Tr. at 4389 (Vieira testifying that Marty had not returned home before she left at 2:00 p.m.); 4571-72 (Suominen testifying that when he stopped by around 4:00, Marty was already working on his car). Moreover, Cherouvis admitted that he kept no notes or records of the inspection he performed on Marty's car, and had no way of verifying the date Marty and Seymour were at the auto shop. Tr. at 4646-47. Further disputing Cherouvis' memory of the date is his own testimony that Marty's nose was "black and blue" the day he and Seymour were there. Tr. at 4662-63. By September 6, Marty had a few blood spots in his eyes, but he was no longer bruised from the nose surgery performed earlier in the summer. See Tr. at 732 (Vincent Bove testifying that he saw Marty that evening, and asked to see his nose; "I noticed he just had two red spots in his eyes"); Tr. at 661 (Robert Montefusco testifying that Marty's nose "looked nice," and not mentioning any bruising).

Most significantly, even if Cherouvis' testimony is credited, it negates the very motive that the DA ascribes to it. Cherouvis says that during the same conversation in which Marty supposedly complained about the Lincoln, his father told him he was planning to buy him a new car. Tr. at 4670-72. This testimony alone should dispose of the DA's "enduring myth" that Marty had a motive to murder both of his parents because he supposedly did not like the Lincoln.

[51] It is difficult to understand why the DA has chosen to attack the character of the victims in this case. In its memorandum, the DA first states that Seymour was amoral. DA Opp. at 8. And here, the DA goes so far as to imply that Seymour and Arlene hated each other. DA Opp. at 12, 198. Despite the reams of testimony from friends and family who state that Seymour and Arlene had an incredibly loving relationship with each other and with Marty, the DA prefers to single out one lone comment that Seymour made to his card-playing friends to "prove" that he and Arlene were not "fond of each other." See DA Opp. at 12, 199 ("Seymour stated that...he and Arlene were having problems and were 'at each other's throats'"). And this is in spite of contrary testimony from the prosecution's own

Marty was upset with his parents because he hated his car and he resented the restrictions on his boating privileges. DA Opp. at 38, 47.

Yet, Stacy Goldschmidt, the very witness the DA relies on to argue that Marty was somehow willing to kill his parents for a new car, testified that Marty never spoke poorly of the car he had. Tr. at 208. This sentiment was echoed by no fewer than four other witnesses.[52]

The most damning blow to the DA's theory comes from yet another prosecution witness: at Tankleff's trial, Peter Cherouvis testified that the day before the murders, Seymour told him -- in Marty's presence -- that he planned to buy a Porsche or Mercedes for Marty within a matter of months. Tr. at 4670-72. It is absurd enough to think that a 17 year old would murder his parents over a car, especially when he liked the one he had. But the DA's theory is utterly destroyed by the fact that Seymour had already told Marty he was going to buy Marty a different car.

Not only did Marty's friends and the prosecution witnesses tell a completely different story about the car, but the DA's theory about how Marty felt about the boat also holds no water. There is no evidence that Marty's boating privileges were restricted, much less that he resented his parents for it. Five witnesses testified at trial that Marty never complained about the boat, and Seymour actually *encouraged* Marty to use the boat.[53] No one testified to the contrary.

---

witnesses. See, e.g., Tr. at 656-57, 662, 700, 766 (Montefusco, Cecere, and Bove all testifying that both Arlene and Seymour were in "good spirits" on September 7, 1988).

[52] See Tr. at 4487, 4502 (Mark Perrone); 4557 (Frank Perrone); 4591 (Linda Perrone); 4479 (Jennifer Johnson). The DA attempts to use the testimony of Marty's "friend" Lance Kirshner, Danielle Makrides, and Stacy and Audra Goldschmidt to prove that Marty disliked the Lincoln enough to murder his parents. See DA Opp. at 9-10. Kirshner admitted, however, that he and Marty were merely co-workers, not friends. See Tr. at 593 ("We worked together and that's it"). Moreover, the Goldschmidts had both known Marty for less than a month, and Makrides admitted that she had just met Marty for the first time that night. Tr. at 138, 173, 195. Thus, the DA again relies on the people who barely knew Marty to advance its theory, while those he was closest to -- and knew him best -- testified to the contrary.

[53] See Tr. at 4479-80 (Jennifer Johnson); 4485-86, 4502-4503 (Mark Perrone); 4557 (Frank Perrone); 4570 (Zach Suominen); 4591 (Linda Perrone).

### C. In Contrast, the Evidence Demonstrates that Jerry Steuerman Had a Substantial Motive to Murder the Tankleffs

Jerry Steuerman, Seymour's business partner, had considerable debts. And at trial, he testified to his immense financial difficulties. Steuerman confirmed that he took a huge hit on a house he built in Belle Terre between 1985 and 1986. Tr. at 888, 924. He spent more than $900,000 to build the house, but lost $350,000 when he sold it just a year later for only $550,000. Tr. at 925-926, 1048. Admitting that this substantial loss made money "tight," he also acknowledged that at least six entities had judgments against him in 1987 and 1988 totaling almost $200,000. See Tr. at 1044-48.

Further, Steuerman admitted that he committed crimes to get back at those he felt had cheated him in certain business deals. In 1989, Steuerman claimed that a distributor had cheated him out of a few cases of orange juice. Steuerman refused to pay his bill, and the distributor sued him for non-payment. Steuerman -- still unwilling or unable to pay -- submitted a letter to the court, forging the vendor's name, and asserting that the case had been dropped. The vendor had not, in fact, dropped the case, and Steuerman subsequently pled guilty to committing fraud upon the court. Tr. at 891-92, 909-19.[54]

Moreover, Steuerman owed a particularly large debt to Seymour Tankleff. When Steuerman was building his $900,000 house, he ran short on money. So he borrowed $350,000 from Seymour. Later, Steuerman borrowed another $75,000 from Seymour. Tr. at 1022, 1033-35. As collateral, Seymour took a 50% stake in Steuerman's bagel factory and a 50% stake in one of Steuerman's retail bagel stores. Steuerman testified that Seymour "wanted 50 percent as

---

[54] In 1978, Steuerman was also arrested for criminal trespassing. Claiming that his stockbroker caused him to lose $3,000, Steuerman handcuffed himself to the front door of Merrill Lynch's office in Huntington. When the company refused to give him the money, the next day Steuerman "did what [he] had to do." He arranged to have reporters from the New York Times and the Wall Street Journal meet him at Merrill Lynch's Manhattan office, where he threatened to "chain himself to Wall Street" if the company did not give him the $3,000 he felt he was owed. Tr. at 889-90, 921.

collateral so God forbid something goes wrong and I don't pay him his money, he has my business." Tr. at 888, 937-38, 963.

In fact, Steuerman -- who drove Lincolns, Cadillacs and Ferraris at the time -- didn't want to pay Seymour. Steuerman testified that their relationship "deteriorated" in the months leading up to the murders, because "Seymour believed he owned one-half of me, not one-half of my businesses." Tr. at 998, 1041, 1080. At the time, Steuerman was paying Seymour $2,500 each week. Tr. at 945, 1225. While visiting the Tankleffs in July 1988, Mike McClure spoke with Seymour about his relationship with Steuerman. Seymour told McClure that Steuerman had asked to skip some loan payments. Seymour, who was "very angry," repeated to McClure the response he had given Steuerman: "Jerry, don't fuck with me. I want my payment and I want my money on time." Tr. at 4624-25.[55]

Steuerman complained to others about his problems with Seymour. For example, Robert Montefusco testified that in the months leading up to the murders, Steuerman griped to him -- on more than one occasion -- that Seymour was "out for himself." Tr. at 646-48. Within months of Seymour's death, Steuerman formalized his complaints by suing the Tankleffs' estate, claiming that the money he was paying to Seymour was "usurious," and that he felt he no longer had to pay. Tr. at 955, 1217. In fact, he stated that he wanted his money back. Tr. at 973-77.

---

[55] McClure's testimony is corroborated by that of Arlene's sister, Marcella Alt Falbee. Approximately one week before the murders, the trouble between Seymour and Steuerman came to a head. Arlene's sister Marcella spent a considerable part of the summer at the Tankleffs' home in Belle Terre. She stated under oath that one morning while she was there, Seymour came home from the bagel shop "very upset." Seymour had demanded his money from Steuerman. This left Steuerman so irate that he "lunged across the store's counter and got Seymour in a neck hold of some sort." Marcella stated that, according to both Arlene and Seymour, Steuerman then threatened Seymour, saying, "You son of a bitch. You want to own me. *I'll see you dead first.*" Alt Falbee Aff. ¶ 7 (emphasis added).

### D. The Evidence Proves that Jerry Steuerman Was -- Without a Doubt -- the Last Person to Leave the Tankleffs' House In the Early Hours of September 7, 1988

Most members of the After Dinner Club gathered at the Tankleffs' house on the evening of September 6, 1988 to play their weekly game of poker. Aside from Seymour Tankleff, the players that night included Jerry Steuerman, Peter Capobianco, Al Raskin, Robert Montefusco, Joseph Cecere and Vincent Bove.[56]

Bove was the first to leave after the game ended at about 3:00 a.m. Tr. at 733.[57] He testified that on his way out, he went through the kitchen, cut another piece of watermelon for himself, and left. Tr. at 733.[58] Still in the house were Cecere, Raskin, Montefusco, Seymour and Steuerman. Cecere eventually went out to his car with Raskin. Tr. at 682. He testified that he had to sit and wait for all of the others to leave because his car was blocked in. Tr. at 683, 710-11, 716. Meanwhile, Montefusco wanted to stick around and talk to Seymour, but saw that Seymour and Steuerman were engaged in a "private" conversation. Montefusco decided not to even try interrupting, and he left. Tr. at 634, 665. While Cecere and Raskin still were waiting outside, Steuerman eventually went out to his car. Cecere testified that, because of the way their cars were parked, Steuerman should have left first; instead, Steuerman waved at Cecere to go ahead. Tr. at 683, 710-11, 716. To Cecere, this "just [did not] make any sense." Tr. at 710. But Cecere proceeded delicately to back his car around Steuerman's, and then he pulled down the

---

[56] Bove testified at trial that he was on a diet at the time, so Seymour popped some popcorn and cut up some watermelon for Bove to snack on during the game. Tr. at 729-30. Bove stated that others in the group were also eating watermelon that evening. Tr. at 763-64.

[57] Capobianco left earlier in the evening, before the game was over. Tr. at 676-77.

[58] At trial, Bove was shown a photograph of the knife he used to cut the watermelon. He stated that, as depicted in the photograph, the knife was not in the same exact place he left it on the counter. Tr. at 235, 240. Again, the DA uses this as supposedly conclusive proof that the knife was the murder weapon, yet Bove admitted that he did not see any of the other card players leave, and that he had no idea what day the photograph was taken, or how many police officers and civilians had been in the house in the interim. Tr. at 750-51. In short, the knife might not have been where Bove thinks he left it, but that does not make it a murder weapon. And, as with the barbells, the forensic evidence demonstrated that it was not. See Section IV(H)(3)(a), infra.

driveway and out onto the street -- leaving Steuerman alone in the Tankleffs' driveway. Tr. at 684, 712. Cecere testified that he never saw Steuerman's headlights behind him, and he never saw Steuerman's car follow him out. Tr. at 713. In short, no one saw Steuerman leave.

### E. The Evidence Demonstrates Upon Finding His Parents' Bodies, Marty Was Excited, Screaming, and Crying

According to the testimony of Patricia Flanagan, a Suffolk County emergency services dispatcher, the next morning at 6:11 a.m. a police operator patched through a call from Marty Tankleff:[59]

MT: This is Marty Tankleff, 33 Seaside Drive in Belle Terre. I need an ambulance. Emergency.
911: Alright, hold on and I'll connect you.
MT: Emergency.
911: I'm connecting you with the ambulance.
O: Fire Rescue Center.
911: 763.
MT: I'm at 33 Seaside Drive in Belle Terre.
O: 33 Seaside?
MT: Seaside Drive in Belle Terre, it's off Crooked Oak Road, Belle Terre. Please, my father.
O: Wo, wo, hold on, I can't write that fast.
MT: Thirty...
O: What corner street?
MT: 3, it's off Crooked Oak Road.
O: Crooked Oak?
MT: Yes, yes, hurry up.
O: No, no, no, answer my questions. What's your name?
MT: Marty Tankleff, I'm his son. He's gushing blood from the back of his neck, he's got a cut.[60]
O: What's the phone number you are calling me from?
MT: 928-2242.
O: How old is he?
MT: He's 62.
O: What happened to him?

---

[59] A link to the audio recording is available on Court TV's website: http://www.courttv.com/news/tankleff/background.html.

[60] Teenaged Marty Tankleff was extremely squeamish about blood. At the first sight of his father, he described the considerable blood as "gushing." In fact, while there was a lot of blood, it could not have still been gushing when Marty called 911. Just minutes later, Ethel Curley, the experienced EMT who responded to the scene at 6:27 a.m., testified that the blood was dried and coagulated. See Section IV(F), infra.

MT: I don't know, I just woke up and he's in the office, he's gushing blood...please...
O: Alright, listen to me. Is this a private house?
MT: Yes, it is.
O: Alright, now, listen.
MT: It's a red driveway.
O: Listen to me. I'm sending you an ambulance, I want you to take a clean towel...
MT: Yes.
O: Wrap wherever he's gushing blood from...
MT: Okay...
O: Hold pressure on it...
MT: Okay...
O: Lay him down if possible...
MT: Okay...
O: Get his feet elevated and we'll have someone down there for you.
MT: Okay.

Flanagan testified that Marty was so "excited" and speaking so fast that she had to slow him down a number of times to just take his name and phone number. Tr. at 71-72, 87-90.

Marty followed Flanagan's instructions: he did his best to move Seymour to the floor, then elevated Seymour's feet on a pillow and wrapped a towel around his neck. At approximately 6:20 a.m., he called the Perrones. Linda Perrone testified at trial that Marty was "very upset" and that he was "crying." Tr. at 4592, 4598. A few minutes later, Mark Perrone called Marty back. He testified that Marty was speaking "very fast" and he "seemed to be excited." Tr. at 4490-91. Next, Marty called Shari Rother, his half-sister. Rother testified that Marty was "agitated," "upset" and yelling. Huntley Hearing Testimony of Shari Rother at 4.

A short time later, Morty Hova, the Tankleffs' next-door neighbor heard someone "screaming" outside. Tr. at 101, 120-121. Hova testified that it was Marty, who had run to Hova's front door. In fact, when Hova first heard Marty yelling, his screams were so loud and insistent that Hova thought that a jogger was being attacked by a dog. Tr. at 101-102. According to Hova, once he opened his front door, Marty, without pausing, turned around and

ran back toward his house. Hova followed him. Tr. at 102, 121-22. Moreover, Hova testified that the whole time they were running, Marty -- barefoot and wearing shorts and a zippered sweatshirt -- continued to scream. Tr. at 103, 122.

By the time Marty and Hova made it back to the Tankleff residence, the police were pulling into the driveway. Officers Crayne and Gallagher, the first to arrive, testified that Marty was "talking fast" and "agitated" when he ran over to their car, "gesturing" and "scream[ing]." Tr. at 256, 371-72. At 6:27 a.m., an ambulance arrived. See Tr. at 423, 464. Emergency medical technician Ethel Curley testified that Marty, standing in the driveway, waved his arms at them "vigorously" and "excited[ly]." Tr. at 423, 465. As other members of the ambulance crew went into the office to tend to Seymour, Marty "quickly" led Curley to his parents' bedroom. Tr. at 424-25, 469.

### F. The Evidence Also Shows that Arlene and Seymour Were Covered in Dried Blood When the Paramedics Arrived

Curley stated that she found Arlene on the floor on the far side of the bed. Curley testified that from the doorway, she could only see the top of Arlene's head, "since the bed happened to be...occluding the sight of the body." Tr. at 425, 470. In fact, Arlene was so close to the bed that when Curley made her way to Arlene's body and tried to find signs of life, she found it difficult to maneuver. Tr. at 426.

Curley testified that Arlene, who lay motionless, was pale and her skin was dry. Tr. at 470-71. Curley stated that there was a lot of "dried crusted blood" around Arlene's scalp, in her hair, on her upper torso and on her arms. Tr. at 471-75. Curley also said that there was dried blood on the carpet. Tr. at 476-77.

Further, Curley testified that after leaving the master bedroom, she made her way to Seymour's office. Tr. at 439. She stated that she did so with some difficulty because she

"couldn't hear anything" coming from the other side of the house. Tr. at 438, 483.[61] Upon arriving in the office, Curley found that the other members of the ambulance crew had given Seymour oxygen. Curley testified that Seymour's feet were propped up on a pillow, and she noted that he was having a hard time breathing. Tr. at 439, 441-42. To give her crewmates more room, Curley, Crayne and Gallagher moved Seymour's desk out of the way and Curley "kicked" Seymour's chair "to get it out of the way as well." Tr. at 443, 382.[62]

According to Curley, there was dried, crusted blood on Seymour's head, scalp, chest, and both arms. Tr. at 486-87, 488-89. Curley also stated that Seymour's pre-hospitalization report noted that he was "mostly covered with dried blood." Tr. at 492.

Once Curley and the ambulance team got Seymour onto a stretcher, they prepared to transport him to the hospital. Curley testified that on the way out of the office, a large clump of Seymour's dried, coagulated blood, approximately the size of a golf ball, literally fell to the floor with a thud. In fact, the sound was so loud that Curley stated that she thought one of her colleagues had dropped a piece of medical equipment. Tr. at 458, 487-88. Curley also testified that there was another clump of dried, coagulated blood, two inches long, on the seat of Seymour's chair. Tr. at 487-88.

---

[61] Given the layout of the Tankleffs' house, sound did not travel well -- particularly in Marty's room. Jennifer Johnson testified that when visiting the Tankleffs that summer, she stayed in Marty's room with her step-sister while Marty slept in the guest room next door. She said that even when she and her step-sister Christi were both in the room, she could not hear Christi talking. Tr. at 4477. This was corroborated at trial by sound expert Bonnie Schnitta-Israel. Schnitta-Israel testified that she performed tests in the master bedroom to see if a scream as loud as two cymbals crashing together could be heard in Marty's room. For the test, Schnitta-Israel duplicated the conditions in the house as closely as possible to what they were the night of the attacks, and concluded that with the door to the master bedroom open, the sound entering Marty's room would have been as loud as a whisper. With both the door to the master bedroom and the door to Marty's bedroom closed, virtually no sound would have entered the room at all. Tr. at 4440-4456.

[62] Thus, the desk was moved, along with the phone and phone cord that were on the desk -- before the desk or phone were later examined by the DA's blood splatter expert, Charles Kosciuk.

### G. That Morning, Tankleff's Statements Were Remarkably Consistent

Within a short time of the police arriving, several family friends and neighbors gathered on the street in front of the Tankleff residence. Over the course of the morning, Marty spoke with at least seven people and told them what he knew of what had happened.

He told Gallagher, Bove, McNamara, Doyle, Rein, and McCready that when he woke up that morning, all of the lights were on in the house. Tr. at 275, 742, 780-84, 2616, 2835, 3439. According to Bove, McNamara, Doyle, Rein, and McCready, Marty said that he then walked down the hall and looked into his parents' room. Tr. at 742, 780-84, 2616, 2835, 3439. Not seeing anyone, Gallagher, Crayne, Bove, McNamara, Doyle, Rein, and McCready all said Marty told them he walked through the house until he spotted his father, injured, in the office. Tr. at 275, 335, 742, 780-84, 2617, 2836, 3441. Bove, McNamara, Doyle, Rein, and McCready all stated that Marty said he then called 911. Tr. at 742, 780-84, 2617, 2836, 3441. Marty told Crayne, Bove, McNamara, Doyle, Rein, and McCready, that he administered first aid to his father. Tr. at 343, 742-43, 783-84, 2617-18, 2836, 3441. Then, according to McNamara, Doyle, Rein, and McCready, Marty said that he looked for his mother's car in the garage. Tr. at 783-84, 2617-18, 2836, 3442. Seeing her car there, Marty told McNamara, Doyle, Rein, and McCready that he returned to the master bedroom, where he then saw his mother on the floor. Tr. at 784-85, 2618, 2837, 3442. Marty told Doyle, Rein, and McCready that he then returned to the kitchen, where he called his half-sister, Shari Rother, and his best friend, Mark Perrone. Tr. at 2618, 2837, 3442. And according to Bove, McNamara, and Rein, Marty said that he then ran out of the house toward the Hovas'. Tr. at 743, 783-85, 2837.

Even though Marty repeatedly told the same story all morning to more than a half-dozen different people, the DA claims that Marty was inconsistent, and that discrepancies in his

statements are proof of his guilt. In making this argument, the DA relies heavily on the testimony of a single witness, McNamara. The DA not-so-subtly implies Marty used three conversations with McNamara that morning to craft his "story." See DA Opp. at 22-23, 25-26.

That the DA ignores the testimony of so many witnesses to whom Marty was consistent to focus instead on minor inconsistencies attested to by McNamara is simply incomprehensible. Indeed, even if McNamara had testified to *material* inconsistencies by Marty, which he did not, this Court should afford no weight to McNamara's testimony.

Less than two years after Marty's trial, McNamara was arrested for, and subsequently admitted to, taking more than $6 billion in fraudulent loans from General Motors Acceptance Corporation (GMAC), in what remains "one of the largest frauds in American corporate history." Liam Pleven, "Fitness of the Witness; Aliperti's Lawyers Focus on McNamara's Credibility," Newsday, March 15, 1995, A06; "Dealer's Plea in Fraud May Be Bargain of His Life," Tampa Tribune, Jan. 29, 1995, 1.[63]

Not surprisingly, McNamara's fraud has cast severe doubts on his credibility. When McNamara testified as an informer in a GMAC-related trial, the jurors thought McNamara made

---

[63] As one journalist wrote:

> McNamara himself will forever be part of Long Island history for the titanic sum of money he bilked out of GMAC by securing loans for cars that didn't exist. Even McNamara had trouble spitting out the numbers. "Uh, 400 and...I believe it was 422 million dollars," he said when asked how much he owed GMAC at the time he was caught red-handed. If he stood at the proverbial gates to Brookhaven and handed every man, woman and child $1,000 to go Christmas shopping, he'd still have a couple of million left over.

Beth Whitehouse, "Quiet Witness for the Prosecution; McNamara Lays Out Pattern of His Crime," Newsday, Dec. 9, 1994, A39.

McNamara's "mother of all pyramid schemes" started in the 1970s, when he financed through GMAC the purchase of an actual van, then altered that van's vehicle identification number and got GMAC to finance it again. He diverted the extra funds to his other businesses, and "when GMAC employees would show up at his lot to inspect the vehicles, he would have his employees simply jockey vans around so they would be counted more than once." The scam didn't stop there. Instead, it "accelerated" in the 1980s to finance McNamara's various real estate interests. At this point, McNamara "stopped the double-financing scheme and simply began obtaining loans for vans that didn't exist in the first place." And when he needed to show GMAC a letter of credit from his bank, "he said he simply whited out the expiration date, whited out the amount and typed in new numbers that satisfied GMAC." Michael Slackman, "How He Scammed GM; A Little Bit of Charm and Some White-Out Helped," Newsday, Dec. 9, 1994, A04.

a "poor witness." See Beth Whitehouse, "Quiet Witness for the Prosecution; McNamara Lays Out Pattern of His Crime," Newsday, Dec. 9, 1994, A39 ("But, with yesterday's acquittal and mistrial, McNamara's credibility as a witness would appear to be close to zero. Jurors...said his admissions of stealing billions from GMAC far outweighed his testimony against [the defendants].")

Yet the DA asks this Court to credit statements made by McNamara while he was engaged in one of the largest frauds in history. The Court should give no weight to McNamara's trial testimony, which -- even if accepted -- does little to advance the DA's theory.

### H. Tankleff's Suspicions of Steuerman's Involvement Were Shared by Other Family Members and Were Justified

And despite all of the evidence to the contrary, the DA paints Marty Tankleff as a cold-hearted schemer: around 6:11 a.m., Marty called 911, "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." DA Opp. at 191.[64] Quixotically attempting to prove its own faulty logic, the DA claims that a 17-year-old boy with no criminal history engaged in an elaborate and sophisticated scheme to murder two people, leave no physical evidence of the crimes and "frame" Jerry Steuerman, a grown man with a known violent streak. See DA Opp. at 159 ("Minutes after reporting the crime, Tankleff's attempt to frame Jerry Steuerman began to

---

[64] It is ridiculous for the DA to think that just because Marty slept through the attacks, he should have had "no idea" who to suspect. As many family members were aware, Jerry Steuerman and Seymour Tankleff had been arguing for months, with Steuerman threatening Seymour only weeks earlier. It was obvious to Marty -- as well as to Arlene's nephew and other relatives -- that Steuerman was likely involved. See H.T. 12/09/04 at 161-62 (Ron Falbee testifying that on the morning of the attacks he told the police that he suspected Steuerman was responsible, as did other family members); Marcella Alt Falbee Aff. ¶ 8 ("I immediately sensed that Jerry Steuerman had something to do with it"); Norman Tankleff Aff. ¶ 7 [appended hereto as Attachment B] ("I immediately knew that Gerard 'Jerry' Steuerman was somehow directly involved and/or responsible"). The DA also insinuates that Marty could not have slept through the attacks. As discussed above, even if Arlene had screamed at the top of her lungs, Marty would not have heard a thing in his bedroom. See note 61, and accompanying text.

unravel, as family friends and neighbors pointed out the flaws in parts of his story"); id. at 191 ("Tankleff realized that framing another for one's own murderous acts would become difficult if one of the victims survived").[65] But each of the DA's arguments in support of this contention is wholly inconsistent with the evidence.

### 1. Marty Was Emotionally Distraught That Morning, and Was Likely in Shock

Even after Marty "excited[ly]" told Flanagan to "hurry up" with the ambulance, he spoke to others while "very upset" and "crying." Vincent Bove testified that when he arrived at the Tankleffs' house, Marty ran up to his car before he even had a chance to get out. Tr. at 757. According to Bove, Marty was "excited" and was talking "rapid and fast." Tr. at 757, 768. Later, Bove noticed Marty pacing back and forth. Tr. at 752. Dara Schaeffer, Marty's high school classmate, testified that when she stopped to talk to Marty on her way to school, she noticed that his eyes were red. Schaeffer also said that Marty was "babbling" and seemed to be in a state of shock. Tr. at 573.[66] Further, police officer Edward Aki testified that Marty seemed "very excited" when they spoke that morning. Tr. at 407.

Yet one of the DA's "enduring myths" is that Marty was insufficiently upset that morning. In fact, the DA claims that Marty's "lack of emotions and series of false statements would have led *any* rational detective to suspect him." DA Opp. at 194-95 (emphasis in

---

[65] According to the DA's own logic, Marty could only successfully frame Steuerman if both Arlene and Seymour were dead. If this were true, and if Marty were executing some elaborate scheme to implicate Steuerman, Marty never would have called 911 when Seymour was alive. But as the DA points out, Marty, who had an I.Q. of 124, "was not stupid." DA Opp. at 192. He would have certainly ensured that Seymour was dead before calling 911. Instead, Seymour was alive and breathing when Marty called 911, when he insisted that 911 provide an immediate response, when Marty followed instructions and performed first aid on his father and when he assisted Curley and her team upon their arrival.

[66] The DA highlights Schaeffer's testimony that she thought she heard Marty say, "Last night someone killed my mother, tried to kill my father and molested me." DA Opp. at 25. The DA recognizes Marty's testimony that he actually said, "They . . . must have *missed* me," id., but fails to acknowledge that, after September 7, Schaeffer repeatedly doubted her memory of what she heard. See Tr. at 555-60, 572 (Schaeffer testifying that in February 1990, she told Detectives Rein and Doyle "over and over" that she was not sure what she heard, and that in March 1990 she told private investigator Murtaugh that she doubted her memory).

original). This is despite the fact that no fewer than eight people -- Patricia Flanagan, Morty Hova, Linda Perrone, Mark Perrone, Shari Rother, Ethel Curley, Vincent Bove, and Dara Schaeffer -- testified that Marty was "screaming," "crying," "excited," "very upset," and "babbling." Tr. at 101-102, 573, 752, 757, 768, 4490-91, 4592, 4598. Thus, it seems the police were the only ones who thought Marty was unemotional that morning; the people who actually knew him painted a picture of a scared, traumatized 17 year old. Compare DA Opp. at 19, 29, 31 (police referring to Marty as "composed," calm, and businesslike), with id. at 17, 18, 20, 21, 25 (friends and acquaintances describing Marty as screaming, crying, and in shock).[67]

### 2. When Marty Initially Looked into His Parents' Bedroom, He Could Not See His Mother's Obscured Body on the Bedroom Floor

The DA concedes that Marty, who had just gotten out of bed, was not wearing glasses or contacts when he looked into his parents' room. DA Opp. at 193, n.97. The DA further admits that sunrise did not occur until 6:25 a.m. DA Opp. at 17, n.8.[68]

Thus, Marty, half-asleep and with blurred vision, looked into his parents' darkened bedroom. He specifically looked at his parents' bed, expecting to find them there. When he saw that the bed was empty, he continued down the hall. The DA claims that because Marty was able to tell that they were not in bed, he should have been able to see his mother on the floor. DA Opp. at 194. At that point, however, Marty had absolutely no reason to be looking at the floor at all -- much less looking for his mother there. Compounding his poor vision and the darkened

---

[67] The DA also claims that Marty's "false statements" aroused suspicion. The DA, however, labels as "false" any statement that it chooses not to believe. But as discussed above, Marty, a traumatized teenager, did not knowingly make any false statements. At worst, in the face of aggressive and repetitive questioning, he may have been incorrect about a few meaningless details, while remarkably consistent in repeated answers about the significant events of the prior evening and that morning.

[68] The DA uses one of McCready's many lies to Marty as fodder for its own argument that there was plenty light for Marty to see into his parents' bedroom: "McCready interrupted that when he awoke at ten minutes to six it was already light out." DA Opp. at 195. Completely ignoring the conceded fact that sunrise did not occur for another 35 minutes, the DA treats McCready's lie as fact, and insinuates that Marty's accurate statements about how dark the room was are an indication of his guilt. See DA Opp. at 195 (stating that Marty then "backpedaled" about how light it was in the room).

state of the bedroom was the fact that Arlene was not readily visible from the doorway. She was not, as the DA claims, "only a few feet in front of him." Instead, as Ethel Curley testified at trial, Arlene's body was on the far side of the bed, and the top of her head was barely visible.

Struggling to prove that Marty did not actually look into the bedroom -- because, according to the DA's theory, had he done so he would have seen his mother on the floor "only a few feet in front of him" -- the DA asserts that Daniel Gallagher was in the master bedroom *sometime after 6:17 a.m.*, and that James McCready was in the bedroom around *8:00 a.m.*, and *both of them* were able to see her. DA Opp. at 19, 192-93. The DA further implies that because Marty was able to identify Mike Fox outside the house sometime after 8:00 a.m., he should have been able to see his mother hours earlier. DA Opp. at 193, n.97.

That McCready and Gallagher were able to see Arlene later in the morning -- when they knew to look for her on the floor and when there was most certainly more light in the room -- means nothing in terms of Marty's ability to see her earlier in the morning, with no indication that he should be looking there. And the DA's claim about Marty's ability to identify Mike Fox is simply beside the point. When Fox pulled up outside the Tankleffs' house, it was hours after Marty had looked into his parents' bedroom and it was plainly light outside. Marty was able to make out Fox's *car* -- a vehicle he had seen many times. Tr. at 4225. There is absolutely no correlation between Marty being able to identify a familiar automobile in broad daylight, and his ability to see his mother's mostly obscured body on the floor of a darkened bedroom when he had no reason to look at the floor on the far side of the bed.

### 3. The Blood Evidence

Of the hundreds of articles of evidence inspected at the Tankleff residence, only a handful had blood on them. According to Kosciuk and Baumann, there was unsmeared blood

splatter on the telephone in Seymour's office, blood stains on a towel found at the foot of Marty's bed, and blood on the doorknob to Marty's bedroom and the light switch in Marty's bedroom. Tr. at 2272-75.[69] In addition, Baumann testified that Marty had a small amount of blood on his right shoulder, and that there were small spots of blood on two tissues in his pocket. Tr. at 2276-78.

Kosciuk and Baumann testified that there was *no trace* of blood on the front door, the door to Marty's bathroom, the towels in Marty's bathroom, Marty's bathmat, the stopper, grout and tile in Marty's bathtub, Marty's bathroom floor, six other telephones (in the master bedroom, kitchen, den, sunroom, Marty's room, and the sewing room), ten different drains and water traps (from two kitchen sinks, two sinks in Marty's bathroom, the tub in Marty's bathroom, a slop sink in the utility room, the sink from the guest bathroom, two sinks in the master bathroom, and a sink next to the pantry), the rug in Marty's bedroom, Marty's fingernails, Marty's necklace, the door to the garage, and almost two dozen knives and hammers taken from Marty's bedroom, the kitchen, and garage. Tr. at 1684-88, 1717-21, 1774-75, 2218-2226, 2230-37, 2250-53, 2265-66, 2280-81, 2304, 2312-26, 2328.

### a. The Blood Evidence Disproves the Case Against Tankleff and Demonstrates the Falsity of His Confession

According to Robert Baumann, a witness called by the DA, blood generally travels into small nooks and crannies, and into little cracks and crevices to find its lowest point of gravity.

---

[69] The forensic evidence established that the blood on the light switch and on the doorknob to Marty's room was solely Arlene Tankleff's and not Seymour Tankleff's. This is inconsistent with the DA's theory that Marty killed both of his parents and then transferred the blood to the light switch and the doorknob. Given the forensic evidence, had Marty attacked them both then gone back to his room, blood from both Arlene and Seymour would have been found on the light switch and doorknob. See Tr. at 2177, 2183 (Baumann testifying that Seymour's blood was found on the wall of the master bedroom and on the bed sheets). Similarly, had Marty killed both of his parents, then wiped his hands on the towel at the foot of his bed, blood from both Arlene and Seymour would have been on it. To the contrary, Baumann testified that the blood on the towel was Seymour's only. This is completely consistent with Marty's statements that he only touched his father, and never touched his mother. And note that if there were two murderers (Creedon and Kent), the one who killed Arlene -- upon checking Marty's bedroom to make sure that he had not awoken -- would have left only Arlene's blood on the light switch and doorknob.

Tr. at 2305-2306, 2320. Thus, Baumann totally disassembled the "watermelon knife" to determine if any blood or other human fluids could be found in any of its smallest pieces. Tr. at 2305-2306. Notably, Baumann testified that the knife had absolutely no trace of blood or tissue anywhere on the blade -- or under its handle. Tr. at 2237. In fact, Baumann stated that there was a small piece of a "pink substance" on the knife. He testified that this substance was not human tissue, and when he sent it to a County lab for testing, it dissolved. Tr. at 2237. Thus, while there was no blood or tissue clinging to its blade or caught under the handle, there was a bit of pink material clinging to the knife. After being used to cut watermelon, the knife had clearly not been used to kill two people, cleansed of every trace of human material, but somehow left with a pink, watermelon-like substance on it. See Tr. at 2307.[70]

Moreover, Baumann stated that he also took Marty's barbells apart to search for microscopic traces of blood and tissue. Once more, he testified that he found nothing -- no blood, no tissue, and no hair -- anywhere on the bars, the weights, or the screws holding them all together. Tr. at 2250-53, 2313-16. The instruments actually used to bludgeon Arlene and Seymour Tankleff drew blood from both of their scalps and fractured both of their skulls such

---

[70] For as much attention that the DA has paid to the precise location where Bove claims he recalls having placed the watermelon knife when he left the Tankleff residence, one would assume that it would have also noted that Bove was not the only person eating watermelon that night and that Bove was the first of the card players to leave after the game finally broke up. Tr. at 733, 735, 750. Indeed, Bove himself admitted that Seymour was even cutting up watermelon and bringing it in to the group during the card game. Tr. at 763. And Bove did not see any of the other card players leave behind him, so he had no idea how many of them might have been in the kitchen after he left, also cutting up watermelon to go. Tr. at 751. Thus, it is quite possible that another card player, or even Seymour himself, used the knife and failed to put it exactly where Bove had left it. In addition, prosecution witnesses readily admitted that they moved items in the house before crime scene technicians arrived. EMT Ethel Curley testified that, to make enough room to work, she moved the desk in Seymour's office and kicked his chair across the room. Tr. at 443. As Robert Baumann, another prosecution witness, testified, "You can't go through a house without touching anything." Tr. at 2282-83. Indeed, the crime scene detectives acknowledged that they moved potentially important evidence, including the towel at the foot of Marty's bed and the bathmat in Marty's bathroom. There were countless police officers walking through the house that day. It is impossible to know who might have moved the knife or the barbells. But regardless, the forensic evidence shows that they could not have been the murder weapons.

that Arlene's tissue was "pulped," her ear was torn, and Seymour's brain was exposed.[71] The shower's trap was removed, and the drain was found to be filled with hair and other debris. It is simply impossible that blood and human tissue were washed down the drain without any of it remaining in the drain's clogged mass.

In the face of the overwhelming evidence that the knife and barbell were not used in the murders or cleaned in the shower, the DA claims a slit in a shower sponge proves its theory. DA Opp. at 199. Yet, there was no evidence whatsoever showing that the blade of the knife matched the cut in the sponge. And, most importantly, when Baumann inspected the sponge *under a microscope*, he found absolutely no trace of blood or tissue in the very nooks and crannies that would normally retain such substances. Again, the DA's theory is disproven by its own forensic experts.

### b. The DA's Own Forensic Testimony Is Inconsistent with Its Current Speculation about How the Blood Should Have Transferred

According to Kosciuk, many factors determine whether blood will transfer from one surface to another. He stated that one of the most important factors is whether the blood is wet or dry. Tr. at 1849-51. In addition, both Kosciuk and Baumann testified that dried blood does not transfer easily and that it will not smear when one rubs it with one's hand. Kosciuk also noted that a minute amount of blood will dry much faster than a pool of blood in the same room. Tr. at 1860, 1862.

---

[71] The DA argues that the defense has presented no evidence that blood should have been on these items. See DA Opp. at 199-200 ("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 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"). This not only improperly shifts the burden of proof to the defense, but it also asks the Court to suspend common sense.

Notwithstanding this testimony -- and without citing any supporting evidence -- the DA argues that had events unfolded as Marty said they did, there would have been blood on the kitchen phones, the garage door, on Marty's clothes, and on his face. DA Opp. at 193-94, 197, 202-203. These conclusory assertions are not facts, but mere theories that are unsubstantiated by any evidence. In fact, the most puzzling aspect of the DA's conclusions is the flawed premise underlying them: all blood is always wet, and all blood is always, therefore, readily transferable. As Detective Charles Kosciuk and Robert Baumann -- the prosecution's own witnesses -- testified at trial, the DA's premise is incorrect.

First, the DA asserts that because the bloodstains on the office phone were not smudged, Marty could not have used that phone to call 911. As discussed above, the blood on Seymour's chest, head and scalp was already dried and crusted when the EMTs arrived, and large clumps of his blood had already coagulated. Thus, it follows from Kosciuk's and Baumann's testimony that the blood splatter on the office phone -- in the form of infinitesimal droplets -- was already dry and, thus, not susceptible to smudging.[72]

Next, the DA claims that -- because there was no blood on the kitchen phone or on the garage door -- Marty lied about the sequence of that morning's events. Instead, the DA says that Marty called 911, Perrone and Rother, opened the garage door, and then -- just before running out of the house -- dipped his hands in Seymour's blood "to make it appear as if he had rendered first aid to his father." DA Opp. at 205. This speculation, again unsupported by any evidence, is

---

[72] At trial, Kosciuk did not describe in any detail his claim that the cord was not moved. But the DA speculates that because there was blood on the phone cord, the phone cord itself must not have been disturbed. The DA uses this speculation to then assert that Marty must have lied about using the office phone to call 911. See DA Opp. at 203 ("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...He testified that he did not know how he managed not to...disturb the telephone cord"). The DA, however, ignores the testimony of Curley, Gallagher and Crayne, who all said that they literally shoved Seymour's desk -- upon which the phone sat -- out of the way, as well as the testimony of the crime scene investigators who said that they later moved the desk back to where they thought it belonged. The long phone cord must have been disturbed during these moves back and forth, but the dried blood was undisturbed.

faulty on its face: had Marty dipped his hands in Seymour's blood "just before running out of the house," and if the DA were correct that the blood was still wet and easily transferable, there would have been blood on the front door or its attached storm door. There was none.

Rather, since it is undisputed that Marty did have his father's blood on his hands when he left the house, the lack of blood on the front door demonstrates, consistent with the eyewitness testimony, that the blood was dried and coagulated, and it was not easily transferred. Whatever wet blood he did get on his hands would have been absorbed by the towel that he wrapped around Seymour's neck. There was no blood on the garage door or on the kitchen phone not because Tankleff did not touch these items when he said he did, but because his father's blood was dried and coagulated and Marty had used a towel before he touched either the garage door or the kitchen phone.

In addition, because Marty could not explain how he got blood on his shoulder and no blood on his clothes, the DA claims that he must have murdered his parents in the nude, showered and missed a spot, then gotten dressed. But had Marty gone to take a shower that morning, with blood not only on his hands, but all over his body, he would have gotten *some* blood *somewhere* in the bathroom: on the bathroom doorknob, the towels, the bathtub stopper, the bathmat, or the bathroom floor. Again, there was none. Likewise, it would have been impossible for Marty to shower off all the blood that he had on his body, but then miss the one spot -- not on some obscure part of his body, but on his shoulder -- that would have been exposed to the most water. And all of this is confirmed by the simple fact that there was absolutely no trace of blood in the tub, in the grout, on the tiles, in the trap water, on the tub's stopper or

anywhere in the collection of hair and fibers clinging to the stopper. Had Marty tried to rinse blood down the drain, at least some small speck of blood would have been trapped in that mass.[73]

And finally, because Marty did not have blood on his face, he obviously did not cry like he said he did -- because, according to the DA, *everyone* wipes their eyes and "dabs" their nose when they cry, and had Marty done that, he would have gotten blood on his face. DA Opp. at 193-94, 197, 202-203. Again, the DA offers speculation, but ignores the actual evidence. Linda Perrone testified that when she spoke with Marty at approximately 6:20 a.m., he was "very upset" and he was "crying."[74]

## I. The DA Simply Ignores the Forensic Evidence Indicating that There Were Multiple Assailants Who Used Multiple Weapons

According to Suffolk County medical examiner Vernard Adams, the front of Arlene's throat had been cut, and she had stab wounds on her back and both forearms. Tr. at 3944-45. Adams testified that these cuts were caused by a sharp blade -- but he could not determine how many blades were used or whether the instrument was a knife. Tr. at 3954, 4008-4009, 4036. Moreover, Adams was given several knives that had been taken from the Tankleffs' house, but he could not say that any of them had been used to cut Arlene. Tr. at 4035-36.

Adams also stated that some of Arlene's injuries -- bruises on her knuckles and the cuts on her forearms -- were "defensive wounds," meaning they were consistent with being inflicted "during a struggle." Tr. at 3944-45, 3946, 4005-4008. Adams testified that these defensive wounds could have been inflicted by more than weapon. Tr. at 4009.

---

[73] Contrary to the fantastic suggestion that Marty was walking around the house nude, attempting to single-handedly murder his parents with a barbell, and the DA's speculation as to when Marty put on the sweatshirt, the fact is simply that he did not put on his sweatshirt until immediately before going outside. As Jeff Ciulla testified, it was quite cool outside that morning.

[74] Finally, the tissue from Marty's pocket, with a small spot of Arlene's blood on it, fails to further the DA's theory. The amount of blood on the tissue was miniscule, which clearly indicates that the tissue did not come in contact with Arlene's extremely bloody body. This is consistent with Marty's testimony that he did not touch his mother's body. The tissue could have been in the sweatshirt pocket from prior to the murders, or it could have touched any surface in the house that had a speck of Arlene's blood on it from her murder.

In addition, Adams testified that Arlene, who was five feet, six inches tall, and weighed 191 pounds, had eleven lacerations on her scalp that were consistent with being struck with a blunt instrument. Tr. at 3945, 3989, 4010. Adams said that these injuries were in a "variety of shapes" -- some were linear, some were curved, and some were shaped like stars. The impact to Arlene's head "pulped" the tissue beneath her scalp, and one blow ripped her ear. Tr. at 3957, 3963, 4010-4011. The impact also imbedded Arlene's hair in several of her head wounds. Tr. at 4015-16.

Adams could not determine what instrument had been used to inflict Arlene's blunt-force injuries. He stated that they could have been caused by a barbell, but he said that the instrument used did not leave any screw impressions. In fact, Adams said that it could have been something else entirely. Tr. at 3975, 4021-22. For example, Adams testified that some of Arlene's head wounds were also consistent with a hammer, a tire iron, and a baseball bat. Tr. at 4017-18, 4020-21. Adams specifically stated that these blunt injuries could have been caused by multiple instruments and by more than one assailant. Tr. at 4017-19, 4022-23, 4027, 4031, 4070.

As for Seymour, Dr. Adams testified that his neck had also been cut. But again, Adams was unable to say how many blades were used to cut Seymour, or how many assailants were involved. Tr. at 4037-38, 4070.

Further, Adams stated that Seymour, who was five feet, eleven inches tall, and weighed at least 213 pounds,[75] had been struck in the head at least five times with a blunt instrument. Tr. at 3984-85, 3989, 3999-4001. One blow was so severe that it caused Seymour's skull to fracture, and left part of his brain exposed. Tr. at 3984-85.

---

[75] This was Seymour's height and weight at death. Adams testified that it was possible that Seymour weighed more at the time of the attacks. Tr. at 3989, 4037.

Once more, Adams could not determine what kind of weapon was used. In fact, Adams testified that Seymour's head injuries were consistent with the use of more than one blunt instrument. Tr. at 4000-4001.

Moreover, Detective Kosciuk testified that when he inspected Seymour's office, the desk chair, which was a recliner, was tilted back with the footrest extended. Tr. at 1878. According to Kosciuk, blood patterns on the chair and in the room indicated that when Seymour was attacked, he was seated in the chair in its upright position. Tr. at 1681. He concluded that, given the way Seymour's blood pooled onto the seat of the chair, the footrest had been extended after Seymour was attacked.[76] Kosciuk testified unequivocally that Seymour, seated in the chair, had been struck from different angles. Tr. at 1838.[77] He also stated that he could not determine how many individuals had attacked Seymour. Tr. at 1834.

---

[76] In addition, Kosciuk noted that because the blood on the footrest was smeared, Seymour's legs had been dragged across it after he was injured. Tr. at 1828-29, 1876, 1878. This demonstrates that, contrary to the DA's assertion, Marty Tankleff did not have the strength to lift his father out of the chair. Instead, Marty struggled to drag Seymour off of the chair and onto the floor. The DA states that Tankleff testified that he possessed the strength to lift Seymour from the chair and place him on the floor, but this plainly misrepresents Marty's testimony. Marty never testified that he lifted Seymour out of the chair. To the contrary, Marty testified that he first tried to level the chair by reclining it. Tr. at 4118. This is corroborated by the testimony of Detective Kosciuk, who stated that when he arrived at the house, the chair was in a reclined position. Tr. at 1878. In addition, when Marty actually reclined the chair, it tipped forward, causing Seymour to slide out of the chair a bit. Tr. at 4118, 4206-4207. All else failing, Marty said he then "pulled" his father off the chair. Tr. at 4118, 4207.

Plainly, a barely 17-year-old Marty did not have the strength to commit the brutal murders of two people substantial larger and stronger than he was. Several trial witnesses testified that Marty was "wimpy." In fact, Suominen testified that Marty was so wimpy that he would not work out with Suominen because he was too embarrassed. Tr. at 4571. Dan Hayes also testified that Marty was "fairly weak." Tr. at 1316-17. In addition, Syd Tankleff, Seymour's brother, has stated that "Arlene and Seymour...were physically much larger than Marty. If there came a time when Marty needed to be handled, Seymour or Arlene could have easily handled Marty without any question." Syd Tankleff Aff. ¶ 7 [appended hereto as Attachment C].

Arlene had multiple bruises on her knuckles and on her forearms. As Adams testified, these "defensive wounds" were plainly consistent with having been inflicted during a struggle. Tr. at 4005-4008. Yet Marty had nary a scratch or bruise on him. Tr. at 2299. Clearly, an under-sized Marty did not attack his mother, who struggled and fought with her attacker.

[77] The lack of defensive wounds on Seymour Tankleff indicates that he did not struggle when attacked. There is no reason for a single assailant to be moving around an incapacitated Seymour Tankleff, striking him from different angles. Rather, the multiple angles of the wounds is compelling evidence that there was more than one attacker striking him simultaneously.

### J. The Evidence Showing that the Assailants Wore Gloves and that They Did Not Use Force to Gain Entry to the House Is Consistent With Steuerman Letting in His Henchmen -- It Is Not Evidence of Marty's Guilt

Upon inspecting the house, the police discovered "question patterns" in the bloodstains on the Tankleffs' bed sheets, their pillowcases, and their comforter. Tr. at 2186-93. Detective Robert Genna testified that these patterns were actually glove prints, all of which "...were consistent with the type of pattern that you commonly find on the grip areas of the fingers or the palm area of a glove, either a fabric or rubber type glove" such as those used for house cleaning. Tr. at 2442, 2455-59. Genna, who stated that no gloves were recovered inside or outside the house, also testified that he could not rule out that the prints were left by more than one person. Tr. at 2460-61, 2465-66, 2472.

The police also found fingerprints throughout the house. Detective David Schaffer testified that some of the prints belonged to the Tankleffs, while others belonged to various police officers. Tr. at 2541-52. At least one fingerprint belonging to Jerry Steuerman was found on a water glass in Seymour's office. Tr. at 2542-43. In addition, there was one "unidentified" print on the front storm door. Tr. at 2549-50.[78]

Moreover, there were no signs of forced entry. Detective James Barnes testified that the front door and the storm door were intact and showed no signs of damage. Tr. at 1373. Moreover, none of the windows were damaged. Tr. at 1373-85.

Not surprisingly, the DA uses this information to suggest that only Marty could have been the perpetrator because he was already inside the house. See DA Opp. at 238 ("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

---

[78] None of the knives taken from the Tankleff residence were dusted for fingerprints, nor were the barbells. Tr. at 2579-80.

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."). And while the lack of forced entry and of visible signs of theft might explain the detectives' immediate focus on Marty as a suspect, these facts are wholly consistent with the evidence adduced at the 440 hearing, which demonstrated that the murders were committed by people let into the home by Jerry Steuerman, the man with the most obvious motive to murder the Tankleffs. The perpetrators were wearing gloves when they committed the murders, so no prints would be expected. And while they left bloody glove prints all over the master bedroom, no gloves were found *anywhere* inside or outside the house, meaning that they took the gloves with them.[79]

### K. The Evidence Shows that the Police Convinced Marty to Tell Them What They Wanted to Hear

In a homicide investigation, the victims' families are "usually able to provide valuable background information about the victim[s]. The lead detective should form a close relationship to the victim[s' families]." Suffolk County Investigative Guide, Ch. 32, at 6 [appended hereto as Attachment D]. Moreover, the suspect "should be the last individual interviewed, except in emergency situations." Id., Ch. 6, at 1.

The evidence here shows that those responsible for investigating the Tankleffs' murders did nothing of the sort. They specifically chose to not interview any family members other than Marty. See, e.g., Syd Tankleff Aff. ¶ 11 (Seymour Tankleff's brother stating that "no member of the Suffolk County District Attorney's Office nor the Suffolk County Police Department ever interviewed me"); Carol Falbee Aff. ¶ 6 (Arlene Tankleff's niece stating that "no one from the Police Department or the District Attorney's Office attempted to speak with me"). And they

[79] Harris' sworn statement states that he saw Creedon with gloves when he came out of the Tankleffs' house. Conversely, the DA fails to even offer a theory of how it is Marty would have disposed of the gloves. An exhaustive search of the Tankleff home and its grounds yielded no gloves consistent with the prints.

specifically chose to interview Marty, who McCready suspected before even leaving the house, first.

When questioned, Marty was in an acute traumatic state. See Tr. at 4270-71. Moreover, the police who questioned him were intimidating, and, as the DA admits, they employed tactics such as staging "phony phone calls" to the hospital to make him confess. See DA Opp. at 45.[80] Despite the DA's incredible assertion that the police "treated [Marty] well" by benevolently giving him a chair and a cup of coffee, see DA Opp. at 195, they pointed their fingers at him, they accused him of murdering his parents and they confronted him with supposed inconsistencies in his story. H.T. 7/21/04 at 76-79. Given Marty's mental state and the fact that he was "clearly intimidated," his judgment was impaired and it was difficult for him to answer detail-specific questions, such as when exactly he put on his sweatshirt. See Tr. at 4270-71. The detectives intentionally exploited this impairment, waited until he was "at the brink," and eventually succeeded in making him "crack." DA Opp. at 197.

As Dr. Ofshe testified at the 440 hearing, the "confession" that Marty gave was false. The police made Marty feel that his situation was hopeless, and he, in turn, told them what they wanted to hear. See H.T. 7/21/04 at 67-68. For example, he said that he used the watermelon knife to stab his parents; but, as described above, the forensics demonstrate that this is not true. He also said that he showered off after attacking his parents; but, again, the forensics show that that this is not true. H.T. 7/21/04 at 81-85. Indeed, the confession itself demonstrates that Marty knew nothing about how the attacks actually occurred. H.T. 7/21/04 at 81-85.[81]

---

[80] Zach Suominen also testified that when the police interviewed him, a mere witness, they were "intimidating." Suominen stated that the police wanted him to see things their way.

[81] Dr. Ofshe's testimony would have been particularly helpful to the jury at Marty's trial. In his closing argument, DA John Collins pointedly told that jury that a defendant would never confess unless he was guilty. Tr. at 4885. In addition, Collins told the jury that Detective McCready's phony phone call would never cause an innocent person to admit to something he did not do. Tr. at 4926. With testimony from an expert in false confessions and interrogation tactics, the jury would have seen these statements for what they were -- untrue and misleading.

### L. Despite the Wealth of Information Implicating Steuerman, the Evidence Demonstrates that the Police Treated Him with Kid Gloves, and that the DA Continues to Do So

As the DA repeatedly mentions, on the morning of September 7, 1988, Marty told several people that he believed Jerry Steuerman was responsible for the attacks. Moreover, Ron Falbee and other family members "absolutely" told the police the same thing that morning. H.T. 12/09/04 at 161-62. Ron Rother, the husband of Marty's half-sister, also told the police that Steuerman owed Seymour a lot of money, that Steuerman "was reneging" on that debt, and that Steuerman had threatened Seymour just five or six weeks before the murders. Tr. at 1546-47.

But in spite of the victims' family members telling the police that Steuerman had a motive to commit the attacks, and in spite of the huge debt that Steuerman owed Seymour, and in spite of their recent confrontations, the police did not consider Steuerman a suspect.

The DA claims that "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." DA Opp. at 195. Yet unlike Marty's "interview," which took place after he was taken to the police station in a squad car, the police *scheduled an interview* with Steuerman. Steuerman testified that they met at his bagel shop, where they sat at a table and talked for 15-30 minutes while customers milled about. Tr. at 905, 1084-87. And unlike Marty's "interview," which took place in a small room with a closed door, and which mostly consisted of McCready and Rein pointedly accusing Marty of murdering his parents, Steuerman said that the police never accused him of murder, never lied to him and told him that his hair had been found in Arlene's hands, and never told him that Seymour awoke from his coma and implicated him. Tr. at 1087-88. They never even raised their voices at him. Tr. at 1089. Most strikingly, it is unclear why the police intentionally waited to interview Steuerman --

the *one and only* person implicated by the victims' families -- last. What is clear is that this gave Steuerman plenty of time to get his story straight, and it afforded the police sufficient time to extract a confession from Marty Tankleff.

By the time the police met with Steuerman again a few days later, the police had, in fact, extracted a confession from Marty. And Steuerman had cleaned out the joint bank account he shared with Seymour Tankleff, who, at that point, was still very much alive. Tr. at 1141-43. But the police thought nothing of once more sitting and "pleasantly" speaking with Steuerman at a table in his bagel shop, with customers again wandering about. Tr. at 905, 1090-91.

And yet, Steuerman testified that on September 14, 1988, he faked his death and fled New York. According to Steuerman, he told his attorney that he had received death threats -- which he admitted was a lie -- then parked his car across the street from a hotel, left the engine running and the door open, went into the hotel long enough to change his clothes and shave his beard, then took a bus to Atlantic City with $10,000 cash in his pocket. Tr. at 906, 1182-83, 1186-90. Steuerman said that, once in Atlantic City, he took a limousine to Newark, where, traveling under the pseudonym "Jay Winston," he boarded a plane to Los Angeles. Tr. at 906, 1192-93. He stayed at a hotel at the airport for a night or two, then checked in to a psychiatric retreat for a few nights. Tr. at 906, 1185, 1193-95. Steuerman testified that he then made his way to San Francisco, where he called his girlfriend back home and uttered a single codeword: "pistachio." Tr. at 1195, 1198. According to Steuerman, when finally located by Suffolk County authorities, he broke into tears. Tr. at 1199-1200.

In spite of this incredibly suspicious behavior, the police did not question Steuerman about his relationship with Seymour, about the debts he owed, or about being the last person to leave the card game on September 7. Tr. at 1208-10. Steuerman said that the police -- again --

never raised their voices. Tr. at 1208-1209. And this time, they assured him that he was not a suspect. Tr. at 1210.

Steuerman, who admitted that he had done something "foolish," testified that he spent the next few days hanging around the hotel: "That's it. Just hung around. Didn't do a thing." Tr. at 1206, 1212. Then the police simply flew him home.

The DA says it knows Steuerman is innocent because the police interviewed him and they concluded that he was not a suspect. DA Opp. at 58. Further, the DA asserts that "an innocent Steuerman" could not have been responsible for the murders of Seymour and Arlene Tankleff because another card player saw him sitting in his car after the game was over. DA Opp. at 13-14, 238.

Instead of showing that Steuerman could not have been involved, the evidence demonstrates that *no one ever saw Steuerman leave*. Steuerman was, in fact, the last person at the Tankleff residence, and Steuerman had, in fact, the perfect opportunity to go back inside and distract Seymour Tankleff until Joseph Creedon and Peter Kent arrived.[82] By the time the police finally interviewed him, he had more than sufficient time to talk to his daughter, Bari Steuerman. She then provided his "alibi": that he arrived home shortly after 3:00 a.m., conveniently having forgotten his house keys so that he had to wake her, allowing her to know what time he got in. Of course, even if this story is true, it is no alibi. Steuerman only needed to have remained at the Tankleff home for seconds after the other poker players left so that Seymour would not set the security alarm. Once Creedon and Kent were in the house, Steuerman could leave.

Steuerman admitted that he owed Seymour hundreds of thousands of dollars and benefited financially from the murders, admitting that he settled with the Tankleffs' estate for an

---

[82] The DA also mentions in a footnote that Marty stood to inherit "millions of dollars." DA Opp. at 203, n.102. The DA fails to acknowledge, however, that 17-year-old Marty stood to inherit nothing until he turned 25.

amount substantially less than what he actually owed, and admitting that -- even owing this lesser amount -- he still stopped making payments to the estate's executor. All of this is in addition to Steuerman's bitterness with Seymour, who wanted half of him and half of all of his business. By removing the Tankleffs from the equation and from his life, Steuerman freed himself to engage in any future business endeavors he wished and freed himself from repaying his substantial debts.

In all, by skewing the relevant trial evidence to the point that it is rendered unrecognizable, and by continuing to ignore all of the evidence that points to Jerry Steuerman's guilt, the DA relies on irrational conclusions and inconsequential inconsistencies in an effort to support its claims. In fact, the trial evidence against Marty Tankleff was weak. The new evidence, weighed against the trial record, plainly requires -- at a minimum -- a new trial where all of the evidence can be considered by a jury.

## V. At Trial, the Prosecution Violated Mr. Tankleff's Rights to Due Process by Failing to Disclose Brady Evidence and by Failing to Correct Detective McCready's False Testimony

As discussed in Mr. Tankleff's Memo, as a result of Detective McCready's failure to disclose that he and Jerry Steuerman were friends and business associates, the prosecution violated (1) its duty to disclose exculpatory evidence, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963); and (2) its duty to correct testimony it knows, or should know, is false, see, e.g., Napue v. Illinois, 360 U.S. 264 (1959). The DA makes no attempt to dispute the merits of these arguments, but simply says that they should be denied based on the discretionary, procedural ground set forth in C.P.L. § 440.10(3)(b), which provides that a court *may* deny a motion to vacate when the "ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding." DA Opp. at 208 n.105. The DA fails to provide any

citation to the previous motion, but is apparently referring to Mr. Tankleff's post-conviction motion to vacate his conviction decided by Judge Tisch on October 4, 1990. See DA Opp. App. at 46. There the court held that an affidavit alleging that McCready had said he was a friend of Jerry Steuerman was not Brady material. Id. at 57. The claim in the current C.P.L. § 440.10(1)(g) motion is based on credible testimony that Detective McCready and Jerry Steuerman were not only friends *but also business associates*.

Contrary to McCready's testimony at trial, McCready knew Steuerman years before the murders. H.T. 8/3/04 at 77-79.[83] In fact, Leonard Lubrano can positively place Steuerman and McCready together as early as 1984. In the late 1970s and early 1980s, Lubrano operated a wholesale distribution company that supplied baked goods to area restaurants. For bagels, Lubrano went to Steuerman. He personally picked up bagels from Steuerman on a daily basis and saw McCready at the bagel shop on more than one of those occasions. H.T. 8/3/04 at 75-76. Aside from remembering McCready from the bagel shop, McCready also told Lubrano that he was doing work for Strathmore Bagels (or Strathmore Stables, which Steuerman also owned). H.T. 8/3/04 at 78.

McCready failed to disclose that he had both a personal and a professional relationship with Jerry Steuerman, and he lied on the stand at trial regarding this relationship. The truth would have revealed the financial and fraternal relationship between McCready and Jerry Steuerman, substantiating Mr. Tankleff's claim that Jerry Steuerman committed the murders, revealing the intimate relationship between the lead detective (who targeted Tankleff as a suspect and manipulated him into falsely confessing) and the true murderer, and explaining why the

---

83 This is not the first time that Mr. Tankleff has learned that the prosecution team, and specifically McCready, failed to disclose exculpatory evidence. Shortly after his trial, Mr. Tankleff discovered that McCready had known before trial that Jerry Steuerman had hired Hell's Angels to commit violence against union members picketing his store.

police did not investigate Steuerman, despite his bizarre behavior evidencing consciousness of guilt and his motive and opportunity to commit the crimes. It also casts considerable doubt on the entirety of McCready's trial testimony, revealing his propensity for deceit.

For the reasons discussed in Mr. Tankleff's Memo (52-54), the prosecution violated Mr. Tankleff's due process rights by failing to disclose Brady evidence and eliciting false testimony from McCready at trial. Accordingly, Mr. Tankleff's conviction should be vacated.

## CONCLUSION

For all of the reasons set forth above and in each of Mr. Tankleff's prior pleadings, there is now an overwhelming body of evidence that Martin Tankleff is innocent of the murders of his parents and is wrongly serving time for crimes committed by others. This Court should vacate his convictions. At a minimum, justice demands that the Court order a new trial so that a jury may hear all of the evidence.

Respectfully submitted,

STEPHEN L. BRAGA
COURTNEY GILLIGAN
BAKER BOTTS LLP
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

BARRY J. POLLACK
DAWN MURPHY-JOHNSON
Collier Shannon Scott, PLLC
Washington Harbour, Suite 400
3050 K St., N.W.
Washington, D.C. 20007-5108
(202) 342-8472

BRUCE BARKET
666 Old Country Road
Garden City, N.Y. 11530
(516) 745-0101