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

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

- against -

ORAL ARGUMENT REQUESTED

MARTIN H. TANKLEFF,

Defendant.

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

In its Memorandum in Opposition to Martin Tankleff's August 2005 C.P.L. § 440 Motion to Vacate His Murder Convictions ("DA Opp. Sept. 2005"), the District Attorney's Office ("the DA") altogether fails to contradict the merits of the motion. The DA does not try to rebut the fact that Joseph Guarascio met with Joseph Creedon, his father, in April 2004. Nor does the DA attempt to disprove the fact that Creedon told Guarascio that he killed the Tankleffs or that Creedon described how it happened. Indeed, the DA concedes that the new evidence from Guarascio is corroborated by other evidence developed at the evidentiary hearing on Mr. Tankleff's pending 440 petition.

Lacking the ability to address the merits of the motion, the DA instead chooses to continue to distort the factual record. The DA also attempts to manufacture a record from whole

cloth by engaging in rampant speculation not tethered to any support in the factual record from the evidentiary hearing held before this Court.[1]

Further, the DA shamelessly hurls baseless accusations at Tankleff's *pro bono* counsel and inaccurately claims that Tankleff's theory of this case has "evolved." In fact, since September 7, 1988, Marty Tankleff and his family have consistently said that Jerry Steuerman was behind the murders of Seymour and Arlene Tankleff. What has changed is what the DA attempts so desperately and transparently to ignore: there is now overwhelming evidence demonstrating that Marty Tankleff and his family have been right all along. By continuing to ignore or distort the evidence, the District Attorney's Office reveals much more about itself and the poverty of its position than it does about Marty Tankleff's innocence and his entitlement to a new trial. One wonders whether at this point even the DA believes its own overblown rhetoric.

I. The DA Has Once Again Ignored The Substance Of The Evidence Presented By Tankleff; Instead, It Attacks Witnesses Unrelated To The Evidence Presented And, Without Basis, It Accuses Tankleff's Counsel Of Unethical Behavior

What is most striking is not what the DA's brief contains, but what it lacks. After wading through the swamp of factual distortions, baseless and outrageous allegations, and flatly dishonest arguments, one would hope to find at least one piece of dry land containing a few

[1] In discussing the trial record, the DA unconvincingly claims that the physical evidence corroborated Marty Tankleff's confession. As discussed in detail in Mr. Tankleff's August 2005 Reply Memorandum, the physical evidence in fact contradicted the confession. Dr. Richard Ofshe testified before this Court that the techniques employed in the interrogation of Tankleff resulted in an unreliable confession. Accordingly, the DA's continued reliance on that confession as the basis for Tankleff's conviction and incarceration is misplaced. As Judge Henry Friendly has observed:

> Although many citizens devoted to the Bill of Rights may not agree that a "fair state-individual balance" requires the government "to shoulder the entire load" in the investigation as it does in the prosecution of crime, few will deny that one innocent man sent to his death or to a long prison term because of a false confession is one too many. There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led.

Friendly, *Benchmarks* (1967), at 282, quoted in United States v. Sasson, 334 F.Supp.2d 347, 367 (E.D.N.Y. 2004).

words on the merits of Guarascio's affidavit. Tellingly, however, the DA did not offer a single argument rebutting Guarascio's factual assertions.

Similar to its opposition to Tankleff's post-hearing brief, the DA has completely ignored the substance of the evidence presented in Tankleff's August 3, 2005 § 440 motion. In its opposition, the DA wastes *not a single sentence* attempting to dispute the facts set forth in Joseph Guarascio's affidavit. Instead, the DA stoops to a new all-time low, insinuating -- with no basis whatsoever -- that Tankleff's counsel is somehow "inducing" witnesses, including Guarascio, to give false testimony. Further, the DA also suggests -- again, without any evidence -- that Tankleff's counsel has inappropriately force-fed facts to potential witnesses and has actually fabricated evidence.[2]

The DA does not dispute that Guarascio met with Creedon in April 2004. It does not attempt to disprove the fact that Creedon told Guarascio that he killed the Tankleffs or that Creedon gave Guarascio a detailed account of the murders. Nor does it contest that Creedon told Guarascio that, after the attacks, he checked on Marty and saw that he was asleep.[3] It does not

[2] The DA's baseless and unfounded allegations should be cause for concern. See U.S. v. Meyerson, 18 F.3d 153, 162 n.10 (2d Cir. 1994) (stating that a prosecutor has a special duty not to mislead); Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (stating that a prosecutor has a duty not to lie); New York Lawyer's Code of Professional Responsibility Disciplinary Rule 1-102, A(4)-(5) (prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and in conduct that is prejudicial to the administration of justice).

[3] The DA expresses skepticism that Tankleff would have slept through someone looking in his room and momentarily turning on a light, ignoring the trial evidence that Tankleff's bed was in an alcove largely shielded from the light. However, the DA supports its skepticism with no facts, or even a theory to the contrary. If Marty killed both his parents as the DA claims, why would Marty be opening the door to his room from the outside and turning on the light in his bedroom while wearing bloody gloves and why would the gloves have only his mother's blood on them? Conversely, if there were multiple assailants and one of them checked in on Marty to see if he had awoken, the smudges of blood on the outer door knob and on the light switch bearing a glove print containing only one victim's blood makes perfect sense.

rebut the fact that Creedon said there was a pipe, or that Creedon and Kent burned their clothes.[4] It does not challenge the fact that Creedon showed Guarascio documents demonstrating that Creedon was tracking Guarascio and his family. It does not refute the fact that Creedon owns a Harley-Davidson motorcycle. It does not challenge the fact that Creedon has tortured people. And it does not disprove that Creedon showed Guarascio his safe, loaded with cash and jewelry, or that Creedon flaunted several guns, some handcuffs and leg shackles. The DA offers not a single word from Joseph Creedon, or anyone else, disputing Guarascio's statement. The Court should conclude from the DA's silence regarding the *substance* of the new evidence set forth in Guarascio's affidavit that the DA simply cannot refute it.

As a substitute for actually addressing the factual allegations in Guarascio's affidavit, the DA relies on the same tired arguments that it has used time and again in other filings before this Court. First, the DA claims with no basis that Guarascio will not testify at an evidentiary hearing held by this Court. Second, the DA again attempts to attack the credibility of virtually every witness that has already testified and claims that they were all lying, in a ham-handed attempt to marginalize the significance of Guarascio's testimony.

A. Guarascio Will Testify

The DA sent two Suffolk County Detectives to Florida to speak with Joseph Guarascio, a minor, without his mother being present. Guarascio felt intimated by the detectives, who refused to accept his unwillingness to speak with them without his mother there. Indeed, the Detectives

[4] While it is true that Guarascio and Harris do not agree on where Creedon and Kent burned their clothes, the fact that the clothes were burned, and not at which house in Selden they were burned, is what is significant. Kent's claim at the hearing that his mother moved from Selden (a fact Harris points out in one of his letters) does not mean that Kent also moved (a fact that Harris points out in the same letter). At the evidentiary hearing, Kent himself never directly denied burning the clothes, he merely testified that it could not have been at his mother's house. See H.T. 12/09/04 at 258.

threatened to arrest Guarascio if he refused to speak with them. See Guarascio Aff. (9/20/05), at ¶ 3 (attached hereto as Exhibit A).[5]

Guarascio nonetheless declined to speak to the Detectives, which he had every right to do. However, the DA is simply incorrect in leaping to the conclusion that this somehow means that Guarascio would refuse to testify in an evidentiary hearing before this Court.[6] Indeed, Guarascio has re-affirmed under oath that he remains ready, willing and able to do so. See id. at ¶ 6.

B. In An Effort To Marginalize Guarascio's Testimony, The DA Improperly Attacks Other Witnesses And Even Tankleff's Attorneys

The DA once more attacks the credibility of Glenn Harris, Billy Ram, Joseph Graydon, Mark Callahan, and Terry Covais, and argues that they all lied.[7] This is despite the fact that these attacks are wholly irrelevant to *Guarascio's* affidavit, which is supposedly the subject of the DA's opposition. Because the defense has thoroughly rebutted these arguments in previous briefs, little time will be spent doing so again. See Tankleff Reply Aug. 2005 at 34-43.

But instead of merely relying on the false assumptions and misstatements of fact that it has used in the past, this time the DA has taken its usual attempts to distract from the truth one

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[5] In addition to Guarascio himself, there were other eyewitnesses to the arrest threat. This threat to arrest a witness is wholly improper and constitutes witness tampering. It comes on the heals of improper witness intimidation of Glenn Harris and Brian Scott Glass. This pattern of witness tampering cannot be ignored and will be the subject of a separate forthcoming motion by Mr. Tankleff. Nor are these the only examples of improper conduct by the DA's agents. When informed that a pipe was found in the vicinity where Glenn Harris said one was thrown out the window of the get-away car, the DA refused to collect the evidence. When faced with a witness, Harris, whose testimony would damage the DA's case, not only did Warkenthien threaten him with life in prison, but other agents of the DA told him that he was in physical danger. And when ADA Lato first introduced Warkenthien to the Tankleff family, he described Warkenthien an independent investigator and former New York City detective. In fact, Warkenthien is also a former Suffolk County detective, whose tenure overlapped with Detectives James McCready and Norman Rein, the lead detectives in the original murder investigation, and he reports directly to District Attorney Spota, who previously represented McCready and Todd Steuerman and was supposedly recusing himself from the case.

[6] Guarascio could not, like Glenn Harris, assert his Fifth Amendment rights even if he were inclined to do so. His testimony incriminates his father, but it does not incriminate himself.

[7] The DA continues to altogether ignore the corroborating testimony of Neil Fischer, Leonard Lubrano, Heather Paruta, and Father Lemmert.

step further. In its latest filing, the DA has -- with nary a shred of evidence to back it up -- not-so-subtly accused Tankleff's counsel of: (1) bribing Billy Ram, (2) attempting to bribe Brian Glass, (3) fabricating evidence, (4) suborning Mark Callahan to commit perjury, and (5) feeding information to Glenn Harris and Joseph Guarascio so they could provide false sworn affidavits to this Court.

In fact, the DA's only way around Guarascio's affidavit is to claim that the defense made it all up -- that Guarascio "coincidentally" said precisely what counsel needed him to say in order to bolster Tankleff's case. Aside from the fact that the DA has no basis whatsoever for this unwarranted and false allegation, a point that will be addressed in more detail below, Guarascio's affidavit is just one more brick in the massive wall of evidence demonstrating Marty Tankleff's innocence. On their own, should Guarascio testify at an evidentiary hearing consistent with his sworn affidavit, Creedon's statements to Guarascio are of sufficient weight to grant Tankleff a new trial; and even without this compelling new evidence, the body of evidence exculpating Tankleff remains overwhelming.

But neither Guarascio's statements nor the evidence already established should be viewed in isolation. That they corroborate each other simply devastates the DA's continued fight against Tankleff's efforts to secure a new trial. Rather than acknowledge the obvious fact that evidence that is corroborated by other evidence is reliable and should be afforded great weight, the DA turns logic on its head and argues that because the new evidence is corroborated, its reliability is questionable. The DA thus concludes that all of the evidence is fabricated. This argument is as disingenuous as it is transparently wrong.

Among the DA's many disingenuous claims, it asserts that "Guarascio's paragraph 7 claim that…his father showed him a safe stacked with money is derived from Covais's claim that

Creedon was still doing 'some collecting.'" DA Opp. Sept. 2005 at 22. The DA offers no evidence that Joseph Guarascio, under oath, falsely claimed that his father showed him a safe loaded with money and jewelry. Nor is Guarascio's statement difficult to believe. The DA does absolutely nothing to dispute the testimony of three witnesses who testified at Tankleff's 440 hearing that Creedon did, in *fact*, collect money for drug dealers. See HT 7/20/04 at 7-10; 7/26/04 at 6-7; 10/26/04 at 33-34. In addition, it is a well known *fact* that Creedon brags about his exploits. See HT 7/22/04 at 55-56.

Next, the DA claims that Guarascio's statement that he was impressed by Creedon's Harley-Davidson motorcycle "is Tankleff's attempt to show that Creedon was 'the biker' that Bruce Demps assumed to be the member of the Hells Angels who had killed the Tankleffs." DA Opp. Sept. 2005 at 22. Notwithstanding this baseless speculation, the DA offers nothing to dispute the *fact* that Creedon does own a Harley-Davidson motorcycle.

The DA also argues that "Guarascio's paragraph 9 claim that his father showed him guns, handcuffs and leg shackles is an attempt to support Covais's claim that Creedon had guns and tortured people." DA Opp. Sept. 2005 at 22. It is astounding that the DA can simply choose to overlook the *fact* that Creedon's nickname is Joey "Guns" Creedon, especially given the testimony of three witnesses who stated that Creedon "always" had a gun with him and the testimony of Gaetano Foti, a witness that the DA itself has previously characterized as reliable, who testified that he had actually seen Creedon shoot someone. See HT 7/26/04 at 5, 7, 33-34; 8/3/04 at 31-32. Indeed, even Creedon himself admitted in his testimony that he uses guns to threaten people. See HT 7/20/04 at 10.

In sum, the DA asserts that through Guarascio's affidavit, Tankleff's counsel tried to bolster Karlene Kovacs' testimony that Creedon said he needed to leave town; respond to the

DA's own illogical assertion that Steuerman could not possibly have opened the door for Creedon and Kent; match the trial testimony that Arlene Tankleff was attacked in and found near her bed; show that Marty Tankleff slept through the attacks; and demonstrate that Creedon was in the house that night. Tankleff's counsel has been investigating, and will continue to investigate, all probative evidence. When Tankleff's counsel comes into possession of significant, corroborated, credible and probative evidence, they will not, like the DA, simply ignore the evidence. Rather, they will promptly, as they have in the past, bring such evidence to the Court's attention.

Having attempted to denigrate the new evidence simply because it is helpful to Tankleff's case, the DA offers no evidence that Guarascio's conversations with Creedon did not take place. And it offers no evidence that these facts are not true. Instead, it claims, with zero substantiation, that Tankleff's lawyers induced Guarascio to perjure himself just so they could reinforce Tankleff's case -- despite the fact that Tankleff's case, which at this point is undeniably overwhelming, needs no bolstering.[8]

The DA of course offers no evidence that Tankleff's counsel fabricated Guarascio's statement. The DA offers no evidence that Guarascio decided to put himself and his mother in physical danger and to commit perjury. In lieu of evidence, the DA offers its observation that

[8] The DA inexplicably refers to Theresa Covais' hearing testimony as the "Covais disaster." DA Opp. Sept. 2005 at 22. This strategy fits well with the DA's scurrilous attacks on all of the witnesses, having previously declared them "misfits"; its *ad hominem* attacks on Tankleff's 440 counsel suggesting they are suborning perjury; and a similar claim it has advanced that Tankleff's trial counsel, Robert Gottlieb, committed perjury at the 440 evidentiary hearing. The DA's response is utterly shameless. Covais testified in this hearing pursuant to a subpoena. She did so at great personal risk, giving damning testimony about the father of her two children, an admitted violent felon. Her testimony was a "disaster" only for those attempting to argue that Joe Creedon should not be a suspect in the Tankleff murders. Seizing on the fact that she agreed to allow her children to meet and spend some time with their biological father, the DA suggests that all of Covais' testimony about Creedon's criminal conduct should be disregarded. Covais' hearing testimony standing on its own was credible and compelling and deserves great weight. However, the DA is correct in its implicit concession that Joseph Guarascio's testimony further corroborates Covais' testimony.

Guarascio's affidavit says that Creedon made the statement, "Yeah, I did it," and that at trial Norman Rein claimed that Marty Tankleff used this phrase. On this basis alone, the DA contends that Guarascio perjured his testimony by plagiarizing Detective Rein.

The only plagiarism here is the DA's plagiarism of its own worn-out tactics. The DA has previously conjured up visions of conspiracy because more than one person used the common phrase, "putting two and two together." DA Opp. June 2005 at 93, 98, 137, 172, 228, 235. Fortunately, in our legal system conjecture is no substitute for evidence. While the DA's brief is awash in the former, it is devoid of the latter. The Court should not entertain the DA's baseless contention that Tankleff's counsel combed the trial record in order to insert into Guarascio's affidavit identical common figures of speech. The DA's claim that Tankleff's counsel conspired with Joseph Guarascio for Guarascio to commit perjury is absurd.

That suggestion alone is truly beyond the pale, and it is further evidence of the DA's desperation. Yet, the DA does not stop there. As mentioned above, the DA also accuses defense counsel of bribing Billy Ram, see DA Opp. Sept. 2005 at 20 n.5 (stating that Ram lied at the 440 hearing because he "received $4,000 and other incentives from the Tankleff defense"; ignoring the fact that it is undisputed Ram made his statements implicating Harris well before Tankleff's counsel agreed to reimburse him for lost wages); attempting to bribe Brian Glass, see id. at 24 (claiming that Glass lied in exchange for "some inducement from Tankleff"; ignoring the fact that Glass' claim was uncorroborated and contradicted by Salpeter's sworn testimony); fabricating evidence, see id. at 20 (alleging that the defense coincidentally "found" a pipe months after Glenn Harris first stated that one had been thrown out the car window; offering no explanation for why a pipe happened to be present on the property where Harris said the pipe had been discarded and ignoring the testimony of the homeowner that he had no explanation for the

pipe's presence); convincing Mark Callahan, who had no motive to so do, to lie under oath, see id. at 20-21 (stating that, after Glass changed his story, Callahan conveniently "surfaced" to state that the DA's office had pressured Glass into doing so; ignoring Callahan's sworn testimony); and feeding information to Glenn Harris, see id. at 20 ("But Harris lacked any knowledge how the Tankleff murders occurred, so Harris wrote letters to Tankleff and Salpeter requesting information, and Salpeter furnished Harris with 'articles' and with details of the crime").[9] Once more, the DA makes each of these incredible allegations without any factual evidence to support its outrageous claims.[10]

The DA's accusations with respect to Glass seem particularly ironic. A review of the evidence reveals that if anyone improperly influenced Glass, it was plainly the DA. Two versions of what happened have been put forth: Glass says that the defense offered him a free lawyer if he would testify "falsely" that Creedon was involved in the Tankleffs' murders; Callahan says that the DA threatened Glass with prison if he were to testify for the defense and that it promised Glass leniency if he would recant.

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[9] As previously discussed, see Tankleff Reply Aug. 2005 at 36-37 n.33, the articles that Salpeter sent to Harris were not about the Tankleff case. They were articles about *Salpeter*, as a way of introduction. See Salpeter Aff. (9/16/05)(attached as Exhibit B) at ¶¶ 5, 6, 7. Indeed, at the time that Salpeter was writing to Harris, there were no articles being written about the Tankleff case.

[10] The DA's allegations might be more shocking, were they not so predictable. The DA has long engaged in a pattern of distraction and distortion. For example, the DA still maintains that Tankleff's *pro bono* lawyers and investigator attempted to lure Kent onto the "winning team" based on promises of $50,000 in a Western Union account, despite the fact that Western Union has no such accounts. See HT 12/21/04 at 704. Also, the DA called Jeffrey Ciulla to the stand at the 440 hearing to testify that a Belle Terre constable was on duty during the early morning hours of September 7, 1988, despite the fact that the constabulary's own logbooks show that no one was on duty in the early morning hours. See HT 12/16/04 at 592-93. The DA's investigator, Walter Warkenthien, testified that he attempted to obtain the constabulary's logbooks, HT 2/4/05 at 25-26, but a Freedom of Information ("FOIL") request has subsequently shown this to be patently untrue. See FOIL correspondence (attached hereto as Exhibit C). The DA also continues to claim that Marty Tankleff, Glenn Harris and Mark Callahan must have been in contact with each other because they were confined in the same facility, despite the fact that they were in distinct units (in Harris' case) and in different buildings (in Callahan's case). See HT 12/16/04 at 538; 12/21/04 at 732, 743. Indeed, the DA's own witness conceded that he had no reason to believe that Harris and Tankleff could have been in communication with each other. See HT 12/16/04 at 550-52. There is absolutely no evidence that they were.

Interestingly enough, the inducement that the defense allegedly offered to Glass was neither needed by him, nor helpful to him. All on his own, Glass went out and hired William Wexler, one of Long Island's most prominent attorneys and the son of a federal judge. Glass obviously was not destitute, was clearly quite able to afford an attorney, and did not need a "free" lawyer from the defense. More importantly, a "free" lawyer could not change Glass' criminal history (another robbery conviction would have been his third felony conviction and would have resulted in a life sentence) or alter the fact that he had robbed someone at knifepoint. In contrast, the DA could actually offer Glass something much needed in exchange for his recantation: a deal. And Glass got one. He was released without bail on his pending robbery charge and on two subsequent misdemeanors. Then at the 440 hearing, he claimed that the defense tried to bribe him with offers of a free lawyer and that he was "bored" so he just made up the story about Creedon.[11]

Callahan, who had absolutely nothing to gain from testifying, stated the obvious: that *the DA* improperly induced Glass to change his testimony. The DA has offered no motive whatsoever for Callahan to come into this Court and commit perjury by testifying as to Glass' admissions to him.

Moreover, to accept the DA's version of events, one must disregard the sworn testimony Jay Salpeter, who was present when defense counsel met with Glass, and who testified that they offered Glass *nothing*. And, the Court would need to accept that not one, but two officers of this Court, engaged in highly unethical conduct. In sum, the DA is asking the Court to believe a life-

[11] Of course neither Glass nor the DA has explained how, if Glass' statements were invented on the spur of the moment, they matched almost exactly the testimony of Joseph Graydon who only three days later independently called the prosecutor and then Tankleff's lawyers and told them that Creedon (after having the "work" passed to him by Glass) recruited Graydon to help murder Seymour Tankleff.

long felon whose story is incredible on its face, instead of a credible unbiased third-party witness, two officers of the Court and a retired New York City detective.

As the DA kindly reminds us in its snide told-you-so fashion, it "predicted…that 'there will be another 440 motion with affidavits from new 'witnesses.'" DA Opp. Sept. 2005 at 25. Given that the DA knew that more affidavits would be filed, one would assume that it would respond with something more than continued belittling of the witnesses (except, oddly enough, Creedon and Kent who are implicated in the murders) and distortions of the facts. The DA did, in fact, respond with more, but unfortunately all the DA could muster was to attack opposing counsel with specious accusations of misconduct. If the DA were to spend nearly as much time and effort actually investigating the crime that took place on September 7, 1988 and objectively weighing the new evidence as it does insulting witnesses and spuriously questioning counsel's actions, it would long ago have discovered what Marty Tankleff and his family members have been telling the DA since that day: Marty Tankleff is innocent and Jerry Steuerman is behind the murders of Seymour and Arlene Tankleff.

We have come to the point where the DA can no longer offer any credible, reasonable resistance to the large and growing number of witnesses and documentary evidence against Creedon, Kent, Harris and Steuerman. The DA cannot, in good faith, continue to oppose Marty Tankleff's request for a new trial. Rather than facing that fact and ceasing its fight, the DA has instead chosen to cease any pretense of acting in good faith.

II. Tankleff's Theory Has Not Changed, But The Body Of Evidence Supporting Tankleff's Theory Has Grown

The premise for the DA's baseless allegations that Tankleff's counsel have somehow manufactured the evidence in this case is that Tankleff needed to do so because his theory of the case has "evolved." The DA's premise is as flawed as the baseless allegations it generates.

From the moment Marty Tankleff found his parents' bodies on the morning of September 7, 1998, he and his family members immediately believed that Jerry Steuerman was the only person who had the motive to kill the Tankleffs and that Steuerman was the person responsible. In the seventeen years since then, neither Marty nor his family members have wavered from this belief.[12] Nor should they. The evidence that they were correct all along has continued to snowball and is now overwhelming.

It is certainly true that as the evidence has developed, we have learned more of the details. We have learned of the involvement of Harris, Creedon and Kent. We have learned about possible murder weapons. And now, from Creedon's admissions to his own son, we have a first-hand account of what transpired inside the Tankleff home on the night of the murders. Tankleff has investigated the murders, found new witnesses, and has actually listened to what the witnesses have to say. But this does not mean his theory has evolved. It means that the body of evidence has grown.

One would expect the DA to consider new evidence and re-visit its theory of the case, a theory that becomes less supportable with each new witness. Rather, the DA has performed no credible investigation of the case and ignores all of the evidence. Now that there are too many witnesses for even the DA to dismiss by simply claiming each is lying, the DA resorts to a

[12] Almost fifteen years ago, Marcella Alt Falbee, Arlene Tankleff's sister, spoke on behalf of the family at his sentencing hearing. She stated: "Your honor, I know Marty is innocent. From the moment he was taken into custody I believed he was innocent. Nothing that has happened in this court has changed my mind." Transcript, Decision on Hearing & Sentencing, Oct. 23, 1990, at 8-9 (attached hereto as Exhibit D). She also spoke with the Suffolk County Probation Department on August 16, 1990, and said that "she believed with all her heart that [Marty] was innocent…[and] that a great injustice has been done." Suffolk County Probation Department Report to County, Aug. 28, 1990, at 4 (attached hereto as Exhibit E). On August 8, 1990, Norman Tankleff, Seymour Tankleff's brother, told the Suffolk County Probation Department that "a gross miscarriage of justice has occurred and that [Marty] should have been vindicated." Id. at 3. Ron Falbee, Arlene's nephew, also spoke with the Probation Department. On August 16, 1990, Falbee stated that "he was deeply distressed by the outcome of the trial and that he firmly believed that the defendant is innocent beyond any shadow of a doubt." Id. at 6.

massive conspiracy theory pursuant to which Tankleff's defense counsel "induces" witnesses to perjure themselves and even resorts to outright bribery.

In the DA's world, the web of interlocking evidence implicating the people with the motive, opportunity and means to kill the Tankleffs is not actually evidence of their guilt. In the DA's world, this web is instead evidence that Marty Tankleff's defense team has engaged in a broad conspiracy involving the bribery of multiple witnesses and the manufacturing of evidence. If these allegations and this steadfast refusal to honestly assess the evidence were not coming from pubic servants entrusted to pursue the truth, they could easily be dismissed for the unsupported ramblings that they are. Instead, the DA's response is sad and frightening. It is sad that Martin Tankleff is still in prison for a crime he did not commit. It is frightening that the District Attorney allows people so obviously implicated in a brutal double murder to wander free on the streets of Suffolk County. The DA is plainly unwilling to allow its theory to evolve in light of the evidence.

The Court, however, may not ignore the evidence. Without the new evidence from Guarascio, Tankleff's 440 petition should be granted based on the extraordinary evidence presented to this Court implicating others and demonstrating Marty Tankleff's innocence. With Guarascio's sworn statement, the decision is just that much easier.

III. Tankleff Exercised Due Diligence In Presenting Guarascio's Statement

The DA argues, again without any factual support, that Tankleff could have apprised the Court of Joseph Guarascio's knowledge of his father's admissions prior to the conclusion of the evidentiary hearing on the pending 440 motion on February 4, 2005. Based on this conjecture, the DA argues that Tankleff failed to exercise due diligence and should be precluded from

having the Court consider highly probative evidence: the admission of Joe Creedon to his own son that he was involved in committing the Tankleff murders.

The DA premises this argument on the fact that, in his affidavit, Joseph Guarascio indicates that he first told the Tankleff defense team about his conversations with his father in "February 2005." See Guarascio Aff. (7/28/05) at ¶ 13. The DA seizes on the fact that Guarascio did not supply an exact date in his affidavit to *speculate* that this took place prior to February 4, 2005.

As an initial matter, even if the DA's speculation were correct, it would be irrelevant. When Joseph Guarascio told the Tankleff defense team in February about his earlier conversations with his father, he was unwilling to make those statements publicly. He was, therefore, unwilling to execute an affidavit -- knowing that it would be filed and become a matter of public record -- and he was unwilling to commit to testifying in open court. Guarascio was understandably concerned for his mother's safety, as well as his own, and he was ambivalent about providing testimony implicating his father in a double homicide. Thus, the Tankleff defense team had only unsworn statements from Joseph Guarascio and had no evidence it could produce to the Court at that time.

In July 2005, Joseph Guarascio agreed to recount his conversations with his father "on the record." Accordingly, he agreed to execute an affidavit and he committed to testify. His affidavit was consistent with the "off the record" statements he made to the Tankleff defense team in February. Promptly after obtaining a sworn statement from Joseph Guarascio on July 28, 2005, Mr. Tankleff filed the pending 440 petition.[13]

[13] Tankleff filed a new 440 proceeding because there was no other procedural mechanism to re-open the evidentiary hearing that had already concluded on the pending 440 petition. As discussed below, judicial economy dictates consolidating the two petitions and issuing a ruling based on the entire body of evidence.

Further, the DA's speculation with respect to when Joseph Guarascio first contacted the Tankleff defense team is simply incorrect. Guarascio first informed the defense of his conversations with his father about the Tankleff murders on February 10, 2005. See Salpeter Aff. (9/16/05), at ¶ 4. Counsel for Mr. Tankleff then met with Guarascio on February 12, 2005. Accordingly, under no circumstances could Mr. Tankleff have produced Guarascio as a witness at the evidentiary hearing that concluded on February 4, 2005.[14]

In sum, the DA's contrived efforts to bootstrap its unsupported speculation into unnecessary and unwarranted procedural roadblocks should be soundly rejected by this Court. The DA, whose job it is to seek the truth, should not be permitted to run from the evidence. There is no legitimate reason for the Court to decline to hear the new evidence produced by Mr. Tankleff. Indeed, the interests of justice demand that Court hear all of the evidence.

IV. At A New Trial, Guarascio's Testimony Regarding His Father's Confession Would Be Admissible Under Chambers

Guarascio's testimony will be admissible at Marty Tankleff's re-trial based on Mr. Tankleff's due process rights under the Fourteenth Amendment to the U.S. Constitution. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also People v. Esteves, 152 A.D.2d 406, 549

[14] The DA has repeatedly attempted to raise procedural roadblocks in an effort to avoid having to confront the merits in this case. Even if Mr. Tankleff had evidence in February 2005 in a form that could have been presented to the Court, and had Tankleff failed to produce it until six months later in August 2005 (as the DA argues without any factual support), such a delay would not prevent the Court from considering this evidence. C.P.L. § 440.10(1)(g) does not set forth a bright-line time limit for filing. The statute merely requires due diligence. The District Attorney cites no authority for the proposition that a delay of six months violates the statutory requirement of due diligence. See, e.g., People v. Maynard, 183 A.D.2d 1099, 1103-04 (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; 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.") The DA, who did not discover that Creedon had made admissions to Guarascio, has not even claimed that it has suffered any prejudice as a result of the six-month "delay" it has attempted to manufacture. The interests of justice plainly warrant consideration of Guarascio's testimony, which adds to the large body of evidence implicating Creedon -- and thereby exonerating Marty Tankleff -- in the murders of Arlene and Seymour Tankleff.

N.Y.S.2d 30, 35 (2d Dept. 1989) (recognizing that the U.S. Constitution may require courts to admit exculpatory hearsay statements that do not fall within any hearsay exception); People v. Seeley, 186 Misc. 2d 715, 720 N.Y.S.2d 315, 317 (2000) ("A defendant's constitutional right to present evidence that is exculpatory . . . may require the admission of evidence that would ordinarily be inadmissible.").[15] "A mechanistic application of the hearsay rule is not appropriate to defeat the ends of justice." People v. Qike, 700 N.Y.S.2d 640, 647 (S.Ct. Kings Cty. 1999) (citing Chambers, 410 U.S. at 302). "A defendant has a right to introduce evidence that a person other than himself committed the crimes and *due process* requires that he be permitted to introduce proof in support of his contention." People v. Vasquez, 686 N.Y.S.2d 624, 634 (S.Ct. NY Cty. 1999) (citing Chambers, 410 U.S. 284).

Guarascio's testimony, in combination with the testimony of Foti, Ram, Kovacs, and John Guarascio, is nearly identical to the testimony that the U.S. Supreme Court determined was improperly excluded in violation of the defendant's right to due process in Chambers. In that case, the defendant attempted to present the testimony of three witnesses who would have testified that a third party, Gable McDonald, stated -- to each one on three separate occasions -- that he was responsible for the murder for which the defendant was on trial. Chamber, 410 U.S. at 298. McDonald was available and testified in court, but denied having any involvement in the murder. Id. at 291, 301. The Court opined that the "testimony rejected by the court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the

[15] One prerequisite to vacating a conviction based on new evidence is that the evidence will probably change the result if a new trial is granted. People v. Salemi, 309 N.Y. 208, 215 (1955). As part of this criteria, the new evidence must be admissible at trial. E.g., People v. Boyette, 201 A.D. 2d 490, 491 (NY 1994). Conversely, with respect to Mr. Tankleff's actual innocence claim, the Court may consider "any reliable evidence whether in admissible form or not." People v. Valance Cole, 1 Misc. 3d 531 (S. Ct., Kings Cty. Sept. 12, 2003). Accordingly, this admissibility requirement is irrelevant to Tankleff's actual innocence claim and the Court should, at a minimum, reopen the hearing to take testimony from Guarascio in order to fully and fairly decide this claim.

exception for declarations against interest." Id. at 302. The Court held that the defendant was denied a "trial in accord with traditional and fundamental standards of due process," in part, because of the refusal, on hearsay grounds, to admit the testimony of the three witnesses. Id. at 302.

In this case, the testimony of Guarascio, Foti, Ram, and Kovacs that Creedon admitted to them his involvement in the Tankleff murders bears similar assurances of trustworthiness. Creedon made these admissions separately to each of these four witnesses, his admissions are corroborated by other evidence (for example, Harris' sworn statements), "[t]he sheer number of independent confessions provided additional corroboration for each," and each confession was incriminatory and against his interest. Id. at 300-301. Also, Creedon was available to testify at the hearing and, presumably, will be available to testify at trial. In light of this case's striking similarity to Chambers and the fact that this testimony is vital to Mr. Tankleff's defense, it seems clear that these statements will be admissible.[16]

The DA attempts to distinguish Chambers by arguing that Guarascio's testimony and Kovacs' testimony[17] will be inadmissible at trial because: (1) Kovacs' testimony is "untrustworthy"; (2) Creedon barely knew Kovacs at the time he made this confession and Kovacs no longer liked Creedon when she testified; (3) Kovacs remained silent until six years after the murders; (4) Creedon's confession to Guarascio was made nearly sixteen years after the murders; (5) Creedon had not seen Guarascio in nine years; (6) Guarascio's mother hated

[16] Assistant DA Leonard Lato appears to have previously 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.")

[17] Tankleff considers the DA's failure to address Creedon's other confessions to Foti and Ram that he committed the murders an oversight by the DA, and will assume that his argument remains the same, even in light of the fact that Creedon admitted to the murders to (at least) four different listeners on four different occasions.

Creedon; and (7) Guarascio's statement is not corroborated by the new evidence or the evidence at trial.

The DA's arguments (2) through (5) are simply not persuasive. The DA provides no authority for its contention that the nature of Creedon's relationship to each listener, the timing of Creedon's repeated confessions, or the timing of Kovacs' statements regarding his confession should prove dispositive. And, while in Chambers the statements were made by McDonald to three of his close friends in temporally close proximity to the murder, the dispositive question was whether the testimony "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." Chambers, 410 U.S. at 302.

The DA's arguments (1) and (6) are at least relevant to the issue at bar, but ultimately unpersuasive because Guarascio's testimony is corroborated by both the new evidence and the evidence at trial, and thus bears persuasive assurances of trustworthiness. With respect to the new evidence, the DA employs its infamous technique of trying to distract the Court from the fundamental consistencies of the new evidence by pointing to minor and irrelevant inconsistencies. The fundamental consistencies corroborate Guarascio's testimony. See, e.g., Reply Memorandum of Law in Support of Defendant's Motion to Vacate His Convictions Pursuant to C.P.L. § 440 at 26-31 (8/29/05). The most compelling is Creedon's admission to (at least) four different people on four different occasions that he was involved in the Tankleff murders. And the DA has already conceded that it believes the fundamental aspect of Kovacs', Ram's, and Foti's testimony: that Creedon has implicated himself in the Tankleff murders to several people. See Report of the People's Investigation of 12/18/03 at 60. Moreover, as Tankleff has repeatedly explained, Kovacs', Ram's, and Foti's testimony regarding Creedon's

admissions to them that he committed the Tankleff murders are clearly corroborated by the new evidence and the evidence at trial. See, e.g., Reply Memorandum of Law in Support of Defendant's Motion to Vacate His Convictions Pursuant to C.P.L. § 440 at 26-31 (8/29/05). Finally, "[t]he sheer number of independent confessions provided additional corroboration for each," and each confession was incriminatory and against his interest. Chambers, 410 U.S. at 300-01.

In addition, the evidence at trial corroborates Guarascio's statements. Memorandum of Law in Support of Defendant's Motion to Vacate his Conviction Pursuant to C.P.L. § 410.10(1)(g) at 17-18 (8/3/05). The DA makes no attempt to show otherwise. Instead, the DA tries to use the fact that Guarascio's affidavit is corroborated by trial evidence to pose accusations that Guarascio's statements were "derived" from that trial evidence. See DA Opp. Sept. 2005 at 22-24. While such explanations would be convenient for the DA, they are, as previously discussed, simply unfounded and the DA has no good faith basis for making such accusations. This Court should, instead of accepting the DA's unsupported and fallacious reasoning, recognize that the fundamental consistencies between the trial evidence and Guarascio's statements show that his statements bear persuasive assurances of trustworthiness.

Because both the new evidence and the trial evidence corroborate Guarascio's statements regarding his father's confession to the Tankleff murders -- admissions that were clearly against Creedon's interest -- those statements bear the necessary assurances of trustworthiness and are well within the basic rationale of the exception for declarations against interest. See Chambers, 410 U.S. at 302. In addition, this testimony is vital to Mr. Tankleff's defense. Accordingly, it will be admissible at a new trial under Chambers, as this is exactly the type of evidence the Supreme Court spoke of when it held that state evidentiary rules can not be used to exclude from

a jury compelling evidence of a defendant's innocence. Failure to admit such testimony would violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

VI. In The Interest Of Judicial Economy, This Court Should Either Grant Mr. Tankleff's First 440 Petition or Hear Guarascio's Testimony Before Ruling On The Other New Evidence

The nature of the relief that Mr. Tankleff seeks is clear: he requests that his conviction be vacated based on the overwhelming amount of evidence establishing his innocence. This Court should grant Mr. Tankleff's first 440 petition, as he has presented overwhelming evidence of his innocence. Mr. Tankleff agrees with the DA that, if the Court grants his first 440 petition, resolution of the instant motion is not necessary to this Court's decision. Nonetheless, since an appeal by the DA would likely follow, judicial economy is better served by developing the record more fully by hearing from Guarascio prior to ruling on the first petition. Further, if the Court is not presently prepared to grant the first 440 motion, the best use of judicial resources would be to hear Guarascio's testimony before this Court rules on the other new evidence.

The Court must review newly discovered evidence in the context of the entire record. See, e.g., People v. Stover, 254 A.D.2d 377 (N.Y. App. Div. 2d Dept. 1998). In this case that means that Guarascio's evidence must be viewed in light of the evidence from the trial and the post-judgment hearing, which concluded on February 4, 2005. If the Court were to deny the first 440 motion without considering Guarascio's evidence, then the Court would have to: (1) issue an opinion regarding the first 440 motion; (2) consider Guarascio's evidence in light of the evidence at trial and the post-judgment hearing; and (3) issue a second opinion. And both of those decisions would be followed by separate appeals. To avoid such a situation, this Court should conduct a limited hearing at which it can hear the new evidence, and following the hearing the Court should rule on all of the evidence before it. See, e.g., People v. Greaves, 1 A.D.3d 979,

981 (N.Y. App. Div. 4th Dept. 2003) (after determining defendant deserved a new trial, considering defendants remaining contentions "in the interest of judicial economy"); People v. Henry, 1 Misc. 2d 1027, 1028 (N.Y., D. Ct., Nassau Cty. 1996) (entertaining two separate motions as one in the "interest of judicial economy"). Guarascio is available to testify, see attached affidavit, and has no Fifth Amendment right to refuse to testimony regarding his father's confession to the Tankleff murders.

CONCLUSION

For the reasons set forth above, the Court should grant the pending 440 petition or, in the alternative, hold an evidentiary hearing to hear testimony from Joseph Guarascio and consider that testimony in deciding the pending 440 petition.

Respectfully submitted,

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