COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

---------- X

PEOPLE OF THE STATE OF NEW YORK

ORAL ARGUMENT REQUESTED

– against –

MARTIN H. TANKLEFF,

Defendant. Index Nos. 1535-88/1290-88

---------- X

MEMORANDUM OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT MARTY TANKLEFF'S MOTION TO VACATE HIS CONVICTIONS UNDER C.P.L. § 440

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We recognize that any effort to vacate convictions for murders that occurred in the summer of 1988, almost 17 years ago, is a "long shot" in our judicial system. But what do the odds here really show?

Jerry Steuerman: Steuerman has been a central figure in the drama surrounding this case ever since he was identified by Marty Tankleff as the likely perpetrator behind his parents' murders the morning after those murders. Steuerman shortly thereafter faked his own death, fled from New York, and altered his physical appearance to live under an alias in California. Undisputed hearing evidence, through the testimony of Ron Falbee and others, added ample detail of Steuerman's severe financial problems with Seymour Tankleff in the summer of 1998 and, thus, his motivation to harm Mr. Tankleff. Against this backdrop, what are the odds that Brian Scott Glass would voluntarily come forward in connection with this hearing and further link Steuerman to these events by advising Marty Tankleff's counsel that—in the summer of 1988—Jerry Steuerman tried to hire him to "hurt or kill" Seymour Tankleff?

Glass declined Steuerman's offer of employment and passed the "work" on to his friend, Joseph "Joey Guns" Creedon. What are the odds that another of Creedon's friends, Joseph Graydon, without knowing of Glass' disclosure or even speaking to Glass, would then only three days later also come forward in connection with this hearing—after consulting with his pastor about the right thing to do—to inform the Court that in June of 1988 Creedon told him that one of the partners at Strathmore Bagels had hired him to kill the other partner over a money dispute? Graydon accompanied Creedon in an effort to complete this job at one of the bagel shops, but they were unsuccessful because Seymour Tankleff was not there. Creedon subsequently asked Graydon to help him with the job on another occasion, but Graydon refused. Graydon revealed this information to defense counsel only three days after Glass made his disclosure. What are the odds that these two men, who had not spoken with each other in years, would independently

reveal that Steuerman had planned to kill Seymour Tankleff several weeks before Creedon actually committed the murders, if Steuerman and Creedon had not engaged in the conduct attributed to them?

After Graydon's refusal, what are the odds that Billy Ram, another of Creedon's friends, would then independently voluntarily come forward in connection with this hearing to testify that on the night of September 6, 1988—the very night that Marty Tankleff's parents were murdered—Creedon was at Ram's house with some other friends and told him that he had been hired to "rough up" some guy's business partner, "a Jew in the bagel business," who lived in Belle Terre. Creedon offered to pay Ram to help him with this job, but Ram refused. Creedon then left Ram's house with Peter Kent and Glenn Harris to do the job themselves.

Harris then independently, by affidavit and by statements to a priest and a nun who counseled him, informs the Court about what happened next that night: he drove Creedon and Kent to the Tankleff home in Belle Terre, where those two men went into the house and later ran out covered in blood. What are the odds that Harris' statements—given before Glass, Graydon and Ram even came forward—would mesh so perfectly with the chain of events set forth by those other individuals? What are the even more staggering odds that Harris' description of the disposal of one of the murder weapons, a steel pipe, on the night in question would then be corroborated by the actual recovery of that pipe—from the exact location in the Tankleff neighborhood where Harris said it had been thrown—decades later in connection with this hearing?

The three men (Harris, Kent and Creedon) implicated in the murder of Seymour and Arlene Tankleff are childhood friends and life-long criminal associates. They grew up within a few miles of each other in Selden, NY, which is only 9 miles from the Tankleff home. They have acknowledged that they committed, individually and jointly, dozens of violent felonies including armed robberies, burglaries and vicious assaults. Together these men are undoubtedly responsible for hundreds of violent felonies and have spent a substantial portion of their adult life behind bars. Yet in the early morning hours of September 7, 1988, none of them can account for their whereabouts other than through Harris' explanation that they all participated in murdering Marty Tankleff's parents. In fact, Kent acknowledges that on that date he was in the middle of a seven-day crime spree in order to feed his drug addiction. His crimes included numerous armed robberies, some which occurred only a few miles from the Tankleff residence. Curiously there is a 36-hour gap in these crimes, right in the middle of which the Tankleffs were murdered.
What are the odds that all of the men implicated in this murder would be placed only a few miles from the crime scene without an alibi of any kind?

Finally, with respect to Steuerman, what are the odds that a witness, Neil Fischer, would come forward in connection with this hearing to testify that in the Spring of 1989—less than a year after the Tankleff murders—he would hear Steuerman scream that he "had already killed two people and that it wouldn't matter to him if he killed [one more]"? And what are the odds that Steuerman's own son Todd, a friend and business associate of Creedon, would tell Bruce Demps—on two separate occasions—that Marty Tankleff did not kill his parents, that Todd's father had a "beef" with the Tankleffs and hired someone to kill them?

The odds against each of these pieces of evidence fitting together the way they have before this Court is truly mind boggling. Yet they have, and there is even more.

Joseph Creedon: "Joey Guns" Creedon is a career criminal and a thug for hire, as his testimony before this Court amply revealed. Many of his connections to the chain of events stemming from Steuerman's effort to hire someone to rough up Seymour Tankleff in the summer

of 1988 have already been discussed above. But what are the odds that Joey Guns just happened to have been working for Steuerman's son Todd as an "enforcer" in Todd's drug business at the time?

More tellingly, what are the odds that—long before the hearing in this Court—Joey Guns would admit to three separate and unrelated people that he was a participant in the Tankleff murders? And what are the odds that each of those three people would independently come before this Court to report about Creedon's statements? If not true, why would Creedon have told Karlene Kovacs that on the night of the Tankleff murders he was hiding in the bushes outside the house watching a card game, that he later entered the house and was present when the murders took place? Why would Creedon have told Gaetano Foti, on two separate occasions, that he had committed the Tankleff murders and, as a result, that Marty Tankleff was innocent, if that was not true? Why would Creedon have confirmed to his friend Billy Ram that he was responsible for the Tankleff murders if that was not true? Each of Joey Guns' admissions of his own complicity in the Tankleff murders meshes perfectly with the many other pieces of evidence identified above that unerringly point to the conclusion that he was indeed hired by Steuerman to hurt Seymour Tankleff in the summer of 1998, and that he did so. What are the odds of that resulting from happenstance rather than reality?

Marty Tankleff: Since the moment he was released from police interrogation, Marty has disavowed the "confession" that Suffolk County Detectives obtained from him the morning his parents were brutally attacked in their home. That "confession," of course, matched none of the physical evidence from the crime scene forensics. But nonetheless, at the urging of prosecutor John Collins, the trial jury was left to wonder why any son would "confess" to such a crime if he was not involved in it. What are the odds that in the intervening period since Marty's trial a new body of "false confessions" expertise would develop in the law, and that one of its leading proponents—Dr. Richard Ofshe—would actually opine before this Court that Marty's "confession" was false? And what are the further odds that before this hearing began Marty would take and pass a polygraph examination denying his responsibility for his parents' murders?

At bottom, when all is said and done in this case, Marty Tankleff being the actual murderer of his parents is the true "long shot" bet here. But what makes perfect sense by contrast, supported by the incredible common fabric of the many disparate pieces of evidence discussed above, is that Steuerman hired Creedon to kill the Tankleffs and that Creedon, with the assistance of a friend (Peter Kent) actually did so. It is simply impossible to imagine the odds against all of the many pieces of evidence lining up the way they have against Steuerman and Creedon—including their own admissions of guilt—unless that was truly what happened. It would have been impossible to craft a piece of fiction that would fit together so nicely. Yet as we all know, the truth is often stranger than fiction. Here it is indeed.

From Day One, Marty Tankleff told the Suffolk County Detectives who was responsible for his parents' murders, but for almost 17 years now the Suffolk County authorities have—quite literally—done nothing about it. It is time for this Court to step in and do the right thing. Under the law, the dispositive question to be answered is simply this: what are the odds that any "reasonable juror" knowing all of the foregoing "could convict [Marty Tankleff] of the crimes for which [he] was found guilty"? The answer is absolutely, and unequivocally: "zero."

INTRODUCTION

At the hearings recently conducted by this Court pursuant to C.P.L. § 440, Marty Tankleff demonstrated that he is actually innocent of the crimes of which he was convicted. It is

clear that Mr. Tankleff did not murder his parents; indeed, the evidence presented plainly establishes that Peter Kent and Joseph Creedon murdered Seymour and Arlene Tankleff, at the behest of Jerry Steuerman.

At Mr. Tankleff's trial, the jury was given scant evidence upon which to base its verdict. The physical evidence connecting him to the murders was absolutely nonexistent. The motive offered was paper-thin. The confession presented was false, had been elicited from Mr. Tankleff through coercive tactics, and he had immediately disavowed it. With only these slender reeds linking Mr. Tankleff to his parents' murders, the jury struggled with the case; after a full week of deliberations, it ultimately convicted him through a compromised verdict, which was based almost exclusively on the false "confession."

The jury was not, however, privy to the substantial body of evidence recently presented at Mr. Tankleff's § 440 hearing and it was offered no tangible alternative theory to Mr. Tankleff's guilt. Consequently, if Marty did not murder his parents, the jury was left to speculate as to who did and how. At trial, defense counsel argued that Steuerman was involved—the explanation Marty offered to police only minutes after discovering his parents—but he could not prove it. The trial court, however, specifically prohibited counsel from establishing the link between Steuerman and Creedon; counsel was permitted to ask Steuerman about this relationship, but was stuck with Steuerman's denial—a denial we now know to be a lie. Because there was no evidence available to connect Creedon to the murders, the court ruled the relationship was collateral. Thus, at trial, the defense had no way to prove its assertion that Jerry Steuerman was behind the murders.

We now have an abundance of evidence establishing that Creedon actually committed the crime with Kent and Harris. We have admissions from Steuerman himself and we now know that Creedon worked for Steuerman's son, Todd, as a "collector" in Todd's drug business and now know that Creedon did, in fact, know Jerry Steuerman. In short, the defense can now—because of the newly discovered evidence—prove the theory originally offered at trial: that Steuerman, not Marty, was responsible for Arlene and Seymour's murders. Clearly, this new evidence would have altered the outcome of the trial had it been available to the jury.

When viewed en mass, the evidence adduced at the hearing presents a complete, logical picture of the events and actors responsible for the deaths of Seymour and Arlene Tankleff, and it would have provided the jury with the proof it needed to acquit Marty: proof that Jerry Steuerman had a substantial motive to kill Seymour Tankleff and needed someone to take care of this problem for him; that his son, Todd, knew someone, Joseph Creedon, who could help him out; that Creedon was part of a loosely knit group of individuals—himself, Peter Kent, Glenn Harris, Brian Scott Glass, Billy Ram and Joseph Graydon—that was engaged in committing violent crimes in the area; that the members of this group all knew one another; that these individuals committed crimes together; that these individuals all concede their relationships with one another and their common criminal conduct; and that all of them were connected, through Todd Steuerman and Creedon, to Jerry Steuerman. [1]

[1] More specifically, the jury did not hear that Marty's confession was inherently unreliable; that Todd Steuerman ran a cocaine operation from the bagel stores his father owned with Seymour Tankleff; that Todd Steuerman employed career criminal Joey "Guns" Creedon as his enforcer; that Creedon had spoken with Jerry Steuerman on multiple occasions; that Creedon and Joseph Graydon had previously attempted to murder Seymour; that Creedon later solicited the assistance of Billy Ram and Glenn Harris in committing the murders; that Ram refused, but Harris, Creedon and Peter Kent proceeded with the murders without him; that Harris later told Ram of that evening's events; that Creedon subsequently admitted his involvement in the Tankleffs' murders to numerous people; and that Jerry Steuerman later admitted that he had two people killed.

Too many witnesses have come forward with similar stories implicating Steuerman, Creedon, Kent and Harris—witnesses who either do not know one another or have not seen or spoken to one another in years—for those stories to be anything other than the truth. The truth is that Marty Tankleff did not murder his parents. That he has been wrongfully imprisoned for the past 15 years is now, with the evidence recently presented, a matter of common sense and corroboration. There is no question that this evidence would have made a difference to the jury.

STATEMENT OF FACTS

In the early morning hours of September 7, 1988, Seymour and Arlene Tankleff were brutally murdered in their home in Belle Terre, New York. Their son, Marty Tankleff, was due to start his senior year of high school that day. Instead, Marty, just 17 years old, awoke to find his father in his study, unconscious and barely clinging to life, and his mother's body in her bedroom. Trial Tr. at 16, 3441, 4119-20.

When the police arrived at the Tankleff residence around 6:15 a.m., Marty told them—without hesitation—of his belief that Jerry Steuerman, his father's business partner, was somehow responsible for his parents' murders.[2] The police, however, immediately suspected Marty, and by 6:37 a.m., had placed him in a squad car. Trial Tr. at 394. While Seymour Tankleff was transported to the hospital, the police asked Marty to accompany them to the station, ostensibly to provide more information about Seymour's relationship with Steuerman. Trial Tr. at 39-41, 95, 3458, 3608.

Instead, Marty, who had not been informed of his Miranda rights, was taken to police headquarters, where Suffolk County Detectives James McCready and Norman Rein interrogated him. Trial Tr. at 1155-56, 3468-69. Still dressed in the shorts he had worn to bed, Marty was questioned for hours—uninterrupted—in a windowless room, with the door closed, without an attorney and without notice of his rights. Two hours into the interrogation, Detective McCready briefly left the room, then returned to tell Marty a series of lies, the most significant of which was that the hospital had called; a shot of adrenaline had awakened Seymour Tankleff from his coma and he had positively identified Marty as his assailant. Trial Tr. at 112-13, 134, 1440-43, 2887, 3486, 3819-20. Marty continued to maintain his innocence with the detectives and even offered to take a lie detector test, which they refused to administer.[3] Trial Tr. at 114, 1112, 1450, 2887, 3823, 3487. Still, Marty was not advised of his Miranda rights.

McCready's lie convinced Marty that Seymour had identified him as the attacker; confused and searching for an answer, Marty asked the detectives whether it was possible that he had attacked his parents but did not remember doing so. H.H. at 115-16; Trial Tr. at 2287-92; 4156. With encouragement from the detectives, Marty ultimately suggested that he remembered what had happened, saying, "[i]t's starting to come to me." H.H. 115-16; Trial Tr. 2887-89, 3487-88. It was only then, after hours of continuous prodding and questioning, that the detectives gave Marty his Miranda warnings.

The detectives then managed to elicit from Marty a fantastical tale of how he allegedly killed his mother and attacked his father—all of which supposedly took place between 5:35 a.m., when he awoke, and 6:17 a.m., when the police arrived at the Tankleff residence. Trial Tr. at

[2] The day of the murders, Marty's cousin, Ronald Falbee, also told the police that he suspected that Steuerman was responsible, as did other family members. Ronald Falbee, 12/9/04 at 161-62. Law enforcement never contacted Falbee regarding his statement. Id. at 162-63.

[3] Marty subsequently took and passed a polygraph test on September 11, 2001. Salpeter, 7/19/04 at 17.

117, 150-51, 227, 1113, 1455-56, 2888-89, 3488. The detectives assisted Marty in crafting the story by providing details they learned from the crime scene and they took it upon themselves to write out his confession. Trial Tr. at 2895, 3493. They were halfway through doing so when Myron Fox, the Tankleff family's attorney, called the police station and insisted that the interrogation cease. Trial Tr. at 2910-11, 3364-65, 2876. Marty instantly repudiated the confession, which remained unsigned and unrecorded.

Despite the utter lack of physical evidence linking Marty to the murders, see "Memorandum of Law in Support of Defendant Marty H. Tankleff's Motion to Vacate His Convictions Under C.P.L.R. § 440" [hereinafter "Defendant's Memorandum of Law"] at 11-13, and in the face of the failure of the police to investigate the prime suspect, Jerry Steuerman, see id. at 13-14, a jury convicted Marty of first-degree murder of his father and second-degree murder of his mother. Marty was sentenced to the maximum of 50 years to life, which he has been serving since 1990.

Since Marty's trial, a substantial body of new evidence has come to light—evidence that the jury did not have the opportunity to consider. It is clear that the one and only indication of Marty's guilt—his "confession"—is overwhelmingly outweighed by this new evidence, which plainly demonstrates Jerry Steuerman's desire to see Seymour and Arlene Tankleff dead and describes his efforts to have them killed. As it was, the case at trial was close and the jury struggled with its decision; it is undeniable that this new evidence would have changed the outcome.

I. MARTY TANKLEFF HAD NO MOTIVE TO KILL HIS PARENTS

Marty Tankleff and his parents had a wonderful, loving relationship, and he had no credible motive to kill them. See generally Block Aff.; Celentano Aff.; Diamond Aff.; Carol Falbee Aff., Marcella Falbee Aff.; Ronald Falbee Aff.; Bentley Strockbine Aff.; William Strockbine Aff. (Attached hereto as Exhibit A.) In the weeks and months leading up to the murders, Marty's relationship with his parents was absolutely normal; there was no hostility, no arguing, no threats.[4] See id.

Marty and Arlene enjoyed cooking together and taking walks together. Marcella Falbee Aff. ¶ 5. They had a very affectionate relationship, and whenever Marty left the house they exchanged a kiss on the cheek. Bentley Strockbine Aff. ¶ 7. Indeed, Marty was the "apple of Arlene's eye," Block Aff. ¶ 3, and Marty doted on her in return. Diamond Aff. ¶ 5.

[4] Save two, Robert Gottlieb, Marty's trial attorney, either failed to speak with these affiants about Marty's relationship with his parents, or he never followed up with them. See Block Aff. ¶ 8; Celentano Aff . ¶ 8; Diamond Aff. ¶ 9; Marcella Falbee Aff. ¶ 9; Bentley Strockbine Aff. ¶ 10; William Strockbine Aff. ¶ 10. Estelle Block knew the Tankleffs and met with Marty and Seymour a few weeks before the murders; she spoke with Mr. Gottlieb before Marty's trial, but he did not follow up with her. See Block Aff. ¶¶ 4, 8. Marcella Falbee, Arlene's sister, sent a letter to Mr. Gottlieb, telling him that she had spent the summer of 1988 at the Tankleffs' and could comment on Marty's close relationship with his parents; she never heard from him. Marcella Falbee Aff. ¶¶ 3, 9. Ben Strockbine was one of Marty's best friends in high school and spent a great deal of time at the Tankleffs' home that summer. Mr. Gottlieb never contacted him to inquire as to Marty's demeanor that summer or his interactions with Seymour and Arlene. Bentley Strockbine Aff. ¶¶ 4-7, 10. Will Strockbine, Bentley's father, met with Mr. Gottlieb before Marty's trial to tell him what he knew of Marty's relationship with his parents. Mr. Gottlieb never followed up with him. William Strockbine Aff. ¶ 10. Brian Diamond was one of Marty's close friends who also could have commented on the rapport Marty had with his parents; Mr. Gottlieb did not contact him either. Diamond Aff. ¶¶ 4-7, 9.

Seymour, who took great pride in Marty's accomplishments, spent a lot of time with him on the family's boat. See Marcella Falbee Aff. ¶ 5. Seymour and Marty also collected baseball cards together; it was a business endeavor that Seymour used to teach Marty about business. Bentley Strockbine Aff. ¶ 6. In turn, Marty very much admired his father and his business acumen and enjoyed sitting in on Seymour's business meetings, where he could learn even more. Diamond Aff. ¶ 6; William Strockbine Aff. ¶ 6.

Marty Tankleff is a gentle person who had no problems with his parents. See Celentano Aff. ¶ 5; Carol Falbee Aff. ¶ 3, 7; Marcella Falbee Aff. ¶ 8; Ron Falbee Aff. ¶ 3, 7; Bentley Strockbine Aff. ¶ 5. He adored them. Carol Falbee Aff. ¶ 7; Bentley Strockbine Aff. ¶ 5.

II. JERRY STEUERMAN HAD A SUBSTANTIAL MOTIVE TO MURDER SEYMOUR TANKLEFF

In stunning contrast, Jerry Steuerman had a substantial motive to kill the Tankleffs: Steuerman admittedly owed Seymour hundreds of thousands of dollars, which Seymour was trying to collect in the weeks before he was killed.[5] Trial Tr. at 888; Salpeter, 7/19/04 at 72; Lerner, 12/6/04 at 104-105; Demps, 7/26/04 at 60. Further, Steuerman would not or could not pay. Lerner, 12/6/04 at 104-105; Demps, 7/26/04 at 60.

In the months before the murders, the relationship between Seymour and Steuerman fell apart. Falbee, 12/9/04 at 147-48. Steuerman and Seymour were business partners in a few joint ventures, one of which was Strathmore Bagels. Seymour decided he wanted nothing more to do with Steuerman, except to ensure the return of his money. Falbee, 12/9/04 at 150-51; Lerner, 12/6/04 at 108. Accordingly, Seymour called in part of his debt and tried to push Steuerman out of the bagel business. He wrote Steuerman a letter demanding $50,000,[6] and had gone so far as to draw up papers to close on the loans and take Steuerman's share of their partnership. Falbee, 12/9/04 at 166; Lerner, 12/6/04 at 108-109, 122.

Because of the way their partnership operated, Steuerman felt he could do nothing without Seymour's approval. Trial Tr. at 998. Steuerman could not start a business on his own without Seymour's involvement. Trial Tr. at 713, 823-24, 888-96; Falbee, 12/9/04 at 189. Further, if Steuerman spent his own money, Seymour would get angry about the funds Steuerman owed him. For example, during the summer of 1988—just months before the murders—they had a falling out when Steuerman invested $30,000 in a horse; Seymour was furious that Steuerman would spend that kind of money on a horse when he owed Seymour so much more. Lerner, 12/6/04 at 106-107.

By July 1988, the situation deteriorated to the point that it was out of control. Falbee, 12/9/04 at 147-48. The Tankleffs hosted a family reunion at their house sometime that month.

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[5] The motive extended beyond money. As Steuerman testified at the trial, Seymour Tankleff, because of the debt, was demanding a 50% stake of every business venture into which Steuerman entered. As Steuerman testified, Seymour did not just feel he owned half of the business, he felt he "owned one-half of me." Trial Tr. at 998. By having the Tankleffs murdered, Steuerman did not eliminate a mere debt; he eliminated a shackle.

[6] Steuerman owed Seymour far more than the $50,000 demanded in the letter. Falbee, 12/9/04 at 166. See also note 5, infra, and accompanying text. By calling in a portion of the debt, Seymour was increasing the pressure on his business partner. The letter, dated June 29, 1988 and accompanied by a certified mail receipt, was found by Ronald Falbee on Seymour's desk after the murders. Falbee, 12/9/04 at 156, 160-61. These papers were admitted at the hearing as Defendant's 25. Even though these papers were in plain view on Seymour's desk, splattered with blood, the police left them at the Tankleff residence and never considered them in their investigation. Falbee, 12/9/04 at 156, 190-93.

Falbee, 12/9/04 at 149. When Ronald Falbee, one of Arlene's nephews, arrived at the Tankleff residence, Seymour and Steuerman were having a "very angry, loud, aggressive" conversation on the phone. Falbee, 12/9/04 at 149. Steuerman had threatened Arlene and Seymour, and Arlene was frightened.[7] Indeed, she so feared what Steuerman might do to them that she detailed her concerns in writing and put the documents in the family safe.[8] Falbee, 12/9/04 at 149-50, 152.

Only a week before the murders, things went from bad to worse. One morning at the bagel shop, Seymour again demanded his money from Steuerman. Enraged, Steuerman lunged across the counter, took Seymour in a neck hold and screamed, "You son of a bitch. You want to own me. I'll see you dead first." Marcella Falbee Aff. ¶ 7.

Without Seymour around, Steuerman was free to live his life and spend his money as he pleased. After Seymour's death, Steuerman was able to open new businesses without his interference. Once Seymour died, Steuerman immediately stopped making payments to the estate,[9] Strathmore Bagels took off, and Steuerman reaped the rewards. Trial Tr. at 888, 897, 951, 955; Falbee, 12/9/04 at 189-90.

III. THERE IS AN ADMITTED, CORROBORATED CONNECTION BETWEEN JOSEPH CREEDON, PETER KENT, GLENN HARRIS, BILLY RAM AND BRIAN GLASS AND BETWEEN THIS GANG AND JERRY AND TODD STEUERMAN

Jerry Steuerman wanted to get rid of Seymour Tankleff, and the only question was how to do it. Fortunately for Steuerman, he had an "in" with a gang of thugs operating in the area. The web connecting this group of men is undeniable; the link between the gang and both Jerry and Todd Steuerman is equally indisputable.

Most of the men in this group have known each other since childhood. Joseph ("Joey Guns") Creedon, Peter Kent, Glenn Harris and Billy Ram all grew up in the same Selden neighborhood, within a few miles of one another. Kent, 12/14/04 at 298, 304. In the 1980s, this group of men dealt drugs together and committed armed robberies together, and they all worked in the "collections" business.[10] Graydon, 8/3/04 at 23-24; Kent, 12/9/04 at 245-47; Ram, 10/26/04 at 6-8; Salpeter, 7/19/04 at 94, 160. For example, Kent and Harris were jointly involved in "approximately fifty" burglaries together. Kent, 12/9/04 at 246. Graydon, Creedon and Kent, if not others in the group, also knew Brian Scott Glass, another "enforcer" working the area. Glass, 12/6/04 at 13.[11]

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[7] Arlene was so frightened, in fact, that she asked her sister Marcella to spend the summer with her in Belle Terre. See Marcella Falbee Aff.

[8] These papers were admitted at the hearing as Defendant's 24.

[9] Steuerman settled with the Tankleffs' estate, but shortly thereafter ceased making payments on the debts owed. Falbee, 12/9/04 at 189.

[10] This "business" involved collecting money from drug dealers, usually by violent means; methods of persuasion used were robbery, physical beatings, and the brandishing of weapons, among others. Ram, 10/26/04 at 33-34; Creedon, 7/20/04 at 7, 10. A few of these men had no qualms about also tormenting people unaffiliated with their profession. For example, Creedon and Harris once returned to Creedon's home with a dog and an exotic bird that they stole from a mentally handicapped child. Covias, 7/20/04 at 82-83.

[11] Glass is Kent's cousin by marriage. Kent, 12/14/04 at 308.

This gang is also directly connected to both Jerry and Todd Steuerman. Both Glass and Creedon did collections work for Todd Steuerman, who routinely dealt cocaine, marijuana and Valium out of the Strathmore Bagels shop. Creedon, 7/20/04 at 7-8, 12-13; Glass, 12/6/04 at 13, 50; Guarascio 7/22/04 at 38; Salpeter, 7/19/04 at 93. Moreover, Creedon had previously gone to the bagel store on at least one occasion to meet with Jerry Steuerman, when Todd was notably absent. Covias, 7/20/04 at 87-89.[12] Creedon has also spoken with Steuerman on the telephone several times.[13] Gottlieb, 7/22/04 at 11.

IV. STEUERMAN APPROACHES ONE MEMBER OF THE GANG—GLASS—AND ASKS HIM TO THREATEN, INJURE OR KILL SEYMOUR TANKLEFF; GLASS DECLINES AND PASSES THE WORK ON TO CREEDON

Once Steuerman resolved to take matters with Seymour into his own hands, he had a ready and willing network to plug into. He first turned to Glass, who his drug-dealing son employed for collections work. Sometime in 1988, Steuerman met with Glass at the bagel store and offered him some other "work"; Steuerman said that *Seymour* owed *him* money, and asked Glass to physically threaten or injure Seymour. Glass, 12/6/04 at 6-8, 74. Because Glass thought it was odd that Steuerman wanted to have Seymour "roughed up" when he could just collect the money Seymour supposedly owed, he turned Steuerman down. Id. at 9-10.[14] Glass, however, passed the job on to Creedon—another of Todd Steuerman's "employees"—a long-

[12] A few months after the Tankleff murders, Todd and Creedon were involved in an altercation that resulted in Todd shooting Creedon. Creedon, 7/20/04 at 24. When Todd was later arrested for the shooting, Jerry Steuerman offered Creedon $10,000 to drop the charges. Creedon, 7/20/04 at 24; Gottlieb, 7/22/04 at 11. Soon thereafter, Creedon told Steuerman he would not accept the money; Steuerman threatened to have Creedon killed, telling him he was "fucking with the wrong people." Creedon, 7/20/04 at 24; Gottlieb, 7/22/04 at 11.

[13] Creedon signed a sworn affidavit, admitted as Defendant's 21, which stated that he had spoken with Steuerman on multiple occasions and recognized his voice on the telephone. Robert Gottlieb testified that Creedon was unequivocal on this point. Gottlieb, 7/22/04 at 11-13, 24. Creedon thus perjured himself at this hearing by contradicting his prior sworn testimony and by claiming that the prior affidavit repeatedly erroneously referred to his conversations with Jerry Steuerman.

[14] When Glass met with defense counsel in July 2004, he recounted this version of events and agreed to testify at the § 440 hearing. A few days later, Glass remained willing to testify, but he was worried that if he appeared in court he would be arrested on an outstanding robbery charge. Glass, 12/6/04 at 21. He was also afraid that if Creedon heard that he testified and if he were subsequently sent to prison on the robbery charge, his girlfriend's life would be in danger. Id. at 21-22. Glass met with the D.A.'s office on October 22, 2004. Glass, 12/6/04 at 67. At this meeting, Glass was informed that if he testified as planned, the D.A.'s office would make things tough for him. As a two-time violent offender, he was facing 25 years to life if convicted of the pending robbery charge. Callahan, 12/21/04 at 736; Glass, 12/6/04 at 17-18. After he met with the D.A.'s office, Glass changed his story. Callahan, 12/21/04 at 735. Glass relayed this series of events to Mark Callahan, an acquaintance from high school, on October 25, 2004, when they were both awaiting arraignment. Callahan, 12/21/04 at 734-35. Glass was arraigned for the robbery and released on recognizance upon the motion of the D.A. Callahan, 12/21/04 at 754. Glass has since denied that he knows Steuerman and that Steuerman ever asked him to attack Seymour Tankleff. He now claims to have made up his original story because he was bored and/or because the defense promised to arrange legal representation for the robbery case. Glass, 12/6/04 at 15-16, 50.

time friend with whom he sold drugs, did drugs, and robbed drug dealers. Callahan, 12/21/04 at 739-40[15]; Glass, 12/6/04 at 11-12, 74-75.

V. CREEDON AND JOSEPH GRAYDON GO TO THE STRATHMORE BAGEL STORE TO KILL SEYMOUR TANKLEFF AND ARE UNSUCCESSFUL

With the job in hand, Creedon set out in search of someone to assist him in murdering Seymour Tankleff. In June 1988, Creedon approached Joseph Graydon—another member of the gang with whom he sold drugs, did drugs, and robbed drug dealers—and told him that he had been hired to kill one of the partners at Strathmore Bagels. Graydon, 8/3/04 at 12-14. One of the partners owed the other some money and Creedon would get $25,000 to do the job. Id. at 16, 70-71. His plan was to go to the bagel shop on a Sunday—when the mark would be there to pick up all the cash from the weekend's sales—and make the hit look like a robbery. Id. at 12-13, 44-45. If Graydon went along on the job, Creedon would split the $25,000 with him and whatever money they could take from the bagel store. Id. at 16.

The following Sunday, Graydon drove Creedon to the Strathmore Bagels store located in a shopping center in East Setauket. Graydon, 8/3/04 at 14. Creedon was carrying a gun. Graydon, 8/3/04 at 18. The store was closed, so they drove to the rear of the building, looking for an indication of whether anyone was inside. There were no cars in the parking lot and no one was in the store, so they decided to leave.[16] Id. at 14-15.

A few weeks later, Creedon again asked Graydon to help him with the same job, but Graydon refused. Graydon, 8/3/04 at 12-13, 16, 49.

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[15] It was as early as 1990 or 1991 that Glass first told Mark Callahan about Steuerman's offer to kill the Tankleffs. Glass said that he had passed the job on to Creedon. He also threatened Callahan that he could wind up like the Tankleffs if Callahan ever "turned" on him. Callahan, 12/21/04 at 738, 740.

[16] As Graydon was driving though the shopping center's parking lot, Creedon yelled at him to stop the car. Creedon got out of the car, picked up a trashcan, and threw it through a store window; he entered the store and came out a few minutes later with a box of money. Graydon, 8/3/04 at 14-15, 46-47. They used the money to buy some crack cocaine, which they smoked later that evening. Graydon, 8/3/04 at 59.

Florine Goldstein, former manager of Triple H Stationery Store, which is located in the same East Setauket shopping center as the bagel store, testified at the § 440 hearing that her store's alarm went off on November 30, 1988, in the middle of the night. Goldstein, 12/16/04 at 511. The bottom half of the glass door was broken and a Lotto machine, 25 cartons of cigarettes and some money had been stolen. Id. at 511, 520. There was not, however, a trashcan or anything else that had been used to break the door inside the store. Id. at 517-18. Ms. Goldstein conceded that the store had been broken into on multiple occasions and that she recalled the November 1988 occasion in particular only because her memory had been refreshed by police records pertaining to that incident , which were shown to her by the Suffolk County D.A. Id. at 512, 518. Kathy Stillufsen, Suffolk County Police Department records clerk, testified that she found the November 1988 incident in the police records, but was not asked to perform, nor did she perform, a search for June of 1988. Stillufsen, 12/16/04 at 529, 535.

Graydon was unequivocal that he and Creedon went to the bagel store in June 1988. He specifically remembers that it was June because he had just catered a wedding for a friend of his. Graydon, 8/3/04 at 66-67. Graydon also stated that he and Creedon went there when it was still light out, not in the middle of the night. Id.

It seems apparent that the incident Ms. Goldstein remembers is not the same incident that Graydon recalls, which plainly happened prior to the Tankleff murders.

VI. ON SEPTEMBER 7, 1988 CREEDON, KENT, AND HARRIS GO TO THE TANKLEFF RESIDENCE AND KILL ARLENE AND SEYMOUR TANKLEFF

On September 6, 1988, Creedon, Kent, and Harris spent the early part of the evening at the home of Billy Ram. Sworn Statement of Glenn Harris, at 1. While there, Creedon approached Ram with the same offer he had made to Graydon; Creedon had been hired to "rough up" some guy's business partner who lived in Belle Terre—"a Jew in the bagel business." Creedon asked Ram to help and offered to pay him. Ram, 10/26/04 at 9-11, 29-33. Ram turned Creedon down. Ram, 10/26/04 at 11.

Undeterred, Creedon, Kent and Harris did the job themselves. They left Ram's house and Harris drove them to Belle Terre.[17] Sworn Statement of Glenn Harris, at 1. They drove past the Tankleff residence, toward Long Island Sound, made a u-turn and then made their way back toward the house. Harris parked the car;[18] Creedon and Kent got out, walked across a neighbor's driveway and entered the Tankleffs' home through the rear. Sworn Statement of Glenn Harris, at 1; Lemmert, 7/27/04 at 10; Salpeter, 7/19/04 at 40. Twenty minutes later, Creedon and Kent ran from the house and returned to the car; they were visibly agitated and covered in blood. Sworn Statement of Glenn Harris, at 1; Lemmert, 7/27/04 at 10; Ram, 10/26/04 at 13-14; Salpeter, 7/19/04 at 196. Kent was white as a ghost, and Creedon removed a pair of gloves.[19] Sworn Statement of Glenn Harris, at 1; Ram, 10/26/04 at 13-14; Salpeter, 7/19/04 at 196. To this point, Harris had assumed that the job involved the usual burglary and drug-related shake down, but when Creedon and Kent returned to the car, he knew that it had not been a regular robbery. Lemmert, 7/27/04 at 10; Ram, 10/26/04 at 13-14.

With Creedon and Kent back in the car, Harris drove away. A short distance down the road, Creedon made Harris stop the car; he got out and threw a pipe into the woods.[20] Salpeter, 7/19/04 at 41.

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[17] Creedon also asked to use Ram's mother's car, which was relatively new. Because Belle Terre is an upscale neighborhood, Creedon feared that Harris' older car—an unregistered 1971 Grand Prix, the only other car available—would "stick out." Ram declined to let him use the car and did not accompany them. Ram, 10/26/04 at 12-13; Salpeter, 7/19/04 at 114-15, 195.

[18] Harris told Investigator Warkenthien that he drove to the end of the road and then parked the car. Warkenthien, 12/20/04 at 608. Harris said he was somewhat familiar with the area because his mother took him there when he was younger. Id. Warkenthien measured the distance from the end of Cliff Road, which he thought to be "the bluffs" to which Harris was referring; his measurement came in at 0.6 miles. Warkenthien 12/20/04 at 609.

However, all of the homes in Belle Terre overlooking Long Island Sound are on "the bluffs," including the Tankleff residence. Celentano Aff. ¶ 10; Howard Aff. ¶ 9. Thus, there is not one location in Belle Terre that is called "the bluffs." On cross-examination, Investigator Warkenthien conceded that Seaside Drive, where the Tankleff residence was located, lies along the Sound; he also conceded that he was unaware that residents refer to the area at the end of Seaside Drive as the bluffs. The end of Seaside Drive is closer to the Tankleff residence than the end of Cliff Road, and is a more reasonable location for Harris to have parked his car, but Investigator Warkenthien never measured that distance. Warkenthien 2/4/05 at 31-34.

[19] Note that the police found glove prints inside the Tankleffs' house, while Marty's confession made no reference to wearing gloves and no gloves were found in the Tankleff residence. Trial Tr. at 2460-65.

[20] Jay Salpeter later accompanied Glenn Harris to Belle Terre, where Harris walked him through the evening's events. Salpeter returned to the property where Harris said the pipe was thrown and found a pipe within 40 yards of the road and less than 10 from the property owner's driveway. See Statement of Facts, Section VIII, infra.

VII. TIME AND AGAIN, THOSE INVOLVED IN THE MURDERS HAVE IMPLICATED BOTH THEMSELVES AND ONE ANOTHER

Days, months and years after the murders, those involved have repeatedly implicated themselves and one another. Their stories are consistent, and some of those who have come forward have not seen one another or spoken with one another in years.[21] Under these circumstances, it is impossible that this is a coincidence; instead, these statements show that Marty Tankleff was not involved in his parents' deaths and affirmatively prove that Creedon and Kent were responsible for their murders and Harris was present when it happened.

A. Harris

Within a few hours of the murders, local news stations were reporting the Tankleffs' murders; Harris heard one such report and realized that while the Tankleffs were being murdered inside their home, he had been outside, sitting in the getaway car. Sworn Statement of Glenn Harris at 2; Lemmert, 7/27/04 at 10-11. That afternoon, Harris—visibly frightened—went back to Ram's house and described to him what had taken place. Ram, 10/26/04 at 13-14, 34, 54.

Harris has indicated numerous times and to numerous people that he was present when Seymour and Arlene Tankleff were murdered and that Creedon and Kent were responsible. He told Jay Salpeter in March 2002, when Salpeter interviewed him at the Clinton Correctional Facility in Dannemora, New York. On the same visit, he told his mother the same story. Salpeter, 7/19/04 at 196. A few months later, Mr. Salpeter returned to Clinton with Barry Pollack; Harris then set forth the same set of facts. Salpeter, 7/19/04 at 21. Harris was voluntarily polygraphed in June 2002, and in August 2003 he gave a sworn statement to Mr. Salpeter and Bruce Barket. Salpeter, 7/19/04 at 21-23, 102, 202. In addition, Harris divulged the same information to Fr. Ronald Lemmert and Sr. Evangeline, the Catholic chaplains at Sing Sing. Lemmert, 7/27/04 at 9-11, 13; Salpeter, 7/19/04 at 33-34. Harris later authorized Fr. Lemmert verbally and in writing to disclose the contents of their conversations. Lemmert, 7/27/04 at 9. Harris has also told numerous other people about the murders, including his co-residents at the "sober house" where he lived for a few months in early 2004. Kelly, 12/20/04 at 646-47. Further, on March 21, 2004, Harris accompanied Salpeter to Belle Terre, where he pointed out places of interest related to the Tankleffs' murders and walked Salpeter through that evening's events. Salpeter, 7/19/04 at 14-15, 35.

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[21] For example, Glass met with defense counsel on July 26, 2004 and told them that Jerry Steuerman had approached him about harming Seymour Tankleff. Two days later, Graydon called the D.A.'s office and told them he went to Strathmore Bagels with Creedon to do just that. Glass and Graydon have not spoken in years. Glass, 12/6/04 at 11. It is impossible that they individually concocted the same story. Common sense dictates that they both told the same story—that Steuerman hired them to kill Seymour Tankleff—because it is the truth.

The prosecution has made much of Harris' history of mental health problems and his supposed recantations of his story, but for years his story has remained consistent and, significantly, it was corroborated by the evidence adduced at the hearing.[22] For example:

In his sworn statement, Harris says that on the night of the murders, he, Creedon and Kent were at Billy Ram's house in Selden, left from there and went to Belle Terre. Ram testified at the hearing that Harris, Creedon and Kent were at his house that night and left together. Ram, 10/26/04 at 13.

During Salpeter's first interview with Harris, Harris stated that the Tankleffs' residence was on the right side of the Belle Terre community. Salpeter testified that this is, in fact, where the Tankleffs' residence was located. Salpeter, 7/19/04 at 197.

On their visit to Belle Terre, Harris showed Salpeter where Creedon got out of the car and threw a pipe into the woods. Salpeter, 7/19/04 at 41. Salpeter later returned to that spot and found a pipe there. See Statement of Facts, Section VIII, infra.

Harris has stated that no one was at the guard booth when he drove into Belle Terre the night of the murders. Warkenthien, 2/4/05 at 25. The Court heard testimony from Jeffrey Ciulla, a former Belle Terre constable, who described the constabulary's logbook in which the officers tracked their rounds of the village and who also testified that there were no entries in the logbook between the hours of 2:10 a.m. and 6:15 a.m. Ciulla, 12/16/04 at 593. Thus, no one was on duty during the early morning hours when Harris, Creedon and Kent entered Belle Terre, and no one would have been in the guard booth at that time.

Harris knows that Creedon and Kent murdered the Tankleffs. He has been consistent in this regard from the first conversation he had with Billy Ram in 1988, up to the present. Not only has Harris been consistent in his claims, but the claims themselves—which show that Marty Tankleff did not murder his parents—have also been corroborated by numerous other people.

B. Ram

The afternoon of the murders, Ram saw reports of two people named Tankleff who had been murdered in Belle Terre; he immediately recalled Creedon's comments about going there to rough up a Jew in the bagel business and quickly reached the logical conclusion: that Creedon, Kent, and Harris were responsible for murdering Seymour and Arlene Tankleff. Ram, 10/26/04 at 15-16.

Since then, Ram has told several people—further corroborating Harris' statements—that he knows Marty is innocent. Long before these proceedings began or Ram spoke with the defense, he disclosed what he knew about the murders to Heather Paruta, his girlfriend, and a few family members. Ram, 10/26/04 at 53. Ram first mentioned Marty's situation to Paruta in 1999, saying he knew someone serving 25-to-life for killing his parents, a crime this person did not commit. Paruta, 10/27/04 at 19-20, 25, 30. The topic arose again in December 2003, when

[22] The D.A. has attempted to impeach Harris' credibility based on his admitted history of mental health problems and statements taken out of context from excerpts of letters he has written. These tactics, however, are incredibly backhanded. Harris did not testify at the hearing because the D.A.'s office purposefully intimidated him by threatening him with life in prison and then refused to grant even use immunity for his testimony. See Statement of Facts, Section IX, infra. So rather than confront Harris himself, and ask him directly about his diagnoses, mental health history, or the significance of statements he has made, they attempted to impeach him through Salpeter's testimony about his letters. The D.A. cannot be allowed to impeach someone, who did not testify solely because of their own obstructionist ploys, who has no opportunity to confront the supposed impeachment material. However, regardless of the D.A.'s view of Harris' credibility, Harris' statements must be viewed in light of the wealth of evidence adduced at the hearing—evidence that, as discussed above, corroborates them.

Ram described more specifically what he knew: that Creedon had killed the Tankleffs. Paruta, 10/27/04 at 22, 28-29.[23]

C. Creedon

Creedon has a reputation for violence and has admitted to several acts of violence: assault with a deadly weapon with the intent to cause physical injury, assault with physical abuse and property damage, and the forcible rape of a 14 year-old girl. Creedon, 7/20/04 at 20-22, 61. Even Billy Ram, a man who stands at 6 feet, 2 inches tall and weighs 300 pounds, has referred to Creedon as a scary individual. Ram, 10/26/04 at 38, 44. Creedon's reputation is such that Ram, himself an imposing person, took Creedon along on a few of his collections solely for the impact: if Creedon was there, Ram must mean business.[24] Ram, 10/26/04 at 52.

Theresa Covias, Creedon's ex-girlfriend, paints a vivid picture of Creedon's potential for brutality. She and Creedon lived together for nine years, from 1986 until 1994. Covias, 7/20/04 at 78. During that time, he beat her and she saw him beat others. Covias, 7/20/04 at 86-87; Guarascio, 7/22/04 at 36-37. He "terrorized" Covias' family, and he tortured others. Guarascio, 7/22/04 at 36-37. On at least one occasion, Creedon lit someone's hands and face on fire.[25] Covias, 7/20/04 at 86-87. Eventually, Covias left because she was afraid of Creedon.[26]

Creedon's role as an enforcer in the drug trade routinely involved violence. In his line of "work," Creedon was known for beating people up and for always having a gun on hand.[27] Foti,

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[23] As brought out by the defense on direct, Mr. Ram was compensated for his lost wages and out-of-pocket expenses during the time he was in New York to testify at the hearing. Ram, 10/26/04 at 4. Ram initially hesitated in coming forward with this information because he did not want to be seen as a snitch, but eventually he felt he had to. Ram, 10/26/04 at 19. Paruta encouraged him to do the right thing and come forward. Paruta, 10/27/04 at 23. After six years in prison, he knows "what it is like": "I know the hell that it is to be there for something that you did do. And to know that this guy is in there for something that he didn't do, well—for a much longer time, it just kind of weighed on my conscience." Ram, 10/26/04 at 20. Ram told Jay Salpeter what he knew when Salpeter spoke with him in Florida. Ram then came to New York and told defense counsel the same. After he returned to Florida, defense counsel asked him to return to New York again to prepare for his testimony and then to testify. Only after he was asked to return to New York for a second time, and miss work for a second time, did Ram ask if he could be compensated for his lost wages. Defense counsel agreed, as permitted by New York's ethical rules. Given that he had told his girlfriend about his knowledge of the Tankleffs' murders years ago and had told Salpeter, Barket and Pollack what he knew on two different occasions before he asked for or was offered lost wages, the suggestion that his testimony was influenced by his remuneration is ludicrous. It is ironic that the D.A. made this allegation given that Glass changed his testimony after receiving an inducement from the D.A. and that Harris refused to testify after being threatened by the D.A. Ram, on the other hand, was perfectly consistent throughout. Unlike these other witnesses, Ram's testimony was not influenced at all.

[24] Creedon will also go to great lengths to accomplish his criminal goals. For example, in 1988, he and Harris broke in to steal Todd Steuerman's drug money from the safe at Strathmore Bagels. They were unable to remove the safe fromthe store, so they stole the store's delivery truck, rammed it into the wall of a nearby shoe store and stole the shoe store's safe instead. Creedon, 7/20/04 at 16-17.

[25] Creedon also kept weapons in the house, and once allowed their five year-old son to shoot a gun out of the dining room window. Covias, 7/20/04 at 122.

[26] Covias fled New York with their two children and went to her sister's house, where the police installed a panic button. Covias, 7/20/04 at 122. Covias was initially afraid to testify because she feared that Creedon, who is "not a very nice person," would find out. Covias, 7/20/04 at 85-85. Covias was frightened when he did, in fact, learn her whereabouts. Salpeter, 7/19/04 at 204.

[27] For this reason, Creedon is known as "Joey Guns." Graydon, 8/3/04 at 31-32.

7/26/04 at 7. His job was to extort money—which Creedon called a "tax"—from drug dealers; if the dealer was not willing to pay, Creedon would beat them up or even go so far as to shoot them. Foti, 7/26/04 at 7; Creedon, 7/20/04 at 10.

His violent tendencies were not limited to his work collecting drug debts and robbing drug dealers. There are "plenty of times" when Creedon robbed and beat up people who did not do drugs and were not drug dealers. Ram, 10/26/04 at 34. For example, Creedon was once in a bar with Graydon and a few others. Someone upset Creedon by saying something about his girlfriend; Creedon "bugged out" and "beat the shit out of the guy." Graydon, 8/3/04 at 68-69. In such instances, Creedon "keeps stomping and stomping. Even if he knocked you out, he would keep hitting and hitting you. He always wore boots. He would…kick you with the boots. He was a small little guy but he would hurt you." Graydon, 8/3/04 at 68-69. And "Joey Guns" was certainly not afraid to wield his gun and shoot people. Ram, 10/26/04 at 52.

Furthermore, Creedon is not merely violent; knowing Creedon's history and reputation, it is the opinion of many who know him that he is capable of murder. Guarascio, 7/22/04 at 57; Kent, 12/14/04 at 309; Ram, 10/26/04 at 40. Indeed, even Peter Kent conceded to Investigator Warkenthien that Creedon was capable of murdering the Tankleffs; he also stated at the hearing, "we all imagined he was a killer." Kent, 12/14/04 at 308.

Creedon has also told numerous people in different settings over a period of years that he has committed murder. Creedon enjoys telling people about the crimes he commits to build up his reputation as a "tough guy." Guarascio, 7/22/04 at 56; Ram, 10/26/04 at 23. Accordingly, the fact that he has admitted to at least four people that he killed the Tankleffs should come as no surprise.[28]

1. Joseph Graydon

Creedon and Graydon did not see much of each other after Creedon's second request for Graydon's assistance in murdering Seymour Tankleff, but in 1992 or 1993 Graydon ran into Creedon at a bar, where, in the course of their conversation, Creedon told him that he had committed a couple of murders and gotten away with it. Graydon, 8/3/04 at 17-18.

2. Karlene Kovacs

In 1990 or 1991, Karlene Kovacs accompanied John Guarascio[29] to the home shared by Creedon and Theresa Covias for Easter dinner. Kovacs, 7/21/04 at 4-5; Guarascio, 7/22/04 at 40. Sometime that afternoon, Kovacs, Guarascio, Creedon, and one other individual smoked a joint of marijuana together.[30] Kovacs, 7/21/04 at 8-9; Guarascio, 7/22/04 at 40,42. Kovacs, who grew

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[28] Creedon himself testified that he does not believe that Marty Tankleff committed these murders. The obvious basis for Creedon's opinion is that he was knows that Marty is innocent, because he was there, participated in the murders and knows that Marty had nothing to do with it.

[29] Guarascio is Theresa Covias' brother. Guarascio, 7/22/04 at 36. Guarascio was contacted about Creedon's involvement in the Tankleffs' murders in 1994. At the time he would not discuss it because he did not want Creedon "terrorizing [his] family or abusing [his] sister over something that would come back to him…That is the type of person he was." Guarascio, 7/22/04 at 53. Guarascio testified at this hearing consistent with Kent; Guarascio unequivocally stated that, based on his dealings with Creedon, he believes Creedon is capable of murder. Id. at 57.

[30] During the hearing, Assistant District Attorney Lato made much of the conflict between the testimony of Kovacs and Guarascio as to where the joint was smoked. See Guarascio, 7/22/04 at 47-48; Kovacs, 7/21/04 at 21-23. Whether the joint was smoked in the bedroom or somewhere outside is absolutely irrelevant and does nothing to

up in Suffolk, and Creedon, who lived in Suffolk, came to realize that they knew a lot of the same people, so they started comparing notes. Guarascio, 7/22/04 at 43-44. A short time later, in the midst of this friendly banter, Creedon admitted that he was present when the Tankleffs were murdered: he hid in the bushes outside the Tankleffs' house, watching a card game; at some point he entered the house and was there with one of the Steuermans, "pumped up" with adrenaline. Guarascio, 7/22/04 at 43-44; Kovacs, 7/21/04 at 10, 15-16, 49. He said that, afterwards, he had to get rid of his clothes and that he was thinking about leaving town.[31] Kovacs, 7/21/04 at 15-16.

3. Gaetano Foti

Gaetano Foti met Creedon one day in the 1990s, when Creedon came to the bar where Foti worked and had tried, unsuccessfully, to extort money from him. Creedon never attempted to extort money from Foti again, but he continued to frequent the bar. Foti, 7/26/04 at 5, 7. On one such occasion, the topic of conversation turned to Marty Tankleff. Mr. Foti said that he "thought that the kid was innocent," and Creedon responded by stating that he himself had committed the murders. Foti, 7/26/04 at 8. Rather than discuss it further, because Foti "knew who [he] was talking to," Foti dropped the subject. Foti, 7/26/04 at 8.

A few months later, Creedon was again at the bar, saying that he had to "take care of" someone who owed some drug money; he stated that if he had to shoot this person, he would. Foti, 7/26/04 at 8. At that point, another patron at the bar commented that Creedon would not actually shoot this person to collect the money; Foti said, "Why isn't he going to shoot him? He told me he was involved in the Tankleff [murders]." Id. at 8-9. Creedon then shook his head, and said he was, in fact, responsible. Foti, 7/26/04 at 8-9, 15-16.[32]

4. Billy Ram

A few years after the murders, Billy Ram saw Creedon, who mentioned that Kent and Harris were snitching on each other. Ram indicated that if that were the case, Creedon himself would be in prison for murdering the Tankleffs, and Creedon agreed. Ram, 10/26/04 at 16-17. Creedon's simple reply, "It makes sense," is yet another admission of his involvement.

5. Harris

Finally, a couple of months after the Tankleff murders, Harris and Creedon were committing a burglary together. Creedon threatened Harris, saying, "Remember what happened in Belle Terre."

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impeach Ms. Kovacs' credibility. What is significant is that the core of Ms. Kovacs' story has remained consistent for more than a decade: that Joseph Creedon told her that he was present, with one of the Steuermans, when the Tankleffs were murdered. Further, Guarascio's testimony corroborates that of Ms. Kovacs.

[31] At first, Kovacs was too frightened to tell anyone what Creedon said. Kovacs, 7/21/04 at 11. It was not until years later, in 1994, that she spoke with Robert Gottlieb, Marty's trial attorney, and signed an affidavit he prepared. Kovacs, 7/21/04 at 13-14. Kovacs also went to the Suffolk County authorities with the same information, but they did little to investigate Creedon. Kovacs, 7/21/04 at 14. In 2003, Kovacs took a polygraph test, which she passed. Kovacs, 7/21/04 at 15.

[32] Detective Robert Trotta, of the Suffolk County District Attorney's Office, considers Foti to be a reliable witness. Trotta, 12/16/04 at 576.

D. Kent

Ram had a similar conversation with Kent about Harris' proclivity for snitching. Like his discussion with Creedon, Ram insinuated that if that were true—if Harris were indeed a snitch—Kent would likely be in prison for the Tankleffs' murders. Ram, 10/26/04 at 18-19. To such a statement, one which rational people would normally deny, Kent did not say much; instead he said something to the effect of, "Yes. Right." or "I don't know." Ram, 10/26/04 at 18-19.

Moreover, instead of providing Kent with an alibi, his schedule the week of the Tankleffs' murders actually further implicates him in them. He claims to have been in the middle of crime spree that week, committing up to ten robberies with his friend Danny Raymond. This may well be true, but the facts show that this left open the opportunity to murder the Tankleffs. Kent stayed at his sister's house in Selden on September 6; he committed a robbery in Farmingville, only a couple of miles from Selden, the next night; Danny Raymond told police they did that robbery on their way from Selden. Kent, 12/14/04 at 345-49. Meanwhile, Kent's claim that he was in the city, buying drugs, during the hours the Tankleffs were murdered is completely uncorroborated.

What has been corroborated, however, is that Kent was with Ram, Harris and Creedon on the night of the murders. Ram and Harris have both said he was with them (and Creedon) at Ram's house in Selden the night of September 6; they also said that he, Creedon and Harris left from there to go to the Tankleff's house, which is just 9 miles away. And in fact, Kent's own testimony bolsters their statements: it would have been quite simple for Kent to have gone from Ram's house, in Selden, the 9 miles to Belle Terre, and then return to his sister's house.

E. Todd Steuerman

Todd Steuerman has spoken of his father's role in the Tankleff murders, to Bruce Demps in particular. Demps and Todd knew each other from the time they were both incarcerated at Clinton around 1989 or 1990 and at Comstock around 1991 or 1992. Demps, 7/26/04 at 54. While in prison together, Demps and Todd had two separate discussions about the Tankleff murders, but the conclusion both times was the same: Marty did not kill his parents; Jerry Steuerman had a "beef" with the Tankleffs and hired someone to kill them.[33] Demps, 7/26/04 at 54-55, 57.

F. Jerry Steuerman

Finally, while Jerry Steuerman might not initially impress people as a murderer, he is "far from a regular guy." Fischer, 7/27/04 at 43-44. Steuerman had a reputation for violence, and routinely displayed his temper. In one such moment, he admitted that he killed two people.

In the spring of 1989, Neil Fischer, a cabinet builder, was installing counters at Steuerman's bagel store in Oakdale. Steuerman was at the store, as was a gentleman who had sold him a bagel oven. Fischer, 7/27/04 at 43-44. The oven was malfunctioning and Steuerman

[33] It appears that on at least two other occasions, Jerry Steuerman enlisted others to help him "resolve problems"—both for Todd and others. While Bruce Demps was in prison, he heard that a guy was "messing" with his girlfriend. Todd called his father, and Steuerman sent someone over to visit the guy and settle the matter. Demps, 7/26/04 at 56-57. Todd also relied on his father to help settle his own problems. Also while incarcerated, Todd learned that one of the Clinton prison guards was having an affair with his wife. Jerry Steuerman sent some people to visit the guard, who was later seen with two black eyes and a few bruises. Demps, 7/26/04 at 59-60.
Steuerman has also hired Hell's Angels to rough up employees who were trying to unionize at the bagel stores. While McCready knew this, he did not disclose this fact to defense counsel at trial.

was very angry; in his rage, he screamed that he "had already killed two people and that it wouldn't matter to him if he killed [the oven salesman]." Fischer, 7/27/04 at 43-44. Fischer, who knew of Steuerman's reputation, assumed Steuerman was referring to the Tankleffs. Id.

Folks who worked in Steuerman's bagel shop in Florida read about the proceedings in New York and started asking questions about his involvement in the Tankleffs' murders. On one particular occasion, Steuerman said to two employees, "So what? I slit their throats. What are they going to give me; fifty years at this age?" Salpeter, 7/19/04 at 28.

In sum, each of the participants in the scheme to murder the Tankleffs—Todd Steuerman, Jerry Steuerman, Joseph Creedon, Joseph Graydon, Brian Scott Glass, Glenn Harris and Peter Kent—has made admissions admitted into evidence in the §440 hearing pertaining to their involvement in the Tankleff murders. This is overwhelming evidence that Marty Tankleff is actually innocent of these crimes.

VIII. THE POSSIBLE MURDER WEAPON IS FOUND ON THE PROPERTY OF JOHN TRAGER, IN THE TANKLEFF'S NEIGHBORHOOD

Further, a pipe that is possibly the murder weapon has been located and corroborates Harris' story of what occurred the night of the murders. On March 21, 2004, Harris took Jay Salpeter, a retired New York City detective hired by the defense, to Belle Terre and described to Salpeter what took place the night the Tankleffs were murdered. Salpeter, 7/19/04 at 14-15, 35. Harris specifically pointed out the spot where Creedon got out of the car and threw the pipe into the woods.

On June 27, 2004, Salpeter returned to the property—owned by Mr. and Mrs. John Trager of 61 Crooked Oak Road—with Charles Haase, a retired New York City crime scene detective. Salpeter, 7/19/04 at 43, 46. After three hours of searching, Salpeter and Haase found a pipe. It was rusted, old and weathered, and measured 36 inches in length. Salpeter, 7/19/04 at 47, 212; Trager, 7/19/04 at 128. It measures one inch in diameter at one end and between 1 ¼ and 1 3/8 inches in diameter at the other end. It lay 40 yards from Crooked Oak Road, but less than 10 yards from the Tragers' driveway. Salpeter, 7/19/04 at 46-47. There are a patch of trees about halfway up the driveway. If Creedon ran twenty yards up the driveway, he could not be seen by either the street or the Trager house and could have thrown the pipe to the location where Salpeter ultimately found it.

The property where the pipe was found, which the Tragers have owned for the past 32 years, is heavily wooded and has never been altered. Mr. Trager testified that nothing he has done to or around the property would explain the pipe's existence. Trager, 7/19/04 at 126, 129-30.

Salpeter notified the D.A.'s office about the pipe, but they refused to go to the Tragers' property to see it. Salpeter, 7/19/04 at 48. So on June 29, 2004, Haase removed the pipe and packaged it according to instructions from Forensic Science Associates, the California lab where it was analyzed. Salpeter, 7/19/04 at 48-50.[34] The same day, Salpeter and Haase finished searching the area and found nothing else that was relevant to the investigation. Salpeter, 7/19/04 at 56-57. Harris later confirmed to Fr. Ronald Lemmert, a Catholic priest in whom he confided, that the pipe Salpeter and Haase found was the murder weapon. Lemmert, 7/27/04 at 15-16.

[34] The pipe tested negative for biological material. This is consistent with the pipe having been outside for more than fifteen years.

Further, the location of the pipe corroborates Harris' explanation of what happened the night the Tankleffs were murdered. Harris has said that he drove toward Long Island Sound, made a u-turn and made their way back toward the Tankleff's house. Lemmert, 7/27/04 at 10; Salpeter, 7/19/04 at 40; Warkenthien, 2/4/05 at 26. As Harris, Creedon and Kent were leaving Belle Terre, Creedon made Harris stop the car; he got out and threw a pipe into the woods. Salpeter, 7/19/04 at 41. Driving out of Belle Terre from Seaside Drive, where the Tankleff residence was located, the shortest path back to Cliff Road, the community's main road, is to turn right onto Crooked Oak. Warkenthien, 2/4/05 at 38. On Crooked Oak, the last house on the right before reaching Cliff Road is that of the Tragers, where Harris said Creedon threw the pipe and where a pipe was actually found. Id. at 38-39. Simply put, from the Tankleffs', the Tragers' property was on the way out of the community; stopping to throw the pipe onto their property is entirely consistent with Harris' story.

IX. THE DISTRICT ATTORNEY HAS CONFLICTS OF INTEREST THAT HAVE IMPAIRED HIS OBJECTIVITY IN THIS CASE

Despite the overwhelming nature of the evidence presented at the § 440 hearing, the District Attorney's office seems intent on preserving Marty's conviction, no matter the cost. As this Court is aware, Mr. Spota has several conflicts of interest in this case; and despite Mr. Spota's assurances that he would remove himself from these proceedings, it is now apparent that his conflicts have impaired his objectivity and have infiltrated the People's case.

As described above, Jerry Steuerman had a substantial motive to kill Seymour Tankleff. See Statement of Facts, Section II, infra. Further, as this Court is aware, Steuerman was present at a poker game that took place at the Tankleff residence the night Seymour and Arlene were murdered and was the last one to leave the house when the game ended. A week after the attacks, while Seymour was still alive, Steuerman engaged in some incredibly bizarre behavior: he withdrew money from the joint account he held with Seymour, feigned his own death, changed his appearance and fled to California. Later, Steuerman offered Creedon $10,000 to cut out Marty's tongue because Marty had accused him of murdering the Tankleffs. See "Affirmation and Memorandum in Support of Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor" [hereinafter "Motion to Disqualify"] at 4-5.

Despite these facts, Detective McCready failed to investigate Steuerman. Contrary to McCready's testimony at trial, McCready knew Steuerman years before the murders, and the two were on friendly terms.[35] Lubrano, 8/3/04 at 77-79; Salpeter, 7/19/04 at 33.

As this Court is also aware, Detective McCready was well acquainted with District Attorney Spota. The two have maintained a lengthy attorney-client relationship, during which

[35] 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. Lubrano, 8/3/04 at 75-76. In 1984, Lubrano opened a pizzeria, where he again encountered McCready. McCready owned a construction business and had a number of jobs in the area, so he frequented the pizzeria to pick up food for his construction crews. Lubrano had noticed McCready's Rolex watch on his trips to the bagel shop and recognized the watch and McCready when McCready came into the pizzeria. Lubrano, 8/3/04 at 77-78, 79. 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). Lubrano, 8/3/04 at 78.

Mr. Spota has defended Detective McCready in court, before a state commission investigating police misconduct, and before the public. See "Motion to Disqualify" at 6. Given the discrepancies in McCready's testimony regarding his relationship with Steuerman, it is possible that McCready—Mr. Spota's former client—committed perjury while testifying at Marty's trial.

And despite Mr. Spota's assertions that he has walled himself off from this case, he was seen conferring with Mr. Lato in a jury room next to the Court's chambers just before Mr. Lato announced the decision to deny immunity to Glenn Harris. See id. at 12. In addition, Investigator Warkenthien, who was handpicked by Spota to work on this hearing, testified that throughout his investigation, he reported directly to Mr. Spota. Warkenthien, 2/4/05 at 73-74.

It is apparent that these conflicts have compromised the District Attorney's impartiality and objectivity. Several actions taken by the D.A.'s office more than amply show this to be so, including intimidating Harris (as compared to its treatment of Kent and Glass), ignoring the potentially exculpatory evidence Graydon had to offer, and revealing Foti's identity.

A. The D.A.'s Office Purposefully Intimidated Glenn Harris to Prevent Him from Testifying

Glenn Harris knows what happened the night that Arlene and Seymour Tankleff were murdered and has information that speaks directly to Marty's innocence: Harris knows that Marty did not murder his parents and that Creedon and Kent are actually responsible. After extensive consultation with Fr. Lemmert and the defense, Harris agreed to testify at the §440 hearing.

Harris appeared in this Court on July 26, 2004, but refused to answer any questions regarding the Tankleff murders, citing his Fifth Amendment right against self-incrimination. See Harris, 7/26/04 at 21-31. It is clear why he did so: the District Attorney's office intentionally played to his fears—his concern for his own life and the safety of his children and the fear that he would spend the rest of his life in prison—by having other inmates and Investigator Warkenthien threaten him so that he would not testify. See Lemmert, 7/27/04 at 15.

On October 6, 2003, Investigator Warkenthien interviewed Harris at Sing Sing, where he was incarcerated. Warkenthien, 12/20/04 at 605. Harris told Warkenthien the same story he has told time and again: that he drove Creedon and Kent to Belle Terre, where they murdered the Tankleffs. When Warkenthien insinuated that this version of events was inconsistent with what he had previously told Jay Salpeter, Harris stated that he wanted an attorney and would not say anything further. Id. at 611. As he was leaving, Warkenthien turned to Mr. Harris and threatened him, saying, "You know, when a nonparticipant in a — during a felony gets killed, every — all the persons involved in the felony are guilty. So if the statement you gave to Mr. Salpeter is true, you may be very well changing places with Marty Tankleff." Id. at 613; Warkenthien, 2/4/05 at 36; Lemmert, 7/27/04 at 15. Warkenthien conceded he was trying to tell Harris that he would serve the rest of his life in jail if he testified consistently with his sworn statement. Warkenthien, 2/4/05 at 36-37.

In addition, as part of his investigation for the D.A.'s office, Warkenthien wired two inmates in an attempt to get Harris to say he had lied about Creedon and Kent murdering the Tankleffs. Each of these efforts was after this Court appointed counsel for Mr. Harris. On November 5, 2003 and again on November 18, 2003 these inmates individually attempted to engage Harris in conversation about the Tankleff murders while they wore recording devices. Warkenthien, 2/4/05 at 52. During the course of those conversations, Harris, who again reiterated that he was telling the truth about the Tankleffs' murders, was threatened; the inmates

told him "we know where your children live and we're going to get them." Lemmert, 7/27/04 at 15.

Faced with these threats, four days before Harris was to testify he called Fr. Lemmert and said he was not going to do so. Harris was torn between coming forward to clear Marty's name and maintaining his silence—he feared for his life and the safety of his children. Id. at 13 Harris also feared that if he were to come forward he would have the murders "pinned on him."[36] Id. at 14. He has been plagued by what he knows; the information he has regarding Marty's innocence has weighed on his conscience and he has experienced nightmares and other related sleep problems. Lemmert, 7/27/04 at 9, 14. Yet in spite of this, Harris—whose testimony would be exceptionally damaging to the D.A.'s case—ultimately refused to testify; he did so solely because of the fear the prosecution intentionally instilled in him.[37]

By contrast, the D.A.'s office has coddled both Kent and Glass, the two witnesses who have denied all involvement in Tankleffs' murders. On October 7, 2003, Warkenthien met with Peter Kent. By that time Kent knew that Harris had implicated him in the Tankleffs' murders. Kent, 12/14/04 at 368. And when Warkenthien confronted him with this information, Kent—a career criminal who has committed hundreds of robberies and other acts of violence—broke down and cried.[38] Kent, 12/14/04 at 339; Warkenthien, 2/4/05 at 18. Faced with a man who cried, most likely because he thought he had finally been caught, Warkenthien did not do anything to attempt to elicit an admission from him. Rather, he immediately comforted Kent by telling him that he did not believe the allegations. Further, at no time did Warkenthien wire anyone in an attempt to get Kent to make any incriminating admissions, nor did he threaten him that if he did not cooperate he would have to "trade places" with Marty in prison.[39] Warkenthien, 2/4/05 at 19.

The D.A.'s office offered substantial benefits to Glass. As described above, see note 14, infra, and accompanying text, Glass originally told defense counsel that Steuerman had offered

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[36] In fact, Harris was so terrified of the thought of spending the rest of his life in prison that he once broke out in hives over his entire body. Lemmert, 7/27/04 at 16.

[37] The Court repeatedly allowed Harris to invoke a blanket waiver or allowed his counsel to do so without Mr. Harris himself responding to individual questions. Thus, the Court failed to make a sufficient inquiry to determine the propriety of Harris' invocation of the privilege. Indeed, Harris' counsel has stated in media interviews that Harris feared prosecution for perjury—not for the substantive underlying events—should he testify. While this fear might be well justified given the D.A.'s repeated statements that he disbelieved Harris' sworn testimony, a fear of prosecution for perjury is not a proper basis for invoking one's Fifth Amendment rights. See United States v. Vavages, 151 F.3d 1185, 1192 (9th Cir. 1998); United States v. Whittington, 783 F.2d 1210, 1218 (5th Cir. 1986). Thus, the Court's procedure violated Marty Tankleff's rights to due process and to compulsory process.

[38] At the § 440 hearing, Kent testified that he was "emotionally disturbed of the fact, yeah. Yeah. Sometimes when I get emotional, I cry, sure, no question about it. I cried." Kent, 12/14/04 at 340. This is the same man who has been arrested 20 times, done 6 years in the state penitentiary and other time in local prisons. Id. Yet when faced with the fact that he had been exposed as a murderer and because he believed—momentarily—that he would be prosecuted for murder, he broke down in tears.

[39] To the contrary, Warkenthien then had Kent call Ram—another witness whose testimony is unfavorable to the D.A.'s case—in an attempt to get Ram to make admissions. Kent, 12/14/04 at 296; Warkenthien, 2/4/05 at 23. Harris and Ram were the only two witnesses who Warkenthien attempted to record. Warkenthien, 2/4/05 at 60. He never attempted to record any witnesses who might provide information exculpating Marty Tankleff. Moreover, he offered benefits to witnesses who offered to inculpate him. Brian France, a convicted murderer who allegedly had negative information connecting Marty to his parents' murders, was assured that if he were to cooperate with Warkenthien's investigation, a letter would be written on his behalf to the parole board. Id. at 53.

him the job of killing Seymour Tankleff. Subsequently, the D.A.'s office threatened Glass, saying that if he testified as to the offer from Steuerman, they would make things tough for him. Callahan, 12/21/04 at 736. The D.A.'s office wanted Glass to change his story, id. at 735, and in return it did him a favor. When Glass, a two-time violent offender, was arrested on another robbery charge, he faced 25 years to life if convicted. Callahan, 12/21/04 at 736. At his arraignment, the D.A. moved to release Glass on recognizance; as Mark Callahan testified at the hearing, "As you know, helping the D.A. when you've got an armed robbery, a violent B felony, and you're a two-time violent felon and you get an ROR, obviously there's a benefit there." Callahan, 12/21/04 at 751.

B. The D.A.'s Office Blatantly Ignored Joseph Graydon and the Exculpatory Information He Could Offer

Graydon heard about the Tankleff murders shortly after they occurred, but he did not immediately connect them with the ill-fated hit at the bagel store. The victims and locale were different from those in Creedon's plan: he and Creedon were meant to "whack" a male businessman at the bagel store, but the newspapers reported that both a husband and wife were killed and that the murders took place in the couple's home. Graydon, 8/3/04 at 52-54. Further, Graydon had heard the son had confessed to the Tankleff murders. It was not until October 2003 that he put the pieces together. He came upon a news story implicating Creedon in the Tankleffs' murders and was shocked to discover that the bagel partner he and Creedon were hired to murder was Seymour Tankleff. Graydon, 8/3/04 at 19-20.

Graydon did not immediately come forward with this information in 2003, because he assumed that Creedon would be prosecuted and that Marty would be released. Graydon, 8/3/04 at 19-20. Upon reading another news story several months later, he realized that Creedon had not been charged and that Marty was still in prison. Graydon reflected on the situation and discussed it with his pastor, who encouraged him to contact the authorities. Graydon, 8/3/04 at 21-22.

Graydon took the rather courageous step of calling the District Attorney's office to disclose the information he had on Creedon's involvement in the Tankleffs' murders, but he was met with nothing but hostility on the other end of the line. Stunned by the realization that the D.A.'s office was not interested in this information, he requested the phone number of Marty's attorney. The D.A.'s office refused. Determined to contact the defense, Graydon jumped into the dumpster where he had discarded the newspaper that contained the latter news article about the case, found Mr. Barket's name, and called information to get his phone number. Graydon, 8/3/04 at 22-23, 36-39.

C. The D.A. Revealed the Identity of a Confidential Witness—Gaetano Foti—to the Very Person Foti Feared: Creedon

Gaetano Foti testified before this Court under the assumption that his identity would be protected. He requested confidential-witness status specifically because he feared retribution by Creedon, should Creedon discover he had implicated him in the Tankleffs' murders. In particular, he feared for his girlfriend's safety. Trotta, 12/16/04 at 571. Mr. Lato has conceded that before Foti testified, he revealed to Creedon—precisely the person Foti wanted protection from—that Foti was planning to testify against him, and used both Foti's given name and his street name ("Tommy the Beard") to ensure Mr. Creedon knew exactly who he was. This is in spite of the fact that Robert Trotta, a detective in the Suffolk County Police Department, felt him to be a reliable witness. Trotta, 12/16/04 at 576.

X. THE CONFESSION COERCED FROM MARTY TANKLEFF WAS FALSE

As stated above, Marty immediately repudiated the "confession" he gave to Detectives McCready and Rein. The reason is simple: his confession was false.[40]

As Dr. Richard Ofshe testified at the § 440 hearing, interrogations generally encompass two ultimate goals. The first goal is to obtain a confession from the suspect. To arrive at this end, the interrogator employs techniques that influence the suspect's perception of his current situation, his likely future, and his options. As a consequence, the interrogator convinces the suspect—sometimes by lying to him about the evidence—that his situation is hopeless. See id. at 67-69 (explaining, inter alia, that the interrogator convinces the suspect that "[l]ike it or not, guilty or not, innocent or not, they are about to be arrested," that investigators in America are "permitted to lie to suspects and to invent evidence," and that "the tactics can have the same effect on the innocent as they can on the guilty").

Even an innocent suspect can be persuaded to confess if convinced, through common police tactics, that his situation is hopeless. Id. at 66-70. One such tactic is to make the suspect believe that his memory is somehow faulty and that he has committed a crime that he simply does not remember. In this situation, the interrogator tells or suggests to the suspect that, for example, he blacked out, that he was drunk, or that he feels so guilty about the crime that he has blocked it out. When combined with the evidence that the police have previously revealed, this tactic can lead an innocent suspect to conclude that he must have committed the crime. Id. at 70-72.

The second goal of interrogation is to collect from the suspect a narrative of the crime that corroborates his confession. Id. at 80. While true confessions tend to be factually accurate, false confessions are apt to be rife with errors when an innocent suspect confesses to an act that he knows he did not do or of which he has no knowledge. Because these inaccuracies are precisely what would be expected from an innocent individual who has been made to invent a story without knowledge of the actual events, error-filled confessions can serve as proof of the suspect's actual innocence; the suspect guessed and simply got it wrong. Id. at 82.

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[40] False confession is a "regularly occurring phenomenon in modern America," and approximately one-fourth of wrongful convictions are the result of police-induced false confessions. Ofshe, 7/21/04 at 59, 63. Dr. Ofshe testified that "[u]sing techniques that constitute what is called psychological interrogation, we know that false confessions regularly occur throughout this country." Ofshe 7/21/04 at 59. He explained that people falsely confess to double homicides and other serious crimes. Id. Further, jurors are strongly biased against believing that innocent people will falsely confess. Ofshe, 7/21/04 at 63-64. So while the jury heard from Dr. Spiegel, a psychiatrist who testified about Marty's psychiatric status at the time of his interrogation, it was not informed of the steps involved in interrogation or the ways in which police obtain confessions. Id. at 87. Dr. Ofshe testified that most jurors (one study showed 70%) do not believe that an innocent person could be made to falsely confess and thus are remarkably biased against the "false confession" conclusion. Id. at 64-65. "My experience in the several hundred cases that I've testified in is that jurors need to understand about the phenomenon of false confession; that it occurs, and they need to understand what it is that causes an individual to give a false confession. Without that understanding, they cannot comprehend that this could occur and that is where this bias comes from. With that understanding, I believe what happens is that they are now able to get beyond the prejudice and look at the facts and make a determination of how much weight to give the confession, if any, and whether to weigh the confession as evidence of innocence, [sic] of guilt because it can be evidence of innocence."

"But lacking that understanding, it appears that a substantial percentage of people coming into the courtroom will presume that the innocent don't falsely confess, and that is very disadvantageous in arriving at a reasonable, I think, and just conclusion in any particular case." Id. at 65.

Marty's confession meets both criteria of falsity. First, the tactics used by Detectives McCready and Rein have the characteristics of a typical false confession case. Ofshe, 7/21/04 at 67, 76-83. Marty believed in the honesty of police officers and was extraordinarily vulnerable, having just discovered his parents dead.[41] At the time, Marty knew he had not murdered his parents, but when confronted with Detective McCready's lie that his father identified him as the attacker—which was posed as a fact—and when asked whether he could have blacked out, Marty suddenly wondered whether his memory had failed him.

Second, the statement Marty gave to Detectives McCready and Rein does not corroborate what actually took place when his parents were murdered; rather, it reveals that he knew nothing about that evening's events. Ofshe, 7/21/04 at 83. Marty told the detectives he used a watermelon knife to stab his parents, a fact that was disproved by the D.A.'s own forensics. Similarly, Marty told the detectives he used a barbell as a weapon. Again, this was disproven by the D.A.'s forensics. There is evidence that gloves were worn at the scene of the crime, but there is nothing in Marty's "confession" about him wearing gloves. In addition, the confession was mistaken about who was attacked first. This is just a sampling of the objectively knowable facts that directly contradict the contents of Marty's confession.

In crafting his statement, Marty (or McCready) necessarily had to invent a tale about the series of events that purportedly led to his parents' deaths—events he knew nothing about because he was not there. In fact, his error-filled statement demonstrates his innocence: he had to guess and he got it wrong.[42] Id. at 84-85.

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[41] Seymour himself was the commissioner of the Belle Terre constabulary in 1988. Ciulla, 12/16/04 at 584. Marty testified at trial that he was brought up to always trust and believe in the police. Trial Tr. at 4153.

[42] In June 2004, the New York State Bar Association, by a unanimous vote of its House of Delegates, adopted a joint resolution proposed by the New York County Lawyers' Association and the Criminal Justice Section of the American Bar Association that called for all law enforcement agencies to videotape or audiotape custodial interrogations of crime suspects. Press Release, New York County Lawyers' Association, House Approves Taping Interrogations (June 21, 2004), available at http://www.nycla.org/publications/7-14-04pr.pdf. The report outlining the proposal recognized the danger of false confessions misleading, among others, jurors without the availability of videotaped or audiotaped interrogations:

> "False confessions by suspects appear to be among the major causes of wrongful convictions within the criminal justice system. To reduce the number of convictions of innocent persons and ensure the integrity of the criminal justice process it is imperative to reduce the number of false confessions. Research indicates that about one-fourth of the cases of convictions of innocent defendants have included, among other things, false confessions. Such false confessions include a suspect's incorrect statements of involvement in any or all facets of the crime(s) being investigated. These incorrect statements by a suspect can mislead police, prosecutors, defense attorneys, judges and juries into focusing the case on the suspect, too often resulting in an erroneous conviction. An additional negative consequence is that the focus is away from the true perpetrator of the crime, too often resulting in that perpetrator's freedom to continue criminal activity."

The New York County Lawyers' Association and American Bar Association Section of Criminal Justice, Report to the House of Delegates at 1, available at http://www.abanet.org/crimjust/policy/revisedmy048a.pdf (citations omitted). (Note that Mr. Tankleff's interrogation and "confession" were not videotaped or audiotaped.) The report also cited a 1998 article by Dr. Ofshe and Dr. Leo for, among other reasons, its identification of "34 confessions proven false through other evidence, and 18 confessions which appear false because of the lack of corroboration and presence of exonerating evidence." Id. at 2-3 (citing Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429 (1998)). In fact, one of the 18 cases that the article discusses is Mr. Tankleff's. Leo

ARGUMENT

I. MARTY TANKLEFF'S CONVICTION SHOULD BE VACATED BECAUSE HE IS ACTUALLY INNOCENT AND HIS CONVICTION AND INCARCERATION VIOLATE THE NEW YORK STATE CONSTITUTION OR, IN THE ALTERNATIVE, BECAUSE HE HAS SATISFIED CPL § 440.10(1)(G)'S STANDARDS FOR VACATING A CONVICTION BASED ON NEW EVIDENCE

It is axiomatic that "the major function of a criminal proceeding is the conviction of the guilty and the acquittal of the innocent." See, e.g., People v. Berkowitz, 50 N.Y.2d 333 (Ct. App. 1980). A great miscarriage of justice has led to the conviction and incarceration of an innocent man: Marty Tankleff. Now, almost fifteen years later, it is time to vindicate Tankleff's rights under, among others, the New York State Constitution.

Mr. Tankleff's conviction should be vacated because he has shown by clear and convincing evidence, described below, that no reasonable juror could convict him of murdering his parents, Arlene and Seymour Tankleff. In other words, Mr. Tankleff has shown that he is actually innocent. Therefore, his conviction and continued incarceration violate the New York State Constitution. In the alternative, Mr. Tankleff's conviction should be vacated and the Court should order a new trial because, as discussed below, Mr. Tankleff has presented newly discovered evidence pursuant to CPL § 440.10(1)(g) and it is probable this new evidence will change the result of the trial if a new trial is granted.

A. Mr. Tankleff Has Shown By Clear and Convincing Evidence that He Is Actually Innocent (i.e., That No Reasonable Juror Could Convict Him of Murdering His Parents) and Therefore His Conviction and Continued Incarceration Violate the New York State Constitution and His Conviction Should Be Vacated

CPL § 440.10(1)(h) authorizes a court to vacate a judgment obtained in violation of an accused's constitutional rights. The New York State Constitution prohibits the conviction and incarceration of a person who is actually innocent. N.Y. Const., Art. I, § 5 (prohibiting cruel and unusual punishment), § 6 (prohibiting deprivation of liberty without due process of law); see People v. Valance Cole, 1 Misc. 3d 531 (S. Ct., Kings County, Sept. 12, 2003). In Cole, the court correctly found that the New York State Constitution extends greater rights than the U.S. Constitution, and "the conviction of and/or punishment imposed upon an innocent person violates the New York State Constitution." Id. at 542. Cf. State ex el. Amrine v. Roper, 102 S.W.3d 541, 547 (Mo. 2003) (en banc) (recognizing a free-standing claim of actual innocence for those sentenced to death under Missouri law); People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996) (recognizing a free-standing claim of actual innocence under Illinois constitution); Summerville v. Warden, St. Prison, 641 A.2d 1356, 1369 (Conn. 1994) (recognizing a free-standing claim of actual innocence under state habeas procedures); In re Clark, 855 P.2d 729, 797 (Cal. 1993) (en banc) (recognizing a free-standing claim of actual innocence in capital cases under state habeas procedures); see also Ex Part Elizondo, 947 S.W.2d 202, 205 (Tex. 1997) (en banc) (recognizing a free-standing constitutional claim of innocence). The Cole court stated that

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& Ofshe, supra, at 458-459. The discussion of Mr. Tankleff's case appears under the heading "Highly Probable False Confessions," and details their reasons for categorizing Mr. Tankleff's "confession" as such. Id. at 455, 458-459.

"if a court sustains a free-standing claim of innocence, the court should vacate the conviction and dismiss the accusatory instrument." 1 Misc. 3d at 544.[43]

For determining actual innocence, the Cole court adopted the "clear and convincing evidence standard": "Balancing the public and private interests involved and considering that the defendant has had the opportunity to prove his innocence, the court finds that 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." Id. at 543.[44] 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 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).

Mr. Tankleff has shown by clear and convincing evidence that no reasonable juror could convict him of the murders of his parents and that his conviction and continued incarceration violate the New York State Constitution. First, Mr. Tankleff has shown substantial evidence that other people murdered Seymour and Arlene Tankleff. Second, the basis for Mr. Tankleff's conviction, his "confession," which he immediately disavowed, has been shown to be unreliable and, in fact, may be evidence of his innocence.

This Court heard a great deal of evidence that other people committed the murders of the Tankleffs, including evidence of the web connecting a crime gang with Jerry Steuerman. This connection ended ultimately in members of this gang murdering the Tankleffs at the behest of Steuerman.

First, Jerry Steuerman had a motive to kill Seymour and Arlene Tankleff, his business partners. Steuerman owed Seymour several hundred thousand dollars, which Seymour attempted

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[43] Additional relief for an actually innocent defendant can be granted under Judiciary Law § 2-b(3), which authorizes courts to "devise and make new process and forms of proceedings necessary to carry into effect the powers and jurisdiction possessed by it." Section 2-b(3) permits the Court to devise new processes to carry out its functions where fairness so requires. See, e.g., People v. Thompson, 678 N.Y.S.2d 845, 851 (N.Y. Sup. 1998).

[44] The court determined that the "clear and convincing" standard was proper after discussing other standards for determining actual innocence, including the "probably innocent" standard. The interests in finality and in judicial administration must yield to the societal interest in assuring that no individual is unjustly deprived of his liberty, N.Y. Const. § 5, or disproportionately punished, N.Y. Const. § 6, when he is actually innocent. See Miller v. Commissioner of Correction, 242 Conn. 745, 814 (1997) (Berdon, J., concurring and dissenting). The "probably innocent" standard more definitively safeguards those sacred rights. Id.; see also Cole, 1 Misc. 3d at 545 (noting, after finding that the defendant had failed to prove by clear and convincing evidence that no reasonable juror could convict the defendant, "[f]or the purpose of completeness and for the purpose of review should an appellate court determine that the proper applicable standard would be different, this court finds that the defendant has shown that he is probably innocent (more likely than not approximating 55%)"). Accordingly, this Court should find the proper standard is a preponderance, not clear and convincing. However, Mr. Tankleff has met both standards. This court may adopt the "probably innocent" standard. Cf. Schlup v. Delo, 513 U.S. 298, 327 (1995) (holding that a petitioner seeking exception to a procedural bar based on the claim that "constitutional violation has probably resulted in the conviction of one who is actually innocent . . . must show that it was more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.") But see Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003) (en banc) (petitioner must "make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment"); Miller, 700 A.2d at 1130-31 (petitioner must show by clear and convincing evidence that he is actually innocent and that no reasonable fact finder would find the petitioner guilty).

to collect in the weeks before he was gravely injured. As Steuerman testified at Mr. Tankleff's trial, he thought that Seymour felt he "owned one-half of" Steuerman. Trial Tr. at 998. Their business relationship had deteriorated. Arlene had indicated that she was frightened of Steuerman. Falbee 12/9/04 at 149-50, 153. A copy of a letter Seymour wrote to Steuerman demanding his money back was in plain view on Seymour's desk after the murders. Id. at 156, 160-61. After the Tankleffs' deaths, Steuerman ceased paying his debt, and, as a result of their deaths, Steuerman gained the ability to start new business ventures without having to share the proceeds with them. Id. at 189-90.

Second, Jerry Steuerman had the opportunity to orchestrate the murders. Steuerman was the last person to leave the poker game at the Tankleffs' home that broke up around 3:00 a.m. the morning of the murders. Trial Tr. at 634, 710-13. That was just three hours before Mr. Tankleff discovered the bodies of his parents, and evidence at trial suggested that the assaults may have occurred at about 3:00 a.m.[45] In addition, Harris said that there was no guard on duty when he, Kent, and Creedon drove into Belle Terre. Jeffrey Ciulla testified at the hearing that according to the constable log book (introduced into evidence at the hearing) there was no guard on duty from 2:10 a.m. until the "911" call was placed from the Tankleff residence. Ciulla, 12/16/04 at 591-94. At trial, Constable Hines testified that he did not come on duty until 4:00 a.m., but that he went home to change his shirt when he realized how cold it was out and was at home when the "911" call came in. Trial Tr. at 400.

Third, Jerry Steuerman had the means, as he was not afraid to enlist others to harm persons he thought deserved to be harmed. Between the time of the Tankleff murders and Mr. Tankleff's trial, while Mr. Tankleff continued to assert his innocence and implicate Steuerman, according to a sworn affidavit from Creedon the following occurred: Todd Steuerman, who Creedon described as a cocaine dealer, approached Creedon with an offer from Jerry Steuerman—Steuerman wanted Creedon to cut Marty Tankleff's tongue out of his mouth and wanted someone "whacked" for $10,000, People's Report at A30; Creedon declined the Steuermans' offer, id.; the following day, Todd Steuerman shot Creedon in the arm, id. at A31; following the shooting, Steuerman offered Creedon $10,000 not to press charges against Todd, Creedon spoke with Steuerman to reject the offer, and Steuerman told Creedon "You're fucking with the wrong people," Memorandum in Support of Defendant Exhibit 4.[46] When Steuerman first started in the bagel business, he hired members of the Hell's Angels to inflict violence on members of a union that were picketing his store. The Court heard Bruce Demps testify that, while he was in prison, he heard that a guy was "messing" with his girlfriend, Todd Steuerman called Jerry Steuerman, and Steuerman sent someone to visit the guy and settle the matter. Demps 7/26/04 at 56-57. Demps also testified that, while Todd was incarcerated, he learned that

[45] Ehel Curley, the first medical personnel to examine Arlene, testified that the blood on Arlene's head, forearm, and nightgown was dry. Trial Tr. at 471-472. Similarly, a technician assisting Seymour testified about a golf ball size clump of coagulated blood that fell from Seymour's body, making a loud noise when it hit the floor. Trial Tr. at 487-488. The dried blood suggested a time of death hours earlier than the 6:00 a.m. approximate time indicated in Mr. Tankleff's confession.

[46] Creedon made these statements in sworn affidavits in 1989 and 1990. In December 2003, he told the District Attorney's office under oath that the offer was conveyed to him by Todd Steuerman, not Jerry, and that the references to Jerry in the earlier affidavit were a "mistake." Creedon swore under oath that he had never spoken with Jerry Steuerman. People's Report at A35. The Court heard Covias, Creedon's then-girlfriend, testify that she had heard that Jerry Steuerman had offered Creedon money to cut out Mr. Tankleff's tongue, Covias 7/20/04 at 91, and Gottlieb, Mr. Tankleff's trial attorney, testify that Creedon had said that Steuerman had called Creedon to offer him $10,000 to drop the charges against Todd, Gottlieb 7/22/04 at 23.

a prison guard was having an affair with his wife, and that Jerry Steuerman sent some people to visit the guard, who was later seen with two black eyes and bruises. Id. at 59-60. The Court heard Scott Glass testify that he had told Mr. Tankleff's attorneys that, in the summer of 1988, Jerry Steuerman asked Glass to harm or intimidate Seymour Tankleff. Glass refused, but passed the job on to a friend, Joseph Creedon. Glass 12/6/04 at 10-11. (The Court heard Callahan testify that, in 1990 or 1991, Glass had told him the same facts about the Steuermans' offer. Callahan 12/21/04 at 737-40.) Creedon, a violent criminal who already associated with Todd Steuerman as the enforcer for Todd's drug trade, Creedon 7/20/04 at 7-8, and had already met with both Jerry and Todd Steuerman at least twice, accepted. Glass 12/6/04 at 10-11; Callahan 12/21/04 at 740.

Fourth, Joseph Graydon testified that he and Creedon made a first attempt to kill Seymour Tankleff. After being hired by Steuerman, Creedon recruited Graydon to go to Strathmore Bagels with him to kill one of the partners for a split of $25,000. In June 1988, Creedon and Graydon went to Strathmore Bagels to murder the partner (Graydon later realized the partner was Seymour), but he was not there. Graydon 8/3/04 at 12-15, 44-47, 70-71. (Instead, they robbed the store.) After Graydon refused to help Creedon with the same job, Graydon did not see much of Creedon. But in 1992 or 1993, Creedon told Graydon that he had gotten away with killing a couple of people. Id. at 17-18.

Fifth, Ram testified that, on September 6, 1988, the night before the early-morning murders of the Tankleffs, Creedon tried to recruit him to help Creedon "rough up" some guy's business partner who lived in Belle Terre—"a Jew in the bagel business." Ram turned Creedon down. Ram 10/26/04 at 9. But Peter Kent and Glenn Harris went with Creedon. Id. at 13. (All three men have lengthy criminal records.) Lemmert (a priest), Salpeter (Mr. Tankleff's investigator), and Ram (Harris' friend) testified about what Harris had told them happened that night: Harris drove Kent and Creedon to a house in Belle Terre, he parked the car, Creedon and Kent entered the Tankleff's home through the rear; later, Creedon and Kent ran out of the house and returned to the car visibly agitated and covered in blood; a short distance down the street, Creedon got out of the car and threw a pipe into the woods[47]; the next morning, Harris concluded that the Creedon and Kent murdered the Tankleffs.[48] Lemmert 7/27/04 at 10-16; Salpeter 7/19/04 at 35, 40, 114-15, 195; Ram 10/26/04 at 13-16.

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[47] A pipe was located that corroborates Harris' statements. See supra Statement of Facts, at 18.

[48] Not only did Harris tell these individuals his story, but he also swore to it under oath in an affidavit, Memorandum in Support of Defendant Exhibit 2, relating the following: Harris drove Kent and Creedon, at Creedon's direction, to a house in Belle Terre the night the Tankleffs were killed; Creedon and Kent went around the home into the backyard; approximately, ten to thirty minutes later, the two men returned to the car, Creedon carrying gloves, and Harris drove them away; and, later that morning, Harris observed Kent burning his blue jeans and sweatshirt.

Harris took a polygraph test to confirm his statements regarding the night the Tankleffs were murdered. The truthfulness of his statements was verified by his polygraph examination. See id.

Moreover, the District Attorney's office (unethically after this Court appointed counsel for him) had two cooperating witnesses surreptitiously record conversations with Harris in an effort to show that Harris' statements were untrue. In both partial transcripts revealed by the District Attorney's office, Harris stood by the truth of his sworn statement. People's Report at 21, 22, 24, 34-35, 38. Harris also repeated to both witnesses the five key assertions: (1) Harris drove to a residence in Belle Terre the night of the Tankleff murders, id. at 23, 28-29; (2) Joseph Creedon and Peter Kent were passengers in his car, id.; (3) Creedon and Kent got out of the car at the Tankleff residence, id. at 24, 29; (4) when Creedon and Kent returned to the car, Harris drove them back, id. at 24,

Sixth, the Court heard testimony that Creedon admitted to Karlene Kovacs, Kovacs 7/21/04 at 10, 15-16, Gaetano Foti, Foti 7/26/04 at 8-9, 15-16, and Billy Ram, Ram 10/26/04 at 16-17, that he killed the Tankleffs.[49] In addition, Kent, Kent 12/9/04 at 309, and Guarascio, Guarascio 7/22/04 at 57, testified before this Court that Creedon was capable of murder.

Seventh, one week after Arlene Tankleff was murdered and Seymour Tankleff was grievously injured, Jerry Steuerman feigned his own death and fled New York. But, before he fled, he withdrew $10,000 from his and Seymour's joint bank account. Trial Tr. at 1190-119, 1142-1145. Steuerman was later found living under an alias, having shaved his beard and changed his hair weave.

Eighth, rootless hairs were found on Arlene's and Seymour's bodies, and in Arlene's hand. This hair did not match Mr. Tankleff's. Jerry Steuerman had a hair weave made from rootless hair. But because Steuerman had his hair weave "serviced" while he was hiding out under a false identity in California, the hair in the hair weave had been replaced and the police lost their opportunity to get a sample of Steuerman's weave as it had been on the date of the attacks.

Finally, the Court heard testimony from Neil Fisher that Jerry Steuerman admitted killing two people, Fischer 7/27/04 at 43-44, as well as testimony from Salpeter that Steuerman had told two cooks at his Florida bagel store that he had slit the Tankleffs' throats, Salpeter 7/19/04 at 28-30. The Court also heard testimony from Demps that Todd Steuerman had stated on two different occasions that Mr. Tankleff did not kill his parents, but that Steuerman had a "beef" with the Tankleffs and hired someone to murder them. Demps, 7/26/04 at 54-55, 57.

In addition to all this evidence that this crime gang killed the Tankleffs at the behest of Jerry Steuerman, the basis for Mr. Tankleff's conviction, his "confession," which he immediately disavowed, has been shown to be unreliable and, in fact, may be evidence of his innocence. This Court heard the notable testimony of Dr. Ofshe (and read Dr. Leo's affidavit, Memorandum in Support of Defendant Exhibit 5, and Dr. Ofshe's declaration, id. Exhibit 6), explaining four crucial points regarding Mr. Tankleff's "confession": (1) why an innocent man could decide to confess to murders he did not commit; (2) why jurors must hear testimony from an expert on false confessions in order to overcome their bias that innocent persons do not confess; (3) that Mr. Tankleff's "confession" appears to be false; and (4) that the factual errors in Mr. Tankleff's confession may demonstrate his innocence. If the jury had had the benefit of these experts' testimony, no reasonable juror could have convicted Mr. Tankleff. In other words, the undermining of the sole piece of evidence against Mr. Tankleff by expert witnesses alone is enough to show by clear and convincing evidence Mr. Tankleff's actual innocence.

In Amrine, the Supreme Court of Missouri found "[i]n light of the resulting lack of any remaining direct evidence of Amrine's guilt from the first trial, Amrine has already met the clear and convincing evidence standard . . . ." 102 S.W.3d at 544. "Amrine was convicted solely on the testimony of three fellow inmates, each of whom have now completely recanted their trial testimony." Id. at 548. Like in Amrine, "[t]his case presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction." Id. Mr. Tankleff has

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30; and (5) afterwards, Harris saw clothes being burned, id. at 22, 30. At the hearing before this court, Harris asserted his Fifth Amendment rights.

[49] The District Attorney acknowledged that Creedon had admitted to at least four witnesses on more than four different occasions that Creedon committed the Tankleff murders. People's Report at 60. And the District Attorney concluded that "beginning on or about Easter Sunday 1991 and continuing for years after, Creedon stated to several persons that he had something to do with the Tankleff murders. [While Creedon denied to the District Attorney that he had ever made such an admission to anyone,] his denials are not credible." Id.

consistently maintained his innocence and Dr. Ofshe and Dr. Leo have now explained Mr. Tankleff's "confession." It is as if the only true witness against Mr. Tankleff, himself, has recanted. As a result, there remains no direct evidence of Mr. Tankleff's guilt from his trial, and he has met the standard of clear and convincing evidence. "[C]onfidence in his conviction and sentence are so undermined that they cannot stand and must be set aside." Id. at 549.

But, it is not necessary for the Court to rely on this expert evidence alone. Applying the clear and convincing standard of proof to the entire record in this case, Mr. Tankleff has shown his actual innocence and that no reasonable juror could convict him of the murders of his parents in light of, not only the expert evidence regarding his false confession, but also the wealth of interlocking corroborated evidence that other people killed the Tankleffs. See generally Statement of Facts, infra.

As in Miller, in which the Supreme Court of Connecticut found the habeas petitioner had shown his actual innocence, Mr. Tankleff has shown by clear and convincing evidence that third parties committed the murders of his parents and thus no reasonable juror could convict him. See 242 Conn. at 807. In Miller, the defendant was convicted of two counts of first-degree assault. Id. at 747-748. Unsuccessful on direct appeal, he petitioned for a writ of habeas corpus, claiming factual innocence of the charges. Id. at 748-753. At the habeas hearing, the court heard testimony from a Mr. Johnston that he was the perpetrator of the assaults, not the defendant. Id. at 758-759. The court also heard other testimony regarding physical evidence, the history of Johnston's statements regarding the assaults, identification evidence, and circumstantial evidence linking Johnston to the crimes. Id. at 759. The court acknowledged that "Johnston's testimony was not fully consistent with the evidence presented at the original criminal trial or with the testimony" of the victim. But the habeas court found, and the Supreme Court of Connecticut agreed, that the "mosaic of evidence clearly and convincingly established the petitioner's innocence." Id. at 806. Here, the mosaic of evidence, described above, clearly and convincingly establishes Mr. Tankleff's innocence. There is the evidence explaining false confessions and why Mr. Tankleff's confession was false. There is the evidence of Glenn Harris' multiple statements, admitting to unwittingly being the getaway driver for the Tankleff murders, which is supported by, inter alia, his history of statements to others regarding the murders and corroborated by, inter alia, Ram's testimony and statements made by Creedon to other witnesses regarding the murders. There is physical evidence (for example, the recovered pipe) supporting that third parties committed the crimes, and there is no physical evidence that Mr. Tankleff committed the crimes. There is a history of Creedon's statements to others regarding his murdering the Tankleffs. Finally, there is a plethora of circumstantial evidence and testimony from co-conspirators supporting that Jerry Steuerman, Joseph Creedon, Peter Kent, and Glenn Harris planned and committed the murders. This mosaic of evidence clearly and convincingly establishes Mr. Tankleff's innocence.

In Cole, the court concluded that the defendant had failed to show he was actually innocent of manslaughter in the first degree by the clear and convincing evidence standard, but noted that the defendant had shown that he was more likely than not innocent. 1 Misc. 3d at 545. At trial, two eyewitnesses identified the defendant as the shooter and one eyewitness and an alibi witness testified that the defendant was not the shooter. Id. Defendant brought a petition for post-conviction relief pursuant to C.P.L. § 440, and the court ordered a hearing. During the hearing the defendant called four alleged eyewitnesses, all of whom had extensive criminal records, who testified that the defendant was not the shooter, and presented an audiotape and videotape recantation of one of the prosecution's eyewitnesses from trial. Id. at 546. In favor of

the defendant's actual innocence claim, the court noted that the descriptions of the shooter given to the police at the crime scene did not match the defendant's appearance and the stories of the new witnesses were consistent with each other and with the defendant's trial witness. Id. at 544-545. Weighing against the defendant's actual innocence claim, the court noted that the new witnesses' credibility was questionable; the time line of the new witnesses was inconsistent with documentary evidence and police officer testimony at the hearing, and some of the new witnesses were contradicted by the police testimony; and there was evidence that the defendant or his brother threatened or bribed certain witnesses. Id.

Clearly, as described above, Mr. Tankleff has a much stronger case than the Cole: inter alia, there were no eyewitnesses or physical evidence against Mr. Tankleff, and at the § 440 hearing Mr. Tankleff presented evidence of Jerry Steuerman's motive and opportunity to kill the Tankleffs; evidence of Jerry's consciousness of guilt; evidence connecting Jerry and Todd Steuerman to a crime gang, including Creedon, Kent, Harris, Ram, and Glass; evidence that members of that crime gang committed the murders, including numerous admissions by members of that gang and Jerry to involvement in the Tankleff murders; and evidence that Mr. Tankleff's "confession," the only evidence against him at trial, is unreliable. If the court in Cole found that the defendant had shown that he was more likely than not factually innocent, then Mr. Tankleff passes the clear and convincing test with room to spare.

Through this mosaic of clear and convincing evidence, Mr. Tankleff has shown that no reasonable juror could convict him of murdering his parents. In other words, he has shown that he is actually innocent and therefore his conviction and continued incarceration violate the New York State Constitution. Mr. Tankleff's conviction, therefore, must be vacated.

B. Mr. Tankleff's New Evidence Satisfies the Requirements of CPL § 440.10(1)(g) and, Accordingly, the Court Should Vacate His Conviction and Order a New Trial

In the alternative, this Court should set aside the judgment of conviction pursuant to C.P.L. § 440.10(1)(g) because Mr. Tankleff's new evidence is legally and factually sufficient to warrant a new trial. C.P.L. § 440.10(1)(g) provides that:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

People v. Salemi, 309 N.Y. 208 (1955), sets out the criteria for determining whether evidence is "newly discovered" for the purposes of C.P.L. § 440.10(1)(g): (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since trial; (3) it could not have been discovered before trial through due diligence; (4) it must be material to the issue; (5) it must not be cumulative; and (6) it must not be merely impeaching. The determination whether the requirements of the statute are satisfied and the power to vacate a judgment upon the

ground of newly discovered evidence and to grant a new trial rest in the sound discretion of the Court. E.g., id. at 215; People v. Baxley, 84 N.Y.2d 208, 212 (1994). "This discretion has been described as 'unlimited.'" Cole, 1 Misc. 3d at 535 (quoting People v. Baxley, 84 N.Y.2d 208, 212 (1994); People v. Crimmins, 38 N.Y.2d 407, 415 (1975)).

Mr. Tankleff has presented this Court with new evidence that is legally and factually sufficient to meet the newly discovered evidence standard. This evidence includes (1) new sworn statements and testimony indicating that others killed the Tankleffs and (2) new expert testimony indicating that Mr. Tankleff's "confession" was false.[50] Each of these pieces or sub-groups of newly discovered evidence is sufficient on its own to warrant a new trial for Mr. Tankleff. And, taken as a whole, it is undeniable that this web of newly discovered evidence is sufficient. Also, taken in light of the fact that Mr. Tankleff's conviction was based almost exclusively on his false confession, this evidence clearly is material and would change the result of his trial.

1. New Sworn Statements and Testimony Indicating That Others Killed the Tankleffs

Mr. Tankleff presented this Court with new evidence that others killed his parents; among others, this evidence includes: (a) Harris' sworn statements that he was involved in the Tankleffs' murders, as well as the testimony of Salpeter, Salpeter 7/19/04 at 35, 114-15, 195, Lemmert, Lemmert 7/27/04 at 10, and Kelly (manager of a sober house that Harris resided in for a period of time), Kelly 12/20/04 at 646-47, regarding Harris' similar statements to them; (b) Foti's, Ram's, and Kovacs' testimony that Creedon admitted involvement in the Tankleffs' murders; (c) Graydon's testimony regarding his participation in Creedon's first attempt to kill Seymour Tankleff, Creedon's statements to him about being hired to perform the hit, and Creedon's admission to him later that he had gotten away with a couple of murders; (d) Ram's other testimony regarding the events of the night before the Tankleffs' murders; (e) Demps' testimony regarding Todd Steuerman's statements to him about Steuerman's involvement in the Tankleffs' murders and Mr. Tankleff's innocence; and (f) Fischer's testimony that Steuerman admitted that he had killed two people.

a) Harris' sworn statements and the testimony of Salpeter, Lemmert, and Kelly regarding Harris' statements to them

Harris' affidavit and the testimony of Salpeter, Lemmert, and Kelly regarding Harris' statements to them indicate that Harris was an eyewitness to, and participant in (albeit unwittingly), the Tankleffs' murders. This affidavit and testimony are new evidence that satisfy the Salemi criteria, listed above. See People v. Wong, 784 N.Y.S.2d 158, 160 (App. Div. 3d Dept. 2004) (finding that, inter alia, admissions by a third party to various other people that he committed the murder for which the defendant stood convicted was new evidence). As such, this court should vacate Mr. Tankleff's conviction and order a new trial.

With respect to the first Salemi criterion, Harris' affidavit and statements will clearly "probably change the result" of Mr. Tankleff's trial if a new trial is granted. (This is especially true in Mr. Tankleff's case because there was no physical evidence linking him to the crimes, and he was convicted almost exclusively on the basis of his "confession.") As part of this criteria, the new evidence must be admissible at trial. E.g., People v. Boyette, 201 A.D.2d 490, 491 (1994). Harris' affidavit and his statements to Salpeter, Lemmert, and Kelly, if they are

[50] See Statement of Facts, Section X, infra.

offered for their truth, will be hearsay, but they will be admissible at trial under (1) the exception for statements against penal interest or (2) Chambers v. Mississippi, 410 U.S. 284 (1973).

A statement is admissible as a declaration against penal interest if it satisfies four elements: (1) the declarant is unavailable to testify; (2) the declarant was aware at the time he made the statement that it was contrary to his penal interest; (3) the declarant had competent knowledge of the underlying facts; and (4) there is sufficient evidence independent of the declaration to assure its trustworthiness and reliability. See, e.g., People v. Thomas, 507 N.Y.S.2d 973, 975, 500 N.E.2d 293 (1986). Statements offered by a defendant as exculpatory evidence are held to a more lenient standard of scrutiny than those offered by the prosecution as inculpatory evidence. See, e.g, id. "Moreover, where a statement forms a critical part of the defense, due process concerns may tip the scales in favor of admission." People v. Darrisaw, 206 A.D.2d 661, 664 (3d Dept. 1994) (citing Chambers, 410 U.S. at 302). The Third Department has noted that a prosecutor's refusal to grant immunity "bears profoundly" on the correctness of a ruling refusing to permit introduction of an affidavit, exculpatory to the defendant, by an individual who invoked his Fifth Amendment right at trial. Id.

Harris' statements meet the standard for admissibility as statements against his penal interest. Harris was unavailable at the hearing because he invoked his Fifth Amendment privilege against self incrimination, id. (citation omitted); presumably, he will be unavailable at a new trial for the same reason.[51] 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 murders; he made the admissions under oath to Salpeter, whom he believed would take this information to the prosecuting authorities, see, e.g., Morales v. Portuondo, 154 F. Supp. 2d 706, 726 (S.D.N.Y. 2001) (discussing the declaration against penal interest exception under New York law); and he must have realized that disclosure to Salpeter and Kelly could lead to criminal prosecution. He was personally involved in the murders and therefore had competent knowledge of the facts.

Finally, sufficient evidence exists independent of Harris' declarations to ensure their trustworthiness. With respect to this last requirement, if a declaration against penal interest is offered by the defendant as exculpatory evidence, the 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). Here, 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 People v. Fonfias, 204 A.D.2d 736, 423 (2d Dept. 1994) (noting that even though the declarant recanted his confession to the crime that defendant was on trial for there was still sufficient indicia of reliability to allow the jurors to hear the evidence and assess credibility). On at least six separate occasions to six different listeners,[52] Harris admitted to others that he was involved in the Tankleffs' murders. "'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

[51] Harris should testify at the new trial. As discussed, see note 22, supra, Harris' invocation of his Fifth Amendment rights was improper. Further, the court at the new trial should compel Harris' testimony, even if his Fifth Amendment assertion were otherwise proper. See United States v. Bahadar, 954 F.2d 821, 825-26 (2d Cir. 1992) (stating that the court should require the government to grant immunity where its own overreaching caused the witness to invoke the Fifth Amendment, the witness has material, exculpatory testimony, and the testimony cannot be obtained through another source). Indeed, this Court erred in failing to order immunity for Harris as requested by Mr. Tankleff's counsel.

[52] The six listeners are Salpeter, Ram, Lemmert, Matero, and the District Attorney's two confidential informants.

statements. Additionally, his statements are consistent with the crime (for example, Harris stated that Creedon had gloves and the perpetrator wore gloves) and corroborated by, inter alia, Creedon's admissions of guilt. Accordingly, 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, even if Harris himself fails to testify.

In the alternative, the affidavit and statements will be admissible based on the due process requirements described in Chambers. See, eg., People v. Robinson, 89 N.Y.2d 648 (1997) (allowing defendant, on due process grounds, to introduce grand jury testimony of unavailable witness, even though such testimony did not fall within a recognized hearsay exception); People v. James, 242 A.D.2d 389 (2d Dept. 1997) (same); People v. Esteves, 152 A.D.2d 406, 549 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); see also 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.")[53] "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 (SCt 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 (SCt NY Cty 1999) (citing Chambers, 410 U.S. 284). Harris' affidavit and statements to others will be admissible at Mr. Tankleff's new trial because they are vital to Mr. Tankleff's defense and bear sufficient indicia of reliability, Harris is unavailable, and failure to admit them would violate his right under the Due Process Clause of the Fourteenth Amendment. Robinson, 89 N.Y.2d at 694; see also Morales, 154 F. Supp. 2d at 725-727 (finding that similar statements to the one in this case would be admissible under New York law).

Harris' statements also satisfy the remainder of the Salemi criteria. Harris' involvement in the murders was discovered after Mr. Tankleff's trial. His statements and involvement could not have been discovered before the trial; neither Mr. Tankleff nor the police and prosecution learned of Harris' involvement before 2002, and the delay was not "unreasonable." 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 (N.Y. Sup. Ct. 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.") Harris' statements are clearly material to the only issue at trial, and not cumulative and not merely impeaching to the trial evidence.

Finally, CPL § 440.10(1)(g) requires that a motion to vacate based on new evidence be made with due diligence after the discovery of such new evidence. Any delay by Mr. Tankleff in

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[53] Harris' statements do meet a recognized hearsay exception in the Federal Rules of Evidence. They are admissible under Rule 807, the exception for residual hearsay. As statements of a co-conspirator in the course of and in furtherance of a conspiracy, they have trustworthiness that distinguish them from ordinary hearsay. Cf. Federal Rule of Evidence 807(d)(2)(E) (stating that if one co-conspirator is a defendant, the statement is not hearsay at all).

bringing his motion does not constitute a lack due diligence and did not prejudice the government. People v. Maynard, 183 A.D.2d 1099, 1103-1104 (3d Dept. 1992) (holding that two-year delay did not constitute a lack of due diligence). Between the time that Mr. Tankleff's team became aware of Harris (January 2002) and the time of the filing of Mr. Tankleff's motion before this Court (October 2003), Mr. Tankleff investigated Harris' new evidence by locating and interviewing additional witnesses, gave Harris a polygraph, which he passed, and provided the information to the District Attorney's office for investigation. Any delay was due to the exercise of diligence on Mr. Tankleff's part.

Harris' affidavit and the testimony of Salpeter, Lemmert, and Kelly regarding his involvement in the Tankleffs' murders meet the Salemi criteria and satisfy all of the prerequisites of CPL § 440.10(1)(g). It is, therefore, "new evidence" within the meaning of the statute and this Court should vacate Mr. Tankleff's conviction and order a new trial.

b) Foti's, Ram's, and Kovacs' testimony that Creedon admitted his involvement in the Tankleffs' murders

Foti's, Ram's, and Kovacs' testimony that Creedon admitted to each of them that he committed the Tankleffs' murders[54] is also new evidence for similar reasons. See Wong, 784 N.Y.S.2d at 160 (finding that, inter alia, admissions by a third party to various other people that he committed the murder for which the defendant stood convicted was new evidence). This evidence meets the Salemi criteria, listed above, and the Court should vacate Mr. Tankleff's conviction and order a new trial.

As for the first criterion, this testimony regarding Creedon's admissions to involvement in the Tankleffs' murders clearly "will probably change the result" of Mr. Tankleff's trial if a new trial is granted. (Note again that Mr. Tankleff was convicted almost exclusively based on his "confession.") If offered for their truth, then these statements are hearsay. However, these statements will most likely be admitted based on the Mr. Tankleff's due process rights, described above. "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 (SCt NY Cty 1999) (citing Chambers, 410 U.S. 284).

This testimony is almost identical to the testimony 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 made statements to each one on three separate occasions that he was responsible for the murder for which defendant was on trial. Chambers, 410 U.S. at 298. This third party was available and testified in court, but denied having any involvement in the murder. Id. at 291, 301. The Court noted that the "testimony rejected by the court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the 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

[54] Foti testified that on two occasions Creedon admitted to him having committed the Tankleffs' murders. Foti, 7/26/04 at 7-9, 15-16. Ram testified that, during a conversation he had with Creedon, Creedon agreed with Ram that Creedon should be in jail for the murders. Ram, 10/26/04 16-17. Kovacs testified that Creedon told her that, after hiding out in the bushes outside of the Tankleffs' home, he was there with a Steuerman when the Tankleffs were murdered and that they had to get rid of their clothes, and he was talking about moving out of town. Kovacs, 7/21/04 10, 15-16, 49.

case, the testimony of Foti, Ram, and Kovacs that Creedon admitted to them his involvement in the Tankleffs' murders bears similar assurances of trustworthiness. Creedon made these admissions separately to each of these three 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, these statements would plainly be admissible.

As for the rest of the Salemi factors, the evidence was discovered since trial and could not have been discovered before the trial by the exercise of due diligence because Creedon did not make the statements until after the trial. The testimony regarding Creedon's admissions is clearly material to the only issue at trial, and not cumulative and not merely impeaching to the trial evidence.

Finally, as for CPL § 440.10(1)(g)'s requirement that a motion to vacate based on new evidence be made with due diligence after the discovery of such new evidence, this requirement is clearly met for Foti and Ram for the reasons discussed above with respect to Harris' statements. The District Attorney did not discover that Foti had this information regarding Creedon until October 2002, and Salpeter discovered Ram as a result of Harris' statements. This inquiry is a little more complicated with respect to Kovacs, who signed an affidavit recounting Creedon's admission to her that had been prepared by Mr. Tankleff's trial attorney at the time and alerted the Suffolk County authorities in 1994.[55] CPL § 440.10(1)(g) does not set forth a bright-line time limit for filing, but merely requires due diligence. The prosecution was not prejudiced by the delay in filing based on Kovacs' testimony. See 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."); see also 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"). This Court should consider the practicalities of bringing a § 410.10 and the relative strength of Kovacs' testimony in light of Ram's and Foti's, and conclude that the delay should not prohibit the service of justice.

Foti's, Ram's, and Kovacs' testimony regarding Creedon's admissions to his involvement in the Tankleffs' murders meet the Salemi criteria and satisfy the prerequisites of CPL §

[55] As discussed below in text, while each piece of evidence or sub-group of evidence is sufficient to warrant vacating Mr. Tankleff's conviction, the Court must also consider the evidence in the aggregate. The Court similarly should consider the cumulative effect of the evidence in making its due diligence determination. Mr. Tankleff did not bring a CPL § 440.10(1)(g) motion based on Kovacs' testimony in 1994 because that testimony, standing alone, did not meet the Salemi criteria. However, when assessed in the light of the other new evidence, in particular Foti's and Ram's testimony, Kovacs' testimony clearly meets the Salemi criteria. Once Mr. Tankleff had sufficient evidence in the aggregate to show that such evidence would change the result of his trial, Mr. Tankleff moved promptly to bring that evidence before the Court. The Court should not adopt a rule requiring a petitioner to bring any evidence, however weak, before the court *ad seriatim* in multiple CPL § 440 motions for fear of being accused of not exercising due diligence should additional evidence become available in the future. Rather, the Court should encourage a petitioner to wait until he has a body of evidence that *in toto* could fairly be described as meeting the Salemi test. By considering the cumulative effect of the evidence in making the due diligence determination, the Court will in fact be encouraging both efficiency and diligence.

440.10(1)(g). Their testimony is therefore "new evidence" within the meaning of the statute and, accordingly, this Court should vacate Mr. Tankleff's conviction and order a new trial.

c) Graydon's testimony regarding his participation in Creedon's first attempt to kill Seymour, Creedon's statements to him about being hired to perform the hit, and Creedon's admission to him later that he had gotten away with a couple of murders

This Court heard testimony from Graydon that: (1) in June 1988, he and Creedon went to Strathmore Bagels to murder Seymour Tankleff but only robbed the store because Seymour was not there; (2) Creedon told Graydon that Creedon was hired by one business partner of Strathmore Bagels to kill the other business partner; and (3) Creedon later (in 1992 or 1993) admitted to Graydon that he had gotten away with a couple of murders. Graydon 8/3/04 at 52-54. This testimony is new evidence that satisfies the Salemi criteria, listed above. Accordingly, this Court should vacate Mr. Tankleff's conviction and order a new trial.

As for the first Salemi criterion, Graydon's testimony meets the "will probably change the result" of Mr. Tankleff's trial standard. Graydon's testimony that he and Creedon robbed Strathmore Bagels because the target of their hit was not there will be admissible, as Graydon will testify about events that are relevant and that he was an eyewitness to. Graydon's testimony that Creedon told him that Creedon was hired by one business partner of Strathmore Bagels to kill the other business partner will be admissible because it will not be offered for its truth (*i.e.*, that Steuerman hired Creedon to kill Seymour), but rather it will be offered to show the mere fact that it was made, regardless of its truth, tends to implicate Creedon in the Tankleffs' murders. See, e.g., DeLuca v. Ricci, 194 A.D.2d 457, 458 (1st Dept. 1993) ("'Where the mere fact that a statement was made as distinguished from its truth or falsity, is relevant upon trial, evidence that such statement was made is original evidence, not hearsay.'" (quoting Richardson, Evidence § 203 (Prince 10th ed.)). In the alternative, this testimony, along with Graydon's testimony that Creedon later (in 1992 or 1993) admitted to Graydon that he had gotten away with a couple of murders will most likely be admitted under Chambers, as discussed above with respect to Creedon's admissions to Foti, Ram, and Kovacs. This Court should also note that the statements between Creedon and Graydon are statements between coconspirators (in a conspiracy to harm/murder the Tankleffs for money), which increases their reliability. See, e.g., United States v. Regilio, 669 F.2d 1169, 1176 (7th Cir. 1981) ("The community of interest of the conspirators evidences likelihood of reliability" (internal quotation and citation omitted)).[56]

[56] In support of this testimony's admissibility, this Court can look to the Federal Rules of Evidence for guidance. In federal court, Graydon's testimony would likely be admitted under Federal Rule of Evidence 807 because, among other things, these statements meet the requirements of Rule 807 and are statements between coconspirators made "during the course of and in furtherance of the conspiracy," and such statements carry with them a considerable degree of reliability. Federal Rule of Evidence 807 states, in pertinent part, that "[a] statement not specifically covered by Rule 803 and 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence." The statements offered are not specifically covered by the rules because Mr. Tankleff is not is not a party to the conspiracy, see Fed. Rule Evid. 804, but rather a third-party defendant. The statements are evidence of the material fact that Creedon, along with his gang, was intimately involved in the execution of the Tankleffs. The statements are more probative on Creedon and Graydon's first attempt on Seymour's life than any other evidence. Accordingly, these statements would likely be admitted in federal court under Rule 807. This fact makes this Court's Chambers decision easier. In Chambers, the Court dealt

As for the other Salemi factors, Graydon was discovered after trial and could not have been discovered before trial by the exercise of due diligence; neither Mr. Tankleff nor the prosecution learned of Graydon's existence as a witness until July 2004, and any delay was not "unreasonable." Hildenbrant, 125 A.D.3d at 821 ("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.") Graydon's testimony is material to the only issue at trial—Mr. Tankleff's guilt or innocence—because it tends to show that others, not Mr. Tankleff, committed the murders. His testimony is also not cumulative or merely impeaching to the trial evidence. Finally, there was no delay between the time of discovery of Graydon as a witness and Mr. Tankleff's filing of his CPL § 440.10 motion, as the motion had already been filed.

Graydon's testimony meets the Salemi criteria and satisfies the prerequisites of CPL § 440.10(1)(g). Therefore, it is "new evidence" within the meaning of the statute and this Court should vacate Mr. Tankleff's conviction and order a new trial.

d) Ram's other testimony surrounding the Tankleffs' murders

Besides testifying that Creedon had admitted his involvement in the Tankleffs' murders to Ram, Ram also testified that: (1) Creedon and Kent were together with him the night before the murders; (2) 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; and (3) Harris described to him the events of that night and he told Harris to "keep his mouth shut and stay away" from Creedon and Kent, Ram 10/26/04 at 14. This testimony is new evidence that satisfies the Salemi criteria, listed above. Accordingly, this Court should vacate Mr. Tankleff's conviction and order a new trial.

As for the first criterion, Ram's testimony meets the "will probably change the result" of Mr. Tankleff's trial standard. Ram's testimony regarding Creedon and Kent's whereabouts before the murder will be admissible as relevant and as Ram's first-hand knowledge. And Ram's testimony about Creedon's request that Ram help him physically harm "a Jew in the bagel business," as well as the statements between Ram and Harris regarding the murders, will be admissible because they will not be offered for their truth (*i.e.*, that Creedon wanted to harm this man), but rather to show that these statements were made on the night before and the day after the Tankleff murders. 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)). In the alternative, Ram's testimony regarding Creedon's statement should be admitted under Chambers, for similar reasons to those discussed above with respect to Creedon's admissions to Foti, Ram, and Kovacs. (Note also that Ram's testimony regarding Creedon's statements to Ram, Ram's statements to Creedon, Harris' statements to Ram, and Ram's statements to Harris are statements between co-conspirators, see supra note 56, and are therefore innately more reliable. See, e.g., Regilio, 669 F.2d at 1176.)

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with a Mississippi case and did not discuss the Federal Rules of Evidence, but notably the hearsay at issue would not have been admissible under the Federal Rules of Evidence. As such, we can deduce that Chambers and a defendant's right there under are broader than the federal rules. Accordingly, statements that are admissible under the Federal Rules of Evidence are plainly admissible under Chambers.

As for the other Salemi factors, as discussed above, Ram was discovered after trial and could not have been discovered before trial by the exercise of due diligence; neither Mr. Tankleff nor the prosecution learned of Ram's existence as a witness until after Harris came forward, and any delay was not "unreasonable." Hildenbrant, 125 A.D.3d at 821. Ram's testimony is material to the only issue at trial—Mr. Tankleff's guilt or innocence—because it tends to show that others, not Mr. Tankleff, committed the murders. His testimony is also not cumulative or merely impeaching to the trial evidence. Finally, as for CPL § 440.10(1)(g)'s requirement that a motion to vacate based on new evidence be made with due diligence after the discovery of such new evidence, this requirement is clearly met for the reasons discussed above with respect to Harris' statements.

Ram's testimony meets the Salemi criteria and satisfies the prerequisites of CPL § 440.10(1)(g). Therefore, it is "new evidence" within the meaning of the statute and this Court should vacate Mr. Tankleff's conviction and order a new trial.

e) Demps' testimony regarding Todd Steuerman's statements to him about Steuerman's involvement in the Tankleffs' murders and Mr. Tankleff's innocence

The Court also heard Demps' testimony regarding Todd Steuerman's statements to him about Steuerman's hiring of people to kill the Tankleffs because of Steuerman's debt to them and Mr. Tankleff's innocence. This testimony is new evidence that satisfies the Salemi criteria, listed above. Accordingly, this Court should vacate Mr. Tankleff's conviction and order a new trial.

With respect to the first criterion, this testimony meets the "will probably change the result" of Mr. Tankleff's trial standard. This testimony will likely be admissible under Chambers. As discussed above, "[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." Vasquez, 686 N.Y.S.2d at 634 (citing Chambers, 410 U.S. 284). The statements are sufficiently reliable because Todd repeated them to Demps on two separate occasions, they are corroborated by other evidence (for example, Creedon's admissions), they were against Todd's father's penal interest, and Todd had no motive to lie. Accordingly, the testimony should be admissible at trial in order to safeguard Mr. Tankleff's right to due process. See Seeley, 720 N.Y.S.2d at 317 ("A defendant's constitutional right to present evidence that is exculpatory . . . may require the admission of evidence that would ordinarily be inadmissible."); Qike, 700 N.Y.S.2d at 647 ("A mechanistic application of the hearsay rule is not appropriate to defeat the ends of justice.") (citing Chambers, 410 U.S. at 302)).

As for the other Salemi factors, Todd's statements to Demps were discovered since Mr. Tankleff's trial and could not have been discovered before trial, as they were not made until after trial. This testimony is material to the only issue at trial—Mr. Tankleff's guilt or innocence—as Mr. Tankleff maintained throughout that Steuerman was responsible for the murders of his parents. Additionally, the testimony is not cumulative and not merely impeaching to the trial evidence.

Finally, as for CPL § 440.10(1)(g)'s due diligence requirement, Demps gave an affidavit disclosing Todd's statements to him in 1997.[57] As mentioned above, CPL § 440.10(1)(g) does

[57] As discussed in note 55, supra, the Court should consider new evidence in the aggregate when determining whether this due diligence requirement is met. Here, Mr. Tankleff did not bring a CPL § 440.10(1)(g) motion based

not set forth a bright-line time limit for filing, but merely requires due diligence. The prosecution was not prejudiced by the delay in filing based on Demps' testimony. See People v. Bell, 179 Misc. 2d at 416; see also People v. Farrell, 159 Misc. 2d at 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"). In the interests of justice, the delay and a technical procedural reason should not result in the rejection of Demps' testimony as new evidence.

Demps' testimony meets the Salemi criteria and satisfies the prerequisites of CPL § 440.10(1)(g). Therefore, it is "new evidence" within the meaning of the statute and this Court should vacate Mr. Tankleff's conviction and order a new trial.

f) Fischer's testimony that Steuerman admitted that he had killed two people

Finally, the Court heard the testimony of Fischer that, in late June or early July of 1989, when Steuerman's oven was not working properly, Steuerman was screaming at the oven guy and said something to the effect that he "had already killed two people and that it wouldn't matter to him if he killed him," Fischer 7/27/04 at 45, and that Fischer assumed that Steuerman was talking about the Tankleffs' murders. Id. at 50. This testimony is new evidence that satisfies the Salemi criteria, described above. Accordingly, this Court should vacate Mr. Tankleff's conviction and order a new trial.

As for the first Salemi criteria, Demps' testimony will probably change the result of Mr. Tankleff's trial if a new trial is granted. (This is especially true in Mr. Tankleff's case because there was no physical evidence linking him to the crimes, he was convicted almost exclusively on the basis of his "confession," and he maintained that Steuerman was responsible for the murders.) The analysis here is similar to the analysis regarding Creedon's statements confessing guilt. This testimony, if offered for its truth, is hearsay, but is admissible under Chambers. See, e.g., Robinson, 89 N.Y.2d 648 (allowing defendant, on due process grounds, to introduce grand jury testimony of unavailable witness, even though such testimony did not fall within a recognized hearsay exception); People v. Qike, 700 N.Y.S.2d 640, 647 (SCt Kings Cty 1999). The statement bears indicia of reliability because it was incriminatory and against Steuerman's penal interest to make the admission, he was very angry and did not have time to reflect on what he was saying, and it is corroborated by other evidence (for example, Creedon's admission to Kovacs). Because this testimony is vital to Mr. Tankleff's defense and bears sufficient indicia of reliability, Fischer's testimony will likely be admitted in order to secure Mr. Tankleff's right to due process. See Robinson, 89 N.Y.2d at 634,

As for the other Salemi criteria, Steuerman's statements in front of Fischer were discovered since Mr. Tankleff's trial and could not have been discovered before trial, as they were not made until after trial. This testimony is material to the only issue at trial—Mr. Tankleff's guilt or innocence—as Mr. Tankleff maintained throughout that Steuerman was responsible for the murders of his parents. The testimony is not cumulative and not merely

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on Demps' testimony in 1997 because that testimony, standing alone, did not meet the Salemi criteria. However, when assessed in the light of the other new evidence Demps' testimony clearly meets the Salemi criteria. And, once Mr. Tankleff had sufficient evidence in the aggregate to show that such evidence would change the result of his trial, Mr. Tankleff moved promptly to bring that evidence before the Court. Considering the cumulative effect of the newly discovered evidence in the due diligence determination encourages both efficiency and diligence.

impeaching to the trial evidence. Finally, there was no delay between the time of discovery of Fischer as a witness and Mr. Tankleff's filing of his CPL § 440.10 motion, as the motion had already been filed.

Fischer's testimony meets the Salemi criteria and satisfies the prerequisites of CPL § 440.10(1)(g). Therefore, it is "new evidence" within the meaning of the statute and this Court should vacate Mr. Tankleff's conviction and order a new trial.

2. The New Evidence Is Overwhelming in Light of the Lack of Evidence Against Marty Tankleff

a) At a new trial, Marty Tankleff's confession would be inadmissible

On June 28, 2004, the United States Supreme Court issued an opinion that radically changes the posture of Marty Tankleff's C.P.L. § 440 motion. The Supreme Court ruled in Missouri v. Seibert—on facts essentially identical to those here—that a suspect's confession must be suppressed when it is the product of a two-stage interrogation that renders Miranda warnings ineffective. Missouri v. Seibert, 124 S.Ct. 2601, 2611-2613 (2004) (plurality opinion). Marty Tankleff's confession, introduced at his first trial, was obtained in violation of the Seibert rule. Accordingly, in considering whether Tankleff's new evidence may change the outcome of a new trial, this court must bear in mind that, in light of Seibert, Tankleff's confession would likely be suppressed at that new trial and the new jury would consider the new evidence in the absence of the illegally obtained confession.

(1) The Admission of Marty Tankleff's Inculpatory Statements Violated His Rights Under the New York State Constitution and the Federal Constitution

Under New York State law, it long been illegal to use "question first" tactics in interrogating an in-custody defendant, relying on a Miranda warning inserted somewhere midstream in the interrogation. "[L]ater is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning." People v. Chapple, 38 N.Y.2d 112, 378 N.Y.S.2d 682, 685-86, 341 N.E.2d 243 (1975)

Because there was no break at all in the questioning, let alone one that could conceivably have returned him to a pre-questioning status, it necessarily follows that, if Tankleff was in custody from the time he entered the police station, then both his pre- and post-Mirandized statements were inadmissible under New York law, and failure to suppress them resulted in a violation of his rights under the New York State Constitution.

The definition of "custody" under the New York State Constitution is indistinguishable from that of "custody" under the U.S. Constitution. See People v. Yukl, 25 N.Y.2d 585, 589 (N.Y. 1969). Thus, if Tankleff was in custody from a federal perspective, he was necessarily in custody from a New York State perspective as well.

The question of Marty's pre-warning custody status has been adjudicated by the State courts, People v. Tankleff, 199 A.D.2d 550, 606 N.Y.S.2d 707 (App. Div. 1993), aff'd 84 N.Y.2d 992, 622 N.Y.S.2d 503, 646 N.E.2d 805 (1994), and the Second Circuit Court of Appeals, Tankleff v. Senkowski, 135 F.3d 235, 241 (2d Cir. 1998). The State courts found that he was not in custody prior to the Miranda warnings. As a consequence, his pre-warning

statements were implicitly[58] found to be admissible because, not having been in custody, he was not entitled to Miranda warnings at that time, and his post-warning statements were held admissible because they were made after he had been advised of, and had waived, his Miranda rights.

However, the Second Circuit squarely found that, as a matter of federal Constitutional law, Marty *was* in fact in custody during the period of his interrogation which preceded his being advised of his Miranda rights, and that, as a consequence, the admission of his pre-warning statements was federal constitutional error. "(W)e believe that Tankleff was in custody and hold that he was entitled to the Miranda warnings at some point prior to 11:54 a.m., when he was finally advised of his rights…Tankleff should, therefore, have been advised of his rights as required by Miranda much earlier than he was, and all of the inculpatory statements he made before receiving the warnings should have been suppressed." Tankleff v. Senkowski, 135 F.3d 235, 244 (2d Cir. 1998)

While the individual States are permitted to afford a defendant *more* rights than does the U.S. Constitution, it is axiomatic that they are not permitted to afford him *fewer* rights than does the U.S. Constitution. Moreover, because "in custody" is identical under both a federal and a New York State analysis, the Second Circuit finding as to custody status controls. This Court ought to use the federal holding that he was in custody as the foundation for its evaluation of both his State and federal Constitutional claims as to the admissibility of all of the inculpatory statements. As has been argued above, the fact scenario of Seibert also necessarily and independently implies that Tankleff must be seen to have been in custody well prior to being given Miranda warnings.

Further, in Elstad, which was extant at the time of Tankleff's trial, the defendant was presumed to be in custody *when he was still in his living room with his mother a few steps away*, Elstad at 315, and a police officer was questioning him in a distinctly non-coercive manner. Id. The Elstad Court—as had all the lower courts in question—treated dismissively any suggestion to the contrary, saying, "It has never been remotely suggested that any statement taken from Mr. Elstad without benefit of Miranda warnings would be admissible." Oregon v. Elstad, 470 U.S. 298, 307 (U.S., 1985). If Elstad was in custody, as the State conceded he was, and as he *must* have been if his unwarned admissions were inadmissible under Miranda, Tankleff was a fortiori in custody, and no State Court may make a finding contrary to clearly established law as found by the Supreme Court, even were it permissible for New York courts to disregard the finding of custody by the Second Circuit.

Marty, then, was in custody under New York State law during the entirety of his interrogation, and the 11th hour Miranda warnings afforded him were therefore "too late" under New York State law. The entire "confession" elicited from him, both the pre- and post-warning sections, should therefore have been suppressed, and their admission amounted to a substantive violation of the due process rights afforded him by the New York State Constitution. His conviction must therefore be vacated.

Further, as observed above, even if, contrary to fact, it could still be maintained that he was not in custody prior to the Miranda warnings, the holding in Seibert makes clear that his post-warning admissions cannot possibly be seen as voluntary, given the manifest ineffectiveness of the warnings under such fact scenarios. Thus, minimally, Tankleff's involuntary post-warning

[58] The State courts did not make a distinction between his pre-warning and post-warning statements.

statements should have been suppressed, and failure to do so violated his rights under the New York State Constitution. His conviction must therefore be vacated.

Federal constitutional law affords defendants fewer protections against un-Mirandized custodial interrogations than does New York State constitutional law, in the sense that (unlike New York's law) it does not require virtually automatic suppression of admissions made after Miranda warnings which came at some point after custodial interrogation began. Tankleff v. Senkowski, at 246. Under such circumstances, federal law requires the judge to find whether the circumstances of the pre-warning interrogation were such as to render the post-warning statements ineffective, Seibert, at 2609-2610, which in turn renders the post-warning statements involuntary, Tankleff, at 244-245, thus inadmissible without violence to a defendant's due process rights.

The Second Circuit found that the circumstances present during the pre-warning stages of Marty's custodial interrogation were such as to "barely" avoid having been so coercive as to overbear his free will when he waived his Miranda rights. Thus, under federal law, they were admissible. Tankleff at 245. This holding in turn rendered the original Miranda violation a harmless error, since the wrongly admitted pre-warning statements were brief and substantially the same as those given after the Miranda warnings. Id. In no way, however, was the original finding as to custody status and consequent constitutional error disturbed. It was simply the case that failing to find error in the admission of the post-warning statements, the error that was found was not reversible, under federal law.[59]

The Second Circuit relied for its second holding on Oregon v. Elstad, 470 U.S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985), despite the fact that Elstad issues were never briefed or argued. In Elstad, the Supreme Court found that, rather than directly applying Fourth Amendment "fruits of the poisoned tree" jurisprudence, Seibert at 2610, to fact scenarios involving Miranda warnings given at some point after the onset of custodial questioning, it should instead apply a totality of the circumstances test to determine the "effectiveness" of the late-coming Miranda warnings, which in turn would determine whether or not the post-warning statements were "knowingly and voluntarily made," Elstad at 309.

In Elstad, which the Second Circuit cited as an "easy" case, Tankleff, at 245, n.2, the defendant made brief inculpatory remarks in his living room in the presence of his mother in response to unwarned questions from a police officer. Later, at the police stationhouse, he was advised of his Miranda rights, which he waived, and made a full statement, which he signed. The Elstad Court found that this post-warning admission was fully voluntary, citing the distinctly non-coercive environment in which the first admissions were made, the inadvertence of the failure to warn at that time

Seibert makes clear that the reliance on Elstad in evaluating the circumstances surrounding Tankleff's admissions was misplaced. Seibert has two crucial consequences for Tankleff's claims of federal constitutional violations. First of all, were the federal courts to review Tankleff's Miranda claims today, with the benefit of Seibert, it is absolutely

[59] The Second Circuit suggested that it might well constitute grounds for reversal under State law, however, given New York's "later is too late" stance, and essentially invited the New York courts to reverse on the basis of the custody holding in federal court. Tankleff at 246. The Court of Appeals declined, without an opinion, to entertain a motion for reconsideration on the question, People v. Tankleff, 93 N.Y.2d 1034 (1999). Considering the controlling force of the custody finding by the federal court, this can only have been because jurisdiction did not lie to the Court of Appeals. The motion properly would have been presented in the venue of the trial court, which had the authority to reconsider its admission of the statements in light of the federal finding of custody and consequent error.

inconceivable that his post-warning statements would be seen to be voluntary, thus admissible. It is as if, with Seibert, federal law has "caught up" with New York's more enlightened interpretation of Miranda. Under fact scenarios like Tankleff's, "later" is now understood to be "too late" under federal as well as New York State law. The admission of Marty's post-warning statements therefore constituted a violation of his Fifth and Fourteenth Amendment rights under the U.S. Constitution, and his conviction must be vacated.

Secondly, Seibert has the effect of rendering no longer *federally* harmless the first, *already-found* Miranda violation inherent in the admission of the pre-warning statements. That error was only harmless insofar as the post-warning statements were admissible. Miranda, albeit unknown to the Second Circuit, in fact prohibited the introduction of the post-warning statements, as is now clear through Seibert. Therefore, the first Miranda violation rises from a dormancy as *harmless* error, and can now be seen to be, necessarily, *reversible* error. Standing alone, the already-found constitutional error inherent in the first Miranda violation mandates reversal of Tankleff's conviction. Further, it will be *this* Court's adjudication of Tankleff's federal claim which will be subject, if necessary, to federal review.

(2) Seibert Bans the Procedure Used on Marty Tankleff

In Seibert, police questioned a murder suspect for 30 to 40 minutes without Miranda warnings until she confessed to murder. 124 S. Ct. at 2606 (plurality opinion). The suspect was then given a 20 minute break before she was given her Miranda warnings, asked to waive her rights, and confronted with her pre-warning statements. Id. at 2606. The suspect confirmed her earlier unwarned statements and was charged with first-degree murder. Id. The interrogating police officer explained that he used the following interrogation technique: "question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" Id.

The Supreme Court announced that this two-stage technique of interrogating in successive, unwarned and warned stages violates Miranda and both the pre-warning and post-warning statements must be suppressed. Id. at 2610-2611. As Justice Souter explained: "By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Id. at 2610.

Furthermore, the Court clarified that the rule in Oregon v. Elstad, 470 U.S. 298 (1985), admitting a subsequent statement made after Miranda warnings, did not apply because the police officers had deliberately employed an interrogation technique designed to circumvent Miranda's precepts. Seibert, 124 S. Ct. at 2612 (plurality opinion).[60] Five facts supported this conclusion:

[60] Justice Souter wrote for a plurality consisting of himself and Justices Stevens, Ginsburg and Breyer. Justice Kennedy joined the judgment and authored a concurring opinion in which he "agree[s] with much in the careful and convincing opinion for the plurality" but adds his view that the Seibert rule applies only where the police engaged in the two-stage interrogation procedure intentionally, and not accidentally, and no curative measures were taken. Seibert, 124 S. Ct. at 2614-15 (Kennedy, J., concurring). As discussed in the text, Marty Tankleff's case easily meets Justice Kennedy's requirements for suppression of a confession obtained through the two-stage procedure. There is no dispute that: the interrogation was skillfully designed to elicit a confession; it was no accident that the warnings were not issued until long after the interrogation had become hostile, the detectives had used trickery and deceit, and Marty had finally incriminated himself; and no curative measures were taken. As the Second Circuit held, Marty Tankleff was plainly in custody, well before Miranda warnings were issued. See Tankleff v. Senkowski, 135 F.3d 235, 244 (2d Cir. 1998).

(1) the police officers systematically and exhaustively questioned the suspect at the station house; (2) the substance of the pre-warning and post-warning statements was the same; (3) the second stage of interrogation followed the first in the same location after a pause of only 15-20 minutes; (4) the same police officers questioned Seibert both before and after Miranda warnings were given; and (5) the police officers treated the two stages as one continuous interrogation and did nothing to dispel Seibert's likely misimpression that the second period of questioning was a continuation of the first. Id. at 2612-2613.

The identical illegal interrogation procedure was used on Marty Tankleff, in circumstances even worse than in Seibert on each of these same five key points—that is, in circumstances where it was even more likely that Marty Tankleff "would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." Id. at 2611.

Once at the police station, detectives questioned Marty for more than two hours without interruption in a closed-door, windowless room, and without Miranda warnings. Trial Tr. at 3468-72. The questions concerned every aspect of Marty's whereabouts the night before and morning of the murders and his efforts to render first aid to his father. H.H. at 91; Trial Tr. at 3475-79. During this pre-warning phase of the interrogation procedure, Marty was "subjected to increasingly hostile questioning . . . , during which the detectives [ ] accused him of showing insufficient grief, [and] said that his story was 'ridiculous' and 'absurd'. . . . " Tankleff v. Senkowski, 135 F.3d 235, 244 (2d Cir. 1998).

After approximately two hours of questioning, Detective McCready left the interrogation room and pretended to have a telephone conversation. H.H. at 110-13; Trial Tr. at 2885-87, 3485-86. While Detective McCready was outside the interrogation room, Detective Rein placed his hands on Marty's knees and told Marty that he "couldn't accept" Marty's explanation for the lack of blood on his clothing. Trial Tr. at 2886, 3245-46. When Detective McCready returned, he leaned over Marty, pointed at him, and falsely reported that the hospital had called to say that Marty's father had regained consciousness and had positively identified Marty as his attacker. H.H. at 112-13; Trial Tr. at 2887, 3485-86, 3819-20. The detectives still did not read Marty his Miranda rights.

The detectives continued their ploy, asking Marty if his father was conscious when he "beat and stabbed" him. H.H. at 114; Trial Tr. at 3487. No Miranda warnings were given. Finally, Marty, convinced that his own father accused him of committing the attacks and that the detectives believed he was the attacker, said that the person who had committed the crime needed psychiatric help, and asked if it were possible that he attacked his parents but "blacked out" and had no memory of it or that he was "possessed." H.H. at 115-16; Trial Tr. at 2287-92, 4156. The detectives encouraged this line of thinking, and eventually Marty indicated that "[i]t's starting to come to me." H.H. at 115-16; Trial Tr. at 2887-89, 3487-88. Only then, after more than two hours of station house questioning, did detectives provide Marty his Miranda warnings.

With no break whatsoever in the interrogation, the detectives proceeded to elicit a tale from Marty about his parents' murder, "assisting" Marty by providing information they had gleaned from the crime scene. No one left the room; the door remained closed; the conversation did not ebb through the entire pre-warning/warning/post-warning procedure. Interrogation ceased only when Marty's attorney contacted the police station and insisted that no further questioning occur. Marty's interrogation was not transcribed or recorded, and he did not sign a statement. Trial Tr. at 2910-11, 3364-66.

Every one of the facts important in Seibert was present in Marty Tankleff's interrogation, but worse.

- Seibert was questioned for 30-40 minutes before warnings; Marty was interrogated in a closed-door, windowless room at the station house for more than two hours before warnings.
- Both Seibert's and Marty's pre- and post-warning interrogations covered the same ground. H.H. at 1167-68. Both Seibert and Marty repeated their inculpatory statements after receiving their warnings. Prior to his warnings, Marty suggested that he could have blacked out, or been possessed, and said that the murderer needed psychiatric help. Immediately after the warning, he repeated that "somebody else, another person who was inside of " him did it and he needed psychiatric help.[61] Trial Tr. at 115-16, 123.
- Seibert had a 20 minute break between the pre- and post-warnings. Marty had no break whatsoever.
- The same detectives conducted both the pre- and post-warning phases of the interrogation, in the same room.
- The detectives treated the interrogation as a continuous event, from the pre-warning phase to the post-warning phase, without doing anything to suggest the post-warning phase was different from the pre-warning phase. In fact, the detectives who questioned Marty characterized the questioning as "nonstop." H.H. at 88.

As in Seibert, the detectives blatantly violated Marty's constitutional right to remain silent by strategically and deliberately withholding his Miranda rights until after he started to

[61] The Second Circuit not only held that Tankleff's Miranda rights were violated, but also that the techniques used to elicit the pre-warning confession "barely" failed to render the statements coerced and involuntary.

give a statement. Marty's statements to the detectives were illegally obtained in violation of the Seibert rule.

Courts interpreting Seibert have focused on the calculated and deliberate nature of police efforts to circumvent the Miranda protections in circumstances similar to those present in Marty Tankleff's case. For example, in United States v. Aguilar, 384 F.3d 520, 525 (8th Cir. 2004), the defendant was questioned by two officers for ninety minutes at police headquarters, then given Miranda warnings, and then questioned for another half hour. The defendant had no previous experience with police and had no means to leave the station. The court found this "question first" tactic—deliberately employed by the police—amounted to a violation of Seibert and the confession had to be suppressed. See id. at 527. See also Hill v. United States, 858 A.2d 435, 447 (D.C. 2004) (stating that "mental games" like purposely withholding Miranda warnings are "not to be countenanced" under Seibert, the court held the confession was inadmissible, where defendant was first told he would be charged and that witness had "told [police] what happened," then defendant made inculpatory statements, and then Miranda warnings were administered); United States v. Khan, 324 F. Supp. 2d 1177, 1190 (D. Colo. 2004) (finding Seibert violation and suppressing confession where "question-first, Mirandize-later tactic . . . thwarts Miranda's purpose of reducing the risk that a coerced confession would be admitted."). These cases demonstrate that police officer tactics designed to break a suspect's will before Miranda rights are given—such as the mental games Marty Tankleff endured—render a subsequent statement involuntary and inadmissible.[62]

(3) Seibert Changes The Landscape of Marty Tankleff's New Evidence Claim

The totality of the evidence proves that Marty Tankleff is actually innocent of his parents' murders. Marty Tankleff has presented two alternative claims related to this new evidence—an actual innocence claim, under which no new trial is needed, and a newly discovered evidence claim, under which a new trial may be granted. If the Court reaches the alternative claim—newly discovered evidence—it must assess the probability that a new trial would yield a different result than the first. See People v. Salemi, 309 N.Y. 208, 216 (1955). The Court may not consider Tankleff's confession in conducting this analysis because, under Seibert, his confession would be inadmissible at a new trial.

A new trial will require a new suppression ruling, and, as discussed above, there can be no question that the confession will be ruled inadmissible. Law of the case doctrine presents no hurdle to this outcome because it does not apply when there is a change in controlling law. People v. Williams, 591 N.Y.S.2d 467, 468 (2d Dept. 1992); Ramsay v. Mary Imogene Bassett Hosp., 551 N.Y.S.2d 342, 343 (3d Dept. 1990); Szajna v. Rand, 517 N.Y.S.2d 201, 201-202 (2d Dept. 1987); Imbrici v. Madison Ave. Realty Corp., 99 N.Y.S.2d 762, 764-65 (N.Y. Sup. Ct. 1950) (quoting Commissioner v. Sunnen, 333 U.S. 591, 599 (1948)); accord Pescatore v. Pan American World Airways, Inc., 97 F.3d 1, 8 (2d Cir. 1996). Even if it were applicable, law of the case doctrine is one of judicial discretion and does not prohibit a court from revisiting an earlier decision, for example where there is a change in controlling law. People v. Evans, 94

[62] The Second Circuit held otherwise under Oregon v. Elstad. Tankleff v. Senkowski, 135 F.3d at 245-246. Despite the fact that the D.A. never argued that if there were a Miranda violation, the post-warning statements were tainted. Rather, the D.A. argued Tankleff was never in custody, a position soundly rejected by the unanimous Second Circuit panel. Thus, the Oregon v. Elstad issue was never briefed or argued. Regardless, the Second Circuit obviously did not have the benefit of Siebert in performing its Oregon v. Elstad analysis.

N.Y.2d 499, 503, 727 N.E.2d 1232, 1235, 706 N.Y.S.2d 678, 681 (2000); see Nahl v. Nahl, 576 N.Y.S.2d 388, 390 (3d Dept. 1991) ("[T]he doctrine of law of the case is not inflexible and may be ignored in extraordinary circumstances.") This is particularly true where the doctrine's application, due to an intervening change in controlling law, as presented here, would result in manifest error. See People v. Taylor, 450 N.Y.S.2d 370, 370 (1st Dept. 1982) (Sandler, J., concurring) (finding no "manifest error" where there was no intervening "developments in pertinent legal principles").

To continue to allow the government to rely on Tankleff's confession after Seibert is indisputably manifest error. As Justice Milonas concluded in People v. Taylor:

> Where an injustice has occurred, it would be wrong for this court to adhere to its prior mistakes on the ground of the law of the case. Certainly admitting an illegal confession, which is, as is the situation here, the heart of the people's case, would be "manifest error."

450 N.Y.S.2d at 375 (Milonas, J., concurring). Without Tankleff's confession, there can be no question that a jury considering the new evidence and the remaining trial evidence would have a reasonable doubt as to Tankleff's guilt.

Nor do the previous decisions of the Appellate Division and Court of Appeals concluding that Tankleff was not in custody for purposes of Miranda dictate otherwise. Although lower courts are bound to follow decisions of higher courts, a court may depart from such a decision where there is an intervening change in law. Szajna, 517 N.Y.S.2d at 201-02; United States v. Ekwunoh, 888 F. Supp. 369, 372 (E.D.N.Y. 1995); In re Highland Fin. Corp., 216 B.R. 109, 114 (Bankr. S.D.N.Y. 1997); see Welch Foods, Inc. v. Wilson, 692 N.Y.S.2d 873, 875 (N.Y. App. Div. 4th Dept. 1999) (law of the case may be ignored in extraordinary circumstances). As the Appellate Division has stated: "Were this court to reverse [the Supreme Court] for its bold practicality, we would be unnecessarily subjecting defendant[ ] to the expense of . . . further appeals to obtain a preordained outcome. The law cannot be so unyielding." Welch Foods, Inc., 692 N.Y.S.2d at 875 (quoting Foley v. Roche, 447 N.Y.S.2d 528, 530 (2d Dept. 1982)).

Seibert changes the law of custody in the fact scenario presented in Tankleff's case. Under Seibert, no other conclusion is possible than that Tankleff was in custody during his interrogation. A necessary underpinning of Seibert is that a suspect subjected to the two-stage interrogation procedure is in custody throughout the entire procedure. This is because Seibert rests on the facts presented there—and present in Tankleff's case—that questioning occurred at the station house and there was no break in the questioning, no change of room or detectives, and no indication from the detectives that the post-warning phase was a new interrogation. Under these facts, and in light of Seibert, it is not possible for a suspect to not be in custody before the warnings and magically enter custody at the time of the warnings. Seibert precludes such an outcome. If it were otherwise, police officers could vitiate Seibert's ruling and continue to engage in improper two-stage interrogation by arguing that the suspect was not in custody until Miranda rights were provided.

For essentially the same reasons, the Second Circuit in this very case concluded that Marty was in custody during the interrogation at the police station house. Tankleff, 135 F.3d at 244. The Second Circuit did not go further and find a constitutional violation because of the holding in Oregon v. Elstad, Tankleff, supra, at 244-45, which Seibert expressly finds does not apply where, as here, police officers use a two-stage technique of interrogating in successive, unwarned and warned stages.

Finally, even if this Court were to conclude that the previous decisions of the Appellate Division and Court of Appeals affirming the trial court ruling that Marty Tankleff was not in custody preclude suppressing Marty Tankleff's pre-Miranda statements, at the very least, Seibert dictates that Marty Tankleff's post-Miranda statements are inadmissible at a new trial. At the time of the warnings, the detectives formally "placed" Marty under arrest (although they did not tell him this—there was no indicia of a status change). H.H. at 95, 149-50. It is not disputed that at that time, once Marty Tankleff was warned, he was in custody. Seibert makes clear, however, that the mere giving of Miranda warnings does not necessarily make the post-warning statement admissible. To the contrary, post-warning statements are admissible only if they are "effective enough to accomplish their object." Seibert, 124 S. Ct. at 2612 (plurality opinion); accord id. at 2610 ("The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as Miranda requires.").

Given the similarities between the fact pattern of Seibert and this case, it cannot reasonably be concluded that the Miranda warnings given to Marty Tankleff were effective. If the warnings in Seibert were ineffective, the warnings Tankleff received were ineffective. Just as in Seibert, "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" Seibert, 124 S. Ct. at 2611 (plurality opinion) (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986)). Because the facts cannot reasonably support a conclusion that the Miranda warnings given could have served their purpose, Marty Tankleff's post-Miranda statements would be inadmissible at a new trial. Accordingly, at a bare minimum, this Court must view Marty Tankleff's new evidence in the light that the only "confession" that would be admissible at a new trial is his statement that "it is coming to me" and his suggestions that he may have been possessed or might have blacked out and done it, but not the details the detectives led him through after the Miranda warnings. Of course, because virtually no evidence other than Marty's coerced and illegally obtained confession pointed to his guilt, there can be little credible dispute that he would be acquitted at a new trial where the post-warning statements were suppressed.

b) Even if admissible, at a new trial the confession is undermined by new expert testimony indicating that Mr. Tankleff's "confession" was false

The Court heard the new expert testimony of Dr. Ofshe, described in detail above, indicating that Mr. Tankleff's "confession" appears to be false and that the factual errors in Mr. Tankleff's confession may demonstrate his innocence, and explaining why an innocent man could decide to confess to murders he did not commit and why jurors must hear testimony from an expert on false confessions in order to overcome their bias that innocent persons do not confess. This testimony is new evidence that satisfies the Salemi criteria, listed above. Accordingly, this Court should vacate Mr. Tankleff's conviction and order a new trial.

As for the first Salemi criterion, Dr. Ofshe's testimony meets the "will probably change the result" of Mr. Tankleff's standard. As mentioned above, Mr. Tankleff was convicted almost exclusively on the basis of his "confession." Dr. Ofshe's testimony will be admissible expert opinion testimony, explaining false confessions. See, e.g., De Long v. Erie County, 60 N.Y.2d 296, 307 (1983) ("Expert opinion is proper when it would help clarify an issue calling for professional or technical knowledge possessed by the expert and beyond the ken of the typical juror."); see also Miller v. Indiana, 770 N.E.2d 763 (Ind. 2002) (reversing conviction based on

the trial court's exclusion of Professor Ofshe's testimony); Boyer v. State, 825 So.2d 418, 419-20 (Fla. Ct. App. 1st Dist. 2002) (reversing conviction based on exclusion of Dr. Ofshe's testimony, which met Frye standard of admissibility, went to the heart of defense and would have assisted jury); Washington v. Miller, 1997 Wash. App. LEXIS 960 (Wash. Ct. App. 1997) (reversing conviction based on exclusion of Professor Ofshe's testimony: "stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"); United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996) ("Properly conducted social science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony, assuming its validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried."); United States v. Raposo, No. 98-Cr-185, 1998 U.S. Dist. LEXIS 19551 at * 14-15 (S.D.N.Y. December 14, 1998) (false confession expert testimony was based on testing generally accepted in the scientific community and would be helpful to the jury); United States v. Hall, 974 F. Supp. 1198, 1206 (C.D. 1997) ("Dr. Ofshe testified that a common misperception among the public is that once a person confesses to his guilt, he must be guilty. Dr. Ofshe's expert testimony challenges this perception based on systematic observation of data to which the jury is not privy."); see also supra note 42 (discussing the New York Bar Association's June 2004 adoption of a proposal to encourage videotaping and audiotaping of interrogations in light of the evidence of false confessions). As New York courts have routinely recognized, expert testimony can help a lay jury understand why someone in a certain unusual situation may behave in a counter-intuitive manner. See, e.g., People v. Drake, 188 Misc. 2d 210, 212, 215 (N.Y. Sup. Ct. 2001) ("If the subject matter is one about which jurors have some general understanding, expert testimony may nonetheless be properly received to dispel misconceptions . . ."). Thus, it seems clear that Dr. Ofshe's testimony will be admissible at trial, and its notable contents will probably change the result of the trial.

As for the rest of the Salemi criteria, Dr. Ofshe's expert opinion regarding Mr. Tankleff's confession was not discovered until after trial and probably could not have been discovered earlier through due diligence. At the time of Mr. Tankleff's trial, courts had only begun to acknowledge the field of false confessions. See J. Agar, "The Admissibility of False Confession expert Testimony," 1999 Army Law 26, at 32. Mr. Tankleff should not be faulted for failing to discover this newly developing science earlier. And, in any event, it probably would not have been admissible in 1989 and, therefore, no amount of diligence would have allowed him to present the testimony and the prosecution is clearly not prejudiced. See Hildebrandt, 125 A.D.2d at 821 (opining that the court must look at "the practicalities of the situation" when making the due diligence determination).[63] Dr. Ofshe's testimony is clearly material to the issues at trial, it is not cumulative and not merely impeaching to other trial evidence.

Finally, as to CPL § 440.10(1)(g)'s requirement that a motion to vacate based on new evidence be made with due diligence after the discovery of such new evidence, the Court should take into account the fact that this was a developing science in the 1990s, but is now widely

[63] In the alternative, if the Court were to find that this evidence would have been admissible at the time of trial, then failure by trial counsel to obtain and introduce such testimony would constitute ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution. Where the government's case at trial relies heavily on a particular piece of evidence, competent counsel must at least investigate the possibility of challenging that evidence with expert testimony and that failure to do so constitutes ineffective assistance of counsel. See, e.g., Phoenix v. Matesanz, 189 F.3d 20 (1st Cir. 1999).

accepted. CPL § 440.10(1)(g) does not set forth a bright-line time limit for filing, but merely requires due diligence. The prosecution was not prejudiced by any delay in filing based on Dr. Ofshe's testimony. See Bell, 179 Misc. 2d at 416. This Court should consider the practicalities of this new testimony, the strength of Dr. Ofshe's testimony and the interests of justice, and hold that the due diligence requirement is met.

Dr. Ofshe's testimony meets the Salemi criteria and satisfies the prerequisites of CPL § 440.10(1)(g). Therefore, it is "new evidence" within the meaning of the statute and this Court should vacate Mr. Tankleff's conviction and order a new trial.

All of the evidence described above satisfies the Salemi criteria and the requisites of CPL § 440.10(1)(g). Thus, the Court may vacate Mr. Tankleff's conviction based on any single piece or sub-group of the evidence. But even if the Court finds that any one piece of evidence does not justify vacating his conviction, the newly discovered evidence in the aggregate clearly does justify vacating Mr. Tankleff's conviction and ordering a new trial. See, e.g., Kyles v. Whitley, 514 U.S. 419, 421 (1995) (opining that the materiality of undisclosed evidence "turns on the cumulative effect of all such evidence"). The time has come for the this Court to vindicate Mr. Tankleff's rights; thus the Court should vacate his conviction and order a new trial. At a bare minimum, justice requires that a jury hear the evidence introduced at the § 440 hearing and make its own decision, in light of all of the evidence, to convict Marty Tankleff or not.

II. MARTY TANKLEFF'S CONVICTION MUST BE VACATED BECAUSE HIS RIGHTS TO DUE PROCESS WERE VIOLATED AT TRIAL; IN THE ALTERNATIVE, HIS RIGHTS TO DUE PROCESS WERE VIOLATED DURING HIS C.P.L. § 440 HEARING

CPL § 410.10(h) authorizes a court to vacate a judgment obtained in violation of an accused's constitutional rights. The right to due process is guaranteed by both the Federal and New York State Constitutions. U.S. Const. amend. XIV; N.Y. Const. art. 1, §6. Mr. Tankleff's due process rights were violated at trial by the prosecution's failure to disclose Brady evidence and its failure to correct McCready's false testimony at trial; as such, his conviction must be vacated. In addition, if this Court does not find for Mr. Tankleff on the merits, a due process violation will ripen based on this proceeding.

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

As mentioned above, CPL § 410.10(h) authorizes a court to vacate a judgment obtained in violation of an accused's constitutional rights. In addition, § 410.10(b) authorizes a court to vacate a judgment procured by, inter alia, "fraud on the part of the . . . prosecutor or a person acting for or in behalf of a . . . prosecutor," and § 410.10(d) authorizes a court to vacate a judgment obtained via false material evidence. At Mr. Tankleff's trial, Detective McCready was asked several different times in several different ways whether he knew anything about Jerry Steuerman at the time of the murders. McCready, the lead detective on this case, responded repeatedly that he knew nothing about Steuerman at the time of the murders.[64] At the § 440

[64] This is not the first time that we have determined that the prosecution team, and specifically McCready, failed to disclose exculpatory evidence. Shortly after the trial, Mr. Tankleff discovered that McCready had known before trial that Jerry Steuerman had, in the past, hired Hell's Angels to rough up his employees. In light of McCready's friendship and association with Steuerman, this failure to disclose the Hell's Angels information makes more sense and the Court can see the effect of McCready and Steuerman's relationship on Mr. Tankleff's trial.

hearing, this Court heard testimony that McCready in fact was a friend and associate of Jerry Steuerman's long before the murders.

As a result, 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 not to correct testimony it knows, or should know, is false, see, e.g., Napue v. Illinois, 360 U.S. 264 (1959). See generally United States v. Coppa, 267 F.3d 132, 139-145 (2d Cir. 2001) (explaining the applicable standards). This Court should therefore vacate the judgment based on, inter alia, this egregious violation of Mr. Tankleff's due process rights.

1. The prosecution failed to disclose Brady evidence at trial.

The "basic rule of Brady is that the Government has a constitutional duty to disclose favorable evidence to the accused where such evidence is 'material' either to guilt or to punishment." Id. at 139 (citing Brady, 373 U.S. at 87). "Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness." Id. (citing Giglio v. United States, 405 U.S. 150, 154 (1972)). The evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Kyles v. Whitley, 514 U.S. 419, 433-34 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); id. at 685 (White, J., concurring in part and concurring in the judgment)).

In order to be Brady evidence, the evidence (1) must be "favorable to the accused," Strickler v. Greene, 527 U.S. 263, 281-82 (1999); (2) "must have been suppressed by the state," id. at 282; and (3) "prejudice must have ensued," id. Stated simply, the fact that McCready knew Jerry Steuerman is classic Brady material that should have been disclosed to the defense at trial. As to the first prong, the evidence that McCready and Jerry were friends and associates was favorable to Mr. Tankleff. At the hearing before this Court, Leonard Lubrano, testified that McCready and Steuerman knew each other, that he had seen McCready converse with Steuerman many times at Steuerman's bagel shop, and that McCready had told Lubrano that his construction crew was doing work for Steuerman's store. Salpeter testified that one of the original owners of Strathmore Bagels told Salpeter, inter alia, that McCready and Steuerman knew each other for years before the Tankleff murders. This evidence was clearly favorable to Mr. Tankleff. His defense was that Jerry Steuerman murdered his parents. McCready's failure to give credit to Mr. Tankleff's theory and investigate Steuerman was inexplicable at trial without this crucial piece of information: McCready and Steuerman were friends and associates.

As to the second prong, the prosecution failed to disclose to the defense that Detective McCready knew Jerry Steuerman. McCready knew that he was a friend and associate of Steuerman. That knowledge should be imputed to the prosecution because McCready was the lead detective on the case. See Kyles, 514 U.S. at 437 (impeachment evidence known only to the police was nevertheless subject to Brady disclosure); see also Schneider v. Estelle, 552 F.2d 593, 595 (5th Circ. 1977) (knowledge imputed to prosecution where law enforcement officer perjured himself). The knowledge of Brady evidence by members of the prosecution team is imputed to the prosecution: "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 438. "[T]he prosecutor has the means to discharge the government's Brady responsibility if he will, [and] any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves." Id.

As to the third prong, prejudice clearly ensued at Mr. Tankleff's trial. Detective McCready testified at Mr. Tankleff's trial that he did not know anything about Jerry Steuerman before the murders. Part of the prejudice to Mr. Tankleff was the fact that the defense, absent the crucial information regarding McCready and Steuerman's relationship, could not explain why the prosecution team coddled Steuerman. The fact that McCready was a friend and associate of Steuerman's would have explained to the jury why Steuerman basically got a pass from the authorities, despite his flight and bizarre behavior evidencing consciousness of guilt and his obvious motive and ample opportunity to commit the crime. In addition, Mr. Tankleff was deprived of the ability to effectively cross-examine McCready about his relationship, both personal and professional, with Jerry Steuerman, the man Mr. Tankleff has maintained murdered his parents. It is therefore beyond doubt that, if this evidence had been disclosed, there is a reasonable probability that the outcome of Mr. Tankleff's trial would have been different.

Accordingly, the prosecution violated Mr. Tankleff's due process rights by failure to disclose McCready's relationship with Jerry Steuerman (as well as McCready's resulting false testimony, discussed below) at Mr. Tankleff's trial. The failure to disclose this Brady evidence and the resulting due process violation warrant vacating Mr. Tankleff's conviction and ordering a new trial. See Giglio, 405 U.S. at 154-55; United States v. Amiel, 95 F.3d 135, 144-45 (2d Cir. 1996).

2. The prosecution allowed McCready's perjury to go uncorrected.

Moreover, Detective McCready testified falsely at trial that he did not know anything about Jerry Steuerman at the time of the murders. But the testimony of Lubrano and Salpeter in the hearing before this Court indicated otherwise; it indicated a long-standing relationship, both personal and professional, between the two men. And the prosecution has failed to offer any evidence to rebut this point, for example, McCready did not testify at the § 440 hearing.

"[T]he presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 153 (1972) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)). In order to show that the prosecution failed to correct testimony it knows, or should know is false, Mr. Tankleff must show that (1) false testimony was introduced, (2) the prosecution knew or should have known that the testimony was false, (3) the testimony went uncorrected, and (4) the false testimony was prejudicial in that there is a "'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Filion, 335 F.3d at 127 (quoting Agurs, 427 U.S. at 103). "[W]hen a prosecutor elicits testimony he or she knows or should know to be false, *or allows such testimony to go uncorrected*, . . . the conviction must be set aside unless there is no 'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Shih Wei Su v. Filion, 335 F.3d 119, 126-27 (2d Cir. 2003) (emphasis added) (quoting Agurs, 427 U.S. at 103; Giglio, 405 U.S. at 154).

First, as discussed above, McCready's false testimony that he did not know anything about Jerry Steuerman was introduced. Second, McCready's knowledge that this testimony was false should be imputed to the prosecution, as he was a pivotal part of the prosecution team. "[T]he argument to charge the prosecution with knowledge of a government agent's perjury is even stronger than the argument to impute knowledge of Brady material. While the prosecution's failure to the disclose relevant information might be due to a negligent lack of communication, perjury by a government agent can only be a knowing, intentional decision to lie by a member of the institution which is charged to uphold the law and seek just convictions." United State v. Sanchez, 813 F. Supp. 241, 248 (S.D.N.Y. 1993) (holding that police officers' perjury was "knowing use of perjury by the prosecution," even though the Assistant U.S.

Attorney was unaware of the perjury, because the police officers were members of "'the prosecution team'" (quoting Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977)); see also United States v. Espinosa-Hernandez, 918 F.3d 911, 914 (11th Cir. 1990) (opining that a new trial would be required if a government agent involved in the case were found to have committed perjury); Wedra v. Thomas, 671 F.2d 713, 717 n.1 (2d Cir. 1982) (noting that knowingly false testimony by a police officer is imputed to the prosecutor if officer acted as an arm of the prosecution); Schneider, 552 F.2d at 595 ("If the state through its law enforcement agents suborns perjury for use at the trial, a constitutional due process claim would not be defeated merely because the prosecuting attorney was not personally aware of this prosecutorial activity."); United States v. Turner, 490 F. Supp. 583, 610 (E.D. Mich. 1979) (ordering a new trial on prosecutorial misconduct grounds based on a Drug Enforcement Agent's failure to correct a witness' false testimony and the Agent's false testimony, even though the prosecuting attorney had no actual knowledge of the perjury), aff'd, 633 F.2d 219 (6th Cir. 1980). It is clear that this knowledge should be imputed to the prosecutor, but even assuming, arguendo, it is not imputed, the prosecution should have known, as the prosecution has a responsibility to seek and ensure justice and is the spokesperson for the government.

Third, the false testimony went uncorrected. And fourth, there can be no question in this case that there is a reasonable likelihood that the false testimony could have affected the judgment. McCready called the shots in this investigation.[65] McCready, after sidestepping Miranda, procured a false confession from Mr. Tankleff and refused to investigate the true murderer, Jerry Steuerman. The truth, that McCready and Steuerman knew each other, would have substantiated Mr. Tankleff's claim that Steuerman committed the murders and it would have shown the relationship between the real murderer and the lead detective. Moreover, it is not just the fact that McCready, the lead detective in this case, was a friend and associate of the other suspect that he failed to investigate, but his lies cast considerable doubt on the entirety of his testimony. "[W]hen new evidence of perjury by a prosecution witness is uncovered, the prosecution's case is imperiled in two respects. First, the prosecution could lose an evidentiary building block that helped construct the case against the defendant. Second, the prosecution could be tarnished by a jury's revelation that one of its witnesses has committed perjury." Chamberlain v. Mantello, 954 F. Supp. 499, 510-11 (N.D.N.Y. 1997) (granting habeas relief to state prisoner based on perjured testimony of state troopers). McCready's lies not only undermine the building blocks of the case against Mr. Tankleff, but also call into question McCready's motives in his pursuit of Mr. Tankleff as the prime suspect, and cast considerable doubt on the entirety of his testimony. Additionally, the jury would have clearly looked at McCready differently had they known of his propensity for deceit. This Court should consider the impact of McCready's perjury on both the factual elements of the case and on the credibility of McCready. Upon such consideration, there can be no question in this case that there is a reasonable likelihood that the false testimony could have affected the judgment. Accordingly, the prosecution violated Mr. Tankleff's due process rights by eliciting false testimony from McCready and his conviction should be vacated.

[65] Indeed, McCready responded to the scene even though he was off-duty at the time. From his curious arrival on the scene, he was the lead detective conducting the investigation.

B. Mr. Tankleff's Rights to Due Process Were Violated by Certain Procedures of this Hearing

This Court should also consider that failure to grant Mr. Tankleff relief on the merits will result in a federal due process claim. Having provided for C.P.L. § 440 collateral review of Mr. Tankleff's conviction and sentence, the review must comport with the due process. See Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (narrowest-grounds opinion of O'Connor, J.) (holding that the Due Process Clause applies to state clemency proceedings); Rohan v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003) (Due Process Clause applies to federal habeas proceedings); see also Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (discussing fundamental fairness mandated by the Due Process Clause when states provide for the avenue of collateral relief); Oken v. Warden, 233 F.3d 86, 94-95 (1st Cir. 2000) (assuming "that due process requirements of fundamental fairness apply to state post-conviction proceedings"). The procedures used in this case, if Mr. Tankleff is not granted relief, will rise to the level of fundamentally unfair for three main reasons. First, failure to disqualify District Attorney Spota in light of his clear conflicts of interests, see Memorandum in Support of Renewed Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor, in this proceeding resulted in a fundamentally unfair hearing. Spota's former small law firm represented Todd Steuerman while Spota was still with the firm in a case that was factually related to the present hearing. Also, Spota and McCready have a lengthy attorney-client relationship, during which Spota has defended McCready in criminal court, before a state commission investigating police misconduct, and before the public. "Motion to Disqualify" at 6. Todd Steuerman and McCready play critical roles in this case and, as such, the threat of abuse was substantial and real and Spota should have been disqualified. See People v. Shinkle, 51 N.Y.2d 417 (1980) (holding that the appearance of impropriety was sufficient to warrant disqualifying the District Attorney because it created "the continuing opportunity for abuse of confidence entrusted to the attorney during the months of his active representation of defendant"). The failure to disqualify Spota made this proceeding fundamentally unfair and violated due process.

Second, the prosecution intimidated witnesses, at least Harris and Glass, into altering their testimony or refusing to testify. "[S]ubstantial interference by the State with a defense witness' free and unhampered choice to testify violates due process as surely as does a willful withholding of evidence." People v. Shapiro, 50 N.Y.2d 747, 761 (1980); see United States v. Crawford, 707 F.2d 447, 449 (10th Cir. 1983) (noting "[s]ubstantial governmental interference with a defense witness's decision to testify violates a defendant's due process rights"); see also Webb v. Texas, 409 U.S. 95, 98 (1972) (holding that defendant's due process rights were infringed because the judge, in warning the defendant's witness not to commit perjury, used "unnecessarily strong terms," such that the witness may have been precluded from making a free and voluntary decision whether or not to testify). As described above, Harris was repeatedly threatened by agents of the District Attorney: (1) Warkenthien, the District Attorney's investigator in this case, threatened Harris, indicating that "if the statement you gave to Mr. Salpeter is true, you may be very well changing places with Marty Tankleff," Warkenthien, 12/20/04 at 613; and (2) two wired informants for the District Attorney threatened that they knew where Harris' children lived and were "going to get them," Lemmert, 7/27/04 at 15. Additionally, this Court heard testimony that the District Attorney's Office threatened Glass. Callahan, 12/21/04 at 735-736. This witness intimidation, coupled with the failure to grant

Harris immunity, resulted in a failure by the prosecution to seek the truth and a proceeding that was fundamentally unfair.

Third, the Court refused to compel witnesses for Mr. Tankleff's favor. See U.S. Const. amend. VI (right to "compulsory process in obtaining witnesses in [accused's] favor). The Court refused to compel at least two witnesses, Todd Steuerman and __ Oaks. As mentioned above, Todd Steuerman stated on two different occasions that Mr. Tankleff did not kill his parents and that his father, Jerry Steuerman, had a "beef" with the Tankleffs and hired someone to murder them. Oaks, because he had information about the night of the murders from Ram, could have further corroborated the testimony of the other witness implicating Creedon, Kent, Harris, and Steuerman. Failure to compel these witnesses resulted in a proceeding that was fundamentally unfair.[66]

Mr. Tankleff's ability to present his claims was significantly undercut by the failure to disqualify Spota, the witness intimidation, and the failure to compel witnesses in his favor to the point that this proceeding violated the fundamental fairness guaranteed by the Due Process Clause. The violation is particularly acute in this case where Mr. Tankleff claims, among other things, actual innocence. Cf. Schlup, 513 U.S. at 324-25 ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence.").

III. MR. TANKLEFF'S CONVICTION MUST BE VACATED BECAUSE HIS RIGHTS TO EQUAL PROTECTION UNDER THE LAW WERE VIOLATED; IN THE ALTERNATIVE, HIS RIGHTS TO EQUAL PROTECTION WERE VIOLATED DURING HIS § 440 HEARING

As mentioned above, CPL § 440.10(h) authorizes a court to vacate a judgment obtained in violation of an accused's constitutional rights. The Federal and New York State Constitutions guarantee equal protection. U.S. Const. amend. 14; N.Y. Const. art. 1, § 11. Mr. Tankleff's rights to equal protection were violated by the Suffolk County Law Enforcement Community's failures resulting in an arbitrary deprivation of safeguards provided to criminal defendants in every other New York County. In the alternative, if this Court does not find for Mr. Tankleff on the merits, an equal protection violation will ripen based on this proceeding.

A. Mr. Tankleff's Conviction Violates Equal Protection Because Failures by the Suffolk County Law Enforcement Community in Its Administration of Criminal Justice, As Opposed to Every Other New York County, Resulted in Arbitrary Deprivation of Safeguards Provided to Criminal Defendants in Other Counties

In Suffolk County, at least around the time when Mr. Tankleff was tried and convicted, criminal defendants were arbitrarily deprived safeguards provided to criminal defendants in other counties in violation of the Equal Protection Clauses. In Bush v. Gore, 531 U.S. 98, 104-09 (2000), the U.S. Supreme Court found an equal protection violation based on the lack of consistent standards from county to county in vote classification, which failed to assure that "the rudimentary requirements of equal treatment and fundamental fairness [were] satisfied." Id. at 109; see also Vallien v. Louisiana, 812 So. 2d 894, 904 (La. App. 2002) (Thibodeaux, J., concurring in part and dissenting in part) (opining that the "minimum procedural safeguards" that ware the essence of Bush were absent where the lack of guidance resulted in arbitrary and disparate treatment). Like voting rights, the liberty interests at stake in criminal prosecutions are clearly substantial.

[66] As noted above, Mr. Tankleff's compulsory process rights were violated by the Court's failure to order the District Attorney to grant Harris immunity. See note 51, infra.

An investigation of the Suffolk County District Attorney's Office and Police Department by the New York State Commission of Investigation, issued in 1989, details many concerns and questionable conduct within the Suffolk County Law Enforcement Community (SCLEC). Defendant's Memorandum of Law Ex. 8. Those problems included, but were not limited to, (1) ineffective management and accountability, including for official misconduct, id. at 23; (2) the District Attorney ignored the responsibilities of his office, including "repeatedly defend[ing] assistants in his Office in the face of serious ethical breaches," id. at 26-27; (3) the detectives and police officers, with the approval of their supervisors, engaged in illegal investigatory tactics, id. at 27-28; (4) the "Police Department and the District Attorney's Office engaged in and permitted improper practices to occur in homicide prosecutions, including perjury, as well as grossly deficient investigative and management practices," id. at 28-29. The Commission called for "major reform," including "instituting reform which seeks justice and integrity, in place of an attitude of 'You do what you've got to do to arrest and convict'" and "reform which replaces professionalism for the slipshod practices of the past." Id. at 23-24. The impetus to the investigation was the great deal of criticism and controversy arising with respect to the SCLEC. Id. at 5. The Commission stated that such "criticism and controversy" was "unique to any county in New York State with respect to frequency and intensity." Id.

Here, the dramatic differences between Suffolk County and every other New York County in its administration of criminal justice, as outlined in the Commission's Report, violate the equal protection clause by arbitrarily depriving Suffolk County criminal defendants of the safeguards available to criminal defendants in other counties. The lack of uniform standards for criminal investigations and prosecutions from county to county renders Mr. Tankleff's conviction unconstitutional under Bush because "the rudimentary requirements of equal treatment and fundamental fairness," 531 U.S. at 109, are not satisfied.

B. Mr. Tankleff's Rights to Equal Protection Were Violated in this Proceeding Because Other Similarly Situated Petitioners Face an Objective, Conflict-Free District Attorney, Whereas Mr. Tankleff Faced District Attorney Spota

As discussed above, District Attorney Spota has significant conflicts of interest in this case. It has long been established that "if [a law] is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1986); see also Seligson v. Fidelity and Casualty Co., 29 N.Y.2d 828, 112 (1971) (holding that allowing one party access to confidential information without requiring disclosure to all parties would constitute a denial of equal protection and violate the concept of fundamental fairness). As described above, failure to disqualify Spota interfered with Mr. Tankleff's fundamental right to due process. Failure to disqualify Spota and appoint a Special District Attorney, pursuant to County Laws 701 and 702, resulted in "an unequal hand," such that other petitioners face an objective, conflict-free District Attorney, but Mr. Tankleff was forced to deal with Spota, a District Attorney who could not be impartial and unfair in light of his conflicts. Accordingly, this proceeding violated Mr. Tankleff's rights to equal protection.

IV. MARTY TANKLEFF'S CONVICTION MUST BE VACATED BECAUSE DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL RESULTING IN THE JURY'S DECISION TO CONVICT HIM

As mentioned above, CPL § 440.10(h) authorizes a court to vacate a judgment obtained in violation of an accused's constitutional rights. The right to effective assistance of counsel is guaranteed by both the Federal and New York State Constitutions. U.S. Const. amend VI; N.Y. Const., art. I, § 6. The right to counsel exists in order to protect the fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684 (1984). Additionally, "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970). To render effective assistance of counsel, the attorney must ensure proper preparation of the case for pre-trial and trial proceedings. See, e.g., People v. Droz, 39 N.Y.2d 457, 462 (1976); see also People v. Bennett, 29 N.Y.2d 462, 466 (1972) (right to counsel includes right to have counsel conduct appropriate investigation).

Strickland defines the test for determining whether an accused received effective assistance of counsel as twofold: the defendant must show (1) that his attorney's conduct fell outside the wide range of "professionally competent assistance," and (2) that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The New York state right is "broader than its federal counterpart," People v. Claudio, 83 N.Y.2d 76, 84 (1993) (Titone, J., concurring). To succeed on a claim of ineffective assistance of counsel under the New York Constitution, the defendant must merely "demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims." People v. Garcia, 75 N.Y.2d 973, 974 (1990).

In this case, Mr. Tankleff's counsel made several serious errors that affected the outcome of his case and denied him due process of law. As explained by the American Bar Association, "[e]ffective investigation by the lawyer has an important bearing on competent representation at trial . . . . Failure to make adequate pretrial investigation and preparation may . . . be grounds for finding ineffective assistance of counsel." ABA Standards for Criminal Justice, Standard § 4-4.1, Commentary ("Duty to Investigate") (3d ed. 1993). Mr. Tankleff's trial counsel failed to adequately investigate this case, and consequently failed to submit important evidence at trial. In addition, Mr. Tankleff's attorney failed to keep promises he made during his opening statement with respect to family member witnesses and proving Steuerman was the true murderer. See id. § 4-7.4 ("Defense counsel should not allude to any evidence [during opening statement] unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence."). Generally, Mr. Tankleff's attorney failed to meet his "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 468; See also supra note 63. Mr. Tankleff's attorney failed to render effective assistance of counsel under both Strickland and the "meaningful representation" standard of the New York Court of Appeals.

First, Mr. Tankleff's counsel failed to call sufficient witnesses to negate the prosecution's motive arguments. While his counsel developed minimal evidence through a handful of family members, there were many other members of Mr. Tankleff's family who were prepared to testify that Mr. Tankleff had a loving relationship with his parents and no motive to attack them. This testimony would have been especially powerful because some of these individuals were not just relatives of the defendant, who might have a motive to protect him, but were also relatives of the victims. Those relatives did not then, and do not now, believe that Mr. Tankleff was the murderer. But Mr. Tankleff's attorney either failed to speak with these relatives or failed to

follow up with them. See supra note 4 (summarizing these relatives' affidavits). "[I]t is hard to perceive any trial strategy which would justify counsel's failure to interview and/or call witnesses who had exculpatory information which tended to exonerate the defendant and substantiate his defense." People v. Maldonado, 278 A.D.2d 513, 515 (2d Dept. 2000). The failure to contact a potentially favorable witness, People v. Droz, 39 N.Y.2d 457 (1976), or to interview an available witness, People v. Sullivan, 209 A.D.2d 558 (2d Dept. 1994) has resulted in a finding of ineffective assistance. By failing to investigate, follow up with, and call these witnesses, Mr. Tankleff's attorney departed from acceptable representational standards and rendered ineffective assistance.

Second, Mr. Tankleff's counsel failed to keep promises he made during his opening statement, including that he would call Mr. Tankleff's family member witnesses, identified above, to show that the prosecution's alleged motive was without merit and that he would show that Jerry Steuerman was the murderer. Counsel failed to deliver on these promises. The prosecution exploited Mr. Tankleff's attorney's unfulfilled promises in his closing argument. See Trial Tr. 4888-95. "[I]t was inexcusable to have given the matter so little thought at the outset as to have made the opening promise[s]." Anderson, 858 F.2d at 18. By failing to call the family witnesses, Mr. Tankleff's attorney created a "speaking silence." Id. Moreover, by promising to prove that Steuerman had committed the murders, Mr. Tankleff's attorney shifted the burden from the government (to prove guilt beyond a reasonable doubt) to Mr. Tankleff (to prove Steuerman committed the murders). That approach would have been fine if Mr. Tankleff's trial attorney possessed the evidence Mr. Tankleff presented in this § 440 hearing, which shows that Steuerman, Creedon, Harris, and Kent were involved in the murders. However, he did not have the evidence to support his promise. Mr. Tankleff's attorney departed from acceptable representational standards and rendered ineffective assistance.

Mr. Tankleff's trial attorney's performance fell below professionally competent assistance. Additionally, his failures to investigate, follow up with, and call the witnesses described above, as well as his failure to keep his promises to the jury to call these witnesses and prove Jerry Steuerman committed the murders prejudiced Mr. Tankleff. Not only was his attorney inadequately prepared, but he lost the trust of the jury and created a "speaking silence" from which the jury could infer that these witnesses did not exist and that Steuerman did not commit the murders. Under both the Federal and New York State standards, Mr. Tankleff's trial attorney's performance was ineffective and Mr. Tankleff's conviction must be vacated.

CONCLUSION

The amount of evidence and the number of witnesses establishing that Seymour and Arlene Tankleff were murdered, not by their loving son Marty Tankleff, but by Joseph Creedon, Peter Kent, and Glenn Harris, at the behest of Jerry Steuerman is staggering.

V. Summer of 1988: Jerry Steuerman grabs Seymour Tankleff by the throat and threatens to kill him. (Marcella Falbee);

VI. Summer of 1988: Jerry Steuerman offers Brian Scott Glass money to "hurt or kill" Seymour Tankleff. (Brian Scott Glass);

VII. Summer of 1988: Brian Scott Glass declines this offer and passes the "work" to "Joey Guns" Creedon. (Brian Scott Glass);

VIII. Summer of 1988: Joseph Creedon hires Joseph Graydon to assist him in murdering Seymour Tankleff at Steuerman's request. The two men drive to the bagel store but cannot find Mr. Tankleff. (Joseph Graydon);

IX. Spring of 1989: Jerry Steuerman admits that he "already killed two people and it wouldn't matter" if he did it again. (Neil Fisher);

X. 1990 or 1991: Brian Glass states that he was asked to kill the Tankleffs but he passed the job to Creedon. (Mark Callahan);

XI. Easter 1991 or 1992: Joseph Creedon admits that he killed the Tankleffs after waiting in the bushes and watching the card game. (Karlene Kovacs);

XII. The mid 1990s: Joseph Creedon states that he knows Marty is innocent because Creedon killed the Tankleffs himself. (Gaetano Foti—a "reliable" government informant);

XIII. 1990 or 1991: Todd Steuerman states that Marty did not kill his parents. Todd admits that his father had some of his "friends" do it. (Bruce Demps);

XIV. August 2003: Glenn Harris admits that he drove Peter Kent and Joseph Creedon to the Tankleff residence. Immediately thereafter Kent and Creedon left the house covered in blood, discarded a pipe (a pipe has been found) and burned their clothes. (Glenn Harris);

XV. 1999: Billy Ram tells his girlfriend and family about a man he knows to be innocent but was nonetheless wrongly convicted of murder. (Heather Paruta); and

XVI. October 2005: Billy ram admits that Joseph Creedon, Peter Kent and Glen Harris were at his house the night of the Tankleff murders and left his house to go to Belle Terre to "take care of a Jew in the bagel business." (Billy Ram)

The Suffolk County District Attorney's office's feeble response to these eleven witnesses is that they are all lying. According to Mr. Lato, each person has concocted a wild tail of murder and intrigue. In exchange for this they have been intimidated by the law enforcement community, ridiculed by Leonard Lato in the press, and in some cases threatened with incarceration and had their names and identities revealed to the very persons against whom they have offered evidence. What are the odds that an objective, fair, unbiased prosecutor would act in this manner? What are the odds that this prosecutor is correct?

The question which this Court must now answer is—at a minimum—whether this staggering amount of interlocking and corroborated new evidence would likely result in an acquittal if it were heard by a jury? There simply is no serious argument that Martin Tankleff would be convicted by a jury who knew what this Court has learned over the last 18 months. He would be acquitted. Further, unless this evidence is submitted to a jury, Marty Tankleff's conviction and continued incarceration will rightfully have no legitimacy with the public, and they will undermine the public's faith in the criminal justice system. In the interests of justice, this Court should grant him the opportunity to present this evidence to a jury.

For the foregoing reasons, this Court should find Marty Tankleff actually innocent or, at a minimum, should grant him a new trial where both his pre-warning and post-warning statements, or at least the latter, would be excluded.

Respectfully submitted,

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