SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Argument Requested By:
JENNIFER M. O'CONNOR AND
STEPHEN L. BRAGA

60 Minutes Requested

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PEOPLE OF THE STATE OF NEW YORK

– against –

Docket No. 2006-03617

Suffolk County Indictment
Nos. 1290/88 & 1535/88

MARTIN H. TANKLEFF,

Defendant-Appellant.

----------X

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INTRODUCTION

Despite its length, the DA's brief is largely based on form rather than substance, invective rather than analysis, and assumption rather than fact. This is because the DA has no credible explanation for why so many unrelated witnesses from so many different walks of life have come forward on their own to testify to facts that corroborate each other to a striking degree in painting a compelling picture of Marty's innocence. Either this is the greatest conspiracy of witnesses in history or Marty was wrongfully convicted. The latter is the case.

In one sense, this appeal is complicated. On the factual side, these issues require sorting through a huge mass of evidence to separate the wheat from the chaff, and then to weigh what is left along with the trial record and to apply basic common sense. On the legal side, these issues require scrupulously applying proper legal standards to evaluate the new evidence as a whole.

In another sense, however, this is an easy appeal. A young man was sent to prison, essentially for life, by a jury unaware of an extraordinary amount of evidence that others murdered his parents. Moreover, since the time of that verdict, there have been remarkable strides in recognizing the reality of error in the criminal justice system, including the common phenomenon of false confessions. Here, the ordinary citizen's reaction to Marty's case is also the one called for by

the law—he should, at a minimum, receive a new trial, where a jury can judge him in light of *all the relevant evidence.*

Unfortunately, the DA in his brief—like the court below—failed to analyze this case correctly. But when the facts are properly considered—not tree-by-tree, but with a view of the entire forest—and the correct standards are applied, no doubt remains that Marty has made a sufficient showing of his innocence to be entitled to a reversal of his convictions, or, at the very least, a new trial.

FACTS

The DA goes to great lengths in his "factual" recitations[1] to suggest that Marty cannot be believed, because his testimony differed from that of other witnesses at trial, because he did not recall some things that other witnesses recalled, and/or that he simply got it wrong. The DA's not-so-subtle theme is that Marty has misrepresented the facts.[2] It would be understandable for a seventeen-year-old who discovered his parents brutally murdered in his home to forget some details or to misremember them. There is nothing sinister in such a natural human reaction to tragedy.

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[1] The DA has copied his lengthy version of the relevant facts almost verbatim in all of his briefs on appeal. Accordingly, our rebuttal herein applies to all of Marty's appeals.

[2] The DA also accuses us of avoiding the bad "facts." We did no such thing. Our opening brief addressed every fact relied upon by the County Court. *See* Def-Br. 92-96. But not even that court mentioned the alleged physical evidence that the DA claims points to Marty, or the three teenage girls' testimony the DA now says is critical.

But there is no excuse for the DA's misrepresentation of facts. In distorting the record and ignoring facts he dislikes, the DA has forsaken the principle that "[i]t is as much [the prosecutor's] duty *to refrain from improper methods calculated to produce a wrongful conviction* as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added).

We highlight below some of the most significant of the DA's distortions of the trial record (those regarding the new evidence will be addressed in the argument section). Space limitations prevent us from delineating all of the DA's misstated facts, but these examples amply illustrate why this Court cannot trust the DA's version.

When the trial record is seen accurately, it is completely understandable why the jury in this case struggled for a full week—with three jurors initially voting to acquit the morning the verdict was returned and one juror later recanting his guilty votes. *See* Def-Br. 23. That week-long deliberation is drastically longer than the average *four hours* that New York juries take to return felony verdicts even in capital cases.[3] Given the closeness of the verdict, even a modest amount of additional exculpatory evidence would have tipped the scales towards acquittal.

[3] *See* Judge and Attorney Survey (New York), State of the States—Survey of Jury Improvement Efforts (2007), *available at* http://www.ncsconline.org/D_Research/cjs/state-survey.html (reporting median jury deliberation times); *see also Fry v. Pliler*, 127 S. Ct. 2321, 2329 n.2 (2007) (Stevens, J., concurring in part and dissenting in part) (relying on these statistics).

Cf. Jones v. Stinson, 229 F.3d 112, 120 (2d Cir. 2000) ("[I]n a close case, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." (internal quotation marks omitted)).

Physical evidence

The DA boldly asserts (at 31) that the "physical evidence" from the scene is "consistent with [Marty's] confession" (capitalization altered). The two limited facts that the DA then cites in support of this assertion, however, reveal its disingenuousness. Of all the sources of evidence at the scene and all the details of Marty's alleged "confession," the DA cites only the following as proof of the alleged consistency between the "physical evidence" and the "confession": 1) "the blood patterns and the blood pooling showed that Seymour was sitting in his chair behind his desk when he was hit, in an up and down motion, with a blunt instrument," and 2) "[i]n the kitchen, next to watermelon rinds, [the police] found a knife in a position different from the one in which Bove, the card game's last user, had left it." *Id.* at 31-32.

But the "blunt instrument" described in Marty's confession was one of his "barbells," which were disassembled and tested microscopically for blood—none being found. And the "watermelon knife" was likewise tested extensively for blood—none being found—while a piece of watermelon residue was found on it, making it impossible that it had been cleaned. A.3549-3550. To test the knife, Dr.

Bauman, the Suffolk County Forensic Serologist, completely disassembled the knife and removed its handle, "[t]o examine [it] for possible traces of blood" using catalytic testing, and no trace was found. A.3548-3549. It would be quite a feat indeed if Marty could have used the watermelon knife for these murders, cleaned it so thoroughly that not a molecule of blood could be detected on the knife, even when disassembled, while leaving the watermelon residue on it. The suggestion is preposterous. *The DA never tries to explain this*, yet he has the audacity to title a section of his brief "Laboratory Results Point to Tankleff." Resp-Br. 33.

Autopsy results

There is, in fact, *no* physical evidence even hinting that the barbells or the watermelon knife Marty "confessed" to using were actually used in the crimes. Although the DA claims (at 31) that Arlene's autopsy results are "[c]onsistent with the [c]onfession" and (at 35) that Seymour's autopsy results "[p]oint [t]o Tankleff," these claims are either only true at a very high (and meaningless) level of generality or they are simply inaccurate.

Dr. Vernard Adams testified that the instrument that caused Arlene's head wounds did not leave screw impressions (the barbell would have left screw marks), and that the wounds were *also consistent* with having been inflicted by a hammer, tire iron, baseball bat, or *any other* "blunt instrument." A.3740-3743. Indeed, he testified that the wounds may have been caused by *multiple instruments* and by

multiple assailants, which is utterly inconsistent with Marty's confession. A.3740-3749, 3754. Meanwhile, Dr. George Tyson, who performed surgery on Seymour Tankleff the day of the attacks, said that his injuries were caused by an "object similar to a hammer," Tr.4347, and also could have been caused by multiple instruments, Tr.4348. Thus, the autopsy results give equal support to Marty's theory of multiple assailants and multiple weapons, including a pipe and/or gun butt.

Blood evidence

The DA also maintains that the evidence of blood (and sometimes lack of blood) in the Tankleff home proves Marty's guilt. In reality, the blood evidence strongly suggests that Marty is innocent. The most important piece of blood evidence in this regard is Seymour's blood stains on the wall and sheets in the master bedroom. A.3504-3507. This is entirely inconsistent with the DA's theory—based upon Marty's false "confession"—that Marty first killed his mother in the bedroom and then killed his father in the office with the same weapons. Resp-Br. 10. That Seymour's blood was found in the bedroom, and none of Arlene's blood was found in the study, Tr.2213-2217, indicates that Seymour was killed first and then the bloodied weapons were taken to the bedroom where Arlene was killed.[4]

[4] The DA also makes much of the lack of blood in various areas where he believes it should be. We agree with him, to a certain extent. If Marty had committed these murders as the DA contends, then there would have been buckets of blood transferred all around the Tankleff home. But the fact that such a trail of blood was not found within the home suggests two things. First,

Falsity of Marty's "confession"

There is no physical evidence consistent with Marty's "confession" because it was false. Although one would never know it from the DA's brief, the lead prosecutor and the investigating detectives quite literally conceded at trial that Marty's confession was full of inaccuracies—as it would be given that it was false. *See* Tr.4933 (lead prosecutor's closing statement: "The detectives ... did testify that they did not believe all of it ...."). The detectives so testified at trial:

> Q. And during that entire period of time [5:35-6:10 a.m.]—correct me if I'm wrong—Marty supposedly tells you that he commits both of these horrible murders, he wipes and cleans the dumbbell and the knife and himself in the shower, he lays down, cleans up, calls 911, correct?
>
> A. That's what he told me, that's correct.
>
> Q. You didn't believe that, did you?
>
> A. No sir, not at all.

Tr.3845 (lead Detective McCready). Detective Rein concluded similarly. *See* Tr.3301-3302. Everyone recognized at trial that Marty's confession did not match the physical evidence; it is shameful that the DA does not to recognize the same before this Court.

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the absence of blood in certain areas admittedly touched by Marty, such as door knobs, is explained by the fact that the blood was largely dried by the time he found his father, and dried blood does not easily transfer or smear. A.3210-3214, 3218-3221; A.3566 (Baumann); Def-Br. 21 n.13. Second, the murderers who did get covered with blood took their bloody clothes and gloves with them. *See* A.1800 (Father Lemmert testifying that Harris said that Creedon and Kent had "blood on them" as they came back to the car).

Marty's supposed motive

The DA repeatedly recites (at 7, 8, 126, 187) his principal purported motive for the murders, as if repeating it makes it credible. That motive is Marty's alleged homicidal displeasure with his "crummy old Lincoln" car. Tr.2894, 3492. In the DA's view (at 8), Marty brutally murdered his parents so that he could buy the car of his choice.

But the facts do not support this strained motive theory. At trial, only one witness testified that Marty disliked his car, but that same witness went on to cut the legs out from the DA's motive theory. The DA called Peter Cherouvis, a car mechanic, to testify about his interactions with Seymour and Marty Tankleff concerning Marty's Lincoln the day before the murders. Tr.4638-4646. The Lincoln had a broken manifold, making it very noisy. Tr.4638. Cherouvis testified that he heard Marty say that he did not want to drive the car to school. Tr.4642. Cherouvis went on to testify, however, that Marty was getting a Porsche or Mercedes to replace it:

> Q. Seymour told you that Marty was only going to drive the Lincoln for a short period of time, correct?
>
> A. Exactly.
>
> Q. You had a conversation with Marty in which you discussed that Marty was only going to drive the Lincoln for a short period of time, correct?
>
> A. Exactly.

Q. You discussed with Marty that if he drove the Lincoln for a short period of time he was going to wind up getting a Porsche or Mercedes?

A. Yes.

Q. At an[] auction, correct?

A. Exactly.

Q. So, Marty knew by this time—while he's driving around in this Lincoln, he knew that ultimately he was going to be getting a Porsche or a Mercedes?

A. Yes.

Q. And Seymour made that clear to both you and to Marty, correct?

A. Of course.

A.3865-3866. Thus, Marty had no motive to murder his father to get a new car because he knew he was about to get a "Porsche or Mercedes."[5]

Marty's demeanor

The DA interprets numerous small bits and pieces of evidence entirely in his favor, without even recognizing in good faith the limitations of such evidence. *See* Def-Br. 93-94. If the facts were as clear cut as the DA makes them out to be in his one-sided brief, then it would not have taken the jury a full week to deliberate, and two Justices of this Court never would have authored an opinion recognizing that there was virtually no evidence connecting Marty to the murders besides his

[5] Moreover, this "murder for money" theory is also refuted by the terms of Seymour Tankleff's will, which barred Marty from receiving his inheritance until he reached the age of twenty-four, *seven years after the murders*. *See* Probate Proceeding, Will of SEYMOUR TANKLEFF, No. 2060P88, Surrogate's Court, New York State, Suffolk County (January 31, 1985 will at 3-4). Marty told the detectives, at the time of the murders, that he knew many things about his father's will. *See* Tr.2853-2854 (Rein); Tr.4233-4236 (Tankleff).

"confession." *People v. Tankleff*, 199 A.D.2d 550, 556-557 (2d Dep't 1993) (O'Brien, Eiber, JJ., dissenting). The evidence is not so clear-cut.

For example, apparently exercising the power to read minds, the DA (at 17) insinuates sinister intent into the fact that, after neighbor Donald Hines said that Marty's father might survive, Marty's eyes "widened" and he did not respond. The DA's insinuation is preposterous. It is at least as likely Marty's eyes widened at his joy in hearing a ray of hope that one parent might live. In these extreme circumstances, this snippet of noncommunicative conduct is too thin a reed to bear the great weight the DA places on it.[6] Unfortunately, the DA relies heavily on such flimsy "demeanor" evidence to make his case—despite evidence that such "hunches" about demeanor are unreliable and lead to false convictions.[7]

Similarly, the DA repeatedly cites (at 7-8) the testimony of three teenage girls who recalled Marty saying he could "get any car that he wanted" if "he could have a hit on ... his parents." The actual testimony of the Goldschmidt girls puts this conversation in a much different, teenage context than the DA would care to admit. The conversation occurred at the Goldschmidts' kitchen table, while Stacy

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[6] In the same portion of his brief, the DA (at 117 n.9) criticizes our representation concerning the criminal conviction of prosecution witness John McNamara, who testified to Marty's allegedly suspicious behavior that morning. *See* Def-Br. 93 n.75. We apologize for any error, but our point is the same regardless of whether McNamara pled guilty to a "$6 billion" fraud or a "$412 million" fraud. Either way, at any retrial of this case, McNamara's credibility would be substantially undermined due to his fraud conviction.

[7] *See* A.226-227 n.19 (Kassin Affidavit) (also noting people often react to tragedy by "appearing 'cool and collected'").

was looking at an expensive car magazine featuring Ferraris and Lamborghinis. Tr.168, 201. Marty made the single statement in question with reference to those cars, and in a "very nonchalant, regular manner." Tr.202; *see also* Tr.169. He was "not angry", Tr.178, 202, and the conversation "was light" and "wasn't serious." Tr.180-181. According to the girls, Marty often bragged about his family's money. Tr.179-181, 199-200, 202. He was not seriously "speak[ing] of having his parents killed," Resp-Br. 7 (capitalization altered); he was an immature teenage boy tossing a one-liner to girls he was trying to impress with what it would take for him to get a Ferrari or a Lamborghini. A stupid comment? Absolutely. Proof of a murder plot? Hardly.

Moreover, these girls were unreliable witnesses at trial. They each testified with certainty that this conversation took place on August 26 or 27, 1988. *See* Tr.138, 147, 166, 174, 184, 191 & 199. However, Dr. Arnold testified for the defense that Marty was hospitalized on both of those days as a result of his nose surgery and, on the 27th, was still wearing drainage tubes that none of the girls recalled. Tr.4405.

Marty's 911 call

The DA (at 12) describes Marty's 911 call to the police in which he reports the attack on his father as follows: "an 'excited' but not 'upset' Tankleff said that he had found his father bleeding." In describing that same 911 call at trial,

however, the prosecutor said, "[t]he defendant appears to sound upset or frantic." Tr.4909. The 911 tape is an evidentiary exhibit in the record before this Court. Tr.85 (People's-Ex. 3). We encourage the Court to listen to that tape to determine if it reveals, as the present DA has about—faced to contend, that Marty sounded "not upset" or, as the trial DA contended, that Marty sounded "upset or frantic." One thing that we are sure of is that Marty sounds terrified, as expected under the circumstances.

Beyond the about-face description of Marty's call, the DA's brief never comes to grips with the more important analytical issues associated with it. For example, if Marty committed the murders as the DA alleges, then he would have known that his mother had been attacked by the time of this 911 call and yet he never mentions her. Similarly, if Marty's motive was to murder his parents to buy a new car as the DA alleges, then he would have finished killing his unconscious father, not call 911 and try to save him. Once again, as with so much of this case, the pieces do not fit together sensibly under the prosecution's theory that Marty did it.

Other assailants

The DA also alleges that "*[n]o credible evidence* connects anyone other than Tankleff to the murders. An identification crew dusted the Tankleff house for fingerprints, and the crime-scene coordinator examined the house windows and

doors. There were no strange prints inside the house ...." Resp-Br. 186 (emphasis added). The DA's argument is curious. The absence of fingerprints is readily explained by undisputed evidence that the assailant(s) wore gloves. Indeed, there were numerous unidentified glove prints—blood-smeared and otherwise—found in the house. However, no gloves were mentioned in Marty's "confession" and the DA has never attempted to explain how Marty somehow made these gloves disappear. At the same time, however, Harris said that Creedon (or Kent) wore gloves on the night of the murders.

Patrol in Belle Terre on the night of the murders

Finally, there are a number of "facts" established at trial that the DA should in good faith cease repeating in light of the new evidence. Here, we mention only one example. The DA asserts (at 11 (citing Tr.496-500)) the following with respect to the constable who was supposed to be patrolling the streets of Belle Terre on the evening of the murders:

> Belle Terre had a constabulary, and a constable or a deputy constable patrolled the village at all times. According to Donald Hines, the village's chief constable and Seymour's friend (Seymour was the constable commissioner), there were three shifts: noon to 8 p.m., 8 p.m. to 4 a.m. and 4 a.m. to noon. Hines testified that at 4 a.m. on September 7, he relieved the deputy working the prior shift and began patrolling the streets.

The DA intends this snippet to suggest that Belle Terre's streets were well-patrolled on the night of the murders, implying the murders could not have been committed by outsiders who drove in.

Yet, as the DA knows, this has been proven false by documentary evidence introduced by the DA's own 440 witness, Jeffrey Ciulla, who was "deputy chief of the constables" in Belle Terre. A.2630. Ciulla authenticated the Belle Terre constables "logbook" that recorded "when a constable would make his rounds." A.2639. The logbook contained periodic entries, in less than hourly increments (sometimes much less), for patrols in Belle Terre throughout the day on September 6, 1988, and through 2:10 a.m. in the morning on September 7. A.2641-2643. But then there is "not another entry from 2:10 a.m. until 6:15 a.m." on September 7, A.2643—a gap of over four hours that covers the very period in which all parties agree the murders occurred.[8]

DEFENSE COUNSEL'S INVESTIGATION

Before addressing the new evidence, a comment is necessary regarding the DA's repeated appalling accusations that Marty's defense team has engaged in bad faith conduct, including an elaborate—but imaginary—conspiracy. *See, e.g.*,

[8] As the prosecutor told the jury, "this crime occurred between 3:00 and 6:00 a.m." Tr.4932. Notably, Hines did not testify that he began patrolling at 4 a.m. on the day of the murders; he merely stated that "[n]ormally in the summertime [he] cover[s] the 4 a.m. to noon shift." Tr.500. On the day of the murders, Hines actually stated that he left his house at 4 a.m. and returned to his house again around 6 a.m. *Id.*

Resp-Br. 152, 48-51, 54-55, 70, 71. The DA suggests to the Court that the Tankleff defense lawyers are zealots who will do almost anything to try to free Marty. Nothing could be further from the truth. The Tankleff defense's only goal in this case is to see that justice is done, as a brief review of certain key facts confirms:

- Upon securing Karlene Kovacs' affidavit after Marty's trial, the Tankleff defense gave it to the DA's office to investigate Creedon's admissions. A.443. & n.1.

- Upon securing the cooperation of Glenn Harris, the Tankleff defense paid to have a polygraph examination administered to Harris, as well as to Karlene Kovacs and Marty, to help gauge the credibility of his information that Creedon committed the Tankleff murders, and then shared those results with the DA.

- Upon completing Marty's 440 motion papers, the Tankleff defense voluntarily provided a copy to the DA for review and investigation six months before the motion was ever filed in Court. *See* A.442.

- Upon discovering the pipe that Harris said Creedon threw into the woods immediately after the murders, the Tankleff defense advised the DA about the pipe's discovery and invited him to come out and observe its location and recovery before the defense team moved it. A.1197-1204.

Does each of these acts evidence good or bad faith? The answer is obvious and the DA's attacks are baseless.

ARGUMENT

I. MARTY'S NEW EVIDENCE DEMONSTRATES HIS ACTUAL INNOCENCE AND, AT A MINIMUM, REQUIRES A NEW TRIAL

A. The DA Does Not Dispute That New Evidence Must Be Evaluated Through The Eyes Of A Reasonable, Properly Instructed Jury, But He Ignores This Standard At Every Turn

The DA simplifies this appeal by not disputing the proper standard for evaluating Marty's new evidence.[9] The parties thus agree that, to grant a new trial, the Court must determine that a reasonable, properly-instructed jury, after evaluating the old and new evidence together as one body of evidence, would more likely than not find reasonable doubt as to Marty's guilt.[10] *See* Def-Br. 46-48. However, the DA, like the court below, ignores this standard repeatedly.

Rather than evaluating the evidence in its totality, the DA, like the court below, incorrectly takes the "divide and conquer" approach of evaluating each witness' testimony in isolation, thus avoiding the cumulative and cross-corroborating weight of the new evidence. In some instances the DA simply ignores certain new evidence, such as the testimony of Heather Paruta, who

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[9] Notwithstanding the skepticism expressed in the DA's response to the amici, the DA concedes here that the federal and New York constitutions provide relief for freestanding claims of actual innocence. *See* Resp-Br. 157-159.

[10] The DA does not dispute the "more likely than not" standard that governs Marty's claim under § 440.10(1)(g) (referring to "a probability" of a more favorable verdict). The DA, however, argues (at 159) that a "clear and convincing" standard applies to Marty's constitutional actual innocence claims. Without waiving our argument that that standard is unduly high, we will use that standard here because the new evidence plainly satisfies both standards. *See* Def-Br. 45-46 & n.34.

testified that, years before the present § 440.10 motion, in 1999, her boyfriend Billy Ram told her "about a case in Belle Terre where somebody was getting twenty five to life for killing their parents and they didn't do it and that he knew who did it." A.2029. The DA does not question Paruta's credibility, and her testimony strongly corroborates Ram's testimony and rebuts the DA's fantastic accusations of bribery.

Thus, the DA's analysis fails to adopt the perspective of a reasonable jury, which is presumed to "consider fairly *all* of the evidence presented," *Schlup v. Delano*, 513 U.S. 298, 329 (1995) (emphasis added), and fails to consider "the likely *cumulative effect* of the new evidence had it been presented at trial," *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (emphasis added).

Moreover, the DA simply offers his own judgments on the credibility of Marty's witnesses and proceeds as though it is *Marty's* burden to establish that Creedon and Kent were the killers. But the issue on a new trial motion is not whether the DA, or even the County Court, ultimately believe that Creedon and Kent did it. *See House v. Bell*, 126 S. Ct. 2064, 2077 (2006) ("The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the new evidence on reasonable jurors."). Rather, the new evidence must be evaluated for whether—at a new trial where the jury heard the evidence of Creedon and Kent's participation in the murders, as well

as the false confession expert evidence and the evidence of McCready's perjury—a reasonable jury would have reasonable doubt that Marty was guilty. *See Schlup*, 513 U.S. at 328.

Given that nearly a dozen witnesses would offer sworn testimony that Creedon and Kent committed the murders; that McCready's perjury and the false confession expert evidence is largely conceded by the DA; and that the original jury struggled with reasonable doubt for a full week, there is ample reasonable doubt here.

By design, proof beyond reasonable doubt is a difficult standard to satisfy, and this is exactly why the DA's scattershot criticisms and accusations are insufficient to defeat Marty's entitlement to a new trial. A jury faced with this new evidence would have to ask itself if it is really plausible that all of the witnesses reporting Creedon and Kent's admissions to the murders are lying or mistaken. And it would have to answer this question in light of evidence showing that Marty is innocent, including the fact that Marty's "confession" contradicts the physical evidence; the expert testimony showing that Marty's "confession" precisely fits the pattern of false confessions; and Marty's polygraph results. It is more "likely than not"—if not nearly certain—that such a jury would find a reasonable doubt—indeed well more than just a doubt—as to Marty's guilt and thus return a "more favorable" verdict. C.P.L. § 440.10(1)(g).

B. Standard Of Review

Despite the DA's suggestions, this Court has ample power to reverse the County Court and grant Marty the relief he seeks.[11] Reversal is appropriate on the law, the facts, and/or in the interest of justice. *See* Def-Br. 48-51; *generally* C.P.L. § 470.15(1), (3).

First, because the County Court's evaluation of the evidence did not adhere to the proper legal standards, its determinations are erroneous as a matter of law. *See, e.g., Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168-169 (2d Cir. 2001) (decision based on incorrect legal principle is necessarily an abuse of discretion). The County Court did not consider the evidence in its totality or from the perspective of a reasonable jury; in fact, without explanation, it ignored critical pieces of the new evidence (such as the polygraph evidence and two corroborating witnesses), as well as the exculpatory physical evidence from the original trial. *See* Def-Br. 72-76, 88-91. Reversal as a matter of law is also appropriate because—as illustrated by the Supreme Court's decision in *House*, 126 S. Ct. at 2087—applying the objective "reasonable jury" standard to new evidence ultimately calls for a *legal* determination, as to which the trial court's binary labeling of evidence as

[11] The DA has previously acknowledged the Appellate Division's discretion in this regard. *See* People's Post-Hr'g Mem. 163 n.86 (June 14, 2005), quoting *People v. Baxley*, 84 N.Y.2d 208, 212 (1994), for the point that the appellate division has a discretion beyond the review power of the Court of Appeals to grant a new trial based on new evidence.

credible or not cannot "tie [the reviewing court's] hands," *id.* at 2078; *see also* Def-Br. 51 n.51.

Second, even were the issues factual in nature, this Court may and should reverse the lower court. The DA misleadingly cites case snippets out-of-context regarding deference to the County Court's finding of facts, *see* Resp-Br. 78-79, but these same decisions also recognize the Appellate Division's well-settled power to, "like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987); *People v. Neely*, 219 A.D.2d 444, 447 (2d Dep't 1996); *see also* Def-Br. 49-50 & n.37.[12] Accordingly, while deference is initially owed to the lower court's factual findings, the Appellate Division must engage in its own weighing of the evidence wherever a "different finding would not have been unreasonable." *Bleakley*, 69 N.Y.2d at 495; *see also People v. Wong*, 11 A.D.3d 724, 725-726 (3d Dep't 2004) (reversing denial of relief under § 440.10(1)(g), where the Third Department believed the recantation of a trial witness and found other witnesses credible despite "minor inconsistencies"). "[W]ould not have been unreasonable" is a low hurdle to clear. Indeed, not even the DA claims that different factual conclusions on this record

[12] The Appellate Division's factual-review power, C.P.L. § 470.15(1), indisputably applies to orders denying motions pursuant to § 440.10. *See id.* § 470.15(1) (review of "a judgment, sentence or order of a criminal court"); *id.* § 450.15(1) (classifying as an "order[] of a criminal court" an "order denying a motion, made pursuant to section 440.10, to vacate a judgment").

would have been "unreasonable," thus triggering this Court's independent review of the evidence.

Third, the DA does not dispute that this Court has "extremely broad" power to reverse the lower court as a matter of discretion in the interest of justice, *see People v. Kidd*, 76 A.D. 2d 665, 667 (1st Dep't 1980), even in cases where all the formal prerequisites for relief are not present, *see, e.g.*, *People v. Bryce*, 287 A.D.2d 799 (3d Dep't 2001).

II. MULTIPLE WITNESSES CONFIRM THAT CREEDON AND KENT COMMITTED THE MURDERS

The DA ignores much of Marty's key arguments and evidence, frequently distorts the record, and consistently fails to evaluate the evidence in its totality and from the perspective of a reasonable jury. Fairly considered, Marty's new evidence proves that two violent career criminals, Creedon and Kent, killed Marty's parents. A reasonable jury hearing this evidence would find reasonable doubt as to Marty's guilt.

A. The DA Ignores Its Previous Concession That Creedon Repeatedly Admitted To The Murders And Fails To Explain How So Many Witness Could Be Lying Or Mistaken About Creedon's And Kent's Admissions

Marty has presented six witnesses—Joseph Guarascio, Gaetano Foti, Karlene Kovacs, John Guarascio, Billy Ram, and Joseph Graydon—who report that, over a course of years, Creedon admitted he committed the murders. Marty

has offered four witnesses—James Moore, Daniel Raymond, Frank Messina, and Billy Ram—who report that Kent also implicated himself in the murders. Although the DA attacks their credibility and nit-picks their testimony for minor inconsistencies, their testimony as a whole, *at a minimum,* raises reasonable doubt about Marty's guilt and, indeed, makes plain that Creedon and Kent killed Marty's parents.

Remarkably, like the County Court, the DA ignores his earlier concession in his own investigative report that, beginning *sixteen years ago* Creedon admitted to "several persons" that he was involved in the Tankleff murders. A.498 (DA's report); *see* Def-Br. 52-55. In concluding that Creedon made such admissions, the DA observed that "*too many persons unconnected with one another have reported that he did. Although each of those persons, except perhaps John Guarascio, are career criminals or have a history of drug abuse, so does Creedon, and his denials are not credible.*" A.498 (emphasis added). The DA's failure to address this concession is telling: It remains impossible to explain why so many people "unconnected with one another" would report these admissions if they had not occurred.[13] It offends all notions of fairness for the DA to have previously acknowledged that Creedon made these admissions, but to now reject the notion

[13] It is not plausible to believe that these witnesses are all perjuring themselves as part of a conspiracy funded by Marty's *pro bono* lawyers. As any reasonable jury would understand, large groups of unrelated people simply do not commit mass perjury, nor do they all coincidentally make the same "mistake" about whether they heard someone admit to murder.

that a reasonable jury would find them to raise reasonable doubt as to Marty's guilt.

In attacking the credibility of the new witnesses, the DA also avoids another inconvenient reality: Every day, prosecutors rely on witnesses with criminal records to convict defendants, and often these witnesses testify under promises of leniency, giving them a great incentive to lie. *See* Def-Br. 57 & n.42.[14] Like every prosecutor, Marty must take his witnesses as he finds them.[15] Although a witness' criminal history is a relevant consideration, a reasonable jury would not find it particularly surprising that Creedon and Kent consort with, and make admissions to, other criminals and drug users. As the thirty former state and federal prosecutor amici acknowledged, "[I]t is often *only* witnesses with criminal records who are privy to the words and actions of other criminals." Br. for Former New York Prosecutors 12 n.5.

The DA also charges that many of Marty's witnesses are lying because of their dislike of Creedon or Kent. No shred of *evidence* supports these charges. *See, e.g.*, Def-Br. 62 n.44. In any event, it is a reality that sadistic criminals like

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[14] For example, in prosecuting Marty, the DA relied on the testimony of Jerry Steuerman, who was convicted of committing fraud on a court the very year before Marty's trial. Def-Br. 38 n.26.

[15] *See People v. Brown*, 2007 WL 1774953, at *3 (1st Dep't June 21, 2007) ("[t]he testimony of a People's witness is not automatically rendered unreliable because he has an 'unsavory and criminal background' or is a drug abuser" (citing *People v. Harris*, 276 A.D.2d 562 (2d Dep't 2000))). The instant case is even stronger because of the numerous witnesses (many admittedly with criminal and drug histories) who corroborate one another.

Creedon have wronged many people. But it is fanciful to think this causes mass perjury among unacquainted people. Further, it would be a tragic irony were the fact that Creedon has wronged others used to shield him from his prior admissions. *See* Def-Br. 59 n.43. A reasonable jury simply would not accept that every one of these witnesses, whose accounts and details corroborate each other, even where they are unacquainted, have all just made it up after swearing to tell the truth.

B. The DA Avoids Marty's Arguments And Distorts The Record In Analyzing The New Witnesses

Marty's opening brief addressed the County Court's and the DA's previous criticisms of all of the new evidence. In contrast, the DA mainly cuts and pastes his attacks from prior briefs. Thus much of the DA's argument was already addressed in Marty's opening brief. To spare the Court a rehash here, we address only a subset of the witnesses where further discussion is helpful and respectfully refer the Court to Marty's opening brief discussion of the rest. Def-Br. 26-41.[16]

1. Joseph Guarascio

The DA offers little to rebut Joseph Guarascio's account of his father's confession. Although the DA refers (at 152) to Marty "induc[ing]" Guarascio to

[16] Because we already addressed the DA's arguments regarding Fisher, Kovacs, Guarascio, and Foti, we will not elaborate on those witnesses. Only one additional point bears mentioning regarding Foti. The DA argues: "Foti also testified that, a couple of months later, Creedon admitted being 'involved in the Tankleff shooting.' But when speaking with [Detective] Trotta in October 2003, Foti said nothing of a 'shooting' and admitted that Creedon had said only, 'The kid didn't do it, I was there.'" Resp-Br. 62. The DA's suggestion of a discrepancy is disingenuous. While testifying, Foti momentarily misspoke and referred to the "Tankleff shooting," but then instantly corrected himself, saying "killing." A.1715-1716.

testify, the DA offers *no evidence* of this. In fact, there is no reason this teenager would perjure himself.

The DA does not endorse the County Court's *sua sponte* speculation upon which it rejected Guarascio's testimony—that it could possibly have been motivated by Creedon's past abuse of Guarascio's mother, Teresa Covias. *See* Def-Br. 59-60.[17]

Instead, the DA makes two unpersuasive arguments. First, the DA argues (at 152-153) that, while Guarascio reported that Creedon said that he strangled Seymour Tankleff with a stripped bicycle cable and that he was beaten with a handgun, no physical evidence supports this account. The DA is mistaken. At trial, Dr. Adams, the medical examiner, testified that Seymour's head injuries were caused by one or more blunt instruments and he could not specify what type. Tr.4000-4001.[18] The use of a handgun butt is consistent with this testimony. As for the bicycle cable, Dr. Tyson, the surgeon who operated on Seymour the day of the attacks, testified as follows:

> It was a very deep cut that went all the way around the neck or almost all the way around the neck.... [I]t was a very unusual and extensive wound, and I remember forming the impression that someone had tried to cut Mr. Tankleff's head off.... The wound appeared to me to be

[17] In fact, the DA's otherwise irrelevant discussion of Covias' testimony suggests that Creedon, Covias, and their children were in fact getting along as late as 2004. *See* Resp-Br. 57-58.

[18] Similarly, Dr. Tyson, Seymour's surgeon, testified that his head injuries were caused by "an object similar to a hammer," and could have been caused by multiple instruments. Tr.4347-4348.

> deeper than would be necessary to kill someone. It went right down to the center of the structures of the neck.

Tr.4348-4349.[19] This is potentially consistent with use of a stripped bicycle cable.

Second, the DA argues (at 153) that Guarascio's testimony that Creedon admitted paying Detective McCready a $100,000 bribe was "absurd." But there is nothing absurd about the notion that McCready—who was found by a New York commission to have perjured himself in a 1985 murder trial, *see* Def-Br. 88 n.70, and who clearly perjured himself at Marty's trial—would accept a bribe.

2. Billy Ram And Heather Paruta

Ram gave reliable testimony that Creedon, Kent, and Harris left together for Belle Terre to "rough up" a "Jew in the bagel business" on the night of the murders and that they later admitted their involvement in the Tankleff murders. The DA's brief recycles outrageous and baseless accusations, based on Kent's obviously biased testimony, that the defense team bribed Ram for his testimony. Not even the County Court accepted this theory. A.15.

As an initial matter, Marty's defense lawyers paid Ram only what is permitted by New York ethics rules—his out-of-pocket expenses and lost wages for traveling to meet with lawyers and testify at the 440 hearing. A.1956-1957

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[19] Dr. Tyson added: "[Mr. Tankleff] was a big man with a thick neck, and it would have taken a ... great deal of energy and determination to produce a wound this deep and this extensive in a neck of that sort." Tr.4349. This underscores the unlikelihood that the teenaged, 150-pound Marty, who was "fairly weak," could have committed the attacks. *See* Def-Br. 89-90 n.72.

(Ram); A.2744-2745 (Salpeter).[20] Those reimbursements were supported by pay stubs and a letter from Ram's employer, and the details were disclosed to the DA. A.2747-55 (Salpeter). Moreover, Ram gave the same information about Creedon to Salpeter in a taped statement in Florida on September 29, 2004, and to defense counsel on October 12-13, 2004. These discussions took place before Ram requested reimbursement. A.2763-2767.[21]

Two other factors support Ram's credibility. As discussed earlier, Ram's girlfriend, Paruta, testified that, in or about 1999, Ram told her about an innocent person who was serving 25-to-life for killing his parents and that he knew who did it. A.2029-2033. This prior consistent statement was made long before Marty filed his § 440.10 motion and thus long before Ram would have any motive or ability to fabricate this account. *See* Def-Br. 64-65. The DA and the County Court fail even to address this strong corroboration.

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[20] When the DA challenged these payments, defense counsel referred the court, *see* A.2776, to New York Disciplinary Rule 7-109(C), which states, in pertinent part, that a "lawyer may advance, guarantee, or acquiesce in the payment of: (1) [e]expenses reasonably incurred by a witness in attending or testifying [or] (2) [r]easonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel," as well as to a New York State Bar ethics opinion, which authorizes a lawyer to pay a witness reasonable expenses including wage reimbursement for lost time of work for preparing to testify and testifying, *see* N.Y. Comm. on Prof'l Ethics, Formal Op. 668 (1994). Not surprisingly, the court below opined that the sparring between the parties over these payments was "irrelevant." A.2744.

[21] Kent testified that Ram told him the defense offered to bribe him with $50,000, which was being held in a Western Union "account." A.2316 Not only is the suggestion that Marty's *pro bono* lawyers would do this absurd, but Western Union has no such "accounts." A.2755 (Salpeter).

Second, after Ram's testimony at the 440 hearing, while he was being prosecuted for armed robbery, the DA's investigator, Warkenthien, offered to secure a reduced prison sentence for Ram if he would recant his testimony and "admit" to being bribed. Ram refused, insisting that his testimony was truthful. *See* Def-Br. 65 n.47.

3. Joseph Graydon

Graydon testified that, in June 1988, Creedon recruited him to assist in an unsuccessful attempt to kill a Strathmore Bagels partner (Seymour Tankleff), and that, in 1992 or 1993, Creedon said he had gotten away with a couple of murders, referring to the Tankleffs. A.1865-1873.

The DA heaps sarcasm on what he calls Graydon's "tough guy" image and criticizes his sometimes silly answers to irrelevant questions. Resp-Br. 146-149. But this fails to undermine Graydon's testimony.

The DA does not contest that, in the late 1980s, Graydon and Creedon were friends, neighbors, and partners in criminal activities, including drug dealing and robberies. A.1864-1865. Thus, Graydon was a natural person to whom Creedon would turn for help in carrying out a crime. Moreover, Graydon has no motive for lying and the DA does not offer one.[22] Finally, although the DA continues to argue

[22] The DA ominously notes that both Graydon and Foti said, at different times, that "[t]he kid [Marty] didn't do it." *See* Resp-Br. 150. It can only be hoped that the DA is being facetious when he suggests that the use of common expressions somehow proves a defense conspiracy.

that Graydon must be mistaken in claiming that he and Creedon robbed a stationary store after the failed attempt on Seymour's life, the DA does not address the obvious explanation—the police records clerk did not find this robbery in the records because it happened in June and the DA only asked the clerk to search July and August records. A.2574-2583 (Stillufsen); Def-Br. 66 n.48.

4. Brian Scott Glass And Mark Callahan

Glass initially recalled that, sometime in 1988, Jerry Steuerman asked Glass, an "enforcer" for Todd Steuerman's drug-dealing operation, to physically threaten or injure Seymour Tankleff. Glass declined and passed the job to his friend, Creedon. *See* Def-Br. 34-35.

Glass later recanted this account at the 440 hearing, claiming that he fabricated this story because Marty's defense team promised him a free lawyer for a pending robbery charge. This explanation of his about-face is not believable. According to Mark Callahan, a high school acquaintance who was in jail with Glass, Glass changed his story because, after agreeing to testify for Marty, he met with the DA on October 22, 2004, and the DA threatened to make things tough for him on the pending robbery charge if he testified as planned. Facing 25-years-to-life as a two-time offender, Glass changed his story, and, after being arraigned on the robbery charge, he was released on his own recognizance upon the motion of the DA. Glass recounted these events to Callahan. A.2785-2786, 2805 (Callahan).

The County Court completely ignored Callahan's testimony. The DA has offered no plausible reason why Callahan would lie. The DA notes (at 72) that Callahan and Marty were both incarcerated at the Nassau Correctional Facility during the 440 hearing, but the DA does not rebut Callahan's testimony that they never came into contact and were housed in "two different buildings." A.2783.[23] The DA also mentions (at 73) that Callahan wrote a letter to Marty claiming that, like Marty, he was innocent, but the DA never explains why this would make Callahan perjure himself.

Given that Callahan had no motive to lie, a reasonable jury would credit Callahan and believe that Glass recanted because of the DA's threats concerning the robbery charge.[24] *See, e.g.*, *Wong*, 11 A.D.3d at 725-726 (in evaluating the credibility of a recantation, a court should consider, *inter alia,* "the reasons offered for both the [original] testimony and the recantation"). Clearly, Glass is beholden to the DA for getting him released in highly unusual circmstances, which makes his recantation highly suspicious.

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[23] Http://maps.google.com/maps?f=l&hl=en&q=100+carmen+avenue&ie=UTF8&near=East+Meadow,+NY&ll=40.733665,-73.552721&spn=0.005634,0.007972&t=k&z=17&om=1 (last visited July 3, 2007) (Google Maps image of Nassau County Jail showing two buildings separated by a parking lot and a road).

[24] The DA has never explained the remarkable fact that Glass, a career criminal facing 25-years-to-life on the robbery charge, *was released on his own recognizance upon the DA's motion.*

5. Glenn Harris

Harris is an eyewitness to Creedon's and Kent's involvement in the Tankleff murders, and his account to multiple witnesses and in his affidavit is corroborated by Creedon and Kent's multiple admissions, as well as by a polygraph test whose methods and results *the DA does not contest* (in fact, the DA relies (at 93-94) on the polygraph results in one respect). Rather than address what Harris says and how it is corroborated, the DA exploits Harris' mental health problems, distorts Harris' statements, and ignores all factors supporting his reliability. Although he is far from a perfect witness, a reasonable jury would credit the core truth of Harris' account.

As an initial matter, the DA does not respond to the numerous factors that point to Harris' reliability. These factors include the uncontested results of Harris' June 2002 polygraph examination; the significant consistency in Harris' confessions to multiple people, including his wife and a priest, over a number of years; the fact that two wired informants sent by the DA were unsuccessful in their efforts to prod Harris into waivering in his account; and the unlikelihood that Harris could have fabricated his account. *See* Def-Br. 67-71. This is enough for a jury to credit Harris' testimony, even if it agrees he is an imperfect witness.

Instead of addressing these indicators of reliability, the DA badly distorts the letters that Harris wrote to Salpeter, the defense investigator. While those letters

are often rambling and filled with erratic statements, and while Harris is the first to acknowledge his mental health issues, drug use, and memory problems, the letters strongly demonstrate his veracity. They depict a person who is agonizing over coming forward to reveal the truth about the Tankleff murders, which he fears will come at great personal cost. Indeed, the letters are filled with statements that are wholly inconsistent with the DA's theory of fabrication.

For example, in Harris' earlier letters to Salpeter and Marty (though never delivered to Marty), Harris asks questions to ascertain whether Marty was connected to Creedon and involved in the murders in any way. A.311 (letter to Salpeter); *see also* A.262 (letter to Marty asking if he was involved in drugs and whether he knew Creedon). Of course, Harris would have had no reason to ask these questions if he had invented Creedon's participation in the murders. Similarly, Harris persistently worries that Creedon and Kent would finger him as a knowing participant in the murders. A.391-392 ("If one or both [Creedon or Kent] confess they are gonna say I was knowingly involved."); A.297, 366, 409. Harris would not agonize about Creedon and Kent confessing if he had fabricated their involvement. Finally, Harris repeatedly asked to take a lie detector test, which is irreconcilable with the DA's theory of fabrication. *See, e.g.*, A.382 ("Im [sic] eager to take the polygraph test Jay."); A.373 ("When is this lie detector test coming? The sooner the better."); A.392.

The DA argues (at 95) that because Harris' letters ask questions about how the murders occurred, this proves his account is fabricated. The DA is mistaken. Harris was outside in the car while Creedon and Kent committed the murders, so Harris did not know what transpired inside the house. It is thus no surprise that Harris asks how the murders occurred and what evidence was left. *See, e.g.*, A.327-328. It is the logical behavior of someone who unwittingly played a role in a crime but does not know the details. Moreover, a theme running through Harris' letters is his fear that, if he comes forward, he will be disbelieved and his credibility will be attacked; he realizes that his criminal history and mental health problems will make him an easy target. *See* A.363-365 ("Ill [sic] be on trial here!"); A.437 ("Will I be believed? And at what price? ... Just the truth, right Jay? Nothing more, nothing less."); A.259, 268, 272, 304, 342, 344.[25] Because of this fear, Harris sought Salpeter's assurances that other evidence supported his recollections. *See, e.g.*, A.300-301, 342.[26]

The DA also focuses on Harris' sole "recantation" letter, *see* A.329, but the DA never addresses the common sense explanation that Harris wrote the letter out of fear of being accused as an accomplice to the murders and fear of retribution by

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[25] Harris' statement that "it ain't gonna wash," A.342, is part of this litany of fears that others will not believe him. Nothings supports the DA's claim (at 143-144) that this is an admission of fabrication.

[26] In other instances, Harris is obviously struggling to remember details of the night of the murders, which took place over ten years earlier. *See, e.g.*, A.327-328. These difficulties are understandable given Harris' mental problems and history of drug use.

Creedon. There is no doubt that these fears weighed heavily on Harris' mind. A.1803-1807 (Father Lemmert); *see also* A.297 ("Of course they'll [Creedon and Kent] implicate me."); A.401 ("If the opportunity was right, and given a chance thinkin' they could get away with it, they would kill me, you, my parents, your parents and/or anyone else for a pittance."); A.259, 300-301.[27] This isolated letter, written by an obviously fearful person, provides no basis for completely writing off Harris' subsequent sworn statement, his polygraph results, his numerous consistent statements to his wife, his priest, and others, and all of his other correspondence. That would truly be throwing the baby out with the bathwater.

The DA also repeats his claims regarding the pipe that Harris led Salpeter to find, which Creedon discarded immediately after the murders in a lot near the Tankleff house. The DA argues that this pipe is irrelevant because when the DA's investigator, Warkenthein, went to the property, he "found four other rusty pipes 'in clear view' of the exact site of Salpeter's pipe." Resp-Br. 55. But the DA's argument has a critical flaw: The pipe Salpeter found was 36 inches long, slightly conical in shape, and loose on the ground, while the pipes Warkenthein saw were well pipes that measured ten feet long or longer, were perfectly cylindrical, and

[27] The DA is incorrect in claiming (at 141) that we misstate the chronology of events leading to Harris' decision not to testify. Our brief states (at 30 n.19) that, even after Warkenthien's threat to Harris and the improper taping of Harris by wired inmates, Harris said he would testify at the 440 hearing. It was only after he asked for, and was denied, use immunity that he decided not to testify. That request for immunity is consistent with Harris' general fear that he will be prosecuted for his role in the Tankleff murders.

were half-buried. *See* Def-Br. 70 n.52. Thus, the pipe was not like the others and the fact that Harris led Salpeter to it shows that Harris was in Belle Terre as he reported.[28]

Finally, the DA remains unable to offer a plausible reason why Harris would implicate himself in a double homicide if it were not true. Harris' letters paint a portrait of a conflicted person who is struggling with guilt over his role in the murders and in keeping an innocent man in prison, while at the same time intensely fearing the repercussions of coming forward. *See, e.g.*, A.297-298, 308-311, 343-345; *see also* (Father Lemmert testifying that Harris "was torn between wanting to come and clear Martin Tankleff's name and ... fear for his own life and the safety of his children"). Far from believing that coming forward would benefit him, he felt he was likely to be harmed by Creedon or prosecuted or both. It is simply not plausible to believe, as the DA asserts (at 55), that Harris invented this account as a way of getting back at Kent for supposedly having an affair with his wife[29] or as a

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[28] The DA was given an opportunity to test, or at least come and see, the pipe, but did not do so. A.1202-1206. When the defense team had the pipe tested, it did not reveal any DNA evidence, but this is consistent with what one would expect of a pipe that had been exposed to the elements for 15 years.

[29] Although Kent testified that Harris said he was framing Kent for sleeping with his wife, this self-serving testimony is not credible, especially given Kent's multiple confessions to the Tankleff murders and his efforts, exposed by Daniel Raymond, to fabricate an alibi for the night in question. Moreover, not only would there have been much easier ways to get back at Kent, but it is notable that Harris focuses blame on Creedon, not Kent, and in fact suggests that Kent had lesser culpability. *See* A.421 (Harris letter stating that, "Kent w/ used as a pawn too. Not me but for Peter it was either intimidation, influenced by Creedon, his reputation via extortion.").

way of making money.[30] Any doubts in this regard are resolved by another witness, Patrick Touhey, who reports that, while he was in prison with Harris in *1996*, Harris told Touhey that he knew of someone "in jail for committing murder but didn't do it." A.4005 (Touhey Affidavit). This discussion took place years before any of the motives posited by the DA could have arisen.

6. Bruce Demps

Bruce Demps testified that, while he was in prison with Todd Steuerman in the late 1980s and early 1990s, Todd told him on two occasions that Marty did not kill his parents and that his father, Jerry, hired someone to commit the murders. A.1761-1767; Def-Br. 36. Demps later told this to Marty and signed an affidavit saying the same thing. A.1764-1765; A.43-44.

The DA contends (at 137-138) that Demps' account should be rejected because he was housed in the same prison as Marty. But there is no evidence that Marty somehow induced Demps to perjure himself at the 440 hearing; nor is there evidence that they are even friends. Demps was set to be released from prison in eleven months—why would he risk longer incarceration by perjuring himself? *See*

[30] The DA also repeats (at 138) his assertion that Harris and Tankleff communicated while at the Clinton Correctional Institution, but, again, the DA fails to offer any proof. The record shows that Marty and Harris were detained in separate sections of the prison and were not permitted to see or speak to each other. *See* A.2600-2601 (testimony by Department of Corrections official that great care is taken to preclude contact between inmates in the Assessment and Program Preparation Unit and inmates in the general population at Clinton Correctional Facility). Further, Harris wrote letters to Marty through Salpeter, the defense investigator, asking Marty questions that indicated they had never met. Those letters were never delivered to Marty and were disclosed to the DA during the 440 hearing. A.262-267; *see* Def-Br. 69 n.51.

A.1760. In any event, courts have granted new trials based on exculpatory evidence provided by witnesses who were imprisoned with the defendant, *see, e.g.*, *Wong*, 11 A.D.3d 724; *People v. Carini*, 2007 WL 1365740 (Sup. Ct. May 10, 2007), and Demps' testimony is corroborated by the extensive other evidence of Steuerman's involvement, *see* Def-Br. 27, 33-36.[31]

III. NEW EVIDENCE ESTABLISHES THAT LEAD DETECTIVE MCCREADY PERJURED HIMSELF AT TRIAL

Marty's evidence demonstrating that lead Detective McCready perjured himself at trial by denying his longstanding relationship with Jerry Steuerman would, on its own, be sufficient to raise a reasonable doubt in the minds of a reasonable jury. *See* A.3672-3673 (McCready); A.1930-1934 (Lubrano); Def-Br. 38 n.27. In the court below, the DA did not dispute that McCready perjured himself this way.[32] And all the DA can say now is that Lubrano was not "a hundred percent sure." Resp-Br. 176.

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[31] Because Todd told Demps that that his father used the Hell's Angels to "take care of business," Demps assumed that Jerry Steuerman had hired a Hell's Angel to kill the Tankleffs and stated this in his 1997 affidavit. A.1762, 1775-1776. The DA insinuates (at 137) that Demps' affidavit was fabricated based on its supposedly suspicious timing with a federal district court opinion addressing Marty's habeas *Brady* claim regarding Steuerman's past use of Hell's Angels to attack union members. *See Tankleff v. Senkowski*, 993 F.Supp. 159, 160 (E.D.N.Y. 1997). The DA's claim is absurd. Demps' affidavit addressed different facts and was too late in time to assist in Marty's federal habeas petition.

[32] Nor, for that matter, has the DA contested that McCready was found to have perjured himself in a 1985 murder trial. *See* Def-Br. 88 n.70; A.553-564 (NY Commission of Investigation Report).

This feeble argument fails to undermine the impact of Lubrano's testimony. Lubrano, whose credibility was conceded by the County Court, testified that he saw McCready and Steuerman talking on more than one occasion in Steuerman's bagel store during the mid 1980s. A.1932-1933 (he remembered McCready's Rolex and the fact that he was a "polished dresser"); A.2026. Lubrano also testified that McCready told him that he was doing contracting work (while moonlighting) for one of Steuerman's businesses. A.1933. Additionally, William Vincent Sullivan, a former restaurant manager, has sworn that he saw McCready and Steuerman socializing in 1987 and 1988. A.3936-3938 (Affidavit). At bottom, at this point, there is no question that McCready lied on the stand regarding knowing Steuerman.

Crucially, the DA does not dispute the immense significance this perjury would have in the eyes of a reasonable jury. Revealing that McCready had a concealed friendship with an obvious suspect and then lied about it at trial would not only destroy McCready's credibility, but it would impugn the integrity of the entire investigation, explain McCready's bias against Marty, and indicate that Steuerman had never really been investigated. *See* Def-Br. 86-88.[33]

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[33] *See also Lisker v. Knowles*, 463 F.Supp.2d 1008, 1018-1019 (C.D.Cal. 2006) (holding that a reasonable jury would not find defendant guilty of murder in light of new evidence showing, *inter alia,* that "[t]here was a likely suspect whose culpability appears not to have been investigated thoroughly by police," and that "Detective Monsue's credibility, which was central to the prosecution case against Petitioner at trial, has been called into question in significant ways").

The DA seeks to dodge the impact of this perjury by arguing that the County Court was bound by Judge Tisch's decision in an earlier § 330.30 motion. However, the DA does not contest that, even if Judge Tisch's ruling did somehow apply to Lubrano's testimony,[34] the court below enjoyed discretion to admit the evidence despite Judge Tisch's ruling and that its ruling that Judge Tisch's order barred admission of Lubrano's testimony is a legal error. *See* Def-Br. 84.[35]

Most importantly, the DA does not—and, indeed, could not—dispute that Judge Tisch's ruling was manifestly wrong as a matter of law. Evidence showing that McCready and Steuerman had a longstanding relationship would not be "collateral" because it would go to McCready's bias. *See Badr v. Hogan*, 75 N.Y.2d 629, 635 (1990) (matters such as a "witnesses' bias" are not "collateral" and may therefore be proved by extrinsic evidence for impeachment purposes).[36] Moreover, because this evidence forms a crucial part of Marty's showing of innocence, the "interests of justice" affirmatively demand that it be considered.

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[34] The DA fails to dispute that Judge Tisch's prior evidentiary ruling would not apply in the first instance, because it applied to a wholly different piece of evidence and was dicta in any event. *See* Def-Br. 84.

[35] *See* C.P.L. § 440.10(3)(b) (the court "may" deny a motion if it was previously determined on the merits); *id.* § 440.10(3) (stating that "in the interest of justice and for good cause shown [the court] may in its discretion grant the motion").

[36] *See also People v. McFarley*, 21 A.D.3d 1166, 1167 (4th Dep't 2006) ("[E]xtrinsic proof tending to establish a reason to fabricate is never collateral." (internal quotation marks and alterations omitted)); *People v. Vigliotti*, 203 A.D.2d 898, 898 (4th Dep't 1994) (reversing conviction where defendant was precluded from offering proof of police officer's bias toward defendant and interest in case); Def-Br. 85 n.67.

Def-Br. 143 n.116 (enumerating additional reasons that procedural bar should not apply). The DA has never even attempted to identify what legitimate interest would be served by suppressing this evidence of blatant police misconduct.

IV. MARTY'S FALSE CONFESSION EXPERT EVIDENCE UNDERMINES THE PROSECUTION'S CASE

Marty's expert evidence on false confessions would strike at the heart of the prosecution's case and would therefore, on its own, raise a reasonable doubt as to Marty's guilt. As with the evidence of McCready's perjury, the DA has little to say in response to Professors Ofshe, Leo, and Kassin. The DA does not question their qualifications or methods, nor does he dispute the admissibility of their testimony.

What is more, the DA does not dispute any of the key findings about which the experts testified, such as the prevalence of false confessions (including the startling statistic that approximately 25% of DNA exonerees had falsely confessed); the interrogation techniques that lead to false confessions (including the use of hoaxes like McCready's here); factors that contribute to false confessions, such as youth; and the fact that false confessions are sometimes vividly detailed and thus difficult to spot.[37]

[37] Indeed, the DA does not endorse the County Court's lone (and absolutely baseless) basis for dismissing this expert testimony, namely that there was "no conduct by the detectives that would have rendered the defendant's confession false," because "a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary." A.19 (internal quotation marks omitted); *see* Def-Br. 77-80.

And, except in one minor respect, the DA does not deny that this expert testimony would have a powerful effect on a jury hearing Marty's case, particularly given the centrality of his "confession." As Professor Ofshe testified, most jurors—one study shows a statistic of 70%—do not believe that an innocent person could be made to falsely confess. *See* A.1574. There is no reason to believe that the jurors at Marty's trial were atypical in this regard. Indeed, those jurors had no reason to distrust the prosecutor's assurances that Detective McCready's hoax would not have caused an innocent person in Marty's shoes to confess to crimes "so horrible as these." A.3157; *see* Def-Br. 80 n.60 (citing similar prosecutorial statements).[38]

Thus, by learning of the reality of false confessions, a jury hearing Marty's case would be more inclined to evaluate Marty's "confession" critically, to require corroborating physical evidence, and to home in on the inconsistencies between his "confession" and the physical evidence. This is quite different from what occurred at the original trial, where Marty's "confession" was dispositive, and Marty was convicted *despite*, not because of, the physical evidence.[39]

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[38] Marty's trial took place in 1990, at the very beginning of the wave of DNA exonerations and thus at a time when there was nothing close to today's (still limited) popular awareness of wrongful convictions and the role of false confessions.

[39] *See* Richard A. Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards In the Twenty-First Century*, 2006 Wis. L. Rev. 479, 485 ("Confessions are among the most powerful forms of evidence introduced in a court of law, even when they are contradicted by other case evidence and contain significant errors. This is because police, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and

Additionally, this expert testimony would arm the jury with knowledge of the interrogation techniques and other factors that lead to false confessions. The DA does not contest that a reasonable jury would find that many of the key factors contributing to false confessions were present in Marty's interrogation, including the use of seemingly incontrovertible but false evidence of guilt. *See* A.1581-1598 (Ofshe). A reasonable jury would therefore view the interrogation and subsequent "confession" with extreme skepticism.

The DA only takes issue with Professor Ofshe's statement that the details of the confession contradict the physical evidence. The DA suggests (at 60-61) that this conclusion is flawed because Professor Ofshe relied on an account of the physical evidence provided by defense counsel. A.1621. But the DA has not refuted any of the inconsistencies between the "confession" and the physical evidence upon which Professor Ofshe relied.[40] And at trial, he would be cross-examined on what he reviewed. Further, Professor Ofshe's testimony about the existence of false confessions and the techniques and conditions that produce them would carry independent weight with the jury and does not rely on any particular description of the trial evidence.

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see them as dispositive evidence of guilt. Juries tend to discount the possibility of false confessions as unthinkable, if not impossible." (footnote omitted)).

[40] *See* A.177-180 (Ofshe Affidavit) (listing contradictions). Even the DA and his witnesses conceded that the confession does not match the physical evidence. *See* Tr.3845 (McCready); Tr.3301-3302 (Rein).

Finally, the DA is incorrect in suggesting that Marty could have called a false confession expert to testify at his 1990 trial. At the time of Marty's trial the science of false confessions was only beginning to take hold and it was only during the 1990s that significant developments took place—including the wave of DNA exonerations that provided conclusive evidence of false confessions—that advanced the field into general acceptance. *See* Def-Br. 76 n.55. In that period, a New York court would not have admitted such evidence under the *Frye* standard. *Id.*[41] Likewise, the DA is mistaken in claiming (at 132) that the psychiatrist who testified at Marty's trial somehow obviated the need for a false confession expert. That psychiatrist did not, and could not properly have been qualified to, "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. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996) (vacating conviction where trial court improperly excluded Professor Ofshe's testimony).

V. MARTY WAS DILIGENT IN BRINGING FORWARD HIS NEW EVIDENCE

The DA, like the court below, appears to be arguing, first, that Marty lacked diligence with regard to Kovacs and Harris and, second, that this somehow means that *all* of his new evidence is barred. Both contentions are false.

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[41] For this reason, the DA's reference (at 132) to Professor Leo's affidavit is inapposite. *See* A.219 (Leo Affidavit). Even if Marty's trial counsel could have "consult[ed]" with a false confession expert, the testimony of such an expert would not have been admitted at trial.

A. Marty Was Diligent With Regard To Kovacs And Harris

As the DA concedes, § 410.10(1)(g) "contains two due-diligence requirements. First, a defendant must show that even if he had exercised due diligence, he could not have produced the new evidence at his trial. Second, he must also show that after he discovered his new evidence, he exercised due diligence in filing his motion." Resp-Br. 82.[42]

The DA does not contest that Marty has satisfied the first requirement. *See* Def-Br. 114. The DA does argue (at 82) that Marty lacked diligence in bringing forward Kovacs' 1994 affidavit. However, the DA wholly fails to dispute that "due diligence" under § 410.10(1)(g) does not require a defendant to immediately file a motion upon discovering new evidence if that evidence is not sufficiently strong by itself to warrant relief under the *Salemi* factors. *See* Def-Br. 114-115. Such a reading would force a defendant to bring any new evidence, however minor, before the court *ad seriatim*, which would pointlessly burden both defendants and the judiciary.

The DA, like the court below, conflates an evidentiary basis for *starting an investigation* with a sufficient evidentiary basis for *moving for relief.* This distinction was recognized in *Carini*, 2007 WL 1365740. There, the defendant was convicted of murder in 1985. In 2004, he learned that two witnesses in a federal

[42] The Court below expressly recognized, as the DA does implicitly, that there is no due diligence requirement applicable to Marty's actual innocence claims. *See* A.21.

investigation had told prosecutors that the his dead brother had admitted to committing the murder. The defendant filed a § 440.10 motion, and the DA argued that it should be denied for lack of diligence because ten years earlier one of the witnesses, told him that the defendant's brother committed the crime. The court rejected that argument. *Id.* at *6. Because the witness had not provided the defendant with specific details ten years earlier, and because the witness would not have testified to the real perpetrator's involvement while the guilty brother was alive, the Court found that it would have been pointless for the defendant to have filed a § 440.10 motion based solely on this conversation. *Id.* Instead, the Court ruled that the due diligence inquiry began in 2004 when the defendant learned of the new, more detailed, and corroborative, testimony presented in the § 440.10 motion. *Id.* at *6-7.

The similarities in Marty's case are staggering. There is "no way a viable motion to vacate the judgment" could have been brought forward in 1994 based on the Kovacs affidavit, which lacked specific detail,[43] and the extremely limited information that Marty had about a potential conversation between Steuerman and Creedon. As in *Carini*, it was only after obtaining more specific, corroborating evidence—Harris' 2003 sworn statement describing Creedon and Harris' role in

[43] Given the myriad deficiencies the DA finds in Kovacs' affidavit, it would be hard for the DA to disagree with this assessment.

the murders—that any due diligence "clock" could start running in good faith on these facts.[44]

The DA implicitly understands the foregoing distinction. In referring to Harris, the DA asserts (at 144) that "his letters do explain Tankleff's lack of due diligence: after hearing Harris' story in March 2002, Tankleff waited seventeen months, until August 2003, to obtain an affidavit from Harris." What defense counsel did in this case—working through the admitted vagaries of Harris' many statements, checking Harris' facts and acquiring more detail, and obtaining a polygraph examination to verify the truth of Harris' account before securing an affidavit—exemplifies the very type of diligence that attorneys should conduct before running into court.

B. There Is No Requirement That The Defendant Exercise Due Diligence To *Discover* New Evidence

The DA argues—and the court below seems to suggest—that *all* of Marty's new evidence is barred because a defense investigator could have supposedly found it all years back by following up on Kovacs' 1994 affidavit. This notion is

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[44] *Cf. People v. Pacheco*, 38 A.D.3d 686 (2d Dep't 2007). In that case, the defendant claimed a violation of due process from "the delay of approximately 18 years between the date the crime was committed and the date of the indictment." *Id.* at 687. This Court found no such violation because "[t]he delay was based on a good faith determination that the police lacked probable cause to arrest the defendant until several witnesses came forward in 2002 and told law enforcement officials that the defendant admitted killing the victim." *Id.* (Based on this holding, of course, the Suffolk County police would have ample "probable cause" to arrest Creedon for the Tankleff murders now that "several witnesses came forward" in the proceeding below and testified that Creedon "admitted killing the victim[s].")

unprecedented and flies in the face of the statute. The DA himself concedes that § 410.10(1)(g) contains "two due-diligence requirements" and that "410.10(1)(g) does not, on its face, require that a defendant exercise due diligence to discover new evidence." Resp-Br. 82, 84. That should end the matter, but the DA nevertheless baldly asserts (at 84) that such a requirement exists. There is simply no warrant for adding an additional requirement to the statute.[45] Particularly given the liberty interests involved in motions under § 440.10(1)(g), this Court should not countenance an additional barrier to relief.[46]

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[45] *See People v. Jackson*, 87 N.Y.2d 782, 788 (1996) ("Where a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." (internal quotation marks omitted)). The DA relies (at 85) on a 1960 federal case, which does not interpret the New York statute. *See Mills v. United States*, 281 F.2d 736, 739 (4th Cir. 1960). The cited language in *People v. Messina*, 212 N.Y.L.J. 24 (Sup. Ct. 1994), was dicta. Finally, in *People v. Friedgood*, 58 N.Y.2d 467, 472-473 (1983), the court addressed § 440.10(3)(a), which requires diligence in raising the facts of a claim before sentencing; here, there is no claim that Marty could have raised his evidence at trial or before sentencing.

[46] In any event, even if such a requirement exists, the DA's reasoning is flawed. Some of the key pieces of Marty's new evidence came into existence years after Kovacs' 1994 affidavit, such as Kent's admission to Moore in 2002, while some of it came into existence only after Marty filed his § 440.10 motion, such as Creedon's confession to his son and Kent's threatening of Billy Raymond to support his false alibi, both of which occurred in 2004. Moreover, the assumption that Marty could have discovered all of this evidence in 1994 is completely unrealistic and suffers from hindsight bias. There is no basis for holding Marty, an indigent prisoner, to the standard of what a well-trained former homicide detective like Jay Salpeter could have found in 1994. *See* Def-Br. 117 n.98. Moreover, the fact that Salpeter was able to obtain evidence years later does not mean he could have obtained it earlier, since witnesses' willingness to come forward drastically changes over time due to a variety of factors. A.1172-1173 (Salpeter). The success of Salpeter's investigation in the early 2000s was fortunate and should not be twisted into a reason to deny Marty relief.

VI. MARTY'S NEW EVIDENCE IS ADMISSIBLE

The County Court erroneously held that the majority of Marty's new evidence would be inadmissible. Even considering only the new evidence for which admissibility is not disputed, Marty has carried his burden for obtaining a new trial. In any event, the County Court's admissibility determinations were fraught with legal and factual error and merit reversal.

Significantly, while evidence submitted under § 440.10(1)(g) must be admissible, that requirement does not apply to constitutional claims of actual innocence. *See People v. Cole*, 1 Misc.3d 531, 543 (Sup. Ct. 2003). Thus, this Court may grant Marty relief on his actual innocence claims without resolving these issues of admissibility.

A. The Evidence For Which Admissibility Is Not Disputed Is Alone Sufficient To Require A New Trial

As an initial matter, even Marty's evidence for which admissibility is not disputed is more than sufficient to create reasonable doubt in a new jury's eyes, particularly given how weak the case against Marty was at trial. *Cf. Jones v. Stinson*, 229 F.3d 112, 120 (2d Cir. 2000) ("[I]n a close case, additional evidence of minor importance might be sufficient to create a reasonable doubt." (internal quotation marks omitted)). This includes:

(1) False confession expert evidence;[47]

(2) Evidence of McCready's perjury'[48]

(3) Graydon's testimony that, one or two months before the Tankleff murders, he went with Joseph Creedon to Strathmore Bagels to murder one of the owners;[49]

(4) Ram's testimony that, on the night of the Tankleff murders, Creedon, Kent, and Harris left Ram's house together;

(5) Creedon's admission that he acted as an enforcer for Todd Steuerman, Jerry Steuerman's cocaine-dealing son;

(6) Evidence that Creedon, Kent, and Harris knew one another and had extensive criminal histories.

The above evidence is plainly admissible and by itself would create a reasonable doubt in the minds of a reasonable jury, particularly when viewed, at a minimum, in light of the following trial evidence: 1) evidence of Jerry Steuerman's motive to kill the Tankleffs and his feigned death and flight from the jurisdiction shortly after the attacks; 2) evidence that the Tankleffs' wounds were consistent

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[47] *See* A.1569 (Professor Ofshe's expert testimony admitted without objection).

[48] The DA does not dispute, as a matter of evidence law, that proof of McCready's and Steuerman's prior relationship would be admissible to show McCready's bias; the DA only claims (at 172-174) that Judge Tisch's prior ruling acts as a procedural bar regarding this testimony.

[49] Graydon's testimony about what *he* did, with whom, and why is relevant and not hearsay. The DA appears to agree, objecting only to Graydon testifying about Creedon's intent. *See* Resp-Br. 101-102. This latter analysis is incorrect, as demonstrated *infra.*

with multiple assailants and multiple weapons; and 3) the lack of any meaningful evidence linking Marty to the murders, other than the "confession," which conflicts with the physical evidence.

In addition, there is extensive additional evidence of Creedon's and Kent's involvement in the Tankleff murders that the lower court erroneously ruled would be inadmissible.

B. The County Court Erred In Excluding Vast Amounts Of Marty's Evidence

Attempting to distract the Court from Marty's extraordinary showing of innocence, the DA spends much of his brief arguing to exclude admissible evidence. At bottom, the DA is arguing that a defendant facing murder charges would be prohibited from informing the jury that two career criminals with no alibis admitted to the murders to nine different witnesses over a course of years, where that testimony is corroborated by eyewitness statements (including by the getaway driver) and by unrebutted polygraph results. In the DA's view, this highly probative evidence can be withheld from *the jury* based on a *judge's* belief that the witnesses are "nefarious scoundrels," *see* A.11, or that their accounts suffer from inconsistencies—factors that affect the weight of the evidence, which is the jury's purview.

In ruling vast amounts of Marty's evidence inadmissible, the County Court applied incorrect legal standards; considered each piece of evidence in isolation,

while ignoring other corroborating evidence; disregarded some evidence outright; made improper credibility determinations; and failed to apply the due process mandate of *Chambers v. Mississippi*, 410 U.S. 284 (1973). The DA repeats these mistakes and also invokes specious procedural barriers.

1. The County Court Wrongly Ignored Marty's Unrebutted Polygraph Evidence In Making Its Reliability Determinations

The County Court erred in wholly ignoring Marty's polygraph evidence. Professor Reicherter of the Department of Defense's Polygraph Institute certified, through polygraph examination, that Marty, Harris, and Kovacs were truthful in their statements. *See* A.144-151 (polygraph reports). The DA does not contest these results, nor does he question Reicherter's methods or qualifications.

At a minimum—and particularly where, as here, the polygraph results are uncontested—the County Court should have considered these results in making its threshold reliability determinations regarding Marty's evidence. *See* Michael M. Martin, et al., *New York Evidence Handbook*, § 1.5.2, at 18 (2d ed. 2003) ("In making its determination of preliminary questions, the court is ordinarily not bound by the rules of evidence."); *see also People v. Kemp*, 59 A.D.2d 414, 419-420 n.2 (1st Dep't 1977). Putting aside the general admissibility of polygraph evidence, there is no justification for ignoring unrebutted polygraph results—showing the veracity of Marty's claims of innocence, Harris' eyewitness account

of Creedon's and Kent's entry into the Tankleff house, and Kovacs' account of Creedon's admission to the Tankleff murders—in the relatively narrow context of deciding whether evidence is sufficiently reliable to be *considered* by the jury. This is particularly so given that New York courts and law enforcement agencies throughout the country have acknowledged the usefulness of polygraph testing.[50]

2. Creedon's Statements To Graydon And Ram Would Be Admissible To Show His Intent To Perform The Subsequent Act Of Attacking Seymour Tankleff

Creedon told Graydon that he intended to go to a Strathmore Bagels store to kill one of the owners and asked Graydon to come along. A.1866-1867. On the night of the Tankleff murders, Creedon told Ram that he planned to go to Belle Terre to "rough up" a "Jew in the bagel business," and asked for Ram's help. A.1961-1963. Among other grounds, Creedon's statements would be admissible as statements of present intent to perform a subsequent act. *See People v. Malizia*, 92 A.D.2d 154, 155 (1st Dep't 1983) (a "declarant's statement is permitted to show his existing intent, and from this intent the trier of fact is permitted to infer that the act was carried out"), *aff'd*, 62 N.Y.2d 755 (1984).[51]

The DA erroneously counters that Creedon's statements are inadmissible because Marty must, but cannot, show that they were "made under circumstances

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[50] *See* Def-Br. 73 & n.53. The DA does not dispute that the County Court erred in failing to rely on this evidence, particularly where the polygraph results in question are unchallenged. *Id.*

[51] *See also People v. Bongarzone*, 116 A.D.2d 164, 169 (2d Dep't 1986).

that make it probable that the expressed intent [is] a serious one[] and that it [is] realistically likely that the future act would take place." Resp-Br. 104 (internal quotation marks omitted). But the DA previously conceded to the County Court that this showing is not required. *See* Respondent's Appendix ("RA") 110 n.94 ("Because Creedon's alleged statements do not implicate a third person, there is no requirement ... of independent evidence of reliability."). The DA cannot reverse position now, but, in any event, his present position misstates the law. A party need only provide evidence of a "serious" intent where the "the inference sought to be drawn implies some conduct on the part of one *other than the declarant* or to some extent requires that individual's cooperation." *Bongarzone*, 116 A.D.2d at 169 (citing *Malizia*, 92 A.D.2d at 159-160) (emphasis added). Because Marty offers Creedon's statements merely to show *Creedon's* intent to perform a subsequent act, no further evidence of reliability is required.[52]

The DA also argues that Marty is precluded from asserting this basis for admitting Creedon's hearsay statements because he waived the argument below. Resp-Br. 103. However, the DA flatly misstates the very pages from his appendix

[52] Even if this requirement applied, it would be satisfied here because Creedon is a violent criminal and he made these statements to fellow criminals in the context of their past histories together. The DA argues that, because the "County Court found Ram and Graydon to be unworthy of belief," "[t]heir testimony regarding Creedon's intent to commit future acts would therefore be inadmissible." Resp-Br. 104-105. But the DA is mistaken. The issue is not whether Ram's and Graydon's report of what Creedon said is credible (after all, their testimony in this regard is subject to cross-examination), but rather whether there is reason to think that Creedon's expressed intent was a serious one. Given that Creedon engaged in this type of activity, it is likely he meant what he said.

that he cites. In Marty's reply brief in the County Court, Marty states that he "agrees with the DA that Graydon's testimony that Creedon offered him money to help murder a Strathmore [B]agel business partner, as well as Ram's testimony that Creedon offered him money to help rough up 'a Jew in the bagel business,' will be admissible to show the declarant's state of mind (or statements of intention to perform a subsequent act)." RA.115-116. Thus, Marty's position was squarely before the trial court.[53]

3. Creedon's, Kent's, And Steuerman's Admissions Are Admissible As Prior Inconsistent Statements, Under The Exception For Statements Against Penal Interest, Or As A Matter Of Due Process

In total, six witness report that Creedon admitted to the Tankleff murders; four have reported Kent's admissions; and one reported Steuerman's admission. There is ample reason to believe these witnesses, including the DA's previous concession that "too many persons unconnected with one another" reported Creedon's admissions for them not to have happened. A.498.

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[53] Creedon's statements to Ram and Graydon would also be admissible as non-hearsay "verbal acts." *See* Def-Br. 112-113. Both statements were acts of criminal solicitation because Creedon was asking Ram and Graydon to participate in crimes. *See* Penal Law § 100.00 (defining criminal solicitation). Statements that in and of themselves constitute crimes, such as statements of solicitation or agreeing to participate in a conspiracy, are not hearsay. *See, e.g.*, *People v. Caban*, 5 N.Y.3d 143, 149 (2005); *United States v. Smith*, 354 F.3d 390, 396 (5th Cir. 2003) ("[S]olicitation of perjury is itself a verbal act, not hearsay."); *Morgan v. State*, 741 So.2d 246, 257 (Miss. 1999) ("The 'verbal act' of the solicitation is not hearsay."). Accordingly, whether as verbal acts or as evidence of intent to perform a subsequent act, this evidence would be admitted at a new trial.

However, the DA argues none of these statements would be admitted into evidence based on his hypothetical speculation regarding who would offer the witnesses and whether they would either be physically available or would "take the Fifth." But whether or not a new trial must be granted cannot turn on speculation of this nature—it turns on the evidence itself, whether standing alone it satisfies admissibility requirements, and whether it would affect a jury's determination of reasonable doubt. Nothing requires the Court to speculate as to whether a witness might die, flee the country, lie, take the Fifth, be called by the DA as a preemptive measure, or be called by the defense. Indeed, that sort of speculation would frustrate the truth-seeking purposes of § 440.10(1)(g). *Cf. People v. Santos*, 306 A.D.2d 197, 198-199 (1st Dep't) (motion based on newly discovered evidence "does not only involve a procedural nicety, but ... the very essence of a trial's truth finding goal: namely, to accord an accused a full and fair opportunity to present highly relevant evidence in his or her defense"), *aff'd* 1 N.Y.3d 548 (2003). Because whether a new trial is warranted ultimately depends on the *strength* of a defendant's new evidence, courts should normally resolve any speculation of this kind *in favor* of admissibility—and as discussed below there are numerous scenarios in which the evidence is clearly admissible. *See People v. Ausserau*, 77 A.D.2d 152, 155-156 (4th Dep't 1980) (noting that the "[t]he trial court's reliance upon a hearsay consideration is premature at this stage of the proceedings"

because, *inter alia*, "the hearsay concern may become irrelevant because it is not certain that [the witness], given the proper assurances of immunity, will not testify at a second trial").

In any event, even if a trial played out as the DA imagines, the testimony in question is so important to Marty's defense, and its exclusion by the state evidentiary rules so arbitrary and disproportionate, that it would be admissible as a matter of federal and state due process. *See, e.g.*, *Chambers*, 410 U.S. at 301. Below, we review each scenario for admission in turn.

a. Prior Inconsistent Statements

The DA does not contest that if he called Creedon, Kent, and Steuerman[54] to the stand at a new trial, and they denied their involvement in the Tankleff murders, Marty could impeach those denials by introducing their admission to these crimes as prior inconsistent statements. *See* Resp-Br. 108. The DA argues, however, that if these statements are admitted, they can only be used to impeach Creedon, Kent, and Steuerman, and not as affirmative evidence of their guilt. *Id.* But this is irrelevant. At a new trial, Marty would not need to prove their guilt. Rather, he would demonstrate reasonable doubt as to his own guilt based on evidence pointing to other suspects (*e.g.*, Graydon's testimony about his and Creedon's

[54] Steuerman was called by the DA at the original trial. Although the DA argues that he would not call Creedon and Kent, it is quite plausible that he would do so, since, for example, the DA called Kent at the 440 hearing to impeach Harris.

failed murder attempt on Seymour Tankleff; Ram's testimony that Creedon, Kent, and Harris left for Belle Terre the night of the murders; Steuerman's motive to kill Seymour and his suspicious feigned death) and the incredibility of these suspects' denials based on their multiple prior admissions.[55]

b. Statements Against Penal Interest

If Creedon, Kent, and Steuerman "took the Fifth," they would be unavailable, and their previous admissions would be admissible as statements against their penal interest. The first three requirements for admitting such statements are readily satisfied. *See* Def-Br. 107 (declarant is unavailable, was aware at the time that the statement was contrary to his penal interest, and had competent knowledge of the underlying facts); *see also People v. Thomas*, 68 N.Y.2d 194, 197 (1986).

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[55] The DA argues that Marty failed to raise this prior-inconsistent-statement argument in the lower court. However, Marty clearly argued for the admissibility of this testimony and challenged the application of the hearsay rule. Once a claim is properly presented, on appeal, "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Nor did the DA suggest in its opposition to Marty's motion for leave to appeal that this argument was somehow not properly before this Court. In any event, this Court has broad discretion to consider this argument in the interest of justice. *See People v. Cona*, 49 N.Y.2d 26, 33 (1979) ("[T]he Appellate Division, if it deems it appropriate, may exercise its discretionary power to review alleged errors even in the absence of that timely objection which is necessary to create a question of law."); *People v. McKenna*, 77 A.D.2d 926, 927 (2d Dep't 1980) (choosing, in the interest of justice, to consider an argument not raised below); *People v. Clegg*, 18 A.D.2d 694, 694 (2d Dep't 1962) (same); *People v. Altintop*, 13 A.D.2d 508, 508 (2d Dep't 1961) (suggesting that in close cases the Court should be particularly willing to consider arguments in the interest of justice).

Like the County Court, the DA focuses his attention on the fourth requirement. Where, as here, the statement is exculpatory as to the defendant, "[s]upportive evidence is sufficient if it establishes *a reasonable possibility that the statement might be true.*" *People v. Settles*, 46 N.Y.2d 154, 169-170 (1978) (emphasis added). However, because the County Court did not apply this legal standard, A.16-18, its determinations are owed no deference. Rather than focusing on the *reliability* of Creedon, Kent, and Steuerman's statements, *i.e.*, whether there is a reasonable possibility they might be true, the County Court improperly focused on assessing the credibility of the witnesses reporting the admissions. However, the *credibility* of testifying witnesses is the sole province of the jury. *See, e.g.*, *People v. Darrisaw*, 206 A.D.2d 661, 664 (3d Dep't 1994) (holding that once the party offering an exculpatory statement demonstrates "a reasonable possibility that the statement might be true ... [,] the assessment of credibility becomes a matter for the jury"); *see also People v. Robinson*, 89 N.Y.2d 648, 657 (1997) (it is the role of the Court to determine "reliability rather than credibility," and "[u]nless perjury is clear ... , it is not for the court to determine that certain biases revealed by a witness would ... render testimony untrustworthy when it was adduced under circumstances which bear sufficient indicia of reliability").

As previously discussed, there are multiple indicia of reliability attaching to Creedon, Kent, and Steuerman's statements. *See* Def-Br. 102 n.82 (listing nine

factors corroborating Creedon's statements, including Harris' and Kovacs' polygraph reports); Def-Br. 106 (Kent); Def-Br. 110 (Steuerman). The DA, like the court below, ignores many of these factors, such as Paruta's testimony that indicates that Ram told her about an innocent man in prison for killing his parents and that he knew who did it—years before any of the supposed nefarious motives to fabricate could have surfaced.

c. Due Process

If this Court accepts the DA's speculation that Creedon, Kent, and Steuerman would be available at trial and the DA would not call them, Marty would have to call them and they would take the stand and testify in a manner inconsistent with their admissions. Notwithstanding the voucher rule and the "unavailability" requirement, these admissions would be admissible as a matter of federal and state due process. *Holmes v. South Carolina*, 126 S. Ct. 1727, 1731 (2006); *Chambers*, 410 U.S. at 302-303; *Robinson*, 89 N.Y.2d 648. These cases recognize that the Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense." *Holmes*, 126 S. Ct. at 1731.[56]

The DA would gut this protection by interpreting *Chambers* so narrowly as to confine it to its facts. Neither the Constitution nor the caselaw countenance this result.

[56] Other witnesses' testimony would also be admissible under *Chambers*.

As an initial matter, the County Court, except by way of a quotation containing a parenthetical citation to *Chambers*, never expressly addressed Marty's claims under *Chambers*, A.16, and that court did not have the benefit of *Holmes*. For these reasons, and because *Chambers* and *Holmes* are of a constitutional stature, review of the County Court's decision must be *de novo*.[57]

First, the statements at issue could not be more critical to Marty's defense. Informing the jury of Creedon, Kent, and Steuerman's past admission to the Tankleff murders is the only practical means of demonstrating, as is Marty's right, that others, not he, committed the murders. Because these admissions are reported by a range of people, many of whom do not know one another and do not know Marty, they are powerful. Indeed, there is even more cause to admit these statements than there was in *Chambers* itself. In *Chambers*, the person who Chambers was accusing of being the real killer, McDonald, had executed, but later recanted, an affidavit confessing to the crime. 410 U.S. at 291. While Chambers presented that affidavit at trial, he was denied the opportunity to present McDonald's admissions to three other witnesses as a way of impeaching his recantation, and the Court held this violated due process. *Id.* at 291-292. By

[57] *Cf. Lilly v. Virginia*, 527 U.S. 116, 136 (1999) ("Nothing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness. To the contrary, those opinions indicate that we have assumed ... that 'independent review is ... necessary ... to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.").

contrast, here Marty does not even have a recanted admission in evidence, and so the new evidence of Creedon, Kent, and Steuerman's statements is even more significant.

Second, these statements bear strong indicia of reliability. Even apart from their self-inculpatory nature, all the statements and confessions bear many other hallmarks of trustworthiness:

- Creedon's spontaneous and in some cases detailed confessions were made over several years to six people, including his own son. *See* Def-Br. 27-29.
- Kent's spontaneous confessions were made to four people, over several years. *See* Def-Br. 31-32.
- Jerry Steuerman's confession was made spontaneously, during a fit of anger, and occurred relatively soon after the murders. *See* Def-Br. 36.
- Harris swore a statement and also made similar statements to his wife, his mother, and two clergy. Harris' wife reports that he confessed in detail to her and to his mother. *See* Def-Br. 29-31.
- Todd Steuerman's statements to Demps were made relatively soon after the murders and were made twice to the same individual. *See* Def-Br. 36.
- All of the confessions and statements are corroborated by each other as well as by other admitted evidence and the unrebutted polygraph results. *See* Def-Br. 41-42.

While the DA would urge this Court to bar this evidence based on its own assessment of the witnesses' credibility, that view contradicts *Chambers*. As one court has put it, "If [*Chambers*] mean[s] anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury." *Pettijohn v. Hall*, 599

F.2d 476, 481 (1st Cir. 1979). The evidence here is at the very worst "important yet possibly unreliable"—and, as discussed, it is reliable.

Finally, the state interests in excluding this evidence are exceedingly weak. Prohibiting Marty from impeaching Creedon, Kent, and Steuerman with prior inconsistent statements solely because Marty was the party that called them is exactly the type of arbitrary rule barred by *Chambers* and *Holmes*. *See Chambers*, 410 U.S. at 295-296 (finding due process violation and stating that the voucher rule is a "remnant of primitive English trial practice" that "bears little present relationship to the realities of the [modern] criminal process," where "defendants are rarely able to select their witness" but rather "take them where they find them."); *Welcome v. Vincent*, 549 F.2d 853 (2d Cir. 1977) (New York's voucher rule violated due process where it barred defendant from confronting a witness with his previous confessions).[58] Likewise, it is arbitrary and fundamentally unfair to exclude statements against penal interest for the sole reason that the declarant is *available* to testify. Such a rule is precisely backwards. The Court of Appeals has frequently observed that a declarant's availability for cross-examination actually

[58] *See also Lipinski v. New York*, 557 F.2d 289, 293 (2d Cir. 1977) (criticizing the voucher rule's traditional rationale as "plainly bankrupt" because no one will "today defend the proposition that a party is morally bound by the testimony of his witnesses"). Further, in civil cases, New York courts often allow a witness' prior inconsistent statements to be admitted substantively as an exception to the hearsay rule. *See Letendre v. Hartford Accident & Indem. Co.*, 21 N.Y.2d 518, 521 (1968); *accord Nucci v. Proper*, 95 N.Y.2d 597 (2001); *see also Vincent v. Thompson*, 50 A.D.2d 211 (2d Dep't 1975). Indeed, New York's failure to recognize this exception in the *criminal* context—particularly where a defendant is attempting to introduce exculpatory evidence—is also arbitrary and thus violative of due process.

makes hearsay testimony *more* reliable. *See, e.g.*, *People v. Buie*, 86 N.Y.2d 501, 512 (1995) ("In cases involving statements admitted pursuant to hearsay exceptions where the declarant has also testified in court, this Court has consistently not only permitted the use of the statements, but has also cited the declarant's presence on the witness stand as additional justification for the allowance because of the opportunity to verify and test the statements' trustworthiness."); *see Chambers*, 410 U.S. at 301 (holding that the availability of a declarant to be cross-examined reduces the dangers posed by hearsay testimony).

By excluding Creedon, Kent, and Steuerman's admissions, the lower court violated *Chambers*' command that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.[59]

4. Harris' Sworn Statement And Multiple Confessions Would Be Admitted As Statements Against His Penal Interest Or As A Matter Of Due Process

Marty's opening brief explained in detail why Glenn Harris' sworn statement and his statements to multiple witnesses would be admissible as

[59] The DA contends that New York has no residual hearsay exception. He admits, however, as he must, that New York courts have frequently said that exculpatory hearsay evidence not falling under any statutory exception often must be admitted in criminal cases. *See, e.g.*, *Robinson*, 89 N.Y.2d 648 (allowing defendant to introduce grand jury testimony of unavailable witness even though such testimony did not fall within any recognized hearsay exception); *People v. James*, 242 A.D.2d 389 (2d Dep't 1997) (same). Whether to describe evidence admitted in this way as admitted pursuant to a residual hearsay exception or as admitted pursuant to the defendant's due process rights is academic.

declarations against penal interest. *See* Def-Br. 107-109. The DA contests that these statements were made against his penal interest, that he had competent knowledge of the facts, and that they are sufficiently reliable. We address each argument in turn.

a. Harris' Statements Were Against His Penal Interest

Respondent claims (at 91-94) that Harris did not think his statements were contrary to his penal interest because Harris supposedly could present an affirmative defense to the felony murder charge to which his statements expose him. But this is absurd. Any ordinary person would think that admitting to being a getaway driver to a robbery-turned-murder is against that person's penal interest. And even assuming Harris had the nuanced legal knowledge to believe that he made out all elements of an affirmative defense, there is no reason he would trust that the prosecutor would see the matter the same way.

In any event, Harris likely could not make an affirmative defense to felony murder based on his statements. The final two requirements of the affirmative defense to felony murder are that the defendant: "(c) [h]ad no reasonable ground to believe that any participant was armed with" a "deadly weapon, or any instrument ... readily capable of causing death or serious physical injury," and "(d) [h]ad no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury." *People v. Caicedo*,

234 A.D.2d 379, 380 (2d Dep't 1996) (quoting Penal Law § 125.25(3)). However, as the DA has acknowledged, Joey "Guns" Creedon was known to be a violent person and to always carry a gun. Moreover, Harris' statements acknowledge his participation in a 3 a.m. burglary of a private home when he knew both the other participants were violent felons. Under these circumstances, even if Harris had known the rules for stating an affirmative defense to felony murder, he could not have been remotely confident of satisfying them, because he had a reasonable ground to believe that Creedon or Kent might be armed or intended to engage in violent conduct.[60] As Father Lemmert explained, "[Harris] told me from day one that he was afraid that by coming forward and telling the truth, that he would end up having the murders pinned on him." A.1804.[61]

The DA also argues (at 93-94) that Harris shows a lack of understanding that his statements were against his penal interest, citing his letter saying that Salpeter had assured him that on a scale of 1 to 10, the chance of Harris not getting caught up was 8 or 9. However, even this statement makes clear that Harris knew he was

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[60] In addition, Harris was admitting that he was involved as a getaway driver in a burglary. The DA argues that this is irrelevant because the statute of limitations for burglary had run by the time of the admissions. However, the fact that the statute of limitations has run does not necessarily mean that a statement otherwise against penal interest is rendered unreliable. *See Sellars v. Estelle*, 450 F.Supp. 1262, 1263 (S.D.Tex. 1978) (noting that even though the statute of limitations had run on the crime, the statement against penal interest was still regarded as reliable). There is no evidence that Harris had actual knowledge of the running of the statute of limitations, so his statements still fall within the rationale of the exception.

[61] Father Lemmert added that Harris decided not to testify because "he was terrified of the thought of spending the rest of his life in jail." A.1806.

risking prosecution, and Harris noted in the same letter that he thought his chances of getting caught up in the investigation were actually greater than Salpeter claimed. A.343-345. Furthermore, even the DA seems to acknowledge (at 94) that after Warkenthien met with and threatened Harris in October, 2003, Harris knew he risked prosecution. Yet Harris continued making statements acknowledging his role in the Tankleff murders (to Father Lemmert, Sister Angeline, John Kelly, and two wired jailhouse agents of the DA).

b. Harris Had Competent Knowledge Of The Facts

The DA argues (at 94-96) that Harris lacks competent knowledge of the facts because he asked Salpeter questions about certain details of the murders. However, the vast majority of the details Harris asked about were ones that he never claimed to know and that his statements would not be used to prove, such as exactly how Creedon and Kent entered the Tankleff house, or what types of wounds the Tankleffs had. Harris' statements would be used to describe the time directly before and directly after the Tankleff murders, when he drove Creedon and Kent to and from the Tankleff home. Harris was present at this time and has direct knowledge of what occurred, so he does have competent knowledge of the facts contained in his statements.

c. Harris' Statements Bear Sufficient Indicia of Reliability

As noted, the County Court did not apply the proper legal standard. A.16-18. Rather than focusing on the *reliability* of Harris' statements, the County Court improperly focused on assessing Harris' *credibility*, which should be the role of the jury. *See, e.g.*, *Darrisaw*, 206 A.D.2d at 664 (holding that once the party offering an exculpatory statement demonstrates "a reasonable possibility that the statement might be true ... [,] the assessment of credibility becomes a matter for the jury"). The DA makes the same error in his brief, focusing on Harris' mental stability and motives.

As detailed in Marty's opening brief, under the proper legal standard Harris' statements bear sufficient independent indicia of reliability to establish a "reasonable possibility" that they might be true. *See* Def-Br. 107-109. Harris' statements are corroborated by Ram and Creedon's and Kents' multiple admissions; Harris confessed the day after the murders to Ram; and, in total, he has confessed to at least nine different people and his accounts have remained largely the same. *See, e.g.*, *Morales v. Portuondo*, 154 F.Supp.2d 706, 727 (S.D.N.Y. 2001) ("[T]he fact that a declarant has made numerous confessions to different individuals is an independent circumstance attesting to the trustworthiness and reliability of declarant's statements." (internal quotation marks omitted)). Finally, the manner in which Harris provided some of his confessions (to a priest with an

expectation of confidentiality, in an affidavit under the penalty of perjury) further confirms that they were made in conditions conducive to reliability. *See* Def-Br. 109 n.91.

Together, these factors undoubtedly establish "a reasonable possibility that [Harris'] statement['s] might be true." *Settles*, 46 N.Y.2d at 169-170.

d. Harris' Statements Would Also Be Admissible As A Matter Of Due Process

As an eyewitness account of the actual killers entering the Tankleff home, Harris' confessions are uniquely important to Marty's defense. For the reasons detailed earlier, his statements bear adequate indicia of reliability and thus ought to be presented to a jury. *See* Def-Br. 107-109.

VII. MARTY'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS FEDERAL AND STATE *MIRANDA* RIGHTS

Although the court below did not even address the issue, Marty was in "custody" at least by the time Detective McCready told him, falsely, that his father had woken up from his coma and fingered Marty as the attacker. As the Second Circuit held, by then, if not earlier, no "reasonable person" in Marty's shoes would have felt free to walk out of the interrogation room. *Tankleff v. Senkowski*, 135 F.3d 235, 244 (2d Cir. 1998). Tellingly, the DA never disagrees.[62]

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[62] Although the DA does not propose a different "reasonable person" analysis, he discusses *People v. Yukl*, 25 N.Y.2d 585 (1969). *See* Resp-Br. 170-171. However, that case is inapposite. In *Yukl,* the police never confronted the defendant with evidence (real or false) of his guilt, nor did they rigorously interrogate him or continuously meet his answers with disbelief.

The DA also does not deny that, under New York law, if Marty was in custody before he received *Miranda* warnings, then his subsequent post-warning statements should be suppressed because there was no break at all in the interrogation. *See People v. Chapple*, 38 N.Y.2d 112, 115 (1975). Additionally, in light of Justice Kennedy's clarification of the law in *Missouri v. Seibert*, 542 U.S. 600, 618 (2004), federal law would produce the same result because McCready's interrogation of Marty used a two-step strategy designed to circumvent the effectiveness of the warnings.

Because the DA cannot seriously contest the *merits* of Marty's *Miranda* claims, he focuses on the *procedural* bar precluding claims decided on direct review. *See* C.P.L. § 440.10(2)(a). That bar is overcome, however, where there "has been a retroactively effective change in the law controlling such issue." *Id.* Here, Marty has identified two such changes in the law.

A. The Second Circuit's "Custody" Decision Is A Retroactive Change In The Law

The Second Circuit's application of the federal definition of "custody" to the facts of this case represents a "retroactively effective change in the law" governing Marty's federal and state *Miranda* claims. Although state appellate courts are not bound by federal courts of appeal, it is clear that, had the Second Circuit's decision existed at the time of state appellate consideration, this Court and the Court of Appeals would have accorded that decision great weight. The DA does not dispute

that New York courts are obligated to give "due and great respect" to federal decisions resolving federal law issues. *See, e.g.*, *People ex rel. Ray v. Martin*, 294 N.Y. 61, 73 (1945), *aff'd*, 326 U.S. 496 (1946); *see* Def-Br. 131 n. & 107 (citing cases). Although the Second Circuit's decision would not necessarily determine the outcome of Marty's *Miranda* claims in state court, that decision would not be ignored and it is thus a part of the legal landscape governing Marty's claims.[63]

B. *Missouri v. Seibert* Is Also A Relevant Retroactive Change In The Law

As discussed in the opening brief, Justice Kennedy's controlling opinion in *Seibert* explained the boundaries of *Elstad* and clarified that a deliberate two-step questioning strategy is prohibited under *Miranda*. *Seibert* demonstrates that the Second Circuit erred in denying Marty a federal remedy based on its overbroad view of *Elstad*.[64] Def-Br. 127-128.

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[63] The DA argues (at 166) that the Second Circuit's decision does not satisfy § 440.10(2)(a) because it does not contain the words "retroactive" or "change in the law." But the DA cites no precedent requiring that a decision refer to or define its retroactive effect; indeed, few decisions do so.

[64] The DA claims (at 165) that this argument based on *Seibert* is new and should therefore be disregarded. However, in the DA's opposition to Marty's motion for leave for appeal, he discusses *Seibert* on the merits and makes no hint that he considers the argument new. *See* Resp. Mem. in Opp. 23 n.7 (May 1, 2006).

In any event, the DA is mistaken. After *Seibert* was decided in 2004, Marty argued that *Seibert* supported, among other things, his argument that his convictions should be vacated pursuant to C.P.L. § 440.10(1)(h) because the admission of his confession violated his constitutional rights. Because he could not make this claim without overcoming the procedural bar of § 440.10(2)(a), Marty was necessarily claiming that *Seibert* had retroactive effect. *See, e.g.*, Mem. of Supp. Authority 75 (Mar. 1, 2005) ("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.... *Miranda,* albeit unknown to the Second Circuit, in fact

The DA incorrectly claims (at 167) that *Seibert* is not retroactive. As Marty's opening brief explained, *Seibert* has retroactive effect because it was dictated by prior *Miranda* law and thus did not announce a "new rule" of constitutional law. *See* Def-Br. 132 n.109.

The DA relies on *Hawthorne v. Quarterman*, 2006 WL 3542673, at *2 (N.D.Tex. Dec. 8, 2006), but that case supports Marty's position that *Seibert* did not announce a "new" rule. There, a federal habeas petitioner was asserting a *Seibert* claim and the district court addressed whether the one-year statute of limitations should be deemed to begin on "the date on which the Supreme Court initially recognizes a *new constitutional right* and makes the right retroactively applicable to cases on collateral review." *Id.* (discussing 28 U.S.C. § 2244(d)(1)(C)) (emphasis added). The court held that that provision (which concerns "new" watershed rules) did not apply because "[n]o court has indicated that *Seibert* recognized a new constitutional right." *Id.* at *2.[65]

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prohibited the introduction of the post-warning statements, as is now clear through *Seibert*.... Standing alone, the already-found constitutional error inherent in the first *Miranda* violation mandates reversal of Tankleff's conviction."); *see also* Tankleff Reply Br. 9 n.6 (arguing that *Seibert* supported the vacatur of his convictions pursuant to C.P.L. § 440.10(1)(h) and supported his argument that his "confession" would be suppressed at a new trial).

[65] The DA also cites *State v. Singleton*, 2006 WL 2522392, at *3 (Ohio Ct. App. Sept. 1, 2006), which reasons that "the holding in *Miranda v. Arizona*, itself, has not been given retroactive application. Perforce, the holding in *Missouri v. Seibert* ..., should not be given retroactive application." There is no reason, however, that *Seibert*, which only clarified existing law, would necessarily track *Miranda,* which created entirely new law, on the issue of retroactivity.

C. Marty's Interrogation Plainly Violates *Seibert*

The DA argues (at 168) that Marty has not adduced any evidence to suggest that Detective McCready deliberately withheld *Miranda* warnings in order to obtain a preliminary statement that would lead to a later statement. [66] But a deliberate withholding of *Miranda* warnings can be inferred from the objective conditions of the interrogation, such as the "timing, setting and completeness, of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *United States v. Williams,* 435 F.3d 1148, 1159 (9th Cir. 2006). Given Marty's interrogation—in which the detectives, even after subjecting Marty to increasingly hostile questioning for nearly two hours without a break and then confronting him with a (fake) eyewitness account accusing him of murder, nevertheless did not administer *Miranda* warnings—it is a fair, if not undeniable, inference that the lead interrogator, Detective McCready, deliberately withheld *Miranda* warnings until the moment Marty "cracked" and began his false confession. Further, several additional factors—McCready's intentional and elaborate hoax regarding Marty's farther, his concealed bias against Marty, his record of misconduct, and the Suffolk

[66] The DA argues that *Seibert* does not apply because the state courts held that Marty was not in custody prior to being given *Miranda* warning. The Second Circuit's decision, however, shows that Marty was in fact in custody before he received the appropriate warning. In any event, *Seibert* satisfies the terms of C.P.L. § 440.10(2)(a) because it is a change in the law controlling Marty's *Miranda* claims and thus entitles Marty to have his *Miranda* claims adjudicated on the merits.

County Police Department's exceedingly high rate of confessions, which indicate department-wide improper interrogation practices, *see* Def-Br. 82 n.64, strengthen this inference.[67]

In any event, it is the DA who has the burden of proving that McCready *did not* employ a deliberate two-step interrogation strategy. *See United States v. Ollie*, 442 F.3d 1135, 1143 (8th Cir. 2006); *see also Edwards v. United States*, 2007 WL 1280260, at *7-8 (D.C. Cir. May 3, 2007) (adopting *Ollie*'s reasoning on burden of proof); *Whitney v. Henry*, 2007 WL 951345, at *3 (S.D.Cal. Mar. 15, 2007) (same). The DA asserts (at 168) that *Ollie* applies only to pre-trial suppression hearings, and that Marty "has the burden of proof" here because he "has been found guilty." *Ollie* is not limited to pre-trial proceedings, and, indeed, the policy rationale behind *Ollie* applies to post-conviction hearings every bit as much as pre-trial hearings. At both types of hearings, "putting the burden of proof on the prosecution will help ensure that probative evidence is brought to the court's attention." *Ollie*, 442 F.3d at 1143. Accordingly, federal habeas courts applying *Seibert* have placed the burden on the prosecution. *See, e.g.*, *Whitney*, 2007 WL 951345, at *3. The DA has offered no proof that Detective McCready was not

[67] The cases the DA relies on are off-point. In *People v. Paulman*, 5 N.Y.3d 122, 134 (2005), "the break in questioning, change in location and police personnel, and distinctions in the nature of the interrogation" foreclosed a two-step strategy under *Seibert*. Here, there was no break. And, unlike in Marty's case, in *People v. Cowell*, 11 A.D.3d 292, 293 (1st Dep't 2004), the initial pre-warning statement was "sufficiently attenuated" from the post-warning statements.

engaging in a deliberate two-step strategy—presumably because he has no such proof to offer.

VIII. THE PROSECUTION VIOLATED MARTY'S FEDERAL AND STATE *BRADY* AND *GIGLIO RIGHTS*

In his opening brief, Marty argued that the prosecution violated its *Brady* obligations by failing to disclose McCready's and Steuerman's longstanding but concealed relationship and violated its duty under *Giglio* by failing to correct McCready's perjury. *See* Def-Br. 135-143.

A. The DA Largely Concedes The Merit Of These Claims

The DA fails to dispute the bulk of Marty's arguments supporting these claims. First, the DA does not dispute that the Supreme Court has instructed that "*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (2006) (internal quotation marks omitted); *United States v. Sanchez*, 813 F.Supp. 241, 248 (S.D.N.Y. 1993), *aff'd*, 35 F.3d 673 (2d Cir. 1994) (same rule applies for *Giglio* claims).

Second, the DA does not contest that Marty has demonstrated prejudice under both *Brady* and *Giglio*. That is, the DA does not deny that McCready's perjurious denials of his longstanding relationship with Steuerman would, if exposed at trial, have radically undermined the prosecution's case, revealing McCready's motive for pursuing Marty so aggressively and turning a blind eye to

Steuerman—the person Marty and other family members accused upon learning of the attacks; the person with whom Seymour Tankleff had been fighting over a large debt and whom Arlene Tankleff feared would do them violence; and the person who, remarkably, feigned his own death and fled the jurisdiction the week after the attacks.

Third, although the DA faults Lubrano for not being "a hundred percent sure," the DA does not deny that McCready in fact perjured himself repeatedly at Marty's trial, nor did the DA deny this in the County Court. As discussed above, Lubrano gave reliable testimony that McCready and Steuerman's friendship went back years. In addition, William Sullivan also gave a reliable affidavit that McCready and Steuerman socialized in a bar the very year before the Tankleff murders. Given that these witnesses have no motive to lie, and given the DA's non-denials, it cannot be doubted that McCready repeatedly perjured himself at Marty's trial.

B. No Procedural Bar Prevents This Court From Granting Relief For McCready's Blatant Perjury

Rather than confront McCready's perjury, the DA argues (at 174) that Marty's claims are procedurally barred, citing C.P.L. § 440.10(3)(b). Yet, the DA

largely ignores Marty's arguments for why, even if that provision applies,[68] the Court should exercise its discretion to nevertheless adjudicate his claims.

Under § 440.10(3) and 440.10(3)(b), this court may adjudicate Marty's claims for "good cause shown" and in the "interest of justice."[69] *See, e.g.*, *People v. Bell*, 179 Misc.2d 410, 416 (Sup. Ct. 1998) (procedural bars set out in § 440.10(3) are "permissive, not mandatory," and finding that the interests of justice required resolution of the defendant's claims on the merits.). Adjudication is warranted here because Marty's claims strike at the heart of the public's faith in the criminal justice system. Marty is the victim of outright perjury by the case's lead investigator and the interrogator who forced his false confession. Because of McCready's perjury at trial, Marty's counsel was unable to elicit for the jury McCready's secret friendship with, and bias towards, the most obvious alternative suspect. Additionally, McCready is a repeat perjurer, *see* A.553-564 (N.Y.

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[68] *See* C.P.L. § 440.10(3)(b) (the court "*may*" deny a motion if the ground or issue raised was previously determined on the merits on a prior motion (emphasis added)); *id.* § 440.10(3) (stating that "in the interest of justice and for good cause shown [the court] may in its discretion grant the motion"); *see also People v. Lewis*, 165 Misc.2d 814, 818 (Sup. Ct. 1995). Section 440.10(3)(b) does not apply to Marty's *Giglio* claims because Judge Tisch did not address a claim under *Giglio* and such a claim is subject to a lower prejudice requirement than that under *Brady*.

[69] Despite the DA's assertion (at 174), the County Court dismissed Marty's *Brady* and *Giglio* claims in a catch-all sentence rejecting all remaining arguments as "lacking in merit." *See* A.26. The court's decision does not mention *Brady* or *Giglio*, and its discussion of Lubrano's testimony and Judge Tisch's prior ruling was in the section discussing Marty's claim under § 440.10(1)(g). *See* A.13-14. Additionally, far from acknowledging its discretion to adjudicate a claim previously decided, the County Court plainly believed it was bound by Judge Tisch's ruling. A.21 (holding that Marty's new evidence "does not change the ruling of Judge Tisch in this case").

Commission of Investigation Report finding that McCready perjured himself in a 1985 murder trial), but the DA has taken no steps to address McCready's misconduct, much less acknowledge it. Furthermore, there is now strong evidence showing Marty's innocence; in these circumstances, discretionary procedural bars should not prevent a defendant from obtaining a full review of his constitutional claims. *See Kuhlmann v. Wilson*, 477 U.S. 436, 464 (1986). Notably, the DA has never articulated any prejudice he would suffer by the adjudication of these claims, nor has he identified any interest—other than the suppression of the truth—in ignoring evidence of police perjury. Thus, good cause and the interests of justice support the adjudication of Marty's claims. *See* Def-Br. 143 n.116.

IX. MARTY'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY HIS DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND CALL TO THE STAND NUMEROUS EXCULPATORY FAMILY MEMBERS

A. Defense Counsel's Failure To Investigate Key Family Witnesses Cannot Be Excused As A Strategic Choice

The DA's brief studiously avoids our central contention: that under well-established principles, it was unreasonable and deficient representation for Marty's defense counsel to have *failed to investigate* Marty's numerous close family members in order to ascertain what testimony they might provide on the key issues of Marty's family life and his supposed motive to commit murder. Twelve family members—the siblings and other close relations of the victims—swore affidavits

establishing that, with only a few exceptions, defense counsel *never even contacted them about testifying*. *See* Def-Br. 147 n.118 (listing affidavits). And of the few who were contacted, defense counsel did not follow up. The case law makes very clear that counsel can only make a valid strategic decision not to call witnesses if that decision is based on a *reasonable investigation*. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *People v. Green*, 37 A.D.2d 615, 615 (2d Dep't 2007); Def-Br. 146. Quite simply, defense counsel could not have made a valid strategic decision not to call twelve close family members *without even having contacted them to ascertain what they would say*. This is the crux of Marty's ineffective assistance claim, and the DA fails to rebut it.

The DA cites no evidence to support his claim that defense counsel's failure to investigate these family witnesses was a strategic decision. And the cases he cites make plain that a defendant is entitled to have his counsel fully investigate his case. *See, e.g.*, *People v. Bussey*, 6 A.D.3d 621, 623 (2d Dep't 2004). An attorney simply cannot make a legitimate "strategic" decision without investigating beforehand. *See Gersten v. Senkowski*, 426 F.3d 588, 609 (2d Cir. 2005) (the reasonableness of counsel's tactical decisions is judged "in terms of the adequacy of the investigations supporting it").[70]

[70] The DA has never disputed the family members' sworn statements that Gottlieb never contacted them (or, in a few instances, did not follow up with them) about the prospect of

B. Defense Counsel Compounded This Error By Promising To Call These Family Witnesses In His Opening And Then Failing To Deliver

Not only did defense counsel fail to investigate and call to the stand these important witnesses, but he compounded this error by promising in his opening statement that the jury would hear from Marty's family and friends about his "loving relationship ... with his mother and his father," and failing to deliver. This created the foreseeable *but wholly false* impression in the minds of the jurors that these family members were not called because their testimony would have been damaging to the defense. The DA does not dispute that such unfulfilled promises can be highly damaging and thus constitute ineffective assistance of counsel. *See* Def-Br. 149-150 & nn.120-122.

The DA argues, however, that defense counsel in fact fulfilled his promise by calling the McClure family, who lived in California and occasionally visited the Tankleffs, to testify. But this argument is flatly contradicted by the lead prosecutor's repeated and impassioned statements to the jury, *which the DA wholly ignores*. The prosecutor asked, "Where were the family members that saw and talked to the defendant that day? Where were Uncle Norman and Aunt Ruth?" A.3879. He then continued with this theme, pointing out the absence of other close family members and remarking on why only the McClure family was called:

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testifying. And although Gottlieb was on the stand at the 440 hearing, the DA did not examine him on whether his failing to investigate was a strategic choice.

"Why did we have to sing [referring to the McClures] three verses of ten days in July? *Maybe all was not so well.*" A.3880 (emphasis added); *see also* Def-Br. 151.[71]

As the prosecutor's closing shows, it was clear to the jury that the family members who knew Marty and his parents the best—including Marty's aunts, uncles, and grandparent—were absent. To the jury, this failure spoke volumes—falsely, as we know—and in fact *bolstered* the prosecution's spurious allegations about motive.

C. Defense Counsel's Errors Were Highly Prejudicial And The Family Members Who Were Not Called Were Not "Cumulative"

Not only did the failure to investigate and call to the stand Marty's close family members create the damning impression that they thought him guilty, which is sufficient prejudice on its own, this failure also deprived the jury of valuable testimony. As discussed at length in Marty's opening brief, testimony from Seymour's and Arlene's siblings and others who lived in Long Island would have provided a qualitatively different and much more powerful account of Marty's family life than that offered by the McClure family. *See* Def-Br. 152-153 (reviewing these twelve family members' probable testimony).

[71] In determining the severity of an error, whether the prosecutor found the element to be important is significant. *See Zappulla v. New York*, 391 F.3d 462, 471-472 (2d Cir. 2004).

The sheer number of family members attesting to Marty's loving relationship with his parents and his inability to commit the murders would have made an undeniably profound impact on the jury. But rather than this chorus of family members, the jury heard only from out-of-state relatives and was thus left to guess the worst about the family that was closest to Marty and his parents.

D. No Procedural Bar Prevents Granting Relief On Defense Counsel's Deficient Performance

Contrary to the DA's claims, there is no basis for applying the discretionary procedural bar of § 440.10(3)(c) to these ineffective assistance claims. The DA asserts that Marty should have brought these claims in one of his "four prior CPL 440.10 motions." Resp-Br. 178. However, in his first, second and third motions,[72] Marty was represented by his trial counsel, Robert Gottlieb, *see* A.778, 781, 1025, and courts have recognized that it is inappropriate to expect the defendant's trial counsel either to raise claims based on his or her deficient performance at trial, or to assist subsequent counsel in raising such claims.[73] And, in his fourth motion—which was brought pursuant to Judiciary Law § 2-b(3), not § 440.10, and sought

[72] This third motion was not substantive, but rather sought access to trial evidence for DNA testing. As the County Court noted, the motion was brought "pursuant to C.P.L. § 440.30(1-a)," A.1025, not § 440.10.

[73] *See Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993) ("[I]t would be unrealistic to expect that trial counsel would be eager to pursue an ineffective assistance claim. Moreover, even the scrupulous attorney searching the record in good faith would likely be blind to his derelictions at the trial level."), *abrogated on other grounds by Massaro v. United States*, 538 U.S. 500, 506 (2003) (noting that "trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence").

access to two crime-scene fingerprints for purposes of reexamination—Marty was proceeding *pro se*. *See* A.1032. Thus, Marty was not "in a position adequately to raise," C.P.L. § 440.10(3)(c), these ineffective assistance claims—which necessarily depend on evidence outside of the record—in his prior motions.

In any event, even if § 440.10(3)(c) applied, this Court enjoys discretion under that provision and § 440.10(3) to nevertheless consider Marty's claims. *See People v. Bell*, 179 Misc.2d at 416 (§ 440.10(3) is "permissive, not mandatory"). Particularly in light of Marty's showing of innocence, it is in the interest of justice to ensure that he received constitutionally adequate representation at trial. Moreover, the DA does not allege any improper or strategic delay in bringing these claims, nor does he claim any prejudice in responding to these claims at this time. Indeed, it was reasonable and in the interest of judicial economy for Marty's *pro bono* defense team—after the completion of federal habeas and a full re-investigation of the case—to have combined *in one motion* Marty's constitutional claims and those based on his newly discovered evidence of innocence. Thus, the equities strongly favor adjudicating Marty's ineffective assistance claims on the merits.

CONCLUSION

Where one ends up in this case largely depends on where one starts. If you start with the premise that Marty's "confession" is accurate and analyze everything

else through a shaded lens designed to preserve the fruit of that confession, Marty's convictions, then—like the DA—you end up with a simple credibility exercise designed to find reasons to disbelieve everything except that "confession," which paradoxically even the lead Suffolk County Detectives found to be fraught with inaccuracies.

But if you start with the premise of evaluating the new evidence neutrally and through a clear lens designed to evaluate the whole fabric of that evidence, then you confront interlocking evidence from multiple unrelated sources that cross-corroborate themselves in a manner that simply defies any legitimate explanation other than the fact that Marty is innocent.

Seen through a clear lens, with no ulterior agenda, any principled effort to "connect the dots" of who was responsible for what happened at 33 Seaside Drive in the early morning hours of September 7, 1988, has to address the following timeline of interrelated pieces of evidence (some new, some old) with respect to Marty's claim that the evidence demonstrates that Joey "Guns" Creedon and Peter Kent murdered his parents at the request of Jerry Steuerman.

Such a review must ask whether such evidence is the result of *coincidence* or *conspiracy* as the DA claims, or of simple truthful *corroboration* as Marty claims.

Prior To The Murders:

- Detective McCready and Jerry Steuerman are friends as early as 1984, and are seen socializing on two occasions at a bar in late 1987 and early 1988.

- Jerry Steuerman "is broke," is "trying to renege on [his business] deal" with Seymour Tankleff and only paid "1/2 the amount" of cash he owed Seymour "for the month of May" 1988. A.3087.

- On June 29, 1988, Seymour Tankleff sends a letter by certified mail to Jerry Steuerman making a formal "demand" for "payment ... immediately" of "$50,000" owed by Steuerman to Tankleff under a June 2, 1986 promissory note. A.3093.

- Jerry Steuerman asks Brian Glass, an "enforcer" for Todd Steuerman's drug-dealing operation, to threaten or injure Seymour Tankleff. Glass declines the job and passes it on to his friend Creedon.

- Creedon has an admitted relationship with the Steuerman family through Jerry's son Todd.

- In the summer of 1988, Creedon offers his friend Joseph Graydon an opportunity to help him with a job where one partner wanted another "partner eliminated" at a Strathmore Bagel store.

- Weeks before the murders, during a visit to the bagel store, Jerry Steuerman lunges across the counter, grabs Seymour by the neck, and says "You son of a bitch. You want to own me. I'll see you dead first." A.80.

The Night Of The Murders:

- Creedon, Kent and Harris are together at Ram's house on the night of September 6, 1988, and Creedon asks Ram to help him "rough up" a "Jew in the bagel business" who lived in Belle Terre.

- After Ram declines, he sees Creedon, Kent, and Harris leave together.

- Harris swears under oath, passes a polygraph examination, and tells a priest that he drove Creedon and Kent to the Tankleff house on the night of the murders.

- Jerry Steuerman intentionally makes himself the last person to leave the late night poker game at the Tankleff residence on the night of the murders.

- Harris says that Creedon and Kent came running out of the Tankleff house, with gloves, on the night of the murders, and blood-stained latex glove prints are found inside the house after the murders.

- Harris also says that Creedon threw a pipe into the woods after leaving the Tankleff home, and a rusted pipe was subsequently found there that did not belong to the property's owner.

- Creedon has no alibi for his whereabouts on the night of the murders.

- Kent's purported alibi for the night of the Tankleff murders places him right in the geographic vicinity of the murders that night.

After The Murders:

- The morning after the murders, Marty, his brother-in-law Ron, and other family members tell Detective McCready and other police that they suspect Steuerman and that Arlene Tankleff had recently voiced her fear that he would do them violence.

- The day after the murders, Harris tells Ram that "he thinks he did something bad" and that "he's going to be in trouble" because Creedon and Kent came "running" back to his car the night before with "blood on them" and Kent was "white as a ghost."

- The day after the murders, Jerry Steuerman withdraws money from his and Seymour Tankleff's joint bank account. Several days later, while Seymour was still in a coma, Steuerman fakes his own death, flees to California, changes his appearance, and begins living under an alias.

- After the murders, Jerry and Todd Steuerman offer Creedon $10,000 to cut Marty Tankleff's tongue out so that Marty will stop accusing Jerry of the murders.

- Todd Steuerman shoots Creedon in the arm when he refuses to do so.

- Jerry Steuerman loses his temper at his store and yells to an oven salesman that he "already killed two people and that it wouldn't matter to him if he killed him."

- Todd Steuerman tells Bruce Demps that he "knew" Marty "didn't do it" and that his father hired someone to kill the Tankleffs.

- At Marty's trial, lead Detective McCready repeatedly testifies that he never knew Jerry Steuerman before the day of the Tankleff murders.

- Joe Creedon voluntarily admits to *six* different individuals—including one (Gaetano Foti) who has been recognized by the Suffolk County Police as a "reliable" informant—on different occasions, that he committed the Tankleff murders.

- Ram tells Heather Paruta in 1999 "about a case in Belle Terre where somebody was getting twenty five to life for killing their parents and they didn't do it and that he knew who did it."

- Marty, Harris, and Kovacs pass polygraph examinations administered by a recognized authority in the field indicating that Marty is innocent, Harris was the getaway driver, and Creedon confessed to the murders.

- Creedon tells his son, Joseph Guarascio, that on the night of the murders, he and Kent waited outside the Tankleff home until they received a signal from Jerry Steuerman to enter the house to kill the Tankleffs.

- Kent admits his participation in the Tankleff murders to four people, including James Moore, who says Kent told him that he had beaten the Tankleffs to death with a pipe out in Belle Terre, and that he was "paid to do the deed."

- Kent admits his role in the murders to Danny Raymond and threatens him into supporting his false alibi. But even Raymond's false alibi affidavit conflicts with the alibi Kent gave at the 440 hearing.

Is this vast body of evidence of Marty's innocence coincidence, conspiracy or corroboration? What does this extraordinary tapestry of facts from myriad

different witnesses have in common? In combination, they point to an inescapable reasonable doubt that Marty committed the crimes for which he is now serving the eighteenth year of his sentence. They all point convincingly as well to the identification of the real perpetrators of these heinous crimes.

The DA can chastise us (at 184) all he wants for having an "[e]volving [t]heory" of how these murders were committed, but as this Court is aware it is natural for a picture to become clearer as more facts become known. What is far more objectionable is the DA's refusal to change his theory no matter how the facts develop that call that theory into question. The DA's brief amply highlights the dogged degree to which he will stick to his theory of this case no matter what. *See* Resp-Br. 185 ("the number of witnesses that Tankleff finds is immaterial"). The pursuit of justice requires better than that, and we ask this Court to provide better than that to Marty Tankleff by now reversing his convictions for these crimes of which he is innocent.

Dated: July 9, 2007

Respectfully submitted,

BY: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f), counsel for Defendant-Appellant certifies that this brief complies with the applicable rules, except with respect to the word limit, as to which the Clerk of the Court granted permission pursuant to 22 NYCRR § 670.10.3(e) to file an oversized brief of 23,384 words. This brief has been prepared using Microsoft Word in a proportionally spaced typeface.

Name of typeface: Times New Roman

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This brief contains 23,384 words, excluding the parts of the brief exempted by 22 NYCRR § 670.10.3(a)(3).

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

AFFIDAVIT OF SERVICE

Appellate Division Docket No.:

2006-03617

City of Washington, D. C.)

County of DC) s.s.:

Roberto J. Gonzalez, being duly sworn, deposes and says that:

1 The deponent is not a party to the action, is 18 years of age or older, and resides at:
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2 On the 9th day of July, 2007, the deponent served the following described paper upon the person or persons listed in paragraph 5 hereof:

Reply Brief for Defendant Martin H. Tankleff

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- o By leaving the paper at the person's residence within the State of New York with a person of suitable age and discretion, pursuant to CPLR 2103(b)(4) where service at the person's office could not be made pursuant to CPLR 2103(b)(3).

o By transmitting the paper by facsimile transmission to the telephone number or other station designated by the person for that purpose, pursuant to CPLR 2103(b)(5). A signal was obtained from equipment of the person served indicating that the transmission was received and a copy of the paper was mailed to the person

X By dispatching the paper to the person by overnight delivery service at the address designated by the person for that purpose, pursuant to CPLR 2103(b)(6).

5. The name of the person or names of the persons served and the address or addresses at which service was made are as follows:

Leonard Lato
Assistant District Attorney
200 Center Drive
Riverhead, NY 11901-3388
631-852-2500

Dated: July 9, 2007

Washington, D.C.

Sworn to before me this 9th day of

July, 2007

Notary Public
Elaine F. Pitts
Notary Public, District of Columbia
My Commission Expires 06-14-2012