COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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PEOPLE OF THE STATE OF NEW YORK

- against –

MARTIN H. TANKLEFF,

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

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REPLY OF DEFENDANT MARTIN TANKLEFF TO THE PEOPLE'S OPPOSITION TO HIS MOTION TO VACATE HIS CONVICTIONS UNDER C.P.L. § 440

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FACTUAL BACKGROUND

I. Introduction

On August 29, 2003, undersigned counsel provided the Suffolk County District Attorney's Office blockbuster new evidence in a case that has troubled the victims' family members, the media, legal commentators and the general public since its inception. Immediately following the fatal attacks on Seymour and Arlene Tankleff in 1988, Suffolk County detectives focused their attention exclusively on the Tankleffs' son, Martin Tankleff, and never investigated any other suspects. Martin Tankleff was convicted of the murders of his parents after a contentious trial entirely devoid of any eyewitness testimony or physical evidence linking him to the brutal and bloody crimes. By August 2003, Martin Tankleff's counsel had now obtained a sworn statement, tested by an experienced polygrapher, from an individual who admits that he drove two individuals to and from the crime scene on the night of the murders and saw one of those individuals the following day burning his clothing. Rather than immediately file this sworn statement in open court, Tankleff's counsel provided it to the Suffolk County District Attorney's Office so that an objective investigation into who really killed Seymour and Arlene Tankleff could finally occur outside the glare of the media. Instead of investigating this compelling new evidence, the DA's office sat on it. In October 2003, Martin Tankleff filed this 440 motion.

Remarkably, the DA's office responded to the filing of the motion not by conducting any serious investigation of the persons implicated by the new evidence, but by going to extraordinary and illegal lengths to discredit the witnesses who implicated them. The DA's "investigation" raises more questions than it answers. Having itself repeatedly and utterly failed to conduct an objective fact-finding investigation, the DA's office now argues that this Court

should refuse to hold an evidentiary hearing, ensuring that Martin Tankleff, the remainder of the victims' family and the public will be forever deprived of learning the truth about who murdered Arlene and Seymour Tankleff. The new evidence, particularly when viewed in conjunction with the factual record in this case, is simply too important to be swept under the rug. Our criminal justice system demands that the inconsistencies, biases of the witnesses and, most importantly, the credibility of the witnesses, be tested through cross-examination and the facts be determined in open court. Only then can this Court properly determine whether an innocent man is serving a fifty year to life sentence while the actual murderers remain unpunished for their brutal and deadly crimes.

II. The New Evidence is Compelling

A. Harris is Remarkably Consistent

As the DA recognizes, Glen Harris has made numerous recent statements implicating Joseph Creedon and Peter Kent in the Tankleff murders. The DA went to great lengths to try to discredit these statements, including having not one, but two cooperating witnesses try to induce Harris to retract his statements while being surreptitiously recorded.[1] The DA's office highlights minor inconsistencies between the different statements made by Harris at different times in an effort to cast doubt on his credibility. Of course, the proper way to determine his credibility is at an evidentiary hearing. Nonetheless, an objective comparison of Harris' different statements, including those illegally obtained by the DA's office, is instructive in assessing the reliability of Harris' statements.

[1] Both of these efforts by the DA's office were patently illegal, in that they were undertaken by the DA when he admits that he knew that Harris was represented by counsel. The overzealousness of the DA's efforts to discredit Harris is in striking contrast to the DA's complete failure seriously to investigate Creedon and Kent. Despite the fact that the DA's office was provided Harris' statements at a time when neither Kent nor Creedon had counsel, the DA's office made no effort to even interview either of them, much less have cooperating witnesses surreptitiously record either of them.

On June 19, 2002, Glenn Harris was interviewed by polygrapher Joel M. Reicherter.[2] Mr. Harris asserted: 1) he drove to a residence in Belle Terre the night the Tankleff's were murdered; 2) Joseph Creedon and Peter Kent were passengers in his car; 3) at the Tankleff residence, both Creedon and Kent got out of the car; 4) when Creedon and Kent returned to the car, Harris drove them back; and 5) afterwards, Harris observed Kent burning clothing. Mr. Reicherter concluded through a polygraph examination that Harris was telling the truth that he drove Creedon and Kent to the Tankleff residence the night of the murders and that he witnessed the burning of clothing the following day. See Tankleff 440 Memorandum of Law at Exhibit 2.

On August 29, 2003, Mr. Harris gave a sworn statement to an investigator working on behalf of Martin Tankleff. In that statement, Mr. Harris repeated each of the same five key assertions: 1) he drove to a residence in Belle Terre the night the Tankleff's were murdered; 2) Joseph Creedon and Peter Kent were passengers in his car; 3) at the Tankleff residence, both Creedon and Kent got out of the car; 4) when Creedon and Kent returned to the car, Harris drove them back; and 5) afterwards, Harris observed Kent burning clothing. See id.

On November 5, 2003, the DA's office had a cooperating witness engage Harris in a surreptitiously recorded conversation in an effort to corroborate that Harris had conceded to the cooperator that Harris' sworn statement was untrue. This action was illegal, as Harris was represented by counsel. In the DA's report of its investigation, the DA suggests that Harris was not represented with respect to the matters about which he was being questioned. This suggestion is specious. See People's Report at 21 n. 9. As the DA concedes (Id. at 18), this Court appointed counsel for Mr. Harris for the express purpose of protecting his rights vis-à-vis inquiries relating to the Tankleff murders. See Order of the Court dated October 31, 2003.

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[2] Mr. Reicherter's c.v. is appended to Tankleff's 440 Motion as Exhibit 4.

The DA's office has not disclosed the identity of the cooperating witness or what inducements it provided to the cooperating witness. Further, the DA's office has produced only a partial transcript of the recorded conversation, providing neither a complete transcript nor the tape itself. Nonetheless, even the partial transcript reveals that Harris repeatedly stated that his sworn affidavit is true and repeated each of the five key factual assertions: 1) he drove to a residence in Belle Terre the night the Tankleffs were murdered (DA's Investigation Report at 23); 2) Joseph Creedon and Peter Kent were passengers in his car (id.); 3) at the Tankleff residence, both Creedon and Kent got out of the car (id. at 24); 4) when Creedon and Kent returned to the car, Harris drove them back (id.); and 5) afterwards, Harris observed Kent burning clothing (id. at 22). Harris also, despite the prodding of the cooperator, repeatedly stood by the truth of his sworn statement to Tankleff's counsel: "I told him the truth, I told him the fuckin truth." (id. at 21); "It's not bullshit, it's the truth. . . . I mean, uh, uh, it's the truth, how would you, it's not really bullshit, it's the truth." (id. at 22); "I mean everything that the paper said (inaudible) what I attested to is true, you know what I mean?" (id. at 24).

Not satisfied with the results of the first illegal recording, the DA's office had a second cooperating witness illegally surreptitiously record Harris on November 18, 2003. Again, the DA fails to disclose the identity of this witness or what inducements may have been provided to the witness. However, the results of the second effort were startlingly similar to the first. Harris reiterated he took Creedon and Kent to the Tankleff residence. Id. at 28-29. Creedon and Kent got out of the car at the Tankleff home and later returned. Id. at 29. Harris then drove them back. Id. at 30. Afterwards, he saw clothes being burnt. Id. Thus, yet again, Harris repeated each and every one of the five key assertions. And again, Harris repeatedly stood by his sworn statement: CS-4: "[W]hat part of the statement is false? Harris: "Nothin, none, none of it . . ."

Id. at 34-35. CS-4: "Where does the fabrication come in?" Harris: "There was none . . . ." Id. at 35. CS-4: ". . .[I]f they asked you sign a statement right now, and they tell you they're going to give you immunity, and you're not going to implicate yourself, what would you write in your statement? What is the fucking truth?" Harris: "I would say what I already, the affidavit I already gave, that I told them." Id. at 38.

In addition to his conversations with the Government's informants, Harris has repeated these statements in other settings where he would have no basis to fabricate. Indeed, Mr. Harris has confided in both a priest and a nun that he drove Creedon and Kent to the Tankleff residence the night of the attacks and that he was wrestling with his guilt at failing to come forward with this information earlier than he did. See Statement of Father Ronald Lemmert and Statement of Sister Angeline Matero, attached at Exhibit 1.

Not only is Mr. Harris remarkably consistent on the significant portions of his recollections, but the inconsistencies are minor, inconsequential or non-existent. For example, the DA states that Harris mentions the beach at Belle Terre and the DA claims there is no beach at Belle Terre. See DA's Report at 24 n. 11. Attached as Exhibit 2 is a photograph taken of the beach at Belle Terre with a sign with the word "beach." See also Defendant's Exhibit W introduced at trial. Similarly, the DA makes much of the fact that Harris cannot consistently recall exactly where he first met up with Creedon on the night of the murders -- at Creedon's residence, at Billy Ram's house, or at "a fucking house in Seldon." DA's Report at 62. However, what the DA neglects to explain is that Creedon's residence and Billy Ram's residence are both in Seldon, within a mile or two of each other. Thus, at which location they first met is hardly material.

B. The DA's Office Concedes Harris' Statements Are Corroborated

The DA's office goes to great lengths in its efforts to discredit Harris and characterize his statements as unreliable. Yet, the crucial portion of Harris' statement, from which he has never wavered, has been corroborated repeatedly. At the heart of Harris' statement is the allegation that Joseph Creedon was involved in the Tankleff murders. As the DA's investigation revealed, Creedon himself has admitted on numerous different occasions to numerous different individuals that he was involved in the Tankleff murders. The DA's conclusion in this regard is unambiguous: **"I find that, beginning on or about Easter Sunday 1991 and continuing for years after, Creedon stated to several persons that he had something to do with the Tankleff murders. [While Creedon denied to the DA that he had ever made such an admission to anyone,] his denials are not credible."** People's Investigation Report at 60 (emphasis added).

First, as Karlene Kovacs first disclosed in the early 1990's, on Easter Sunday 1991, Creedon admitted to Kovacs that he was involved in the Tankleff murders.[3] While again relying on its tactic of trying to exploit minor inconsistencies in Kovacs' recollections over the years, as the quote above demonstrates, at the end of the day, even the DA believes Creedon admitted his involvement to Kovacs on Easter Sunday 1991.

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[3] Having been unable to convince even himself that Kovacs is incorrect in her recollection that Creedon admitted his involvement to her, the DA raises two purported legal roadblocks to the Court's consideration of Kovacs' statement. First, citing no authority and conceding contrary authority, he argues that Martin Tankleff's actual innocence is irrelevant under the New York Constitution. Second, he argues that since Kovacs told Tankleff's counsel about Creedon's admission in the early 1990's, her statement cannot be considered as new evidence. Both legal issues are dealt with below. From a factual standpoint, however, even if the DA were correct legally, the new evidence in this case -- Harris' statement, the Creedon admissions uncovered by the People's Investigation, and the expert opinions regarding the interrogation techniques employed in this case -- must be considered in light of the entire factual record in this case, including Kovacs' statement. *Cf. Kyles v. Whitley*, 115 S.Ct. 1555, 1567-69 (1995)(court may not conduct "a series of independent [evidentiary] evaluations, rather than [a single] cumulative evaluation").

Second, on October 1, 2003, John Guarascio, in an interview with the DA's office, admitted that on Easter Sunday 1991, Creedon admitted in Guarascio's presence that he and others had been hanging out in the bushes smoking while the card game was going on. See People's Investigation Report at 9. Guarascio's October 2003 statement is unquestionably new evidence, and the DA credits Guarascio's statement. Id. at 60.

Third, the DA interviewed a confidential source (CS-1), whom to date, the DA has not identified to Tankleff's counsel. In his interview with the DA, which again is unquestionably new evidence, CS-1 stated that Creedon had told him on two different occasions that he knew that Martin Tankleff did not commit the murders, because he, Creedon, was there.[4] People's Investigation Report at 11. The DA found CS-1 to be telling the truth about Creedon's admissions to him. Id. at 60.

Fourth, a second confidential source (CS-2), whom the DA has likewise refused to identify, also has provided new evidence in this case. This source, also credited by the DA's office, said that Creedon had made statements to him implicating himself in the Tankleff murders.

Thus, Creedon has corroborated the heart of Harris' statement to at least four different individuals and on more than four different occasions. The DA simply and blithely concludes

[4] In Harris' surreptitiously recorded statements, Harris candidly states that while he can honestly say that he brought Creedon and Kent to the Tankleff residence the night of the murders, he cannot rule out the possibility that Martin Tankleff participated in the murders with Creedon and Kent. Despite the fact that there is no evidence to support such a theory, the DA picks up on this theme and argues that since Martin Tankleff cannot conclusively prove the negative, he should not be entitled to relief, or even an evidentiary hearing. This argument simply ignores Creedon's own admission to CS-1, who the DA deems credible, that Martin Tankleff was not involved in the murders. Interestingly, this admission, which is now coming to light for the first time, dovetails with Todd Steuerman's statement that he likewise knew Martin Tankleff was not involved because the murders were perpetrated by friends of his father. See Affirmation of Bruce Demps, Exhibit 17 to the 440 Memorandum of Law.

that Creedon must have been lying on each and every one of these occasions. Without the benefit of an evidentiary hearing, the DA seeks to usurp the function of the Court and unilaterally to make credibility determinations about two crucial witnesses. First, the DA discounts Harris, largely because his statements are allegedly uncorroborated. Then when faced with the fact that Harris' implication of Creedon has been corroborated, by Creedon himself no less -- and not once, but at least four times -- the DA concludes that Creedon must have been confessing to a crime that he did not commit. This conclusion is not only unsupported, it is truly extraordinary. The People's theory at trial was that no person, even one who is emotionally distraught and exposed to hours of hostile and coercive interrogation by experienced homicide detectives, would confess even once to committing murders he did not in fact commit. The DA's office cannot have it both ways.

The DA's theory, which it applied to Martin Tankleff at trial, applies with far greater force against Creedon, because of Creedon's multiple admissions over a period of years to participation in the Tankleff murders. The same DA's office now asks the Court to disregard Creedon's multiple admissions (corroborated by Harris) based solely on its unsubstantiated theory that Creedon on at least four separate occasions over a several year period confessed to committing murders that he did not commit. This conclusion defies reason and should be squarely rejected. Unlike the DA's office, this Court should not ignore multiple, corroborated admissions by a person other than the defendant that he was, in fact, the one who committed these crimes.

C. Jerry Steuerman, Todd Steuerman and Joseph Creedon Were Likely Co-Conspirators

Not only have unrelated witnesses repeatedly implicated Joseph Creedon, Mr. Creedon is a logical suspect. Unlike Martin Tankleff, who had no criminal record and no history of violence

at the time of his parents' murders, both Mr. Creedon and Mr. Kent have lengthy criminal records. Further, Creedon had a relationship with Jerry Steuerman and his son Todd Steuerman.

Following the murders, but prior to Martin Tankleff's trial, Martin was continuing to assert his innocence and to implicate Jerry Steuerman as being behind the murders of his parents. As Creedon himself stated in a sworn affidavit, Todd Steuerman, who Creedon described as a cocaine dealer, approached Creedon -- in one of the bagel stores that Jerry Steuerman had owned jointly with Seymour Tankleff -- with an offer from Jerry Steuerman: Jerry Steuerman wanted Creedon to cut Martin Tankleff's tongue out of his mouth and wanted someone "wacked" [sic] for $10,000. Creedon declined. The following day, Todd Steuerman shot Creedon in the arm. Creedon Affidavit dated April 23, 1989, attached as Exhibit 3.

Following the shooting, Creedon says that he was offered $10,000 by Jerry Steuerman not to press charges against Todd Steuerman and that he spoke with Jerry Steuerman to reject the offer. Creedon made these statements in a sworn affidavit in September 1990. *See* Affidavit of Joseph Creedon, dated September 17, 1990, attached as Exhibit 4. In December 2003, Creedon told the DA's Office under oath that the offer was conveyed to him by Todd Steuerman, not Jerry Steuerman, and the references in the 1990 affidavit to Jerry Steuerman were a "mistake." Indeed, Creedon goes so far as to swear under oath that he has "never spoken with Jerry Steuerman." *See* Affidavit of Joseph Creedon, dated December 4, 2003, attached as Exhibit 5. The more contemporaneous affidavit, however, is far more credible than the affidavit Creedon recently gave to the DA's office. As reflected in a memorandum to the file by Martin Tankleff's trial counsel, Creedon told him:

> After he was shot by Todd Steuerman, Jerry Steuerman offered him $10,000.00 to drop the charges and said "what are you fucking crazy, you're dealing with the wrong person, I can have you dead." He spoke to him on the phone at least two times before that so he recognized his voice.

Memorandum to the File, from Robert C. Gottlieb, dated April 26, 1990, attached as Exhibit 6.

Thus, it is apparent that Jerry Steuerman and Joseph Creedon had spoken previously and that Creedon's recent sworn statement to the DA is untrue. That Jerry Steuerman and Joseph Creedon knew each other also demonstrates that Jerry Steuerman lied to the DA's office during Martin Tankleff's trial when he told the DA he had never met or spoken with Joseph Creedon. The DA's representation to the Court that Mr. Steuerman had never met Creedon led to the Court curtailing Tankleff's trial counsel's ability to cross-examine Steuerman on his relationship with Creedon; however, Steuerman's limited testimony was untruthful based on Creedon's 1990 sworn statement. See Trial Transcript at 1162-67.

That Jerry Steuerman lied to the DA's office and that he had a relationship through his son, Todd, with Joseph Creedon prior to the Tankleff murders is also demonstrated by a statement given by a confidential witness who has asked not to be identified due to fear of Joseph Creedon, who states that he/she recalls seeing Creedon with Jerry Steuerman prior to the Tankleff murders. See Statement of Movant's CS-1, dated March 24, 2004 (a copy of this statement will be provided to the DA's office and the Court).

Finally, Todd Steuerman has conceded that he knows for a fact that Martin Tankleff was not involved in his parents' murders. He stated that he knew this because the murders were committed by a friend of his father. See Affidavit of Bruce Demps.

Thus, it is evident that when Jerry Steuerman wanted to commit violence against the Tankleff family, he had his drug dealing son solicit the services of Joseph Creedon, the very same individual who Glenn Harris says he drove to the Tankleff residence on the evening that Jerry Steuerman was in the house alone, having been the last to leave the poker game.

Indeed, Jerry Steuerman has recently made statements acknowledging his own involvement in the Tankleff murders. Referring to the news that a new motion has been filed in the Tankleff case, Steuerman stated that he "cut their throats," but that at this point, given his age, he will be dead long before he has to serve any sentence. Mr. Tankleff's defense team is continuing its investigation. An evidentiary hearing where the parties have subpoena power will shed further light on these admissions.

Joseph Creedon has conceded his involvement in the Tankleff murders to numerous individuals and Todd Steuerman has conceded that he knows that Martin Tankleff was wrongfully convicted. As to whether or not Creedon was capable of committing the Tankleff murders as he bragged he did, a testimonial comes from none other than Peter Kent. Kent told the D.A. that Creedon was capable of committing these crimes. See People's Report at 40.

The DA's reasons for rejecting Creedon as a suspect, despite acknowledging that he has admitted his involvement to several persons over a period of years and that he lied to the DA in the DA's interview of him, do not withstand any serious scrutiny.[5] While acknowledging that Creedon has committed violent offenses including rape and has been known to use firearms, the DA simply notes that he has never previously been convicted of murder or using knives.[6] Of

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[5] The DA's current unwillingness to credit the information about Joseph Creedon mirrors its unwillingness at the time of the trial to pursue leads relating to Jerry Steuerman, the person who likely solicited Creedon's involvement. In a recent television interview, Detective McCready again dismissed Jerry Steuerman as a suspect, saying "he wouldn't hurt a fly." See videotape of "48 Hours" broadcast April 7, 2004. After the trial, the defense learned, through another McCready interview with the media, that unbeknownst to the defense, McCready possessed information that Jerry Steuerman had previously hired "Hell's Angels" bikers to commit violence against employees of Steuerman's bagel shops who were trying to organize a union. McCready has never explained why he did not share this information with the defense or how it squares with his view of Steuerman as someone who would never solicit acts of violence.

[6] While the DA claims that Joey "Guns" Creedon had no experience with knives, it is interesting to note that in December 1988, three months after the Tankleff murders, Joseph Creedon and Glenn Harris committed a burglary at the Fayva Shoe Store in Centereach, New York. As the evidence recovery sheet demonstrates, one of the items the burglars left behind was a hatchet. See Suffolk County DA's Information and Evidence Recovery Sheet, attached as Exhibit 7.

course, Martin Tankleff has no history of murder or of using knives (or anything else) as a weapon. There can be no question that Creedon's background makes him a more likely suspect than Martin Tankleff.

Creedon has repeatedly admitted his involvement and has now been placed at the crime scene by an eyewitness. This evidence simply cannot be dismissed unilaterally by the DA. It cries out for further exploration at an evidentiary hearing.

D. Harris' and Creedon's Statements Match the Crime Scene

With his 440 motion, Mr. Tankleff provided a crime scene diagram that clearly indicates the presence of mud in the office where Seymour Tankleff was found. There was trial testimony that there was an exterior door to that room and that the door was ajar when the detectives first walked through the crime scene. Creedon's statements that he hid in the bushes and Harris' statements that he brought Creedon and Kent to the house and that they entered the house toward the rear of the house suggest that Creedon entered through the sliding glass door of Seymour's office. This is consistent with there being mud on the floor and inconsistent with Martin, who obviously was already inside the home, being the perpetrator.

The DA cites trial testimony that there were cobwebs on the exterior of the sliding glass doors and the People's argument at trial that this meant it was unlikely these doors had been used recently. Tankleff's trial counsel, however, argued to the contrary: this merely demonstrated that these doors were not used frequently, which only bolsters the significance of the fact that these doors were found ajar. Seymour would have been unlikely to have left them ajar.

The DA is unable to contest, however, the significance of the word "mud" on the crime scene diagram. Whether or not the significance of this word was addressed in trial testimony, it is highly significant in light of the Creedon and Harris statements. While the DA suggests that

Tankleff's counsel are merely misreading the diagram and that it refers to blood (DA Memorandum of Law at 2 n. 1), the diagram plainly says, "mud stains" and places these stains near the exterior wall.[7] This diagram only further corroborates the statements made by Creedon and Harris and further contradicts the theory that the murderer came from inside the house.

III. The Remaining Evidence Developed by the DA is Inconsequential, or, at Best, Needs to Be Tested Through Cross-Examination at an Evidentiary Hearing

A. Martin Tankleff's Purported Subsequent Jailhouse Admissions are Wholly Incredible and are Fabrications

i. Jerome Martino

The DA's report refers to Jerome Martino, a deceased and formerly discredited witness, as a person to whom Martin allegedly made inculpatory statements. Mr. Martino in 1992 gave an unsworn statement that Martin Tankleff told him in prison that Martin Tankleff had destroyed the gloves that he used to kill his parents by placing them in gasoline. However, as the DA concedes, this story is fantasy. Prior to the conclusion of Martin Tankleff's trial, the DA's office, apparently worried about its lack of any physical evidence to support the notion that Martin Tankleff murdered his parents, and aware that the perpetrator wore gloves -- despite the absence of any reference to gloves in Martin's "confession" -- tested the theory of whether or not the gloves could have been destroyed by soaking them in gasoline. Based on forensics testing of the Suffolk County Crime Laboratory, the DA concluded that this was not possible. See People's Report at 44.

ii. Brian France

Brian France is a neo-Nazi who will be up for parole next year and was seeking a favorable statement from the DA to the Parole Board. He claims that, in 1996, Martin Tankleff

[7] To the extent that the DA were correct and this diagram were ambiguous, the Court should hear testimony at an
(Footnote continued on next page)

confessed to him that he had in fact killed his parents. Kurt Pashke, an inmate who knows both Martin Tankleff and Brian France has provided an affidavit with regard to Mr. France's reputation for honesty. See Affidavit of Kurt Pashke, attached as Exhibit 8 Given Mr. France's reputation for lying and his motive to lie, his fantastic story that of all people, Mr. Tankleff decided to confide in him, should be given little weight. At a minimum, it needs to be tested through cross-examination.

B. Jerry and Todd Steuerman

The DA did cursory interviews of Jerry and Todd Steuerman. Jerry Steuerman was interviewed by telephone. He offered no new information to shed light on his remarkable disappearance in the days following the deaths of his business partners, Seymour and Arlene Tankleff. He again concedes that he feigned his own death and changed his identity, but denies that this behavior was consistent with consciousness of guilt. Rather, he explains that he was "distraught" over the death of his business partners. He does not explain why he was not too distraught to withdraw a substantial sum of money from his partners' bank account, or why he was not too distraught to commit insurance fraud by taking out a million dollar life insurance policy naming his girlfriend as his beneficiary, before feigning his death. Steuerman was never prosecuted for insurance fraud by the DA's office. Rather, he was brought back to Suffolk County to appear as a witness against Martin Tankleff. Finally, Steuerman offered that he did not benefit from the Tankleffs' deaths because he continued to owe a debt to the estate. What he neglects to say is that he stopped paying his debt after the Tankleffs' deaths. Also, as demonstrated at trial, Steuerman's biggest source of frustration with Seymour Tankleff was Seymour's insistence that Seymour be made a partner in any new business ventures started by

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evidentiary hearing to resolve this significant ambiguity.

Steuerman. As a result of Seymour's death, Steuerman gained the ability to start new business ventures without having to share the proceeds with anyone.

Todd Steuerman, a convicted drug dealer, was also interviewed by telephone by the DA's office. He denied any association with Joseph Creedon. However, this contradicts Creedon's sworn affidavit. Apparently, Todd was not asked why he shot Creedon, a person with whom he was claiming he had no relationship. Todd Steuerman also denied stating that he knew that Martin Tankleff did not kill his parents. This statement contradicts the sworn testimony of Bruce Demps.

C. Dick Gordon

The DA interviewed Dick Gordon, who was supposedly a friend of the Tankleffs. Dick Gordon completely contradicted the main motive for Martin to kill his parents relied upon by the DA's office at Martin's trial, the notion that he was upset because his parents had given him an old Lincoln to drive rather than a sports car. See People's Report at 48.

D. Ronald Rother

The DA also interviewed Ronald Rother, the ex-husband of Martin Tankleff's half-sister. Mr. Rother told the DA about petty grievances a teenage Martin Tankleff supposedly had with his parents and speculated that Martin was on steroids at the time of his parents' deaths. This suggestion, supported by no evidence, is absurd. At the time of the murders, Martin Tankleff was a slight teenager who weighed about 150 pounds. His father outweighed him by a hundred pounds and his mother outweighed him by 50 pounds.

Mr. Rother also cites Martin Tankleff's failure to respond to the patently offensive accusation Rother made against Martin prior to the trial -- that Martin had in fact murdered his parents -- as "evidence" of his guilt. Obviously, even if this incident occurred, at a time that

undoubtedly his counsel had told him not to talk about the case with anyone, Martin's silence in this context is hardly an admission.

Finally, after providing his lay observations about the crime scene, Rother admits that he and McCready had a business relationship with each other. Obviously, this relationship is evidence of bias that would need to be explored through cross-examination before any weight could be afforded to Mr. Rother's current professed recollection of the crime scene.

E. Shari Mistretia

Shari Mistretia, Martin's half-sister, told the DA's office that even after learning that Martin confessed, she believed in his innocence. See People's Report at 54. Indeed, this is consistent with an affidavit that she gave prior to his trial. Ms. Mistretia, then Ms. Rother, stated that: "Martin has always been a gentle, loving, and kind individual, very considerate of me and everyone else with whom he has had contact." See Shari Rother Affidavit dated September 19, 1988, attached as Exhibit 9. Indeed, Ms. Rother was so convinced of Martin's innocence, she wanted him to live in her home with her two children, then aged 15 and 11. Id.

Ms. Mistretia also reiterated her Huntley hearing testimony regarding a conversation she had with Martin from police headquarters following his confession. In this conversation, Martin told her that he confessed because the police made him. This is crucial testimony, because not only does it bolster Martin's claim that his confession was not reliable, it also demonstrates that one of the detectives who interrogated him perjured himself about the content of this conversation at trial. Detective Rein testified at trial that he overheard the conversation with Shari and that Martin repeated his confession, not that Martin told her that the police made him confess. In summation, the prosecutor misrepresented this conversation and improperly noted

that Shari had not been called by the defense as a trial witness, knowing that her sworn testimony in fact corroborated Martin Tankleff's testimony and cast doubt on Detective Rein's credibility.

Finally, Ms. Mistretia told the DA that the reason that Martin left her home while he was released pending trial and went to live with another relative, Ronald Falbee, was that she was feuding with him over items she wanted from her father's estate, not, as Ronald Rother portrayed it, because the Rothers had somehow concluded that he was guilty of the murders. Compare DA's Report at 50 ("Rother concluded that Martin did it. According to Rother, he told Martin that he no longer wanted Martin in his house. Martin moved in with cousin Ronald Falbee shortly thereafter.") with id. at 55 ("According to Mistretia, she showed the letter [she had received from Martin's civil lawyer demanding that she return property that she had taken that belonged to the estate] and demanded, 'What the fuck is this?' According to Mistretia, [Martin told her she would have to speak to the attorney]. According to Mistretia, shortly thereafter, she told Martin to leave.").

Interestingly, Shari, who alone among Martin Tankleffs' relatives, the victims of the Tankleff murders, spoke out against Martin following his conviction, recently told CBS' "48 Hours" that based on the new evidence developed by Martin Tankleff's defense team, she is no longer sure that he committed the offenses. See Videotape of "48 Hours" broadcast on April 7, 2004, copy attached.

F. The Other Family Members

After devoting six-and-a-half pages of its report to the Rothers, the DA's report devotes about three pages to all of the other Tankleff family members. The DA spoke to five of the family members, each of whom knew Martin Tankleff and his parents and had had the

opportunity to see them together on many occasions. Each stated unequivocally, that they do not believe that Martin Tankleff could possibly have murdered his parents.

On the recent CBS "48 Hours" broadcast, fourteen of the Tankleff family members stated that they did not believe that Martin Tankleff killed his parents. While the DA's office is typically seen as the representative of the victims of a crime, each of the fourteen stated that they were never interviewed by the DA's office prior to murder charges being brought against Martin, or for that matter, prior to his trial. Id.

Detective McCready, on the same broadcast, at first accuses the family members of lying about the fact that they were never interviewed. Just seconds later, he concedes that he did not interview them, claiming that despite the fact that they knew both Martin Tankleff and the victims better than anyone, they would have had no information useful to his investigation. McCready, claiming that greed was the motive for Martin to kill his parents, conceded that he did not know at the time of the trial, as any of the family members could have told him, that Martin could not, as he knew under the terms of his parents' will, participate in his parents' estate until he was 25 years old. He was barely seventeen when his parents were murdered.[8]

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[8] In addition to reporting the results of its recent "investigation," in its Memorandum of Law, the DA gives a detailed rendition of the facts adduced at trial in an effort to suggest that there was substantial evidence at trial to corroborate Martin Tankleff's confession. For example, the DA notes that Martin recalled touching the door leading to the garage after rendering first aid to his father, looking for the family car while he was trying to figure out what had happened to his mother. Yet, the DA argues, there was not blood on the door handle. What the DA omits is that the police never removed the door handle to test it for the presence of blood. Similarly, Martin testified he used the phone in his father's study to call "911." The DA argues that the blood spatter on the phone had not been disturbed, from which the DA concludes that that phone was not in fact used. It is, of course, immaterial which phone Martin used to call "911." However, if the murders occurred a couple of hours earlier, which would be consistent with Jerry Steuerman orchestrating the murders after the poker game concluded rather than Martin attacking his parents moments earlier, the blood on the phone in the study would have been dried and the blood splatter would not have been disturbed. Lastly, the DA notes that a tissue Marty was holding when the police arrived had a couple of spots of his mother's blood on it, yet Marty said he had not touched his mother's body. The murder of Arlene Tankleff was brutal and tremendously bloody. If Martin had touched her body after attacking her, the tissue would have been soaked in blood. The fact that there were a couple of small spots of her blood is far more consistent with the blood having been transferred from any surface in the house touched by Marty that had earlier been touched by the murderers. Despite the DA's best efforts, the evidence at trial in fact rose and fell with Martin's confession. The bulk of the physical evidence proved the confession to be false. This is precisely why the two

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IV. A Recent Statement By Detective McCready Calls Into Question A Portion of his Trial Testimony, Further Undermining his Credibility

At trial, Martin Tankleff testified that when he first looked into his parents' bedroom on the morning they were attacked, he did not see either of his parents. He proceeded to his father's office, where he found his father, brutally attacked, and called "911." The "911" call was logged at 6:11 a.m., whereas sunrise did not occur that morning until 6:25 a.m. This easily explains why, when Martin originally looked into his parents' bedroom, he did not see his mother's body, which was lying on the floor on the far side of the bed. Later, when it was lighter out, the body was partially visible from the doorway.

At trial, McCready testified that one of the reasons he quickly concluded that Martin Tankleff was lying was that he could see Arlene's body from the doorway and he did not believe that Martin could have looked into the room and not immediately seen her body. The DA specifically cites this testimony by McCready in his Memorandum of Law:

> McCready also confirmed that the drapes in the master bedroom were open with the television on and that notwithstanding defendant's claim that the room was dark and that he could not see anyone inside, the room in fact was well illuminated, so that one "could see plainly" through the entire length of the room (A. 331-332, 4935-4936).

DA Memorandum of Law at 11.

Yet, Detective McCready in a recent interview has contradicted his own trial testimony. Describing what he saw in the master bedroom when he first arrived at the Tankleff residence on the April 7, 2004 "48 Hours" broadcast, Detective McCready stated: "It was an eerie feeling, because it always is an eerie feeling. It was dark. She

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members of the Appellate Division who would have suppressed the confession would not have remanded for a new trial, but would have vacated the convictions altogether.

[Arlene Tankleff] was nearly decapitated and it appeared to me that she had struggled with whoever assaulted her." See Exhibit 10 (emphasis added).[9]

ARGUMENT

I. The New Evidence and the Record as a Whole Warrant an Evidentiary Hearing

Mr. Tankleff has presented compelling new evidence that would, even accepting every factual contention made by the DA, probably result in a jury reaching a different result; and the entire record in this case, even accepting every factual contention made by the DA, demonstrates that he is innocent of the crimes for which he was convicted and that no rational juror could find him guilty beyond a reasonable doubt. Accordingly, this Court can and should vacate his convictions, even absent an evidentiary hearing. See § 440.30, subd. 3. However, if the Court concludes that it cannot grant Mr. Tankleff's motion to vacate his convictions absent a hearing, it must conduct an evidentiary hearing. See § 440.30, subd. 5. The DA has plainly not met its burden of conclusively refuting by unquestionable documentary proof the factual allegations raised by Mr. Tankleff's motion. See § 440.30, subd. 4.

The DA is correct that the standard under § 440(1)(g) that a defendant must meet to prevail on a claim based on new evidence – it must be such as will probably change the result if a new trial is granted – is a lower standard than that for a constitutional claim of actual innocence – taking into account the entire record, no reasonable juror could convict the defendant beyond a reasonable doubt. As set forth below, Mr. Tankleff prevails both on his claim that the new evidence would probably result in a different outcome if a new trial is granted and on his claim that no reasonable jury could find him guilty beyond a reasonable doubt based on the entire record in this case.

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[9] Despite the evidence Arlene Tankleff struggled with her attacker, Martin Tankleff showed no signs of having been
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A. The New Evidence

i. There is Substantial New Evidence Not Heard by the Jury

a. Glenn Harris

Mr. Harris' eyewitness testimony to the crimes for which Mr. Tankleff was convicted would plainly have been material to the verdicts in this case. The DA's argument to the contrary should be rejected. DA Mem. at 61-62. The case upon which the DA relies, *People v. Reyes*, 255 A.D.2d 261 (1st Dep't 1998), does not support the contention that Harris' testimony is immaterial. There, the court held that evidence of a witness's criminal conduct that took place three years after the defendant's trial was immaterial to the defendant's guilt. *Id.* at 264. Here, in contrast, Harris' statement is plainly material because his criminal conduct involves the murders for which Martin Tankleff was convicted. Harris provides eyewitness testimony that he took two career criminals -- one of whom had a relationship with Jerry Steuerman and neither of whom have any relationship to Martin Tankleff – to the Tankleff residence the night of the murders and that the following morning he saw one of those individuals burning clothing. Harris' testimony is plainly material. *See People v. Maynard*, 183 A.D.2d 1099, 1102-03 (3d Dep't 1992) (granting § 440.10 motion where new witness testimony implicated herself and others in the crime).

The DA also argues that Glenn Harris' August 2003 statement is not newly discovered evidence because Mr. Tankleff failed to exercise due diligence to learn of Harris' identity and call him as a witness at trial. In fact, neither Mr. Tankleff nor the DA learned of Harris' involvement in this case at the time of the trial. Once Mr. Harris was discovered years later by Mr. Tankleff and his defense team, they needed to investigate him, interview other witnesses,

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in a struggle.

and develop corroborating evidence. Mr. Tankleff then provided that evidence to the DA's office, in advance of filing the 440 motion, in order to give the DA the opportunity to investigate this evidence before the subjects of the investigation would learn about the evidence. Unfortunately, as weeks passed, the DA did nothing to investigate the new evidence.[10] Mr. Tankleff's defense team obtained a sworn statement from Mr. Harris on August 29, 2003, and filed his 440 motion approximately one month later. This sworn statement by Mr. Harris is undoubtedly newly discovered evidence, not available at the time of Martin Tankleff's trial.

The DA baldly asserts, without any support or even any argument, that Martin Tankleff could "easily" have found Harris "at the time of trial or soon afterwards." DA Memorandum of Law at 59. This is a striking assertion given that the police themselves never discovered Harris' connection to these murders. In any event, the proper standard is whether it was "unreasonable" that Harris' role was not discovered by the time of trial. People v. Hildenbrandt, 125 A.D.2d 819, 821 (3d Dept. 1986) ("The existence of the witness was not uncovered by the police and there is nothing in the record to indicate that the failure to discover the witness was unreasonable. Thus, it can hardly be said that defendant should be charged with a lack of due diligence in finding the witness."); see also 34 N.Y. Jur. 2d Criminal Law § 3064 ("Notwithstanding the due diligence requirement, the granting of a motion to vacate a judgment of conviction will not be precluded where there is nothing in the record to indicate that the defendant's failure to acquire the evidence before or during trial was unreasonable."). Given the police's failure to identify Harris' role by the time of trial, it plainly is not "unreasonable" that Martin Tankleff did not either. People v. Wise, 194 Misc. 2d 481, 494 (N.Y. Sup. Ct. 2002) ("It

[10] The first interview conducted by the DA, according to the DA's appendix to its Report, occurred on October 1, 2003, weeks after Mr. Tankleff had provided it the new evidence, and after Tankleff, having waited weeks with no action by the DA, had informed the DA that he would be filing his 440 motion the following day.

is well recognized that the prosecution has a great advantage over the defendant in the fact-gathering process due to his superior manpower and access to other law enforcement facilities.") (internal quotation marks omitted); see also People v. Ramos, 132 Misc. 2d 609, 612 (N.Y. Sup. Ct. 1985) ("At the time of the trial, no one was aware of [the complainant's] record. The difficulty, and ultimate failure, of both counsel and the court, in obtaining reliable and complete information about [the complainant], demonstrates that even with due diligence, the defendant could not at trial have produced the evidence outlined herein.").

Next, the DA attempts to erect a bright line rule that a 440 motion must be filed within one year of learning of new evidence, even if the evidence could not through the exercise of due diligence have been discovered at the time of trial. However, there is no such rule in either the statute or the case law.

CPL § 440(1)(g) sets forth no time limit in which a defendant must bring a claim of newly discovered evidence following the discovery of the potential existence of such evidence. Instead, it merely requires that the motion be made with "due diligence after the discovery" of the new evidence. In this regard, § 440.10(1)(g) differs from its predecessor. See People v. Huggins, 144 Misc. 2d 49, 51 (N.Y. Sup. Ct. 1989)(citing Code of Criminal Procedure §§ 465(7), 466). Plainly, if the legislature wanted to create a time limitation, it knows how to do so and has chosen not to set such a limitation. *See, e.g,*. CPL § 460.30(1)(setting one year limit on motion for extension of time to appeal).

Thus, in People v. Maynard, 183 A.D.2d 1099 (3d Dep't 1992), the court reversed the County Court's denial of the defendant's § 440.10 motion for lack of due diligence. The court held that the defendant's *two-year* delay did not constitute a lack of due diligence where such delay was both reasonably explained and did not prejudice the government. Id. at 1103-04.

In this case, an investigator working for Mr. Tankleff first met with Harris in March 2002 and arranged to give Harris a polygraph in June 2002, which he passed. Given the polygraph corroboration of this significant new evidence, Tankleff's defense team continued its investigation, locating and interviewing additional witnesses. Given the long history of repeated skepticism and lack of investigation by the DA's office of important evidence in this case, it was obviously crucial that Tankleff's defense team investigate the evidence as thoroughly as possible before presenting it to the DA. Following the completion of the defense investigation, Mr. Tankleff informed the DA's office of Mr. Harris' role in the offense in August 2003. The "delay" – of seventeen months from first meeting, and fourteen months from the polygraph corroboration -- was therefore due to the exercise of diligence by Mr. Tankleff in investigating the new information. Mr. Tankleff provided the information to the DA's office to investigate this important new evidence using governmental powers of investigation unavailable to Mr. Tankleff. Unfortunately, the DA's office exercised no diligence and did nothing to investigate the new evidence. Accordingly, Mr. Tankleff filed his motion in October 2003.

Thus, this case is unlike People v. Friedgood, upon which the Government relies. There, the court upheld the lower court's denial of a § 440.10 motion because the defendant offered no explanation other than that he was working on his appeal to justify a *three-year delay* in bringing his motion. People v. Friedgood, 58 N.Y.2d 467, 471-73 (1983).[11]

[11] Nor do People v. Stuart, 123 A.D.2d 46 (2d Dep't 1986), or People v. Huggins, 144 Misc.2d 49 (N.Y. Sup. Ct. 1989), support the DA's contention that evidence more than a year old cannot be considered in a motion for a new trial based on newly discovered evidence. In Stuart, the court merely held that under the facts of that case it was not error to conclude a one-year delay supported a finding of a lack of diligence, finding the defendants did not demonstrate the new evidence would probably have changed the result at trial. Stuart, 123 A.D.2d at 54. Similarly, in Huggins, where the defendant waiting twenty months after obtaining an exculpatory affidavit without taking any action, the court, recognizing "there is no definitive appellate resolution as to what is 'due diligence,' nonetheless considered the merits of the defendant's claims. Huggins, 144 Misc.2d at 51-52.

Moreover, the DA has not argued and could not demonstrate that it was prejudiced by this "delay;" given that the trial occurred some fourteen years ago, the period of months between discovery of Harris' and Creedon's and Kent's roles in the murders and the filing of this motion is insignificant. See People v. Bell, 179 Misc. 2d 410, 416 (N.Y. Sup. Ct. 1998) ("[A]fter more than 20 years, it is difficult to see how the additional five years since 1992 would dim memories disproportionately. The interests of justice, as perceived by this court, has required resolution of defendants' claims on the merits."); cf. People v. Farrell, 159 Misc. 2d 992, 994 (N.Y. Sup. Ct. 1994) (considering merits of § 440.10 motion despite delay in bringing claim because, "[t]aking into account the nature of the dispute, the interests of justice require the court to resolve the substantive questions rather than reject the application for technical procedural reasons").

b. Professors Leo and Ofshe

In addition to Mr. Harris' statement, there is other substantial newly discovered evidence that was never considered by the jury in this case. At trial, the DA relied almost exclusively on Mr. Tankleff's confession. Indeed, the only two members of the Appellate Division to reach the issue on direct appeal both concluded that absent the confession, the case must be dismissed as there was insufficient evidence of guilt from which any rational jury could convict. Mr. Tankleff has presented two expert opinions that conclude that the interrogation techniques employed by the homicide detectives in this case induced a confession that was unreliable and false. See Affidavits of Professor Leo and Professor Ofshe, Exhibits 5 and 6, respectively, to the Memorandum of Law in Support of the 440 Motion. These expert opinions undermine the most crucial piece of evidence against Mr. Tankleff, and the DA does not contest the validity of either expert's methodology or conclusion.

Rather than attempt to challenge the validity or methodologies of these expert opinions, the DA relies on a single case, a 1999 case from the Supreme Court for Queens County, to argue that the opinions would not be admissible at a re-trial. See DA Memorandum of Law at 60. In that case, the court found that the "voluntariness" expert sponsored by the defendant was not basing his testimony on then-generally accepted scientific principles. Regardless of whether or not that ruling was correct, it does not preclude the admission of the testimony from Professors Leo and Ofshe. As set forth in his affidavit, Professor Leo has been qualified as an expert and testified 69 times in sixteen different states. See Affidavit of Professor Leo at ¶ 3. Dr. Ofshe has been qualified as an expert on at least 134 occasions. See Boyer v. State of Florida, 825 So.2d 418, 419 n. 1 (Fla. App. 2002). As set forth in Mr. Tankleff's Memorandum of Law at 31 n. 20, courts around the country have admitted the testimony of Professors Leo and Ofshe, because it is scientifically based and is of value to a lay jury in assessing what weight to give a confession depending on the interrogation techniques employed. Many of these cases have been decided since the case cited by the DA was decided in 1999, demonstrating that what may not have been generally accepted science in 1999, is today.[12] See e.g., Miller v. Indiana, 770 N.E.2d 763 (Ind. 2002) (reversing conviction based on trial court's exclusion of Professor Ofshe's testimony); Boyer v. State, 825 So.2d 418, 419-20 (Fla. Ct. App. 1st Dist. 2002)(reversing conviction based on exclusion of Dr. Ofshe's testimony, which met Frye standard of admissibility, went to the heart of defense and would have assisted jury); Washington v. Miller, 1997 Wash. App. LEXIS 960 (Wash. Ct. App. 1997)(reversing conviction based on exclusion of Professor Ofshe's testimony: "stripped of the power to describe to the jury the circumstances that prompted his

[12] The DA, by arguing that even as recently as 1999, such expert testimony would not have been admissible, implicitly concedes that no amount of diligence would have allowed Mr. Tankleff to have presented this testimony at trial. Accordingly, the Leo and Ofshe affidavits are plainly new evidence.

confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"); United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996) ("Properly conducted social science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony, assuming its validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried."); United States v. Raposo, No. 98-Cr-185, 1998 U.S. Dist. LEXIS 19551 at * 14-15 (S.D.N.Y. December 14, 1998)(false confession expert testimony was based on testing generally accepted in the scientific community and would be helpful to the jury); United States v. Hall, 974 F.Supp. 1198, 1206 (C.D. 1997)("Dr. Ofshe testified that a common misperception among the public is that once a person confesses to his guilt, he must be guilty. Dr. Ofshe's expert testimony challenges this perception based on systematic observation of data to which the jury is not privy.") As New York courts have routinely recognized, expert testimony can help a lay jury understand why someone in a certain unusual situation may behave in a counter-intuitive manner. See, e.g., People v. Drake, 188 Misc.2d 210, 212, 215 (N.Y. Sup. Ct. 2001)("[i]f the subject matter is one about which jurors have some general understanding, expert testimony may nonetheless be properly received to dispel misconceptions . . .").

Accordingly, the testimony of Leo and Ofshe is new evidence, not available at trial, but recently generally accepted and admissible.

c. The Expert Polygraph Testimony

In addition to the Harris testimony and the Leo and Ofshe opinions, the new body of evidence includes expert polygraph results corroborating the truth of the statements of Mr. Harris, Mr. Tankleff's claims of innocence and Mr. Creedon's admissions to his involvement in

the Tankleff murders. The DA asks the Court not to consider this testimony, because polygraphs generally are not admissible at trial. The fact that polygraphs are typically inadmissible at trial, however, does not mean they should not be considered for purposes of deciding this 440 motion. While inadmissible before a petit jury at trial, polygraphs are admissible in other proceedings. See People v. Vernon, 391 N.Y.S.2d 959, 961-62 (Sup.Ct. N.Y.Cty. 1977)(concluding court can consider factual and expert testimony of polygraphers in § 210.40 proceeding: "As to the argument that binding New York precedent holds polygraphy unreliable for trial purposes, and, a priori or a fortiori, unreliable for any other probative purpose whatsoever, I do not find the Court of Appeals decisions to go so far."); see also People v. Frank, 83 A.D.2d 642, 643 (Second Dep't. 1981)(Hopkins, J.) (dissenting)("Although polygraph evidence has not been accepted to determine guilt or innocence before a petit jury, such evidence has been held worthy of consideration in guiding the exercise of the discretion of the court in Clayton hearings and for other purposes."); People v. Miller, 2 Misc.3d 1006(A), 2004 N.Y. Slip Op. 50166(U), 2004 WL 615136 (Chemung Cty. Mar. 18, 2004) (polygraph evidence may be considered on a motion to dismiss an indictment in the interests of justice because the case is based on circumstantial evidence and the defendant has adamantly maintained his innocence). Courts in other jurisdictions have also concluded that, even if inadmissible at trial, polygraphs can be considered in other contexts, including motions for a new trial based on newly discovered evidence. See State v. Humphrey, 445 So.2d 1155, 1159 (La. 1984)("The introduction of polygraph examinations are allowed at the post-trial deliberations because the judge can properly assess and weigh the polygraph's validity and results with the other considerations and testimony presented in the post-trial proceedings."); People v. Barbara, 400 Mich. 352, 413 (1977) (holding that court may consider polygraph evidence on motion for new trial based on newly discovered evidence).

Accordingly, in considering the weight of the other new evidence, the Court should consider the polygraphs providing corroboration of the veracity of that evidence.

d. Creedon's Repeated Admissions

Finally, the DA himself has added to the body of newly discovered evidence. Not only is Harris' sworn statement new, but the DA, after the filing of the 440 motion, discovered several other individuals to whom Creedon admitted his involvement in the Tankleff murders. The statements from these individuals, not all of whom the DA has yet identified, are plainly newly discovered evidence.

ii. The Newly Discovered Evidence Probably Would Have Changed the Result at Trial

Given the utter lack of physical evidence at trial implicating Martin Tankleff and the fact that his confession was contradicted by the physical evidence, this was an exceedingly close case. Indeed, the jury deliberated for over a week before returning its verdicts. When it did so, it acquitted Martin Tankleff of the first degree murder of his mother.

There can be little doubt that had the jury heard expert testimony undermining the reliability of Mr. Tankleff's confession, eyewitness testimony from Glenn Harris placing two career criminals, Joseph Creedon and Peter Kent, at the Tankleff residence the night of the murders, and evidence Mr. Creedon has admitted his involvement in the Tankleff murders to numerous individuals on numerous occasions over a period of several years, this information would have had a dramatic impact. No rational juror could have convicted under these circumstances; undoubtedly, Mr. Tankleff has made a prima facie showing that at an evidentiary hearing he could demonstrate by a preponderance of the evidence the jury would have probably reached a different outcome had it been presented with the new evidence. See § 440.30, subd. 6

(burden of proof for movant seeking to vacate a judgment under § 440.10 is preponderance of the evidence).

B. Harris' Request for Transactional Immunity is Irrelevant to Whether or Not Martin Tankleff is Entitled to a New Hearing

The DA notes that Mr. Harris, through counsel, has asked for transactional immunity. The DA then throws up his hands and decides that there is no point in having a hearing. As an initial matter, simply because Harris is requesting transactional immunity does not mean that the DA has to extend such immunity to obtain his testimony. As the DA well knows, he can compel Harris' testimony through use immunity. Whether or not Harris would like transactional immunity, he would have to testify if extended use immunity. See People v. Riela, 178 N.Y.S.2d 873, 878 (Sup.Ct. Tioga Cty. 1958)(if granted a promise not to prosecute based on testimony, witness must testify). Granting Harris use immunity would still allow the DA to prosecute him if he later determines prosecution is warranted through independently developed evidence. If the DA is interested, as he should be, in learning what actually happened on the night of the Tankleff murders, there would be no reason for the DA to refuse to provide Harris use immunity to allow Mr. Tankleff, and the Court, to obtain the benefit of his testimony.

Quite simply, if the DA, by refusing to extend Harris immunity, were successful in depriving Mr. Tankleff eyewitness testimony demonstrating that others committed the offenses for which he has been convicted, Mr. Tankleff would be deprived of his right to due process. See People v. Shapiro, 431 N.Y.S.2d 422, 429 (N.Y. 1980) ("[T]here are times when the exercise of [a witness' privilege against self-incrimination] may press on a defendant's due process right, . . . all the more so when, as in the present case, the offenses are of such a nature that the only persons capable of furnishing useful testimony will be those implicated in some way in the crime."); People v. Sapia, 391 N.Y.S.2d 93 (N.Y. 1976) (defendant's due process rights could be

violated were prosecutor unwilling to extend immunity to active participant in the criminal transaction at issue).

Secondly, under these circumstances, were the DA to decline to grant Mr. Harris use immunity, the Court could and should order the immunity itself. See Shapiro, 431 N.Y.S.2d at 429 (prosecutor abuses its discretion not to offer immunity when it ignores implications for defendant's due process rights).

Thirdly, even if the DA could and did decline to extend use immunity and the Court did not do so, Harris could be compelled to testify. He has now given numerous statements – to the Tankleff defense team, to the DA's office and on television – about the subject matter on which his testimony would sought. Accordingly, he has waived his right against self-incrimination and can be compelled to testify. One cannot selectively invoke one's Fifth Amendment rights. People v. Bell, 485 N.Y.S.2d 416, 420-21 (Sup.Ct. N.Y. Cty. 1985)(once witness gives testimony, implicitly waiving his privilege against self-incrimination, he "may not withdraw his waiver to prevent matters which he has already gone into from being explored in greater detail").

Fourthly, the DA argues that Harris' statements on this subject are not against his penal interest. See People's Report at 66-67 (noting that while Harris implicated Creedon and Kent in multiple homicides, he only implicates himself in burglary -- for which he faces no risk of prosecution, since the statute of limitations has long since run). If his testimony is not expected to be against his penal interest, by definition his testimony will not be self-incriminatory and he cannot invoke his right to avoid self-incrimination to decline to testify. See People v. Jones, 747 N.Y.S.2d 308 (Sup.Ct. Bronx Cty. 2002)(Protection of the privilege against self-incrimination "extends only to witnesses who have `reasonable cause to apprehend danger from a direct answer,' and whether such cause exists is an `inquiry for the court; the witness' assertion does

not by itself establish the risk of incrimination.'"(*Quoting* Ohio v. Reiner, 532 U.S. 17, 21 (2001)); see also People ex rel. Taylor v. Forbes, 143 N.Y. 219, 231 (1894)(witness may be compelled to answer when "it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution").[13]

Finally, even if Harris were not to testify, that is not a reason not to hold an evidentiary hearing. There are numerous other witnesses from whom relevant testimony will be obtained. For example, the DA concedes that there are at least four people to whom Creedon has made admissions. Each of those four people would be called to testify. Similarly, the testimony of Todd Steuerman, Peter Kent and Joseph Creedon will also be vitally important. In addition to the factual testimony, the Court should hear expert testimony from Professors Leo and Ofshe and from polygraph expert, Joel Reicherter.

C. The Totality of the Evidence, at a Minimum, Raises a Prima Facie Claim of Actual Innocence that Warrants an Evidentiary Hearing

i. The New York State Constitution Permits a Freestanding Claim of Actual Innocence

The DA is quick to dismiss the holding of People v. Cole, 765 N.Y.S.2d 477 (N.Y. Crim. Ct. Misc. Pt. 2003), that "conviction of and/or punishment imposed upon an innocent person violates the New York State Constitution," id. at 485; see also People v. Cole, Exhibit 19 to the Memorandum of Law in Support of the 440 Motion, characterizing it as merely "persuasive."

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[13] Conversely, if the DA is incorrect and the statement Harris has given is against Harris' penal interest and therefore he could and did invoke his right against self-incrimination, the statement he has given would be admissible as a statement against interest by an unavailable witness. *People v. Fields*, 66 N.Y.2d 876 (1985) (holding that written statement made by witness that implicated another in the crime was admissible as a declaration against penal interest); *People v. Settles*, 46 N.Y.2d 154, 167 (1978) ("To qualify for admission into evidence as a declaration against the maker's penal interest the following elements must be present: first, the declarant must be unavailable as a witness at trial; second, when the statement was made the declarant must be aware that it was adverse to his penal interest; third, the declarant must have competent knowledge of the facts underlying the statement; and, fourth, and most important, supporting circumstances independent of the statement itself must be present to attest to its trustworthiness and reliability.").

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See DA Memorandum of Law at 56. However, the DA fails to point to any contrary New York precedent. Moreover, Cole does not stand alone in its recognition of a freestanding claim of actual innocence under the laws of states such as New York that have chosen to extend greater rights than the federal government. See State ex rel. Amrine v. Roper, 102 S.W.3d 541, 547 (Mo. 2003) (en banc) (recognizing freestanding claim of actual innocence for those sentenced to death under Missouri law); People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996) (recognizing freestanding claim of actual innocence under Illinois constitution); Sommerville v. Warden , St. Prison, 641 A.2d 1356, 1369 (Conn. 1994) (recognizing freestanding claim of actual innocence under state habeas procedures); In re Clark, 855 P.2d 729, 797 (Cal. 1993) (in banc) (recognizing a freestanding claim of actual innocence in capital cases under state habeas procedures); see also Ex Part Elizondo, 947 S.W2d 202, 205 (Tex. 1997) (en banc) (recognizing freestanding constitutional claim of innocence).

The DA fails to offer any persuasive reason to reject the holding of Cole. The DA, mirroring the treatment of actual innocence in federal *habeas* cases, asserts that the "concept of actual innocence" should be used only to excuse certain procedural failures, because other remedies are available to a defendant post-conviction. DA Memorandum of Law at 56-58. This argument, however, ignores that, "[t]he New York State Constitution grants an accused *greater* rights than those provided in the Federal Constitution." Cole, 765 N.Y.S.2d at 484-85 (emphasis added) (identifying numerous rights provided by the New York but not the federal constitution). Cole considered and rejected the contention that the existence of alternative remedies foreclosed a freestanding claim of innocence under the New York State Constitution. Id. at 483. That the legislature saw fit statutorily to create the various post-conviction remedies set forth in CPL

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§ 440.10 does not answer the question whether a *constitutional* freestanding claim of innocence exists. As explained in Cole, only the courts can "determine whether the New York State Constitution bars the conviction or jailing of an actually innocent individual." Id. (emphasis added).

Moreover, although it is true that criminal procedural rights are designed to prevent the innocent from being convicted, the DA is wrong that this requires the rejection of a freestanding constitutional claim of innocence. The court in Cole rejected the notion that the New York State Constitution sets forth rights to ensure that the innocent are not convicted, and yet offers *no protection* to the innocent who are convicted but can only establish their innocence post-judgment. see id. at 485; see also People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996) ("The stronger the claim . . . [that] a convicted person is actually innocent[,] the weaker is the legal construct dictating that the person be viewed as guilty.").[14]

ii. Cole Sets Forth the Proper Procedures to Evaluate a Claim of Actual Innocence

As set forth in Cole, "a court conducting a hearing on a claim of innocence should admit into evidence any reliable evidence, whether in admissible form or not." Cole, 765 N.Y.S.2d 477, 486; see also Exhibit 19 to the Memorandum of Law in Support of the 440 Motion; State ex rel. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003) (en banc) (claim of factual innocence

[14] The DA's further contention that it is a "fundamental error" for the Court to make post-conviction findings of fact, DA Memorandum of Law at 57, ignores similar remedies that are already available under New York law. Most notable, CPL § 470.15 sets up a framework by which intermediate appellate courts sit as the "thirteenth juror" in criminal appeals in making determinations whether criminal judgments are against the weight of the evidence, People v. Rayam, 94 N.Y.2d 557, 560 (2000) ("[A] court reviewing the weight of the evidence must engage in its own de novo review of the evidence, sitting as a 'thirteenth juror.'"). See also CPL § 470.15(5); CPL § 470.20(5) ("Upon a reversal or modification of a judgment after trial upon the ground that the verdict . . . is against the weight of the trial evidence, the court must dismiss the accusatory instrument or any reversed count."). Analysis of a claim of actual innocence under the New York Constitution involves a similar post-conviction review to ensure that the defendant's fundamental constitutional right not to be incarcerated for an offense he did not commit has not been violated.

"must be assessed in light of all of the evidence now available"); Miller v. Commissioner of Correction, 700 A.2d 1108, 1130-31 (Conn. 1997) (court must consider all of the evidence). There can be no reasonable dispute that this standard permits admission of polygraph evidence, expert testimony regarding false confessions, and reliable witness affidavits. In addition, in considering a claim of innocence, the trial court is free to reexamine the credibility of trial testimony based on the newly presented evidence. See Cole, 765 N.Y.S.2d at 486-87. Further, procedural rules regarding, for example, due diligence, do not apply in the consideration of actual innocence claims. See Exhibit 19 to the Memorandum of Law in Support of the 440 Motion at 6 ("Even if a defendant were not diligent in pursuing his claim of actual innocence, the incarceration of an actually innocent person would violate the New York State Constitution. . . ."); compare Cole, 765 N.Y.S.2d 477 at 480-81 with id. at 482-87.

A defendant prevails on a claim of actual innocence by establishing "by clear and convincing evidence," taking into account the totality of all evidence from the trial and hearing, that "no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." Cole, 765 N.Y.S.2d 477, 486.[15]

The record as a whole states a compelling case of actual innocence. At trial, the theory of the prosecution was that Martin Tankleff, a slight teenager with no history of violence, single-handedly killed both of his parents without getting a scratch on him and somehow made the murder weapons, clothing and gloves, magically disappear. There was no physical evidence

[15] This standard is similar to that adopted in other jurisdictions. See State ex rel. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003) (en banc) (petitioner must "make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment"); Miller v. Commissioner of Correction, 700 A.2d 1108, 1130-31 (Conn. 1997) (petitioner must show by clear and convincing evidence that he is actually innocent and that no reasonable fact finder would find the petitioner guilty); Ex Part Elizondo, 947 S.W2d 202, 209 (Tex. 1997) (en banc) ("the petitioner must show *by clear and convincing evidence* that no reasonable juror would have convicted him in light of the new evidence").

linking Martin Tankleff to the crimes, his confession was disproved by the physical evidence, and the evidence of Martin Tankleff's motive was weak.

Conversely, Jerry Steuerman had equal opportunity to commit the offenses and a far more powerful motive. We now know that an associate of Steuerman's son, Joseph Creedon, has repeatedly admitted his involvement in the Tankleff murders. These admissions are corroborated by eyewitness testimony from Glenn Harris, placing Creedon and Kent, both career criminals, at the crime scene. Harris has passed a polygraph test.

Finally, the DA's trial theory was that, despite the DA's complete failure to develop physical evidence and the availability of obvious alternative suspects, no innocent person would confess and therefore Mr. Tankleff must be guilty. That theory is thoroughly rebutted by the expert testimony of Professors Ofshe and Leo.[16]

The DA attempts to erect an impossible standard for a claim of actual innocence. The DA claims that Mr. Tankleff must prove a negative, that he did not commit these offenses, and must do so to a moral certainty. Thus, assuming that Harris and Creedon are telling the truth when they both say that Creedon was one of the murderers, Tankleff would still have to prove that he did not participate in the murders with them. This, of course, is not the standard.

As the DA concedes, the question pursuant to the Cole case is whether or not a rational juror could convict based on all of the evidence. There is simply no evidence in the record that Martin Tankleff had any relationship with either Joseph Creedon or Peter Kent. While one could speculate of a theoretical possibility that Martin Tankleff committed the murders with Creedon

[16] The weakness of the DA's theory that no one would confess to a crime he did not commit is contradicted by the DA's own willingness to ignore the fact that Mr. Creedon has confessed to these crime not once, but on at least four different occasions over a period of years. Of course, unlike Mr. Tankleff's single confession, extracted using questionable tactics and flatly contradicted by the physical evidence, Mr. Creedon's confessions are corroborated by eyewitness testimony, that of Glenn Harris.

and Kent, there is no evidentiary basis to support such a theory.[17] No rational juror, confronted with the fact that two career criminals, who through Jerry Steuerman's drug dealing son had a relationship with Jerry Steuerman, came to the Tankleff residences the night of the poker game and participated in killing Arlene and Seymour Tankleff, could, without a shred of evidence connecting Martin Tankleff to the murderers, find beyond a reasonable doubt that Martin Tankleff committed the murders. Despite the DA's best efforts to confuse the issues, there is little evidence of actual innocence more powerful than evidence that someone else committed the crimes.

II. This Court Should Re-Examine Whether or Not Tankleff was in Custody and Entitled to Miranda Warnings Since the Law Governing this Issue has Changed Since Tankleff's Trial and Direct Appeals

The Government attempts to erect numerous roadblocks to preclude this Court from reaching the merits of the fundamental legal issue in this case: Was Martin Tankleff in custody and therefore entitled to Miranda warnings when he was being interrogated at police headquarters by two homicide detectives, each of whom had informed Tankleff that they did not believe the statements he had made to them about the attacks on his parents and were explicitly accusing him of being the murderer? As set forth below, none of the Government's attempts to evade this issue should succeed.

First, the Government argues that United States Court of Appeals for the Second Circuit in addressing Mr. Tankleff's federal habeas petition did not change the law relating to Miranda, because after concluding that Mr. Tankleff was indeed entitled to Miranda warnings, the Second

[17] The fact that Mr. Tankleff gave a confession, which was contradicted by the physical evidence and makes no mention of any other participants, cannot defeat his claim of actual innocence. See Cherrix v. Braxton, 131 F.Supp.2d 756, 765 n. 6 (E.D.Va. 2001)("Cherrix's confession does not preclude a person's actual innocence of a crime. See Bruce M. Lyons, New Committee looks at DNA and the Death Penalty, CRIM. JUST., Spring 2000, at 1 (reporting that, among DNA exonerations, twenty-one percent of wrongful convictions were based on confessions that were made by or attributed to the defendant).")

Circuit ultimately determined under federal law, and only under federal law, the Miranda violation in this case was "harmless." The Second Circuit plainly changed the law in this case. The trial court and each of the appellate courts on direct appeal in this case ruled that Mr. Tankleff was not in custody prior to the time he received Miranda warnings. The Second Circuit, on the other hand, determined that Mr. Tankleff was in custody well before he received Miranda warnings. Regardless of the impact under federal law of this change, there can be no doubt that a change occurred. The trial court and direct appeals courts reviewing the facts in this case concluded that Mr. Tankleff had not been in custody; the Second Circuit reviewing the identical facts reached precisely the opposite conclusion, constituting a clear change in the law.

Second, the Government cites the general proposition that state courts are not subservient to a federal appellate court and therefore argues that a federal appellate court's ruling is persuasive but not controlling authority. While the Government is correct in its general observation about the relationship between state courts and federal appellate courts, it disregards the unique circumstances of this case that serve to make this general observation irrelevant to the determination of whether there has been a change in controlling authority.

New York state courts have long invoked the federal standard of custody for purposes of Miranda analysis. *E.g.*, People v. Yukl, 25 N.Y.2d 585, 589 (1969) (citing D.C. Circuit case law in determining whether defendant was in "custody"); People v. Wiesmore, 204 A.D.2d 1003, 1005 (4th Div. 1994) (citing federal law in deciding whether defendant in "custody"); People v. Crawford, 152 Misc. 2d 763, 769-70 (N.Y. Sup. Ct. 1991) (looking to law of Second Circuit in interpreting "custodial interrogation"). Indeed, in this very case, the courts on direct appeal explicitly relied on Yukl, a case that invoked the federal standard of custody. Since New York

courts apply the federal standard, when the federal standard changed, it necessarily changed the standard under New York state law.

Under similar circumstances, New York courts have treated the habeas decisions of the Second Circuit as setting forth new controlling precedent. For example, in People v. Otero, 127 Misc. 2d 628 (N.Y. Sup. Ct. 1985), the court was confronted with an irreconcilable conflict between the decisions of the Court of Appeals and the Second Circuit as to whether the right to counsel precluded admission of statements made by a suspect about the suspect's involvement in a different crime. The Second Circuit rejected on habeas the conclusion of the Court of Appeals. *Id.* Although noting that it was not persuaded by the Second Circuit's reasoning, the court in *Otero* nonetheless held that as a practical matter it was bound to apply the Second Circuit's standard. *Id.* at 633.[18]

New York courts have considered themselves bound by the interpretations offered by the Second Circuit in other circumstances as well. For example, in People v. Ressler, 17 N.Y.2d 174 (1966), based on an intervening federal decision, the Court of Appeals reversed prior New York law, which unlike the requirements under Federal law, had previously allowed a defendant who obtained a new trial on appeal from a conviction of a lesser degree of a crime stated in an indictment to be tried for the greater degree crime. *Id.* at 179-81. The intervening change in controlling law was a decision of the Second Circuit, which held that the due process clause of the Fourteenth Amendment imposed the federal requirement upon state courts. *Id.* at 180.

[18] Faced with the same conflict, the court in People v. Alston, 94 Misc. 2d 89 (N.Y. Sup. Ct. 1978), also concluded that the statutory presumption was unconstitutional, although it conducted an independent analysis and concluded that it was unconstitutional as applied. *Id.* at 95. Despite its recognition that the Second Circuit's opinion was not technically binding upon its determination, the court considered itself obligated to "consider" the Second Circuit's "extreme action." *Id.* at 91.

Concluding that the Second Circuit opinion was the "law of the land," the Court of Appeals followed its holding. *Id.* at 181.[19]

New York courts have also considered themselves bound in the "interest of justice" to apply the decisions of the Second Circuit that grant habeas relief to one codefendant of a joint trial to the other codefendant. *See* People v. Bonino, 1 N.Y.2d 752, 753 (1956); People v. Kan, 164 A.D.2d 771, 772 (1st Div. 1990), *aff'd on other grounds*, 78 N.Y.2d 54, 59 (1991) (independently examining constitutional question). Thus, New York courts have treated holdings from the Second Circuit as to the same trial under consideration by the New York courts as controlling law. In this case, the Second Circuit specifically recognized the infirmity of the tainted confession as one of constitutional magnitude under New York law. Plainly, the "interests of justice" are served by having a New York court address the issue on the merits in light of the Second Circuit's decision.

Third, the Government cites the state appellate courts' decisions denying Mr. Tankleff's motion to re-argue based on the Second Circuit's decision. As the Court of Appeals stated, it denied the motion to re-argue because it held that it had not overlooked or misapprehended any relevant issue on direct appeal. Of course, on direct appeal, the courts did not have the benefit of the Second Circuit decision. Thus, the Court of Appeals was correct in stating that on direct appeal, it correctly applied the law as it then existed. That, however, is a different issue than the issue being raised by the present 440 motion. Here, Mr. Tankleff is not arguing that the state trial court, or appeals courts on direct appeal, misapplied the then-existing law. Rather, he is arguing that there has been a change in controlling law since the trial court and the courts on direct appeal addressed the issue.

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[19] Since the United States Supreme Court denied a writ of certiorari from the Second Circuit, the Second Circuit's
(Footnote continued on next page)

Fourth, the Government argues that this issue cannot be raised on a 440 motion, because an issue raised and decided on direct appeal cannot be re-litigated in a post-conviction 440 motion. This argument simply misses the point. The issue being raised in the present motion is whether or not Mr. Tankleff was in custody and entitled to Miranda warnings in light of the change in controlling law on this issue set forth by the Second Circuit following Mr. Tankleff's direct appeals. This issue, by definition, was not raised, and could not have been raised, on direct appeal.

The Government's desire to avoid the merits of this issue is understandable, but it is not legally defensible. New York state courts look to the federal standard to determine when a person is in custody. That standard has now changed. The "law of the land" as set forth by the Second Circuit is that Mr. Tankleff was in custody well before he received the required Miranda warnings. Accordingly, a New York state court now applying the federal standard as dictated by New York law must reach the same conclusion. In light of the Miranda violation, under New York law, all of Mr. Tankleff's statements, including those made following the belated provision of Miranda warnings, must be suppressed. He is entitled to a new trial at which those statements are inadmissible.

III. Tankleff's Ineffective Assistance of Counsel Claim is Not Procedurally Barred

Finally, the DA is incorrect in arguing that Martin Tankleff is procedurally barred from raising his claim that his trial counsel was ineffective in promising the jury that they would hear from numerous members of the Tankleff family and then failing to call such family members as witnesses. The DA's only argument that this Court may not consider the claim is the argument under § 440.10(2)(c) that the Court must deny a motion to vacate when sufficient facts appear in

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(Footnote continued from previous page)
opinion is the "law of the land" in this case as well.

the record that the claim could have been raised on direct appeal, but was not, solely due to the defendant's unjustifiable failure to take or perfect an appeal or his unjustifiable failure to raise the ground in the appeal taken.

In arguing that this claim should have been raised on direct appeal, the DA ignores the nature of the claim, ineffective assistance of counsel. Unlike other claims that must be raised on direct appeal, a claim of ineffective assistance of counsel can be raised in a post-conviction 440 motion. See People v. Brown, 410 N.Y.S.2d 287 (N.Y. 1978)("[I]n the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under C.P.L. 440.10 [rather than on direct appeal]).

Mr. Tankleff's ineffective assistance claim is based on the affidavits from family members filed with his 440 motion. These affidavits are outside the trial record. Accordingly, his ineffective assistance claim can be raised in a post-conviction motion.

The DA alternatively argues that, if Mr. Tankleff is not barred from raising his ineffective assistance claim, the Court should nonetheless exercise its discretionary authority to decline to hear it, since it could have been raised in an earlier 440 motion.[20] Given the significance of the claim and the closeness of this case, there is no reason for the Court to decline to hear Mr. Tankleff's claim. As noted earlier, the DA, and the Court, have a special obligation to the victims of a crime, especially a murder. The victims of these crimes, the Tankleff family members, deserve to be heard.

[20] The DA also argues the Court has discretion not to hear the claim under 440.10(3)(a). By its terms, that provision does not apply to a claim of ineffective assistance of counsel. See People v. Harris, 491 N.Y.S.2d 678, 687 (Second Dep't 1985).

Finally, a hearing on the claim is warranted. Given trial counsel's promise in opening statement, and the ready availability of so many family members who could rebut the theory of the prosecution that Martin Tankleff was so upset by petty disagreements with his parents that he murdered them, it would appear that Martin Tankleff was denied effective assistance of counsel. A hearing would determine if there was an adequate reason for trial counsel's failure to call these seemingly crucial witnesses. See People v. Rahman, 648 N.Y.S.2d 445 (Second Dep't. 1996) (even in the absence of a request from the movant, it was reversible error to fail to hold an evidentiary hearing on a 440 motion that raised an issue of fact).

CONCLUSION

The evidence against Mr. Tankleff at trial, in the absence of any significant physical evidence tying him to the crimes or any history that would make him a likely suspect, was razor thin. As a result, his convictions have for years been a considered a miscarriage of justice by those who know Martin Tankleff and knew the victims of these murders the best, the Tankleff family members. Mr. Tankleff has now presented extraordinary new evidence casting further doubt on his convictions and adding to a substantial record demonstrating his actual innocence. Mr. Tankleff has presented for the first time in the long history of this case, an eyewitness placing two career criminals at the scene of the crime. One of these individuals has repeatedly admitted his involvement in the Tankleff murders. This shocking new evidence is bolstered by polygraph testing corroborating its truthfulness. In addition, the most crucial piece of evidence against Mr. Tankleff, the confession that was taken from him under questionable circumstances as he was in shock from finding his parents brutally and fatally assaulted, has been called into question by two of the nation's leading experts in interrogation techniques, both of whom conclude that Martin Tankleff's confession was unreliable and false. At a minimum, this is not

evidence that can be unilaterally dismissed by the DA's office, a partisan and an advocate in these proceedings. Rather, the Court, if it does not immediately grant Martin Tankleff's motions to vacate his convictions, should hold an evidentiary hearing to explore the vitally important issues raised by Mr. Tankleff's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that I caused a true and accurate copy of the foregoing **Reply Of Defendant Martin Tankleff To The People's Opposition To His Motion to Vacate His Convictions Under C.P.L. §440**, to be SENT BY OVERNIGHT MAIL, VIA FEDERAL EXPRESS on this 15th day of April, 2004, to:

Leonard Lato
Assistant District Attorney
of Suffolk County
Building 77
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Hauppauge, NY 11787

Barry J. Pollack (mcg)
Barry J. Pollack

LIST OF EXHIBITS

1) Statements of Father Lammert and Sister Angeline

2) Picture - Beach at Belle Terre

3) Creedon Affidavit dated April 23, 1989

4) Creedon Affidavit dated Sept. 17, 1990

5) Creedon Affidavit dated Dec. 4, 2003

6) Memorandum to file dated April 26, 1990

7) Evidence Recovery Sheet Suffolk Co. DA

8) Statement of Kurt Paschke

9) Affidavit of Shari Rother dated September 19, 1988

10) Tape of 48 Hours Investigates (original air date April 7, 2004)

EXHIBIT 1

Transcription of Interview/Statement of
Father Ronald Lemmert
March 23, 2004
10:05 a.m.

Salpeter: My name is Jay Salpeter I am a licensed private investigator for the State of New York – I am the private investigator for Martin Tankleff - I am the investigator on the case along with his attorneys - Barry J. Pollack of Nixon Peabody, LLP Washington, DC, Stephen L. Braga of Baker Botts, LLP Washington, DC and Bruce Barket who has his own practice in Nassau County.

Sitting along side of me is Father Ronald Lemmert. Father, for identification purposes can you please state your name and your date of birth.

Father Lemmert: Father Ronald Lemmert – uh, my date of birth is March 26th, 1947.

Salpeter: Ok, Father, we are presently – present now at 143 Lafayette Place in Peekskill New York, is that correct?

Father Lemmert: That is correct.

Salpeter: And this conversation is being recorded and you have granted me permission to record this statement, is that correct?

Father Lemmert: That is correct.

Salpeter: Ok, ok. Now prior to my coming here I discussed uh, a gentleman by the name of Glenn Harris to you, is that correct?

Father Lemmert: That is correct.

Salpeter: Could you tell me how you know Glenn Harris?

Father Lemmert: Yes. First I would like to just mention – that I do have a signed release form that you gave me giving me permission talk about what he had told me while he was a prisoner at Sing Sing Correctional Facility where I am the Chaplain – ok, sorry what was the question?

Salpeter: Ok, the question was you know a gentleman by the name of Glenn Harris? Could you tell me how you met Glenn Harris?

Father Lemmert: Yes, the first time I met Glenn he came to a class that I was teaching at Sing Sing on a Saturday morning – uh, and he disrupted the class, he talked almost non-stop and I couldn't get anywhere with them, where he kept talking about all of his problems and uh, at one point I said well, if you got all these problems – why don't you come and talk to

me one on one. And he didn't – and on the following week, when he came back, I reminded him, I said I offered to help you and you never bothered to come and get some help – and so then, he came and that was the beginning of our relationship, about that same time – another inmate in the Chapel – uh, came to me and said that uh, Glenn had been talking to him about a crime that had – uh, about another inmate up at Clinton Correctional Facility who had been unjustly convicted of a crime and Glenn knew from being there that – that person was not involved in the crime and he didn't know what to do and he was, he wanted to come forward but he didn't want to implicate himself, - and I suggested to him that he come and see me, and this other inmate said that he would tell him to do that. Shortly, after that Glenn was put into protective custody – this was about the time that the story was released in news.

Salpeter: Uh, Father, if I could stop you at this time and just ask you two questions – do you recall what year this conversation and your association with Glenn Harris – uh, when this took place?

Father Lemmert: That would have been 2003.

Salpeter: Ok. And, the other question is, would you recall the name of the inmate up at Clinton that Glenn knew information about?

Father Lemmert: Um, I – I not off the top of my head, ah, he - ah, told me about the case and I knew – uh, when I heard the news report that this was the same case.

Salpeter: Uh, now, - could I refresh your memory - does the name of Martin Tankleff sound familiar?

Father Lemmert: Yes.

Salpeter: Would that be the name of the person?

Father Lemmert: Yes, that is the person, yes.

Salpeter: Yes, ok, thank you.

Father Lemmert: Yes, ok, when I saw him in protective custody, uh, he told me that he had been wanting to see me for a long time, uh, he told me that he had written me numerous letters but he always ripped them up because he was afraid to send the to me – uh, but that uh, he was torn up with guilt, he was having nightmares, he couldn't sleep, uh – because he didn't know what to do. He knew what he should do, but he was afraid to do it, so then he told me basically the story which was in a car with some of his friends, and they stopped at a house, the other guys went in, and uh, when they came out they were upset about what had happened and he, soon discovered that they had just murdered a man, uh, and uh, and then Martin Tankleff was the one who got convicted of the crime, but he knows these other guys were the ones who did it.

Salpeter: Would you know if there was more than a man in the house that was murdered, did he ever mention that to you?

Father Lemmert: I don't remember if he did.

Salpeter: Ok, but you do remember that there was a murder that occurred in that home, is that correct?

Father Lemmert: Yes.

Salpeter: Ok, uh – did he ever tell you what community that this murder occurred in?

Father Lemmert: I know it was in Long Island, it was near where he lived.

Salpeter: Ok, and do you and did you now where he lived?

Father Lemmert: Uh, Long Island – that's uh, to me, uh Long Island is just Long Island, I don't know anything more than that.

Salpeter: Yeah, it's a long island. Ok. Did you ever read this story in the newspaper?

Father Lemmert: No, no I didn't.

Salpeter: Ok, did you ever – ah, after it came out did Glenn ever show this story that was in the newspaper regarding the facts that have come out in this case with regards to Martin Tankleff?

Father Lemmert: No, I heard uh, I heard one television news broadcast that mentioned it very briefly, that was the only thing I saw abut it.

Salpeter: And the news broadcast was regarding Martin Tankleff?

Father Lemmert: Uh, yes – and how, let's see, it mentioned him and it mentioned Glenn and it mentioned the crime.

Salpeter: And that was the crime that Glenn was talking about – about being in the car where his friends came out and a murder occurred and he was upset about it?

Father Lemmert: Right, right.

Salpeter: Ok, now how many times did Glenn discuss this with you?

Father Lemmert: Oh, I visited him once a week in protective custody and uh, for a period of ah, probably a couple of months and every time I saw him we talked a little bit more about it, not so much of the specifics of the crime – but I was urging him to come clean and to do the right thing.

Salpeter: And, uh, Glenn did want to do the right thing, is that correct?

Father Lemmert: Yes, he did.

Salpeter: What did he say about why he was holding this back for so many years? Did he ever mention that to you?

Father Lemmert: Yes, he was afraid that he could end up getting screwed, that uh, he would end up doing the rest of his life in prison and uh, that was the thing that was holding him back.

Salpeter: But it was Glenn's feeling that he wanted to help free this man, Martin Tankleff?

Father Lemmert: Definitely.

Salpeter: He made that clear to you?

Father Lemmert: Oh yes, that was always uh, in conversation.

Salpeter: Ok, do you recall anything else regarding what happened that evening? Did he ever mention names to you of people that were in the vehicle?

Father Lemmert: If he did, I don't remember them.

Salpeter: Ok, if I mention two names – if it does refresh your memory that would be fine, if not, you just don't remember the names? Would the name of Joseph Creedon – do you recall that name?

Father Lemmert: No.

Salpeter: Do you recall the name of Peter Kent?

Father Lemmert: No.

Salpeter: Do you recall the community where this crime occurred being in Belle Terre?

Father Lemmert: No.

Salpeter: So you recall - and you associate what Glenn has said to you with regards to Martin Tankleff?

Father Lemmert: Right.

Salpeter: Right. So it was a murder that occurred in his home or a murder that he is doing time for? - that, Martin did not do? Is that correct?

Father Lemmert: That is correct.

Salpeter: Ok, and do you recall any thing else?

Father Lemmert: No, I can't think of anything else.

Salpeter: Now, you mentioned to me before we went on tape and you gave me permission to tape, we briefly discussed this case, is that correct?

Father Lemmert: Right.

Salpeter: And you had mentioned to me about a conversation you had with Glenn's brother – Dan Harris is that correct?

Father Lemmert: Yes, that's correct.

Salpeter: Could you tell that to me again please?

Father Lemmert: Sure. Uh, Glenn asked me to call his brother uh, to uh, possibly get his brother to help provide an attorney to give him some legal advice on this matter and when I called his brother, his brother was very firmly against him saying anything – he was afraid that Glenn was going to get himself in trouble or end up doing a lot of time in prison – and I relayed that message to Glenn.

Salpeter: Ok, you relayed that message to Glenn – but subsequently it was Glenn's decision to still come forward?

Father Lemmert: That's right.

Salpeter: That's correct, right?

Father Lemmert: Yes, and I had encouraged him to do that.

Salpeter: Glenn always wanted to get an innocent man out of jail, is that correct?

Father Lemmert: That is correct.

Salpeter: And this man being Martin Tankleff?

Father Lemmert: That's right.

Salpeter: Ok, the time is now 11:15 a.m., I am going to conclude this tape, but before I conclude this tape, Father – I want to thank you very much – I did not offer you anything for this?

Father Lemmert: That's correct.

Salpeter: Ok, this was done on your own free will – is that correct? and I did give you a release from Glenn Harris?

Father Lemmert: That is correct.

Salpeter: Ok, thank you very much I am going to conclude this tape.

Salpeter: The time now is 11:30 a.m. it is the same date of March 23rd of 2004, my name is Jay Salpeter I am still at the home of Father Ronald Lemmert – uh, after concluding the tape Father Lemmert mentioned to me that he recalled uh, something specific regarding the tape so we're going to go back on the tape and Father Lemmert could you tell me what just happened?

Father Lemmert: Yes, I remembered that – that I had been told that it was Marty's parents who were killed, I couldn't remember who it was before, but uh, it jogged my memory that uh, that it was his parents that he was accused of and convicted of killing uh, that is what Glenn had told me.

Salpeter: Ok, so that was what Glenn had told you?

Father Lemmert: That is what Glenn told me, that Marty was in prison for having killed his parents and that he knew that this was not the case because he was there at the time uh, when the other – his friends were in there, in the house at the time of the murder.

Salpeter: Ok, thank you. Now when shut the tape off, and we were sitting here, at no time did I ever refresh your memory?

Father Lamert: No you did not.

Salpeter: It was you Father, who advised that you had recalled something regarding this crime – is that correct, what Glenn had told you?

Father Lamert: That's right, right. You asked me if I knew anything about the case, and I said it was his parents, and then it – that's what jogged my memory, but I was the one who remembered it was his parents.

Salpeter: Ok Father, I want to thank you very much – uh, it's 11:32 I will now conclude the tape again.

Transcription of Interview/Statement of
Sister Angeline Matero
March 23, 2004
12:15 p.m.

Salpeter: My name is Jay Salpeter I am a licensed private investigator for the State of New York – I am the private investigator for Martin Tankleff - I am the investigator on the case the attorneys involved in this case are Barry J. Pollack of Nixon Peabody, LLP Washington, DC, Stephen L. Braga of Baker Botts, LLP Washington, DC and Bruce Barket of Nassau County.

I am located now at 143 Lafayette Place in Peekskill, NY sitting along side of me is Sister Angeline Matero. Sister, for identification purposes can you please state your name and address please.

Sister Angeline: Sister Angeline Matero, 250 South Street Peekskill, New York.

Salpeter: Sister, before I started this tape I asked you if you would give me permission that I could record our conversation, is that true?

Sister Angeline: Absolutely.

Salpeter: You have given me permission to record it?

Sister Angeline: Absolutely, yes, yes I did.

Salpeter: Prior to me coming here today you and I discussed a matter with regards to Martin Tankleff and an inmate that you know by the name of Glenn Harris. Is that correct?

Sister Angeline: Yes.

Salpeter: Now prior to you even discussing this case with me, is it true that I gave you a release from Glenn Harris in order for you to speak with me?

Sister Angeline: Yes.

Salpeter: Ok, could you tell me what you recall, how, and where you met Glenn Harris?

Sister Angeline: Mmmhhm. I met Glenn at Sing Sing prison one day when I was making my rounds. I am a Catholic Chaplain there and um, I met him at that time. He was - uh, I know he was going to be released very soon – he told me, but he also told me that what had happened, that there was an innocent man – he didn't mention any names – and I didn't ask him, he didn't tell, it wasn't important to me – uh, he told me though that there was an innocent man involved in something that he was involved in and that man he wants to give that man his freedom back. He said that he couldn't sleep anymore with this on his conscious knowing that there was an innocent man incarcerated and that he was beginning the process of coming out

with what he knew in order to make things right with this man. I didn't know the man uh, uh, he only mentioned uh, uh, and I never asked.

Salpeter: Ok, did he mention to you anything regarding his knowledge or participation of this crime that an innocent man is in jail for?

Sister Angeline: Yeah, he – he said, cause I said to him if you didn't do it – being new to the work, if you didn't do it, what are you doing in here? And he said because I was the driver of the car and – he said – uh, I didn't know what was going on, he said, I had no idea of what they were going to do.

Salpeter: Did he mention to you what they did do?

Sister Angeline: He told me that um, he found out later , he didn't know at the time – but he later found out that those who had gone into the home had murdered the people in the home, but he did not – he had no knowledge of the fact that they were going to do that- um, he got his first hint, his very very first hint that something must be wrong – and here's where I am a little fuzzy, he told me saw blood and that was the first inkling that he had that something more than what they had gone in there to do had happened – it was his first inkling – and ah,

Salpeter: Did he tell you where he saw this blood?

Sister Angeline: I can't say for sure, it was either – uh, they had the intruders had taken the clothing the people – the persons of the people who were murdered or, they were on their clothes and changed clothes, you know, to tell you the truth, I just know he said he saw blood but I can't remember where – you know, I know he said that he saw that house that he drove to, and he didn't go in, they came out somehow either, it was on their clothes or it was on the clothes of the people he murdered, they took something out, or he said something about rummaging, uh rummaging when they came out – rummaging through something on the side of the house, and he said he saw – and that was his first feeling that there might be something more than . . .

Salpeter: Do you recall how many persons went into the house?

Sister Angeline: He gave me the impression there were two.

Salpeter: Ok, thank you. Uh, and he did state to you that he had no idea what was going to happen in that home – is that correct?

Sister Angeline: That's right.

Salpeter: Did Glenn ever mention to you when he found out that a – uh – that a murder, uh – murders were committed in that home?

Sister Angeline: No, no, he didn't say when he found out.

Salpeter: But he knew that evening, that uh, when he went there that he was sure that there would not be a crime of that magnitude? correct?

Sister Angeline: That's right, that that was very clear on – um, he didn't say it that many words, but he made it very clear that he did not know – you know, that uh, anything like that was going to happen.

Salpeter: Ok, did he mention to you the time of year or the community that this happened in?

Sister Angeline: No, no he didn't.

Salpeter: You gave me, and I have in my hands right now a copy of a letter that you have the original of, and this is a copy of letter that Glenn wrote to a person that is known to you, is that correct?

Sister Angeline: That's correct.

Salpeter: And you have the original, I have a copy – is that correct? and on my copy you have taken the name of the person that Glenn wrote this letter to off the copy?

Sister Angeline: Yes, I did.

Salpeter: Ok, is it fair for me to say that in the contents of this letter Glenn writes to this person and I will quote. "I'm trying to give a man his name and his freedom back."

Sister Angeline: Yes. He told me that in person also. He told me that in a visit I had with him at the cell. He said I have to get him out of there, he said, I can't sleep with myself like this anymore.

Salpeter: And he gave you this letter to either deliver or to tell this person?

Sister Angeline: To tell this person. Right, right, and for some reason, I have no idea, of why I didn't even remember that I held onto it until I went through my desk drawer just two weeks ago, and uh, I just held it, I don't why, I just held it, I just held onto it. See, God's got his finger in that.

Salpeter: God is involved.

Sister Angeline: I am really – I'm a thrower outer – I am, you can ask Father, I'm driving him crazy, I don't keep anything, not even Christmas cards, when I get them, I rip them up.

Salpeter: But this letter you saved?

Sister Angeline: But this letter, for some reason I put in the drawer – even forgot it was there.

Salpeter: Well, - uh, thank God.

Sister Angeline: Yeah.

Salpeter: Ok is there anything else you can recall before I conclude this tape?

Sister Angeline: Not really except that he was a gentle person, ya know, he didn't – I mean he, he, just wanted to talk, you could tell he was so disturbed over what had happened and what he had inadvertently gotten involved in, ya know, no idea, he had no idea – and that he was very upset – you know.

Salpeter: Ok, ok, now Sister I want to thank you very much, the time is now almost 12:25 p.m. I'm going to conclude this tape – but before I conclude this tape, uh, I've left you my phone number, my address in the event that you do recall anything else I would appreciate it if you could call me.

Sister Angeline: Yes.

Salpeter: Uh, in order for me to have spoken to you today – I asked your permission, is that correct?

Sister Angeline: Oh yes.

Salpeter: I offered you nothing to speak to me – correct?

Sister Angeline: (Laughing) – Ha, you couldn't!

Salpeter: (Laughing) – Ok, thank you, (I apologize for even saying that).

Sister Angeline: That's ok, that's funny (laughing).

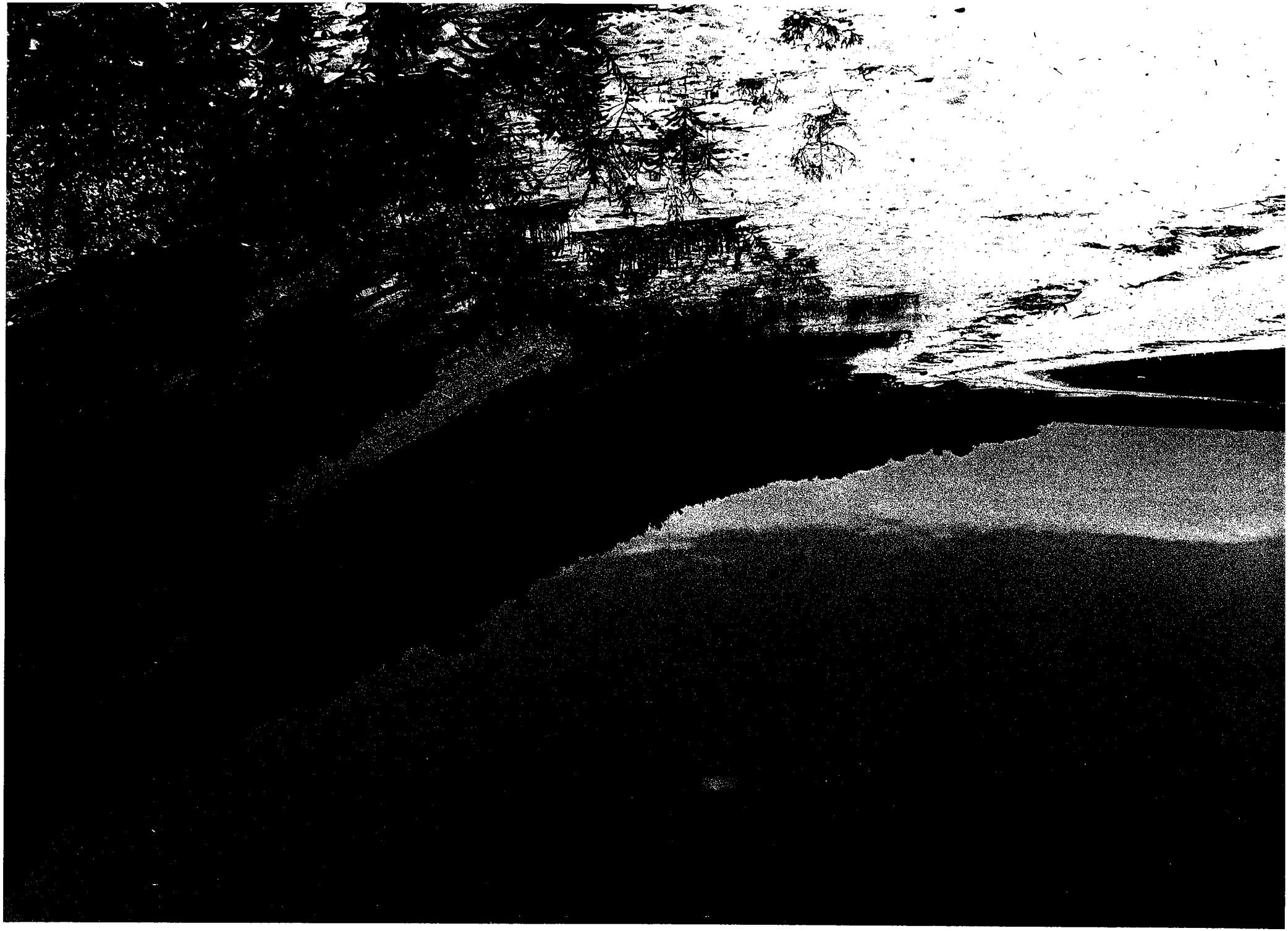
Salpeter: Uh, ok, so you gave me this statement under your own free will?

Sister Angeline: Absolutely, absolutely.

Salpeter: Ok, thank you very much, I am now going to conclude this tape.

EXHIBIT 2


Incorporated Village
of
Belle Terre
JOHN W. KNAPP BEACH
Parking by Permit
Only
No Trespassing.



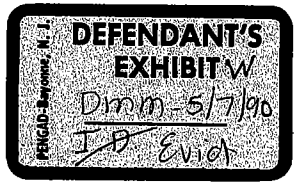

DEFENDANT'S
EXHIBIT W
Dmm-5/7/90
I.D. Evid

EXHIBIT 3

-18107
4/23/89
2130 hrs

PA-30 page 1073

POLICE DEPARTME
COUNTY OF SUFFOLK, N.

I Joseph Creedon being duly sworn, deposes, and says:
I was born on 9/29/58 in Brooklyn, NY I am 30 years old and reside at 175 Norwood Drive, Port Jefferson NY. with my girlfriend Theresa Metzger and our son. My telephone number is 473-1202.

Sometime around April 10, 1989 at about 3:00 PM I was told Steveman in the Strathmore Bagel shop located on Nesconset Highway in St. James, NY. Told owns the bagel shop. Told wanted to talk to me about collecting money that some people owed him. Told is a drug dealer and sells Cocaine, pot, and valiums. He said that a number of people owed him money for drugs that he has sold them. He told me that he wanted me to collect sixty thousand dollars for drugs that he sold. Told came to me because he heard that I was a collector for other drug dealers. Told also told me that I should talk to his father about cutting Marty Tankleff's tongue out of his mouth. He also told me that he wanted somebody whacked for ten grand but wouldn't tell me who. I told Told that I didn't want to get involved in collecting drug money. I then left the bagel store. 1:00

On Sunday evening April 23, 1989 at about 7:15 Told called me on the telephone and told me that he wanted to meet me. We decided to meet at the Walbaum's shopping center on Portion Road in Lake Ronkonkoma at about 7:15 PM. I met Told at the shopping center at about 7:15 PM. He was in a green red pickup truck with another white guy. The white guy

PB-31 POLICE DEPARTMENT
COUNTY OF SUFFOLK, N.Y.

was about 31 years old, medium length blond hair, mustache, medium build, wearing glasses. I stood outside the pickup truck and Todd sat in the bed of the pickup while the guy with the glasses sat inside the truck. Todd and I talked for a few minutes and the guy with the glasses started to get "stupid". I said to him "what do you think, you're a gangster". He then pulled out a small chrome automatic handgun and pointed it at my head. He was sitting in the drivers seat and he pointed the gun at me. I said "you're no gangster". "You won't pull the trigger". Todd then said give me the gun. Todd took the gun and shot me in the right forearm near the elbow. I got in my car which is a 1978 Oldsmobile Cutlass white and red in color. I tried to chase Todd and the guy in the pickup. I last saw them driving west bound on Portion Road. I then drove to 15 First Ave in Lake Ronkonkoma which is my friend Phillip Morris' house. I told Phillip to call an ambulance. The ambulance arrived a few minutes later and took me to Community Hospital of Western Suffolk in Smithtown.

I am now in severe pain from the bullet which went through my right arm. I can't bend my arm due to the pain.

Todd Steenman is a white male, about 23 years old 5'8" tall, thin build, brown crew cut, and he lives at 1785 Coates Ave in Holbrook.

1010-1

page 3 of 3

A-32 POLICE DEPARTMENT
COUNTY OF SUFFOLK, N.Y.

The above statement consisting of three pages was read to me by Det Detective of the Suffolk County Police Department & freely & voluntarily I swear it is all true and I have to sign it with my left hand because of the bullet wound in my right arm.

Sworn to before me this
23rd day of April 1989.
Richard Ausraker

RICHARD AUSRAKER
NOTARY PUBLIC, State of New York
No. 4913261
Qualified in Suffolk County
Commission Expires Nov. 16, 1989

EXHIBIT 4

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF SUFFOLK)

JOSEPH CREEDON, being duly sworn, deposes and says:

1. On April 23, 1989 at approximately 7:15 P.M. I was shot in the arm by Todd Steuerman.

2. On the date, I gave an affidavit to the Suffolk County Police Department, a copy of which is attached to this affidavit. Included in my sworn statement were details concerning Todd Steuerman`s statement to me that " I should talk to his father about cutting Marty Tankleff`s tongue out of his mouth."

3. Several weeks later I received a subpoena to report to the District Attorney`s Office in Riverhead and was met there by Assistant District Attorney Scarmozzino. He told me he was now in charge of my case against Todd Steuerman. He then questioned me about what I had said concerning Todd Steuerman and Todd Steuerman`s saying that I should talk to his father about cutting Marty Tankleff`s tongue out of his mouth. He asked me did I ever meet Jerry Steuerman. He questioned why Todd would even make the statement considering Marty had already been charged with the murders. It became clear while he was questioning me that he did not believe what I had said concerning Todd Steuerman. He clearly was attempting to have me back off my statement.

4. Assistant District Attorney Scarmozzino was interested in why with two (2) murder indictments against Marty Tankleff that Todd Steuerman wanted to have his (Marty) tongue cut out.

5. After Todd Steuerman was arrested for shooting me, I called Jerry Steuerman to let him know I would not accept $10,000 to drop charges and he (Jerry) went so far as to say " You're fucking with the wrong people".

6. Prior to the conversation with Todd Steuerman that is part of my affidavit, Todd Steuerman told me that his brother-in-law, who is Robert Crowe, had "fucked his father" and that he, Todd, wanted him dead.

JOSEPH CREEDON

Sworn to before me this
17th day of September, 1990.

Notary Public

PATRICIA A. BONO
NOTARY PUBLIC, State of New York
No. 4884190
Qualified in Suffolk County
Commission Expires January 26, 19 91

EXHIBIT 5

A-35

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

PEOPLE OF THE STATE OF NEW YORK,

-against-

MARTIN H. TANKLEFF,

Defendant.

----------X

AFFIDAVIT

Ind. No.: 1535-88
1290-88

STATE OF NEW YORK)
)ss.:
COUNTY OF SUFFOLK)

JOSEPH CREEDON, being duly sworn, deposes and says:

1. An ADA and an investigator with the Suffolk County District Attorney's Office have informed me that a number of people have stated or suggested that I was involved with the murders of Arlene and Seymour Tankleff. In particular, they stated that Karlene Kovacs claims that on Easter Sunday in the early 1990's, I stated in her presence that "Steuerman" and I hid behind some bushes at the Tankleff residence in Belle Terre. That "Steuerman" and I killed the Tankleffs and that I thereafter got rid of my bloody clothes and moved to one of the Carolinas.

2. The ADA and the investigator have also informed me that Glenn Harris claims that he drove Peter Kent and me to the Tankleff residence and that Kent and I killed the Tankleffs while Harris waited in the car.

3. I have no idea what Kovacs and Harris are talking about. I never met or knew of the Tankleffs. I did not kill the Tankleffs, nor have I ever been to Belle Terre. I have never spoken or met Jerry Steuerman.

A-36

4. The only thing I know about the Tankleff murders is what I told the DA's office in 1989 and what I told Marty Tankleff's attorney, Robert Gottlieb, in 1990: after the murders, Todd Steuerman told me that his father would pay good money for someone to cut out Marty's tongue.

5. There is one mistake in my affidavit, which Mr. Gottlieb's office prepared and which I signed. Paragraph 5 of that affidavit reads, "After Todd Steuerman was arrested for shooting me, I called Jerry Steuerman to let him know that I would not accept $10,000 to drop the charges and that he (Jerry) went so far as to say, "You're fucking with the wrong people." I have never spoken with Jerry Steuerman. I called Todd Steuerman, and I told Todd Steuerman that I would not accept $10,000 to drop the charges and that he (Todd) went so far as to say, "You're fucking with the wrong people."

6. I have informed the District Attorney's Office that if a hearing is conducted in this matter I will be available to testify.

Dated: Commack, New York
December 4, 2003

JOSEPH CREEDON

Sworn to before me this
4th day of December, 2003

NOTARY PUBLIC

Notary Public, State of New York
Qualified in Suffolk County
Commission Expires December 29, 1985
2005

EXHIBIT 6

MEMO TO FILE

FROM: RCG
DATE: April 26, 1990
FILE: Steuerman
RE: Creedon, telephone 698-5031

After he was shot by Todd Steuerman, Jerry Steuerman offered him $10,000.00 to drop the charges and said "what are you fucking crazy, you're dealing with the wrong person, I can have you dead." He spoke to him on the phone at least two times before that so he recognized his voice.

EXHIBIT 7

POLICE DEPARTMENT, COUNTY OF SUFFOLK, N.Y.

EVIDENCE RECOVERY SHEET

PDCS - 650A

6th	6D	T60A		
0040	0224	12-27-88		

TECHNICIAN: Carbone, Edward PO 3098/4140/T1

REMARKS BY: Det. Peterson cmd 3160

TYPE OF CRIME: Burglary III

EST. DATE & TIME OF OCCURRENCE: 12-26-88 | 2335

PLACE OF OCCURRENCE: Fayva Shoe store Route 25,

TYPE OF RESIDENCE: retail store,Centereach

METHOD OF ENTRY: vehicle through front of bldg.

☐ yes ☐ no ROBBERY CONTACT

TYPE OF CONTACT: none

☐ yes ☐ no INJURY TO PERSON

TYPE OF INJURY: none

ARTICLE	# PHOTOS	AREA OF RECOVERY	METHOD OF RECOVERY	TIME
125 f4	1)2'D	Caption	ASA 400	0111
125 f5.6M	2)30'E	V/O front of store		0114
125 f11Y	3)15'E	V/O impact area on front of bldg.		0116
125 f11Y	4)15'E	V/O front door area		0117
125 f11Y	5)15'NE	V/O counter area from broken door		0118
125 f11Y	6)15'W	V/O front of store from inside		0120
125 f16B	7)10'W	V/O hachet on floor left by perps.		0122
125 f16B	8)15'E	V/O area behind counter		0123
125 f22P	9)8'E	V/O empty safe cabinet		0124
125 f22P	10)5'D	V/O vehicle info. pack on counter		0128
125 f22P	11)10'E	V/O damage on front of bldg. with scale		0135
125 f8Y	12)20'E	V/O front of bldg.& order pad on ground		0138
125 f22P	13)3'D	Cl/up of order pad		0140
EVIDENCE				
1-order pad	12,13	in front of bldg.	hand/SPB/property	0144
2-veh.info pack	10	front store counter	hand/SPB/property	0156
3-hachet	7	front floor of store	hand/SPB/property	0200
			Certified CENTRAL RECORDS SUFFOLK COUNTY PCS	

REMARKS: All times, directions, and distances are approximate.

Dusted POR and counter area with negative results. Item #1-17 page pad from Strathmore Bagels 4088 Rt 347 E. Setauket. Item #2 contains owners manual, registration and insurance card for a 1986 Ford Delivery van color white reg. unit [illegible] Strathmore Bagels Raleigh [illegible]

POLICE DEPARTMENT, COUNTY OF SUFFOLK, N. Y.

PROPERTY BUREAU INVOICE-RECEIPT

PDCS-4201c

DATE: 12/27/88

OF PAGES: 1 1

INSTRUCTIONS: ALL INFORMATION TO BE TYPEWRITTEN.

DISTRIBUTION: THE FIRST THREE COPIES (WHITE, CANARY AND PINK) ARE FORWARDED WITH THE ARTICLES TO THE PROPERTY BUREAU. THE FOURTH COPY (GOLDENROD) IS TEMPORARILY RETAINED BY THE COMMAND UNTIL THE PROPERTY BUREAU ACKNOWLEDGES RECEIPT BY RETURNING THE SECOND COPY (CANARY) INDICATING AN INVOICE RECEIPT NUMBER. THE NUMBER IS NOTED ON THE FOURTH COPY THEN FORWARDED TO THE REPORTING OFFICER AND THE SECOND COPY IS PERMANENTLY RETAINED BY THE COMMAND.

I HEREBY ACKNOWLEDGE HAVING RECEIVED AND INVOICED THE FOLLOWING ARTICLES, FOR WHICH I WILL ACCOUNT TO THE COMMISSIONER OF POLICE:

OFFICER (LAST NAME, FIRST NAME)

Carbone, Edward (for Det Peterson)

RANK: PO/3098/4140/T1 | SHIELD | PCT./COMMAND: for 3160

PRISONERS — NAME | ADDRESS | DATE OF ARR | CHARGE | FIN. DISPOSITION

CLAIMANT — NAME; ADDRESS - STREET - TOWN - STATE | TELEPHONE

FINDER — NAME: reporting officer; ADDRESS - STREET - TOWN - STATE | TELEPHONE

CIRCUMSTANCES/LOCATION WHERE FOUND, RECOVERED, DATE AND TIME, ETC.

On 12/27/88 between 0040 hrs.- 0224 hrs., the below described items were recovered as evidence by the undersigned officer during the investigation of Burglary at Fayva Shoe Store Rt. 25,Centereach.

LIST OF INVOICED PROPERTY

ITEM NO.	QUAN.	ARTICLE	EST. VALUE	PROPERTY BUREAU USE ONLY — PROPERTY BUREAU'S DISPOSITION AND DATE
1	17	Strathmore Bagel order pad		
2	1	plastic case w/vehicle papers		
3	1	hachet with wooden handle		
xx	xx	xxxxxxxxxxxxxxxxxxxxxxxxxxxxx		
		For final disposition contact 6th Squad Detectives. DO NOT CONTACT CRIME SCENE SECTION.		

CERTIFIED
CENTRAL RECORDS SECTION
SUFFOLK COUNTY POLICE DEPARTMENT

☐ HOLD FOR EVIDENCE
FINAL DISPOSITION CARD FORWARDED TO PROPERTY BUREAU ON

DATE | BY (NAME, SHIELD)

LAB USE ONLY — DATE | LAB NO.
RELEASED TO PROP. BUR. (|) SEALED PLASTIC BAG(S)
SIG. OF LAB TECH.
REC'D. FROM LAB
SIG. OF PROP. BUR. OFFICER

REPORTING OFFICER'S SIGNATURE: E.C. Carbone, 3098/4140/T1

SUPERVISOR'S SIGNATURE: [illegible]

PROPERTY CLERK

C.C. NO.: 88-672727

P.B. INVOICE NO.

EXHIBIT 8

Transcription of Interview/Statement of
Kurt Paschke
April 9, 2004

Salpeter: My name is Jay Salpeter I am a licensed private investigator for the State of New York – uh, I have Kurt Paschke on the phone and I'm calling Kurt regarding the case of Martin Tankleff and Kurt's knowledge of both Martin and uh, a fellow by the name of Brian France. Uh, Kurt, this telephone call is being taped, do I have your permission to continue?

Kurt Paschke: Oh, yes you do.

Salpeter: Ok, thank you. Could you just ah, by identification purposes state your name and date of birth?

Kurt Paschke: My name is Kurt Paschke, I was born on 10/25/74.

Salpeter: Ok, Kurt you spent a period of time in Clinton Correctional Facility – uh, do you recall the dates:

Kurt Paschke: I was in Clinton Correctional Facility from August 1995 until February 1998.

Salpeter: And, you served the time there for what crime?

Kurt Paschke: I was convicted of criminal negligent homicide and criminal possession of a weopon.

Salpeter: Ok – and you have served your time correct?

Kurt Paschke: That is correct.

Salpeter: And, are you on parole? or probation at this time?

Kurt Paschke: No, I am completely maxed out.

Salpeter: Your completely, ok good. Alright, the reason I am calling is ah, you know and we've discussed that I uh, am going to be calling you and going to ask permission to record the conversation, I would like to know, ah, your knowledge or ah, anything that you know about Brian France, can you tell me how you met Brian France and uh, what you know of him?

Kurt Paschke: I met Brian France in Clinton Correctional Facility – I think originally Brian had befriended me because my case had involved uh, skinheads and Brian France was a self-professed neo natzi white power skinhead, uh, in my conversations with Brian had uh, often bragged how he had killed someone and that uh, and how he had killed that others that people had not known about and that he was never caught for.

Salpeter: Did he ever mention ever names and circumstances of the other killings that he had not been caught for?

Kurt Paschke: Not so much, no – uh, the one – uh, I know he said a couple of times he was like a paid hitman – and like he was, he was paid to kill people.

Salpeter: Ok, and – during your stay with Brian, what type of personality did he have at the facility?

Kurt Paschke: Brian was a conman, a liar, huh, a portrait of a probably what everyone thinks of an inmate, you know, like a real low life, backstabbing, manipulating extorting person.

Salpeter: He was doing extortions up at Clinton?

Kurt Paschke: Yeah, he extorted several inmates he stole from inmates that he claimed were his friends.

Salpeter: What, uh, what type of items would he steal?

Kurt Paschke: He had stole, uh, walkmans, personal items – he would extort people for food from the commissary and you know with threats of physical violence – he was, he was known to have slapped up a couple of people.

Salpeter: So, he was not the nicest of persons, correct?

Kurt Paschke: No, not at all, uh, like I said he's like your portrait of the tough guy, bad guy inmate.

Salpeter: Ok, is there anything else that you recall?

Kurt Paschke: Uh, when I first met Brian – it was known that I was an artist in prison, that I had done of artwork for other inmates, around one Christmas Brian asked me to draw a picture of a Satin raping Jesus Christ, because Brian was also a self-professed Satinist.

Salpeter: So that was his religious beleif?

Kurt Paschke: Yeah. That uh, Brian uh, he was self-professed white power supremicist skinhead- he uh, he was a Satinist, he uh, was very much – he talked very much against Blacks, and against Jews – and against Jewish conspiricy theories and Black conspiricy theories and manipulating and using people for his advantage.

Salpeter: So I guess he was not well like up there?

Kurt Paschke: No, he had only spent a brief time in our unit, he was finally sent out.

Salpeter: Ok, if you ever recall anything else I have furnished you with my phone number you could call me at time – have I offered you anything for this statement?

Kurt Paschke: No, not at all.

Salpeter: Have I promised you anything?

Kurt Paschke: No.

Salpeter: You are giving this statement uh, under your own free will is that correct?

Kurt Paschke: That is correct.

Salpeter: Ok, the time is now, uh, 2:15 p.m. and I am going conclude this tape and I want to thank you very much.

Kurt Paschke: Alright, thank you.

EXHIBIT 9

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------x

In the Matter of the Application of

MARTIN TANKLEFF,

Petitioner,

For a Writ of Habeas Corpus
to Fix Bail.

----------x

AFFIDAVIT

Indictment No. 1290-88

STATE OF NEW YORK)
COUNTY OF SUFFOLK)

SHARI ROTHER, being duly sworn, deposes and says:

1. I am 40 years old and am the sister of Martin Tankleff.

2. While Marty was adopted shortly after birth, I have always considered him to be my younger brother and I dearly love him.

3. Marty has always been a gentle, loving, and kind individual, very considerate of me and everyone else with whom he has had contact. I have never known him to be irresponsible and I firmly believe he understands the absolute necessity that he report to Court each and every time his case appears on the calendar.

4. My husband, Ronald, and I very much want Marty to live with us. We have two children ages 15 and 11 and both of them adore him. I will see to it that Marty reports to Court whenever Judge Mallon orders him to do so and I respectfully request that I be given the opportunity to ensure his attendance.

5. I do want to correct a gross misrepresentation of the phone call between my brother and I after he was arrested and

while in custody of the police. Mr. Jablonski is absolutely wrong when he indicates that my brother never indicated that he made the statements he made because the police made him. I was on the telephone with my brother, Mr. Jablonski was not. I heard what my brother said and I know what I said during that telephone conversation, Mr. Jablonski does not. There is no question whatsoever in my mind that during that telephone conversation I asked my brother whether he made the statements to the police which had been reported and that he said, in essence, the police made him make those particular statements. Contrary to Mr. Jablonski's statements before Judge Mallon I am not trying to protect my brother. I am simply trying to have the truth come out. Contrary to the statements made by Mr. Jablonski before Judge Mallon there is no reason whatsoever to be concerned about my brother staying with me for all I want to ensure is that he attends Court each and every time he is required to do so and that justice ultimately prevails.

Shari Rother

Sworn to before me this
19th day of September, 1988.

Notary Public

ADELE ESTHERSON
NOTARY PUBLIC, State of New York
No. 52-4633623
Qualified in Suffolk County
Commission Expires April 30, 1990

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
SUSSMAN, GOTTLIEB & NEEDLEMAN
Attorneys for

Office and Post Office Address
353 Veterans Memorial Highway
COMMACK, NEW YORK 11725

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

19
M.

Dated,

Yours, etc.,
SUSSMAN, GOTTLIEB & NEEDLEMAN
Attorneys for

Office and Post Office Address
353 Veterans Memorial Highway
COMMACK, NEW YORK 11725

To

Attorney(s) for

Indictment No. 1290-88
Index No. Year 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of

MARTIN TANKLEFF,

Petitioner,

For a Writ oif Habeas Corpus to Fix Bail.

PETITION FOR WRIT OF HABEAS CORPUS (Bail Application)

SUSSMAN, GOTTLIEB & NEEDLEMAN
Attorneys for Petitioner

Office and Post Office Address, Telephone
353 Veterans Memorial Highway
COMMACK, NEW YORK 11725
(516) 543-8300

To

Attorney(s) for

Service of a copy of the within
is hereby admitted.

Dated,

Attorney(s) for

1500—JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS, N Y C 10013

EXHIBIT 10

48 HOURS TAPE