

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

Index Nos.: 1535-88/1290-88

AFFIRMATION AND

**AFFIRMATION AND MEMORANDUM IN SUPPORT OF
MOTION TO DISQUALIFY DISTRICT ATTORNEY THOMAS J. SPOTA
AND THE OFFICE OF THE DISTRICT ATTORNEY
AND TO APPOINT A SPECIAL PROSECUTOR**

I, Bruce A. Barket, being duly admitted to practice before the courts of the State of New York, and having been retained to represent the defendant in the above-captioned matter, under penalty of perjury hereby affirm that the facts contained in the following statements are true upon information and belief. The source of the information is a review of the case file, personal interviews with witnesses and the fruits of the defense investigation.

INTRODUCTION

This Court has been presiding over a post-judgment hearing to determine whether Martin Tankleff is entitled to a new trial based on the wealth of new evidence implicating Joseph Creedon, Jerry Steuerman and, to a lesser degree, Peter Kent in the murders of Arlene and Seymour Tankleff. The hearing began on July 19, 2004 and continued through August 3, 2004, when the Court heard testimony that demonstrated that Detective James McCready, District Attorney Thomas J. Spota's former client, may have perjured himself in crucial testimony at the

trial of Martin Tankleff. The hearing has been adjourned until August 17, 2004, to allow counsel an opportunity to move to disqualify Mr. Spota from any further role in this hearing and any further proceedings or investigations concerning the murders of Arlene and Seymour Tankleff.

This motion squarely presents this Court with a choice between allowing Martin Tankleff to receive a fair hearing conducted by an independent prosecutor or presiding over a proceeding that is tainted by a prosecutor whose loyalties are split between his oath of office to seek justice and his obligation to protect a former client who may have contributed to the wrongful convictions. This motion requires the Court to determine not only whether or not Martin Tankleff will get a fair hearing, but also whether the citizens of Suffolk County will look at their criminal justice system and see a fair and independent prosecutor or whether they will see a prosecutor distracted from his obligations to the public by his loyalty as an attorney to his former criminal clients.

Counsel for Mr. Tankleff intended to file this motion before the Chief Administrative Justice of the County, Justice Leis. However, Justice Leis' chambers directed counsel to present the motion to this Court, which is presiding over the 440 motion. If this Court grants the motion to disqualify the Suffolk County District Attorney's Office, then the Administrative Justice will follow a set procedure to select a special prosecutor.

A court should disqualify the District Attorney if any one of the following factors are present: (1) where there is a "clear conflict of interest," People v. Zimmer, 51 N.Y.S.2d at 390, 394; accord People v. Gordon, 709 N.Y.S.2d 503, 504 (1st Dept. 2000); (2) where there is a "reasonable potential for prejudice," Zimmer, 51 N.Y.S.2d at 395; or (3) where there is an "appearance of impropriety and a "substantial risk that public confidence in our criminal justice

system could be undermined,” People v. Dellavalle, 687 N.Y.S.2d 199, 200 (3d Dept. 1999); accord, People v. Shinkle, 51 N.Y.2d 417, 421 (1980). As outlined below, every one of these factors is met in the current case, and each standing alone would be sufficient to require disqualification of the District Attorney. Accordingly, the Court must disqualify Mr. Spota and appoint a special prosecutor pursuant to Section 701 of the N.Y. County Law.

I. BACKGROUND

A. Trial Testimony

In October, 1990, Martin Tankleff was sentenced to fifty years to life for the murders of both of his parents. The only significant evidence presented against him at his trial was the inculpatory statement that Detective McCready was credited with extracting from then seventeen year-old Martin Tankleff after a multi-hour un-Mirandized station-house interrogation that involved lying to Martin about his dying father. While another detective was present for the interrogation, it was McCready’s tactic of lying on behalf of Martin’s dying father that directly led to the statements. McCready played a cruel trick on Martin by falsely stating that his father awoke from a coma and accused Martin of the attacks. Martin disavowed those statements as soon as he was out of the direct control of McCready and refused to sign the written statement

McCready prepared for him. Forensic evidence developed by Suffolk County following Martin Tankleff's "confession" and arrest, not only failed to corroborate the "confession," but also demonstrated that the "confession" was inaccurate in almost every respect.¹ Nonetheless, at trial, the Suffolk County District Attorney built its entire case around the "confession."

In contrast, the defense maintained that Seymour Tankleff's business partner, Jerry Steuerman, was the more likely culprit. In fact, within hours of the attacks, Martin himself told McCready that he believed Steuerman "murdered my parents." During the trial, the defense was able to establish that Jerry Steuerman was heavily in debt to Seymour Tankleff. He owed Mr. Tankleff hundreds of thousands of dollars. On the night of the murders Steuerman was at a poker game at the Tankleff residence and was the last person to leave the house and the last person to see Mr. Tankleff alive. Only hours before the murders, Steuerman was seen engaged in a heated discussion with Seymour Tankleff.

Moreover, one week after the attacks, while Martin's father was still alive, Jerry Steuerman engaged in behavior so bizarre that it in and of itself raised serious suspicions about his involvement in the attacks. After withdrawing money from his and Seymour Tankleff's joint bank account, Steuerman feigned his own death and disappeared. Steuerman was subsequently found living under an alias in California, having shaved his beard and changed his hair weave.

¹ At the 440 hearing, Mr. Tankleff has offered the testimony of Richard Ofshe, an expert in police interrogation tactics, who testified that the details of the "confession" actually tend to exonerate Martin Tankleff as they demonstrate that the person who gave this confession had no first-hand knowledge as to how the crimes were perpetrated. Professor Ofshe testified about empirical studies demonstrating that typical jurors, without the benefit of expert testimony, believe intuitively that a person would not confess to a crime he did not commit, while numerous studies demonstrate that many people who have later been proven to be innocent falsely confessed to

After the trial, but before Martin's sentencing, it was learned that Jerry Steuerman had offered Joseph Creedon ten-thousand dollars (\$10,000.00) to cut Martin's tongue out, because Martin was accusing Steuerman of the murder of his parents.

As the lead "investigator" in a case that involved little, if any, investigation, Detective McCready testified at Martin's trial. Despite Steuerman's obvious motive, his opportunity to kill Martin's parents, his flight and bizarre conduct after the murders, McCready claimed to have never even considered Steuerman a suspect. Detective McCready even personally went to California to bring Steuerman back to testify against Martin, promising him he was not a suspect in the murders.

While McCready endorsed Steuerman's innocence, the defense contended that it was Steuerman who either acting alone or with others murdered Martin Tankleff's parents. Trial Counsel for Martin tried to assail McCready's objectivity and credibility by alleging that he knew Steuerman before the murders and was thus predisposed to clear his friend. In response to this line of inquiry, McCready flatly denied that he ever knew Steuerman. Indeed, Detective McCready was questioned as follows (Tr. 3626):

Q: Have you ever met Jerry Steuerman?

A: No sir, I did not.

Q: Did you know anything about Jerry Steuerman?

A: Not at that point, sir, no, sir.

committing the crime for which they were convicted.

Q: Did you know anything about his background?

A: No, sir, not at that point, sir.

Q: Did you know anything about his business relationships with other individuals other than Seymour Tankleff before he mentioned it?

A: Not at that point. I didn't know one thing about Jerry Steuerman at that point.

Q: Did you have any background data on Jerry Steuerman or the people who he does business with?

A: Absolutely not.

Q: Did you know anything about Jerry Steuerman's children or his family?

A: Absolutely not, sir.

In addition, at the Huntley hearing prior to the trial, when asked under oath whether he had ever heard of Jerry Steuerman before the Tankleff murders, McCready responded: "Oh, God, no. I never heard of him." H.H. at 104-05.

Detective McCready was asked this line of questions, obviously, because if he had a personal or business relationship with Jerry Steuerman, the quality of his investigation and the credibility of his testimony would have been easily and rightly attacked. This is particularly true, given McCready's testimony that he was in the neighborhood of the Tankleff home the night of the murders, even though he did not live there, and that he was off-duty when Martin called 911, but responded to the scene anyway. (Tr. 3609.) Thus McCready's testimony that he did not know Jerry Steuerman can hardly be viewed as collateral. If he had admitted a personal

relationship with Steuerman, Martin's defense would have been given a significant boost.

B. McCready/Spota Relationship

Thomas Spota and Detective James McCready first associated with each other in the mid to late 1980's when the law enforcement community of Suffolk County was being investigated by a State Commission exploring wide spread corruption and abuse of power by the police and members of the District Attorney's office. This Court is surely aware of the Commission's report. (See Exhibit "8" to Martin Tankleff's 440 Motion.) The report is relevant here to demonstrate the long-standing ties and loyalties between Detective McCready and Mr. Spota. At the time, Mr. Spota, who at the time represented the police union, appeared in public and defended several of the detectives criticized by the Commission. He also appeared with the detectives when they gave testimony before the Commission. One of the detectives Spota appeared for and publicly defended was James McCready. The report detailed, among other things, what it called "perjury by James McCready" in a homicide trial preceding the Tankleff trial.

Mr. Spota not only defended Detective McCready before the Commission, but also was, like McCready, himself criticized by the Commission. The report discussed the extensive network in place that seemingly covered up the misconduct of several law enforcement officials. Mr. Spota was implicated as being part of this network. According to the report, Mr. Spota was

able to be exonerate himself of illegal fee splitting practices and “*conflicts* and interrelationships” (emphasis added) by making a single phone call to a friend in the District Attorney’s Office (See page 143 of the report.).² Thus, McCready and Mr. Spota have a 20-year relationship during which Mr. Spota has defended McCready in court, before a state commission investigating police misconduct, and before the public.

Less than five months after Martin Tankleff was sentenced, in March 1991, Detective McCready was accused of assault and robbery for allegedly beating a man and stripping him naked on St. Patrick’s Day. (See **Exhibit “A”**.) Mr. Spota, then an attorney in private practice, represented Detective McCready from 1991 through the sensational and emotional trial that resulted in an acquittal more than two years later, in 1993. See **Exhibit “B”**. Ironically, the acquittal was based in significant part on the judge’s decision to suppress statements inculcating Detective McCready, because police had improperly obtained the statements. See **Exhibit “C”**. The conclusion of the trial left McCready hugging Mr. Spota in tears as the verdict acquitting him of assault was read.

It is plain that Detective McCready possessed a close attorney-client relationship with Mr. Spota. It is highly likely that in preparation for his front-page trial, he confided in his attorney as to his prior misconduct and any previous activities that he could be questioned about if he were to testify. In addition, given that this close and confidential relationship began a mere

² That friend, James O’Rourke, later became Mr. Spota’s law partner.

five months after the Tankleff verdicts, and that Detective McCready had become a celebrity through the media coverage of the Tankleff trial, it is highly likely Detective McCready and Mr. Spota discussed the Tankleff trial in the context of their attorney-client relationship.

C. New Evidence

The historical perspective must now be viewed in light of the new evidence produced thus far at the pending 440 hearing. Joseph Creedon has testified that Todd Steuerman, Jerry Steuerman's son, ran a cocaine business out of Jerry Steuerman's bagel stores. Creedon admitted that he had been a "collector" for Todd Steuerman's drug business and that he frequently resorted to violence in order to induce collections. It is Seymour Tankleff's investment in that store³ that led to the financial dispute that the defense has maintained lies at the heart of the motivation for the murders.

There has been testimony and documentary evidence from Robert Gottlieb, Martin Tankleff's trial attorney, that Joseph Creedon not only knew Todd Steuerman, but had spoken by telephone on at least three occasions with Jerry Steuerman. Indeed, Jerry Steuerman offered Joseph Creedon \$10,000 to obstruct justice and not press criminal charges against Todd Steuerman after Todd Steuerman shot Creedon.

³Of course, there is no indication that Seymour Tankleff had any knowledge of the cocaine trade. He lent money to Jerry Steuerman to open a bagel store.

There has been testimony that Creedon, in the summer of 1988, only weeks before the Tankleffs were murdered, was offered twenty-five thousand dollars (\$25,000.00) by Jerry Steuerman to murder his business partner. Creedon employed Joseph Graydon to assist him in the scheme to murder Mr. Tankleff. Graydon testified that the two were unable to locate Mr. Tankleff on a particular evening when they attempted to find him to murder him. When Creedon a few weeks later again asked Mr. Graydon to go “take care of that thing at the bagel store” Graydon backed out of the plan.

There has also been testimony that Glenn Harris,⁴ a criminal associate and friend of Creedon, drove Joseph Creedon and another person, Peter Kent, to the Tankleff residence on the night of the murders. According to Harris,⁵ Kent and Creedon went into the Tankleff home with a pipe while Harris waited in the car. They came out about 30 minutes later with blood on their clothes, out of breath and obviously agitated. According to Harris, they sped off in a car he was driving. Prior to leaving the area, however, Creedon ordered Harris to stop the car. Creedon

⁴Harris, who has yet to testify, has requested use and derivative use immunity prior to testifying in the pending 440 proceeding. Assistant District Attorney Leonard Lato, after consulting with Thomas Spota, refused to grant immunity to Harris. He made this decision knowing that in so doing he would likely deprive the Court of Harris’ important testimony. Harris has expressed fear of being prosecuted for the murders and fear of retaliation by Kent and Creedon. He has stated that he would testify with use and derivative use immunity, but will not testify without it.

⁵Harris came forward with this information and provided an affidavit, which was appended to Martin Tankleff’s 440 motion. His account of the events of that night is also known to the court and to the prosecutor through the testimony of the private investigator, Jay Salpeter, who interviewed Harris and other witnesses to whom he made statements against his penal interest. Harris’ statements have also been admitted through the testimony of Father Ronald Lammert, the chaplain of Sing Sing State Prison to whom Harris confided.

then got out and threw the pipe into a wooded area.

Harris told private investigator Jay Salpeter where the pipe was discarded. Mr. Salpeter obtained permission of the homeowner to search the area and found a rusted pipe. The homeowner testified that he owned the property for 30 years and that the area where the pipe was found had not been touched during that time. He had no explanation for the presence of the pipe and said that there has been no work done on his property which could have resulted in the pipe being abandoned on his property. The pipe is now being tested for any forensic evidence. Harris also reports that Kent burned his clothes hours after the Tankleffs were murdered.

There have also been three witnesses (more are expected when the hearing resumes) who have testified that Creedon has admitted to killing the Tankleffs. In addition, there has been testimony from various friends and associates of Mr. Creedon that he participated in brutal beatings and even torture in the late 1980's, and was certainly capable of murder.

Further, there has been testimony that Todd Steuerman has said that he knows that Martin Tankleff is innocent because Todd's father's friends killed the Tankleffs.⁶ There has also been testimony that Jerry Steuerman himself, while threatening someone months after the Tankleff murders, stated: "I have already killed two people. What is one more?" On August 3, 2004, in the third week of the Tankleff new evidence hearing, Leonard Lubrano testified. In the

⁶ Creedon likewise testified that he does not believe that Martin Tankleff killed his parents. Creedon's first-hand knowledge of what happened the night of the Tankleff murders would explain his emphatic statements that Martin

late 1970's and early 1980's, Mr. Lubrano ran a wholesale bakery business. His supplier of bagels was a bagel store owned and run by Jerry Steuerman. Mr. Lubrano frequently visited Mr. Steuerman's store. He often saw Detective McCready in the store, and witnessed him speaking to Mr. Steuerman.

In the mid-1980's, Mr. Lubrano came to know Detective McCready when Mr. Lubrano opened a pizzeria. Detective McCready ran a construction business in addition to his job at the Police Department, and he often purchased food for his construction crews from Mr. Lubrano. At some point during this time, Detective McCready said to Mr. Lubrano, among other things, that he was performing construction work for Mr. Steuerman's business. Through Mr. Lubrano's testimony, the Court has learned for the first time that Steuerman and McCready knew each for years prior to the murder of the Tankleffs.⁷

This testimony stands in stark contrast to the sworn testimony of McCready given at Martin Tankleff's trial some 14 years earlier. This Court now has before it testimony that Mr. Spota's client may have committed perjury while testifying against Martin Tankleff.

The false testimony from McCready was offered to diminish the defense attacks on the quality of his investigation, his objectivity and his credibility and thereby to bolster McCready's claim that Jerry Steuerman was innocent. Mr. Spota's former client lied to protect one of the

Tankleff is not the murderer.

⁷It should be noted that Mr. Lubrano is not the only witness who has told the defense that McCready knew Steuerman. The hearing was wisely halted when the conflict issue was highlighted. Once it is resumed, the defense

very men who is now systematically being implicated by the defense in the murder of the Tankleffs.

Thus, the discovery of McCready's perjury is itself striking new evidence that adds weight to Martin Tankleff's motion to vacate his convictions. And, this new evidence raises a significant conflict of interest for the Suffolk County District Attorney's Office.

II. ARGUMENT

A. The Conflict

At the outset it must be highlighted that Thomas Spota's involvement with this case has been questioned from the time the motion to vacate the convictions was filed. All parties recognized that his prior representation of, and long time association with, James McCready made it awkward for him to participate in an investigation that could reveal that his client, at the very least, extracted a confession from an innocent man. Of course, at that time no one had the information presented to this court on August 3^d. Testimony had not yet been elicited that suggested McCready lied under oath about knowing Jerry Steuerman, the person the defense believes is behind the murders.

Based on the potential for conflict that was known at that time, upon information and belief, Mr. Spota appointed Assistant District Attorney Leonard Lato to handle the investigation.

plans on calling additional witnesses to establish this fact. For example, see the statements made by a confidential

Mr. Lato informed counsel for Mr. Tankleff that he had erected an informal “firewall” and that he, Lato, had complete authority to and would in fact make all decisions concerning the case.⁸ Mr. Lato, however, while he claims to have erected this firewall, still requires the use of the District Attorney’s staff and support. For example, the memorandum section of the District Attorney’s opposition to the CPL sec. 440.40 motion was drafted by a member of the appeals bureau. Further, the chief investigator⁹ is employed as an investigator for the District Attorney’s office. In cross-examining Mr. Salpeter, Mr. Tankleff’s investigator, Mr. Lato pursued a line of questions about an unrelated case (Chichester) that had been fed to him by John Collins, the Assistant District Attorney who originally prosecuted Martin Tankleff, and who is presently chief of the homicide division of the Suffolk County District Attorney’s Office. Finally, and most importantly, Mr. Lato consulted with Mr. Spota in

source described *infra*.

⁸Mr. Lato has continued through the hearing to assert that he and not Thomas Spota is completely responsible for the handling of the Tankleff post judgment hearing and investigation.

⁹Walter Warkenthien, who has sat at counsel table through out the hearing, is that investigator. Interestingly, he was chosen despite the fact that Warkenthien worked in the homicide bureau with McCready in the mid 1980s.

a jury room next to the Court's chambers just before announcing to the Court the decision to deny Mr. Harris immunity. Thus, in what may be the most important question for the prosecutor in this hearing--short of consenting the application itself--Mr. Spota apparently contributed to the decision by speaking with his subordinate Leonard Lato.

This is a "firewall" in name only. Everyone on the "protected" side of the wall works for the very person from whom they are supposed to be protected. Mr. Lato's claim of independence is belied by the very staff he chose--or that was chosen for him--to work on this case. At any time Mr. Spota desires, he has the power to make any decision in this case either directly or by giving an order to Mr. Lato or by giving an order to the other employees he assigned to work with Lato.¹⁰ Neither the County Law, nor the Disciplinary Rules allow for conflicts to be resolved in this manner.

The existence of this fictitious wall does, however, demonstrate that even before this latest evidence concerning the depth of Mr. Spota's conflict, the District Attorney recognized that it would be problematic for him to be intimately involved with the hearing or investigation. If Mr. Spota believed that it was necessary to set up this "firewall" prior to the discovery of McCready's perjury--as his conduct would suggest-- he cannot now in good faith resist this application for a special prosecutor.

¹⁰ Further, since each of these individuals works for Mr. Spota and is dependent upon him for advancement within the office, even if Mr. Spota does not give a directive, his employees' actions are likely to be colored by their perception of his wishes.

Despite that this problem was known to all parties when the motion was filed, counsel for Mr. Tankleff did not file a motion to disqualify Mr. Spota¹¹ and Mr. Spota did not request the appointment of a special prosecutor.¹² As the hearing has now progressed, we are left with no choice but to file the instant motion, because Mr. Spota has thus far refused to ask for a special prosecutor despite the now manifest conflict of interest. In the same vein, this Court is obligated to act if Mr. Spota continues to insist that his office represent the People of the State of New York.

The current procedure (Mr. Lato retaining full responsibility for the case) is not an acceptable solution. First, if there is a conflict necessitating the appointment of a special prosecutor, County Law section 701 and (NYCRR §200.15) make it clear that the presiding justice of the appellate division, not the prosecutor with the conflict, shall select the special prosecutor. Mr. Spota lacks the statutory authority to appoint his own personal special prosecutor. Even if he could make the selection himself, his employee would be a choice prohibited by the disciplinary rules because such a selection would add to rather than diminish the public's perception of impropriety. Clearly, the public, and the victims' family, correctly

¹¹In hindsight, it now seems clear that such a motion should have been made. While it was impossible to know then that a conflict this serious would arise, the better practice would have been for Mr. Spota to ask for a special prosecutor to be appointed and failing that counsel should have moved for disqualification at that time.

¹²Mr. Spota has not been reluctant to make such a request in other cases. *See People v. Grubman* and *People v. Daniello*. In *Grubman*, an investigator formally employed by the defense joined Mr. Spota's office. In *Daniello*, the complainant's father either was or is employed by Mr. Spota. Obviously, those conflicts were significantly less problematic than what is presented here. If Mr. Spota resists appointing a special prosecutor in this case, it will be perceived by the public that his insistence on retaining control over this case is itself a product of the very conflict

view Mr. Spota's employees as his subordinates acting on his behalf. In fact, absent Mr. Spota's authorization, these employees lack any authority to participate in this proceeding at all. Mr. Lato, notwithstanding his repeated assertions of complete control of the case, serves at the pleasure of the District Attorney. Mr. Spota is free to give orders to Mr. Lato, or simply remove him from the case at any time for any reason. That type of absolute control lies at the heart of a conflict mandating disqualification of the entire office. Mr. Lato is not and cannot be a special prosecutor.

Furthermore, Mr. Spota cannot, absent the appointment of a special prosecutor made by the courts, divest himself of the responsibility for this case. Ultimately, the decisions are his to make. He may choose to follow the advice of a subordinate, but he cannot transfer his constitutional and statutory authority to another person on his staff.

Without question, the professional and official responsibility of Suffolk County District Attorney's Office in this case is to see that justice be done. The office is not simply to pursue convictions or blindly attempt to protect convictions previously obtained. The responsibility to serve justice requires Mr. Spota and his office zealously to pursue the truth, investigating leads that may prove that Martin Tankleff is innocent, as well as those that point to the true culprits. (EC 7-13) See Brady v. Maryland, 373 U.S. 83, 87-88 (1963). It has now been revealed that a former client of Mr. Spota, former Detective James McCready, the lead detective in the Tankleff murder investigation, likely perjured himself at Martin Tankleff's trial.

that should be causing him willingly to step aside.

This allegation and McCready's reasons for lying must be vigorously investigated, because they may bear on the ultimate question of who killed the Tankleffs. The questions surrounding McCready's lie in this regard are startling. Why did McCready lie about this? Why didn't McCready tell his superiors that he had a relationship with Steuerman? Did he disclose this relationship to anyone else connected to this prosecution? Did he come to learn any of the facts (Steuerman's relationship with Creedon through his son, Todd, or that Steuerman hired Creedon to kill Seymour Tankleff) that have been developed during the course of the hearing? The implications of McCready's perjury are potentially far reaching. It is possible McCready may very well be implicated in a conspiracy to cover-up the identity of the actual killers.

While such a statement may have been unthinkable only one week ago, this Court is now confronted with evidence from ordinary citizens, who do not stand to gain anything by their testimony—and indeed are frightened and reluctant to testify—that Mr. Spota's client (a homicide detective) committed perjury in the course of a murder trial. To assert at this early stage of this disclosure that these allegations will not extend beyond perjury is to ignore the lesson taught by Mr. Spota failing to step aside when the motion to vacate was first filed. The conflict may intensify and the problems caused by the conflict may worsen. There can be doubt that regardless of outcome, both sides are now in the process of investigating exactly where McCready's illegal conduct ends. Certainly, McCready's lawyer should have no hand as a prosecutor in this proceeding. Given that Mr. Spota's former client may have committed perjury while testifying against Martin Tankleff, it would simply be improper for Mr. Spota to continue as the

prosecutor. His client's misconduct may have resulted in the conviction of an innocent man.

Accordingly, it is plain that Mr. Spota cannot be responsible for the continuing Tankleff investigation. His personal and professional relationship with Detective McCready raises the question of whether he would zealously pursue the investigation if that investigation began to implicate his client in criminal conduct. It also raises questions about Mr. Spota's objectivity and judgment in evaluating the merits of Martin Tankleff's claim of innocence. If Mr. Spota were to conclude that Mr. Tankleff should be exonerated, Mr. Spota's client, James McCready, will undoubtedly be excoriated for, at the very least, extracting a confession from an innocent man. If, on the other hand, Mr. Spota seeks to protect, or at least not act against, his former client—as he is ethically bound to do—Martin Tankleff, the victims and the public will suffer the loss of a fair minded prosecutor whose only goal should be the proper administration of justice. As a public prosecutor, Mr. Spota cannot possibly fulfill both his obligations to his client and keep his oath of office. This situation presents a classic conflict from which there is no alternative except for Mr. Spota to be removed entirely from the proceeding.

If the integrity of this process and our system is to be maintained, an investigation and ongoing litigation that in part concerns the misconduct and perhaps criminal conduct by a detective must be overseen by a public prosecutor whose objectivity is beyond reproach. The suggestion that such a role can be filled by the detective's long time lawyer seems absurd on its face. The public would rightly lack confidence in any decision made by the detective's own lawyer acting as a prosecutor.

B. Prejudice

Unfortunately, the poisonous fruit of this conflict is already manifesting itself and thereby depriving Martin Tankleff his right to a fair hearing and to due process of law under the New York and United States Constitutions. The motion was publicly filed in October of 2003. However, a draft copy of the motion, which contained the essential factual assertions of the filed copy, was given privately to the District Attorney six weeks earlier with the hope that Mr. Spota's office would begin an investigation without the pressure and problems associated with a highly publicized motion. Counsel for Mr. Tankleff explicitly informed members of Mr. Spota's staff, and Thomas Spota personally, that the motion would not be filed so long as the District Attorney was actively investigating the matter. It is not difficult to see how an un-conflicted office could have made use of such an opportunity. Witnesses could have been interviewed outside of the public spotlight. Those afraid of retaliation could have been offered protection. Suspects could have been interviewed prior to retaining counsel. Yet, the District Attorney's Office took the motion and did not do anything at all. They simply sat on their hands.¹³

¹³ The Suffolk County District Attorney's Office's unwillingness to investigate this case has continued into the hearing itself. Joseph Graydon testified that he called the District Attorney's Office prior to contacting Mr. Tankleff's counsel to inform it that he had first-hand knowledge that weeks before the Tankleff murders Jerry Steurman had hired Joseph Creedon to murder his business partner. The D.A. dismissed the information, because it was not eyewitness testimony to the actual murders. Indeed, its only investigation of this extraordinary information was to ask Graydon for his social security number so that it could gather material to impeach him. Thus, rather than try to develop evidence against the people increasingly implicated in the crimes, the D.A.'s sole interest seems to be to attempt to discredit the witnesses who are providing such evidence. As discussed, *infra*, this is part of a disturbing pattern. It has included the surreptitious recording of Glenn Harris to intimidate him and attempt to get

After the motion was filed, rather than investigating the suspects identified by the new evidence, the District Attorney secretly and unethically sent agents to improperly record statements by Glenn Harris, who was, at that time, the chief witness for Mr. Tankleff. The conduct of the Suffolk County District Attorney's Office of having agents surreptitiously record Mr. Harris is particularly troubling, because it occurred after this Court appointed counsel for Mr. Harris, presumably to protect him from just this sort of improper interrogation in the absence of counsel. Further, the lead investigator for the Suffolk County District Attorney's Office, Walter Warkenthien (McCready's former colleague in the homicide bureau), gave Mr. Harris an inaccurate rendition of the law of felony murder and told him that if he testified, he "would change places with Marty" Tankleff, who is serving 50 years to life in prison. Not being satisfied with that improper threat, the D.A.'s office had its agents intimidate Mr. Harris by threatening him with prosecution and his personal safety if he maintained his desire to testify.

Once the hearing started, the District Attorney enjoyed the fruit of its intimidating tactics when Glenn Harris asserted his right, under the 5th Amendment, not to testify. The D.A.'s Office then continued to obstruct this Court's fact finding function by refusing to grant Glenn Harris limited immunity so that he could be compelled to testify. Given that the District Attorney Office's rationale for not offering immunity is that it does not believe Mr. Harris is being truthful, and that use immunity would not prevent a perjury prosecution, it is plain that the District Attorney would lose nothing by immunizing the witness, permitting the testimony, and

him to retract his testimony, rather than any serious investigation of the persons implicated by Mr. Harris.

letting the fact finder determine Harris' credibility and value.

The D.A.'s Office has not offered protection to a single witness despite the fear expressed by those who have agreed to testify.¹⁴ Several witnesses and potential witnesses have pending criminal cases and have stated that they would testify if they received credit toward their sentence. It is the prosecutor, Thomas Spota, who has within his sole discretion whether or not to entice these witnesses to provide the information they claim to possess. Thus far, Mr. Spota's assigned assistant has only offered benefits to those he thinks can implicate Martin Tankleff.¹⁵

These decisions must now be seen in light of the fact that Mr. Spota represented a witness who likely lied during the trial. While one hopes and presumes Mr. Spota and his staff have acted with only the proper motivations, neither Martin Tankleff nor the public can look at this prosecutor with the confidence that he is acting solely based upon his obligation to the public to seek justice and not being motivated in part -- either consciously or subconsciously -- out of his divided loyalty to McCready.

Mr. Spota's attorney-client relationship with Detective McCready dictates that he may

¹⁴Virtually every witness who has testified or has been interviewed has expressed a profound fear of Creedon, Kent and Steuerman. Many have refused to testify citing their fear and the defense's inability to provide protection. Some people have simply refused to speak to us at all and have expressly said that they are afraid. One valuable witness said to counsel, "I know that Marty is innocent. But you are asking me to trade my life for your client's freedom. I can't do that." That witness, who heard admissions from Creedon and possesses other valuable evidence, told counsel that if subpoenaed he would not testify or would suffer a "failed memory."

¹⁵ Mr. Lato has conceded to the Court that he has offered to write a letter to the Parole Board on behalf of one of his witnesses, while he has offered no benefits of any kind to any witness offering testimony that is exculpatory to Martin Tankleff.

not be able zealously to pursue an investigation into McCready's perjury without revealing confidences, and that his view of the evidence revealed in that investigation may be colored by the private information he may possess based on prior conversations with Detective McCready. He cannot be expected objectively to assess the significance of new evidence about McCready in the context of the present hearing. He cannot fairly determine whether to agree to vacate Martin Tankleff's convictions or whether or not to grant witnesses immunity or offer leniency in return for their testimony, in light of the revelations about McCready, his former client. In short, there is unquestionably a conflict of interest, an appearance of impropriety and a substantial risk of additional prejudice involved if Mr. Spota or his office continues to represent the People in this proceeding.

To make matters worse, Mr. Spota's continued presence may have the affect of obstructing the willingness of other witnesses to come forward. On July 28, 30th and August 4, 2004, a confidential source provided information to counsel for Martin Tankleff. This source told counsel that while a teenager in the early 1980s, he/she lived behind Mr. Steuerman's bagel store and was a personal friend of Mr. Steuerman's son, Todd. Todd told this source that a drug dealing operation was run out of the bagel store, and that local police officers were paid not to interfere with the drug business. One day in 1986 or 1987, while in the Steuerman bagel store, Jerry Steuerman introduced this source to one his "card-playing buddies." (The source later identified Detective James McCready as the person he/she met in the store that day.) McCready and Steuerman then went to a small office in the back of the store where Steuerman kept a safe.

The confidential source recalls seeing Steuerman being returned to New York from his cross country flight after the Tankleff murders and immediately recognizing McCready as the person he/she met in the bagel store. He/She recalls that he/she thought it odd that the police would send Steuerman's friend to pick him up in California.

Currently, this source is terrified about testifying or even signing an affidavit. He/She has stated that "these people are murderers" and asked "who will protect me?" He/She does not want his/her name revealed to even the prosecutor for fear that he will tell Todd Steuerman that he/she provided this information.¹⁶ Counsel for Martin Tankleff have no means with which to protect him/her nor can we assure him/her that the police will not reveal his/her identity to the people he/she fears. After speaking with this source for several hours, it was apparent that he/she knew much more of the murders than he/she was telling. For example the source asked, "what if a person knew the motivation for murder? How could you protect that person?" I had to answer honestly that I could not. The source then refused to elaborate on who the person was or what information he/she had. Clearly this witness needs to speak with a law enforcement official he/she can trust. It is imperative, if the evidence he/she has is going to become available, that an independent prosecutor must investigate his/her claims. It should also be clear that Thomas Spota, the lawyer for the very man against whom he/she may have to testify, cannot be that prosecutor.

¹⁶ This fear is not unfounded. When an earlier confidential witness came forward to testify, Assistant District Attorney Lato informed Mr. Creedon of the witness' identity before the witness testified.

The implications of the Lubrano testimony and this confidential source are jarring. For unknown reasons, Detective McCready, the investigator who never considered any suspect other than Martin Tankleff, and who used a cruel hoax to trick Mr. Tankleff into confessing, perjured himself with his extended and unequivocal testimony denying ever having heard of Jerry Steuerman. His reasons for doing so and the extent to which his relationship with Mr. Steuerman affected his investigation of the murders must be explored. Indeed the answers to those questions may very well help this Court when it makes its ultimate findings on Mr. Tankleff's 440 motion.

These revelations (McCready's perjury coupled with the mounting evidence of Steuerman's involvement with the murders) suggest that Detective McCready may have been involved in a conspiracy, potentially on-going to this day, to cover up the discovery of the real culprits. As the State Commission in 1989 found, McCready and other law enforcement officials were not above employing such tactics to protect their friends and colleagues. Plainly, an investigation is required. The fruits of such investigation must be presented to this Court as it struggles with the decision of whether or not Martin Tankleff should spend the rest of his life in prison. It would be outrageous to suggest that the head of the office responsible for such an investigation should be McCready's former personal attorney, Thomas Spota. Accordingly, Martin Tankleff filed the present Motion to disqualify Mr. Spota and the Office of the District Attorney and urges this Court to grant it.

LEGAL STANDARD

“The role of the public prosecutor is not merely to convict but to foster the trust of the public in the criminal justice system.” People v. Gentile, 511 N.Y.S.2d 901, 904 (2d Dept. 1987); accord People v. Zimmer, 51 N.Y.2d 390, 393 (1980) (prosecutor’s “mission is not so much as to convict as to achieve a just result”). In fulfilling that function, it is “essential that a prosecutor avoid even the appearance of impropriety,” Gentile, 511 N.Y.S.2d at 904, and ensure that a defendant receives “a full measure of fairness,” Zimmer, 51 N.Y.2d at 393.

A. There Is A Conflict of Interest Between Mr. Spota’s Representation of the People and His Pr

In general, “[a] conflict of interest exists when an attorney’s current representation is impaired by the loyalty he owes a former client.” People v. McLaughlin, 662 N.Y.S.2d 1019, 1022 (Supr. N.Y. Cty. 1997) (citing United States v. Moscony, 927 F.2d 742, 749-50 (3d Cir. 1991)). Courts find there to be an “obvious” conflict of interest where a former client of an attorney becomes a chief witness at a trial. McLaughlin, 662 N.Y.S.2d at 1022; see also Gordon, 709 N.Y.S.2d at 503-04. The conflict is made even more stark when a former client of an attorney may be involved in the crime at issue and thus, in order to do justice to the defendant, the attorney must pursue an investigation into or point an accusatory finger at his former client.

In the instant case, the conflict presented by Mr. Spota’s representation of Detective McCready is plain. First, a conflict arises simply because Detective McCready may now be a

key witness at this hearing and is also a former client of Mr. Spota's.¹⁷

If Mr. Tankleff's attorneys were to call Detective McCready to testify regarding his relationship with Jerry Steuerman, in light of the new information about this topic, it would be the District Attorney's responsibility zealously to represent the People, which might require discrediting Detective McCready's testimony. But Mr. Spota cannot ethically do that when he is bound by an oath of loyalty to Detective McCready due to his prior representation, and also because he might risk revealing confidences learned during that prior representation. It will be impossible for Mr. Spota to "steel himself against the intrusion of this conflict," because, as a practical matter, his judgments of his former client will always be based in part on what he learned during his representation of him. *Zimmer*, 51 N.Y.2d at 395. The gravity of a conflict of interest is the same whether it hurts the defendant or the People. *People v. Gallagher*, 533 N.Y.S.2d 554, 556 (2d Dept. 1988). In addition, if Detective McCready has something to hide, as his apparent lies would suggest, there is a substantial likelihood he shared some of that information with his attorney, and thus that attorney, Mr. Spota, cannot vigorously investigate him while at the same time zealously guarding his secrets.

A second and more dangerous conflict is present here, however, because of the testimony that suggests that Mr. Spota's former client, Detective McCready, lied during the Tankleff trial.

¹⁷If the District Attorney continues in on his current track, he will allege that Mr. Lubrano and every other witness who testifies that McCready knew Steuerman is either lying, mistaken or insane. No doubt he will then call

Although the reasons for those lies are presently unknown, the lies surely suggest that he wanted to keep his relationship with Jerry Steerman secret, and it is hard to envision any reason for doing that which does not somehow aid Mr. Tankleff's defense. Even if Detective McCready and Jerry Steerman were merely friends, the credibility of Detective McCready's trial testimony and his entire investigation is seriously weakened. For Mr. Spota to work to "achieve a just result" for Martin Tankleff in this case, he must be free to vigorously investigate Detective McCready's apparent perjury and to determine, if Detective McCready did indeed lie, and whether that is a sufficient basis, along with the other evidence presented in the current proceeding, to recommend that Martin Tankleff's convictions be vacated. See *Zimmer*, 51 N.Y.2d at 394 (prosecutor decides whether a case is to be pressed or dropped). It is unimaginable that he would pursue his former client in this way. Further, regardless of Mr. Spota's inclination to pursue McCready, the Disciplinary Rules prohibit him from doing so. See *McLaughlin*, 662 N.Y.S.2d at 1020 ("One can imagine no greater instance of disloyalty to a former client" than for his former attorney to suggest he is implicated in crimes alleged in a later case where the attorney represents a new client); Cf. *State v. Needham*, 688 A.2d 1135, 1137 (N.J. Super 1996) (attorney might not vigorously cross-examine a former client testifying for the other side). Even if he did, it is likely that his perceptions of Detective McCready's explanations and behaviors would be clouded by his previous representation of him.

James McCready as a witness.

B. There Is A Reasonable Potential for Prejudice to Mr. Tankleff Resulting from Mr. Spota's Co

The Court of Appeals has adopted “standards under which a reasonable potential for prejudice will suffice” to require disqualification of a prosecutor. Zimmer, 51 N.Y.2d at 390. This standard is satisfied when a risk is substantial enough that it “could not be ignored.” Schumer v. Holtzman, 60 N.Y.2d 46, 55 (1983). This standard is appropriate because for practical purposes it is difficult to conclusively establish that a defendant has been disadvantaged by a prosecutor’s conflict. See Zimmer, 51 N.Y.2d at 390.

There is in fact far more than merely a “reasonable potential” that Martin Tankleff will be prejudiced by Mr. Spota’s continued representation of the People in this case. First, there is a significant chance that Mr. Spota is aware of information that ought to be disclosed under Brady, Giglio, or Rosario, but that he cannot reveal, because he learned it through his prior representation of Detective McCready. It could be information as simple as an admission that Detective McCready knew Jerry Steuerman at the time of the Tankleff trial, or information that he did not investigate Jerry Steuerman as a suspect in the murders because he was a personal friend and he did not think him likely to have committed the murders. Martin Tankleff is plainly prejudiced if Mr. Spota has not revealed such information, because it tends to prove that the investigation into the murders and the prosecution’s key witness were not credible.

Second, Mr. Tankleff is highly likely to suffer prejudice because, as discussed above, Mr. Spota is less likely vigorously to pursue an investigation into whether Detective McCready lied

than a disinterested prosecutor would be. And yet, such an investigation could exonerate Martin Tankleff, revealing sufficient information for an independent, objective District Attorney to recommend that his convictions be vacated.

C. Mr. Spota's Conflict of Interest Creates An Appearance of Impropriety.

Defendants, as well as the People, are “entitled to protection against the appearance of impropriety.” Shinkle, 51 N.Y.2d at 421; accord People v. Cassidy, 118 Misc.2d 110, 112 (Crim. Ct. Kings Cty. 1983). Indeed, it is critical that prosecutors carry out their responsibilities “in a manner that foster[s] rather than discourage[s] public confidence in our government and the system of law to which it is dedicated.” Zimmer, 51 N.Y.2d at 396. As such, it is critical that a prosecutor appear to be impartial and not to identify with one side of a “controversy” over another. Id. Accordingly, courts have held disqualification to be proper where they determine that absent disqualification there is a “substantial risk” that “public confidence in our criminal justice system could be undermined.” Dellevalle, 687 N.Y.S.2d at 200. Courts are particularly likely to reach this outcome where a case involves “widespread [media] coverage” such that appearances of impropriety “risk [] jeopardizing the public’s confidence in [an] investigation.” Gallagher, 533 N.Y.S.2d at 556.

Many of the scenarios that give rise to finding of a likelihood of an appearance of impropriety occur when an attorney in a criminal proceeding has a prior relationship with a key witness. See, e.g., Needham, 688 A.2d at 1137-39. When an attorney’s former client is a key witness, there is a likely public perception that the witness may try to aid one side or the other in order to ingratiate himself with his former attorney. See id. Alternatively, there may be a

perception that an attorney will not aggressively cross-examine or, by analogy, investigate a former client. See id. Conversely, there may be an alternative perception that an attorney will rely on private information to give him some measure of influence or control over a witness who is also a former client. See id.

There can be little dispute that the public would perceive impropriety here if Mr. Spota is not disqualified from this case. His Office's objectivity in defending this extremely high profile conviction is already subject to public scrutiny and criticism. If he were to continue to oppose Martin Tankleff's motion, the public would understandably question his motivation. One would question whether his position was born of an honest evaluation of the evidence or of his loyalty to his former client. On the other hand, if Mr. Spota is ultimately persuaded, by the rising tide of evidence, of Martin Tankleff's innocence, acting on that belief will increase the risk that his former client will be subjected to criminal prosecution.

Mr. Spota would suffer from an even greater appearance of impropriety if he continues to prosecute this case now that the allegations about Detective McCready have come to light. There can be little dispute that it is likely the public will greet the news that Mr. Spota has a close attorney-client relationship with Detective McCready, and that he is nonetheless choosing not to investigate vigorously Detective McCready's apparent perjury, with great cynicism. It would appear that Martin Tankleff's interests and Detective McCready's interests are at odds and that the prosecutor, who is entrusted to preserve the integrity of the justice system, has taken sides in the dispute. Cf. Lyman v. Grievance Committee of the Eighth Circuit Judicial District, 552 N.Y.S. 2d 721, 154 A.D. 2d 223 (4th Dept. 1990). In these circumstances, Mr. Spota must be disqualified.

D. The Entire Office of the District Attorney Must Be Disqualified.

As the District Attorney and principal of the District Attorney's Office, Mr. Spota's conflict is imputed to his assistants who are his agents and act at his direction and under his supervision. It is the District Attorney alone who has full power to investigate, prosecute, and dismiss complaints and to hire and fire staff. Although he may delegate certain duties to his assistants, the District Attorney may not transfer "the fundamental responsibilities of the office to them." Schumer, 60 N.Y.2d at 53. Consequently, no amount of firewalls or conflict screens can shield the District Attorney's Office from its conflicts of interest when that conflict bars the District Attorney himself from prosecuting the case.

With primary responsibility for the entire office, the District Attorney is expected to know the details of the various investigations and prosecutions being conducted. He is ultimately responsible for each case, including Martin Tankleff's. See N.Y. County Law § 700(1) (McKinney 2004) ("it shall be the duty of every district attorney to conduct all prosecutions . . ."); id. § 700(6) ("The district attorney must maintain a written record of all indictments . . ."). By virtue of his position, the District Attorney receives information about all of the office's dealings and cannot be walled off by Assistant District Attorney Leonard Lato or any other assistant who may be assigned to this matter. Cf. People v. Wilkins, 28 N.Y.2d 53, 56, 268 N.E.2d 756, 757-58, 320 N.Y.S.2d 8, 10-11 (1971) (suggesting that conflict could be imputed to an individual where there was a free flow of information). New York courts routinely find that firewalls are ineffective and that when one attorney has a conflict, so do the other attorneys in his office. E.g., Shinkle, 51 N.Y.2d at 420-21; People v. Wyatt, 530 N.Y.S.2d

460, 461-62 (Crim. Ct. Bx. Cty. 1988); McLaughlin, 662 N.Y.S.2d at 1022-23.

As a practical matter in the present case, a firewall would be irrelevant. Because of the massive media attention to the case, Mr. Spota would be fully aware of the decisions made by anyone in his office prosecuting this case. To the extent those prosecutors could be chilled in their pursuit of an investigation into Detective McCready's apparent perjury because they feared such an investigation would displease their superior, who controls their salaries and promotions, a firewall would not alleviate the problem. Further, as was explained below, the "firewall," is at best a fiction and at worse a thin veil employed improperly to mask an obvious and debilitating conflict.

Further, Mr. Spota has already played a significant role in the strategic decisions in this case, although he has not been the day to day trial prosecutor with responsibility for the case. For example, when the prosecutor with such case responsibility, Leonard Lato considered whether or not to grant immunity to Glenn Harris, as discussed above, he conferred with Mr. Spota before providing his final decision to the Court.

CONCLUSION

The recent revelations that Detective McCready may have perjured himself at Martin Tankleff's trial, in an effort to cover up a relationship with the most obvious alternative suspect in the case, unquestionably throws a wrench into the works of the proceeding underway. This information must be explored by this Court if justice is to be done in this case. We respectfully submit that District Attorney Spota cannot and should not conduct that investigation, nor can any prosecutor in his office.

The Court has the responsibility of safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. People v. Jelke, 308 N.Y. 56, 63 (1954). In addition it has the obligation on its own initiative to correct real or apparent improprieties which would tend to lower the esteem for the system of justice which it is bound to uphold. People v. Krstovich, 338 N.Y.S.2d 132 (N.Y. Cty. Ct. 1972); People v. Vial, 502 N.Y.S.2d 930, 935 (Crim. Ct. N.Y. Cty. 1986). The facts that have been revealed to date concerning Messrs. Spota, McCready and Steuerman fully implicate that responsibility and obligation.

WHEREFORE, Defendant respectfully requests that the Court issue an order disqualifying Mr. Spota and appointing a special prosecutor. In the alternative, Defendant requests a hearing to examine these issues.

Dated: Garden City, New York
August 6, 2004

Respectfully submitted,

**LAW OFFICES OF BRUCE A.
BARKET, P.C.**

